



**PRAVNI
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SVEUČILIŠTA
U SPLITU**

**INTERNATIONAL DOCTORAL AND
POSTDOCTORAL CONFERENCE
IN THE LAW AND LAW RELATED FIELDS
SPLITLAW 2024**

Editors:

Ratko Brnabić, Željka Primorac

BOOK OF PROCEEDINGS

Split, 10 May 2024



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FOREWORD

Well respected Readers, our Colleagues and Friends,

As a Dean of the Faculty of Law, University of Split, I am very excited and proud to present to You our Flagship project - **"International Doctoral and Postdoctoral Conference in the Law and Law Related Fields - SPLITLAW 2024"**, which is being held for the first time at the Faculty of Law in Split - one of the most prestigious scientific institutions in the Republic of Croatia.

Our fantastic team of experts and enthusiast has recognized the need to organize a doctoral and postdoctoral conference, both as a part of a scientific contribution and as a lifelong education program of the Faculty of Law in Split. I am confident and I firmly believe that we have achieved our primary goal - to contribute to the education, training and improvement of conference participants in preparing, analyzing and conducting their research activities. I want to thank to all of you for joining us, from perhaps the most geographically far aparts of the world where you live and work but sharing the common values. Just to point out that according to the institution where participants graduated - participants come from countries like Austria, Italy, Turkey, United Kingdom, Jordan, Indonesia, Mongolia, Hungary, Spain, Tunisia, United States of America, South America, Germany, Slovakia, Poland, Romania, North Macedonia, Syrian Arab Republic, Pakistan, China, Vietnam, Croatia, gathering in total twenty-two Universities.

Special thanks goes to Full Professor Željka Primorac and to the vice-dean for teaching and students of the Faculty of Law in Split - Assistant Professor Ranka Jeknić for the great support and exceptional involvement in the organization of this conference. Of course, all the credits to all the other members of our team which made this project so great and relevant.

From the enthusiasm of the first received application to the last received application (and there were more then 50 of them), the entire process of obtaining appropriate data and daily contact with you, thousands of emails sent... - we knew how challenging this conference was in terms of organization, but also how important it is to you, at the beginning of your scientific journey.

We will do our best to make SPLITLAW conference as a traditional event that will be held in may every year, as a two-day conference that will provide us with a greater opportunity to connect, design future projects and interact between conference participants and members of the scientific community, judges, experts from economy sector.

As a material proof of high quality work of everyone involved, we are very proud to present the Book of Proceedings which will be referred to the evaluation procedure for indexing in the Web of Science citation database. We know how important this is for the successful career of all scientists involved. Our goal is simple yet ambitious - to grow, to remain relevant and able to send message to the World. Our words shall continue to provide guidance to many! See You all in SPLITLAW 2025. May Your Ideas and work become the stepstone for the better World.

Dean of the Faculty of Law University of Split, Croatia
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CHALLENGES AND DOUBTS OF THE PRINCIPLE OF ACQUISITION OF A COMPANY SHARE IN GOOD FAITH

ABSTRACT

The principle of acquiring a company share in good faith (in bona fides) implies the possibility of acquiring a company share from an unauthorized person, which was not possible in Croatian legal system until the legislative intervention of 2009 implemented in the wake of the solution of the German legal system. Until the Company Act Amendment from 2009, any acquisition from an unauthorized person was presumed to be invalid. This paper primarily aims to expand scientific knowledge about this issue. It is based on the basic hypothesis that the principle of acquiring company shares in good faith in the existing theoretical and legislative frameworks does not provide a satisfactory degree of legal security to the acquirers of company shares. The functioning of the company itself is therefore also called into question, knowledge about company membership and decision-making in an unspecified period of time. In order to answer the hypothesis, it is necessary to consider the need to approach the trust that participants in legal transactions have in land registers, and it is also necessary to examine the need for legislative improvements to the current legislative framework. In conclusion, it will display the results of research into the issue of acquiring company shares in good faith, and point out the observed controversies and their possible solutions with the aim of more transparent application of this legal institute.

Keywords: company share, good faith principle, share transfer, unauthorised person, book of shares

1. INTRODUCTION

The principle of acquiring a company share in good faith essentially boils down to the possibility of acquiring a company shares from an unauthorized person, which was not possible until the legislative intervention in the Companies Act of 2009.¹ Even today, comparative legal systems consider whether legislative

¹ Companies Act, *Official Gazette*, No. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, 34/2022 (hereinafter: CA)

regulation of the principle of acquisition in good faith is advisable or not.² Despite the existence of theoretical doubts that theorists of comparative legal systems recognized regarding the issue of acquiring company shares in good faith, domestic doctrinal analysis was absent. With the aim of expanding existing knowledge on the issue of acquiring company shares in good faith, the introductory part of the paper will present the very principle of acquiring company shares in good faith after the described legislative interventions in CA from 2009. Furthermore, the most prominent controversies and doubts will be presented. The contribution of this research can also be seen in the presentation of comparative legislative solutions of related legal systems (German and Serbian). The conducted research shows that the existing legislative arrangement raises the question of the actual effect of the principle of acquiring company shares in good faith in practical application. The main source of controversy is reflected in the gap in the application of this principle in the context of company law through the acquisition of company shares in relation to the ownership context, specifically the acquisition of real estate by trusting the state derived from land registers (the principle of trust in land registers). In this paper, on that track, we will start from the basic hypothesis that the principle of acquiring company shares in good faith in the existing theoretical and legislative frameworks does not provide a satisfactory degree of legal security to the acquirers of company shares. In conclusion, it should be pointed out that the principle of acquisition in good faith undoubtedly makes a significant contribution to the transparency of the process of acquiring company shares through legal work, but it opens up some significant controversies and doubts. Therefore, the final considerations will present the results of research into the issue of acquiring company shares in good faith with the aim of more transparent application of this legal institute in practice.

2. ACQUISITION OF A COMPANY SHARE IN GOOD FAITH (*IN BONA FIDES*)

2.1. The principle of acquiring a company share in good faith

In CA from 2009, following the example of the German legislation, the possibility of acquiring company shares in good faith (*in bona fides*) was introduced. This type of legislative intervention can be justified primarily with

² Rober, H., *Gutgläubiger Erwerb von GmbH- Anteilen*, Dr Guyyter, Berlin 2011, p. 7; Wagner, J., *Der gutgläubige Erwerb von Geschäftsanteilen in Recht der GmbH, Ein teilweise verfassungswidriges Rechtsinstitut?*, Europäische Hochschulschriften, Peter Lang, Frankfurt a. M. 2010, p. 131.

the goal of achieving greater legal certainty for the acquirer in the process of acquiring company shares. In the older legal doctrine, positions were observed that indicated the problems caused by the lack of protection of good faith when acquiring company shares.³ Until the CA Amendment from 2009, any acquisition from an unauthorized person was presumed to be invalid. The legislative intervention is aimed at the acquisition of company shares from the (presumed) authorized owner in compliance with the requirements of legal certainty and transparency in legal transactions with company shares.⁴ On the other hand, the real holder of the right is thus obliged to suffer an intervention in his right, which consequently leads to the loss of that right, specifically company shares, in the public interest. The amendment of the CA limited the cases in which the acquisition of company shares from an unauthorized person would be legally valid, protecting the honest acquirer and trust in the competent registers (the book of company shares and the court register).⁵ It is therefore a matter of a limited right to acquire company shares in good faith from the disposal of the transferor without the power of disposal.

The protection of acquisition in good faith covers the acquisition of company shares exclusively by legal action.⁶ The principle of acquisition in good faith is associated with the honesty of the acquirer in the realization of a certain legal work, and on the other hand with the authority of the transferor to properly dispose of the business share.⁷ In this context, the literature shows an inconsistent use of the terms power of disposal and right of disposal. The difference is that the right of disposal consists of two elements: the power to dispose of the right and the authority to dispose of that right, that is, the actual legal basis for disposal.⁸ An unauthorized transferor has the power to dispose of company shares, but not the authorization or the right to legitimately dispose of that share.⁹ Thus, it could be concluded that in case of disposal by a person who does not have the power of disposal, the transfer would not be legally valid.¹⁰

³ Rober, H., *op. cit.* note 2, p. 7.

⁴ Rober, H., *op. cit.* note 2, p. 39.

⁵ Verspay, H., *GmbH- Handbuch für den Mittelstand*, 2. Auflage, Springer Vieweg, Köln 2014, p. 123.

⁶ Bartl, H. et. al., *GmbH-Recht, Heidelberger Kommentar*, 7. Auflage, C.F. Müller, Heidelberg 2013, p. 206.; Rober, H., *op. cit.* note 2, p. 25.; Wagner, J., *op. cit.* note 2, p. 157.

⁷ Latin: „*nemo plus iuris potest quam ipse habet*“

⁸ Wagner, J., *op. cit.* note 2, p. 132.

⁹ Bartl, H. et. al., *op. cit.* note 6, p. 206; Walek, T., *Kein gutgläubiger Erwerb gemäss § 16 Abs. 3 GmbHG bei Veräußerungsverboten, bedingten Verfügungen, Navherbschaft und Testamentsvollstreckung*, Juristen Zeitung, year 67, 12/2012., p. 614.

¹⁰ Markovinović, H., *Prijenos poslovnog udjela-što jest, a što ne bi trebao biti*, Zbornik Pravnog fakulteta u Zagrebu, year 72, 1-2/2022, p. 220; Wagner, J., *op. cit.* note 2, p. 135.

Legal doctrine considers two aspects of the problem of acquiring company shares in good faith: a) through the protection of the right to act from an obligatory relationship and b) through an institutional guarantee.¹¹ The basic goal in the implementation of this institute is, therefore, to balance private and public interest. This implies finding a balance in the extent to which the state is obliged to protect the interest of the acquirer of company shares and, secondly, to the extent to which the loss of the rights of the actual right holder can be legalized. The point of view is accepted that the provisions on the acquisition of company shares in good faith cannot be followed only through the private-legal relationship of the acquirer and the transferor, but to a certain extent the public interest must also be taken into account.¹² Acquisition in good faith allows the "expropriation" of the actual holder of a certain right, for which a solid foundation is required from which the justification of such encroachment on his rights arises.¹³ Encroachment on the rights of the actual right holder can only be justified if the legislator in the interest of the benevolent acquirer (acquirer in good faith) enables the loss of his right, and the principle of proportionality must be taken into account.¹⁴ The principle of proportionality implies that the intervention in the rights of the real holder of the rights must be appropriate, necessary and adequate to achieve the goal.¹⁵

2.2. Acquiring a business interest in good faith in the domestic and comparative regulatory framework

In determining the acquisition of company shares in good faith, it is based on the provisions of Art. 410 and Art. 411 of the CA according to which the person to whom the company shares are transferred is considered a fair acquirer with regard to the data available to him through the book of company shares, as well as in relation to the data notified to the registry court. It is a limited right to acquire a business share in good faith from the disposal of the transferor without the power of disposal. On the other hand, the role of the company's management and notaries is emphasized, who in the process of transferring a business share are obliged to ensure that the data kept in the book of company shares and in the court registry are up-to-date and transparent.¹⁶

¹¹ Rober, H., *op. cit.* note 2, p. 7.

¹² Rober, H., *op. cit.* note 2, p. 17.

¹³ Kochel, M., *Gutgläubiger Erwerb von GmbH-Geschäftsanteilen*, Studentarbeit, 1. Auflage, Grin Verlag, 2012., p. 1.

¹⁴ Rober, H., *op. cit.* note 2, p. 17 and 19.

¹⁵ *Ibid.*, p. 19.

¹⁶ Barbić, J., *Pravo društava, knjiga druga, Društva kapitala, Društvo s ograničenom odgovornošću, društvo za uzajamno osiguranje, Kreditna unija*, peto izmijenjeno i dopunjeno izdanje, Organizator, Zagreb 2010, p. 174; Dopke, J.; Spiller, M., *Gutgläubiger*

The basis and restrictive requirement for the acquisition of a business share in good faith is the list of company members from the book of business shares, which is submitted to the registry court.¹⁷ The principle of acquisition in good faith protects the position of the acquirer of a business share based on the information entered in the list of company members from the book of business shares and their power of disposal, but not beyond that.¹⁸ The protection of the honest acquirer therefore includes only confidence in the truthfulness and validity of the entry of the owner of business shares in the book of business shares, which is also notified to the registry court.¹⁹ By provision of Art. 411, para 1. of the CA, it is stated that in favor of the acquirer who acquires a company share or the right to that share through a legal transaction, the content of the list submitted to the registry court is valid as correct, unless the acquirer was aware or due to gross negligence did not remain unaware that the entered information was incorrect. The acquisition of a business share in good faith by an unauthorized person is excluded in cases where the time of incorrect registration in the registry court is shorter than three years from the date of submission of incorrect information for registration in the registry court and the acquirer knew or could not have remained unaware that the transferor was an unauthorized person.²⁰ Outside of these cases, it can be considered that the business share was validly acquired from an unauthorized person. In the specific case, the term "authorized" is not completely clear, so it is possible that it is an incorrectly specified term. The assumption is that the unauthorized registered owner is meant, although this cannot be used as a precise term.

Erwerb von GmbHG- Geschäftsanteilen kraft Inhalts der Gesellschaftsliste gemäss 16. Abs. 3. GmbHG- ein Überblick, Bonner Rechts Journal, 2/2009, p. 125; Gottschalk, E., *Neue Regelungen für die Gesellschafterliste und die Geschäftsanteile sowie der gutgläubige Erwerb von Geschäftsanteilen nach dem MoMiG*, Deutsche Zeitschrift für Wirtschafts und Insolvenzrecht, 19. Jahrgang, 2008, p. 46.

¹⁷ Dopke J.; Spiller, M., *op. cit.* note 16, p. 125; Gottschalk, E., *op. cit.* note 16., p. 45; Lutter, M.; Hommelhoff, P., *GmbH-Gesetz, Kommentar*, Köln 2004, p. 610; Rober, H., *op. cit.* note 2, p. 33; Wilhelm, J., *Kapitalgesellschaftsrecht*, 3., neu bearbeitete und erweiterte Auflage, De Gruyter Recht, Berlin 2009, p 260.

¹⁸ Barbić, J., *op. cit.* note 16, p. 182; Lutter, M.; Hommelhoff, P., *op. cit.* note, p. 612; Wagner, J., *op. cit.* note 2, p. 135.

¹⁹ Bartl, H. *et. al.*, *op. cit.* note 6, p. 244; Dopke J.; Spiller, M., *op. cit.* note 16, pp. 125 - 126; Gottschalk, E., *op. cit.* note 16, p. 49; Verspay, H., *op. cit.* note 5, p. 123.

²⁰ Lutter/Hommelhoff: *GmbH-Gesetz, Kommentar*, *op. cit.*, str. 611 and 620.

"...The plaintiffs, at the relevant time of registration of the contested mortgage in favor of the defendant, were not holders of registered property rights and as such were not registered in the land register; they were registered later....", County Court in Rijeka, decision number: GŽ- 4149/2013 from 06.07.2016., available at Court practice portal of SCRC, 22 February, 2024.

Here, the law provides a negative determination of the acquirer's honesty requirements, therefore, it regulates what the acquirer should not know, and not what the acquirer should know. For example, in the ownership-legal sense, in the spirit of the provisions of Art. 150, para. 1 of the Law on Land Registers, the holder of a registration right that has been violated by registration in favor of a person is authorized, in order to protect his right, to demand the deletion of any registration that offends him and the establishment of the previous (land) registration status by erasure with a lawsuit until circumstances arise on the basis of which the violated right should cease.²¹ In accordance with the provisions of Art. 15, para. 2 of the LLR, an annulment action cannot be filed against a person who, acting in accordance with the truthfulness of the land records, and in good faith, registered his right deriving it from the registered, but untrue right of the legal predecessor with two exceptions. An annulment action would be founded if the holder of the infringed registered ownership, who was delivered a decision on registration in favor of that person's legal predecessor, filed an appeal, requested a record that the entry was disputed and filed an annulment lawsuit within sixty days, or if the said holder of registered ownership was not delivered a decision on registration, and filed a cancellation claim within three years from when registration was requested.

A comparative analysis of the solutions of the German legal system, which served as a model for the Croatian legislator in the implementation of provisions on the acquisition of company shares in good faith in CA, shows that the provisions of Art. 16 of the German Law on Companies with Limited Liability stipulate that in the event of a change in the company members or the extent of their company shares in relation to the company, only persons who are registered as members of the company in the list of company members in the commercial register are considered company shareholders.²² A legal action undertaken by the acquirer of company shares in order to acquire membership in the company is considered valid from the beginning if the list is entered in the commercial register immediately after the execution of the legal action (Art. 16. para. 1. GmbHG). The acquirer can legally acquire company shares or the right to it from an unauthorized person if the seller is entered as the owner of the company shares in the list of shareholders in the commercial register, but the above does not apply if the list was incorrect regarding the share for less than three years at the time of acquisition and the inaccuracy cannot be attributed to the authorized party (Art. 16, para. 3 GmbHG). An acquisition made in good faith is also not possible if the acquirer is aware of the lack of authorization or is not aware of it

²¹ Law on Land Registers, *Official Gazette*, No. 63/19 (hereinafter: LLR)

²² German Law on Companies with Limited Liability, *Official Gazette* No. 5/2023 (hereinafter: GmbHG)

due to extreme carelessness or if an objection has been filed against the list of company members (Art. 16, para. 3 GmbHG).

A comparative analysis of the solutions of the Serbian legal system established that the provision of Art. 143 of the Law on Commercial Companies stipulates that the status of a company member is acquired on the day of registration of ownership of company shares in accordance with the local legislation on the registration procedure in the Agency for Business Registers.²³ The status of a member of the company ends on the day of registration of the termination of the status of a member of the company in accordance with the RA. The director is responsible for the correct and timely entry of data on the members of the company into the records, and issues a certificate of the completed entry or the status of those records. RA regulates the procedure of registration, recording and publication of data and documents which, in accordance with a special law, are the subject of registration, records and publication in registers and records kept by the Agency for Business Registers, as well as other matters of importance for registration, records and publication (Art. 1 RA).

2.3. The principle of acquiring a company share in good faith vs. the principle of trust in land registers

The principle of conscientiousness and honesty is the basic principle of mandatory law, known since Roman law (*bona fides*).²⁴ In establishing mandatory relationships and exercising rights and obligations from those relationships, participants are obliged to adhere to the principles of conscientiousness and honesty (Art. 4 Law on Obligatory Relations).²⁵ The LOR does not regulate the content of this principle, but it is concretized through legal science and judicial practice. According to the principle of conscientiousness and honesty, the contracting parties are expected to respect each other's interests, and

²³ Serbian Law on Business Companies, *Official Gazette*, No. 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019, 109/2021 (hereinafter: srbLCC); Law on the registration procedure in the Agency for Business Registers, *Official Gazette*, No. 99/2011, 83/2014, 31/2019 i 105/2021 (hereinafter: RA)

²⁴ See Osrečak, J., *Poredbeno-pravni prikaz načela savjesnosti i poštenja*, *Zagrebačka pravna revija*, year 3, 1/2014, pp. 53 - 55 and Pavlović, M., *Dužno poštovanje sudionika u ispunjavanju obveza*, *Zbornik radova Pravnog fakulteta u Splitu*, year 51, 3/2014, pp. 578-580.

²⁵ See Decision of the Constitutional Court of the Republic of Croatia number U-III-5262/2010. from 06.06.2014. published in the book by Crnić, I., *Zakon o obveznim odnosima s izmjenama iz 2018. g. i dodatnom sudskom praksom, sedmo, izmijenjeno i dopunjeno izdanje*, Organizator, Zagreb 2018, p. 9.

²⁶ Law on Obligatory Relations, *Official Gazette*, No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23 (hereinafter: LOR)

this principle also imposes on them the obligation of loyal and honest behavior, so it can be said that it regulates the mutual relations of the contracting parties.²⁶ At the same time, each participant in a mandatory relationship is obliged, in exercising his right, to refrain from actions that would make it difficult for the other participants in the mandatory relationship to fulfill their obligations.²⁷

The main objection to the existing arrangement and the application of the principle of acquiring company shares in good faith is that registration in the public court register (court register) is not a sufficient guarantee for the acquirer of a legitimate acquisition, unlike, for example, an honest acquirer of real estate and the protection he enjoys through the application of the principle of trust in the land registry. In addition, a company share is considered a right, not a thing, so in foreign literature the view is expressed that it lacks the material quality of, for example, real estate.²⁸ It is also objected that the registration of company share ownership is a double record of membership, which does not provide a sufficient degree of legal certainty.²⁹ In the spirit of provisions of Art. 411, para. 1 of the CA, in the event of a discrepancy between the entries in the book of company shares and the list of members submitted by the management board to the registry court, it is considered first of all that the founding members of the company are listed in the social contract. This raises the question of the need to approach the trust that participants in legal transactions have in land registers when acquiring real estate, as a result of which it is necessary to consider the need for legislative improvements to the current legislative solution. It can be seen that the acquirer faces considerable risk when acquiring company shares since the actual possibilities of researching the legal position of the acquirer in the process of acquisition, for example the encumbrance of company shares, is questionable, which threatens legal certainty and creates an unequal legal position of the acquirer and the transferor. Anything beyond what is entered in the book of company shares is thus potentially dangerous for the acquirer. The Croatian legislator nevertheless set up some additional protection mechanisms for the acquirer by prescribing the obligation for the management board of the company to enter information on e.g. liens and usufructuary rights in the book of company shares, but given the possible unavailability of this information, their actual effect is questionable. Therefore, the strength of the entry in the book of company shares in the context of acquisition in good faith lacks an objective

²⁶ Osrečak, J., *op. cit.* note 24, p. 54; Pavlović, M., *op. cit.* note 24, p. 588.

²⁷ Pavlović, M., *op. cit.* note 24, p. 577.

²⁸ Reichert, J.; Weller, M., *Der GmbH- Geschäftsanteil, Übertragung und Vinkulierung, Kommentierung zu 14.-18. GmbHG*, Verlag C.H. Beck, München 2006, p. 64.

²⁹ Dopke J.; Spiller, M., *op. cit.* note 16, p. 130.; Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 61.

criterion that will enable the actual realization of the principle of acquisition in good faith.³⁰

The principle of trust in land records, on the other hand, is unambiguously regulated by the provision of Art. 122 of the Law on Property and Other Real Rights (hereinafter: LoP).³¹ In this sense, it is prescribed that the land registers are considered to truly and completely reflect the factual and legal state of the real estate, so who acted in good faith with trust in the land registers, not knowing that what was entered in them was not complete or that it was different from off-book status, enjoys protection in accordance with ZoP.³² The acquirer was in good faith if at the time of entering into the legal transaction and at the time of requesting registration he did not know or, given the circumstances, had no reason to suspect that the item did not belong to the transferor, therefore he was not obliged to investigate off-book balances. In doing so, the principle of truthfulness and the principle of trust in the completeness of the entered data should be kept in mind. Therefore, the acquisition in good faith of the acquirer reflects confidence in the content of the entries in the land registers, which in practice provides a basis that ensures legal certainty. This principle was put to the test for a long time through various interpretations of judicial practice, which threatened its actual implementation, and thus legal certainty.³³ The main doubt in the application of this principle, as well as in the finality and the principle of acquisition in good faith, is the civil law principle that no one can transfer more rights than he has. At the same time, the position that property law regulations are *lex specialis* in relation to the general principle of civil law, which contributes to legal certainty, seems justified.³⁴ Thus, it is emphasized that the basis of acquisition is the fulfillment of legal conditions on the part of the acquirer, not

³⁰ Wagner, J., *op. cit.* note 2, p. 133.

³¹ Law on Property and Other Real Rights, Official Gazette, No. NN 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17 (hereinafter: LoP)

³² Žuvela, M., *Zaštita povjerenja u pravnom prometu u nekretninama: stjecanje stvarnih prava na temelju povjerenja u zemljišne knjige*, In: *Pravo u gospodarstvu: časopis za gospodarsko-pravnu teoriju i praksu* year 46, 6/2007, pp. 75 - 112.

³³ Golub, A., *Stjecanje prava vlasništva nekretnina s povjerenjem u zemljišne knjige - (1. dio)*, In: *Informator: instruktivno-informativni list za ekonomska i pravna pitanja*, year 60, 6065/2012, pp. 8 - 10; Ivančić, V., *Povjerenje u zemljišne knjige nakon odluke Ustavnog suda br. U-III-1719/2014 od 10. prosinca 2015. godine: mogu li založni vjerovnici napokon „mirno spavati“*, In: *Pravo i porezi: časopis za pravnu i ekonomsku teoriju i praksu*, year 25, 6-7/2016, p. 60.

³⁴ Golub, A., *op. cit.* note 33, pp. 8 - 10; Golub, A., *Stjecanje prava vlasništva nekretnina s povjerenjem u zemljišne knjige - (2. dio)*, In: *Informator: instruktivno-informativni list za ekonomska i pravna pitanja* year 60, 6066/2012), pp. 13 - 14; Zrilić, Z., *Zaštita povjerenja u zemljišne knjige: kako funkcionira u praksi*, In: *Hrvatska pravna revija*, year 3, 10/2003, p. 8.

legal work.³⁵ Therefore, it is the legislative framework that gives legitimacy to this type of acquisition. In this sense, there is no conflict between the stated principles and specific circumstances, the principle of trust in land registers is an exception to the rule. The acquirer will obtain the real estate in good faith if he acquired it from a person who was registered as the owner even though he was not, and if the registration is not deleted due to the invalidity of the legal predecessor's registration within three years from when the legal predecessor's registration was requested (Art. 123 LoP). Furthermore, the acquirer who in good faith acquired the right of ownership of the real estate, acquired that real estate as if there were no other rights, encumbrances or restrictions on it that were not registered, nor was it evident from the land registers that the application for registration had been submitted (Art. 124 LoP).³⁶

Thus, it is emphasized that the basis of acquisition is the fulfillment of legal conditions on the part of the acquirer, not a legal transaction.³⁷ Therefore, it is the legislative framework that gives legitimacy to this type of acquisition. Namely, the acquisition occurs on the basis of the law, by fulfilling the assumption that the real estate is acquired on the basis of a legal transaction, that the acquirer acted with confidence in the land registers when concluding the legal transaction and submitting the application for registration, that the alienator is registered as the owner and that the acquirer's right shall not be erased by an annulment action due to invalidity.³⁸

3. ACQUIRING A COMPANY SHARE IN GOOD FAITH - SOME CHALLENGES AND DOUBTS

3.1. Who is an unauthorized transferor of a company share?

The analysis of legislative solutions in the Croatian and comparative systems leads to the conclusion that the basis of acquisition in good faith is the acquisition from a person who, as the owner of company shares, is registered in the book of company shares, therefore, with regard to the data that is available to the acquirer through the book of company shares, as well as in relation to information in the court registry.³⁹ Other persons in that case would be

³⁵ Zrilić, Z., *op. cit.* note 34, p. 6.

³⁶ Giunio, M., *Jesu li načela: povjerenja u ZK-stanje i "nemo plus iuris ad alium transferre potest quam ipse habet" - u sukobu?*, In: Pravo u gospodarstvu: časopis za gospodarsko-pravnu teoriju i praksu, year 46, 6/2007, pp. 520 - 521.

³⁷ Zrilić, Z., *op. cit.*, note 34, p. 6.

³⁸ Golub, A., *op. cit.* note 33, p. 8.

³⁹ Rober, H., *op. cit.* note 2, pp. 37 - 39.

unauthorized persons for the transfer or disposal of company shares. In reality, however, unauthorized persons are those who do not have the authority to dispose of company shares, because they are not the real holders of rights. So, although they essentially do not have the legal authority to dispose of the company shares, a registered person in the status of owner of company shares (member of the company) in relation to the acquirer who relies on the relevant registers is presumed to be an authorized transferor. Thus, the acquirer, with the fulfillment of conditions from Art. 411 of the CA, can validly acquire company shares in good faith from an unauthorized person. However, it should be kept in mind that before the acquisition from an unauthorized person taking place, the legal transaction between the registered owner of the company shares and the member of the company on the one hand, and the acquirer on the other hand, must meet the legal requirements of validity (contract form, consent of the company for the transfer etc.) otherwise there is no acquisition in good faith, as in the legal validity of the legal transaction itself.⁴⁰

It is necessary to distinguish acquisition from an unauthorized person from acquisition from a person with limited right of disposal. A person with a limited right of disposal would be one who transferred company shares contrary to the statutory restriction arising from the social contract. The difference is that acquisition in good faith from an unauthorized person is possible, but it is not with the limitation of the right of disposal in case of transfer.⁴¹ In the context of the protection of violated rights of the real holder of rights against the dishonest transferor and acquirer, the protection can be realized according to the general rules of compulsory law.

When an unauthorized person is incorrectly entered in the book of company shares, the actual authorized person is actually in a situation where he is not a member of the company. The transferor may find himself in the status of an unauthorized person, for example, if it has been established that there was a will, so the heir is not actually an heir, also if the transferor previously acquired company shares from an unauthorized person, if the transferor is commercially incompetent, etc..⁴² Acquisition by an unauthorized person also includes the case in which a company share is disposed of by a person who is not registered in the book of company shares or is registered based on invalid registration and does not have the power of disposal under formal law (e.g. a spouse or an heir who has not regulated the status of company membership). The inaccuracy of the entry should also be seen as the responsibility of the authorized person, i.e. the real holder of the right, to request the implementation of the entry in the book of

⁴⁰ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 616.; Rober, H., *op. cit.* note 2, p. 31.

⁴¹ Walek, T., *op. cit.* note 9, p. 618.

⁴² Jula, R., *Der GmbH-Gesellschafter*, Springer, Berlin 2020, p. 308.

company shares at the moment of acquisition. In doing so, it is recommended that he take the action without delay, because in this way he can most effectively eliminate actions that potentially threaten his acquired rights.

Furthermore, the following most common registration errors causing the invalidity of the application are observed, namely the change of legal status without registration in the book of company shares, e.g. multiple transfer of company shares where the registered member of the company transfers the company shares to the customer, while using the existing status in the list of company members for other disposals (further transfer or encumbrance) and incorrect list of company members (deliberate creation of an error, intentional fraudulent behavior, etc.).⁴³ Entry errors can include entries that would incorrectly reflect the consequences of the division or merger of company shares, so acquisition in good faith would not be applicable here.⁴⁴ Other cases, for example an increase in the share capital and the division of company shares), are more theoretical than they have practical reflections in business practice, so they will not be analyzed in more detail.⁴⁵ Minor data entry errors that can be objectively identified, such as an error in the date of birth or the number of company shares, are not a problem for a good faith acquisition, but otherwise there are significant omissions in determining the subject of legal work.⁴⁶ Mistakes that are a reflection of the intentional fraudulent behavior of the transferor as the owner of company shares, for example providing incorrect information, withholding certain circumstances relevant to company membership (e.g. the circumstance of inheritance), which the company could not have had knowledge of according to some doctrinal points of view, do not enable acquisition in good faith even after the expiration of the three-year period (Art. 411, para. 2 of the CA).⁴⁷

3.2. On the legal position of the acquirer of company shares

In order to show the real meaning of the limited protection of the honest acquirer, the emphasis is that protection cannot be counted on, even though the acquisition occurred by relying on the relevant registers in the event that the real holder of the rights realizes any of the previously mentioned rights within the stated deadlines. In this sense, the provision of a certain degree of protection of the private interest of the actual right holder can be supported. However, from the

⁴³ Rober, H., *op. cit.* note 2, pp. 54 - 60.

⁴⁴ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 613.

⁴⁵ Rober, H., *op. cit.* note 2, pp. 171 - 211.

⁴⁶ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, pp. 611 - 612.

⁴⁷ Barbić, J., *op. cit.* note 16, p. 184.

perspective of the acquirer, and in the context of Art. 411 of the CA, there is a possibility of an error by entering clearly incorrect or incorrectly stated data. In such circumstances, it is certain that each real holder of the right will successfully realize legal protection in the event that he requests it within the prescribed period, even if the acquirer has acted conscientiously, honestly and with confidence in the relevant registers, in certain cases even after the three-year period has passed (error which results in inaccuracy in the authorized person's actions). However, it seems that the stated situation, which can be confirmed by analyzing the existing legislative solution, is not appropriate and essentially seriously threatens the goal and purpose of protecting the honest acquirer, on the one hand, but also seriously calls into question the functioning of the company, knowledge of membership and decision-making in an unspecified period of time. On the other hand, judicial practice makes a clear distinction when it comes to acquiring trust in land records when it comes to the active identification of a person who was invalidly deleted (e.g. by forgery, harmless legal work, etc.), who formally and legally has the status of book ownership legal predecessor, compared to persons who do not hold the right to the books (e.g. unregistered authorized person or spouse).⁴⁸ Therefore, a collision is observed in the acquisition application of company shares in good faith and the acquisition of real estate under the same criteria in the form of more efficient protection of the honest acquirer of real estate from the acquirer of company shares.

With the aim of realizing the status of an honest acquirer, the question arises whether the acquirer's trust in the content of the list of company members is sufficient and whether the acquirer failed to apply due diligence if, before entering into a legal transaction, he did not check the data in the book of company shares and the data kept by the registry court. The acquirer is freed from an in-depth analysis of the state of the company in which he wishes to acquire membership by acquiring company shares, except in case of doubt that would prompt him to perform such an analysis. CA does not require active actions of the acquirer. However, the opinion derived from the legal doctrine is that they nevertheless derive from the provisions of the LOR on the fundamental principles of mandatory law and the rules on concluding contracts. Therefore, the minimum of honest and conscientious behavior cannot be ignored when

⁴⁸ The holder of the book right is actively legitimized to file an annulment claim, that is, the one who was registered in the land register immediately before the contested change in the land register, as well as his universal successors. See decisions number; County Court Split: Gž-1705/2018 from 19.11.2018 and Gž- Zk-325/2019 from 24.02.2020, High Commercial Court of the Republic of Croatia: Pž-350/2023 from 28.03.2023, all available at Court practice portal of SCRC, 22. February, 2024; Gž- Zk-76/2022 from 20.04.2023 available at the *Ius Info* Portal, 14. March, 2024; SCRC Rev-257/2013 from 30.10.2018 in possession of the author.

participating in legal transactions.⁴⁹ The above is reflected in the necessity of inspecting the book of company shares and checking the status in the registry court in the process of acquiring company shares, if the company shares are to be acquired in good faith. Therefore, in relation to the acquirer, it is requested that he does not miss the obvious circumstances essential for the conclusion of the legal transaction.

On the other hand, the legal issue of trust should be distinguished from the acquirer's bad faith. First, it refers to the case that the acquirer did not check the state of the list of company members at all, and secondly, that despite this, he implemented a legal transaction for which he knew that there were disputed circumstances for its implementation.⁵⁰ The first problem is essentially compensated today by the participation of public notaries and the formality of the process of acquiring company shares through legal work. Namely, in the context of the protection of the acquirer, the obligation of the public notary to promptly notify the registry court of a change in the membership structure is highlighted. However, the above has certain shortcomings. The possibility that incorrect data will not reach the registry court should be taken with caution despite the involvement of public notaries in the process of changes that should be carried out at the registry court in the event of a change in membership. Namely, the data is entered in the book of company shares without the participation of a public notary, so it cannot be ruled out that incorrect data could be entered into the book of company shares (e.g. in the case of forgery).⁵¹ The fact is that joint and unlimited liability of management members is prescribed for damages caused to creditors, members of the company and other persons due to incorrect registration, but with the application of general assumptions of liability for damage. In order to strengthen the guarantees aimed at preventing non-transparent actions, one of the proposals for such action is to extend the authority of public notaries in the process of entering and changing data in the book of company shares.⁵² However, this did not take root in practice.

3.3. The principle of acquiring a company share in good faith and other legal processes

In cases of acquiring company shares on other legal grounds than legal business, as explained earlier, acquirers do not enjoy legal protection based on the

⁴⁹ See SCRC decision number Rev- x 686/2014 from 02.09.2015, available at the Court practice portal SCRC, 22 February, 2024.

⁵⁰ Rober, H., *op. cit.* note 2, p. 92.

⁵¹ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 61.

⁵² Kochel, M., *op. cit.* note 13, p. 4.

principle of acquisition in good faith.⁵³ Acquisition in good faith, in the existing framework of company law, does not refer to the previously mentioned acquisition contrary to statutory restrictions, but also, for example, in the case of acquiring unpaid company shares (danger of forfeiture according to Art. 400 - 403 CA), inheritance etc.⁵⁴ The most relevant examples will be presented here.

In the case of inheritance, the legal consequences of acquisition occur *ex lege* and there is no assignment or request for a special form, so the rules on acquisition in good faith do not apply to inheritance.⁵⁵ Heirs thus definitely acquire company shares as universal successors of the decedent, and are legitimized to society as new members, as a rule, by a decision on inheritance.⁵⁶ The heir of an incorrectly registered person (unauthorized person) does not become a member of the company.⁵⁷ However, what if the transferor claims that he acquired the company shares by inheritance, therefore, *ex lege*, and transfers the company shares before he was legitimized by the company and regulated his status by entering it in the book of company shares. Acquisition in good faith is not possible if the company shares are acquired from an heir who has not been legitimized by a valid decision on inheritance.⁵⁸ German legal doctrine considers the economic aspects of the disposal of company shares in the context of acquisition in good faith, stating that in the event that the heirs are the transferors of company shares to other co-heirs, there is no commercial transaction and the rules on acquisition in good faith do not apply to such a transfer.⁵⁹

The acquisition of company shares in good faith should also be considered in relation to the acquirer/buyer who, in enforcement proceedings, acquires company shares at a public auction against a person who is not the actual owner of the company shares, but is entered in the book of company shares. In this case, is it possible to talk about the defects of the purchased item, since company shares that do not belong to the bailee were purchased (Art. 151, Para. 6 Enforcement Law)?⁶⁰ In fact, it could be concluded that the acquirer in that case would acquire a thing with a defect, while the buyer does not have rights based on the defects of the thing. This would mean that in the end, the enforcement

⁵³ Rober, H., *op. cit.* note 2, pp. 27 - 28; Wagner, J., *op. cit.* note 2, p. 157.

⁵⁴ Barbić, J., *op. cit.* note 16, p. 183; Lutter, M.; Hommelhoff, P., *op. cit.* note 17, pp. 614 - 615; Rober, H., *op. cit.* note 2, p. 211; Wagner, J., *op. cit.* note 2, pp. 133 - 134.

⁵⁵ Bartl, H. *et. al.*, *op. cit.* note 6, p. 206; Verspay, H., *op. cit.* note 5, p. 123.

⁵⁶ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 612; Verspay, H., *op. cit.* note 5, p. 156.

⁵⁷ Drygala, T.; Staake, M.; Szalai, S., *Kapitalgesellschaftsrecht, Mit Grundzügen des Konzern- und Umwandlungsrechts*, Springer, Leipzig 2012, p. 266.

⁵⁸ Lutter, M.; Hommelhoff, P., *op. cit.* note 17, p. 615.

⁵⁹ Rober, H., *op. cit.* note 2, p. 27, pp. 37 - 39.

⁶⁰ Enforcement law, *Official Gazette*, No 112/12, 25/13, 93/14, 55/16, 73/17, 131/20, 114/22, 06/24 (hereinafter: EL)

creditor could be liable for damages to the acquirer according to the general rules of the LOR on liability for damage. Therefore, there is a collision between the rules of enforcement procedure and the acquisition of objects of enforcement and the rules of company law on acquisition in good faith. However, by applying the *lex specialis* rule on the acquisition of company shares in good faith at the time of the decision on the award, in the event that the object of enforcement is a company share that does not belong to the enforcement creditor as the actual right holder, and was purchased in the enforcement procedure, the buyer acquires the company shares based on the decision on the enforcement (in accordance with Art. 130 LoP).⁶¹ In this way, the buyer is in the same legal position as other contractors who rely on the status of the book of company shares in concluding legal transactions, while being protected by the rules of enforceable law (and in the case when the pledgor is not the actual owner of the pledged thing/right that is activated in execute). Namely, until the decision on the enforcement is made, there are mechanisms of legal protection of the actual right holder (e.g. objection, postponement and declaration of enforcement as inadmissible from Art. 59 and 67 with the exception of Art. 61, para. 1 EL).⁶²

The law does not regulate the process of merging business shares, however, it stipulates that a decision of the company's assembly is required for merging business shares (Art. 440 CA). One comes across the point of view that in the event that two business shares are merged, one of which does not belong to the merger participant, then the acquisition of a business share in good faith could only occur through a relatively fair disposition of the real owner (i.e. the acquirer acquires only one business share).⁶³ It is stated that the book of business shares contains two incorrect data, one about the (un)authorized owner, and the other about the invalid merger.⁶⁴ However, it seems that this attitude needs to be tested, since the decision on the merger is made by the company's assembly, and based on the merger and the new status in the book of business shares, the process of possibly changing the membership structure is then carried out. Therefore, the position regarding the absence of grounds for the acquisition of merged business

⁶¹ Rober, H., *op. cit.* note 2, p. 30.

The Civil Division of the SCRC at its session of February 22, 2018 under the number: Su-IV-4/18-4 adopted the legal understanding that reads: "*The alleged owner can successfully protect his right in the foreclosure case when prove that the bailiff was unscrupulous, dishonest, or that he abused his right.*", in authors possession.

⁶² "... an honest acquirer will be legally protected regarding the acquisition of a registered right only if, acting in good faith, he registered his right in the land register on the basis of a legal transaction, and if the claimant acquired ownership of the real estate on the basis of the law before the initiation of enforcement proceedings..." , SCRC decision number Revd-2609/2023 od 28.09.2023, available at the *Ius Info* Portal, 14 March, 2024

⁶³ Rober, H., *op. cit.* note 2, p. 207.

⁶⁴ *Ibid.*, p. 208.

shares in good faith does not seem justified as long as the decision of the company assembly on the merger of business shares is valid.

3.4. Some challenges in applying the principle of acquisition in good faith

One of the challenges in the application and realization of the principle of acquiring company shares in good faith is the question of whether the acquisition of company shares in good faith results in unencumbered company shares. In this sense, the analogous application of the provisions of the LoP (Art. 118, para. 5, Art. 124, para. 2, and Art. 243 and 349) according to which an honest acquirer does not enjoy protection from unregistered encumbrances and restrictions if they are based on the law, while the lien on real estate and usufruct ceases if the real estate or servient thing is acquired by an acquirer who did not know that an unregistered lien existed.

In the domestic legal framework, and according to the provisions of Art. 410 of the CA, the registration of the burden of pledge and usufruct is mandatory, so the domestic legal system should reconsider the paradigm of acquiring unencumbered company shares in good faith. This legal point of view needs to be reviewed in the spirit of the provisions of Art. 410 of the CA, according to which it is required that the obligations imposed on the company shares (which are pledge, usufruct, fiduciary) are visible, regardless of the fact that it is an internal document of the company, and not a public register. Notifying the registry court about encumbrances over the company shares is not a legal obligation, while it is in relation to the list of members kept in the book of company shares. In the event that encumbrances are not entered in the book of company shares, the honest acquirer should be protected, because the fact that the entry of that encumbrance as a legal right of the creditor was not requested, represents their responsibility for the consequences of not registering the encumbrance and, in connection, accepting the accompanying legal consequences. It is difficult to justify why the creditor's inaction would have negative effects on a conscientious acquirer who acted with confidence in the state reflected in the book of company shares and its mandatory content. The acquirer could reasonably conclude that there are no encumbrances on the acquired company shares and they are a dead letter to the creditor if they are not transparently recorded by third parties. Essentially, the options of obtaining information about unregistered encumbrances would be excessively burdensome for the acquirer and practically difficult to achieve, which would put him in an unequal position in relation to the relationship between the acquirer and the transferor and the relationship of conscientiousness and honesty of the creditor of security assets (encumbrance on the company shares).

In the case of a partnership based on company shares, the partnership, due to the legal nature of the internal relationship of partners (*res inter alios acta*), does not transfer to the acquirer.⁶⁵ However, legal doctrine considers controversial the question of the extent to which the acquisition of company shares with a co-ownership relationship in good faith reaches. In the case of a co-owner relationship on company shares, the book of company shares can and should contain information about the co-owners. However, the situation in practice does not show that the authorized relationship is regularly entered in the book of company shares (the most common example are spouses as authorized persons on company shares).⁶⁶ In German legal doctrine, the position is observed that the acquirer is not protected in the event that an authorized relationship is based on the company shares, if the transferor transfers more rights than belong to him.⁶⁷ However, following the normative framework provided by the CA and domestic court practice, this point of view is not applicable. Namely, the analogous application of the rules of the LoP can be considered authoritative for the case of off-book burdens on the company shares that is the subject of the transfer, which leads to the actual realization of trust in the status of the book of company shares. Moreover, an unregistered authorized person does not meet the legal requirements to be considered a member of the company. Since the CA for the acquisition of company shares in good faith presumes the acquisition from a registered member of the company, it is difficult to justify the position that the acquirer is not protected by this principle. The protection of an honest acquirer should be provided in the spirit of information that is visible by inspecting the book of company shares, even if this information is not kept at the registry court.⁶⁸

The issue of acquiring company shares in good faith should also be considered in the case of double or multiple transfer of company shares, and the legal position of the participants in such a legal relationship should be considered in relation to their honesty, and thus the option of acquiring company shares in good faith. In relation to the multiple acquisition of real estate, the applicable rule is from the provisions of Art. 125 of the LoP, if he transfers more rights than those belonging to him. The first acquirer is protected as an acquirer in good faith in accordance

⁶⁵ Barbić, J., *op. cit.* note 16, p. 183; Rober, H., *op. cit.* note 2, p. 100.

⁶⁶ "...a third person can, on the basis of a legal transaction, which was not concluded with all joint owners, acquire the right of ownership of real estate under the assumptions under which trust in the land registers is protected, if the ownership was not registered in the land registers...", SCRC decisions number: Rev-2203/2016 from 04.10.2016, available at the *Ius Info* Portal, 14 March, 2024 and Rev-1867/2012 od 29.10.2013, in possession of the author.

⁶⁷ Rober, H., *op. cit.* note 2, pp. 158 - 159.

⁶⁸ Wagner, J., *op. cit.* note 2, pp.161 - 162.

with relevant provisions of the CA. Such an acquirer is a formal and legal new owner of company shares, in other words, an authorized person with an entry in the new list of company members. In the case of multiple acquisitions, if the first acquirer acquired company shares in good faith, this should also apply to subsequent acquirers. Therefore, both the first and later acquirers enjoy equal protection of the principle of acquisition in good faith.

In the case of acquisition of company shares, the problem may also arise due to the fact that this company share has already been transferred earlier, but under a deferred condition. During the period from the conclusion of the legal transaction for the acquisition of company shares to the recording in the book of company shares, it is possible for someone else to be entered in the book of company shares on the basis of a legal transaction that was concluded after the first one, but realized according to the company before the first transaction.⁶⁹ In the event that the acquirer does not apply for registration on the basis of the first legal transaction, and in the meantime a third acquirer is registered, protection of the rights of the first acquirer cannot be claimed based on the principle of acquisition in good faith. In the aforementioned circumstances, the position is taken that later acquirers cannot be excluded from the protection guaranteed to every honest acquirer in good faith. Legal mechanisms for the protection of the first acquirer from the transferor (termination of the contract and/or compensation for damages) can be considered.

What if the company share that is the subject of disposal does not exist at all? In that case, there is no right holder, because formally and legally the company share does not exist. In the specific case, the expected situation in the company is that the sum of the nominal amount of company shares from the list of company members is greater than the sum of the nominal amount of company shares that actually exist.⁷⁰ It is considered that such a disagreement should be noticed by an honest acquirer through inspecting if the sum of the nominal amounts of company shares in the book is greater than the registered share capital. A non-existent right, such as non-existent company shares, cannot be subject to disposal in any legal transactions.

4. CONCLUSION

The principle of acquiring company shares in good faith (*in bona fides*) implies the possibility of acquiring company shares from an unauthorized person through

⁶⁹ Rober, H., *op. cit.* note 2, p. 95.

⁷⁰ *Ibid.*, p. 95.

a legal transaction. Analogously applying the theoretical determinations of the principle of acquisition by trust in land registers, it can be concluded that in essence it is about the legalization of the process of acquiring company shares, which was disposed of by a person who does not have the authority to dispose of it. In order to protect conscientious and honest participants in legal transactions on the one hand, but also to obviously encourage the real holders of rights to take care of them, the law made it possible to acquire in good faith. Namely, it is considered that the legislative framework requires interventions in regulating the process of acquiring company shares in good faith, and as stated earlier, by choosing a membership registration model and relevant data for membership and company shares. When acquiring company shares in good faith, there are too many exceptions to the rules that complicate its goal and purpose and threaten legal certainty. This results in an additional narrowing of the scope of application of the principle of acquisition in good faith, which in the regulatory framework is already limited by the term in which such acquisition can occur due to incorrect or incorrect registration. Therefore, the acquirer's legal position in the existing researched aspects of acquisition is threatened by various errors, and within the three-year period (and even after) they can represent the basis for invalidity of the legal transaction of the realized acquisition of company shares. In this sense, the protection of the rights of an honest acquirer is connected with the circumstance of whether a legal predecessor was previously registered, and on the other hand, whether the legal transaction or the act of disposing of company shares is valid, or whether there is a mistake in the registration made by the authorized person, which causes the invalidity of the acquisition. The above, in relation to, for example, the disposal of real estate, can have harmful consequences on internal relations and decision-making in a company that is an independent legal entity. Although the legislative framework that solves the issue of acquiring company shares in good faith is quite limited, it is clear that the basic criterion is the mandatory data that is kept in the book of company shares and the state that the book of company shares reflects. In this sense, the author is of the opinion that it would be advisable in the legislative framework to give this principle an unequivocal strength of truthfulness and trust in the book of company shares or at the registry court. It is also recommended to prevent double registration of membership, which is subject to possible deviations, and thereby endangering the transparency of data. Also, the operation of this principle should be balanced in the relations between the honest acquirer and the unregistered rights of real holders and third parties (e.g. lien creditors). It is therefore considered instructive to determine the circle of persons who are legitimized and by which legal mechanisms to judicially exercise rights from the transfer of company shares carried out in the circumstances of incorrect and erroneous registrations. In the context of the hypothesis of this paper, that the principle of acquiring company shares in good faith in the existing theoretical

and legislative frameworks does not provide a satisfactory level of legal security to the acquirers of company shares, the answer is partially affirmative. Therefore, it is concluded that minor legislative measures would reduce the scope of theoretical doubts and ensure a more efficient and transparent application of this principle in practice and bring it closer to the principle of acquisition with confidence in land registers.

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Review paper

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HARMONIZING DUE DILIGENCE IN THE EU: THE UN GUIDING PRINCIPLES (UNGPs) AND THE EU CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE (CSDDD)

ABSTRACT

The UN Guiding Principles on Business and Human Rights (UNGPs), adopted in 2011 by the Human Rights Council in the form of a non-legally binding instrument, are today considered the authoritative international ‘soft’ standard on business and human rights. While the UNGPs generally fall within the category of international ‘soft law’ instruments that, as such, do not create obligations binding under international law, the last decade has witnessed a wave of legal developments inspired by the UNGPs, which attempt to convert soft principles set forth therein into binding law at different regulatory levels. At the EU level, specifically, negotiations are ongoing for an EU-wide Directive on Corporate Sustainability Due Diligence (CSDDD), which would aim to promote responsible behavior by companies across global supply chains by introducing ‘sustainability due diligence obligations’ for certain categories of company domiciled in EU member states and foreign companies active in the EU market. The article explores how the UNGPs have informed relevant aspects of the Directive. To this end, the article provides a preliminary analysis of the substantive alignment between the final text of the draft Directive and the UNGPs.

Keywords: companies, soft law, human rights due diligence, UNGPs, EU CSDDD

1. INTRODUCTION

In 2011, the UN Human Rights Council (HRC) adopted the UN Guiding Principles on Business and Human Rights (UNGPs)¹, the final product of the mandate of the Special Representative of the Secretary-General (SRSG) on the

¹ UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 21 March 2011.

issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie. The UNGPs elaborate on the existing international human rights obligations of states to protect human rights in the context of business activities (Pillar I), on the responsibilities of business actors to respect human rights² (Pillar II), and on the right to effective remedy for victims of corporate-related adverse human rights impacts (Pillar III). Under Pillar II, specifically, companies are expected to respect human rights, that is, to avoid causing or contributing to adverse human rights impacts in the context of their business activities and business relationships. Human rights due diligence (HRDD) is the process envisaged by the UNGPs whereby companies can avoid causing or contributing to adverse human rights impacts.

The UNGPs belong to the category of so-called ‘soft-law’ instruments in the field of business and human rights (BHR)³, that is, non-legally binding instruments which seek to lay down principles of expected behavior rather than placing obligations binding under international law. Notwithstanding this, in recent years, ‘hardening’ processes of elements of the UNGPs have been ongoing at the national level, *inter alia*, in a number of EU jurisdictions⁴. These processes have sought to incorporate into domestic law the core component of the corporate responsibility to respect human rights through a legal requirement placed on companies to exercise human rights due diligence.

At the EU level, too, to avoid the legal fragmentation stemming from individual Member States’ national initiatives on mandatory corporate due diligence, negotiations have been ongoing for a Directive on Corporate Sustainability Due

² The UNGPs provide that ‘because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights’. Principle 12 clarifies that the corporate responsibility to respect refers to, at a minimum, the human rights included in the International Bill of Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work.

³ Choudhury, B., «Balancing Soft and Hard Law for Business and Human Rights» in *International and Comparative Law Quarterly*, vol. 67, 2018, p. 968-969.

⁴ Parallel to these developments it should be mentioned that a process to elaborate an international legally binding treaty on business and human rights is ongoing under the auspices of the UN. The treaty process started back in 2014 with the appointment by the UN Human Rights Council (HRC), through Resolution 26/9, of an open-ended intergovernmental working group (OEIGWG) with the mandate to elaborate such instrument. The OEIGWG has so far held nine working sessions and a number of treaty drafts have been negotiated. The latest updated draft of the treaty has been released in July 2023. For an overview of the process see <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>.

Diligence (CSDDD)⁵, which aims to promote responsible behaviour by companies across global supply chains by introducing ‘sustainability due diligence obligations’ for certain categories of company domiciled in EU member states and foreign companies active in the EU market. The explanatory memorandum for the draft Directive declares that ‘Union legislation on corporate due diligence would advance respect for human rights and [environmental] protection, create a level playing field for companies within the Union and avoid fragmentation resulting from Member States acting on their own’⁶. The final text of the draft Directive has been approved with consensus of the EU Council in March 2024 and has received approval by the EU Parliament in April 2024. Once entered into force, the Directive will require EU Member States to enact national legislation placing on relevant categories of corporations due diligence obligations modelled on principles enshrined in non-binding international instruments in business and human rights, among them, the UNGPs.

The present article explores the final text of the draft Directive, which attempts to harmonize the implementation of the UNGPs at the EU level and to ‘harden’ the UNGPs’ ‘soft’ corporate responsibility to respect human rights by requiring EU Member States to place on certain categories of companies a legal requirement to exercise due diligence under domestic law. Put differently, the article is concerned with the move in the area of business and human rights from international ‘soft’ law to national law. The aim of the article is to illustrate how norms enshrined in international soft law instruments ‘may provide a model for domestic legislation and thus become legally binding internally, while remaining non-binding internationally’⁷, by way of examining the alignment between substantive aspects of the draft Directive and core principles enshrined in the three Pillars of the UNGPs. It is outside the scope of the article to examine whether hard law options are preferable to existing soft law instruments in the area of business and human rights.

The article is structured as follows. Section 2 briefly discusses the emerging trend towards a binding corporate obligation to exercise human rights due diligence under domestic law, highlighting some of the reasons behind the call for binding corporate due diligence obligations. Section 3 illustrates the substantive aspects of the draft Directive. Section 4 examines specific elements

⁵ The Proposal for the Directive was adopted by the EU Commission in February 2022. Text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.

⁶ *Ibid.*, p. 3.

⁷ Shelton, D., «Soft Law» in *Handbook of International Law*, Armstrong, D. (ed), Routledge, 2008, at 2. See also Chinkin, C., «The Challenge of Soft-Law: Development and Change in International Law» in *International and Comparative Law Quarterly*, vol. 38, 1989, p. 858.

of principles enshrined in the UNGPs that are reflected in the draft Directive. Section 5 provides concluding remarks.

2. THE TREND TOWARDS MANDATORY CORPORATE HUMAN RIGHTS DUE DILIGENCE UNDER NATIONAL LAW⁸

A trend towards binding corporate obligations to exercise human rights due diligence at the national level has emerged in recent years in response both to poor implementation by companies of their ‘soft’ – that is, non-binding – ‘responsibility to respect’ and to the perceived inadequacy of international ‘soft’ law instruments on business and human rights, specifically the UNGPs, in improving standards of business conduct.

As to the corporate implementation of the ‘responsibility’ to respect human rights, the EU Commission has reported that, ‘despite the influence of the UNGPs, the actual implementation of due diligence for human rights [...] impacts has been very poor in practice’⁹. Recent studies have shown that many companies do not implement at all human rights due diligence as envisaged by the UNGPs, or although purporting to implement it, ‘do not demonstrate practices that meet the [expectations] set by the Guiding Principles’¹⁰. The 2020 Corporate Benchmark Assessment shows that almost half of the 229 companies assessed across all sectors failed to score any points with respect to the exercise of human rights due diligence¹¹. Two years later, in 2022, the same Assessment showed that almost half of the 129 companies examined failed to meet the expectations for the initial steps of the human rights due diligence process envisaged by the UNGPs¹².

⁸ The author has discussed this in Assenza E, ‘From International ‘Soft’ Law to National Law: the UNGPs in Domestic Mandatory Human Rights Due Diligence Legislation’ (2024) 2 Spanish Journal of Business and Human Rights.

⁹ See in this regard European Commission, «Study on Due Diligence Requirements through the Supply Chain – Final Report», 2020, p. 243. Available at: <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>.

¹⁰ See Report by UN Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/73/163, July 2018, para. 25.

¹¹ World Benchmarking Alliance, *Corporate Human Rights Benchmark 2020: Key Findings*, p. 3, available at: <https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-Findings-Report.pdf>.

¹² World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022: Insights Report*, p. 3, available at:

As for those companies that at least purport to implement the responsibility to respect human rights, among weaknesses in corporate human rights due diligence practices the UN Working Group on the issue of human rights and transnational corporations and other business enterprises¹³ has highlighted the lack of understanding by companies that human rights due diligence should focus on the actual and potential risks to rights-holders, rather than to the business¹⁴; the tendency to undertake human rights due diligence processes as a box-ticking exercise, without meaningful engagement of stakeholders, especially vulnerable or at-risk groups¹⁵; and the failure by companies to address risks beyond first-tier companies in their global supply chains¹⁶. Against this background, the Working Group has recommended that states adopt domestic measures to legally require companies to exercise human rights due diligence¹⁷, so as to 'advance corporate human rights due diligence as part of standard business practice'¹⁸.

This poor implementation of the corporate 'responsibility' to respect human rights has been generally attributed to the non-legally binding character of the UNGPs specifically¹⁹. According to many, the UNGPs' soft corporate responsibility to respect human rights has fallen short of improving the way in which companies identify and address their human rights adverse impacts²⁰ because it does not give rise to any legally binding obligations for companies to exercise human rights due diligence²¹. The lack of legally binding obligations on human rights due diligence is alleged to have 'allowed corporations to continue

https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf.

¹³ The body of experts established following the adoption of the UNGPs to promote worldwide dissemination and implementation of the instrument.

¹⁴ UN Doc. A/73/163, para. 25(a).

¹⁵ *Ibid.*, para. 25(c).

¹⁶ UN Doc. A/73/163, para. 29.

¹⁷ *Ibid.*, para. 93.

¹⁸ *Ibid.*

¹⁹ See in this regard European Commission, «Study on Due Diligence Requirements through the Supply Chain – Final Report», 2020, p. 141, available at: <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>.

²⁰ Report by ECCJ and CORE, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check*, (2020), p. 6.

²¹ European Commission, «Study on Due Diligence Requirements through the Supply Chain – Final Report», 2020, p. 243. See also Deva, S., «Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?» in *Leiden Journal of International Law*, 2023, p. 10: 'as business responsibility to respect human rights under Pillar II is voluntary, conducting HRDD is also non-obligatory for businesses. This is a major limitation because market pressures or courts of public opinion do not always work against all enterprises'.

to disregard appalling human rights abuses [...] taking place throughout their global value chains'²². In light of this, it has been argued that introduction of legal obligations is necessary in the area of human rights due diligence, 'where progress resulting from voluntary measures has been slow'²³. The UN Working Group has observed that voluntary instruments are inadequate to address existing weaknesses in business human rights due diligence practices, and has highlighted the need for 'enhanced [...] regulatory action to address business-related human rights impacts across sectors and global value chains', for instance through mandatory human rights due diligence requirements²⁴.

3. THE DRAFT EU CSDDD

As mentioned, the final compromise text of the EU Corporate Sustainability Due Diligence Directive²⁵ was approved with consensus of the EU Council in March 2024. The Directive recognizes the behaviour of companies across all sectors of the economy as 'key to success in the Union's sustainability objectives'²⁶. It highlights how, under existing international standards on business and human rights, among others the UNGPs, companies are expected to exercise human rights due diligence by identifying, preventing and mitigating the adverse impacts of their operations on human rights and by accounting for how they address those impacts²⁷. The main objective of the Directive is to 'better exploit[ing] the potential of the single market to contribute to the transition to a sustainable economy and contributing to sustainable development through the prevention and mitigation of potential or actual human rights and environmental adverse impacts in companies' chains of activities'²⁸. Accordingly, the Directive highlights the potential risk of legal fragmentation stemming from the national

²² Report by ECCJ and CORE, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check*, (2020), p. 4.

²³ World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022: Insights Report*, p. 5. Available at: https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf. See also Report by ECCJ and CORE, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check*, (2020), p. 6.

²⁴ Press Release, UN OHCHR, «UN experts welcome new study on corporate human rights due diligence», March 2020, available at <https://www.ohchr.org/en/press-releases/2020/03/un-experts-welcome-new-study-corporate-human-rights-due-diligence?LangID=E&NewsID=25758>.

²⁵ Draft text available at: <https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf>

²⁶ EU CSDDD, Recital 4.

²⁷ *Ibid.*, Recital 5.

²⁸ *Ibid.*, Recital 71.

initiatives on mandatory human rights due diligence of individual Member States, and the need for action at Union level²⁹.

The Directive provides rules for EU Member States regarding obligations for companies to exercise human rights and environmental due diligence with respect to their own operations, the operations of their subsidiaries and the operations of their business partners in their chains of activities³⁰. It also provides rules for civil liability for companies that violate the aforementioned obligations³¹, as well as obligations related to climate change mitigation³².

It applies to EU companies with more than 1000 employees and a net global turnover of more than EUR 450m³³, as well as non-EU companies with a net global turnover of more than EUR 450m generated in the EU³⁴. Under the Directive EU Member States are required to place on these relevant categories of companies an obligation to conduct risk-based human rights and environmental due diligence³⁵. To say that companies shall exercise due diligence is to say that, as provided for in the Directive, companies shall integrate due diligence into their policies and risk management systems; they shall identify and assess actual and potential adverse impacts; they shall prevent and mitigate potential adverse impacts, while bringing actual adverse impacts to an end; they shall establish a notification mechanism and complaints procedure; they shall monitor and track the effectiveness of their due diligence policies and measures; and they shall publicly communicate how they exercise due diligence. These substantive elements of the due diligence process are dealt with in separate provisions of the draft Directive, as follows.

The first requirement of the due diligence process is the integration of due diligence into the company's policies and and risk management systems³⁶. Moreover, companies should have in place a due diligence policy containing, among others, a description of the company's approach to due diligence³⁷ and a

²⁹ *Ibid.* The objective of the Directive 'cannot be sufficiently achieved by the Member States acting individually or in an uncoordinated manner, but can rather, by reason of the scale and effects of the actions, be better achieved at Union level'.

³⁰ EU CSDDD, Article 1(1)(a).

³¹ *Ibid.*, Article 1(1)(b).

³² *Ibid.*, Article 1(1)(c). For the purpose of the present contribution, the climate aspect of the Directive will not be examined. The focus is on human rights and environmental due diligence obligations that the Directive requires Member States to place on relevant categories of companies under domestic law.

³³ EU CSDDD, Article 2(1)(a).

³⁴ *Ibid.*, Article 2(2)(a).

³⁵ EU CSDDD, Article 4.

³⁶ EU CSDDD, Article 5(1).

³⁷ *Ibid.*, Article 5(1a)(a).

description of the processes necessary ‘to integrate due diligence into the relevant policies and to implement due diligence’³⁸.

The second requirement of the due diligence obligation that Member States shall place on relevant companies under domestic law is the identification and assessment, through appropriate measures, of actual and potential impacts in their own operations and in the operations of their subsidiaries and business partners in the chains of activities³⁹. In order to do so, companies would be required to map their own operations, as well as the operations of their subsidiaries and business partners in their chain of activities ‘in order to identify [...] where adverse impacts are most likely to occur and to be most severe’⁴⁰. Based on the findings of the mapping of these operations, companies would then be required to ‘carry out in-depth assessment’ of these same operations where adverse impacts have been identified⁴¹. The Directive acknowledges the reality of the difficulties encountered by companies in addressing all adverse impacts identified. In this regards, it provides that where it is not possible to address all identified adverse impacts, companies shall prioritize identified adverse impacts ‘based on the severity and likelihood of the adverse impacts’⁴². Once these prioritized adverse impacts are addressed, companies ‘shall address less severe and less likely adverse impacts’⁴³.

After the identification and assessment of actual and potential adverse impacts takes place, the third due diligence requirement is the prevention and mitigation of potential adverse impacts through the adoption of appropriate measures⁴⁴. When choosing the appropriate measures to address identified potential adverse impacts, companies should consider their degree of involvement in the adverse impact. Three degrees of involvement in adverse impacts are referenced in the Directive: (1) the company might cause the adverse impact by itself (causing); (2) the company might cause the adverse impact together with a subsidiary or a business partner in its chain of activities (contribution); and (3) the company

³⁸ *Ibid.*, Article 5(1a)(c).

³⁹ EU CSDDD, Article 6(1). The ‘chain of activities’ includes the activities of the company’s upstream business partners, as well as the activities of the company’s downstream business partners. See Article 3(g).

⁴⁰ *Ibid.*, Article 6(1a)(a).

⁴¹ *Ibid.*, Article 6(1a)(b).

⁴² *Ibid.*, Article 6a(1) and Article 6a(2). The Directive provides that ‘the severity of an adverse impact should be assessed based on the scale, scope or irremediable character of the adverse impact, taking into account the gravity of the impact, including the number of individuals that are or will be affected [...] and the limits on the ability to restore affected individuals [...] to a situation equivalent to their situation prior to the impact within a reasonable period of time. See Recital 32.

⁴³ *Ibid.*, Article 6a(3).

⁴⁴ EU CSDDD, Article 7(1).

might be directly linked to a business partner in its chain of activities which causes the adverse impact (direct linkage)⁴⁵. In the first and second scenarios, companies should take appropriate measures to address and mitigate the adverse impacts⁴⁶. In the third scenario, companies should ‘still aim to use their influence to prevent or mitigate the adverse impact caused by their business partners or to increase their influence to do so’⁴⁷. In this scenario, in order for measures adopted to prevent and mitigate potential adverse impacts to be effective, the Directive requires Member States to ensure that companies ‘prioritize engagement with business partners in their chain of activities’, instead of terminating the business relationship⁴⁸. As a last resort shall companies ‘refrain from entering into new or extending existing relations’ with business partners in their chain of activities⁴⁹. Where there is a ‘reasonable prospect of change’, companies shall temporarily suspend the business relationship with the business partner⁵⁰. This is supposed to increase their leverage over the business partner as well as the chances that the adverse impact is addressed by the business partner. In cases where there is ‘no reasonable expectation that these efforts would succeed, companies should be required to terminate the business relationship with respect to the activities concerned’⁵¹. In this respect, Member States should provide for ‘an option to terminate the business relationship in contracts governed by their laws’⁵².

While identified potential adverse impacts should be prevented and, where it is not possible to prevent them, mitigated, the fourth due diligence requirement is to bring identified actual adverse impacts to an end or to minimize their extent⁵³. With respect to bringing actual adverse impacts to an end, the appropriate measures to be adopted by companies vary according to the three degrees of involvement referenced in the Directive and above. In the first and second scenarios, companies should take appropriate measures to bring to an end or minimize the extent of adverse impacts⁵⁴. In the third scenario, that is, direct linkage to business partners in the chain of activities causing the adverse impacts, companies should ‘use their influence to bring to an end or minimise

⁴⁵ *Ibid.*

⁴⁶ EU CSDDD, Recital 33.

⁴⁷ *Ibid.* The Directive defines ‘influence’ as the company’s ‘ability to persuade the business partner to prevent adverse impacts [...] and the degree of influence and leverage that the company could reasonably exercise’.

⁴⁸ *Ibid.*, Recital 36.

⁴⁹ EU CSDDD, Recital 36.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ EU CSDDD, Article 8(1).

⁵⁴ EU CSDDD, Recital 38.

the extent of the adverse impact caused by their business partners or to increase their influence to do so⁵⁵. In this context, too, in order for measures adopted to bring to an end and minimize actual adverse impacts to be effective, the Directive requires Member States to ensure that companies ‘prioritize engagement with business partners in their chain of activities’, instead of terminating the business relationship⁵⁶. As a last resort shall companies ‘refrain from entering into new or extending existing relations’ with business partners in their chain of activities⁵⁷. Where there is a ‘reasonable prospect of change’, companies shall temporarily suspend the business relationship with the business partner⁵⁸. This is supposed to increase their leverage over the business partner as well as the chances that the adverse impact is addressed by the business partner. In cases where there is ‘no reasonable expectation that these efforts would succeed, companies should be required to terminate the business relationship with respect to the activities concerned’⁵⁹. As part of the due diligence requirement to bring actual impacts to an end and, where it is not possible, to minimize their extent, the Directive requires Member States to ensure that companies provide remediation for actual adverse impacts caused individually or jointly with their subsidiaries and business partners⁶⁰. In cases where the actual adverse impact is caused only by the company’s business partner, remediation by the company can be provided on a voluntary basis⁶¹. The company is in any case allowed to persuade its business partner to provide remediation⁶².

The fifth due diligence requirement concerns allowing relevant parties to submit complaints to companies when ‘legitimate concerns regarding actual and potential adverse impacts’ arise⁶³. In this respect, companies should establish a ‘fair, publicly available, accessible, predictable and transparent’ procedure to handle complaints and, when complaints are well-founded, the adverse impacts identified should be addressed by companies in accordance with their due diligence obligations provided by the Directive⁶⁴. In addition to a complaints procedure, companies should also establish a notification mechanism for the submission by relevant parties of information regarding actual or potential

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, Recital 41.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ EU CSDDD, Article 8c(1).

⁶¹ *Ibid.*, Article 8c(2).

⁶² *Ibid.*

⁶³ EU CSDDD, Article 9(1).

⁶⁴ *Ibid.*, Article 9(3).

adverse impacts with respect to the operations of the company, the operations of its subsidiaries or business partners⁶⁵.

Under the sixth due diligence requirement, the Directive requires Member States to ensure that companies carry out periodic assessments of their own operations and measures, as well as the operations of subsidiaries and business partners in their chain of activities, 'to assess the implementation and to monitor the adequacy and effectiveness' of the due diligence measures⁶⁶.

The final substantive requirement of the due diligence obligation of the Directive is communication. In this respect, Member States are required to ensure that companies report on how they exercise due diligence and how they address their adverse impacts 'by publishing on their website an annual statement'⁶⁷.

To ensure enforcement of national due diligence obligations placed on companies pursuant to the provisions of the Directive, the instrument requires Member States to 'lay down rules on penalties, including pecuniary penalties and to take all measures necessary to ensure that they are implemented'⁶⁸. Penalties shall be 'effective, proportionate and dissuasive'⁶⁹ and shall be imposed on companies taking into account, among other things, 'the nature, gravity and duration of the infringement, and the severity of the impacts resulting from that infringement'⁷⁰. To ensure access to justice and compensation, the Directive also establishes a civil liability regime, requiring Member States to provide for, under domestic law, the civil liability of a company for damages to natural or legal persons stemming from the company's intentional or negligent failure to comply with its due diligence obligations⁷¹. Civil liability also covers situations of 'contribution' to adverse impacts, that is, 'when the damage was caused jointly by the company and its subsidiary, direct or indirect business partner, they shall be liable jointly and severally [...]'⁷². Civil liability does not extend to situations of 'direct linkage', meaning that 'a company cannot be held liable if the damage was caused only by its business partners in its chain of activities'⁷³. In order to ensure individuals' right to an effective remedy, the Directive touches upon some of the procedural and practical barriers to justice traditionally encountered by victims of corporate-related adverse impacts, including 'difficulties in accessing

⁶⁵ *Ibid.*, Article 9(5).

⁶⁶ EU CSDDD, Article 10.

⁶⁷ EU CSDDD, Article 11(1).

⁶⁸ EU CSDDD, Article 20(1).

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, Article 20(2)(a).

⁷¹ EU CSDDD, Article 22(1).

⁷² *Ibid.*, Article 22(3).

⁷³ *Ibid.*, Article 22(1).

evidence, limited duration of limitation periods, the absence of adequate mechanisms for representative actions, and prohibitive costs of civil liability proceedings⁷⁴.

4. THE UNGPs' CONTRIBUTION TO THE CSDDD: A PRELIMINARY ANALYSIS

The aim of the present section of the article is to highlight the extent to which the Directive reflects elements of the UNGPs. To this end, the following subsections examine selected principles enshrined in the three Pillars of the instrument. With regards to Pillar II specifically, they examine how the Directive requires Member States to transform the non-binding corporate responsibility to respect into a binding obligation to exercise due diligence in their respective domestic legal systems.

4.1. Pillar I: The State Duty to Protect

The Directive is informed by core principles belonging to the state duty to protect human rights in Pillar I of the UNGPs. What follows focuses on selected principles.

4.1.1. Principles 1 and 2

Pillar I of the UNGPs elaborates on the existing international human rights obligations binding on states with respect to the conduct of business entities within their territory or jurisdiction. Under international human rights law, states are required to protect human rights against the harmful impacts of corporate activities in their territory and/or jurisdiction. According to Principle 1 in the UNGPs, in order to discharge this obligation, states are required to take appropriate steps to 'prevent, investigate, punish and redress' corporate adverse human rights impacts within their territory or jurisdiction. While states have discretion in deciding which appropriate steps to adopt, they should consider preventative and remedial measures such as 'effective policies, legislation, regulations and adjudication'⁷⁵. The specific requirement to prevent corporate adverse human rights impacts within their territory or jurisdiction entails a positive duty to adopt preventative measures at the domestic level, for instance

⁷⁴ EU CSDDD, Recital 58a.

⁷⁵ Commentary to Principle 1.

the enactment of effective legislation aimed at strengthening business respect for human rights.

The Directive is arguably a tool whereby Member States are required to ensure, under domestic law, that companies respect human rights through the imposition of a legal requirement to exercise due diligence with respect to their operations, the operations of their subsidiaries and business partners in the chain of activities. The Directive highlights that ‘all businesses have a responsibility to respect human rights, which are universal, indivisible, interdependent and interrelated’⁷⁶.

As part of their duty to protect, Principle 2 in the UNGPs provides that states should ‘set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations’⁷⁷. The UNGPs provide that, while home states⁷⁸ are ‘not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction’, ‘there are strong policy reasons for home States to set out clearly the expectation that businesses [domiciled in their territory and/or jurisdiction] respect human rights abroad’⁷⁹. One approach adopted by states to ‘set out clearly the expectation that businesses respect human rights throughout their operations’ is the enactment of ‘domestic measures with extraterritorial implications’⁸⁰. Examples include domestic legislative measures that place on parent companies obligations to report in the regulating state on the global activities of the entire enterprise⁸¹, therefore including the activities of entities potentially located and operating on the territory of states other than the regulating state.

The Directive requires Member States to adopt domestic measures with extraterritorial implications mentioned in the commentary to Principle 2. Member States shall ensure that companies falling within the scope of the Directive exercise due diligence not only with respect to their own operations, but also with respect to the operations of subsidiaries and the operations of their business partners in their chain of activities, irrespective of where these entities are located and operate. In other words, companies falling within the scope of the

⁷⁶ EU CSDDD, Recital 6a. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. The Directive attempts to transform this responsibility into an obligation binding on certain categories of companies under domestic law.

⁷⁷ UNGPs, Principle 2.

⁷⁸ The home state of a corporation is generally the state of domicile of that corporation.

⁷⁹ Commentary to Principle 2.

⁸⁰ Commentary to Principle 2.

⁸¹ *Ibid.*

Directive are expected to exercise due diligence to identify, assess, prevent and mitigate adverse impacts arising from the operations of entities potentially domiciled and operating outside the respective regulating Member States, which is to say extraterritorially.

4.1.2. Principle 3

Principle 3 of the UNGPs elaborates on the exercise by states of their regulatory and policy functions in meeting their obligation to protect human rights. In general, the commentary suggests that, in meeting their obligation to protect human rights against corporate adverse impacts, states should consider ‘a smart mix of measures’, including national mandatory measures, aimed at fostering business respect for human rights⁸². Principle 3 of the UNGPs also suggests that, among measures adopted to operationalize the state duty to protect, states should consider ‘encourag[ing], and where appropriate require[ing], business enterprises to communicate how they address their human rights impacts’⁸³. According to the commentary to Principle 3, state encouragement or binding obligations placed on companies to communicate how they address their adverse impacts, including by way of formal public reporting, are key to foster respect for human rights by business enterprises⁸⁴.

The Directive arguably reflects elements of Principle 3 in the UNGPs. It places an obligation on Member States to adopt national mandatory measures aimed at fostering corporate respect for human rights through a legal requirement to exercise due diligence. The Directive also requires Member States to place on companies an obligation to communicate on how they address their adverse impacts, that is, how they exercise their due diligence under domestic law.

4.2. Pillar II: The Corporate Responsibility to Respect

Pillar II of the UNGPs elaborates on the corporate responsibility to respect human rights, that is, a responsibility for companies to avoid causing or contributing to adverse human rights impacts stemming from their own activities⁸⁵, and to prevent adverse impacts directly linked to their operations, products or services by their business relationships with other entities⁸⁶. The tool

⁸² UNGPs, Commentary to Principle 3.

⁸³ UNGPs, Principle 3.

⁸⁴ Commentary to Principle 3.

⁸⁵ UNGPs, Principle 13(a).

⁸⁶ UNGPs, Principle 13(b).

envisaged by the UNGPs to help businesses meet their responsibility to respect human rights is HRDD, a process or risk-management tool⁸⁷ whereby companies can identify, prevent, mitigate and account for adverse human rights impacts⁸⁸.

The Directive requires Member States to incorporate into domestic law core principles belonging to the corporate responsibility to respect human rights in Pillar II of the UNGPs. What follows focuses on selected principles.

4.2.1. Principle 17

Guiding Principle 17 provides that, in order to meet their responsibility to respect human rights, businesses should exercise human rights due diligence. HRDD enables companies to identify, prevent, mitigate, and account for how they address adverse human rights impacts⁸⁹.

Companies can cause or contribute to adverse human rights impacts either through their own activities, or through their business relationships. In light of these different degrees of involvement in adverse human rights impacts, Principle 17(a) provides that due diligence processes ‘should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships’. ‘Business relationships’ are understood to encompass ‘relationships with business partners, entities in [the company’s] value chain, and any other non-State or State entity directly linked to its business operations, products or services’⁹⁰, with no restriction as to where these entities are located.

The Directive requires Member States to ‘harden’ at the domestic level Principle 17 of the UNGPs by placing a legal obligation binding on certain categories of companies to exercise due diligence. Along the lines of Principle 17 in the

⁸⁷ The notion of due diligence as a risk management tool is familiar to business actors. In commercial contexts, a company engage in due diligence to prevent entering into transactions that might result in unfavorable or disadvantageous consequences for the company itself. See Bjorn Fasterling and Geert Demuijnck, “Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights” *Journal of Business Ethics* 116 (2013): 809. The fundamental distinction is that under the UNGPs due diligence serves the purpose of preventing adverse human rights impacts to individuals and communities, while, in commercial transactions, due diligence is concerned solely with protecting the business interests of the company.

⁸⁸ UNGPs, Principle 17.

⁸⁹ UNGPs, Principle 17.

⁹⁰ *Ibid.*

UNGPs, the Directive references three different degrees of corporate involvement in adverse impacts, distinguishing between situations where the company might cause the adverse impact by itself (causing), situations where the company might cause the adverse impact together with a subsidiary or a business partner in its chain of activities (contribution), and situations where the company might be directly linked to a business partner in its chain of activities which causes the adverse impact (direct linkage). In light of these degrees of involvement, companies would be required, under domestic law, to identify, assess, prevent and mitigate adverse impacts that might be caused by the company alone or jointly with subsidiaries and business partners, as well as adverse impacts they might be directly linked to through the operations of business partners in their chain of activities.

4.2.2. Principles 18, 19 and 20

The elements of the human rights due diligence process envisaged by the UNGPs are respectively dealt with in separate principles under Pillar II. Principle 18 expects businesses to identify and assess any actual or potential adverse human rights impacts in the context of their own business activities or their business relationships. Principle 19 states that, in order to prevent, mitigate and cease any adverse human rights impacts identified, businesses should integrate the findings of their human rights impact assessments across relevant internal functions and processes and take appropriate action. Such action will vary according to whether the company has caused or contributed to the adverse impact or is involved 'solely because the impact is directly linked to its operations, products or service by a business relationship'⁹¹. According to Principle 20, in order to verify whether they are addressing any adverse impacts identified, businesses should track the effectiveness of their response.

These elements of the due diligence obligation enshrined in the CSDDD generally reflect the core elements of the human rights due diligence process envisaged by the UNGPs.

In line with Principle 18 of the UNGPs, Article 6 of the Directive requires Member States to ensure that companies take appropriate measures to identify and assess actual and potential adverse impacts stemming from their own operations, the operations of their subsidiaries and those of their business partners in their chain of activities. In line with Principle 19 of the UNGPs, Article 7 of the Directive requires Member States to ensure that companies take

⁹¹ UNGPs, Principle 19(b).

appropriate measures to prevent and mitigate potential adverse impacts. Article 8 requires Member States to ensure that companies take appropriate measures to bring actual adverse impacts to an end. In both cases, the Directive clarifies that, when deciding the appropriate measures to be taken, companies should take into account their degree of involvement in the adverse impact and the ability of the company to influence the entity causing the adverse impact. With respect to this, the Principle 19 provides that appropriate action will vary according to the company's degree of involvement in the adverse impact, as well as 'the extent of its leverage in addressing the adverse impact'. Finally, in line with Principle 20 of the UNGPs, Article 10 of the Directive requires Member States to ensure that companies assess the implementation of measures adopted to address adverse impacts, while tracking their adequacy and effectiveness.

4.2.3. Principle 21

Principle 21 of the UNGPs provides that 'in order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders'⁹². The commentary explains that 'the responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice'⁹³. Communication by companies on how they address their adverse human rights impacts can provide 'a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders'⁹⁴. Communication can take the form, *inter alia*, of formal public reporting, which is especially expected 'where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts'⁹⁵.

In line with the expectations of Principle 21 of the UNGPs, a core component of the due diligence obligation eshrined in the Directive is the requirement for Member States to ensure, under domestic law, that companies communicate on how they exercise due diligence, among other things. Specifically, Article 11 of Directive requires Member States to ensure that companies publicly report on the matters covered by the instrument by publishing an annual statement on their website.

⁹² UNGPs, Principle 21.

⁹³ Commentary to Principle 21.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

4.2.4. Principle 24

Principle 24 of the UNGPs focuses on the issue of prioritization of adverse impacts, recognizing that ‘while business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously’⁹⁶. It specifically provides that ‘where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable’. The EU Directive interestingly adopts the UNGPs’ approach to prioritization when exercising due diligence. Article 6a requires Member States to ‘ensure that, where it is not feasible to [address] all identified adverse impacts at the same time to their full extent, companies prioritize adverse impacts [...]’ for the purpose of fulfilling their due diligence obligations⁹⁷. According to Article 6a, the prioritization of identified adverse impacts ‘shall be based on the severity and likelihood of the adverse impacts’⁹⁸.

4.3. Pillar III: Access to Remedies

Pillar III elaborates on the roles of states and corporations in ensuring that victims of corporate-related adverse human rights impacts have access to an effective remedy when adverse impacts occur. Core foundational and operational principles enshrined in Pillar III inform the Directive. What follows focuses on selected principles.

4.3.1. Principles 25 and 26

Guiding Principle 25 provides that states are required to ‘take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy’⁹⁹. Unless states take steps ‘to investigate, punish and redress’ the adverse human rights impacts of businesses, the international obligation of states to protect human rights can become ‘weak or even meaningless’¹⁰⁰. Remedies can be provided by State-based or non-State-

⁹⁶ Commentary to Principle 24.

⁹⁷ EU CSDD, Article 6a(1).

⁹⁸ *Ibid.*, Article 6a(2).

⁹⁹ UNGPs, Principle 25.

¹⁰⁰ Commentary to Principle 25.

based, judicial or non-judicial, mechanisms¹⁰¹. Principle 26 provides that ‘states should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses’. The commentary to Principle 26 places state-based judicial mechanisms ‘at the core of ensuring [victims’] access to a remedy’¹⁰².

In line with Principle 25, to ensure victims’ access to justice and compensation, the Directive establishes a civil liability regime, requiring Member States to provide for, under domestic law, the civil liability of a company for damages to natural or legal persons stemming from the company’s intentional or negligent failure to comply with its due diligence obligations¹⁰³. Civil liability also covers situations of ‘contribution’ to adverse impacts, that is, ‘when the damage was caused jointly by the company and its subsidiary, direct or indirect business partner, they shall be liable jointly and severally [...]’¹⁰⁴. Civil liability does not extend to situations of ‘direct linkage’, meaning that ‘a company cannot be held liable if the damage was caused only by its business partners in its chain of activities’¹⁰⁵. In order to ensure individuals’ right to an effective remedy, the Directive touches upon some of the procedural and practical barriers to justice traditionally encountered by victims of corporate-related adverse impacts, including ‘difficulties in accessing evidence, limited duration of limitation periods, the absence of adequate mechanisms for representative actions, and prohibitive costs of civil liability proceedings’¹⁰⁶.

4.3.2. Principles 28 and 29

The UNGPs encourages states to ‘consider ways to facilitate access to effective non-state-based grievance mechanisms dealing with business-related human rights harms’¹⁰⁷. As specified in the commentary to Principle 28, ‘one category of non-state-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a

¹⁰¹ For the purposes of the UNGPs, a grievance is understood as ‘a perceived injustice invoking an individual’s or a group’s sense of entitlement’. A grievance mechanism is therefore understood as a process through which grievances concerning corporate adverse human rights impacts can be raised and remedy can be sought. See Commentary to Principle 25.

¹⁰² Commentary to Principle 26.

¹⁰³ EU CSDDD, Article 22(1).

¹⁰⁴ *Ibid.*, Article 22(3).

¹⁰⁵ *Ibid.*, Article 22(1). In this case, voluntary remediation may be provided by the company. See Recital 41.

¹⁰⁶ EU CSDDD, Recital 58a.

¹⁰⁷ UNGPs, Principle 28.

multi-stakeholder group'¹⁰⁸. These are referred to as operational-level grievance mechanisms.

With respect to these, Principle 29 provides that, 'in order for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who might be adversely impacted'. Such mechanisms are administered at company level and 'can engage the business enterprise directly in assessing the issues and seeking remediation of any harm'¹⁰⁹. According to the commentary to Principle 29, operational-level grievance mechanisms might play an important role with respect to the corporate responsibility to respect human rights because they provide a channel for individuals and communities affected by the activities of the company 'to raise concerns when they believe they are being or will be adversely impacted'. This contributes to support the identification by the company of adverse human rights impacts, as part of its ongoing human rights due diligence¹¹⁰. Once grievances are identified, these mechanisms make it possible for the company to address them and to remediate early adverse impacts, 'thereby preventing harms from compounding and grievances from escalating'¹¹¹.

Aspects of Principles 28 and 29 of the UNGPs are reflected in the Directive. As part of the due diligence obligations enshrined, Member States are required to ensure that companies provide the possibility for persons and organizations to submit complaints when 'legitimate concerns regarding actual and potential adverse impacts' arise¹¹². In this respect, companies should establish a 'fair, publicly available, accessible, predictable and transparent' procedure to handle complaints and, when complaints are well-founded, the adverse impacts identified should be addressed by companies in accordance with their due diligence obligations provided by the Directive¹¹³. In addition to a complaints procedure, companies should also establish a notification mechanism for the submission by relevant parties of information regarding actual or potential adverse impacts with respect to the operations of the company, the operations of its subsidiaries or business partners¹¹⁴.

¹⁰⁸ Commentary to Principle 28.

¹⁰⁹ Commentary to Principle 29.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² EU CSDDD, Article 9(1).

¹¹³ *Ibid.*, Article 9(3).

¹¹⁴ *Ibid.*, Article 9(5).

5. CONCLUSION

When business and human rights emerged as an area of academic research, 'human rights and business were commonly still seen as two entirely separate domains'¹¹⁵. Over the last three decades, however, consensus has coalesced around the idea that, more than a concern just for states, human rights are a fundamental part of the responsibilities of business actors like corporations¹¹⁶. Even more so, since the adoption of the UNGPs, consensus is now building around the idea that human rights are not merely part of the responsibilities of corporations but, more significantly, of national obligations for these actors.

At the EU level, too, consensus has built on the necessity of placing horizontal due diligence obligations on companies active in the EU market. This necessity stems partly from the poor implementation by companies of their soft responsibility to respect human rights and partly from the the perceived inadequacy of international 'soft' law instruments on business and human rights, specifically the UNGPs, in improving standards of business conduct. Against this background, the EU CSDDD aims to regulate corporate conduct through requirements placed on EU Member States to ensure that companies exercise due diligence under domestic law with respect to their operations, the operations of their subsidiaries and those of their business partners in their chain of activities.

The present article has attempted to examine how norms enshrined in international soft law instruments, specifically the UNGPs, have provided a model for domestic legislation. This is evident in a number of substantive aspects of the Directive, which reflect relevant aspects of Principles enshrined in the three Pillars of the UNGPs.

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TOKENS AS OBJECTS OF PROPERTY RIGHTS - WITH NFT AS AN EXAMPLE

ABSTRACT

As blockchain-based technologies are projected to constitute around 10% of the world's GDP by 2027, understanding the legal implications of tokenization, as a mechanism of incorporating certain legal rights into digital tokens, becomes imperative. This paper delves into the intersection of digital assets and Croatian property law, looking to contribute to the ever-growing discourse on ownership rights concerning digital objects. It uses non-fungible tokens (NFTs) as a prominent example of digital assets to explore the feasibility of recognizing tokens, including NFTs, as objects of property within the existing legal framework. The unique properties of NFTs, such as transfer security, immutability, distinct identification, and above all non-fungibility, pave the way for their potential integration into the realm of property law. The objective of this paper is to shine a light on the essential technologies integral to understanding NFTs, their characteristics, and applications. After a comprehensive analysis of these features, a comparative assessment is conducted with existing legal institutes, aiming to align NFTs within the parameters of established regulatory framework. Recognizing NFTs as legal entities with distinct ownership and transfer characteristics, the paper engages with the fundamental question of whether intangible entities like NFTs can be subject to ownership rights, drawing inspiration from legal theory while acknowledging the need for nuanced exceptions. Specifically, by assessing whether the legal fiction of extending the status of a "thing" to immaterial objects can be employed in the case of digital tokens.

Keywords: Digital Assets, Tokenization, Non-Fungible Tokens, Property Law, Ownership Rights

1. INTRODUCTION

Considering the growing importance and prevalence of NFTs, the legal system should develop an adequate legal framework to protect the interests of all interested parties and to "legalize" the part of the economy related to digital assets and non-fungible tokens. As is always the case with new phenomena and institutes, especially those related to technology, there is no universally accepted

categorization of neither tokens, nor of non-fungible tokens(NFTs) as their subspecies.

Every new phenomenon brought about by the advancement of technology will not necessarily find its application in practice, or this application will be so narrow that it will not even enter the legislator's radar. The importance of a certain technological phenomenon and the need to regulate it depend, among other things, on the breadth of application, economic aspects, impact on the market, social elements, and the risk of misuse. When all these elements are met in the case of a technology, the necessity of legal regulation of such an institute arises. Non-fungible tokens are exactly in the described situation. They appeared in 2014, and their application gained momentum in 2021. They are currently in the development phase where new applications of NFT technology are being found, and concept of tokenization comes into play.

One of the primary legal considerations concerning tokens, particularly non-fungible tokens as their representative, revolves around property law and the associated inquiries. The pivotal question emerges: can tokens, as digital entities recorded on distributed ledger networks, constitute objects of ownership? This question gains additional significance in the context of NFTs, given their inherent promise of uniqueness, which aligns with the exclusivity inherent in property rights. As an object cannot be simultaneously owned by multiple competing entities, exploring the compatibility of tokens, especially NFTs, with property law becomes imperative. Consequently, this paper analyzes the underlying technological attributes before scrutinizing the principles of property law and the prerequisites for an entity to qualify as an object of rights *in rem*.

2. TOKENS AS OBJECTS OF PROPERTY RIGHTS – WITH NFT AS AN EXAMPLE

2.1. Blockchain technology

Centralized systems have long been the historical standard due to their efficiency, as they offer lower costs for system configuration, maintenance, and system adjustments, all because the work is done in one place. However, in the last few decades the situation is changing. Decentralized options offer a solution to certain problems that are characteristic of centralized systems, namely vulnerability due to the influence of a single source of failure on the entire system, and the scalability problem.

The most famous decentralized solution are *blockchains*.¹ In the simplest terms, a blockchain is a chronological database that contains a list of transactions that exist on a network of different computers. Each block² in the chain contains a reference to the block that precedes it. This reference is usually the hash of the previous block.³ Therefore, a block that has been stored on the blockchain for some time would be computationally difficult to modify because it would mean that all blocks added after it would have to be modified and a solution would have to be found for each individual hash, in other words decrypt - unlock each of the blocks that were added later. The mentioned characteristics lead to the fact that transactions on the blockchain are almost irreversible, they cannot be altered, and this leads to the trust of all network participants in the network, for which reason an intermediary is not needed.

Each blockchain transaction is generated from an address associated with a cryptographic currency, which represents a mathematical relationship between a private and a public key. Each transaction contains a digital signature that is generated from the combination of the transaction message and the user's private key. The security mechanism is realized in such a way that the signature in each message is different and in this way forgery and misuse are impossible without the original private key.⁴ After approval, transactions are recorded as a new changed state of data on the block chain, and the change is visible to all network participants.

¹ Wright, A., de Filippi, P., *Blockchain and the Law - The Rule of Code*, Cambridge, Mass: Harvard University Press, 2018, p. 5; Zetzsche, D. A.; Buckley, R. P.; Arner, D. W., *The Distributed Liability of Distributed Ledgers: Legal Risks of Blockchain*, University of Illinois, Law Review, no. 4, 2018, p. 1382-1402.; Perkušić, M., *Pravo elektroničkog plaćanja*, Školska knjiga, Zagreb, 2020, p. 317.

² Cunjak Mataković, I., Mataković H., *Kriptovalute - sofisticirani kodovi manipulacije*, International Journal of Digital Technology & Economy, 2018, p. 26; Bhaskar, N. D., Kuo Chuen, D. L., *Handbook of Digital Currency - Bitcoin, Innovation, Financial Instruments, and Big Data*, Sim Kee Boon Institute for Financial Economics, Singapore Management University, Singapore, 2015, p. 48; Buterin, V., *A next-generation smart contract and decentralized application platform - White paper*, Available at: https://blockchainlab.com/pdf/Ethereum_white_paper_next_generation_smart_contract_and_decentralized_application_platform-vitalik-buterin.pdf, Accessed on: 1 April 2024, p. 6

³ Nakamoto, S., *Bitcoin: A Peer-to-Peer Electronic Cash System*, 2008, <https://bitcoin.org/en/bitcoin-paper>, Accessed on: 1 April 2024, p. 3; Buterin, V., *op. cit.* note 2, p. 7.; Rachmawati, D.; Tarigan, J. T.; Ginting, A. B. C., *A comparative study of Message Digest 5 (MD5) and SHA256 algorithm*, Journal of Physics: Conference Series, Vol. 978, No. 1, 2018, p. 5; Kaselj, M., *Bitcoin*, master thesis, Josip Juraj Strossmayer University in Osijek, 2015, Available on <https://repozitorij.mathos.hr/islandora/object/mathos%3A24/datastream/PDF/view>, Accessed on: 1 April 2024, p. 19

⁴ Buterin, D.; Ribarić, E.; Savić, S., *Bitcoin – nova globalna valuta, investicijska prilika ili nešto treće?*, Veleučilište u Rijeci, No. 1, Vol. 3, 2015, p. 145-158.

Given that everyone has access to the entire database, it was necessary to prevent users from adding fraudulent transactions to the blockchain and/or modifying records already stored in the blockchain.⁵ The solution to this problem is a decentralized consensus mechanism, a process where most network participants agree on the state of the ledger. It is a set of rules and procedures that make it possible to maintain a coherent set of facts between multiple participating nodes. A fraudulent transaction cannot be added to the blockchain because most of the network would not verify it. Every blockchain needs an efficient consensus mechanism to ensure that every computer on the network has the correct version of the blockchain that remains consistent with other network participants over time.⁶

In recent years, several consensus mechanisms have been developed. Bitcoin, the most widely used cryptocurrency,⁷ uses a *Proof-of-Work* (PoW) consensus mechanism.⁸ A popular alternative is *Proof-of-Stake* (PoS), which is used by the Ethereum blockchain.⁹ PoS grants the ability to add new blocks to the network in proportion to the current stake ownership in the network.¹⁰ The advantage of this consensus mechanism is improved latency, i.e. faster transaction execution speed and lower energy consumption.¹¹

⁵ Fairfield, J., *Tokenized: The Law of Non-Fungible Tokens and Unique Digital Property*, Indiana Law Journal, Volume 97, Issue 4, p. 1269.

⁶ Swanson, T., *Watermarked tokens and pseudonymity on public blockchains* (unpublished article), 2015, p. 5 - 6, Available at: <http://www.ofnumbers.com/wp-content/uploads/2015/11/Watermarked-tokens-and-pseudonymity-on-public-blockchains-Swanson.pdf>, Accessed on: 1 April 2024; Fairfield, *Tokenized*, *op. cit.* note 5, p. 1269.

⁷ As of May 11, 2023, on the Bitcoin blockchain are contained and coded the data they have market capitalization greater than 550 billion dollars, Available at: <https://blockchain.info/charts/market-cap>, Accessed on: 1 April 2024; Perkušić, *op. cit.* note 1, p. 305, 311 – 326.

⁸ Saleh, F., *Blockchain Without Waste: Proof-of-Stake*, Review of Financial Studies, Volume 34, 2021, p. 7- 8; Bhaskar, N. D., Kuo Chuen, D. L., *op. cit.* note 2, p. 49.; Tasca, P., Tessone, C.J., *A Taxonomy of Blockchain Technologies: Principles of Identification and Classification*, Ledger, Vol 4, 2019, p. 10; López, P.; Montresor, A.; Datta, A., *Please, do not Decentralize the Internet with (Permissionless) Blockchains!*, Conference: IEEE 39th International Conference on Distributed Computing Systems, 2019, p. 6; Buterin, *op. cit.* note 2, p. 13.

⁹ Buterin, *op. cit.* note 2, p. 13; Antonopoulos, A., *Mastering Bitcoin*, 2nd Edition, O'Reilly Media, 2017, p. 232 - 233; Fairfield, J., *Tokenized*, *op. cit.* note 5, p. 1272; Wright, A., de Filippi, P., *op. cit.* note 1, p. 27.

¹⁰ Houy, N., *It will cost you nothing to 'kill' a proof-of-stake crypto-currency*, University of Lyon 2 - Groupe d'Analyse et de Théorie Economique (GATE), 2014, Available at: <http://dx.doi.org/10.2139/ssrn.2393940>, Accessed on: 1 April 2024, p. 3.

¹¹ Hurdle, W.K.; Harvey, C.R.; Reule, R.C.G., *Understanding Cryptocurrencies*, 2019, Available at: <https://ssrn.com/abstract=3360304>, Accessed on: 1 April 2024, p. 8.

Theoretically, to negatively affect the blockchain, an attacker would need to own more than half of the computing power of the entire network.¹² Decentralization in the recording the transactions data and the absence of control by a central body enables the bypassing of traditional intermediaries, as well as regulators.¹³

2.2. Non-fungible tokens

2.2.1. Definition of non-fungible tokens

Tokens¹⁴ have a specific meaning in distributed ledger technology (DLT) circles, they are records on DLT networks. Some consider any digital asset created on a network to be a token, with each network having specific standards for token creation.¹⁵ Perkušić notes tokens are a kind of bonds in electronic form stored within the blockchain system.¹⁶

For the purposes of this paper, tokens are sets of information on transaction systems based on reliable technologies, which sets of information may represent claims or membership rights against a person, property rights or other absolute or relative rights.¹⁷ While tokens can be classified from many different

¹² The Bitcoin network is currently worldwide recorder per collected computer strength. Cohen, R., Global Bitcoin Computing Power Now 256 Times Faster than Top 500 Supercomputers Combined, FORBES, <https://www.forbes.com/sites/reuvencohen/2013/11/28/global-bitcoin-computing-power-now-256-times-faster-than-top-500-supercomputers-combined/>, 2 April, 2024; Limer, E., *The World's Most Powerful Computer Network Is Being Wasted on Bitcoin*, GIZMODO, <http://gizmodo.com/the-worlds-most-powerful-computernetwork-is-being-was-504503726>, Accessed on: 2 April, 2024

¹³ Shein, E., *How Blockchain Changes the Nature of Trust*, <https://linuxfoundation.org/blog/how-blockchain-changes-the-nature-of-trust/>, 2 April, 2024; Nakamoto, *op. cit.* note 3, p. 2; Čulinović-Herc, E., *Zlouporabe blockchain tehnologije i utjecaj na trgovačka društva*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 43, no. 3, 2022, p. 698.

¹⁴ Token is defined by Black's Law Dictionary, 11th edition, 2019: "A sign or mark; a material evidence of the existence of a fact.", Available on: <https://thelawdictionary.org/>, 2 April, 2024

¹⁵ Digital Assets: Cryptocurrencies vs. Tokens, Cryptopedia, Available at: <https://www.gemini.com/cryptopedia/cryptocurrencies-vs-tokens-difference>, Accessed on: 2 April 2024; Moringiello, J.M., Odinet, C.K., *The Property Law of Tokens*, Florida Law Review, 2022, p. 628.

¹⁶ Perkušić, *op. cit.* note 1, p. 335.

¹⁷ The definition has been taken from of Liechtenstein Law on Tokens; Law on Tokens and TT Service Providers (Token and TT Service Provider Act; TVTG), art. 2 paragraph 1.c, Available at: https://www.lcx.com/wp-content/uploads/2020_Liechtenstein_Blockchain_Laws_Translation_English.pdf, Accessed on: 1 April 2024

perspectives,¹⁸I will focus on the basic classification based on fungibility – there are fungible tokens (also known as cryptocurrencies) and non-fungible tokens. The most prominent example of a cryptocurrency is Bitcoin.

There is no official or legal definition of non-fungible tokens.¹⁹ Unlike cryptocurrencies, they cannot be traded or exchanged at par. This represents the biggest difference between non-fungible and fungible tokens, like cryptocurrencies, which are identical to each other and can therefore serve as a means of payment.²⁰

At its core, an NFT is a record on the blockchain that contains two codes: a number (tokenId) and an alphanumeric code (the address code of the so-called smart contract). These two codes are stored on the blockchain, and the combination of such tokenId and address code is unique, which makes the NFT a unique original - thus "non-fungible". Non-fungible tokens are cryptographic records on the blockchain with a unique combination of identification codes that distinguish them from one another.

The key features of non-fungible tokens are: (i) transparency of registration and execution, (ii) availability and integrity of the system, (iii) resistance to unauthorized use (NFT metadata and trading records are permanently stored and cannot be manipulated after transactions are confirmed and written into the block), (iv) up-to-datedness of the registry, (v) independence from other tokens from that model (NFT trading can be done in a single atomic, consistent, isolated and permanent (ACID) transaction), (vi) tradability.²¹

¹⁸ Garbers-von Boehm, K.; Haag, H.; Gruber, K.; (for JURI), *Study on Intellectual Property Rights and Distributed Ledger Technology with a focus on art NFTs and tokenized art*, 2022, Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/737709/IPOL_STU\(2022\)737709_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/737709/IPOL_STU(2022)737709_EN.pdf), p. 12.

¹⁹*Ibid.*, p. 9.

²⁰ Ante, L., *The non-fungible token (NFT) market and its relationship with Bitcoin and Ethereum*, 2021, Available at: <http://dx.doi.org/10.2139/ssrn.3861106>, Accessed on: 1 April 2024, p. 2.

²¹ Wang, Q.; Li, R.; Wang, Q.; Chen, S., *Non-fungible token (NFT): Overview, evaluation, opportunities and challenges*, 2021, Available at: <https://arxiv.org/abs/2105.07447>, Accessed on: 1 April 2024, p. 9.

2.2.2. Creating non-fungible tokens

The standard that is most often used for the creation of NFTs is the ERC-721 protocol.²² This is a technology standard that enables broad applicability and standardization in the creation of non-fungible tokens. The advantage of using a common protocol is that developers can write programs and applications that communicate with them, creating greater interoperability. We can say that ERC-721 produces tokens that differ from each other, have different value, different properties and are associated with different digital or tangible assets.²³ Although there are other blockchain networks that support the creation of NFTs (e.g. Cardano, Flow, Polygon, Solana, Tezos, Zilliqa), Ethereum is currently the most widely used.²⁴

According to the ERC-721 protocol, a smart contract executed for this purpose on the Ethereum blockchain must contain, among other things, a token identification code (tokenId)²⁵, information about the "holder" of the token, and a hash value that refers to the entity or authority being embodied. into a non-fungible token (e.g. the online location of a digital file - an image).

2.2.3. Emergence and application of non-fungible tokens

From the emergence of non-fungible tokens until present day, the token market has seen exponential growth.²⁶ Artist Beeple sold a collection of NFTs for a record \$3.5 million in 2020.²⁷ In February 2021, a print of an animated cat flying through with a rainbow trail was sold for about \$580,000, a month later Beeple sold one of his works for \$69.3 million.²⁸ Jack Dorsey, the former CEO of

²² See: <https://ethereum.org/en/developers/docs/standards/tokens/erc-721/>, Accessed on: 2 April 2024

²³ Fairfield, J., *Tokenized*, *op. cit.* note 5, p. 1272.

²⁴ Garbers-von Boehm, K.; Haag, H.; Gruber, K., *op. cit.* note 18, p. 10, 13.

²⁵ NFT contains a uint256 variable called tokenId. The paired uint256 tokenId and smart contract address are unique to the entire network and cannot be repeated. Another specific feature is that by entering this code (tokenId) in the online application, a certain graphic representation - a picture - can be generated. As in: Wang, Q.; Li, R.; Wang, Q.; Chen, S., *op. cit.* note 21, p. 8

²⁶ Moringiello, J. M.; Odinet, C. K., *op. cit.* note 15, p. 609.

²⁷ Williams, C., Cult Digital Artist Beeple Raises Record \$3.5 Million in NFT Auction, CRYPTO BRIEFING, <https://cryptobriefing.com/digital-art-auction-raises-record-million/>, Accessed on: 2 April 2024

²⁸ Griffith, E., Why an Animated Flying Cat with a Pop-Tart Body Sold for Almost \$600,000, Available at: <https://www.nytimes.com/2021/02/22/business/nft-nba-top-shot-crypto.html>, Accessed on: 2 April 2024; Reyburn, S., JPG File Sells for \$69 Million, as "NFT Mania" Gathers Pace, NY TIMES,

Twitter, sold an NFT of the first tweet for a staggering \$2.9 million, and a New York Times reporter sold an NFT related to a news story (about NFTs!) for \$560,000.²⁹

Although digital art initially served as a pioneering domain for NFT technology,³⁰ its application has significantly diversified across various sectors through tokenization. Tokenization involves linking a tangible or intangible asset with a digital item,³¹ establishing an identity connection with the asset via an entry on the blockchain - a process known as minting, with the resulting entry termed a token.³² The fundamental premise of tokenization lies in the acquisition of ownership of the underlying asset upon acquiring the token, with the primary benefit being the seamless transferability of tokens in secondary markets.³³ Moreover, transactions conducted through blockchain, and smart contracts entail minimal administrative burdens, leading to swift execution and reduced transaction fees.³⁴

<https://www.nytimes.com/2021/03/11/arts/design/nft-auction-christies-beeples.html>,
Accessed on: 2 April 2024

²⁹ Hackl, C., Five Things Brands Need to Know About NFTs (Non-Fungible Tokens), FORBES, <https://www.forbes.com/sites/cathyhackl/2021/03/04/four-things-brands-need-to-know-about-nfts-non-fungible-tokens/?sh=5f86139e222f>, Accessed on: 2 April 2024; Howcroft, E., Twitter Boss Jack Dorsey's First Tweet Sold for \$2.9 Million as an NFT, 2021, Available at: <https://www.reuters.com/article/us-twitter-dorsey-nft/twitter-boss-jack-dorseys-first-tweet-sold-for-2-9-million-as-an-nft-idUSKBN2BE2KJ>, Accessed on: 2 April 2024; Thompson, C., The Untold Story of the NFT Boom, 2021, Available on ; <https://www.nytimes.com/2021/05/12/magazine/nft-art-crypto.html>, Accessed on: 2 April 2024; Roose, K., Buy This Column on the Blockchain!, 2021, Available at: <https://www.nytimes.com/2021/03/24/technology/nft-column-blockchain.html>, Accessed on: 2 April 2024;

³⁰ Trautman, L.J., *Virtual Art and Non-fungible Tokens*, Hofstra Law Review, 2022, p. 371

³¹ Hackl, C., *op. cit.* note 29; Lund, J. et al., *The Digitization of Real-World Assets into Tokens on Blockchain*, 2018, Available at: <https://www.ibm.com/thought-leadership/institute-business-value/report/tokenassets>, Accessed on: 2 April 2024; How Blockchain is Making Car Ownership Easier, VINCHAIN, Available at: <https://vinchain.io/blog/how-blockchain-is-making-car-ownership-easier/296>, Accessed on: 2 April 2024

³² Moringiello, J.M.; Odinet, C.K., *op. cit.* note 15, p. 611.; Roose, K., *op. cit.* note 29; Burne, K., *Tokens of Appreciation?: The Benefits of Digitizing Assets Using Blockchain*, 2020, Available at: <https://www.bnymellon.com/us/en/insights/aerial-view-magazine/tokens-of-appreciation>, Accessed on: 2 April 2024; Laurent, P. et al., *The Tokenization of Assets Is Disrupting the Financial Industry. Are You Ready?*, 2018, p. 62, https://www2.deloitte.com/content/dam/Deloitte/cz/Documents/financial-services/Deloitte_Inside_19_CIO_Edition_Nov_2018.pdf.

³³ Laurent, P. et al., *Ibid.*, p. 63; Burne, K., *Ibid.* ("Here's how tokenization works: the digital token references someone's right to property or delivery of an asset. ")

³⁴ Moringiello, J.M.; Odinet, C.K., *op. cit.* note 15, p. 612.; Raskin, M., *The Law and Legality of Smart Contracts*, Georgetown Law Technology, Vol 1:2, 2017, p. 309.

The vision of the token economy hinges on the token's inherent capability to incorporate immutable and non-replicable information.³⁵ This feature extends beyond digital currencies and securities to encompass various assets and rights from the traditional legal framework. The token economy facilitates the digitization of physical assets, representing ownership or usage rights in a digital format.³⁶ This groundbreaking innovation, akin to the introduction of physical securities, is anticipated to instill unprecedented legal certainty in the digital economy.³⁷

One potential application lies in the realm of property ownership registration systems. Tokenizing real estate could establish the foundation for maintaining land registries within the blockchain, where each property would be linked to a non-fungible token (NFT), enabling seamless, rapid, and transparent transfers. This setup would eradicate the need for intermediaries, cut transfer expenses, and bolster transactional legal certainty.³⁸

Another envisaged use case involves voting systems. Assigning each eligible voter a unique NFT could unequivocally identify individuals with voting rights. Additional functionalities could include verifying the accuracy of votes cast. Conducting voting procedures on the blockchain network would facilitate real-time vote tallies, with blockchain's cryptographic solutions ensuring vote count precision and guarding against potential fraud or manipulation.³⁹

Furthermore, an example already tested in practice, is delivery of tokenized court documents. Official documents, like any tangible or digital asset, can be tokenized, as demonstrated in recent English court cases involving blockchain, tokens, and crypto assets. In the case of *Osbourne v. Unknown Persons*, where the petitioner sought redress against anonymous defendants in possession of "stolen" NFTs, the court endorsed an alternative delivery method. This method involved transferring NFTs containing web links to documents, delivered directly

³⁵Dünser, T., *Legalize Blockchain: How states should deal with today's most promising technology to foster prosperity*, 2020, Books on demand, p. 168.

³⁶ Tripathi, A., *NFTs Can Bring the Real World On-Chain*, Available at: <https://www.coindesk.com/business/2021/03/17/nfts-can-bring-the-realworld-on-chain/>, Accessed on: 2 April 2024

³⁷ Ferreira, A.; Sandner, P.; Dünser, T.; *Cryptocurrencies, DLT and Crypto Assets – the Road to Regulatory Recognition in Europe*, 2021, Available at: <https://ssrn.com/abstract=3891401> or <http://dx.doi.org/10.2139/ssrn.3891401>, p. 14 – 16.

³⁸ Savelyev, A., *Contract law 2.0: "Smart" contracts as the beginning of the end of classic contract law*, Basic research program working papers (National Research University Higher School of Economics, Moscow), 2016, Available at: <https://ssrn.com/abstract=2885241>, p. 6.

³⁹ Fairfield, J., *Tokenized*, *op. cit.* note 5, p. 1273.

to the defendants' crypto wallets, due to the challenges associated with traditional delivery methods stemming from blockchain network anonymity.⁴⁰

The many possible applications of the non-fungible tokens are the reason NFTs should not be taken lightly and should, in turn, be given the appropriate legislative attention. Tokens, as the common denominator for the fungible tokens – cryptocurrency, and the non-fungible tokens, must therefore be analysed from legal perspective, especially from the property law stance.

To enhance the clarity of this paper and to illustrate these abstract technological concepts more effectively, I will use non-fungible tokens as a case in point, representing tokens at large.

3. PROPERTY RIGHT AND TOKENS

The discourse on the future of law, especially regarding traditional legal institutions, is characterized by divergent views. Grant Gilmore's 1974 declaration of the "death" of the contract marked the beginning of discussions on ownership's decline and the evolution of classical contract law.⁴¹ Perzanowski and Schultz suggest a shift from ownership to access due to factors like the Internet of Things and digital rights management.⁴² Savelyev challenges the state's role in law enforcement with blockchain and smart contracts.⁴³ Conversely, some argue that classical legal frameworks are evolving, driven by globalization and regulatory changes.⁴⁴ All these trends and perspectives must be taken into account when embarking on a path to define and accommodate new occurrences, such as digital tokens.

⁴⁰ *Ibid.*, paragraph 44: *In the present case, the evidence continues to be that, with the exception of service by email on the Fourth Defendant, the Claimant had no other available method of conventional service on the Defendants of my order and supporting documents except service by NFT sent to the relevant wallets. This was proposed by way of nonfungible token airdrop, which had already been agreed by Lavender J and executed by the Claimant in relation to his order and supporting and related documents. In my judgment, that was a good reason for authorising service of these documents by NFT. Accordingly, I ordered that the Claimant could serve these documents (...) by updating the document repository located at the original web link/URL contained within the relevant Service NFT previously airdropped into that Wallet.*

⁴¹ Gilmore, G., *The Death of Contract*, Ohio State University Press, 1974, p. 65.

⁴² Perzanowski, A.; Schultz, J., *The End of Ownership - Personal property in the digital economy*, Cambridge, MIT Press, 2016, Available at: <https://www.perzanow.ski/>, p. 35.; Lessig, L., *Law regulating code regulating law*, Loyola University Chicago Law Journal, 2003, p. 1.

⁴³ Savelyev, A., *op. cit.* note 38, p. 4.

⁴⁴ van Erp, S., *Ownership of Data and the Numerus Clausus of Legal Objects*, Maastricht European Private Law Institute Working Paper No. 2017/6, Available at: <https://ssrn.com/abstract=3046402>, p. 2.

When we talk about non-fungible tokens, tokens, digital entities or "digital things", the first questions that arise are (i) whether they are things at all and (ii) whether ownership and other rights *in rem* can be held over them? The ancient Romans considered things to be pieces of external nature, spatially separated and accessible to people.⁴⁵ The emphasis was therefore on the physicality, i.e., corporeality, of things. The question of whether intangible property can be the subject of property rights is still relevant, and we can find the answer in historical discussions about the nature of intangible property.⁴⁶

In Germany, the provisions on ownership date back to the 19th century, so it is not unusual that only physical things are provided for as a possible object of ownership,⁴⁷ as only such objects existed at the time of drafting said provisions.⁴⁸ However, the situation has changed significantly in the last two centuries, which prompted the German legislator to review the original arrangement of property rights. In 2021, the first step was taken towards the dematerialization of property rights in the German legal system, it is now stipulated that electronic securities are considered objects in the context of the BGB and property rights.⁴⁹

The Dutch Civil Code defines ownership as the most comprehensive property right that a person, the 'owner', can have over a thing,⁵⁰ and defines a thing as a tangible object that people can control.⁵¹ The definition of property rights is directly related to the object of property rights, and Dutch law, modeled on German law, stipulates that the subject of property rights must be material, i.e. tangible.

French law takes a more flexible approach here, asserting that property rights in physical things are considered the model for all other types of property rights.

⁴⁵ Horvat, M., *Rimsko pravo*, Pravni fakultet Zagreb, 2008, p. 159; Radošević, P., *Rimski korijeni hrvatskog prava*, Pravni vjesnik Pravnoga fakulteta Sveučilišta Josipa Jurja Strossmayera u Osijeku, no. 3. – 4., 2009, p. 198.

⁴⁶ van Erp, S., *op. cit.* note 45, p. 16

⁴⁷ German Bürgerliches Gesetzbuch - BGB, Section 90, Available at: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0271, Accessed on: 1 April 2024

⁴⁸ Zech, H., *Information als Schutzgegenstand*, Mohr Siebeck, Tübingen, 2012; Lehmann, M., *Finanzinstrumente*, Mohr Siebeck, Tübingen, 2009, p. 267.; Lahusen, B., *Das Sachenrecht der elektronischen Wertpapiere Aufsatz*, RDI, 2021, p. 168.; Omlor, S.; *Elektronische Wertpapiere nach dem eWpG*, RDI, 2021, p. 240.

⁴⁹ Gesetz party Einführung electronic Wertpapiere – eWpG, article 2, paragraph 3., Available at: https://www.gesetze-im-internet.de/ewpg/index.html#BJNR142310021BJNE000101360_, Accessed on: 1 April 2024

⁵⁰ Article 5., Available at: www.dutchcivillaw.com/

⁵¹ *Ibid.*, Article 3, paragraph 2: 'Things' are tangible objects that can be controlled by humans.

Nevertheless, the difference between tangible and intangible assets is emphasized there as well.⁵²

The corporality is therefore the core attribute most civil law systems require from the objects of property rights.⁵³ Croatian system, as well, stipulates things are material pieces of nature. However, our legal system is in somewhat easier position, compared to legal systems presented above, given the fact that it contains a legal fiction that things are everything that is equated with things by the law.⁵⁴

The aim of the following paragraphs is to place non-fungible tokens - NFTs in the property law legal framework, to see if they fit into the existing regulation or should some legislative changes be introduced.

3.1. Principles of real legal regulation

Property law governs the belonging of things to people, whereby other entities, to which the law expressly grants this status, can be equated with things.⁵⁵ Apart from the general principles of civil law; there are four principles, characteristic only of rights *in rem*; the principle of private legal authority over things, a finite number of *in rem* rights, certainty and publicity.⁵⁶

The principle of private law authority over things is manifested through four elements: private law authority over things, direct authority, absolute action and relative permanence. Private law authority entails a relationship of legal equality, distinct from *de facto* possession.⁵⁷ Direct authority allows the holder of a subjective real right to exercise control directly over the object. Absolute action, crucial to ownership, mandates third parties to refrain from infringing on the owner's rights, enforceable through legal protection. Relative permanence ensures that real legal relationships endure over time, allowing repeated exercise

⁵² van Erp, S., *op. cit.* note 44, p. 17.

⁵³ Vizner, B., *Gradansko pravo*, 2nd edition, Štampa, Osijek, 1966., p. 120

⁵⁴ Croatian Zakon o vlasništvu i drugim stvarnim pravima, Official Gazette no. 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 90/2010, 143/2012, 152/2014, (hereinafter: Property Act) Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2015_07_81_1548.html, Accessed on: 1 April 2024, Art. 2 (2): „Uzima se da su stvari i sve drugo što je zakonom s njima izjednačeno.“

⁵⁵ Gavella, N.; Josipović, T.; Gliha, I.; Belaj, V.; Stipković, Z.; *Stvarno pravo*, prvi svezak, Narodne novine, Zagreb, 2007, p. 21. (footnote no. 30)

⁵⁶ *Ibid.*, p. 21.

⁵⁷ *Ibid.*, p. 21 – 26.

of authority without depletion. Classification of authority as real or mandatory depends on the parties' intentions, pivotal in determining the nature of contracts or transactions.⁵⁸

According to the principle of finite number of *in rem* rights, there are only those types of real rights that are provided for by law, *numerus clausus*. This principle implies the limitation of the types of subjective rights, the limitation of the content of each of these real and the indivisibility of the content of each individual subjective real right.⁵⁹For the purposes of this paper, the most important right is the right of ownership. It is the foundation on which other, limited *in rem* rights, rest. In this sense, the right of ownership is a unlimited right over a certain thing that authorizes its holder to do what he wants with the thing and to exclude everyone else from it, if this is not contrary to other people's rights and legal restrictions.⁶⁰All the presented postulates are in accordance with what would be desired and could be achieved if rights *in rem* were extended to digital entities, such as NFTs.

The principle of definiteness is twofold, it means the definiteness of the object of the real right - an individually determined thing or, when the law allows, an entity equated with a thing, but it also means the definiteness of the content of the subjective right.⁶¹The fulfillment of the application of this principle to NFTs is indisputable, non-fungible tokens are unique and individually determined.

The fact that there are one's subjective rights over things should be made known, externally visible, especially because real rights act *erga omnes*, so it is important that all interested parties are familiar with the assignees of real rights to certain things.⁶² The principle of publicity is adequately ensured by blockchain technology, which is actually a register of all transactions carried out on it.

3.2. Object of rights *in rem*—a thing

Things are the object of rights in hereditary and property law, and in law of obligations they are the object of claims.⁶³Therefore, the object of property rights

⁵⁸ *Ibid.*, p. 26.

⁵⁹ *Ibid.*, p. 26. – 33.

⁶⁰ Art. 30, Property Act

⁶¹ Gavella, N.; *et. al.*, *op. cit.* note 55, p. 33.

⁶² *Ibid.*, p. 34 – 37.

⁶³ Gorenc, V.; Slakoper, Z., *Obvezno pravo – opći dio*, Novi informator, Zagreb, 2009, p. 94.

plays a key role in the legal relationship, because the existence of an object is a prerequisite for one's subjective right to exist.⁶⁴

It became clear early on that there was a distinct legal concept of "things" distinct from their lay meaning. Roman law expanded this concept so that things included not only material objects (*res corporales*), but also abstract entities (*res incorporales*) such as subjective rights; claims, inheritance rights and servitude rights.⁶⁵

Some earlier legal systems broadly defined the term thing to include both tangible and intangible entities, i.e., property rights can exist over everything that is capable of being privately owned, including subjective rights and the so-called groups of things (*universitates rerum*).⁶⁶ For example, the Austrian legal system broadly defined things as including non-corporeal entities, but at the same time did not consider things in the legal sense to be things that are not useful for human use.⁶⁷

In the late 19th and early 20th centuries, the legal and philosophical perspective changed with the dominance of a positivist worldview and efforts were made to harmonize the legal concept of things with their physical meaning. The doctrine of the corporeality of things emerged and was widely accepted, especially in the German legal system. As a result, the German legislator faced numerous challenges. The Swiss legislator had a similar experience but choose to be pragmatic, and although adhering to the doctrine of corporeality, allowed the objects of real rights to be entities that, according to the doctrine of corporeality, are not things, such as ideal parts of real estate.⁶⁸

Drawing from past experiences, objects of subjective rights in rem should not be universally equated with physical things. Some things are not suitable as objects of subjective rights, while some entities that are not things can be objects of such rights. Consequently, some lawmakers, including the Croatian legislator, have opted for a compromise by defining "things" as elements of the material realm

⁶⁴ Gavella, N.; *et. al.*, *op. cit.* note 55, p. 64.; Vedriš, M.; Klarić, P., *Osnove imovinskog prava – Opći dio, stvarno, obvezno i nasljedno pravo*, Narodne novine, Zagreb, 1987, p. 58.

⁶⁵ Horvat, M., *op. cit.* note 45, p. 159.

⁶⁶ Gavella, N., *et. al.*, *op. cit.* note 55, p. 65; Vedriš, M.; Klarić, P., *op. cit.* note 64, p. 69.

⁶⁷ Allgemeines bürgerliches Gesetzbuch, § 285. *Alles, was von der Person unterschieden ist, und zum Gebrauche der Menschen dient, wird them rechtlichen Sinne eine Sache genannt.* Available at:

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622>, Accessed on: 1 April 2024,

⁶⁸ Gavella, N. *et. al.*, *op. cit.* note 55, p. 66.

while also permitting certain intangible entities to be classified as such. Article 2 of the Property Act stipulates that the subject of property rights and other real rights can be any movable (movable) or immovable thing (real estate), except for those that are not capable of doing so.⁶⁹

In conclusion, the first and perhaps the most important element of a thing is its material existence. Other elements are possibility of individualization and subjection to human control.⁷⁰

3.2.1. Corporeality

According to the legal definition, things are corporeal parts of nature, different from people, that people can use. This relatively limited notion of things is expanded in our legal system by the legal fiction that things are also everything else that is equated with them by law.⁷¹ Here, it is of crucial importance that this legal fiction be expressly prescribed by law.

Art. 2 (6) of the Property Act stipulates that certain types of rights or anything else can be equated with things by the law. Interpreting the stated legal definition, some authors conclude that the Property Act accepted the division of things into corporeal and incorporeal.⁷² In contrast, other authors advocate the view that there are no incorporeal things, but only incorporeal entities that are treated as things.⁷³

This issue has also been discussed in comparative legal theory, so some believe that, for example, entities that exist in the digital world can be considered incorporeal things *-res incorporales*, in accordance with the ancient Roman division of things. Others point out that when Gaj introduced the division into corporeal and non-corporeal things, under non-corporeal things he meant rights, that is, actions, because he stated that these are things that cannot be touched, and which exist only in law. Although the first element coincides with the characteristics of digital entities, because they are an incorporeal phenomenon, the second element is not fulfilled because it is not true that digital entities exist only in law, they also exist online, on servers, in the digital sphere. Furthermore,

⁶⁹ Art. 2 (1), Property Act

⁷⁰ Gorenc, V., Slakoper, Z., *op. cit.* note 63., p. 95.

⁷¹ Property Act, Art. 2 (2): *It is assumed that things and everything else that is equated with them by law.*

⁷² Vedriš, M., Klarić, P., *op. cit.* note 64, p. 72.

⁷³ Gavella, N.; *et. al.*, *op. cit.* note 55, p. 67.; Gorenc, V., Slakoper, Z., *op. cit.* note 64, p. 96.

proponents of this theory state that digital entities are not rights but can be the object of rights that exist regardless of whether the legal order recognizes them or not.⁷⁴

I lean towards the latter way of thinking. Relevant parts of the Article “*considered to be a thing*” and “*equal to things*” are sufficient arguments for the conclusion that things are corporeal, and that the status of things can legally be attributed to some incorporeal entities as well. This is merely a theoretical disagreement, which in practice should not present difficulties in the application of the Property Act and other regulations that equate non-corporeal entities with things.⁷⁵

Non-Fungible Token (NFT) tokens are evidently distinct from physical objects. However, I assert that this disparity poses no inherent issue, as there exists the potential recourse of employing legal fiction. This entails explicitly defining, through legislation, that NFTs are to be treated equivalently to physical entities, thus affording them the status of things. All that is required is for legislators to acknowledge this requirement, recognizing the legal vacuum through an analysis of socio-economic indicators and the imperative of addressing it by enacting regulations for certain non-physical entities exclusive to the digital realm – tokens.

3.2.2. Possibility of individualization

When we say that items should be individualized, this means that they are clearly defined and distinguished from other items or entities. Each object of law must be sufficiently specific or identified in a way that allows it to be distinguished from other similar or related objects. Individualization enables legal clarity and discernment of what exactly is covered by certain legal rules or rights.

When we categorize things according to their inherent characteristics, we distinguish between generic things (*genus*) and individually defined things (*species*).⁷⁶ Generic things are those that are described in the trade by type, genus, number, quantity or measure (e.g. flour, corn, petroleum, oil). Individually defined things appear in legal transactions as unique examples within their category or are specifically defined by legal transactions between the parties.

⁷⁴ Radonjić, A., *Virtual things, virtual possessio and possessory protection thereof*, in Robbie, J.; Akkermans, B. (ed.); *Property Law Perspectives VII*, Eleven International Publishing, 2020, Maastricht, p. 34.

⁷⁵ Gorenc, V., Slakoper, Z., *op. cit.* note 63, p. 96.

⁷⁶ Horvat, M., *op. cit.* note 45, p. 164, 286.

Genericity encompasses multiple things that are interchangeable in an objective sense (because there are multiple similar things). Since generic things are usually fungible, this separation is often associated with the distinction between fungible and non-fungible things.⁷⁷ It is easy to see here that something called a non-fungible token in this context is an individually defined thing⁷⁸, clearly separated from other things of that kind (the higher term here is non-fungible tokens in general, and an even higher term would be tokens on a blockchain or other DLT network).

The non-fungibility and thus the individual determination of NFTs derives from their natural properties. NFTs are unique digital tokens on the blockchain with individual codes and meta data to distinguish them.⁷⁹ What gives and guarantees uniqueness to NFTs is the computer code, i.e. the smart contract by which the NFT was created and the blockchain technology, which is immutable, transparent, and decentralized. The sum of all the technological characteristics of non-fungible tokens and the capabilities and characteristics of its underlying technologies assures that each individual NFT is unique, non-fungible, non-replicable, and forever stored on the DLT network.

3.2.3. The possibility of subjection to human control

Regarding the aspect of being under human control, digital entities can indeed be controlled in this manner. Originating within human-developed environments and technology frameworks, digital entities lack independent existence post-creation, thus enabling them to be subject to human manipulation. However, a notable distinction between physical objects and digital entities lies in the mode of control; digital entities are indirectly controlled through user interfaces on computers or mobile devices.⁸⁰

⁷⁷ Gorenc, V., Slakoper, Z., *op. cit.* note 63, p. 100.

⁷⁸ I use the term "thing" here because we are talking about the categorization of things, and one of the elements that must be fulfilled in order for something to be considered a thing.

⁷⁹ Dowling, M., *Is non-fungible token pricing driven by cryptocurrencies?*, Finance Research Letters, Vol. 44, 2022, p. 6; Fairfield, J., *Tokenized*, *op. cit.* note 5, p. 1272.

⁸⁰ Radonjić, A., *op. cit.* note 74, p. 36 - 37

3.3. Terminology - digital things and tokens

After determining that: (i) NFTs could easily be equated with things, by applying the legal fiction, (ii) that they are sufficiently individualized and (iii) can be subject to human control, I conclude that non-fungible tokens can, in principle, be considered things. As stated earlier, in this analysis, the NFTs are used as a representative of a broader term – the tokens. What are tokens, how could they be subsumed or translated into legal language?

In this paper, I decided to use the concept of digital things. The intention behind the use of this term is the desire to preserve the reference to traditional, physical things and their position in the property law, but at the same time to clearly emphasize the difference between things and digital things. What are digital things? At first glance, the term seems too broad, and it is necessary to first demarcate what would possibly be included in it and what would not. But how does one even approach such a thankless and extensive task?

3.3.1. Comparative legal theory on terminology

I think a good starting point is the definition of virtual property given back in 2005 by the American scientist Joshua Fairfield.⁸¹ After conducting research, it seems that this definition is the most influential definition of virtual things. All other authors who published their work after Fairfield's seminal article rely on his definition, whether they agree with it, wish to complement it, or criticize it.

According to Fairfield, a virtual thing is a computer code characterized by permanence, rivalry⁸² (exclusivity) and connectivity.⁸³ He believes that the aforementioned characteristics are legally relevant and that virtual things share them with "real world" objects.⁸⁴ The first characteristic - durability, means that

⁸¹ Fairfield, J., *Virtual Property*, Boston University Law Review, Vol. 85, 2005

⁸² Rivalry is a familiar concept in German legal theory as well, serving as a prerequisite for something to qualify as the subject of property rights. Rivalry is evident in the incapacity of a single object to be utilized concurrently by multiple entities. Jacobs, M., Arndt, J., *Bitcoins in der Zwangsvollstreckung*, in the book *Festschrift für Karsten Schmidt*, 2019, p. 565; Linardatos, D., *Der Mythos vom "Realakt" bei der Umbuchung von Bitcoins - Gedanken zur dinglichen Erfassung von Kryptowährungen*, in *Jahrbuch Junge Zivilrechtswissenschaft*, 2020, p. 198.; Hoeren, T., Prinz, W., *Das Kunstwerk im Zeitalter der technischen Reproduzierbarkeit – NFTs (Non-Fungible Tokens) in rechtlicher Hinsicht*, CR, 2021, p. 569.

⁸³ Fairfield, J., *Virtual Property*, *op. cit.* note 81, p. 1054.

⁸⁴ In addition to these characteristics being legally relevant, they also have economic significance, that is, it is important for us that something over which we have control and

the virtual things exist on the server of the Internet service provider and do not disappear after the user stops using them or after the user turns off the computer. Another characteristic refers to the fact that when one person uses a virtual thing, no one else can use that virtual thing without the user's permission. In the American legal system, this characteristic is called rivalry,⁸⁵ and it corresponds to the principle of exclusivity in our legal system.⁸⁶ The third feature means that other people, not just the user, can experience the virtual thing.⁸⁷

Blazer adopts Fairfield's criteria and supplements them with secondary market existence and user-added value to assess digital assets. While acknowledging that a digital entity may exist without a secondary market, the presence of one reinforces its recognition as an asset. Similarly, user-added value suggests the necessity of digital property rights. These supplementary criteria enrich discussions on digital rights but don't redefine the core characteristics of digital entities.⁸⁸ Erlank explores the legal characteristics of real-world objects in South African law and compares them with digital entities, noting the primary disparity: digital entities lack physical presence. However, he contends that similarities in functionality and form support their classification akin to real-world objects.⁸⁹ Plaka critiques Fairfield's definition and introduces *res digitales* as objects existing in computer-controlled environments, comprised of bits stored on hardware, processed by software, and interacted with via user interfaces.⁹⁰

Following this definition, Serbian colleague Radonjić states that virtual things are objects that have the characteristics of durability, rivalry and connectivity, and which are built from bits stored on hardware, processed by software and

power has the described characteristics precisely for economic reasons. *Ibidem.*, p. 1054 – 1055.

⁸⁵ Merrill, T. W., *Property and the Right to Exclude*, Nebraska Law Review, Vol. 77, 1998, p. 730.

⁸⁶ On the principle of exclusivity in Gavella, N.; *et. al., op. cit.* note 55, p. 375 – 378.

⁸⁷ Fairfield uses the URL code as an example. Fairfield, J., *Virtual Property, op. cit.* note 81, p. 1054 – 1055.

⁸⁸ Blazer, C., *The Five Indicia of Virtual Property*, Pierce Law Review, Vol. 5, no. 1., 2006, Available at: https://scholars.unh.edu/cgi/viewcontent.cgi?article=1090&context=unh_lr , p. 142.

⁸⁹ Erlank, W., *Property in Virtual machine Worlds*, PhD Thesis, Stellenbosch University, South Africa, 2012, Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216481 , Accessed on: 1 April 2024, p. 293 – 294.

⁹⁰ Plaka, P., *Virtual Property. Towards a General Theory*, PhD thesis, EUI, Florence, 2017, Available at: <https://cadmus.eui.eu/handle/1814/49664> , Accessed on: 1 April 2024, p. 107, 147, 177.

subject to human control through a user interface whose existence depends on the action of a third party.⁹¹

3.3.2. EU legislative contribution

The European Commission has initiated efforts to define digital entities owned by individuals, particularly focusing on crypto-assets. Recognizing the necessity for a unified approach in defining and regulating crypto-assets within the EU, the Commission passed the Regulation of the European Parliament and of the Council on crypto-asset markets and amended Directive (EU) 2019/1937, known as MiCA. This regulation defines crypto-assets as digital representations of value or rights that can be electronically transferred and stored using decentralized transaction record-keeping technology or similar means.⁹²

However, MiCA explicitly excludes NFTs from its scope,⁹³ indicating that further evaluation and potential regulatory proposals are needed to address associated risks.⁹⁴ Despite acknowledging deficiencies in the current legal framework, MiCA fails to offer a thorough resolution for delineating digital entities. Although it introduces the notion of crypto-assets, it doesn't sufficiently harmonize with established legal principles. Consequently, it struggles to ascertain whether digital entities can be owned. The discrepancy arises from the fact that the term "crypto-assets" does not correlate with the term "things" (*Cro. stvari*), which is fundamental in most civil law property legislation.

The discrepancy likely stems from MiCA's financial services-centric approach, viewing digital entities primarily through the lens of financial instruments. Consequently, although MiCA marks a significant step toward regulating the digital market, it does not definitively address the question of digital entities' eligibility for being object of rights *in rem*. Thus, MiCA serves as an initial exploration into the concept of "digital ownership," leaving this question unanswered for now.

⁹¹ "Virtual things are rivalrous, persistent, inter-connected objects build up of bits stored on hardware, processed by software and susceptible to human control via user-interface whose existence is dependent upon third party action." Radonjić, A., *op. cit.* note 74, p. 37.

⁹² Art. 3 (1) point 2 MiCA

⁹³ Art. 2 (2a) MiCA; NFT - Legal Token Classification, Studija udruge EU Blockchain Observatory and Forum, Available at: <https://www.eublockchainforum.eu/research-paper/nft-legal-token-classification>, Accessed on: 1 April 2024, p. 4 – 5.

⁹⁴ Lučić, D., *Nova pravila EU o tržištima kriptoimovine (MiCA)*, br. 6795-6796, 2023., p. 19.

3.4. Definition of digital things and *de lege ferenda*

In this paper I will use the term digital thing rather than virtual thing, as suggested by Fairfield's seminal article. I think that the definition of the term *digital*⁹⁵ better corresponds to the meaning I want to convey, than the definition of the term *virtual*.⁹⁶ Furthermore, Fairfield himself opted for the term *digital property* in his later articles, instead of the initial term *virtual property*.⁹⁷

Finally, taking into account the definitions offered in comparative legal theory, I believe that digital things should be defined as computer codes, i.e. electronic records that are stored on hardware, processed by software and subject to human control through a user interface, whereby it is important that these codes, i.e., electronic records, have the properties of permanence, connection, and exclusivity, which is limited only by the technological aspects of the technology within which these digital things exist.

Furthermore, once the Property Act contains the definition of digital things, the next step would be to employ the legal fiction and expressly stipulate that digital things can be equated with things for purposes of and in the sense of the Property Act.

3.4.1. Non-fungible tokens as digital things

Now that the definition of digital things has been proposed, it is necessary to see whether NFTs, and tokens in general, are covered by it. Non-fungible tokens are codes, i.e. sets of information, which are created through the 721 protocol and smart contracts, and which have certain technological characteristics, the uniqueness from which rivalry arises, durability and immutability ensured by the decentralized blockchain network, and interconnection with other network users. In other words, NFTs fulfill the characteristics of virtual things, as described by Fairfield in his 2005 definition. Adding to it the attribute of being subject to

⁹⁵ Croatian language portal, Available at: <https://hjp.znanje.hr/>, Accessed on: 1 April 2024, Term *digitalni*, *adj.*, *inform.* the one that has data written in the form of electronic bits, binary, i.e. 0 and 1 and with which there are no losses during data transmission [*digital record*], *opr.* analogous

⁹⁶ Croatian language portal, Available at: <https://hjp.znanje.hr/>, Accessed on: 1 April 2024, Term *virtuelan* *adj.*, 1.a. which exists in appearance or arises from appearance and not from reality; unreal, fictitious b. *fil.* which is located or present in another reality c. *lingv.* which refers to language as a system (langue) as opposed to speech that belongs to actual reality (F. de Saussure) d. potential, possible; 2. *inform.* which is computer generated; artificial, apparent, of the internet.

⁹⁷ Fairfield, J., *Tokenized*, *op. cit.* note 5, p. 1279, 1294.

human control, we arrive at the answer that non-fungible tokens could be considered digital things, for which it was previously shown that they could fall under the status and position of the thing as an object of property based on the legal fiction pursuant to Article 2 (2) of the Property Act.

3.4.2. Ability to be the object of rights *in rem* - tradability

Furthermore, for an entity to be the subject of a subjective *in rem* rights, it must possess the property of tradability.⁹⁸ As I previously offered a definition of digital things, the following analysis refers to digital things – *res digitales*.

The general rule is that things (as physical parts of nature) can be the subject of subjective rights *in rem* unless their natural properties or legal provisions prevent them from belonging to an individual. The ability of things to be the subject of real rights (that is, the tradability of things) is the rule, while the inability to do so (the non-tradability of things) is present only if the thing does not meet the natural or legal criteria for this ability.⁹⁹

What is true for the things, also applies to entities that are equated with things by law. The tradability of things is not the same as the ability to trade, although they tend to coincide. The tradability of things is a prerequisite for legal transactions with things, therefore, for any establishment and acquisition of civil rights related to that thing. When the thing is not in circulation, it is impossible to acquire rights through legal transactions. In other words, only when the thing is in circulation on the market, the question arises whether it is capable of legal transactions, of transferring rights from one person to another based on the will of the first person. It is important to note that, as a rule, anything that possesses the property of tradability is also capable of being an object of legal transactions.¹⁰⁰

Since the capability of things is the rule and the inability is the exception, the reasons for the inability (such as unsuitability or non-transferability) are present only in specific cases. Therefore, the exception should be interpreted and applied very restrictively. Our legal theory considers that terminology related to the

⁹⁸ Vedriš, M.; Klarić, P., *op. cit.* note 64, p. 59.

⁹⁹ Gavella, N.; *et. al.*, *op. cit.* note 55, p. 67.

¹⁰⁰ The aforementioned properties have not always coincided throughout history and existed in parallel. In the regime of social ownership, things that had the property of being tradable were not capable of legal transactions because the authorizations on them were not transferable, the ownership of some negotiable things could not be transferred to legal entities. Gavella, N.; *et. al.*, *op. cit.* note 55, p. 67., Vedriš, M.; Klarić, P., *op. cit.* note 64, p. 60.

market (*res in commercium* and *res extra commercium*) is not entirely appropriate but is used nevertheless because of its deep roots.¹⁰¹ The natural criterion of capacity includes the requirements that the thing be individually determined, useful to people and different from people. The legal criterion of capacity means that the thing must not be deprived by law of the capacity to be an object of ownership or placed outside the scope of legal regulation. It has long been recognized that the tradability of things is not a permanent category that legal orders would have to recognize without exception, because the tradability of things reflects not only the natural properties of things but also social-economic and legal-political elements.¹⁰²

To conclude, this requirement is susceptible to change and therefore we should approach it with an open mind. In the words of a great Croatian theoretician, prof. dr. sc. Gavella: "*The development of science, technique and technology, causes an increase in the natural possibility for individuals to establish their power over many things that were once not suitable to be objects of rights in rem, and it is predictable that such development will continue.*"¹⁰³

3.4.3. The ability to be the object of ownership

The ground rule is that all things are capable of being the subject of property rights, unless their natural characteristics or legal provisions prevent them from belonging to an individual.¹⁰⁴ We can connect this provision with the provision that defines ownership and lists exclusivity as one of its main characteristics, i.e. the owner's authority enforceable *erga omnes*.¹⁰⁵ Are NFTs, as digital things, capable of being owned, or do their natural characteristics prevent them from belonging to an individual?

The holder of the NFT can use the NFT as he wishes, and exclude others, i.e. prohibit them from using that digital thing. It should also be emphasized that the power of this authorization is not threatened because the authorized person depends on the cooperation of the network.¹⁰⁶ Given that miners are rewarded for

¹⁰¹ Gavella, N. *et. al. op. cit.* note 55, p. 68.

¹⁰² Vedriš, M., Klarić, P., *op. cit.* note 64, p. 60.

¹⁰³ Gavella, N.; *et. al., op. cit.* note 55, p. 72

¹⁰⁴ Art. 3 (1), Property Act

¹⁰⁵ Art. 30. (1), Property Act

¹⁰⁶ Maute, L., *Responsio – Warum die Übertragung von Bitcoins kein dingliches Rechtsgeschäft required*, in *Jahrbuch Junge Zivilrechtswissenschaft*, 2020, p. 222.; Maume, P.; Maute, L., *Rechtshandbuch Kryptowerte*, Vahlen, Munich, 2020, § 4 para. 33., Guntermann, L. M., *Non Fungible Token als Herausdorff für das Sachenrecht*, RDİ, 2022, p. 206.

creating new blocks, thereby validating each individual transaction added to a new block, blockchain participants can trust that their transactions, if valid, will be executed. Thus, the participation of the network here can be compared with the participation of any third party that would otherwise be necessary to dispose of the subjective right of the authorized person. An example are land registers, which are a third party that is a key factor in the disposal of property rights because the registration of changes in subjective rights over real estate is constitutive and the transfer, establishment, termination of subjective rights cannot occur without registration.

One of the main characteristics of digital things is that they are present in the digital space, which is why they are easily portable, available to a wide range of subjects, can be effortlessly and quickly copied, and each of their copies is identical to the original. Due to this property of reproducibility, several subjects can simultaneously access and use the same data or information, the same digital thing. This is the reason some argue there is rivalry in use of such objects. Typically, ensuring the negative aspect of ownership rights over digital assets - specifically, the exclusion of others from accessing the same digital data - is challenging.¹⁰⁷ However, there are exceptions to this because certain digital assets possess the quality of non-fungibility, and the best example are the non-fungible tokens. Therefore, NFTs could be owned, because they have all the qualities an object of ownership should have.

Upon reaching this conclusion, we should consider specific authorizations encompassed by a particular token, and the contents thereof. Here, I will adopt the phrase and reasoning introduced by the Liechtenstein legislator in their token container model.¹⁰⁸ Firstly, tokens serve as containers and can store various information – authorizations – rights. Secondly, tokens can be linked to tangible material entities (i.e., things) or digital entities (i.e., digital things). If an NFT (a digital thing) is linked to another digital thing,¹⁰⁹ which is likely its most prevalent and consequential application, the non-fungible token can function as a certificate enabling the establishment of ownership over the underlying digital thing. By connecting the NFTs to digital things, those digital things are individualized and given the characteristics necessary for them to be objects of ownership. It could be said that NFTs are like securities (Cro. *vrijednosni papiri*,

¹⁰⁷ Wagner, G., *BGB* §823, rn. 245; Zech, H., *op. cit.* note 49, p. 117 – 119

¹⁰⁸ Lins, B., Praicheux, S., *Digital and Blockchain-based Legal Regimes: An EEA Case Study Based on Innovative Legislations – Comparison of French and Liechtenstein Domestic Regulations*, Financial Law Review, Issue 22, 2021, p. 5.

¹⁰⁹ To elaborate further, NFTs are digital things, but they are also other types of digital things. In proposed scenario, a non-fungible token is a digital thing that is used to incorporate certain rights over another digital thing, e.g., a graphic representation, a picture that exists only in a digital form.

Germ. *Wertpapieren*) that way, legal instruments that incorporate certain rights and obligation and can be object of property rights themselves.¹¹⁰

Each of the non-fungible tokens is unique,¹¹¹ and the owner of the token is a person who is precisely determined and indelibly recorded on the blockchain. Another important characteristic is that such tokens cannot be broken down into smaller token parts.¹¹² It is precisely the technological features of NFTs,¹¹³ provided by the technology of the decentralized system of block chains, that enable these digital things to be exclusivity, that is, they make NFTs as digital things can belong to an individual.

4. CONCLUSION

Blockchain technology, due to its decentralized nature, replaces conventional centralized databases and authorities responsible for transaction recording and management. This shift eliminates the need for trust in institutions, relying instead on mathematical algorithms and network security. Consequently, the widespread adoption of blockchain technology, as well as its rapid expansion, is unsurprising. According to a report by the World Economic Forum, by 2027, approximately 10% of the global GDP will be linked to blockchain-based technologies.¹¹⁴

Non-fungible tokens (NFTs) function as electronic records representing unique digital or physical items. Created through applications and smart contracts on blockchain networks, NFTs ensure uniqueness, authenticity, and immutability. Recognizing NFTs as possessing economic value, their market has grown substantially, rivaling more established and regulated markets.

¹¹⁰ Gorenc, V.; Slakoper, Z., *op. cit.* note 63, p. 577.

¹¹¹ The uniqueness of NFTs is related to decentralized ledger technology. Some authors point out that it is conceivable that a certain data holder or holder of intellectual property rights simultaneously creates several NFTs for the same subjective right or that a third party creates an NFT for a subjective right with which it has nothing to do. Guntermann, L.M., *op. cit.* note 106, p. 202, Hoeren, T., Prinz, W., *op. cit.* note 82, p. 571.

¹¹² *Ibid.*, p. 201, 203, 204.

¹¹³ Prinz, W., NFT - Was passiert da eigentlich ?, 12 April 2021, Available on: <https://www.linkedin.com/pulse/nft-passiert-da-eigentlich-wolfgang-prinz/>, Accessed on: 1 April 2024

¹¹⁴ Deep Shift, Technology Tipping Points and Societal Impact', World Economic Forum, Survey Report, 2015, Available at: [chrome-extension://efaidnbmninnibpcjpcglclefindmkaj/https://www3.weforum.org/docs/WEF_GAC15_Technological_Tipping_Points_report_2015.pdf](https://www3.weforum.org/docs/WEF_GAC15_Technological_Tipping_Points_report_2015.pdf), Accessed on: 2 April 2024, p. 24.

Contrary to some opinions,¹¹⁵ I advocate for the legal regulation of NFTs, suggesting they encompass elements falling under certain ownership aspects. Property law, which concerns subjects and objects, recognizes objects as "things" or entities equated with them. Unlike certain legal systems, the Croatian legal framework benefits from flexibility, allowing incorporation of incorporeal entities as "things" through legal fiction. Hence, it is crucial to acknowledge and legally recognize the capacity of certain non-physical entities, such as NFTs, to be considered as "things."

After extensively examining the principles of Croatian property law and the requisites for an entity to qualify as an object of ownership and other rights *in rem*, supplemented by comparative legal perspectives, I have concluded that non-fungible tokens could potentially be considered objects of property rights through the utilization of legal fiction inherent in the Croatian legal system. *De lege ferenda*, two essential steps are proposed. Firstly, the introduction of a legal definition for digital things – *res digitales* would be imperative. Subsequently, leveraging the legal fiction outlined in the Property Act to equate digital entities with tangible objects would enable them to be recognized as potential objects of ownership. This would be done by incorporation of a new provision into Article 2 of the Property Act expressly stating the equivalence of digital things to things.

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Review paper

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RECONCEPTUALISING INTERNATIONAL ECONOMIC LAW: TOWARDS COMPREHENSIVE AGREEMENTS ON INVESTMENT AND TRADE (CAITs)

ABSTRACT

There is a need to develop a new term for international economic law that reflects the re-integration of investment and trade in international agreements. Such a reflection is also required in the titles of new comprehensive international agreements. Although titles assigned to international agreements normally have no overriding legal effects, they are descriptors that allow us to make quick judgements and assumptions of their categories and contents. The article argues that BITs and FTAs with investment chapters have been collectively referred to as "investment treaties," however these distinct titles for new trade and investment agreements do not reflect the significant changes they have brought to traditional models. Citing the EU-China CAI as an example, there is a need for a new title for such agreements. The article proposes the title 'Comprehensive Agreements on Investment and Trade (CAITs)' as suitable for such a new generation of international trade and investment agreements. It discusses the proposed title in terms of its descriptive words; "comprehensive," "agreement," and "investment and trade." The differences between "comprehensive" and "deep" in terms of their meanings and implications are also considered.

Keywords: *comprehensive, investment, trade, agreements, EU-China CAI*

1. INTRODUCTION

Today, there are elements that reflect a change in the way that the international system operates. One such reflection is the 're-integration' of trade and investment from separate sub-disciplines. In particular, international trade and investment law are seemingly re-integrating once again from separate sub-

disciplines of international economic law.¹ Accordingly, there have been calls for reforms that reflect the ‘needs of our times’.

In relation to the titles of the new generation of international trade and investment agreements, the article agrees with Debra Steger, a scholar in international economic law. The work of Steger has made reference to the recent actions of the European Union (EU) and China, ‘that call into question the possibility of integrating trade and investment rules’.² Steger has also argued that the re-integration of the investment and trade demonstrates that we need to develop a new term for international economic law, more generally.³ She asks whether we should accept the agreements as they are, and leave dispute settlement systems with the responsibility to bring greater convergence between the trade and investment disciplines.⁴ In response to this question, this article posits that, in accepting the agreements as converging trade and investment, we should first begin with the admission of what the agreements are. Assigning the titles of only ‘trade’ or only ‘investment’ to new generation agreements that reflect both trade and investment elements, does not admit what the agreements substantively are. The observed differences between typical trade and typical investment agreements can be understood as deriving from the fundamentally

¹ The lines between international trade and investment law have become obscure, which has led to the assertion of a re-integration. See eg. Pauwelyn, J., *The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform*, Proceedings of the Annual Meeting (American Society of International Law), 108/ 2014, p. 255–58. Available at: <https://doi.org/10.5305/procannmeetasil.108.0255>. And see: Roger P. A., *The Convergence of International Trade and Investment Arbitration*, 12 Santa Clara J. Int'l L, 35/2013.

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1072.

² Steger, D. P., *International Trade and Investment: Towards a Common Regime?*, Prospects for International Investment Law and Policy, 1/ 2013, p. 156 IN: Roberto Echandi & Pierre Sauvé, eds., Cambridge University Press, 2013.

³ Debra Steger made remarks as part of a panel (*International Trade Law and International Investment Law: Complexity and Coherence*) to ‘consider whether the international trade and investment law dichotomy appears increasingly anachronistic, or whether each regime is maturing according to complementary principles.’ See: The American Society of International Law (ASIL) 108th Annual Meeting: *The Effectiveness of International Law*, 11 April 2014 video recording at: <https://www.youtube.com/watch?v=g7J7RnQJxM0&list=PL0KFz82Oj8Rbiyr5o8RzJ3pDw9YK9jW8d&index=1&t=3904s>. Also see: The American Society of International Law (ASIL) 108th Annual Meeting: *The Effectiveness of International Law*, 11 April 2014 video recording. The introductory remarks by its moderator, Andrew Mitchell, are available written form at: Andrew Mitchell, *Introductory Remarks by Andrew Mitchell*, Proceedings of The American Society of International Law (ASIL) Annual Meeting 108, 2014, p.251–51. doi:10.5305/procannmeetasil.108.0251. American Society of International Law, International Trade Law and International Investment Law, April 11

⁴ Steger, *op cit*, note 3.

different problems that trade and investment agreements are designed to solve.⁵ For instance, typical trade agreements emphasise state-to-state dispute settlement that can be justified based on the government-to-government nature of trade agreements.⁶ Typical investment agreements emphasise investor-state-dispute settlement that can be justified based on the government-to-investor nature of investment agreements.⁷ New generation agreements provide for both trade dispute settlement and investment dispute settlement in a single agreement. Although the titles assigned to international agreements, such as the new generation agreements normally have no overriding legal effects, they are descriptors that allow us to make quick judgements and assumptions of their categories and contents.⁸ Trade and investment agreements have brought significant changes to the traditional models that are not quite reflected in their titles, as their distinctive names.⁹

Reflecting the impact of these changes, there are scholars who have chosen to collectively refer to BITs and FTAs with investment chapters as ‘investment treaties’.¹⁰ There has been an endeavour across scholarship to slot these agreements with overlapping features as either investment or trade agreements. The ‘new generation’ of comprehensive agreements such as the EU-China CAI continue to sound the alarm on the matter concerning the titles of ‘new generation’ international trade and investment agreements. The EU-China CAI is

⁵ See: Ralph, O., Staiger, R.W., Sykes, A.O., *Standing in international investment and trade disputes*, Journal of International Economics, 145, 11/ 2023.

⁶ Ossa *et al*, *op.cit*, note 5.

⁷ Ossa *et al*, *op.cit*, note 5.

⁸ It is the content of an instrument not its name, which makes it an “agreement” or “treaty”. But with the purpose is to facilitate a general understanding of their scope and function, an overview of the key terms employed in the United Nations Treaty Collection to refer to international instruments, notes that although the titles of international instruments ‘may follow habitual uses or may relate to the particular character or importance sought to be attributed to the instrument by its parties’ (that normally have no legal effects), they may legally ‘suggest the objective of the legal instrument, or of the accepted limitations of action of the parties to the arrangement’. Indeed, the actual intent of the parties can often be derived from the clauses of the instrument itself or from its preamble, but the name of the instrument ‘might give a general indication of such intent’. See: United Nations Treaty Collection, *Definition of key terms used in the UN Treaty Collection* at:

https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml.

⁹ The Comprehensive approach on trade and investment agreements has brought significant changes to the traditional models, including the investor-state dispute resolution processes.

¹⁰ For example, Michael Ewing-Chow writes that ‘...potentially different regimes are created governing the protection afforded to foreign investors in a state which is a Member of the WTO but which has also entered into an *investment treaty*, whether in the form of a BIT or a FTA. [Emphasis added]’ See: Ewing-Chow, M., *Thesis, Antithesis and Synthesis: Investor Protection in BITs, the WTO and FTAs*, UNSW Law Journal 548, 33; 30(2), 2007.

a *sui generis* agreement which contains elements of both trade and investment. However, it only has the term ‘investment’ in its title yet it is also thought to be a trade agreement.¹¹ This is still so, even after public clarification by the Director General of the Trade of the European Commission and publication of the agreement text as an ‘investment agreement’.¹² It is not clear whether this continued reference to the EU-China CAI as a ‘trade deal’ is an honest mistake by some legal scholars or a tacit suggestion on the interpretation of the agreement’s objective to reaffirm ‘commitments under the WTO Agreement and their commitment to create a better climate to facilitate and develop trade and investment between the Parties’.¹³

2. COMPREHENSIVE AGREEMENT ON INVESTMENT AND TRADE (CAIT)

In cognisance of the disciplinary overlap, this article proposes to refer to such agreements to both disciplines. Namely, under the category of Trade and Investment agreements (TIAs)¹⁴ which some scholars have already defined as

¹¹ Van der Loo, G., *Lost in translation? The Comprehensive Agreement on Investment and EU-China trade relations*, Royal Institute for International Relations, 3 June 2021. Available at: <https://www.egmontinstitute.be/lost-in-translation-the-comprehensive-agreement-on-investment-and-eu-china-trade-relations/>.

¹² See: Weyand, S., Director General, DG Trade, European Commission IN: CEPS webinar, *Understanding the new EU-China investment agreement*, 2021. Also, China called for talks of a Free Trade Agreement with the EU, in parallel with ongoing negotiations on the EU-China CAI. From this, it should clarify to the public that the EU-China CAI is classified by its officials as an “investment agreement” rather than a “trade agreement”. Also see: Valero, J., *China calls for opening free trade talks with the EU*, EURACTIV, 17 December 2019 at: <https://www.euractiv.com/section/economy-jobs/news/china-calls-for-opening-free-trade-talks-with-the-eu/>.

¹³ Van der Loo, G., *Lost in translation? The Comprehensive Agreement on Investment and EU-China trade relations*, 2021. As a ‘trade lawyer’, Van der Loo has conducted research on EU’s new generation of Deep and Comprehensive Free Trade Agreements to which he identifies similarity with the EU-China CAI. Also see: Article 1(1), Objectives, Section I: Objectives and General Definitions, *EU-China Comprehensive Agreement on Investment*, European Commission (2020). Accessed April 3, 2024. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement_en.

¹⁴ This abbreviation should not be confused with the Trilateral Investment Agreement (TIA). See eg. United Nations Conference on Trade and Development (UNCTAD), *China - Japan - Korea, Republic of Trilateral Investment Agreement* (2012). Last accessed April 3, 2024. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3302/china---japan---korea-republic-of-trilateral-investment-agreement-2012->.

‘those agreements relevant to trade and international investment’.¹⁵ In the fashion of TIAs, the proposal of this article is to title the ‘new generation’ of agreements as Comprehensive Agreements on Investment and Trade (CAITs). In the following paragraphs, this proposition is explained in the separate terms; ‘Comprehensive’, ‘Agreement’, and the proposed title identifying the terms of both disciplines ‘Investment and Trade’. This article does not intend to propose new terminology for consideration. Rather, currently existing terms are understood, and a combination of the terms is explored.

2.1. ‘Comprehensive’

Although, international trade and investment instruments now refer to the term “comprehensive” in their titles, there seems to be no particular legal definition of the term in the agreements. Seemingly, a general, not necessarily legal understanding of the word ‘Comprehensive’ is followed, in that it is ‘including or dealing with all or nearly all elements or aspects of something’,¹⁶ or ‘covering completely or broadly’.¹⁷ In cognisance that there are broader areas restricting trade and investment beyond the traditional, we have seen new generation trade agreements such as EU FTAs seek to substantially liberalises all trade by addressing trade and investment in a “comprehensive” manner.¹⁸ Considered a new generation investment agreement, the EU-China CAI, also takes a

¹⁵ See eg: Delany, L., Signal, L., and Thomson, G., *International trade and investment law: a new framework for public health and the common good*, BMC Public Health 18, 602 (2018). <https://doi.org/10.1186/s12889-018-5486-6>. Although, as also indicated in the article by Delany et al. the definition is not limited to trade and investment but extending to international intellectual property as well. The important point for this article is the scholars’ argument that “The character of TIAs has become more comprehensive...”. These agreements are also referred to by some scholars as ‘Free Trade Agreement TIAs’. See: Reinisch, A., Footer, M.E., and Binder, C., eds., *International Law and ...: Select Proceedings of the European Society of International Law. Select Proceedings of the European Society of International Law*, Oxford: Hart Publishing, 2016. Also, Armand de Mestral and Alireza Falsafi refer to NAFTA as a TIA. The scholars note that TIA models are particularly suited to promoting policy objectives beyond pure trade or pure investment. See: De Mestral, A., and Falsafi, A., 8. *Increasing use of alternative dispute resolution in IIAs* IN: De Mestral, A., Lévesque, C., eds. *Improving International Investment Agreements*, Routledge, 2013.

¹⁶ “*Comprehensive*.” Languages.oup.com. Oxford Languages, 2022. Web. 1 April 2022. ‘Google’s English dictionary is provided by Oxford Languages, widely regarded as the world’s most authoritative sources on current English’. See: Oxford Languages, Oxford Languages and Google at: <https://languages.oup.com/google-dictionary-en/>.

¹⁷ “*Comprehensive*.” Merriam-Webster.com. Merriam-Webster, 2022. Web. 1 April 2022. Merriam-Webster is the oldest dictionary publisher in the United States. It is ‘America’s most trusted online dictionary for English word definitions, meanings, and pronunciation.’ See: <https://www.merriam-webster.com/>.

¹⁸ The new generation of EU FTAs provide for ‘comprehensive’ chapters on investment.

“comprehensive” approach on investment as well as trade by addressing market access.¹⁹ But, before a conclusion on the proposition on the term “comprehensive”, in the next paragraph it is important to discuss the flinch of this article from the term “deep” that some writers have seemingly used synonymously with “comprehensive”.²⁰

Some of the new generation of EU FTAs are known as ‘Deep and Comprehensive Free Trade Areas (DCFTAs)’. ²¹ The DCFTAs are reported to be

¹⁹ The EU-China is spoken of as a new generation BIT. In the subsequent section, I discuss the choice in the article to refer to the instrument as an “agreement” than a “treaty”.

²⁰ For instance, Annette Bongardt and Francisco Torres write that ‘in most cases the EU negotiates comprehensive (i.e. deep) free trade agreements with third countries’. See: Bongardt, A., and Torres, F., *Comprehensive Trade Agreements: Conditioning Globalisation or Eroding the European Model?*, 52 (3), 2017 p.165–170 at: <https://www.intereconomics.eu/contents/year/2017/number/3/article/comprehensive-trade-agreements-conditioning-globalisation-or-eroding-the-european-model.html>. The abbreviation i.e. is short for the Latin phrase *id est*, meaning “that is” or “that is to say” or “in other words.” It is ‘used to explain exactly what the previous thing that you have mentioned means’ in order to clarify its *meaning*. See: “i.e.” Oxford Advanced Learner’s Dictionaries, 2022. Web. 1 April 2022. Also see: “i.e.” Merriam-Webster.com. Merriam-Webster, 2022. Web. 1 April 2022. So, it may be interpreted that the scholars mean that ‘the EU negotiates comprehensive free trade agreements with third countries. In other words, that the EU negotiates deep free trade agreements with third countries.’ But the EU has made a separation of its FTAs including a group of those titled “deep”. See: Overview of the trade Agreements covered by European Commission, *Report on Implementation of EU Free Trade Agreements*, 2018 at: https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157468.pdf. Some scholars have also noted that the EU’s FTAs vary substantially, classified into four groups: “‘First Generation’ Free Trade Agreements negotiated before 2006; ‘New Generation’ ‘Second generation’ Free Trade Agreements, i.e. comprehensive FTA’s negotiated after 2006; Economic Partnership Agreements (EPAs) with Africa, Caribbean and Pacific countries; Deep and Comprehensive Free Trade Areas (DCFTAs) deepening political association and preparing for economic integration. See: Wruuck, P., *What future for EU trade policy and free trade agreements?*, European Investment Bank, 2019 at: http://respect.eui.eu/wp-content/uploads/sites/6/2019/11/Chapter4_Wruuck_Future_EU_Trade_Agreements.pdf. The writers of the paper that I refer to are not legal scholars but scholars in the field of economics, so the weight of my point may seem like there’s nothing to it. However, in the same paper, the scholars have also written that ‘the European Commission has embarked on a new generation of international agreements *that also aim* at abolishing non-tariff barriers to trade.’ This indicates the understanding that the new generation agreements may not necessarily provide for the ‘behind the border’ rules (i.e. deep) but rather also *aim* for such rules. From this, the understanding is that the agreements may be ‘comprehensive’ addressing ‘behind the border’ issues with commitments but not necessarily with ‘deep integration’ through rules. I also discuss this further in the subsequent paragraphs.

²¹ The EU proposed to use the DCFTAs as cornerstones of their future relationship with the Eastern Partnership, at the 2009 Prague summit. See: Koeth, W., *The ‘Deep and Comprehensive Free Trade Agreements’: an Appropriate Response by the EU to the Challenges in its Neighbourhood?*, EIPASCOPE, 2014. Available at: https://www.eipa.eu/wp-content/uploads/2022/01/EIPASCOPE_2014_WKO.pdf. The

prompted by the failure of the WTO member countries to reach a 'comprehensive' agreement on trade liberalisation that would include the 'behind the border' issues such as regulatory issues, rules on foreign investment and investment protection, government procurement²². In response to whether deep and comprehensive trade agreements would violate WTO obligations, Lydgate and Winters also make the distinction between "deep" and "comprehensive".²³ As also Van der Loo, in a study comparing DCFTAs, writes of the "comprehensive" dimension in reference to broad coverage and "deep" dimension mainly related to the approximation clauses of the DCFTAs.²⁴ While it may seem that the terms "Comprehensive" and "Deep" are synonymous or that the joint reference to "Deep and Comprehensive" sounds tautological in that "comprehensive" agreements are a call for "deep" integration,²⁵ Mattoo et al. write that Deep Trade agreements (DTAs) aim at establishing "economic

DCFTAs are more "deep" than new generations FTAs. In this paragraph, I also explain the term "Deep".

²² Koeth, *op cit.* note 21. Prior to the Uruguay Round negotiations spanning from 1986 to 1993, the linkage between trade and investment received little attention in the framework of the General Agreement on Tariffs and Trade (GATTs). The original GATT had reached 'behind the border', although the extent of the prohibitions was not clear. The GATT prohibited investment measures that violated the principles of national treatment and the general elimination of quantitative restrictions, obligations which the Agreement on Trade-Related Investment Measures (TRIMs) negotiated during the Uruguay Round intended to clarify. In this sense, there was a call for a widening of GATT and the deepening in the context of behind-the-border disputes by going beyond traditional trade liberalisation in talking of the rules and disciplines of the trading system. See: Narlikar, A., Daunton, M., and Stern, R.M., *The Oxford Handbook on The World Trade Organization*, Oxford University Press, May 31, 2012. For its effectiveness as 'the foundation of the trading system', it is believed that the WTO needs to negotiate new rules and adopt reforms. However, WTO members have not reached consensus for a new comprehensive agreement on trade liberalisation and rules, which supports the impetus of member states concluding comprehensive' agreements to include the 'behind the border' issues that the WTO has failed to address. See: Cimino-Isaacs, C.D., and Fefer, R.F., *World Trade Organization: Overview and Future Direction*, Congressional Research Service, Updated October 18, 2021 at: <https://sgp.fas.org/crs/row/R45417.pdf>.

²³ The scholars argue that deep but not comprehensive trade agreements would not necessarily violate WTO obligations. See: Lydgate, E., and Winters, A.L., "Deep and Not Comprehensive? What the WTO Rules Permit for a UK-EU FTA, *World Trade Review* 18, 3/2019, p451-79. doi:10.1017/S1474745618000186. Also, The EU and NAFTA are described as "deep" and both compatible with the rules of the WTO. See: Stubbs, N.A., *Chapter 4 Regional Economic Integration: a Comparison of NAFTA and the EU*, University of Washington at: <http://depts.washington.edu/canada/nafta/98chapters/4stubbsnafta98.htm>.

²⁴ Van der Loo, G., *The EU's Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: A Comparative Study*, CEPS Special Report, 24 June 2017. Available at: <https://www.ceps.eu/ceps-publications/the-eus-association-agreements-and-dcftas-with-ukraine-moldova-and-georgia-a-comparative-study/>.

²⁵ Van der Loo, *op cit.* note 13. Stubbs, N.A., *Chapter 4 Regional Economic Integration: a Comparison of NAFTA and the EU*, University of Washington. For example, Stubbs writes that 'Through widening there was a further call for deepening of the EU.'

integration” rights as well as include enforcement provisions that limit the discretion of importing governments in these areas, as well as provisions that regulate the behaviour of exporters.²⁶ And thus, not just liberalisation but the meaningful liberalisation of trade.²⁷ “Deep” agreements ‘provide far-reaching and progressive regulatory approximation’ to the laws of the parties, going beyond the ‘new generation’ FTAs, that are merely “comprehensive”.²⁸ Compromising at a “deeper level” requires countries to fulfill their negotiated commitments, by making the necessary legal, regulatory, and administrative changes.²⁹ DTAs support the rights of the parties to the agreements by setting the rules through regulation,³⁰ as economic integration has become ‘deeper’, tackling measures ‘behind the border’. These agreements are deepening, in the sense that they cover rules on an expanding set of policy areas, such as investment, that goes well beyond the traditional focus of preferential trade agreements such as tariffs.³¹ While these agreements are still referred to as trade agreements, their

²⁶ Mattoo et al. write that DTAs aim at establishing five “economic integration” rights: free (or freer) movement of goods, services, capital, people, and ideas. See: Mattoo, A., Rocha, N., and Ruta, M., eds., *Handbook of Deep Trade Agreements*, The World Bank, 2020. Available at:

<https://openknowledge.worldbank.org/bitstream/handle/10986/34055/9781464815393.pdf>

²⁷ In its position paper on the Trade Sustainability Impact Assessment in support of negotiations of DCFTAs, the EC describes DCFTAs as intended to provide for substantial liberalisation of trade and investment conditions’. See: European Commission, *Commission services position paper on the Trade Sustainability Impact Assessment in support of negotiations of a Deep and Comprehensive Free Trade Area between the European Union and respectively Georgia and the Republic of Moldova* at: https://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152461.pdf.

²⁸ To achieve the objective of deepening political association and economic integration between the EU and its associated partners, ‘the DCFTAs provide far-reaching and progressive regulatory approximation to EU law in trade-related areas and foresee gradual reciprocal market opening. With these distinctive components they go beyond the ‘new generation’ FTAs and represent “a unique type of trade agreements”.’ See: Deep and Comprehensive Free Trade Areas (DCFTAs) EU, Georgia and Moldova, *About the Deep and Comprehensive Free Trade Areas (DCFTAs) between the European Union, Georgia and Moldova* at: <https://www.dcfta-evaluation.eu/>. Also, towards ‘predictable and enforceable trade rules’.. See: European Commission, *Deep and Comprehensive Free Trade Areas (DCFTA) of the EU-Ukraine Association Agreement* at: <https://ec.europa.eu/chafea/agri/en/content/deep-and-comprehensive-free-trade-areas-dcfta-eu-ukraine-association-agreement>.

²⁹ Hornbeck, J.F., *Free Trade Agreements: U.S. Promotion and Oversight of Latin American Implementation*, Inter-American Development Bank 2009 at: <https://publications.iadb.org/publications/english/document/Free-Trade-Agreements-US-Promotion-and-Oversight-of-Latin-American-Implementation.pdf>.

³⁰ See: Mattoo, A., Rocha, N., and Ruta, M., eds., *Handbook of Deep Trade Agreements*, 2020.

³¹ Mattoo et al, *op.cit.* note 26. Mattoo et al. writes that Deep Trade Agreements are about ‘moving from the administration of protection – quotas, tariffs, and subsidies – to the administration of precaution – security, safety, health, and environmental sustainability.’

goal is integration beyond trade or deep integration.³² Whereas trade agreements that are not 'deep' are defined as 'shallow', focussed on tariffs and other at-the-border measures that directly affect market access, as opposed to behind-the-border.³³

The corollary is thus that “deep” investment agreements should go beyond their traditional focus to cover rules at-the-border measures that directly affect market access.³⁴ But as “deep” agreements are about codifying regulatory alignment through binding commitments and a dispute settlement mechanism, the article accepts that not all trade and investment agreements are necessarily “deep”.³⁵ As enlightened earlier in this article, the EU-China CAI does not include rules on investment protection nor rules on trade in goods. The proposition is thus that agreements such as the EU-China CAI may be titled “Comprehensive” in providing for trade liberalisation principles such as market access but not necessarily “deep” in providing for those rules.³⁶ Rather, the concept of “deep” is proposed in this article as perhaps a more a relative than an absolute term, in relation to a certain level of economic integration.³⁷

³²Also see: The World Bank, *Deep Trade Agreements, Deep Trade Agreements: Data, Tools and Analysis* at: <https://datatopics.worldbank.org/dta/about-the-project.html>. Also see:

³³O'Brien, E., and Gowan, R., *What Makes International Agreements Work: Defining Factors for Success*, The NYU Center on International Cooperation (CIC), September 2012. Available at: https://cic.nyu.edu/sites/default/files/gowan_obrien_factors_success.pdf. Also, Roger Alford responds to 'Why would countries sign deep PTAs with investment chapters instead of simply relying on shallow PTAs, the WTO, or BITs?' See: Alford, *op.cit.* note 1.

³⁴ As perhaps, would be expected of the EU-China CAI intended to rebalance the asymmetry between the EU and China in terms of investment as well as providing that the agreement would liberalise market access. See: European Commission, *Commission publishes market access offers of the EU-China investment agreement*, 12 March 2021 at: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2253>.

³⁵ For instance, Great Britain was considered to be opposed to deepening by accepting market integration but with behind the border issues remaining autonomous. See: Stubbs, N.A., *Chapter 4 Regional Economic Integration: a Comparison of NAFTA and the EU*, University of Washington. Although, in 2018 was reported to be headed towards the model of a Deep and Comprehensive Free Trade Agreement (DCFTA) embedded within a broader Association Agreement (AA). See: Emerson, M., *Theresa May's Deep and Comprehensive Free Trade Agreement*, CEPS, 6 March 2018 at: <https://www.ceps.eu/ceps-publications/theresa-mays-deep-and-comprehensive-free-trade-agreement/>.

³⁶ Stubbs, *op. cit.* note 35. *Chapter 4 Regional Economic Integration: a Comparison of NAFTA and the EU*, University of Washington.

³⁷ For instance, the EU has DCFTAs towards political and economic integration, but that with the UK also 'goes beyond traditional free trade agreements' but titled 'The EU-UK Trade and Cooperation Agreement' and explained as an agreement that 'While it will by no means match the level of economic integration that existed while the UK was an EU

To conclude the proposition of 'Comprehensive', the article supports the 'new generation' of agreements continued usage of the term to also maintain the indication of newness in the titles, to contrast with the older agreements.³⁸ Indeed, overlapping the trade and investment disciplines, some old agreements may also be argued to be 'Comprehensive' as they also address rights within both trade and investment.³⁹ Rather, the proposition of this article to use the term 'comprehensive' in the new generation, should not be understood as an interpretation that the earlier agreements are relatively not comprehensive but to serve as a label of distinction between the old and the new.⁴⁰

2.2. 'Agreement'

Today, the majority of international instruments are designated as "agreements" either with a generic meaning for those instruments which do not meet its definition of "treaty" or for a specific meaning as a particular term referring to a "narrower range of subject-matter than "treaties".⁴¹ On this "agreement" trend,

Member State, the Trade and Cooperation Agreement ...provides a solid basis for preserving our longstanding friendship and cooperation'. See: Stubbs, *op.cit.* note 35. Also see: European Commission, *The EU-UK Trade and Cooperation Agreement* (2021) at: https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en. In support of the proposition, relevant to this article, the EU and China have different approaches to economic integration.(China's One Belt, One Road initiative is currently the most important program for deep economic integration). Thus, befitting that the EU-China CAI is not "Deep".

³⁸ In contrast with "TIAs", mentioned in the previous section as agreements relevant to trade and international investment. For example, the Accord de commerce et de protection des investissements entre la Confédération suisse et la République Rwandaise (1963).

³⁹ *Rwanda - Switzerland TIA* (1963), United Nations Conference on Trade and Development (UNCTAD). Last accessed April 3, 2024. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3669/rwanda---switzerland-tia-1963->

⁴⁰ Hence the general proposition to refer to such agreements as International trade and investment agreements (TIAs). The proposed term already encompasses the disciplinary overlap. Although not to suggest that the earlier agreements are not comprehensive. But perhaps also, the new generation agreements are "more comprehensive" as they cover an expanding set of policy areas, such as competition policy, environmental law etc. See: Emily O'Brien and Richard Gowan, *op.cit.* note 33. The areas beyond the traditional areas of "trade and investment" fall outside the scope of the article, so extension to the term 'Comprehensive' to new generation TIAs in this article is for the purposes of distinction by name than by the extended features for the agreements beyond "trade and investment".

⁴¹ But also, 'treaty terminology might be indicative of the relationship of the treaty with a previously or subsequently concluded agreement.' See: United Nations Treaty Collection, Definition of key terms used in the UN Treaty Collection at: https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml.

For example, the *Comprehensive and Progressive Agreement for Trans-Pacific*

this article accepts usage of the term as the usage of "treaty" for international instruments has considerably declined in the favour of "agreements" that are usually less formal and deal with a narrower range of subject-matter.⁴² The new generation is identified as overlapping disciplines typically with more elements of trade or investment and a narrower range of either. For instance, the EU-China CAI is titled as an instrument on 'investment' but lacks provisions resembling traditional international investment agreements as well as dealing with 'trade' but to a lesser extent than typical trade agreements.

2.3. 'Investment and Trade'⁴³

Finally, the proposition of the titles of the agreements in this article, is to explicitly accept the provision for both trade investment to complete the puzzle and settle the discourse on whether Comprehensive Investment Agreements are really investment agreements or whether Comprehensive Trade Agreements are really trade agreements. This is even more troubling when an agreement is titled as an "Investment Agreement" yet classified by its officials as a "Trade Agreement".⁴⁴ We have, anyways, already witnessed that both regimes may

Partnership (CPTPP), that does not have the term "treaty" in its title but described as '*a short-form treaty* that incorporates by reference all of the provisions of the Trans-Pacific Partnership (TPP) agreement'. See: Government of Canada, *How to read the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)* at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/chapter_summaries-sommaires_chapitres.aspx?lang=eng.

⁴² Although the United Nations (UN) General Assembly has never laid down precise definitions of the terms, the 1969 Vienna Convention on the Law of Treaties defines "treaties" as "international agreements" with certain characteristics. Its Art.3 refers also to "international agreements not in written form" and thus less formal. So, the term "international agreement" in its generic sense covers a wide range of international instruments such as oral agreements that may be rare but can have the same binding force as treaties. So, the word "treaty" in its generic sense had been generally reserved for engagements concluded in written form. Although acknowledging this, the choice in this article to accept the term "agreement" in the titles of new generation instruments is based on the specific meaning that the instruments may deal with subject matter from one of the sub-disciplines; trade or investment, but at a narrower range of one or both disciplines. See: *Id.* United Nations Treaty Collection, *Definition of key terms used in the UN Treaty Collection*.

⁴³ Alternatively, "Trade and Investment". In that order, the abbreviation would read "CATI". With no particular importance but a matter of preference, I propose an order with a multi-layered acronym (abbreviation pronounced as a word) that reads "CAIT" as the diphthong "ai" creates a monosyllabic word that sounds more phototactically plausible.

⁴⁴ Replacing earlier ASEAN investment agreements, the ASEAN Comprehensive Investment Agreement (ACIA) is titled as an "Investment Agreement". Also see: Maxwell, I., Wegner, K., *The New ASEAN Comprehensive Investment Agreement*, Asian International Arbitration Journal, 5, 2/2009. p.167-189

apply to the same activity or measure by states, as goods and services may be supplied by way of both trade and investment.⁴⁵ Hence, the proposition to identify this new generation of comprehensive agreements as a direction to both disciplines should not necessarily be seen as a substantive novelty but a proposal to explicitly call agreements for what they already are, without possibly misleading limitation of the titles to a single discipline. This essence is captured by some of the EU's new generation of FTAs titled as 'Free Trade Agreement and Investment Protection Agreement'.⁴⁶ In cognisance that not all trade agreements necessarily pertain to matters of 'free trade', the proposed title with 'Investment and Trade' should therefore suffice.

It is acknowledged in this article that the EU-China CAI is neither a typical trade agreement nor a typical investment agreement, as it seeks to draw on the principles of both trade and investment disciplines. Although the EU-China CAI deals with trade and investment to a lesser extent than typical trade and typical investment agreements, the lesser extent to which trade or the lesser extent to which investment is reflected in the EU-China is not a basis in the article, to reject the terms 'trade' or 'investment' in the title of the EU-China CAIT. Trade

at:<https://kluwerlawonline.com/journalarticle/Asian+International+Arbitration+Journal/5.2/AIAJ2009008>. However, although the ASEAN website makes no classification, the official website of the investment promotion of ASEAN classifies the agreement under "ASEAN Free Trade Agreements" despite the option to also categorise it under "other instruments" that is available on its website. See: Invest in ASEAN, *ASEAN Agreements* at: <http://investasean.asean.org/index.php/page/view/asean-agreements>.

⁴⁵ See: ASIL, *op.cit.* note 3. The American Society of International Law (ASIL) 108th Annual Meeting, *International Trade Law and International Investment Law: Complexity and Coherence* panel to 'consider whether the international trade and investment law dichotomy appears increasingly anachronistic, or whether each regime is maturing according to complementary principles.' Joost Pauwelyn remarks on overlapping proceedings. There have been decisions by the WTO on the trade issues and investor-state tribunals on investment protection claims based on the same facts. Most infamous, on 8 May 1998, the US requested consultations with Mexico in respect of an anti-dumping investigation of high-fructose corn syrup (HFCS), followed by parallel Chapter 19 proceedings and WTO dispute settlement. See: Mexico – Anti-dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (WT/DS132) (*United States v. Mexico*). But also, under the same facts, the US investors alleged a breach of Chapter 11 of the NAFTA and imposed ISDS rights under ICSID. Roger Alford also discusses parallel proceedings light of the convergence of trade and investment. See: Alford, *op.cit.* note 1. *Convergence of International Trade and Investment Arbitration*, 2013.

⁴⁶ The *EU-Singapore Free Trade Agreement and Investment Protection Agreement* (2018), European Commission. Last accessed April 3, 2024. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreements/texts-agreements_en and the *EU-Vietnam Trade Agreement and Investment Protection Agreement* (2019), European Commission. Last accessed April 3, 2024. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement_en.

agreements may be typical but vary in their extent on trade matters. Investment agreements may also be typical but vary in their extent on investment protection. Notwithstanding the varying degrees, the recognition of either discipline is typically not dismissed in their titles. The EU-China CAI should also not be denied reference to both 'trade and investment' in its title.

3. CONCLUSION

The article has proposed the use of the term "Comprehensive Agreements on Investment and Trade" (CAITs) to describe the new generation of international economic law agreements that integrate both investment and trade. The argument is that the traditional titles assigned to international agreements, such as BITs and FTAs, do not reflect the changes brought about by these new agreements. The proposal for the use of CAITs aims to identify the terms of both disciplines, investment and trade, in the title of these agreements. The article has cited the EU-China CAI as an example of such an instrument, which is titled as an investment instrument but lacks provisions resembling traditional international investment agreements and deals with trade to a lesser extent than traditional trade agreements.

The use of the term "comprehensive" is proposed to describe the agreements because they address all elements or aspects of something, including issues beyond traditional trade barriers. The article has also discussed the term "deep" to distinguish it from the term "comprehensive." Moreover, the proposal supports the trend towards using the term "agreement" rather than "treaty" for comprehensive agreements, particularly those that deal with a narrower range of subject-matter than treaties. The EU-China CAI deals with both investment and 'trade' but to a lesser extent than traditional trade agreements. Thus, it is proposed to explicitly title these agreements 'investment and trade', without a possibly misleading limitation of the titles to a single discipline.

It is known that research work is never truly finished. The issues of the titles of new generation agreements are too broad and complex to capture in a single article. It is unfortunate that the paper stops at proposing a title that admits the convergence of trade and investment realms in the titles of new generation trade and investment agreements. The conclusions illuminate that there are lingering questions and open ends that spark interest in further research. The lingering questions are re-enforced by the research gaps and limitations. The limitation of this article is in depth research on the challenges of categorising and assigning titles to these complex agreements that cover multiple areas as well as the possible legal implications for their titles. An investigation of the impact of the

titles of international agreements on their interpretation and implementation should be conducted. This could include an analysis of the legal effects of titles and their role in shaping perception and expectations of the intent of the agreements. Future research may further explore the existing terms and their limitations in addressing whether there is a need for a new term for international economic law that reflects the current changes in the international system. It may also be felt that these recommendations for future research are perhaps more interesting than the focus of this article. It may also be argued that the contribution of this article is in sparking this interest of further research identified by this article. Which would perhaps not have been as apparent without the research of this article itself first conducted and consequentially sparking further research interest.

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Review paper

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THE INCLUSION OF HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW

ABSTRACT

This paper addresses the possibility of harmonizing human rights with international investment law. To achieve this purpose, the paper first focuses on the importance of human rights within the context of international investment law, as well as the challenges in integrating regulations to resolve potential conflicts between these fields. Subsequently, it explores two alternatives that have been utilized to incorporate human rights into the international investment regime: firstly, the inclusion of human rights provisions in international investment agreements, and secondly, the inclusion through interpretation by certain arbitral tribunals. Finally, the paper presents some concluding remarks.

Keywords: Human Rights; International Investment Law; International Investment Arbitration

1. INTRODUCTION

Human rights and international investment law regulate distinct situations. Human rights establish guarantees for individuals in their relations with states, whereas international investment law seeks, primarily, to protect the economic interests of foreign investors from arbitrary behaviors by states or their agents.

However, despite the differences, measures adopted by states can sometimes also violate the human rights of foreign investors. On other occasions, regulatory measures aimed at protecting human rights could affect the economic interests of foreign investors. In these situations, human rights rules and international investment rules could be in contradiction. This is especially problematic because international investment treaties enshrine certain standards of treatment for foreign investors, and when their investments are affected by measures to protect human rights, these might be challenged.

In such a situation, the sovereignty of states and the regulatory capacity to protect human rights could be compromised, leading to an imbalance in the international investment regime that favors the protection of the interests of foreign investors. This problem is even more significant when considering that international investment agreements rarely contain provisions on human rights.

Therefore, a question arises: How has harmonization been achieved between human rights and international investment law? This paper seeks to address this question in three different parts: in the first, the problem of harmonization between human rights and international investment law is presented; in the second, the solutions adopted to achieve a better balance between human rights and the rules of international investment law are introduced; and in the third, some conclusions are highlighted.

2. HARMONIZING HUMAN RIGHTS AND INTERNATIONAL INVESTMENT LAW

There is a public demand for businesses to comply with human rights, recognizing the existence of a social contract that establishes rights and obligations.¹ In this sense, compliance with human rights is a prerequisite for conducting business. There are three generations of human rights depending on the kind of the claims made by society.² The first generation is related to the non-intervention of the state, establishing freedoms and guarantees against arbitrariness. Essentially, political and civil rights belong to this generation. The second generation burdens the state by providing certain living conditions to the people, such as education, healthcare, nutrition, etc. Fundamentally, these conditions fall under the category of socio-economic rights. Recently, a third category of rights has emerged, where claims are not individual anymore but are made collectively by society as a whole. It does not mean that these rights cannot be claimed individually but normally are exercised collectively. These claims are classified as collective developmental rights, such as the right to peace, a healthy environment, sustainable development, etc.³

¹ Choudhury, B., *Human Rights in International Investment Law* in: Bungenberg, M., Krajewski, M., Tams, C.J., Terhechte, J.P., Ziegler, A.R. (eds.), *European Yearbook of International Economic Law* 2020, 2021, Vol. 11., p. 178.

² Joshi, R.& Gurpur, S., *The Silent Spring of Human Rights in Investment Arbitration: Jurisprudence Constante Through Case-Law Trajectory*, *Arbitration International*, 2020, Vol. 36, No. 4, p. 2.

³ *Ibid.*, p. 2.

Traditionally, human rights have been seen as a relationship between the state and citizens, where the state has to guarantee the protection of these rights. However, states are also responsible for protecting human rights from private actors' behaviors, including foreign investors.⁴ This obligation has been explicitly stated in the International Covenant on Civil and Political Rights (ICCPR) of 1966 and acknowledged by the United Nations Human Rights Committee. For example, in its General Comment No. 31, it emphasized that the state has the role of guaranteeing human rights from violations by private actors:

(...) the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”⁵

In this regard, the Committee on Economic, Social and Cultural Rights, in General Comment No. 24, regarding the obligations enshrined in the International Covenant on Economic, Social, and Cultural Rights, stated: “(...) under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice.”⁶

Despite these obligations for states, it is not possible to affirm that foreign investors are subject to binding obligations related to guaranteeing human rights at international law, but they are responsible according to domestic laws.⁷ This does not mean foreign investors are immune to human rights violations. In the context of international investment law, they also have to comply with *erga omnes* regulations, regardless of the absence of international liability for business entities.⁸

⁴ De Brabandere, E., *Human Rights and International Investment Law* in: Binder, C., Nowak, M., Hofbauer, J., Janig, P. (eds.), *Elgar Encyclopedia of Human Rights*, Edward Elgar Publishing Limited, Massachusetts 2022, p. 621.

⁵ UN Human Rights Committee. *General Comment No. 31 (80). The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, paragraph 8. <https://digitallibrary.un.org/record/533996?ln=en&v=pdf#files>, 31 March, 2024.

⁶ UN Committee on Economic, Social and Cultural Rights. *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, 10 August 2017, paragraph 5. <https://digitallibrary.un.org/record/1304491?ln=en&v=pdf>, 31 March, 2024.

⁷ De Brabandere, *op.cit.* note 4, p. 623.

⁸ Choudhury, *op. cit.* note 1, p. 187.

Despite the fact that states guarantee human rights and foreign investors also have to comply with regulations *erga omnes*, the international investment regime does not provide a remedy to ensure that host states will have enough regulatory power to comply with their international obligations in this realm, without breaching their commitments related to foreign investment.⁹ Even if the state wins the case, the arbitral procedure can cause a regulatory chill to protect human rights.¹⁰

The problem is exacerbated by the fact that international investment treaties are designed to protect investments, which sometimes implies a reduction in the regulatory power of the state, limiting the possibility of enacting regulations to protect human rights. On the other hand, sometimes corporations are in a better position than states to minimize the impact of their activities on human rights. This implies that corporations should also bear the burden of respecting human rights.¹¹

The mentioned problem is systemic, the efforts to make compatible human rights and business have been individual and not collectively. This has been acknowledged by the "UN Special Report on Business and Human Rights Protect, Respect, and Remedy Framework":

"Insofar as governance gaps are at the root of the business and human rights predicament, effective responses must aim to reduce those gaps. But individual actions, whether by States or firms, may be too constrained by the competitive dynamics just described. Therefore, more coherent and concerted approaches are required."¹²

The protection of human rights is an issue that has failed to be included in the international investment regime, mainly because there is a view that states are entities with the obligation to fulfill human rights, not foreign investors.¹³ The problem is that the foreign investment regime affects human rights by constraining the sovereignty of the state to enact regulations to protect human rights. For example, environmental regulations or measures to protect life,

⁹ Simma, B., *Foreign Investment Arbitration: A Place for Human Rights?* International and Comparative Law Quarterly, 2011, Vol. 60, No. 3, p. 580.

¹⁰ *Ibid.*, p. 580.

¹¹ Choudhury, *op. cit.* note 1, p. 188.

¹² UN Human Rights Council. *Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, 7 April 2008, paragraph 17. <https://digitallibrary.un.org/record/625292?ln=en&v=pdf>, 31 March, 2024.

¹³ De Schutter, O., *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press, Cambridge 2014, p. 280.

human health, etc.¹⁴ The view that human rights are separate from commitments regarding foreign investments is also shared by some tribunals, which have decided to condemn states because of regulations made to protect human rights.¹⁵

One way to resolve this problem is to include provisions related to human rights in international investment treaties and contracts with foreign investors.¹⁶ However, in fact, some of these inclusions contain rules that are not binding for host states or for foreign investors.

Another approach to addressing the conflict between human rights and the protection of investments in the context of international investment law has been through the interpretation of arbitral tribunals. By interpretation, some arbitral tribunals have acknowledged that human rights should also be included as a relevant part of the relationship between investors and host states, as it is explained in the next section. Nonetheless, this option also has its own limitations regarding the scope of international investment agreements.

According to this, it is possible to affirm that human rights and international investment law belong to the same family: international law. Nonetheless, the challenge lies in how to harmonize the rules of each category, taking into account the principle of *lex specialis*, as each set of rules governs different situations. According to this principle, human rights should be regulated in a different set of rules to those that govern international investments. The next sections address how this problem has been approached.

3. BALANCING HUMAN RIGHTS AND INTERNATIONAL INVESTMENT LAW

In order to harmonize human rights and international investment law, Simma¹⁷ proposes a Human Rights audit prior to the establishment of the investment, enshrined in the investment treaties. In this way, investors could understand the state's commitments to human rights, limitations, and specific regulations in certain sectors. This also provides the opportunity to include methods for complying with these commitments and potential changes in the future or judicial interpretations. The aim of this is to better define the legitimate expectations of foreign investors.

¹⁴ Choudhury, *op. cit.* note 1, p. 180.

¹⁵ *Ibid.*, p. 181.

¹⁶ Simma, *op. cit.* note 9, p. 580.

¹⁷ *Ibid.*, p. 595.

Despite the good idea proposed by Simma, the inclusion of human rights in the world of international investments has been approached in two different ways, as he proposed: firstly, through the inclusion of references or even obligations regarding human rights in international investment agreements; secondly, through the interpretation made by some arbitral tribunals. However, this inclusion has been limited, and human rights are still far from being integrated into international investment law in a comprehensive manner. The following lines address these scenarios and their limitations.

3.1. Wording of international investment agreements

The inclusion of human rights in international investment treaties should pursue two objectives: first, to ensure regulatory sovereignty for human rights issues; second, to justify regulatory actions. However, these treaties should also include obligations and responsibilities for foreign investors related to human rights.¹⁸

Regarding the inclusion of obligations related to human rights for foreign investors, the UN Guiding Principles on Business and Human Rights proposes that corporate responsibility to respect human rights should be included¹⁹. This is a good mechanism for accountability, considering that the international investment regime establishes rights for corporations but not obligations. In this way, the regime could be more balanced.²⁰

Another interesting proposal to harmonize human rights and investment arbitration is the Hague Rules on Business and Human Rights of 2019²¹, developed within the framework of the Center for International Legal Cooperation in The Hague. This work was based on the Arbitration Rules of the United Nations Commission on International Trade (UNCITRAL Rules), but adjusted to the context of business and human rights issues. Unfortunately, similar to the UN guide mentioned above, the Hague Rules are not binding. However, they at least sparked a discussion on how to harmonize business and human rights in the context of investment arbitration.

¹⁸ Choudhury, *op. cit.* note 1, p. 188.

¹⁹ UN Human Rights Office of the High Commissioner. *Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework*, 16 June 2011, p. 13.
<https://digitallibrary.un.org/record/533996?ln=en&v=pdf#files>, 31 March, 2024.

²⁰ Choudhury, *op. cit.* note 1, p. 191.

²¹ Center for International Legal Cooperation. *The Hague Rules on Business and Human Rights Arbitration*, 12 December 2019, p. 1. https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf, 31 March, 2024.

The efforts mentioned indicate a growing awareness of the importance of bridging the gap between business and human rights in the context of international investment law. In addition to the obvious benefits, integrating human rights obligations for foreign investors in the long term could maximize general welfare. This inclusion could influence companies' behavior, resulting in better investments and promoting sustainable development in the long term.²²

Besides the documents mentioned, recently some international investment agreements and contracts between states and investors have included references to human rights or carve-outs to accommodate regulatory measures. Nonetheless, this is not a general trend; only a few legal instruments have enshrined these provisions as it is illustrated in the next lines.²³

The problem is that this kind of language still does not create binding rights or obligations for the parties related to human rights. They have more of an "auxiliary function," stating that specific measures related to public interests should be presumed as legitimate regulatory interests of the state. Another possible auxiliary function is that it clarifies that investors' interests are not absolute and should be weighed against the legitimate regulatory interests of host states. Overall, despite this language, this inclusion does not create enforceable rights or obligations. It might be a useful tool for tribunals to better assess the interests of the parties in dispute, considering human rights as well.²⁴

It is rare to see obligations related to human rights imposed on foreign investors. However, there are some examples where there is an obligation to comply with local laws, including human rights rules, such as the Southern African Development Community (SADC) Protocol on Finance and Investment. In Article 10 of the Annex on Cooperation on Investment, there is a provision that for foreign investors, the local laws, regulations, policies, and administrative guidelines are binding and subject to their compliance²⁵. A similar provision is made in the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, in Article 25, which

²² International Institut for Sustainable Development, *Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements*, 9 January 2018, p. 6. <https://www.iisd.org/system/files/meterial/harnessing-investment-sustainable-development.pdf>, 31 March, 2024.

²³ Choudhury, *op. cit.* note 1, p. 181.

²⁴ *Ibid.*, p. 188.

²⁵ Southern African Development Community (SADC). *Protocol on Finance and Investment*, 18 August 2006. <https://www.sadc.int/document/protocol-finance-and-investment-2006>, 31 March, 2024.

establishes the obligation for foreign investors to comply with local regulations.²⁶

Article 29 of the COMESA agreement also explicitly establishes an obligation for the foreign investor to comply with human rights and to follow the recommendations outlined in the UN Guiding Principles on Business and Human Rights:

1. "COMESA investors and their investments shall observe the United Nations Guiding Principles on Business and Human Rights with modifications necessary for local circumstances.
2. COMESA investors and investments shall among others:
 - (a) support and respect the protection of internationally proclaimed human rights;
 - (b) ensure that they are not complicit in human rights abuses;"²⁷

Additionally, this article of the COMESA agreement provides that investors shall prioritize actions to avoid actual or potential negative consequences on human rights as a result of business activities.

A further development was made by SADC through its model BIT, which explicitly contains obligations for foreign investors related to human rights. Article 15.1 establishes the obligation to respect human rights, refrain from actions that could lead to a violation of them, and not assist or be complicit in their violation:

"15.1. Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife."²⁸

Furthermore, the SADC BIT model and the COMESA agreement establish the possibility of counterclaims against foreign investors who breach their obligations under local laws, including human rights.²⁹

²⁶ Common Market for Eastern and Southern Africa (COMESA). *Investment Agreement for the COMESA Common Area*, 23 May 2007. <https://www.comesa.int/wp-content/uploads/2020/10/English-Revised-Investment-agreement-for-the-CCIA-28.09.17-FINAL-after-Adoption-for-signing.pdf>, 31 March, 2024.

²⁷ Art. 29 COMESA

²⁸ Southern African Development Community (SADC). *SADC Model Bilateral Investment Treaty Temple with Commentary*. July 2012, <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>, 31 March, 2024.

²⁹ De Brabandere, *op.cit.* note 4, p. 633.

Despite the COMESA agreement and the SADC BIT model, the most common inclusion of references to human rights in international investment agreements is in the preamble or in the objectives of the treaty, but not in a separate provision that establishes obligations related to human rights. For example, the bilateral investment treaty between Hungary and Cabo Verde stipulates in the preamble: “Seeking to ensure that investment is consistent with the protection of health, safety and the environment, the promotion and protection of internationally and domestically recognised human rights, labour rights, and internationally recognised standards of corporate social responsibility”³⁰ Other treaties have provisions that aim to not lower standards of protection of human rights. For example, in the case of the Azerbaijan-Hungary BIT, Article 2.3 establishes:

“The Contracting Party shall not encourage investment by lowering domestic environmental, labour or occupational health and safety legislation or by relaxing core labour standards. Where a Contracting Party considers that the other Contracting Party has offered such an encouragement, it may request consultations with the other Contracting Party and the two Contracting Parties shall consult with a view to avoiding any such encouragement.”³¹

The BIT between Cambodia and Japan has a similar wording, but in the preamble, referring to not lowering standards related to health, environment, or safety. Additionally, there are some treaties with a general reference to the state's right to regulate to pursue public welfare objectives, such as the Nigeria-Morocco BIT or the Argentina-Qatar BIT.³²

Regardless of the absence of obligations related to human rights, these kinds of inclusions in the preamble and objectives are useful tools to guide the arbitrators due to Article 31(2) of the Vienna Convention:

2. “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes”³³

³⁰ Agreement between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments, 2019. <https://edit.wti.org/document/show/46bdb04e-721b-4cac-830a-1c346c25c96c>, 31 March, 2024.

³¹ Agreement between the Republic of Azerbaijan and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, 2007.; <https://edit.wti.org/document/show/a32bbcb2-5bde-407d-bf4c-f4317dae54b5>, 31 March, 2024.

³² Choudhury, *op. cit.* note 1, p. 182.

³³ Vienna Convention on the Law of Treaties. 23 May 1969. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, 31 March, 2024.

In that way, it is expected that arbitrators, at the moment of making a decision, take into account human rights.

Another trend in international investment law is to include exemptions in treaties, allowing the host state to avoid obligations with foreign investors to protect human life, animal life, or health, to protect public security, or to maintain public order. For example, Canada is including these exemptions in their treaties such as the Canada-China BIT and Canada-European Union: Comprehensive Economic and Trade Agreement. This last Agreement, in Article 28.3, establishes that:

“For the purposes of Chapters... Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary:

- (a) to protect public security or public morals or to maintain public order;
- (b) to protect human, animal or plant life or health, or
- (c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (...)³⁴

The inspiration for these exemptions is Article XX of GATT, within the framework of the World Trade Organization. In fact, the Canada-European Union: Comprehensive Economic and Trade Agreement explicitly states in Article 28.3 that Article XX of GATT is incorporated into the agreement.

Other treaties have established exceptions related to human rights for certain standards of treatment. For example, the treaty between ASEAN and India enshrines that “financial assistance or measures taken by a Party ... in pursuit of legitimate public purpose including the protection of health, safety, [and] the environment” will not be considered a violation of national treatment obligations.³⁵ Other treaties have gone even further; for instance, Article 9.11(4) of the treaty between China and Australia has established that any regulation to

³⁴ EU - Canada Comprehensive Economic and Trade Agreement (CETA), 2016. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter_en, 31 March, 2024.

³⁵ Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India, 2014. <https://edit.wti.org/document/show/5d30ad06-c913-438d-a6ac-313d6d596aab>, 31 March, 2024.

ensure legitimate public welfare objectives, such as public health, public morals, and the environment, are outside the scope of the treaty for arbitral effects:

“Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section” (Investment).³⁶

When states use GATT language as exceptions in the wording of investment treaties, there is a requirement that they have to meet when their regulatory measures are challenged: necessity. This means they have to demonstrate that the measure is not arbitrary, discriminatory, or a disguised restriction on trade.³⁷ The problem is that there is not certainty about the necessity test in investment arbitration. A good example related to this is the saga of arbitration against Argentina in the framework of the economic crisis at the beginning of XXI century, where the tribunals interpreted necessity in many different ways.³⁸

The most effective way to preserve the regulatory power of host states is to exclude measures related to human rights from the scope of the international investment treaty. In this way, there is no obligation from host states to foreign investors related to regulatory measures in this field. A good example in this regard is the ASEAN-India BIT, which exempts human rights measures from the standards of expropriation and national treatment. Article 8(9) of the ASEAN-India BIT illustrates this point clearly for the standard of non-expropriation:

“Non-discriminatory regulatory measures by a Party or measures and awards by judicial bodies of a Party that are designed and applied in pursuit of public policy to achieve legitimate public interest or public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute expropriation of the type referred to in subparagraph 2(b) of this Article.”³⁹

Ideally, more than the exclusion from the scope of investment treaties of measures related to human rights, there should be obligations for foreign investors in this realm. Unfortunately, in the international investment regime, the inclusion of obligations for companies has been reluctant; there are only some soft invitations to establish standards of social responsibility. For example, the Belarus-India BIT, Nigeria-Singapore BIT, and the Brazil BITs (with

³⁶ Free Trade Agreement between the Government of Australia and the Government of the People’s Republic of China, 2015. <https://www.dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Pages/official-documents>, 31 March, 2024.

³⁷ Choudhury, *op. cit.* note 1, p. 189.

³⁸ *Ibid.*, p. 189.

³⁹ ASEAN-India BIT, *op. cit.* note 35.

Mozambique and Malawi) include provisions that foreign investors should seek the highest standards of social responsibility. Article 10 of the agreement between Brazil and Mozambique provides:

“Investors and their investments should strive to achieve the highest possible level of contributions to the sustainable development of the receiving State and the local community, through the adoption of a high degree of socially responsible practices, by reference to the voluntary principles and standards set in Annex II - "Corporate Social Responsibility"”.⁴⁰

Nevertheless, African countries have gone further, including obligations for foreign investors to comply with human rights. For instance, Article 15 of the Morocco-Nigeria BIT establishes:

“4. Each Party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these law and regulations.

5. All parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party.”⁴¹

Similarly, in the Economic Community of West African States, the Supplementary Act Common Investment Rules for the Community establish that investors shall operate according to human rights obligations and shall not assist or act with complicity with others who violate human rights. In fact, Article 14 stipulates:

“(2) Investors shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties.

⁴⁰ Agreement for Cooperation and Investment Facilitation between the Government of the Federal Republic of Brazil and the Government of the Republic of Mozambique, 2015. <https://edit.wti.org/document/show/c9fd85ab-2190-467a-a063-4ad7c3c98bfd?page=1>, 31 March, 2024.

⁴¹ Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Republic of Nigeria, 2016. <https://edit.wti.org/document/show/bde2bcf4-e20b-4d05-a3f1-5b9eb86d3b3b>, 31 March, 2024.

(3) Investors shall not by complicity with, or in assistance with others, including public authorities, violate human rights in times of peace or during socio-political upheavals.”⁴²

In the case of the BIT between Bangladesh and Denmark, the parties went further by enshrining a legal consequence for losses to the host state originating from investor behavior affecting public health, life, and the environment. In this case, the investor has to compensate the host state which suffered the losses. Article 2(2) of the agreement provides:

“Investment objectives should be achieved without relaxing health, safety and environmental measures of general application. If the Contracting Party in whose territory the investment is made, suffers from a loss, destruction of damages with regard to its public health or life or the environment, including natural resources by the investor of the other Contracting Party, then the First Contracting Party shall be accorded adequate and effective compensation as per its laws and regulations, and if necessary as per International law, by the investor of the other Contracting Party”⁴³

3.2. Arbitral Decisions

Another way to include human rights in international investment law has been through arbitral decisions. However, there is a problem with the jurisdiction of arbitral tribunals due to the scope of international investment treaties, which is to regulate circumstances related to investments. In this regard, states give their consent for arbitration only regarding this concept and not for non-investment issues such as human rights. Therefore, arbitral tribunals have no jurisdiction to resolve disputes outside the scope of investment treaties.⁴⁴

In this regard, the Tribunal in the case *Rompetrol v. Romania* established that its jurisdiction only covers aspects directly related to investment, despite both parties seeking the possible application of the European Convention on Human Rights. On that occasion, the Tribunal considered that according to Article 25 of the ICSID Convention, the applicable law to the dispute is the rules in the investment agreement, and if the parties want to claim a possible breach of the

⁴² Economic Community of West African States, Supplementary Act on Investments, 2008. <https://edit.wti.org/document/show/9030e714-3be3-48f2-93a1-69b5ec76d8bb>, 31 March, 2024.

⁴³ Agreement on the Promotion and Reciprocal Protection of Investments between the Government of People’s Republic of Bangladesh and the Kingdom of Denmark, 2009. <https://edit.wti.org/document/show/16e70a15-af06-4773-8a42-699e2662277c>, 31 March 2024.

⁴⁴ De Brabandere, *op.cit.* note 4, p. 627.

European Convention on Human Rights, they have to submit their complaints before the dispute settlement system created for that purpose. On that occasion, the Tribunal stated:

“The Tribunal starts from the elementary proposition that it is not called upon to decide any issue under the ECHR, whether the issue in question lies in the past or is still open. Its function is solely to decide, as between TRG and Romania, “legal dispute[s] arising directly out of an investment” and to do so in accordance with “such rules of law as may be agreed by the parties,” which in the present case means essentially the BIT, in application of the appropriate rules for its interpretation. The ECHR has its own system and functioning institutional structure for complaints of breach against States Parties.”⁴⁵

On the other hand, despite the jurisdiction of arbitral tribunals regarding issues related to investments, the applicable law is a broader concept that has been used to assess other norms of international law that could be relevant to resolve disputes between parties. For example, Article 42(1) of the ICSID Convention establishes that rules of international law should be applicable. The article provides:

“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”⁴⁶

In the same sense, Article 1131 of NAFTA provides that disputes shall be decided according to the agreement and the rules of international law. Similar provisions can be found in Article 26(6) of the Energy Charter Treaty or even in the United States BIT Model of 2012. These kinds of provisions open the window to the inclusion of human rights considerations in investment disputes.⁴⁷ Therefore, by interpretation, human rights can be included in investor-state disputes.⁴⁸

In order to include human rights in investment arbitration, there are two ways to achieve this purpose: first, by the principle of evolutionary or dynamic

⁴⁵ Rompetrol Group NV v. Romania, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 170.

⁴⁶ ICSID Convention, Regulations and Rules, 2006. <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>, 31 March 2024.

⁴⁷ De Brabandere, *op.cit.* note 4, p. 639.

⁴⁸ Simma, *op. cit.* note 9, p. 582.

interpretation, which means that the terms in international law have to adjust to the dynamics of present times, regardless of the meaning initially given by the states; second, the presupposition that treaties seek to have effects according to the existing rules of international law, which is accorded to Article 31(3)(c) of the Vienna Convention.⁴⁹

The provision contained in Article 31(3)(c) establishes that treaties should be interpreted in the context of any relevant rule of international law applicable to the relations between the parties. This could be considered as a gateway to apply treaties and conventions on human rights to investment disputes when it is pertinent. However, to apply this provision, three conditions must be met:⁵⁰ first, the rule sought to be applied must be a rule of international law; second, that rule must be relevant according to the circumstances; third, the scope of the treaty must allow for the establishment of rights and obligations for the parties.

It is important to consider the perspective of claimants as holders of human rights in international investment arbitration. Not always are claimants challenging measures to protect human rights, but they suffer violations of their rights. However, the arbitral decisions in this regard are not extensive.⁵¹ When a claimant seeks that the tribunal evaluates a possible violation of human rights, there are two conditions that should be complied with: first, the language of the international investment agreement has to be wide enough to allow this kind of argumentation; second, the violation of human rights should be strongly connected to the detriment of the investment.⁵²

Regarding the first condition, in the case of *Toto v. Lebanon*, the claimant argued that the host state violated its human rights. The Tribunal found that the text of the Italy-Lebanon BIT allows the application of the principles of international law to this case.⁵³ This means that considerations regarding human rights are applicable to the dispute. However, in another case, *Biloune v. Ghana*, despite the claim of violations of human rights, the Tribunal considered that it is not possible to expand the scope of the investment agreement to issues different from investments.⁵⁴ These examples show how important the language of the

⁴⁹ *Ibid.*, p. 583.

⁵⁰ Joshi & Gurbur, *op. cit.* note 2, p. 10.

⁵¹ *Ibid.*, p. 3.

⁵² *Ibid.*, p. 3.

⁵³ *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, paragraph 57

⁵⁴ *Biloune & Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, paragraph 75.

investment agreement is to determine if the scope of it allows arguments beyond the clauses contained in it.⁵⁵

In regard to the second condition, in the case of *Spyridon v. Romania*, the claimant alleged the violation of its human rights under the protection of the European Convention on Human Rights and its First Additional Protocol, besides the clauses in the BIT between Greece and Romania. The argumentation was connected to the claim that the host state also violated the standard of fair and equitable treatment under the BIT. In that occasion, the Tribunal found that sometimes BITs could be complemented by other multilateral instruments and agreements, but in that case, the BIT offered enough protection for the investor:

“The Tribunal does not exclude the possibility that the international obligations of the Contracting States mentioned at Article 10 of the BIT could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights and its Additional Protocol No.1. But the issue is moot in the present case and does not require decision by the Tribunal, given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments referred above. Consequently Article 10 of the BIT cannot, in its own terms and in the instant case, serve as a useful instrument for enlarging the protections available to the Claimant from the Romanian State under the BIT.”⁵⁶

Another interesting case connected to this condition is *Grandriver Enterprises v. USA*. In this case, the claimants belong to indigenous people, and they claimed that their rights are recognized by customary international law. Thus, they argued that these rights had to be taken into account in the dispute. The Tribunal agreed, using the preamble of NAFTA, where there are considerations of public welfare, and according to the Tribunal, these rights are included in this category.⁵⁷

Despite the examples mentioned where human rights argumentation was used as a tool for the protection of foreign investors, the most common argumentation about the protection of human rights is used by host states. This is considering they have to guarantee human rights. For that reason, sometimes, when host

⁵⁵ Joshi & Gurpur, *op. cit.* note 2, p. 3.

⁵⁶ *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011, paragraph 312.

⁵⁷ *Grand River Enterprises Six Nations, Ltd et al. v United States of America*, UNCITRAL, Award, 12 January 2011, paragraphs 218-219.

states make regulatory measures to protect human rights, they could undermine foreign investor interests.⁵⁸

In addition, some arbitral decisions have highlighted that foreign investors have obligations to comply with human rights, considering that the legal relationship between them and host states is also regulated by international law. Moreover, human rights have been recognized as *erga omnes* obligations, for some tribunals, so they are also binding for foreign investors and not only for states. Some examples are the awards in *Burlington Resources v. Ecuador*, *Perenco v. Ecuador*, and *Aven v. Costa Rica*.⁵⁹

In the cases of *Burlington Resources v. Ecuador*⁶⁰ and *Perenco v. Ecuador*⁶¹ (paragraph 447), the host state initiated a counterclaim against the claimant for breaching environmental laws. The Tribunals ordered compensations in favor of Ecuador in both cases.

An important consideration was made in *Aven v. Costa Rica*, highlighting that at the international level, foreign investors also have responsibilities and obligations to comply with. This is particularly evident regarding environmental regulations, considering they are binding *erga omnes*. The Tribunal stated:

“Under international law of investments, particularly under DR-CAFTA, the investors enjoy by themselves a number of rights both substantive and procedural, including the right to sue directly the host State when it breaches its international obligations on foreign investment (Section A of Article 10 in DR-CAFTA). What about the investor’s obligations arising of the investment according to international law? This Tribunal shares the views of Urbaser Tribunal that it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law. It is particularly convincing when it comes to rights and obligations that are the concern of all States, as it happens in the protection of the environment. It is pertinent to recall the observation of the International Court of Justice regarding this kind of obligations: “In view of the importance of the rights involved, all States can be held to

⁵⁸ Joshi & Gurpur, *op. cit.* note 2, p. 5.

⁵⁹ Choudhury, *op. cit.* note 1, p. 186-187.

⁶⁰ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision On Counterclaims, 7 February 2017, paragraph 889.

⁶¹ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on The Environmental Counterclaim, 11 August 2015, paragraph 447.

have a legal interest in their protection; they are obligations *erga omnes*.”⁶²

One example of this type of argumentation, which concerns the obligations of foreign investors or the necessity to implement regulatory measures to protect human rights, is the saga of cases against Argentina⁶³. These cases emerged in the context of the economic crisis experienced at the end of the XX century, where the state took measures to provide water and gas supply to its people, albeit at the expense of certain foreign investors' interests.

In this saga of arbitration, there are three different categories of response from the arbitral tribunals⁶⁴: firstly, the tribunals denied to assess the arguments in respect to human rights in the measures challenged; secondly, the tribunals acknowledged that human rights are involved in the dispute, but the outcome was not positive to Argentina; third, the tribunal accepted the fact that human rights are involved in the dispute and the argument of the host state was accepted.

In the first category, in the case of CMS v Argentina, the claimant challenged certain measures made by the host state regarding the tariff adjustment formula for gas transportation. Argentina alleged that the measures were taken to protect economic and social rights. However, the Tribunal dismissed this argument because no human rights collisions were involved in the dispute:

“So too, Article 31 of the Constitution mandates that the Constitution the laws enacted under it and treaties are “the supreme law of the Nation.” Indeed, the Argentine courts have a long-standing record of respect for treaties and have duly recognized their hierarchical standing above the law. While treaties in theory could collide with the Constitution, in practice this is not very likely as treaties will be scrutinized in detail by both the Government and Congress.

In this case, the Tribunal does not find any such collision. First because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly because there is no question of affecting fundamental human rights when considering the issues disputed by the parties.”⁶⁵

⁶² David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Award, 18 September 2018, paragraph 738.

⁶³ Joshi & Gurpur, *op. cit.* note 2, p. 5.

⁶⁴ *Ibid.*, p. 5.

⁶⁵ CMS Gas v Argentine Republic, ICSID Case No ARB/01/8, Award, 12 May 2005, paragraphs 120-121.

The same outcome arose in *Azurix v. Argentina* and *Siemens A.G. v. Argentina*, where similar arguments were used. However, the Tribunals dismissed the arguments, stating that there is no compatibility between human rights and the investment treaty.⁶⁶

In the second category, in the case of *SAUR International v. Argentina*, the Tribunal acknowledged that human rights, including the right to water, should be taken into account in the dispute, but also stated that property is a human right. In that case, the Tribunal ordered Argentina to compensate the claimant. However, the Tribunal mentioned:

“In reality, human rights in general, and the right to water in particular, constitute one of the several sources that the Tribunal must take into consideration to settle the dispute, as these rights are integrated into the Argentine legal system with constitutional rank, and also form part of the general principles of international law. Access to potable water constitutes, from the State's point of view, a basic public service, and from the citizen's perspective, a fundamental right. Therefore, in this matter, the legal framework can and should reserve to the legitimate public authority functions of planning, supervision, policing, sanctioning, intervention, and even rescission, in protection of the general interest.”⁶⁷

In the third category, the case of *Urbaser v. Argentina* is a good example of successful argumentation on human rights to limit the liability of the respondent state under the obligations of the international investment agreement. In this case, Argentina made a counterclaim, arguing that the claimant failed to provide water and sewage services to the population. The Tribunal found that the provisions of the BIT should be harmonized with the principles of international law, which not only enshrined rights but also obligations. On that occasion, the Tribunal stated:

“The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities’ operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on

⁶⁶ Joshi & Gurpur, *op. cit.* note 2, p. 5.

⁶⁷ *SAUR International S.A. v Republic of Argentina*, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, paragraph 330.

their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.”⁶⁸

Finally, the counterclaim was dismissed in the argumentation of human rights because the claimant is not responsible for the protection of human rights, particularly the right to water supply, but is bound to comply with the obligations and duties of the concession contract. The Tribunal observed:

AGBA's performance and its shareholders' investment were certainly designed as a substantial contribution to the enforcement of the population's right to water. Nevertheless, the mere relevance of this human right under international law does not imply that AGBA and its shareholders were holding corresponding obligations equally based on international law. No human rights obligation to provide access to water existed on part of Claimants before they entered into the Concession. The acceptance of the Bid and the Concession Contract could not have as an effect that the obligations arising out under this Contract became, in addition or in parallel, obligations based on international law. The BIT does not contain any indication in such a direction, and its reference to general principles of international law in Article X(5) cannot let emerge an obligation that did not exist on charge of the investing companies before they entered into their investment in the Argentine Republic.⁶⁹

4. CONCLUSION

Harmonization between human rights and business is necessary and desirable, and essentially, attempts to achieve this purpose have been made by including provisions in international investment agreements or through the interpretation of arbitral tribunals. For this reason, the efforts made by the United Nations with the Guiding Principles on Business and Human Rights regarding corporate responsibility to respect human rights were important. Similarly, the Hague Rules on Business and Human Rights address the same issue. These documents serve as guides to achieve a better balance between human rights and investor protection within the framework of international investment law, and they could inform the drafting of future international investment agreements.

⁶⁸ Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic, ICSID Case No ARB/07/26, Award, 8 December 2016, paragraph 1195.

⁶⁹ *Ibid*, paragraph 1212.

Despite these efforts, the world is far from achieving this harmonization, considering that the inclusion of obligations for states and investors in international investment agreements is rare. For this reason, it is important to take a closer look at Africa. African countries, especially those belonging to SADC and COMESA, have shown the world that the inclusion of obligations for all parties, including investors, in international investment agreements is possible. This initiative should be considered by the rest of the international community to provide more tools to realize human rights, especially in the context of business.

On the other hand, arbitral tribunals should also take into account that in a dispute of international investment, not only the treaty is a source of law, but also other legal instruments in international law, such as human rights, considering Article 31(3)(c) of the Vienna Convention. This interpretative framework could be useful for achieving a better balance in arbitral decisions regarding human rights and the interests of foreign investors.

However, the efforts mentioned above are not sufficient; there are further opportunities to harmonize human rights. Indeed, the discussion could be more productive with broader engagement from those directly affected by foreign investors or inadequate regulations. Additionally, ensuring accountability for investors should be paramount. Establishing mechanisms whereby they demonstrate their commitment to promoting and protecting human rights to the international community is crucial. In cases of violations, they must be held accountable at the international level, not solely at the domestic level as is currently the case. Additionally, safeguarding investments should also prioritize a stakeholder approach, which entails soliciting input and proposals from social organizations and communities.

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THE HYPOTHESIS OF BALANCING FRANCHISE DISPUTE RESOLUTION: COURT AND ARBITRATION MATTERS

ABSTRACT

The paper examines franchise dispute resolution scenarios based on drawing comparative research findings and places the author's assumption of the further approach of legal proceedings. Therefore, it found the research gap by applying study results from the literature and analyzing alternative dispute resolution. Thus, the research cited not only distinguished legal coordination but also the briefing of notable franchise litigations in the US and some EU countries. Namely, the importance of the study was act comparisons between law texts, while considering civil procedure matters linked to jurisdiction and tribunal field. Consequently, it covers pursuing legal globalism, and best practices in the Western world. As a result of the research, except in the occasion of class action, I suggest that franchise disputes be resolved through arbitration or other flexible ways rather than litigation. However, it does not mean a downgrade value of the court. To elaborate and strengthen the credibility of research, pre-contractual and post-contractual, arbitral, and judicial dual jurisdiction were taken into account. Comparing franchising practices across different industries, or periods was expected to identify commonalities and differences to gain a nuanced comprehension of how contextual factors influence franchise dynamics which was necessary to inquire or re-think about appropriate franchise lawsuit resolutions.

Keywords: Franchise, Arbitration, Jurisdiction, Forum Selection, B2B

1. INTRODUCTION

Examining how to resolve franchise disputes compares the complexities of the civil procedure, then leads to an analysis of which option is best to use in what kind of circumstances. Hence it is necessary for more comparative studies to fill the research gap or to support a win-win game. My study is directed at this purpose and I considered franchise theoretical and practical questions as follows.

The main reasons for the research question emerge from considering the fundamental principles of legal philosophy. Namely, the rule by law means that legal subjects shall abide by the requirements of certain regulations enacted through legislative powers. Whereas the rule of law teaches all are equal before the law, and have free will to exercise.¹ Hence, the balance is essential for upholding the rule of law and ensuring that legal disputes are resolved equitably and alternatively. The balance requires an adjustment of competing interests to maintain negotiation liberty. A contract procedure rule is a plain example of it. In particular, a commercial contract is considered the priority regulation regarding businesses with combining company law.

The traditional civil procedure aims usually to regulate general issues related to material and non-material wealth, but it is still not good enough for business activities in various jurisdictions. There is a need to enrich and clarify the norms that comprehensively coordinate business relations between traders, i.e. B2B communication. In other words, the Civil Code and its procedure mainly regulate C2C or C2B relationships between consumers and entrepreneurs. However, the principles of protecting business interests between for-profit entrepreneurs, freedom of contract parties, quick, and cost-effective negotiation, and accountability are not sufficiently implemented.

While most participants in everyday private law communications are persons, the parties in franchise agreements are typically licensors and intellectual property owners.² That being so, contract law should provide an interactive framework for social, and economic compounds and encompass market goals.

According to common concepts, contract law has one language with its own set of principles, rules, and doctrines aimed at regulating the relationships and associations between entities.³ Nevertheless, distinction in the continental system has separate pieces of legislation known as codification, whereas Common law consists of judge-made rules. For instance, Inquisitorial and Adversarial forms are practical models of them. While the inquisitive form is a way, too focused on a court proceeding that refers to litigation, the accusatorial form tends to engage in alternative dispute resolution. From this point, the philosophical root of dispute resolution manner starts, I would say.

¹ Stein, A., *What Exactly Is the Rule of Law?* University of Minnesota Law School, 2019, Volume 185, p.187.

² Florea, D., Gales, N., *Franchise contract in international trade law*. European Journal of Law and Public Administration, 2022, Volume 9, pp.12-22.

³ Emerson, W., *Franchising and the Collective Rights of Franchisees*, Vanderbilt Law Review, 1990, Volume 43, p.1507.

Today countries with civil law systems, arbitral power is less than the court and in case of enforcing an arbitral award, it needs to file again to the court. The reason is judicial bodies have more power than defense lawyers and arbiters. Besides, the court handles all evidence in advance and aims to make a decision directly. It shows that, in some law fields, we still need to resolve conflicted questions to prevent unbalance.

As mentioned before, legal subjects enter into some type of negotiation daily, thereby taking part in a relationship in which obligations and rights are granted to others. If the controversy that arose between them cannot be resolved by consensus, it goes to a third party for deciding, and that role has been performed by the courts for hundreds of years. Even though, countries have found that the option of alternative dispute resolution improves the local business enabling environment and helps increase investors' confidence. Franchise agreements often involve ongoing business relationships and disputes are a bright example of settling contract or commercial lawsuits. Because franchise partnerships have the type of B2B. Arbitration and mediation allow B2B parties to work together to find mutually acceptable solutions, potentially preserving the franchisor-franchisee bond and avoiding further damage.⁴

Regardless of the branch, arbitration can provide a sound alternative to resolve contract and commercial disputes. First of all, tribunals can provide a level playing field and ensure that disputes are adjudicated by professionals who understand the complexities of the industry. Moreover, arbitration institutions have rules and procedures specifically designed for international disputes, providing a neutral forum for parties from different jurisdictions to resolve their conflicts.⁵ Therefore, the enhancement of the non-judicial sector can help the court ease its burden and focus on commercial priorities and the reform is an ongoing process. As previously quoted, there are no absolute winners in contract disputes unless one party has been misled or deceived the another. Hence the question arises of where and how to resolve the disagreement between disputers with flexibility. Therefore, dispute resolution form is an important issue for fields of International franchises concerning investment or intellectual property infringements, and market competition.

When selecting a dispute resolution forum, parties should consider jurisdictional issues, including the enforceability of judgments or awards in the relevant frame. Understanding the legal landscape and potential challenges associated with

⁴ Kerkovic, M., *The main Directions in Comparative Franchising regulations*, European Research Studies, 2010, Volume XIII, p.109.

⁵ Zeidman, P., *With the Best of Intentions: Observations on the International Regulation of Franchising*, Stanford Journal of Law, Business & Finance, 2014. Volume 19, p.264.

enforcement is essential in choosing the most appropriate forum. Ultimately, the choice of dispute resolution forum will depend on various factors, concerning the nature of the dispute, the preferences of the parties involved, and the specific circumstances of the franchise agreement. By carefully considering these factors, when necessary, parties can select a dispute resolution method that offers effectiveness in resolving international franchise quarrels.

Given the complexities of franchises and the multitude of potential disputes that can arise, selecting the appropriate dispute resolution forum is indeed crucial. The balancing of dispute resolution means that, while avoiding bias, business-to-business contractual relationships should be distinguished from typical contract dispute resolution forums due to the specialty of franchise and other similar law issues.

2. THE QUESTION OF LEGALLY BINDING

Each form of dispute resolution has advantages and disadvantages; however, the best form of franchise dispute resolution should be in a soft way. In most cases, a combination of approaches, concerning negotiation followed by mediation or arbitration, if necessary, could be the most effective way to resolve franchise disputes.

Namely, negotiation is the best approach when the dispute is relatively minor or when the parties have a good working relationship. It allows for flexibility in finding a mutually agreeable solution for B2B. Nevertheless, it does not belong official resolution structure, and conflict may arise again. Arbitration is advantageous more than negotiation because it typically offers a faster resolution compared to litigation and can be less formal. However, the decision made by the arbiter is binding, which means there is limited recourse if one party is disappointed with the outcome.⁶

Some disputes would benefit from a scenario of different dispute resolution methods. For example, parties may engage in negotiation first, with arbitration as a fallback option if negotiation is unsuccessful. This hybrid approach can provide credibility while still ensuring a binding resolution if needed.

Litigation can be necessary for certain situations, such as when there are significant legal complex issues at stake or when other forms of dispute

⁶ Guide to International Master Franchise Arrangements, UNIDROIT, 1998, Chapter 17, p.8.

resolution have failed. However, it should generally be considered a last resort. For instance, franchise disputes can involve complex legal issues, including serious breach of contract, intellectual property rights, and violations of franchise regulations.⁷ Navigating these complex issues requires a thorough understanding of franchise, contract, and intellectual property laws, and other relevant regulatory frameworks. Moreover, franchise agreements typically outline the rights and obligations of both the franchisor and the franchisee. Disputes may arise when one party alleges that the other has failed to fulfill its contractual obligations. This could include issues such as missing to pay royalties, breach of territorial rights, or non-compliance with operational standards.

On the other hand, disputes would be complicated if either party alleges non-compliance with obligatory franchise regulations, such as not fulfilling required disclosures, or violation of statutory duties or standards. Disputes can arise whether the franchisee uses the intellectual property in a manner not authorized by the agreement or there are allegations of trademark infringement, copyright violation, or misappropriation of trade secrets as well. If the dispute involves significant financial losses or other serious issues that cannot be resolved through negotiation, court litigation may be necessary to protect the interests of both parties.

Furthermore, court proceedings are a matter of public record, which means that the details of the dispute, including evidence and legal arguments presented by both parties, become part of the public domain. This transparency can be advantageous in cases where one party seeks to hold the other accountable for wrongdoing or breaches of contract. On the contrary, arbitration awards do not create the same type of formal legal precedent as court decisions do. For the reason that disputes are awarded behind closed doors at the request of the parties. Frankly, arbitration proceedings are often conducted behind closed doors and are confidential by nature. This means that the details of the dispute, the evidence presented, and the arbitrator's reasoning are not typically made public. Without public access to this information, arbitration awards do not have the same impact on shaping the law or influencing future cases as court decisions, which are part of the public record and can be cited as legal precedents. Because arbitration awards are based on the specific facts and circumstances of each case, they are generally seen as applying only to the parties involved in that particular arbitration and do not have broader legal implications for other parties or future disputes.

⁷ IP disputes and resolution strategy in franchising industry: a case study, WIPO. 2007, p.7. https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=85963

Arbitration awards are subject to limited review by the courts. While courts may review awards to ensure that they are not in violation of public policy or that the arbitrator did not exceed their authority, they generally do not scrutinize the merits of the decision itself. However, arbitration awards can still be persuasive in future disputes, particularly if they are well-reasoned and based on legal principles, even though they may not carry the same formal weight as court precedents.

Quarrel resolvers must base their judgments solely on the facts and applicable law, without being influenced by personal biases or external pressures. It does include various principles and rules aimed at ensuring that all parties to a civil lawsuit are treated fairly and that their rights are protected throughout the legal process. Regarding due process, it requires that parties to a lawsuit are given notice of the proceedings against them and an opportunity to be heard. It ensures that individuals have a fair chance to present their case and defend themselves before a neutral decision-maker.⁸ While court litigation can provide a final and binding resolution to franchise disputes, parties should consider available options to determine the most appropriate course of action based on the specific circumstances of the case.

In the past period, a court was a form of power that implemented the functions of the state, so it is considered the most reliable way to balance disputes. Courts were being indeed played a central role in administering justice and resolving disputes, serving as an essential institution for upholding the rule of law. Nonetheless, dispute resolution manners gradually have changed in progressive ways. While courts have been traditionally relied upon to balance disputes, it's important to recognize that alternative dispute resolution methods, such as mediation and arbitration, have gained prominence in recent years.

Nowadays, two types of suit resolution have dominated around the world. As mentioned before, the adversary process supports options for solving disputes such as conciliator, mediator, and arbitrator as parallel to the court. Therefore, I consider that this is not just a matter of the legal system, but an effective way to diversify the dispute resolution ways. The issue of ensuring legal balance is not a matter of worshipping one way or the other, so every option, such as court, arbitration, or mediation, should be given an equal footing.

⁸ Model Franchise Disclosure Law, UNIDROIT, 2002, Article 85(G)

3. WHY DO FRANCHISE QUARRELS FIT ALTERNATIVE DISPUTE RESOLUTIONS?

As regards the case of transnational businesses such as franchises, prefer to choose mediators or arbitrators instead of filing a lawsuit in the territorial jurisdiction. That's why, mediation and arbitration offer transnational businesses an effective alternative to traditional litigation for resolving disputes across borders. By choosing mediators or arbitrators with expertise in international law and cross-border transactions, parties can achieve efficient resolutions that preserve their business relationships.

Take an example, only in Europe has the number of intellectual property or patent infringements increased by 8 percent in the last 5 years as well.⁹ Major disputes belong to in fields of competition and intellectual property.

Because, a franchise requires transparency, fair competition, vertical restraints, and a well-negotiated payment schedule since it is a legally binding agreement and business model for transmitting intellectual property to the economy. Franchise agreements should provide clear and comprehensive information regarding the rights, obligations, and expectations of both the franchisor and the franchisee. This includes details about fees, royalties, territorial rights, operational standards, and any restrictions or limitations imposed by the franchisor.

Transparency fosters trust and helps mitigate misunderstandings or disputes down the line. Besides, franchising operates within a competitive marketplace, and it's crucial to ensure that franchise agreements do not unfairly restrict competition or stifle innovation. Even so, franchisors should avoid engaging in anti-competitive practices, such as price-fixing, immoral market allocation, or imposing unreasonable restrictions on franchisees that hinder their ability to compete effectively.

The goal of resolving a franchise contract dispute is to find the cause of the conflict between the parties and offer a practical solution to them. Hence, depending on the situation, franchise or other patent disputes are more likely to be settled in alternative dispute resolution. In the field of investment and

⁹ Total annual number of cases of international arbitrations, mediations, and adjudications, 2022 in the United Kingdom, see: <https://www.statista.com/statistics/611403/international-legal-services-activity-in-the-united-kingdom-uk/>

intellectual property negotiations, arbitration is the appropriate form of dispute resolution.¹⁰

Namely, as for the franchise agreement, arbitration¹¹ is a distinctive dispute resolution forum requiring rational decisions of the parties before submission to arbitration. Moreover, for franchisees who wish to remain in their respective systems, arbitration is less adversarial.¹² The reason, it is troublesome with the countries have a variety of legal arrangements for civil procedure. Consequently, arbitration offers the parties dispute settlement outside of the framework of national courts. However, unlike an arbitrator, other soft versions of dispute settlement such as a mediator do not make a mandatory decision for the parties. Therefore, patent and license disputes are rarely brought to the mediator. Nevertheless, the coercive power of the arbitrators is less than the court in most countries, so this is common where a lawsuit is filed again to the court to enforce the awards.

However, questions about jurisdiction have already been decided in some countries. As common law jurisdiction, does strongly supports the principle of party autonomy in international arbitration. This means that if parties have a valid arbitration agreement that is reasonable ground to finalize a dispute, the courts in these jurisdictions are generally inclined to stay in court proceedings and enforce the arbitration agreement. For example, England and Australian courts support the autonomy of international arbitration and will stay court proceedings in the presence of a valid arbitration agreement broad enough to cover the dispute.¹³ In this way, the contract law of the countries has been reformed from time to time. Due to such renewed law coordination, international arbitration cases may doubled in the UK over the last decade.¹⁴

As in many jurisdictions around the world, EU countries typically uphold the principle of party autonomy in arbitration. This means that parties are generally free to choose arbitration as the method for resolving their disputes and to determine the procedures and rules that will govern the arbitration process. Arbitration remains a popular and effective means of resolving disputes in the EU, particularly in international commercial matters. The EU has adopted

¹⁰ Stavros, B., Julian, L., & Loukas, M., *The evolution and future of international arbitration*, Kluwer Law, 2016, p.5.

¹¹ Andrews, N., *Arbitration & Mediation*, Intersentia, 2013, p.89.

¹² Pressman, A., Peabody, N., & Klein, J., *The strategy of Arbitration*, ABA, 2012, p.14.

¹³ General Ed: J William Rowley QC., *Arbitration world. Jurisdictional comparison*, Reference, 2004, p.119.

¹⁴ Total annual number of cases of international arbitrations, mediations, and adjudications in UK 2009-2019, see: <https://www.statista.com/statistics/611403/international-legal-services-activity-in-the-united-kingdom-uk/>

several directives and regulations that promote and support arbitration within the member states. Moreover, Directive 2008/52/EC on mediation in civil and commercial matters encourages the use of mediation as an alternative dispute resolution, including in cross-border disputes within the EU.

If take an example, in Germany, the franchisor and franchisee may agree to seek arbitration, in case of a dispute. The German Civil Procedure Act¹⁵ (Schiedsgerichtsgesetz) governs arbitration proceedings. The act provides a legal framework for parties to submit their disputes to arbitration and ensures the enforceability of arbitration agreements and awards. The parties are free to determine the essential framework of such a procedure themselves. Further advantages of arbitration are that these proceedings can be held confidential and arbitration awards are easily enforceable, especially with decisions of foreign courts outside the European Economic Area and Switzerland.¹⁶

For instance, the US fast-food chain “Subway” a Franchisor, and a German Franchisee entered into a contract for the operation of a branch in Germany. The contract was based on the Franchisor’s multi-purpose standard form contract which was governed by the law of Liechtenstein and under the Arbitration Rules of the UN Commission on International Trade Law.¹⁷ A dispute arose and the Franchisor initiated arbitration proceedings before the American Dispute Resolution Center in Glastonbury, New York, and obtained a favorable arbitral award which it sought to enforce in Germany before the Higher Regional Court in Dresden. It concluded that since all three arbitration clauses were valid, the franchisee’s counterclaims were inadmissible based on the application by analogy of Section 1032(1) of the German Civil Procedure Code.¹⁸

The main legislation governing arbitration in Italy is Law No. 353/1990, also known as the Italian Arbitration Act (*Legge sull'Arbitrato*). The law is based on the UNCITRAL Model Law on International Commercial Arbitration and provides comprehensive provisions for domestic and international arbitration proceedings. Arbitration law upholds the principle of party autonomy in arbitration, allowing parties to agree to resolve their disputes through arbitration and to determine the procedures and rules that will govern the arbitration process. Italian courts have a pro-arbitration approach and are generally

¹⁵ Section 1029-1033, German Arbitration law, Section 1025.

¹⁶ Rohrßen., B., Carandente., G., & Co-Editor Zeidman, P., *Germany Franchise and Licensing*, Lexology, 2021, p.7.

¹⁷ Certainly, the monist form regards international and national private law as two parts of a single system.

¹⁸ Oberlandesgericht Dresden/11 Sch 08/07 2007, Germany, see: https://newyorkconvention1958.org/index.php?lvl=concept_see&id=66&page=57&nbr_li_gnes=2124&l_typedoc=

supportive of arbitration agreements and awards. The country has a well-developed legal framework for arbitration and is generally supportive of arbitration as a viable method for resolving franchise disputes. The country is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which facilitates the enforcement of arbitration awards as well.

Arbitration in France is governed primarily by the French Code of Civil Procedure (*Code de procédure civile*), as well as the French Arbitration Code (*Code de l'arbitrage*). These laws provide a comprehensive framework for all arbitration proceedings. According to the Code of Civil Procedure, an arbitration clause is an agreement by which parties to a contract undertake to submit to arbitration any disputes that may arise in relation thereto.¹⁹ Arbitration awards rendered in France are enforceable and have the same legal effect as court judgments. Many franchise agreements in France include arbitration clauses as a way to provide a streamlined and confidential dispute resolution process that is tailored to the specific needs of the franchising industry. Parties may choose to arbitrate their disputes through private arbitration institutions or ad hoc arbitration proceedings, depending on their preferences and the terms of their franchise agreement. While arbitration is not mandatory for franchise disputes in France, it is a commonly used and accepted method of franchise dispute resolution, offering parties an effective alternative to traditional court litigation.

The process of increasing the value of arbitration in the states of the European Union is being implemented in the form of supporting the legal framework and expanding the scope of arbitration, as well as the validity of arbitration decisions. In this regard, the recognition of arbitration alongside domestic courts is considered a policy measure to reduce transnational business and legal conflicts. As a result of this process, there is no question that the judicial power can be over-reduced or that the business dispute resolution process will become unregulated or excessively arbitrary. Instead of it, as markets, contracts, and commercial law are reformed, court involvement will indeed decrease.

4. DISPUTE AFFILIATION IN THE PRE-CONTRACTUAL STAGE

The next questions are a specific affiliation of arbitration and transparency. Courts and Arbitrators have jurisdiction to hear disputes arising from pre-contractual negotiations and agreements, including those related to franchises.

¹⁹ Code of civil procedure - Arbitration in force 1981, Chapter 1. Article 1442.

Parties may bring claims in court alleging breaches of pre-contractual duties, misrepresentation, fraud, or other legal violations. In pre-contractual franchise cases, courts and arbitrators may consider various legal principles, such as the duty of good faith and fair dealing, negligent misrepresentation, and statutory consumer protection laws.

The court has the authority to award remedies such as damages, specific performance, rescission of contracts, or restitution to compensate parties for losses suffered as a result of pre-contractual disputes. Whereas arbitral awards issued in pre-contractual franchise cases are generally enforceable and have the same legal effect as court judgments. The parties are bound by the arbitration agreement and are required to abide by the arbitrators' decisions. Take an example, according to UN Arbitration Rules where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the Arbitration Rules, then such disputes have to be settled in accordance.²⁰ The franchise contract is often made before the dispute arises. Also, an agreement to arbitrate can be made anytime-even after the dispute arises.²¹ Virtually any business matter such as franchise and transnational commerce disputes can be submitted to arbitration or court at any stage of the contract.

Franchise disputes can potentially be resolved before the contract is concluded, although the specific circumstances may vary depending on the nature of the dispute and the willingness of the parties to engage in pre-contractual negotiations or alternative dispute resolution ways. While it's preferable to resolve franchise disputes before the contract is finalized, parties should be mindful of the potential legal and practical implications of entering into binding agreements or making concessions during pre-contractual negotiations.

For instance, in the case of Hoffman v. Red Owl Stores: During preliminary negotiation, Hoffman and Red Owl Stores delivered a promise to give a franchise contract with a conditional precedent. In reliance on Red Owl stores' commitment to invest 18000 USD, Hoffman bought a premise for his prospective store. However, Red Owl stores breached their promises and asked for more investment. Hoffman cannot afford it and the Franchise Contract was not concluded between them. Under the classical legal doctrine, there is no liability during preliminary negotiation and therefore Red Owl Stores was not liable for such expenses paid by Hoffman. Anyway, the court held that Hoffman deserved compensation and awarded him reliance damages for his loss. The

²⁰ UNCITRAL Arbitration Rules, 2013, Article 1.1.

²¹ Fisher, D., Philips, J., *The legal Environment of Business*, West Pub.co, 1986, p.86.

court was only awarding reliance damages for the expenses and not awarding expectation damages since the franchise contract has not been concluded yet.²²

The North American and German courts' practice of dealing with pre-franchise agreements is more sophisticated. Take an example from the case of German, OLG Düsseldorf: The claimant was seeking to reverse the franchise agreement that was concluded between the parties. The franchisee justified this by stating that the defendant had incorrectly informed him in advance that he would maintain business relationships with several customers, from which the claimant, as a potential franchisee, could also profit economically on a large scale. In particular, the franchisor promised a turnover of 33,000 euros for the first four months according to gross planning, but the franchisee was only able to achieve an income of 1500 euros after the conclusion of the franchise agreement in the same period. The court considered the scope of pre-contractual information obligations in franchise contracts in this case. The franchisor's obligation to inform is a basic requirement of any contract. Therefore, courts do consider pre-contractual disputes regardless of their damages.²³ However, there is no specific franchise law in Germany and pre-contractual disclosure is not regulated by special statutes or monitored by a specific agency.²⁴

5. WHAT ABOUT FORUM SELECTION PROVISIONS?

From the perspective of the Franchise Model Law, the parties to the contract have to agree on which laws, courts, or arbitration shall be selected in the event of a dispute. As a result, the door shall have opened to avoid bias, to overcome possible risks, and to simplify difficulties through joint principles.

The Model law requires the disclosure of forum selection or choice of law provisions. In international situations, franchisors often impose the provisions relating to these items.²⁵ The consequence is a forum that the franchisor finds convenient, often in its own country, and that the law that applies to the contract is the law of the State of origin of the franchisor. This might give rise to problems for the franchisee, who will be less familiar with the law of the

²² Hoffman v. Red Owl Stores Inc.-26 USA. Wis. 2 d 683, 133 N.W.2d 267.1965; see: Donald, H., Dennis, T., *Contract law today: Anglo-French comparison*, Oxford: Clarendon Press. 1989, p.27.

²³ OLG Düsseldorf GER, Urteil vom 25.10.2013 – Az. 1-22 U 62/13., see: <https://www.evers-vertriebsrecht.de/mandanten/franchisenehmer/>

²⁴ Waldzus, D., *Germany – pre-contractual disclosure requirements and relevant case law*, International Journal of Franchising Law, 2014, Vol. 12.p.3.

²⁵ Model Franchise Disclosure Law 2002, UNIDROIT.

franchisor's state. Hence, the prospective franchisee needs to know which arbitration rules will apply and which court will be seized of any dispute, in particular considering that the expenses faced by the parties may differ.

Therefore, most franchise agreements contain a forum selection clause that governs the location of where disputes between the parties should or must be resolved. Parties to a franchise agreement should understand the legal distinction between permissive and mandatory forum selection clauses. When parties agree to refer their disputes to arbitration under specific arbitration rules, they are bound to settle their disputes by those rules. This agreement typically forms part of the arbitration clause within their contract or agreement. For instance, in the case of litigation, the parties cannot choose their courts, as they will be decided by territorial jurisdiction. Considering it from this point, arbitration procedures, which are more in line with international law, sometimes conflict with the national judicial system.

In particular, it is necessary to mention the extreme of agreements containing provisions to the effect that investment disputes will be subject to the law of the host state.²⁶ In the majority of cases applicable law includes both international law as well as the law of the host state and in the case of a transnational franchise agreement, the parties usually provide for the choice of arbitration or an international specialized court.²⁷

For every arbitration proceeding there is an underlying agreement to arbitrate, by which the parties agree to submit their dispute to an arbitral tribunal. The agreement to arbitrate is also where the parties determine some aspects of the procedure to be followed by the tribunal. One essential element that the parties should specify is whether their arbitration will be ad hoc or institutional and what arbitration rules will be applied.

The jurisdiction of disputes varies from country to country and is largely governed by arbitration law. For example, in the EU zone, legal disputes must be resolved, first through mediation and, if it fails, through arbitration "organized or approved by a European Franchise Federation National Association Member" or through litigation.²⁸ Franchise law cases are often handled at the national level

²⁶ Alexander, J., *Arbitration, order public and criminal law*, Taxon, 2009, p.361.

²⁷ The New York Convention on foreign arbitration, by Article V (1) (e) lays down a procedural norm that an arbitral award, duly rendered, attains finality if, and only if, a domestic court endorses it. See: Covindaraj, C., *Private International Law*, Oxford University Press, 2018, p.127.

²⁸ Code of ethics, European Franchise Federation 2016, Article 2.4. & "See", Gordon, B., Philip, L., *EU and US antitrust Arbitration*, Kluwer Law, 2011, pp.11-45.

rather than by a specific European court dedicated to franchise issues. However, there have been instances where EU directives or regulations have influenced franchise-related matters within member states.

Although countries are taking decisive steps to accept broad dispute resolution powers and adopt flexible commercial law policies, contracting parties retain the right to choose their jurisdiction. The formal protection of the forum selection right is mandatory in the written contract itself and prevents interfering with the choices of the parties to the contract.

6. THE COERCIVE POWER OF THE ARBITRATION

Recently common law countries started to adopt statute laws, while civil law countries are studying case law in their court affair. The mixed system is becoming more ideal in countries and both systems have the same purpose of adherence to due process of law.

Some countries have anti-suit policies for the parties' satisfaction. It is a matter of "*Res Judicata*" and so good practice to restrict double jurisdiction. By implementing anti-suit policies, countries aim to promote the effectiveness and enforceability of arbitration agreements and other chosen dispute resolution methods in franchise agreements. These policies help ensure that parties' rights and obligations are determined following the agreed-upon procedures and forums, thereby enhancing legal certainty and facilitating the resolution of franchise disputes fairly and efficiently. The laws may restrict or prohibit parties from pursuing litigation in foreign jurisdictions or forums outside of the agreed dispute resolution manner, such as arbitration. By preventing parties from initiating legal proceedings in jurisdictions other than those agreed upon in the franchise contract, anti-suit policies seek to uphold the integrity of the chosen dispute resolution process and prevent forum shopping or tactical litigation.

Andrews cited, that English law has employed anti-suit injunctions for many years to the satisfaction of aggrieved parties to arbitration agreements. An anti-suit injunction is a court order that prohibits a party from pursuing legal proceedings in another jurisdiction or forum, typically when there is a valid and binding agreement to resolve disputes through arbitration or in a specific court. In the context of franchise disputes, English courts do grant anti-suit injunctions to prevent a party from initiating or continuing litigation in a foreign jurisdiction in breach of an arbitration agreement or forum selection clause.

The English court would consider factors such as the validity and scope of the arbitration agreement, the parties' intentions, and the principles of international comity in deciding whether to grant the injunction. In deciding whether to grant an anti-suit injunction in franchise disputes, English courts could also consider the public interest, fairness, and the interests of justice. Courts shall balance the parties' contractual rights and obligations with broader policy considerations, such as the promotion of arbitration as an efficient and effective means of dispute resolution, and the principle of party autonomy in contract law.

Canadian courts also grant anti-suit relief as well.²⁹ If the franchise agreement contains a forum selection clause designating Canadian courts as the exclusive forum for resolving disputes, and one party commences legal proceedings in a foreign jurisdiction in violation of this clause, the other party may seek an anti-suit injunction. In deciding whether to grant an anti-suit injunction in franchise disputes, Canadian courts will balance the interests of the parties and consider the public interest. Ultimately, the decision to grant an anti-suit injunction rests within the discretion of the Canadian court, which will assess the merits of the case and exercise its equitable jurisdiction to provide appropriate relief.

Regarding Europe, the OLG Dresden, Decision of 2007, 11 Sch 8/07 is an example of how if any contract is governed by Arbitration Rules, the domestic court would not accept counterclaims. This norm is applicable as the contract is governed by the private law of Lichtenstein, where the Austrian ABGB is the applicable law for such cases. The sole objective of this arbitration clause was to further increase the imbalance in power between the commercially less adept franchisee and the franchisor, with the help of the US American parent company.³⁰

7. FRANCHISE CLASS LAWSUIT

Technically, an agreement takes either the form of an arbitration clause or a submission agreement.³¹ Such provisions can include permission for mass or complex mediation, and multi-party arbitration.³² Furthermore, franchisees

²⁹ Andrews, N., *Arbitration & Mediation*, Intersentia, 2013, Vol. II. p.233.

³⁰ Wiewirowska, A., *Franchising Study*, EU, Policy Department A: Economic and Scientific Policy, 2016, p.125.

³¹ General Ed: Rowley, J., *Arbitration world. Jurisdictional comparison, Reference*, 2004, p.8.

³² Garner, M., Hagedorn, S., & MacPhee, L., *Mass litigation by Franchisees*, IFA, 2012, p.8.

accept the need, for practical, economic, and other reasons, to unite as a group to challenge franchisor actions in the same proceeding.³³

To the court, mass franchise actions are joint of more than one petitioner who participates in a class of franchisees against the respondent. For instance, owners of “Meineke Discount Muffler” franchises sued franchisor corporates. The plaintiffs claimed that the franchisor’s handling of advertising breached the Franchise and Trademark Agreements. The plaintiffs also advanced a raft of tort and statutory unfair trade practices claims arising out of the same conduct. Finally, they won a 390 million USD judgment against the franchisor and its affiliated parties. To conclude, the first obstacle to class treatment of this suit was a conflict of interest between groups of franchisees concerning the appropriate relief.³⁴

The above sort of claim exists in both arbitral and court proceedings which belong to common law and statutory, or international law. In comparison, participant in class action whether to apply for arbitration or join a lawsuit is a matter of will for the franchisee. Also, contract disputes cannot be forced to submit arbitration only excepting agreed-upon by all parties.

The arbitral award should be overturned if the arbitrator exceeds its power. Namely, *Bazzle v. Green Tree Financial Corp*, and *Stolt-Nielsen v. Animal Feeds International Corp* cases from the US Courts exhibit courts and arbiters how should approach any class action.

In an attempt to solve a contract dispute, Lynn and Burt Bazzle filed suit against Green Tree Corporation. After they filed the suit, Plaintiff learned that other respondent’s customers were dealing with the same sort of dispute. As a result, they asked for and received permission to file a class action suit. However, Green Tree contracts had a clause requiring that any contract disputes be settled by an arbitrator. Green Tree asked the court to revoke the class certification because the Federal Arbitration Act, it argued, did not permit class-wide arbitration. Instead, the arbitration would have to be conducted on a case-by-case basis.³⁵ The South Carolina Supreme Court disagreed, ruling that, unless specifically banned in the contract, class-wide³⁶ arbitration could be permitted by the courts.³⁷

³³ Heller, M., Zarco, R., *The most significant franchise cases of all time*, ABA, 2014, p.16.

³⁴ *Broussard v. Meineke Discount Muffler Shops* 1998, US, No.87-1808., see: <https://casetext.com/case/broussard-v-meineke-discount-muffler-shops-inc>

³⁵ “*Green Tree Financial Corp. v. Bazzle*, 539 US 444. 2003, “See”, in www.oyez.org/cases/2002/02-634

³⁶ A legal case organized by a group of people. “See”, Susan. W., *Law Dictionary*, Merriam-Webster, 2006, p.11.

Another example of class action, in 2015 chain franchise Jimmy John's faced controversy over its fulfillment of non-compete agreements with its franchise employees. The case involved arbitration proceedings initiated by franchisees. The dispute highlighted the challenges and legal considerations related to non-compete clauses in franchise agreements. Consequently, a United States District Court in Illinois issued an opinion and order which held that two employee plaintiffs did not have standing to pursue their claims for declaratory relief to determine the legal interests, validity, and enforceability of the Confidentiality and Non-Competition Agreements.³⁸

8. TRANSPARENCY REQUIREMENTS AND PECUNIARY DAMAGES

Many countries have specific laws or regulations that mandate franchisors to provide disclosure documents to prospective franchisees. These documents typically include details about the franchise system, the franchisor's financial performance, the obligations and responsibilities of the parties, any fees or payments required, and other relevant information.³⁹

Franchisors are often required to provide these disclosure documents a certain number of days before the franchise agreement is signed to give prospective franchisees ample time to review the information. Even in jurisdictions without specific franchise disclosure laws, franchisors may still have common law duties to provide accurate and complete information to prospective franchisees. Courts may impose a duty of good faith, fair dealing, or full disclosure on franchisors, requiring them to act honestly and transparently in their dealings with franchisees.

Franchise transparency requirements aim to protect the interests of franchisees by ensuring they have access to the information they need to make informed decisions about entering into a franchise agreement. Courts can provide relief for pecuniary damages resulting from a lack of transparency through various legal remedies, including monetary damages and other forms of relief to compensate franchisees for their losses.

³⁷ David, G., *Class action alert*, Nixon Peabody LLP 2003, p.1.

³⁸ *Brunner v. Liautaud*, US 14-C-5509. 2015, see: <https://casetext.com/case/brunner-v-james-john-liautaud-jimmy-johns-llc>

³⁹ Levitt, N., Tyre, H., & Ward, P. *Controlling Your International Franchise System*, ABA, 2010.

In cases where a franchisor's lack of transparency or misrepresentation has caused pecuniary damages to a franchisee, courts may order various forms of relief to compensate the franchisee for their losses. This could include monetary damages to cover the franchisee's financial losses, as well as other forms of relief such as rescission of the franchise agreement, restitution, or specific performance. Franchisees must mitigate their damages by taking reasonable steps to minimize their losses once they become aware of a breach of contract or misrepresentation by the franchisor. Failure to mitigate damages may affect the amount of compensation awarded by the court.

Along with the general principle of contract law, where a party breaches the obligations imposed on it by the contract, this usually results in a claim for damages. For example, German law goes even further than this and partially grants claims for damages if a breach of duty occurs even when no contract has yet been concluded. Therefore, there is an obligation on the franchisor to clarify the profitability of the franchise system on an accurate factual basis in other words, truthfully as a whole. The duty of disclosure includes making accurate statements regarding the turnover to be achieved and, in particular, not presenting the franchise system as more successful than it is.⁴⁰

German courts have stressed that, as a rule, a franchisee should obtain information on its initiative about the general market conditions and their impact on the prospective franchised business. It reflects the expectation that franchisees should conduct due diligence and assess the viability of the franchise opportunity before entering into a franchise agreement. German courts expect franchisees to exercise reasonable care and diligence in evaluating the franchise opportunity. It includes researching and understanding the relevant market conditions, such as consumer demand, competition, economic trends, and regulatory requirements. While franchisors are typically responsible for providing certain information about the franchise system, German courts recognize that franchisees also have a responsibility to gather information independently. This helps mitigate information asymmetry and ensures that franchisees make informed decisions about the franchise investment. However, if there are particular circumstances about which only the franchisor is aware, and which would be important to the potential franchisee's decision as to whether to enter into the franchise contract, the franchisor must disclose that information. German case law has ruled that a franchisor must refrain from providing misleading information about the

⁴⁰ Greifeneder, S., Schwind, E., *The scope of pre-contractual information obligations in franchise contracts* 2019.

franchise system and must disclose all relevant information about it to avoid subsequent damage claims.⁴¹

9. DISPUTES RELATED TO BUSINESS FORMAT FRANCHISING

Franchisees raise concerns about the quality or consistency of products or services supplied by the franchisor. Disputes can arise over the allocation of advertising and marketing funds, as well as the effectiveness of marketing campaigns question the adequacy of marketing support provided by the franchisor, or dispute the use of advertising funds. Financial disputes probably arise over issues such as royalty fees, accounting practices, or financial reporting by the franchisor. Franchisees might challenge the franchisor's enforcement of operational standards or compliance requirements. This could involve disputes over training programs, operational procedures, or health and safety standards. Also, it is necessary not to miss regulatory compliance issues, such as violations of franchise disclosure laws, consumer protection regulations, or antitrust laws.

Today, most franchise disputes related to licensing, supervision and support, system implication, material, product prices, payments, or accounting, post-termination arise among the franchisor and franchisee, license owner, manufacturer, and distributor. Accordingly, in the proceedings, precedent is used to resolve franchise-related litigation. For instance, The Australian Courts generally look to both American cases and relevant Codes of Australia for guidance on how to define a 'system or marketing plan.'

The court considers the meaning of "franchise agreement" under the Code and sets out several indicators that are to be used when determining the existence of a system or marketing plan. Which includes: a) the provision by the franchisor of a detailed compensation and structure for distributors b) centralized bookkeeping and record-keeping computer operation provided by the franchisor for distributors; c) a scheme prescribed by the franchisor under which a person could become a distributor and director; d) the reservation by the alleged franchisor of the right to screen and approve all promotional materials used by distributors; e) a prohibition on re-packaging of products by distributors; f) the provision of assistance by the alleged franchisor to its distributors in conducting opportunity meetings; g) suggestion by the franchisor of the retail prices to be charged for

⁴¹ Smith, R., Billing, M. 2019. *Franchising in Germany*. Franchise law insider, see: <https://franchiseinsider.quarles.com/2019/09/franchising-in-germany/>

products; h) a comprehensive advertising and promotional program developed by the alleged franchisor.⁴²

For systemizing these helpful indicators were relied upon in the case of ACCC v. Kyloe Pty Ltd. The main issue was whether or not a franchise agreement had been entered into inadvertently between two distribution companies. The Federal Court followed its previous decision in Capital Networks Pty Ltd and clarified the criteria set out in the Code, which determines when an agreement is considered to be a 'franchise agreement'. While the Court found that there was no franchise agreement, in this case, the decision provided a full discussion on the definition of a 'system or marketing plan' as previously explored and solidified the Court's willingness to follow American jurisprudence.⁴³

10. HOW DOES REGULATE CONTRACT TERMINATION DISPUTES?

The main provisions that the parties must agree on when concluding a franchise agreement are market restrictions and termination fees. The agreement sets out how the parties will resolve these issues, which are common in practice, through the courts and arbitration. For example: In the United Kingdom, formal termination that would invoke arbitration or litigation is unusual. Because the franchisor faces disruption costs whenever a franchisee leaves the system, comprising lost royalties, costs of finding premises and a replacement franchisee, and training and promotional costs. So, the same arbitration, renewal, and asset-valuation clauses discussed in connection with lease control are invoked whenever a franchisor wishes to terminate a franchise agreement. Consequently, Franchisors use professional limitation (no competition) restrictive covenants in their contracts.

Franchisees must agree that, on leaving the system, for periods of between six months and two years, they will not compete within the same line of work within their old franchise territories. British and European courts will enforce such covenants as long as they are specific to the business and not too long-lived, as shown by *Connors v. Connors*, *Commercial Plastics v. Vincent*, and the '*Pronuptia*' case in the European Court. An example is given by Avis: "The Licensee undertakes that it will not for 12 months after termination be involved

⁴² FCA 808 (2004) *Capital Networks Pty Ltd v. au Domain Administration Ltd.*, see: Sriporn, C., *Franchising legal frameworks: a comparative study of the DCFR, US law and Australian law regarding franchise contracts*, Universiteit Leiden, 2023, p.49.

⁴³ Jones, L., Ned, E., & Schulz, A., *The inadvertent Franchise*. IBA, IFA joint Conference book, 2010, p.12.

directly or indirectly in any vehicle rental business within the licensed territory.” Thus, much of the investment the franchisee has made in building up his business may become worthless to him upon exit from the franchise network.⁴⁴

The vast majority of civil lawsuits filed in the courts of countries claiming termination of a franchise agreement are due to non-payment of contract fees or royalties. For example, according to the agreement, it set out that the licensee would pay Kangol (appellant) a running royalty of 7.5 percent of the wholesale price of the products bearing the mark. If the licensee fails to pay the appellant the minimum royalty level specified agreement, the appellant may terminate this agreement forthwith. That being so the Court of Appeal held in *Robertson v Kangol* that a trademark license agreement could be terminated with immediate effect due to failure to pay agreed charges.⁴⁵

The judgment of 2020 issued by the Supreme Court of Spain refers to a franchise agreement entered into by two companies. The price clause of the contract established two pecuniary obligations for the franchisee: 1) an initial franchise fee; and 2) monthly royalty payments to be paid during the term of the agreement. About a year and a half after the beginning of the contractual relationship, the franchisee sent the franchisor a termination notice as a consequence of disputes between the parties. In summary, the franchisee claimed that the franchisor had breached its contractual technical assistance and support obligations, while the franchisor claimed the non-payment of several monthly royalty payments.

The Supreme Court concluded that, although in a franchise contract, it is possible to distinguish between benefits of continual performance and others of unique performance, all of these together make up the benefits framework that the franchisor undertakes to provide to the franchisee. In this sense, other than the grant of the contract itself, there is no ‘interest’ of the franchisee that could be deemed fully satisfied by the training and know-how received at the beginning of the contract, since the training and know-how alone are useless once the contract has been terminated. Hence, the partial refund of the initial single-payment franchise fee in a proportion that reflected both the actual duration of the agreement and the term of the contract that was not fulfilled was appropriate and, therefore, the franchisor’s appeal was dismissed.⁴⁶

⁴⁴ Dnes, W., *A Case-Study Analysis of Franchise Contracts* 1993, The University of Chicago press Journals. Vol. 22, pp.371, 387.

⁴⁵ England and Wales Court of Appeal. *Robertson plc v Kangol Ltd* BLD 2301040197. 2004, see: <https://www.bailii.org/ew/cases/EWCA/Civ/2004/63.html>

⁴⁶ *Ed. Abell M., Berenguer, P., Fuentes, M., The franchise law review*, the law reviews, 2021, p.253.

In terms of franchisors need to reject the regulations of the state that violate constitutional principles and interfere with the contractual relationship between franchisors and franchisees. On the other hand, the court must restrain the bias of either party, regardless of whether the government has a legitimate interest in protecting franchisees. Thus, a delicate balance between protecting franchisees from unfair practices and preserving the contractual freedom of franchisors and franchisees.

11. CONCLUSION

An important area of comparative research concerns the dispute resolution procedure and I have made due diligence through the study on reforms of arbitration and considered judicial precedents in selected countries. In order, to respect jurisdiction boundaries between the countries there exists a gap to overwhelm legal disputes, and which stipulates, that franchise parties have barriers referring to forum selection clauses. Hence, the study pointed out the distinguished patterns of inquisitorial and adversarial systems in litigation or award on franchise breaches.

The main advantages of arbitration would be defined as confidentiality, cost-effectiveness, and applicable rules. Therefore, building a legal basis such that arbitration awards are as binding as court decisions is crucial in the long run. I would emphasize that if there is no administering power to enforce its decision metaphorically it is like a toothless lion.

Nowadays, the legal experience of countries suggests that alternative dispute resolutions are supported by their courts for resolving franchise and other commercial disputes. The reason is that the court has narrow deadlines and is also expensive.

Frankly, we are standing in front of reactive and proactive legal policies that exist around the world. Dissimilar legal systems expand the gap in which contract parties avoid going to court. The traditional way of preferring the territorial jurisdiction is gradually changing, and there is a tendency to resolve contractual disputes, through arbitration instead of courts. Franchise is a global phenomenon with issues of legal and economic aspects. Hence, non-judicial and international institutions are more specialized in franchise disputes.

Furthermore, balancing dispute resolution in a manner is a matter of modern sense. It has the advantage of reducing the workload on the courts while decreasing the government intervention in contract dispute resolution. Hence, advanced steps have been taken to enhance the legal competence of arbitral tribunals and the validity of their decisions in recent years throughout European countries. There is no wonder that such good practice will give value to the

prompt resolution of legal problems of transnational business by updating the laws of nations.

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IS THE CHARTER OF FUNDAMENTAL RIGHTS OF EUROPEAN UNION APPLICABLE IN CRIMINAL PROCEDURE?

ABSTRACT

The Charter of Fundamental Rights of European Union (CFR) is a document enshrining the fundamental rights protected within the European Union's legal framework. In this paper the author explores the role of the CFR in criminal procedure. Beginning with an overview of the CFR's historical development and legal significance, this paper explores its incorporation into the EU legal order, particularly through the Treaty of Lisbon. It explores the CFR's status as a primary source of law having legal force equivalent to that of the EU Treaties. Following that, the paper explains the applicability of the CFR in general and then concretely in criminal procedure. Paper investigates provisions of CFR relevant to the criminal proceedings and with mention of the case law of CJEU tries to answer some practical questions relating to CFR's provisions related to criminal proceedings. The main goal of this paper is to answer the question if the CFR is even applicable in criminal procedure.

Keywords: *the Charter of Fundamental Rights of European Union, criminal procedure, applicability of the CFR*

1. INTRODUCTION

The issue of fundamental rights has risen gradually with the evolution of the scope of the European Union (hereinafter: EU). Even though the EU was originally the economic integration, with its expansion of members and the need of expansion in competences, member states had to start answering questions about the area of fundamental rights. First mention of some fundamental rights can be found in the founding treaties especially prohibition of discrimination based on the nationality but only within the scope of the treaties.¹ Another

¹ Article 69 of the Treaty establishing the European Coal and Steel Community, <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11951K/TXT>.

mention of the fundamental rights can be found in a jurisprudence of the Court of Justice of the European Union (hereinafter: CJEU). One of the most important decisions was made in the Case 29/69 *Stauder vs. City of Ulm*² where CJEU said that the fundamental human rights are enshrined in the general principles of community law and are protected by the court. What also must be mentioned is that every member state is a contracting party to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention), which means that the fundamental rights are protected by the European Court of Human Rights (hereinafter: ECHR). Current status of protection of fundamental rights in EU can be found in the Treaty on European Union (hereinafter: TEU) in Article 6. The second paragraph says that the Union shall accede to the Convention. The third paragraph mentions fundamental rights guaranteed by the Convention, and fundamental freedoms which are result from the constitutional traditions common to the Member States, as the general principles of Union's law. But for the purposes of this paper the most important paragraph is the first one mentioning the existence and the legal status of The Charter of Fundamental Rights of European Union (hereinafter: CFR).

The purpose of this paper is to explain what exactly the CFR is, its brief historical development and legal significance in the European law, the reasons of the adoption of this document, the application of the CFR in general and then concretely in the criminal procedure and to explain the CFR's provisions relevant to the criminal procedure.

2. WHAT IS THE CFR?

The CFR is a catalogue of certain political, economic, and social rights guaranteed to EU citizens and residents. It was drafted by the European Convention in 2000 and the original idea was for the Member States to sign the CFR at the next revision of the treaties (the next one was the Treaty of Nice), however, that did not happen.³ Since Member States were not interested in adopting the CFR as an international agreement which would made the CFR a part of the primary law, it was solemnly proclaimed as an interinstitutional agreement between the European Parliament, the Council of European Union,

² Judgment of the The Court of 12 November 1969, *Erich Stauder v City of Ulm*, Case 29/69

³ Anderson, D., Murphy, C. C., The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe. In EUI Working Papers, Law 2011/08, Department of Law, p. 2. ISSN 1725-6739

and the European Commission⁴. That meant that it was not binding for neither Member States nor the CJEU.

The first attempt to implement the CFR into the primary law was by the Treaty establishing the Constitution for Europe. Its second part was dedicated to the CFR and basically the whole text of the original CFR was transferred into the Treaty establishing the Constitution for Europe. This Treaty was signed in 2004 but was not ratified by all the Member States so it has never become binding. Later, in 2007, the Lisbon treaty⁵ was signed and entered into force in 2009. Since then, the CFR is a part of the primary law having the same legal value as founding treaties, thus is legally binding for the Member States and the European Union as a whole and every legal act must be in compliance with it. It is explicitly stated in the first paragraph of the Article 6 of TEU: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

The CFR consists of 54 Articles divided into seven chapters – dignity, freedoms, equality, solidarity, citizens’ rights, justice, and general provisions, with preamble in the beginning of the document. In the comparison with the Convention, the CFR guarantees wider protection of human rights especially in the field of modern issues which were not present in the time of signing the Convention. For example, the CFR forbids human cloning (Article 3), it protects the personal data (Article 8) and it guarantees the right to asylum (Article 18). Those rights cannot be found in the Convention.

As the Article 2 of the TEU says: “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.” Protection of human rights is important component of democracy and rule of law which are also the values of EU. The existence of the CFR underlines this protection and guarantees the legal certainty to EU citizens.

⁴ Official Journal 2000, C-364/1 of 18 December 2000

⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007

3. THE APPLICATION OF CFR

The scope of the CFR can be found directly in the CFR, concretely in the Article 51. According to the paragraph 2 of this Article: “This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.” This confirms the fact that the CFR is just a catalogue of fundamental rights. The CFR does not create any new fundamental rights, those are already existing since they are inherited to all human beings regardless of gender, nationality, ethnicity, religion, colour, or language. The CFR only names fundamental rights whose are protected by the EU.

As the paragraph 1 of Article 51 claims, “the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.” From this paragraph we can deduce that not only the European Parliament, the European Commission and the Council of European Union are bound by the CFR, like it was before 2009, but also other institutions and bodies of the EU, e.g. CJEU. Every act of the institution or the body of the EU must be in compliance not only with the treaties but also with the CFR.

The EU institutions must act according to the CFR even when they act outside of the EU legal framework. This was stated by the CJEU: “the Charter is addressed to the EU institutions, including [...] when they act outside the EU legal framework”⁶. Member States are bound by the CFR only when they are implementing the EU law. An individual may object to a violation of the rights guaranteed by the CFR only when the Member State implements the EU law. This was confirmed by the CJEU in the case of Åkerberg Fransson⁷: “...the Charter’s field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.” This definition is quite broad and sometimes it can be tricky to identify when the Member State acts in the scope of EU law. In these cases, there is the CJEU and its case-law which can help us solve this problem.

According to Article 267 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) “the Court of Justice of the European Union shall have

⁶ Judgment of 20 September 2016, *Ledra Advertising/Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 67

⁷ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 20; Judgment of 8 May 2014, *Pelckmans Turnhout*, C-483/12, EU:C:2014:304

jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union". The CFR is not explicitly mentioned here but since it is a part of primary law same as the Treaties the CJEU has jurisdiction to interpret the CFR. If a court or a tribunal of Member State has questions about the interpretation of the EU law, and they consider it a necessary to be able to give the judgment, they can request the CJEU to give a preliminary ruling. One of the obligatory contents of the request for a preliminary ruling is "a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings"⁸.

As it was stated numerous times by the CJEU "the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law"⁹ which means that where a legal situation „does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction"¹⁰. The existence of the CFR itself cannot be the reason of the request for a preliminary ruling since as I mentioned earlier the CFR does not establish any new power for the EU. If the necessary conditions are met, in other words if Member State acts in the scope of the EU law, the CFR can be applied to a wide range of cases which according to the jurisprudence of CJEU can be for example legal aid, penalties for customs offences, cartels, recruitment of local police officers, blood donation, operation of gaming machines, support for rural development, advertising by TV broadcasters, disclosure of accounting documents, obligation to issue fingerprints for a passport or retirement age.¹¹ National courts often apply the CFR in the areas of border checks, asylum and migration, judicial cooperation in criminal matters, fields of employment, non-discrimination and data protection.¹²

⁸ Article 94 of Rules of procedure of the Court of Justice.

⁹ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 20; Judgment of 8 May 2014, *Pelckmans Turnhout*, C-483/12, EU:C:2014:304, paragraph 19

¹⁰ Judgment of 12 July 2012, *Currà and Others*, C-466/11, EU:C:2012:465, paragraph 26; Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 22; Judgment of 8 May 2014, *Pelckmans Turnhout*, C-483/12, EU:C:2014:304, paragraph 20

¹¹ European Union Agency for Fundamental Rights. Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level, Guidance. Luxembourg: Publications Office of the European Union, 2020, p. 18. ISBN 978-92-9461-024-9. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf.

¹² European Union Agency for Fundamental Rights, *op. cit.* p. 19.

3.1 European Union Agency for Fundamental Rights

In the field of fundamental rights, the EU established the European Union Agency for Fundamental Rights also known as Fundamental Rights Agency (hereinafter: FRA). Its objective is “to provide the relevant Union institutions, bodies, offices and agencies and the Member States when implementing Union law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”¹³.

FRA has published a guidance handbook called *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level* which offers a practical orientation on the scope of the CFR. As it is explicitly said in the guidance “while it is based on the case-law of CJEU, it cannot replace a case-by-case assessment and the need to consult legal services as appropriate”¹⁴. The guide was designed for Member States, especially for individuals who are involved in national legislative and administrative authorities but also for individuals working at national courts or human right organisations.

4. APPLICABILITY OF THE CFR IN THE CRIMINAL PROCEDURE

As it was already explained, the CFR is binding Member States only when they are implementing the EU law. This rule is therefore applicable in criminal procedure too, since the national court is the one who is exercising the implemented law when it is making the decision after the law was breached. Not only the court but also investigators of the case must respect the law. When the case is related to implemented EU law, they must respect the CFR which is protecting fundamental rights.

If in front of a national court arise a question about interpretation of EU law including the CFR, national court would turn to CJEU with a prejudicial question to be able to make a fair decision. It is even more important in criminal proceedings because the final decision of national court could heavily impact life and fundamental rights of the defendant. As it is known from the case law of

¹³ Article 2 of Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights amended by Council Regulation (EC) 2022/555 of 5 April 2022

¹⁴ European Union Agency for Fundamental Rights, *op. cit.* p. 9.

CJEU the principle of primacy of EU law exists. It is based on the idea where a conflict between EU law and Member State law appears the EU law prevail. It is to ensure that people in all of EU territories are uniformly protected by the EU law. Thus, the national law should be in compliance with EU law but only in the fields where Member States ceded sovereignty to EU.¹⁵ The EU law itself has hierarchy of EU law with the primary law on top of it. Every secondary act must be in compliance with the primary law. The CFR is part of a primary law that means that every secondary act is (or at least should be) compliant to it.¹⁶ In many cases the court interprets secondary acts together with related CFR provision. And since the secondary act is applicable in the particular case, the CFR provisions will also be applicable.

The CFR's chapter VI called Justice contains four rights important for criminal proceedings - right to an effective remedy and to a fair trial¹⁷, presumptions of innocence and right of defence¹⁸, principles of legality and proportionality of criminal offences and penalties¹⁹, right not to be tried or punished twice in criminal proceedings for the same criminal offence²⁰. That does not mean that other provisions of CFR are not related to criminal procedure at all. It depends on the specific case.

4.1. Article 47 – Right to an effective remedy and to a fair trial

Article 47 provides right to legal remedy to every defendant, regardless of being a citizen of EU or not, if they are a subject of EU jurisdiction. It is based on Article 13 the Convention which enshrines right to an effective remedy before a national authority. EU law protection is wider because it enshrines right to an effective remedy in front of the court. This right was recognized as one of the general principles of EU law by the CJEU in 1986. Article 47 means inclusion of this precedent in CFR. It applies to the institutions of EU and to Member States while implementing the EU law with respect to all rights guaranteed by EU law.²¹

¹⁵ Glossary of summaries. Primacy of EU law (precedence, supremacy). See: <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html>

¹⁶ Glossary of summaries. EU hierarchy of norms. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:norms_hierarchy

¹⁷ Article 47 of CFR

¹⁸ Article 48 of CFR

¹⁹ Article 49 of CFR

²⁰ Article 50 of CFR

²¹ Explanation on Article 47 — Right to an effective remedy and to a fair trial. Explanations relating to the Charter of Fundamental Rights

Right to a fair trial is based on Article 6(1) of the Convention. This right is not confined only to disputes related to civil law but also for administrative law and criminal law.²² Under this article the right to be defended and represented is also provided together with right to legal aid for those who are in economic need. Article 47 has been further developed in secondary law, e.g. Directive 2012/13/EU on the right to information in criminal proceedings²³, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings²⁴, or Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings²⁵.²⁶

4.2. Article 48 – Presumption of innocence and right of defence

This right has the same meaning and scope as the right guaranteed by the Convention in accordance with Article 52(3) of the CFR. Presumption of innocence means innocent until proven guilty. This is one of the most important rules in criminal procedure. Right to defence is tied to right to fair trial because when right to defence is not allowed then there is no possibility to conduct a fair trial. Right to defence includes right to be informed about the nature and cause of the one's accusation, right to be informed in language the person understands, having adequate time to prepare his defence, defend himself in person or through legal assistance, to examine witnesses, and have free assistance of an interpreter if the person is not able to speak language used in front of the court.²⁷ Article 6 of the Convention does not allow any exceptions to presumption of innocence which should also be applied to the CFR. However, as de Hert says: "the practice, nonetheless, is rather different and both courts' case law demonstrates that the presumption of innocence may at times be weakened"²⁸.

²² *Ibid.*

²³ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

²⁴ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

²⁵ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

²⁶ de Hert, P. (2016). EU criminal law and fundamental rights. In V. Mitsilegas, M. Bergström, & T. Konstadinides (Eds.), *Research Handbook on EU Criminal Law* (pp. 105-124). Edward Elgar Publishing Ltd. pp. 117 – 118. See: https://pure.uvt.nl/ws/portalfiles/portal/19815826/pdh16EU_criminal_law_and_fundamental_rights_Mitsilegas16.pdf

²⁷ Explanation on Article 48 — Presumption of innocence and right of defence Explanations relating to the Charter of Fundamental Rights.

²⁸ de Hert, P. (2016). *op. cit.* pp. 115-116.

4.3. Article 49 – Principles of legality and proportionality of criminal offences and penalties

This article follows the rule of non-retroactivity.²⁹ The person cannot be held guilty for a criminal offence which was not an offence at the time of its commission. Same applies for the criminal penalty. The heavier penalty cannot be imposed than the penalty that was applicable at the time of commission of an offence.

Principle of proportionality means that the penalty cannot be disproportionate to the criminal offence. This is also enshrined in the constitutional traditions of Member States and jurisdiction of CJEU.³⁰

4.4. Article 50 – *Ne bis in idem*

The *ne bis in idem* principle means that the person has right not to be tried or punished in criminal proceedings twice in the same criminal offences. This rule applies not only in one State but also between the jurisdiction of several Member States. There are some limited exceptions covered by the horizontal clause in Article 52(1) of CFR.³¹ There are four limitation criteria: the principle of necessity, necessity of general interest recognized by the Union and the need to protect the rights and freedoms for others, prohibition of intervening into the essence and the principle of lawfulness.³² Concrete exception can be found for example in Articles 54 -58 of the Schengen Convention³³.

5. CASE LAW

In this part of my paper, I would like to explain some interesting cases that appeared in front of the CJEU related to interpreting and applying the CFR

²⁹ Explanation on Article 49 — Principles of legality and proportionality of criminal offences and penalties. Explanations relating to the Charter of Fundamental Rights.

³⁰ *Ibid.*

³¹ Explanation on Article 50 — Right not to be tried or punished twice in criminal proceedings for the same criminal offence. Explanations relating to the Charter of Fundamental Rights.

³² EGELÍĜI, Ö. E. EU Charter of Fundamental Rights. Marmara University, June 2013. p. 120.

³³ The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders

provisions in criminal proceedings. Most of them are more recent because I wanted to show that even now after 15 years of having CFR in the part of primary law, there are still unanswered practical questions about its applicability in concrete cases that may arise anytime in the future.

5.1. C-617/10 Åkerberg Fransson

One of the significant judgments is the case of Åkerberg Fransson which I have already mentioned earlier. According to Scalia this case was “a step forward in the CJEU’s controlling role over the compatibility of Member States’ criminal law provisions with fundamental rights”³⁴. In this case Mr. Åkerberg Fransson was charged of serious tax offences in 2009 because the information he provided concerning the VAT was false. The problem was that for the same reasons he was already given penalties by administrative court in 2007, prior to charges in criminal procedure. The Swedish national court basically asked if this is the case of violation of *ne bis in idem* principle.

CJEU, specifically the Court and its Grand Chamber, had to firstly decide if the Court is even competent to make a decision in this case. The governments of Sweden, Czech Republic, Denmark, Ireland and Netherlands, and European Commission disputed the admissibility of the questions referred for a preliminary ruling. In their opinion the tax penalties and criminal procedure of Mr. Åkerberg Fransson is a subject-matter of national law, and it is not the case of implementation of EU law.³⁵ According to the Court tax evasion because the provided information concerning the VAT was false falls under Directive 2006/112 on the common system of value added tax³⁶ and under the Article 325 TFEU regarding the fight against any financial fraud. The Court said: “tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter”³⁷. The Court had found the

³⁴ Scalia, V. Protection of Fundamental Rights and Criminal Law. The Dialogue between the EU Court of Justice and the National Courts. *Eucrim*, issue 3/2015, <https://eucrim.eu/articles/protection-fundamental-rights-and-criminal-law/>, 3 April 2024.

³⁵ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 16

³⁶ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32006L0112>

³⁷ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 27

EU law in the case and, therefore, had jurisdiction to answer prejudicial questions.

The Court decided that the *ne bis in idem* principle does not preclude a Member State from imposing a tax penalty and a criminal penalty, for the same acts of non-compliance with declaration obligations in the field of value added tax, if the first penalty is not criminal in nature which should be determined by the national court. On the other hand, it would be against the *ne bis in idem* principle if the penalty would have criminal nature. In order to ensure that all VAT is collected, and thus financial interests of EU are protected, Member States are allowed to choose applicable penalties, either administrative penalties or criminal penalties or combination of both. There are three criteria for deciding whether the administrative penalty is criminal in nature or not. The first is the legal classification of the offence under national law, the second is the nature of the offence, and the third is the nature and degree of severity of the penalty.³⁸

5.2. C-524/15 Luca Menci

Similar to Åkerberg Fransson case, in this case it was Mr Menci who was firstly ordered to pay administrative penalty and later was, for the same reason of not paying taxes within the time limit stipulated by the law, charged with the tax offences. The Italian national court also basically asked if this case falls under the *ne bis in idem* principle. The Court, again Grand Chamber, decided that criminal proceedings may be brought against a person failing to pay value added tax due within the time limits stipulated by law even when that person was already charged by a final administrative penalty of criminal nature. This contradicts what The Court previously said in the Fransson case about administrative penalty not having a criminal nature, however, the Court adds conditions, particularly the legislation has to pursue an objective of general interest important enough to justify a duplication of proceedings and penalties, contains rules ensuring coordination which limits to what is strictly necessary, and provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned. Ensuring that the actual disadvantage from duplication of the proceedings and penalties is not excessive is the role of the national court.³⁹

³⁸ *Ibid*, paragraph 34-37

³⁹ Judgment of 20 March 2018, *Luca Menci*, C-524/15, EU:C:2018:197, paragraph 65

5.3. C-203/20 AB and Others (*Révocation d'une amnistie*)

What is without a doubt a case of Member State implementing EU law is European arrest warrant (hereinafter: EAW) first adapted by Council Framework Decision 2002/584/JHA on the EAW⁴⁰. But even in these cases practical questions about its implementation arise which are then answered by CJEU via preliminary ruling. An interesting case happened in Slovak Republic. There were few persons accused of series of offences allegedly committed in 1995 but in 1998 the Prime Minister of the Slovak republic exercising the powers of President at that time issued an amnesty covering those offences. Because of that the national court decided to put an end to those prosecutions in 2001. In 2017 new constitutional law entered in the force according to which the mentioned amnesty can be revoked by the resolution of National Council of Slovak Republic. Constitutional Court of Slovak Republic decided that this resolution was in compliance with the constitution and prosecutions were resumed. Slovak national court intended to issue EAW but was uncertain whether the *ne bis in idem* principle precludes the issue of EAW, so the national court turned to CJEU with a prejudicial question.⁴¹

CJEU had to first answer a question about its jurisdiction. Slovak government claimed that the court does not have a jurisdiction because no provision of EU law is applicable in the main proceedings so the Charter cannot be applicable either. But the Court said that the prejudicial question is not about the non-harmonized crimes which are object of a main proceedings but about issuing EAW so the Court has a jurisdiction to answer prejudicial question.

The decision of national court by which the prosecutions was brought to an end has the same effects as the decision of acquittal. However, the sole effect of that decision was to discontinue criminal prosecutions before ruling on the criminal liability.⁴² The Court therefore decided that “Article 50 of the Charter must be interpreted as not precluding the issue of a European arrest warrant against a person who was subject to a criminal prosecution that was initially discontinued by a final judicial decision adopted on the basis of an amnesty, and resumed following the adoption of a law revoking that amnesty and setting aside that judicial decision, in the case where that decision was adopted before any

⁴⁰ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>

⁴¹ Judgment of 16 December 2021, *AB and Others*, C-203/20, EU:C:2021:1016 paragraph 10-18

⁴² Judgment of 16 December 2021, *AB and Others*, C-203/20, EU:C:2021:1016 paragraph 59-60

determination as to the criminal liability of the person concerned⁴³". That means if the criminal liability was decided before amnesty and later the amnesty had been revoked, the national court cannot continue with criminal proceedings.

5.4. C- 282/20 ZX (Régularisation de l'acte d'accusation)

As I mentioned earlier there are cases when together with the provision of CFR the CJEU interprets secondary act. One of these cases is C-282/20 where the Directive 2012/13/EU together with the Article 57 was interpreted. ZX was accused of possession of fake money quoted on currency markets at home and abroad. At the pre-trial hearing the regularity of the indictment was specifically raised. The court decided that the indictment complied with all formalities. However, after the court gathered all the evidence about the fact if the conditions for hearing the parties and giving judgment were met, the court had found some errors in indictment. Thus, Bulgarian specialised prosecutor's office wanted to amend the charges. ZX claimed that there was not basis to do that and that the court should correct those errors in its judgment. The national court said that the errors should have been established at the pre-trial hearing and the case should have been referred back to the prosecutor for drawing up a new corrected indictment. This did not happen and according to Bulgarian law this can happen only at the pre-trial hearing. The national court turned to CJEU with prejudicial question which basically asked if this situation is compatible with Article 6(3) of Directive 2012/13⁴⁴ and Article 47 of the CFR.⁴⁵

According to CJEU the moment at which the benefit of the procedural rights must be ensured is, at the latest, before the criminal begins to examine the charges and that the Directive 2012/13 does not preclude the judge from taking necessary measures to regularise the indictment so the right of the defence and fair trial are protected. The Court also stated that the information related to the charges sent to the defence may be later amended if they are disclosed to the accused person when the person has still time to respond effectively. Therefore,

⁴³ Judgment of 16 December 2021, *AB and Others*, C-203/20, EU:C:2021:1016 paragraph 62

⁴⁴ The article says: "Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person."

⁴⁵ Judgment of 21 October 2021, *ZX (Régularisation de l'acte d'accusation)*, C-282/20, EU:C:2021:874, paragraph 9-23

the Court had decided that the Bulgarian law was not compliant to Directive 2012/13 and Article 47 of the CFR.⁴⁶

6. CONCLUSION

From all that was said in this paper, in my opinion, the CFR as a catalogue of fundamental rights which is part of the EU primary law is applicable in the criminal procedure. Not only the provisions mentioned in chapter VI of the CFR but also other provisions if they are relevant to particular case. The CFR would not be applicable in the case of not implementing EU by Member State which is applicable not only in criminal proceedings. However, in many cases in criminal proceedings it is possible to find EU law at least to some extent. It must be mentioned that fundamental rights are protected not only by CFR but also by constitutions of each Member States and by ECHR which is binding for every Member State. That means that even if there would be case of not applying CFR, fundamental rights stay protected by other ways.

As we can see from the years of when the cases mentioned earlier happened, the interpretation of CFR by the CJEU and its applicability in criminal procedure is still not that clear as we would wish it to be. There are still some unknown practical problems which could arise anytime in the future and CJEU must be ready to answer them. In my opinion, the CFR's application will never be one hundred percent clear. The EU works on its new legislation every year which means new situations for application of the CFR and that can lead to another prejudicial questions. Maybe it would not be a bad idea if the FRA made similar guidance about application of CFR as they already did but focused solely on the application in the criminal proceedings.

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⁴⁶ Judgment of 21 October 2021, *ZX (Régularisation de l'acte d'accusation)*, C-282/20, EU:C:2021:874, paragraph 27-32

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CONTRIBUTION OF THE LEGAL REFORMS IN KSA TOWARDS WOMEN'S LEGAL EMPOWERMENT IN EMPLOYMENT

ABSTRACT

KSA is one of the well-known Middle Eastern countries as an oil producer, an economic advantage that plays an important role in shaping the characteristic of its society. Reliance on oil had the effect of significantly reducing the numbers of female's participation in the public sphere and economy. Realising the effect of such low participation, the country started undergoing several developments recently. The purpose of this article is to analyse the most apparent development plans of legal reforms pertaining to women's employment. The major reforms took place in the country are those opening opportunities for women in The Ministry of Justice and The Ministry of Defence, those introducing new university majors and the those annulling the guardianship system, reforms that enable Saudi women to drive and obtain Identification Cards. In addition to several reforms in Civil Status Law and Labour Law and overall reforms related to women in leadership positions as the article would discuss. This article aims to appraise the reforms that opened new areas for women and encouraged them to participate in the economy, nonetheless, it argues (as a contribution to research) how this top-bottom approach takes long time for changes to take place in the society. It calls for the use of different approaches along the reforms. It suggests a bottom up approach of legal empowerment, starting from changing people's minds and women's agency and self-conscious to accelerate the process of changing women's status, thus leading to more participation in the economy as aspired.

Keywords: KSA, women's legal empowerment, Legal reform, employment, bottom-up approach

1. INTRODUCTION

The significance of women's economic participation has been acknowledged worldwide; most countries and developmental organisations share the aim of eliminating stereotypes and social norms that visibly affect women's right to employment. Firstly, legal factors, such as unclear national legislation and

enforcement procedures have contributed to the limitations of women's rights and empowerment.¹ Secondly, social norms and society's patriarchal traditions also play an important role in hindering women's participation in the economy. Therefore, the significance of social and legal empowerment of women lies in the fact that they ensure women's access to social and legal protection and enable women to have choices and act in the economic sector as agents² individually or through representatives.

The significance of women's legal empowerment mostly appears in creating a new social constituency. That is, by fostering women's participation in society through empowerment, by giving them a choice to act as agents in all spheres, a new social constituency would be created. Empowered women would come about and would be able to question the bases of norms, which affect their participation in the economy. Saudi women are indeed emerging as a divergent constituency, acting as agents with their own interests and projects. Nonetheless, Saudi women are still in need of empowerment, in fact women's legal empowerment in employment is an area in need of research in the country. The United Nations Development Programme (UNDP) stated, '[T]he predominant characteristic of Arab reality today seems to be the existence of deeply rooted shortcomings that stand as obstacles to building human development ... the three deficits of freedom, women's empowerment and knowledge.'³

This article tends to elaborate on women's employment and the law in KSA. It begins with presenting a literature review of Saudi women experience in employment in Saudi Arabia, with reference to the most recent governmental reforms in the country and how they impacted women in Saudi Arabia. The is then to be followed by a discussion about these reforms and women's legal empowerment to participate in the economy. The first upcoming section reviews women's position in the economic sector in KSA by addressing legal amendments relating to women's participation in the country's economic development.

¹ Goulding, K., *Gender dimensions of national employment policies: A 24 country study*, Geneva: International Labour Organization, 2013 and Chacko, P., *Women's economic empowerment in the Indian Ocean region through gender equality in work: building a common agenda* 13 Journal of the Indian Ocean Region 1, 2017.

² Kabeer, N., *Resources, agency, achievements: Reflections on the Measurement of Women's Empowerment* 30 Development and Change 435, 1999

³ United Nations Development Programme, Regional Bureau for Arab States, *The Arab human development report 2000*, Building a knowledge society, United Nations Publications, 2003.

2. LAW REFORMS RELATED TO WOMEN'S EMPLOYMENT IN KSA

Understanding several historical, cultural, customary, and religious factors is important in order to empower women in KSA's economy. Saudi Arabia has been criticised for taking the most restrictive approach in regard to women's participation in civic life.⁴ Recently, KSA started to undergo major changes in relation to women's participation in the economy. In fact, it has even become a requirement for the country to initiate those social and economic reforms. KSA realised the risk of relying on oil as the only source driving the economy; oil demands are decreasing, and the earth's reserves are declining in addition to the growing number of KSA's population.⁵ Some of the examples undertaken in the country include introducing jobs that were previously limited to males and making them available to women such as Soldier rank positions, Sales/retail positions, Passport control and Air traffic control.⁶

The recent decades witnessed more highlights on facilitating access of Saudi women to employment opportunities; women became more involved in the country's goals and plans. Many of the disregarded issues on women's equality are being addressed, prospects and opportunities for Saudi women are being provided as part of the execution of the Crown Prince Mohammed bin Salman's proposal for transformation of the economy in the country⁷, which is mostly translated in vision 2030. In pursuant to the recently proposed country's plan, vision 2030, KSA has issued various laws in commitment to its new policies to fulfil the rights of women to equality. It has taken several reforms to eliminate discrimination against women in employment such as allowing for travel, removing restrictions of women's free movements at night, and offering freedom in the workplace and offices. Additionally, introductions of improvements in entrepreneurship policies; access to credit is made easier to women by removal of gender discriminatory regulations and ascertaining women's equal recognition in contracts as signatories.⁸

⁴ Kibria, N., *Muslims in Motion: Islam and National Identity in the Bangladeshi Diaspora*, Rutgers University Press, 2011, 125.

⁵ Soekarba, S., *Determinants of Patriarchy in the Middle East: Hope for the 2030 Vision in a New Saudi Arabia*, 365 *Advances in Social Science, Education and Humanities Research*, 2018. (2nd International Conference on Strategic and Global Studies. Atlantis Press, 2019).

⁶ Parveen, M., *Women empowerment: New paradigm shift of Saudi women into labor workforce* 17 *Society and Business Review* 1, 2022

⁷ *Ibid.*

⁸ World Bank Group, *Women, Business and the Law 2021*, International Bank for Reconstruction and Development / The World Bank. 31 <

The legal reforms play a role in strengthening the position of women against discriminatory practices; thus, policies, legal and regulatory changes assist in achieving gender equality at work.⁹ Nonetheless, law reforms may not necessarily be effective if not combined by social and legal empowerment of women. Such empowerment would result in achieving improvement in the social and economic structures that contribute to inequality.¹⁰ Moreover, ensuring women's social empowerment would result in access to legal and social protection needed in the economic sector such as anti-discrimination laws, childcare and social protection.¹¹ The upcoming subsections would analyse the most relevant governmental reforms related to women's economic rights that are taking place in the country.

2.1. Saudi Women for the First time in The Ministry of Justice and The Ministry of Defence

One of the reforms the country has enacted to advance the rights of women to participate in the economy is enabling women to work in the Ministry of Justice for the first time in 2017. The opened posts were administrative assistants and social, religious and legal researchers. The Ministry has announced that it is working towards attracting the best talents who will contribute to the realization of the Ministry's vision and the country's development. By offering the opportunity to both men and women to become part of the ministry, it is stressing its support of universal participation and gender equality.¹² Later in 2020 the Ministry of Justice appointed 100 women for public notary positions as a part of the Ministry's plan to expand women's participation in the legal sector.¹³ Saudi women undertook these opportunities, the number of women working with the Ministry of Justice in all 13 regions in KSA are 2164 compared to the 35861 male in the profession according to the data released in May 2021.¹⁴ The

<https://openknowledge.worldbank.org/bitstream/handle/10986/35094/9781464816529.pdf?sequence=7&isAllowed=y> > accessed 2 December 2021 and Parveen, *op. cit.* note 6.

⁹ Chacko, *op. cit.* note 1.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Ministry of Justice, Employment at the Ministry of Justice ,2021 < <https://www.moj.gov.sa/English/Ministry/recruitment/Pages/default.aspx> > accessed: 29th November 2021.

¹³ Ministry of Justice, *Saudi ministry of justice appoints 100 women as public rotaries*, 2020 < <https://www.moj.gov.sa/English/MediaCenter/news/Pages/NewsDetails.aspx?itemId=633> > accessed 4th December 2021.

¹⁴ Open Data, *Manpower in the Ministry of Justice*, May 4, 2021 < <https://data.gov.sa/Data/en/dataset/manpower-in-the-ministry-of-justice/resource/c879f874-d7fc-49c0-8368-56f03c20b1dc> > accessed 6th February 2022.

Ministry praised its female employees whose level of participation in public sector has risen and have been empowered as number of them were assigned with supervisory tasks.¹⁵

Similarly, KSA has also enabled women to participate in the security field. Saudi women for the first time are allowed to serve as soldiers in the internal security. In 2019, KSA's General security proclaimed that Saudi women can now apply to soldier ranks positions.¹⁶ In 1st September 2021, the first batch of women soldiers have graduated from the Armed Forces Women's Cadre Training Centre after completion of a 14 weeks training course.¹⁷ Women are now enabled by the law to sign up to join the Saudi Arabian Army, Royal Saudi Navy, Royal Saudi Air Defence, the Armed Forces Medical Services and the Royal Saudi Strategic Missile Force.

Both reforms opened new opportunities for women by attracting women's talents outside the traditional sectors of health and education. Nonetheless, it is still to be established if women are empowered by those opportunities. A study asserted that even if more jobs are created for women in KSA, Saudi women would be in a dilemma between their career bath on one hand and the traditional female roles rooted in the conservative society on the other hand.¹⁸ Therefore, it is not clear whether women are going to join the sectors had the culture and tradition been disregarded, one could assume certain forms of women's empowerment is needed. This article argues for consideration of feminists' dimensions of women's empowerment in line with law reforms and jobs creation. In the above situations, KSA's approach to women empowerment seems to be generally providing women with the opportunity to engage in the economic and social spheres of life.¹⁹ We argue that to empower women, women's access to valued resources have to translate into changes in their capacity for agency, and consequently challenge the gendered structures of constraint.²⁰ Therefore, for Saudi women to be empowered to work on these fields, they should have an agency to challenge the traditional structure as Batliwala elaborated, empowerment is 'the process of challenging existing power relations, and of

¹⁵Arab News, *Saudi Justice Ministry praises female employees*, December 2021 < <https://www.arabnews.com/node/1978611/saudi-arabia> > accessed 6th February 2022.

¹⁶ Parveen, *op. cit.* note 6.

¹⁷ Saudi Gazzette, *First batch of Saudi women soldiers graduate*, 2021 < <https://saudigazette.com.sa/article/610477> > accessed 4th December 2021.

¹⁸Al-Asfour, A.; Khan, S., *Workforce localization in the Kingdom of Saudi Arabia: issues and challenges*, 17 Human Resource Development International 2, 2014

¹⁹ Sushama, S., *Women and Empowerment– Approach and Strategies*, Discovery Publishing house, New Delhi: India, 1998.

²⁰ Kabeer, N., *Resources, agency, achievements: reflections on the measurement of women's empowerment*, 30 Development and Change 3, 1999.

gaining greater control over the sources of power'.²¹ Other example of recent reforms includes opening more diverse university qualifications for women in addition to the annulment of guardianship system, which is to be elaborated next.

2.2. Saudi Women with New University Majors and the Annulment of The Guardianship System

Allowing women to get access to different qualifications at the universities is also a way of realizing women's rights to work and removing educational constrains. KSA opened the doors of many university schools for women that have been considered as "men only" qualifications, such as flights schools.²² Saudi women currently can study aviation in the country and seek employment as part of the governmental plans. They can pursue careers as co-pilots and cabin crew. Women in KSA constituted the majority of university graduate for decades. Recent statistics show that female graduate constituted 75% in 2010, slightly fluctuating over the years to constitute 55.8% in 2019.²³ Nevertheless, their educational background does not guarantee them jobs after graduation. That is, the educational system does not simply equip them with the skills and background needed to compete in the labour market.²⁴ Moreover, since most of female graduates hold degrees in education, human sciences, Islamic and Arabic studies, their numbers outweigh the jobs available in these fields. Besides, the demand of labour market of computer science, technology and management is different from the educational output.²⁵ Those factors explain the reason of the low rate of Saudi female participation in the labour market, in addition to the social, cultural, and Islamic suitability²⁶ as important factors affecting their choices and participation in the economy.

²¹Batliwala, S., *The Meaning of Women's Empowerment: New Concepts from Action*, in Sen, G.; Germain, A.; Chen, L., (eds), *Population Policies Reconsidered: Health, Empowerment, and Rights*, Harvard Center for Population and Development Studies, Boston: MA, 1994.

²² Saudi Gazette, Flight school is opening doors for Saudi women, 2018 < <https://saudigazette.com.sa/article/539263/SAUDI-ARABIA/Flight-school-is-opening-doors-for-Saudi-women> > accessed 4th December 2021.

²³ Statista, 'Share of female graduates in Saudi Arabia from 2010 to 2019' < <https://www.statista.com/statistics/1118988/saudi-arabia-share-of-female-graduates/> > accessed 7th February 2022.

²⁴ Al-Asfour, A. et al., op. cit. note 18; and Al-Munajjed, M., Women's employment in Saudi Arabia: a major challenge, Booz & Co, 2010 < https://www.arabdevelopmentportal.com/sites/default/files/publication/235.womens_employment_in_saudi_arabia_a_major_challenge.pdf > accessed 7th February 2022.

²⁵ Al-Munajjed, Loc. cit.

²⁶ Al-Asfour A. et al., op. cit. note 18.

Another reform in KSA is the annulment of the guardianship system in 2019 which has had great impact on women's life. The annulment has enabled women to apply for jobs without the requirement of a guardian's consent and to travel for the sake of employment without the requirement of guardianship approval documents. The law enabled them to obtain their passports for such reasons. Article 2 of Travel Documents Law²⁷, stated that passports are only granted to male Saudi guardians. This has been amended to '[a] passport may be granted to any person who has Saudi citizenship'²⁸. The amendment allows women to obtain their passports without guardians' approval.

These contemporary changes are in line with Vision 2030 intending to shake up the *status quo* of the cultural and socioeconomic fabric of the country and liberalize its conservative social dynamics.²⁹ These reforms indicate the attention paid by KSA to empower women economically and socially too, nonetheless, it is to be determined if this approach sufficiently empowers women to participate in the economy. Economic empowerment of women refers to progression of women to be self-sufficient to give rise to earning from the developmental projects³⁰ while social empowerment addresses areas of gender discriminations that persist among male and female in the society.³¹ While vision 2030 aims to empower women socially, politically and economically, this article argues for the significance of legally empowering women as an important approach to reach the economic goals set for women in Saudi Arabia.

Since studies revealed that KSA have recognised women as key players in contributing to the economic growth if given the opportunity,³² women's legal empowerment is expected in this thesis to significantly contribute to women's participation in the economy. The reason is that it would focus on women's direct capacity to exercise their rights. They would be able to utilize what have been

²⁷ Bureau of Experts at the Council of Minister, Travel Document Law, 2000, Royal Decree /M24 amended by Royal Decree M/134 <
<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/e29f08fa-d53e-4944-b22b-a9a700f17fd9/1>> accessed 30/7/2021. Also, at <
<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/e29f08fa-d53e-4944-b22b-a9a700f17fd9/1>> accessed 30/7/2021. Also, at <
<https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/e29f08fa-d53e-4944-b22b-a9a700f17fd9/1>> accessed 30/7/2021.

²⁸ *Ibid.*

²⁹ Spittler, R., *Blurry vision: institutional impediments to reform in Saudi Arabia*, (master's thesis) Naval Postgraduate School, Monterey, CA, 2017

³⁰ Elliot, C., *Global Empowerment of Women: Responses to Globalization and Politicized Religious*, Routledge, New York, 2008.

³¹ Parveen, , *op. cit.* note 6.

³² Agboola, M., *Female Labour Force Participation in Saudi Arabia and its Determinants*, 1 The Polish Journal of Economics 305, 2021.

provided for them by the law. The definition adopted in this paper of women's legal empowerment is that it is a 'process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors'.³³ The upcoming paragraphs are going to use some more examples of the reforms taken by KSA to find out the need for women's legal empowerment in the country.

2.3. Saudi Women's Ability to Drive and Obtain Identification Cards

Along with the Saudi reforms that eases women access to employment is lifting the driving ban in 2018. By examining the original Saudi Traffic Law³⁴, the system clearly adopts a gender-neutral language. Words like "driver" or "person" are used without gender specification which indicates that driving licences should have been issued to males or females. Therefore, one could stipulate that the long-standing ban was based only upon customs and traditions as Islamic law does not prohibit women from driving as well.³⁵ The impact of the new policy of lifting the driving ban is economically apparent, it became easier for women to enter the workforce. Transportation issue was one of the hurdles facing women at work; some women were forced to resign from their jobs because of their relative's inability to drive them back and forth³⁶ combined with the unavailability or suitability of public transportation and the costly burden of hiring a private driver. Secondly, husbands or male are now expected to spend more time in the workforce as previously driving family members was a legitimate reason not to be present at work.³⁷ Additionally, the automotive

³³ The Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, 1 New York: UNDP, 2008, 3.

³⁴ Traffic Law by issued by Royal Decree No. 85, issued and published (2007) < <https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/85364e57-c01e-41ba-8def-a9a700f183e9/2> > accessed 7th February 2022.

³⁵ Hamdan, A., *Women and education in Saudi Arabia: Challenges and achievements* '6 International Education Journal 1, 2005; and Fawzi El-Solh, F.; Mabro, J., (Eds) *Muslim Women's Choices: Religious Belief and Social Reality. Cross-Cultural Perspectives on Women*, Providence: Berg Publications, 1994.

³⁶ Eleanor Abdella Doumato, E., *Women and Work in Saudi Arabia: How Flexible Are Islamic Margins?* 23 Middle East Journal 4, 1999.

³⁷ Soekarba, *op. cit.* note 5 ; and Hvidt, M., *The new role of women in the new Saudi Arabian economy*, Syddansk Universitet: Center for Mellemstudier. News Analysis, 2018

< https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi3uZSW4KT2AhURV8AKHdviDAcQFnoECAUQAQ&url=https%3A%2F%2Fwww.sdu.dk%2F-%2Fmedia%2Ffiles%2Fom_sdu%2Fcentre%2Fcm_mellemoest%2Fvidencenter%2Fartikler

industry has boosted after the decision, expatriate drivers were released as 70% of women chose to drive after the prohibition is lifted.³⁸

Another amendment is the right of women to have their own national identification card (ID) in Article 67 of the Civil Status Law.³⁹ Guardianship approval for women to get an ID card has been abolished and it is now only required for male and female minors under the age of 15. In terms of employment, ID card amendment has the effect of accelerating the process of being employed; it became easier for employers to verify the identity of the applicants. In order to fully participate in the economy, women's access to identification cards has to be eased. Unequal access to identification limits women's economic opportunities as proof of identity is necessary to sign an employment contract, to open a bank account, or to borrow from a financial institution.⁴⁰ There is a significant link between access to identification and financial inclusion of women⁴¹, enabling them means that they can access to bank loans, they can open their own business⁴² and would be less likely to face human rights violations. Those reforms seem to advantage women; nonetheless, it is to be seen if they contributed to their self-agency and empower them. Similar reforms are taken in some civil laws and labour regulations that are to be discussed next.

2.4. Women's Related Reforms in Civil Status Law and Labour Law

The major changes to empower women have been in the Civil Status Law and in Labour Law, these reforms have elevated women's capacity to work and be employed. In terms of women's rights in Civil Status Law, some amendments have been taken to ensure women's equality. For example, Article 33 amendment

%2F2018%2Fhvidt%2Barticle%2Bapril%2B2018.pdf&usg=AOvVaw3VdDumVUTAqn
PFByQyWmwB > accessed 1st March 2022.

³⁸ Rizvi, L., and Hussain, Z., *Empowering woman through legal reforms evidence from Saudi Arabian context* 64 International Journal of Law and Management 2, 2022.

³⁹ KSA Civil Status Law, issued by Royal decree No. M7 1986 Cabinet decision No. 1(21/12/1986) and published (09/01/1987), Article 67 Amended by Royal Decree M/28, Issued on 2nd April 2013.

⁴⁰ Braunmiller, J., *The importance of women's equal access to identification in times of a global crisis*, World Bank Blogs, 2020 <
<https://blogs.worldbank.org/developmenttalk/importance-womens-equal-access-identification-times-global-crisis> > accessed 5th December 2021.

⁴¹ *Ibid.*

⁴² The Global Findex Database 2017<
https://globalfindex.worldbank.org/sites/globalfindex/files/2018-04/2017%20Findex%20full%20report_0.pdf > accessed 1st March 2022.

by Royal Decree M/7 of Civil Status Law⁴³ allows women to report birth of their new-born child to the authority and get a birth certificate. Males have been considered the only legal heads of households and the only one able to report, obtain and change their wife's and children's civil status documents. Previously in the article, it was only for the father or the closest male relative above the age of 18 to report birth and obtain birth certificates. Now, women have the legal capacity to exercise paternity rights over their children. Another amendment is of Article 30 of the Civil Status Law, which has been limiting women's freedom of movement and independence. The article previously states, 'a married woman's domicile is the place of residence of her husband if the marriage is still intact, and a minor's domicile is the place of residence of his father or guardian'.⁴⁴ The article has been amended to apply only on minors. Mandatory legal residency of a married women to be her husband's home is no longer applicable.

The above policies seem to put women on equal footing with men in relation to their families and promoting their independence; nonetheless, other deeper obstacles are not addressed by the reforms. Even if women can register their child, register as the head of the family and get access to identification cards, can they amend or update information in the similar manner of fathers. Would the reforms give them equal authority upon their children in terms of education and travel without documents specifying the fathers' approval. There have been instances where Saudi women act as the head of the family whether their spouses are present or not prior to the reforms but the law did not serve them, would they use the law, break the traditions, and assert independent legal residency for themselves after the reforms are questions to be examined. It has been argued that since the changes in Civil Law are imposed rather than being 'socially contracted'; there will be societal resistance.⁴⁵ The situation is that men are still regarded as the only heads of the families, and everything related to their families are connected to them.⁴⁶

Moving from Civil law reforms to Labour Law reforms, it is important to realize the reforms undertaken in the Saudi Labour Law for women. Firstly, the definition of workers in Article 3 of labour Law has been amended to include both men and women which the previous definition did not include. The

⁴³ KSA Civil Status Law, issued by Royal decree No. M7 1986 Cabinet decision No. 1(21/12/1986) and published (09/01/1987).

⁴⁴ *Ibid.*

⁴⁵ Kinninmont, j., *Vision 2030 and Saudi Arabia's Social Contract Austerity and Transformation*, Middle East and North Africa Programme, The Royal Institute of International Affairs: Chatham House, UK, 2017 <
<https://www.chathamhouse.org/sites/default/files/publications/research/2017-07-20-vision-2030-saudi-kinninmont.pdf>> accessed 1st March 2022.

⁴⁶ *Ibid.*

amendment prohibits discrimination on basis of gender, and it also extends to the process of recruitment. The Article now reads:

Work is the right of every citizen. No one else may exercise such right unless the conditions provided for in this Law are fulfilled. All citizens are equal in the right to work without any discrimination on the basis of gender, disability, age or any other form of discrimination, whether during work performance or when hiring or advertising work vacancies.⁴⁷

Moreover, women were only able to work in designated works for them as the minister of labour sees fit. In 2020, Article 149 of the Labour Law has been abolished.⁴⁸ The Article read:

It is forbidden to employ women in dangerous and harmful occupations and jobs, and the minister would specify the occupations and jobs considered dangerous or harmful and would expose women to specific dangers or harms so as to prohibit their work in such jobs or restrict them under special conditions.

All different kinds of works should now be open to women in theory; the legal constraints in the country are lifted as a part of women's empowerment plans. Previously women faced exclusion from certain sectors of economy because vocational programmes were acknowledged to take into account the difference between genders.⁴⁹ Abolishing the article has the effect of opening more opportunities to women in employment and more participation in the economy. Nevertheless, it is deeply enshrined in the society that men are the breadwinners of the family and women are to take care of the family and stay at home, what is considered 'suitable for women' was not clarified in the regulation itself which makes it even vaguer to clarify what women and society considers as suitable. One could still assume men would have priority over women in securing the jobs because policy implementations in the country have been an ongoing issue⁵⁰, in analogy to the Saudization policies where many private sectors tend to avoid hiring women due to the uncertainty of what 'suitable workplace' for women is and what is compatible with the cultural norms. Additionally, with the phenomenon of young men struggling to find jobs, it is assumed that there is a resistance to the trend of opening more areas for women to work.⁵¹

⁴⁷ KSA Labour Law, issued by Royal decree No. M/51 and Cabinet Decision No. 219 in 27/09/2005 and published in 28/10/2005, Article 142 amended by Royal Decree No. M/134, issued on 25 July 2019.

⁴⁸ *Ibid.*, Article 149 abolished by Royal Decree No. M/5, issued on 26 August 2020.

⁴⁹ Musawah for equality in the family, *Thematic report on Muslim family law and Muslim women's rights in Saudi Arabia*, 2018, 69th CEDAW Session Geneva, Switzerland.

⁵⁰ Kinninmont, *op. cit.* note 45.

⁵¹ *Ibid.*

It has to be said that Saudi employment law does not seem to explicitly discriminates against women⁵², specially that amendments have been made, however, the issue lies in the implementations of the laws. Even though the rights exist in theory, they are not worked upon in practice and women find themselves in the same position prior to the reforms. Full implementation lags on existing legislations at both international and national levels.⁵³ As a result, efforts are needed to enforce the law in practice, perhaps a follow up mechanism to be put in place by the ministry of labour to monitor the implementation of the laws and evaluate their impacts⁵⁴. Results can be attained if women are legally empowered to ask for their rights and demand full implementations. They might stablish a bureau for women affairs in the Ministry⁵⁵ for suitable policies to be put in place.

All in all, existence of external opportunities may alter women's potential reality, nonetheless, they are not empowering in and of themselves unless they enter into women's actual reality.⁵⁶ The last reforms aiming to empower women in KSA was to place them in leadership positions as the next paragraphs explains.

2.5. Saudi Women in Leadership Positions

Inclusion of women in decision making process within the legislative bodies, employing them in leadership positions or engaging them in international representation of the country are important in women's empowerment in employment and are considered areas by KSA recent initiatives too. For example, a royal decree has been issued to amend Article 3 of Law of the Consultative Council (Majlis Al-Shura) to enable women to participate in the council which has been an all-men assembly ever since. Article 3 of Shura Council Law now reads:

Majlis Ash-Shura shall consist of a chairman and sixty members chosen by the King from amongst scholars and men of knowledge, expertise and specialists, provided that women representation shall not be less than (20%) of the number of members. Their rights, duties and all other affairs shall be defined by Royal Decree.⁵⁷

⁵² Al-Munajjed, *op. cit.* note 24.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Brown, S., *Empowerment as Subjective Operant*, 2003, World Bank, Washington DC.

⁵⁷ Shura Council Law, Royal Order No. A/19 issued 01/03/1992 and published 06/03/1992, Article 3 of the Shura Council Law amended by Royal Order No. A/26 dated

Al-shura council advises the government on new legislations. In 2013 King Abdullah appointed the first woman to acquire a seat in the council. Women had an active and passive suffrage right in his time which led to the election of 20 women in the council.⁵⁸ Nonetheless, active participation of women in the council is still needed. Women in the council need to get involved in decision making and acquiring leadership roles as the council has been for long under the direct leadership of men.

Leadership positions in the country in general has been the monopoly of men. KSA is situated among the twenty countries where gender gap in managerial posts is as large as 80% or more according to the 2021 GGGR⁵⁹, in fact KSA figures show 93% gap in such position as the presence of women is almost rare in senior roles. For example, KSA has no female ministers at all.⁶⁰ Another example is diplomatic posts and international representation of the country that have been traditionally allocated to men. Women have just recently been able to acquire such posts. The Ministry of Foreign Affairs started to employ women in 2008, Nonetheless, women's participation in the international arena is still minimal. The ministry stressed that its top leadership positions are open to male and female alike with the requirement of experience in diplomacy which is accumulated over the years.⁶¹ Nonetheless, there were only three female ambassadors appointed by the country⁶², the first female ambassador to the USA was appointed by a royal decree in 2019⁶³, the second and third ambassadors were appointed consecutively by royal decrees in 2020 and 2021. There are still

2/3/1426 AH < <https://laws.boe.gov.sa/BoeLaws/Laws/LawDetails/b5cf540a-e6ac-426a-b348-a9a700f163de/1> > accessed 28 November 2021. [Original Arabic version].

⁵⁸ Karolak, M.; Guta, H., *Saudi Women as Decision Makers: Analyzing the Media Portrayal of Female Political Participation in Saudi Arabia*, 2020, 18 Journal of Women of the Middle East and the Islamic World 75–95.

⁵⁹ World Economic Forum, Global Gender Gap Report 2021. Insight report March 2021, < https://www3.weforum.org/docs/WEF_GGGR_2021.pdf > accessed 2 December 2021, 14.

⁶⁰ *Ibid.*

⁶¹ Arab News, *Saudi female diplomats are making great progress, says ambassador*, 2021 < <https://www.arabnews.com/node/1203406/saudi-arabia> > accessed 15th December 2021.

⁶² Alarabiyah News, *Saudi Arabia appoints third female ambassador Inas al-Shahwan to Sweden and Iceland*, 2021 < <https://english.alarabiya.net/News/gulf/2021/04/22/Inas-al-Shahwan-appointed-as-Saudi-Arabia-s-Ambassador-to-Sweden-and-Iceland> > accessed 14th December 2021.

⁶³ Alarabiyah News, *Princess Reema bint Bandar: Saudi Arabia's first female ambassador*, 2019) < <https://english.alarabiya.net/features/2019/02/24/Princess-Reema-bint-Bandar-Saudi-Arabia-s-first-female-ambassador> > accessed 15th December 2021.

clearer policies and empowerments needed this area. Recently in 2023 more two ambassadors are appointed⁶⁴ but no policies or regulations enacted.

In conclusion, this section examined the most recent Saudi reforms in relation to women's empowerment. It highlighted whether they have the effect of empowering Saudi women, and whether they facilitate their access to the labour market as a way of overcoming patriarchal traditions and customs along with a proposal of the use of women's legal empowerment as an approach that assists in attaining the most favourable results of the reforms. It pointed out how legal reforms are important steps to empower women; nonetheless, continues work towards ending guardianship and patriarchal believes in the country is required⁶⁵ for economic development. Additionally, women individual and collective abilities to identify their rights and interest and work towards them by making strategic choices⁶⁶ is what Saudi women need.

The upcoming section is going to highlight the impacts of the elaborated reforms on Saudi women's agency and if it is enough to empower Saudi women to participate in the economy.

3. KSA DISCOURSE: ARE LEGAL REFORMS ENOUGH?

This section starts with a discussion of the possible impacts of the law reforms upon norms and the society. It is then followed by the statistical impact of reforms taken in KSA. The section would then conclude with general remarks on the effects of policy changes on the country.

As highlighted in the previous section, in order to weaken or possibly eliminate gender inequality in the country, KSA appears to reform its legislation with the aim of providing equal opportunities for all in the economic sector. This approach seems to pay off as statistics show the impact of the reforms on the number of Saudi female's participation in the workforce. However, an important point to note on one hand is that this approach has been implemented in the West as a solution to gender discrimination, they assumed that gender is a social construct; thus, defining the set of attitudes and behaviours that are considered socially acceptable based on sex, and it has not ended discrimination or

⁶⁴ Saudi gazettes, *5 women diplomats represent Saudi Arabia abroad*, 2023 < <https://saudigazette.com.sa/article/630491>> accessed 4th September 2023

⁶⁵ Soekarba, *op. cit.* note 5.

⁶⁶ Maranlou, S., *Access to Justice in Iran: Women, Perceptions, and Reality*, Cambridge: Cambridge University Press, 2014.

patriarchy.⁶⁷ To the contrary, it has the possible effect of reinforcing patriarchy by promoting a universal; social attitude associated with masculinity by giving more value to work outside the household and devaluing labour in childcare.⁶⁸ Reinforcement of equal opportunities in legislations may present masculinity as the universal gender to be embraced by women to be successful. Therefore, it is proposed that legal reforms must be combined with empowerment initiatives for a balanced result. It is to give voice to the empowered and not to speak for them⁶⁹, this is required to avoid repeating similar faults such as the ongoing depiction of the West about Saudi women, many studies are speaking for them and not giving them the chance to speak for themselves.

On the other hand, policies changes and legal reforms have its positive effects, there are interrelations between household composition, norms, and policies.⁷⁰ Therefore, it is assumed that changing the policies of a country lead to changes in its household compositions.⁷¹ The society is expected to accept the changes and thus feeds the policies back into the norms⁷² and as a result, there will be a reshape of the household composition. The changes manifested by KSA's plans appears in its policies. Women are encouraged to enter the public sphere, since they are doing so, it could be assumed that the patriarchal norms are gradually changing. Nevertheless, what is difficult to be changed is not the traditional family norms and values but the institutionalised side of patriarchy.⁷³ A change of the societal norm does not have the immediate effect in changing institutionalised patriarchal policies regarding women's role in the public sphere, even though both require time and effort to be altered. Therefore, it is essential to consider the degrees of patriarchy in both the society and the policies in the country for changes.

The Saudi General Authority for Statistics (GASTAT) shows the number of women in employment throughout the years in the country. Saudi women's unemployment rates proved to be improving according to the labour market

⁶⁷ Butera, A., *The Kingdom of Saudi Arabia Through the Eyes of Saudi Women*, Lexington Books, London: UK, 2021.

⁶⁸ *Ibid.*

⁶⁹ An argument proposed by several authors such as: O'Hara, P., *Exercising agency: Women, space and Place in Saudi Arabia*, 86 *The Cornell International Affairs Review*, 2019

⁷⁰ Spierings, N., *The Influence of Patriarchal Norms, Institutions, and Household Composition on Women's Employment in Twenty-eight Muslim-Majority Countries*, 20 *Feminist Economics* 4, 2014

⁷¹ Kandiyoti, D., *Bargaining with Patriarchy*, 2 *Gender and Society* 3, 1988; and Olmsted, J., *Gender, Aging, and the Evolving Arab Patriarchal Contract*, 11 *Feminist Economics* 2, 2005.

⁷² Ross, M., *Oil, Islam and Women*, 102 *American Political Science Review* 1, 2008.

⁷³ Spierings, *op. cit.* note 73.

statistics. Saudi female unemployment rate has dropped from 31.7% in the first quarter of 2019⁷⁴ to 28.2% in the first quarter of 2020.⁷⁵ It continued to decrease reaching 21.2% during the first quarter of 2021⁷⁶. Statistics show significant decrease of the total number of unemployed Saudi women in a duration of five years, the number of females made up 55.1% of the total unemployed Saudi people in 2017⁷⁷ and currently it decreased to reach 22.3% in the second quarter of 2021.⁷⁸

From the statistics above it appears that the reforms in the country made it easier for women to get into the labour market and be employed. KSA for decades had been among the countries with low female labour force participations. Since women's empowerment was considered as one of the main pillars of the kingdom in the last country plan of vision 2030; the country started stressing on many occasions that it will continue to develop women's talents and invest in their productive capabilities. The government recognized women as great assets; therefore, it set the aims to enable them to strengthen their future and contribute to the development of their country. Those objectives have been affirmed explicitly in KSA's plans⁷⁹, especially the last 2030 vision which stressed that it would increase women's participation in the workforce from 22% to 30%.⁸⁰ The impacts of the reform accelerated the process of achieving this objective several

⁷⁴ General Authority for statistics, KSA, Labour Market Statistics Q1 2020 < <https://www.stats.gov.sa/en/news/395> > accessed 30 November 2021.

⁷⁵ General Authority for statistics, KSA, Labour Market Statistics Q1 2019 < https://www.stats.gov.sa/sites/default/files/labour_market_q1_2019_en.pdf > accessed 30 November 2021.

⁷⁶ General Authority for statistics, KSA, Labour Market Statistics Q1 2021 < https://www.stats.gov.sa/sites/default/files/LM_Q1%202021%20%28Press%20release_EN%29_1.pdf > accessed 30 November 2021.

⁷⁷ General Authority for statistics, KSA, Labour Market Statistics Q1 2017 < https://www.stats.gov.sa/sites/default/files/labour_market_2017_q1.pdf > accessed 30 November 2021.

⁷⁸ General Authority for statistics, KSA, Labour Market Statistics Q2 2021 < https://www.stats.gov.sa/sites/default/files/LM_Q2%202021En.pdf > accessed 30 November 2021.

⁷⁹ For example, kingdom of Saudi Arabia Ministry of Economy & Planning, 'The Eighth Development Plan 2005 – 2009' < <https://www.mep.gov.sa/en/AdditionalDocuments/PlansEN/8th/Eighth%20Development%20Plan%20-%20Index.pdf> > accessed 9th November 2021 and kingdom of Saudi Arabia Ministry of Economy & Planning, 2005 – 2009 'Objectives of the Ninth Development Plan 2010–2014' < <https://www.mof.gov.sa/en/about/OldStratigy/Ninth%20Development%20Plan%20-%20Appendix-مدمج.pdf> > accessed 9th November 2021; and Arab National Development Planning Portal, 'The Tenth Development Plan 2015-2019 KSA' < <https://andp.unescwa.org/node/1239> > [Arabic Version] accessed 3rd March 2022.

⁸⁰ Vision 2030, kingdom of Saudi Arabia, < https://www.vision2030.gov.sa/media/rc0b5oy1/saudi_vision203.pdf > accessed 29/7/2021.

years earlier. KSA has in fact sailed past its target of 30 % to be achieved by 2030. The figures show notable decrease of Saudi female unemployment rate and an increase of the number of employments. The labour force participation rate among Saudi females is 32.4% in the second quarter of 2021.⁸¹

Moreover, KSA has also proved significant improvement globally on women's right to work which is apparent in the 2021 World Bank's women, business, and law report. The report states that Saudi Arabia eliminated all restrictions on women's employment under the *pay* indicator.⁸² It has also eliminated all restrictions in industrial jobs, such as mining, construction, manufacturing, and the water sector, and has also lifted bans on women rights to work.⁸³ It affirmed that KSA has eliminated restrictions on women's employment in jobs previously deemed dangerous for women.⁸⁴ To be mentioned likewise is 'Saudization' later 'Nitaqat' rule in the country that aim to include more Saudis in all job sectors especially the private sectors. Private sectors were obliged to hire more women in line with the government's initiatives to employ both genders and follow the diversification plans. Despite the fear of negative social impact of the Saudization/ Nitaqat policy addressed by some studies. Mainly that the participation of females in the workforce may cause social and family problems that might resulted in a sharp increase in the number of divorce rate, same as similar policies adopted in the neighbouring countries such as the Qatarization policy.⁸⁵ Nonetheless, for KSA these recent years have witnessed promotions and enhancement of women's opportunities paving the way to their success at all levels, which has been acknowledged by several scholars.⁸⁶

Lastly, the KSA 2030 vision has been acknowledged as giving Saudi women the opportunity to prove their value, keeping pace with the aspirations of Saudi society and thus contributing to the process of economic and social development.⁸⁷ The reforms and regulations in women's favour indicate the government's intention to enhance their value and ensure their empowerment. The reforms have also contributed to a major shift in the Saudi perspective on women's rights, they resulted in finding out a lot of the obstacles women are

⁸¹ General Authority for statistics, KSA, Labour Market Statistics Q2 2021(n 167).

⁸² World Bank Group, *op. cit.* note 8.

⁸³ *Ibid* 16.

⁸⁴ *Ibid.*

⁸⁵ Al-Asfour A. *et al.*, *op. cit.* note 18; and Al-Asmari, M., *Saudi labor force: challenges and ambitions*, 16 JKAU: Arts & Humanities 2, 2008.

⁸⁶ For example, Khalid, A., *Are the Male Guardianship Laws in Saudi Arabia a Challenge to Human Rights of Women as Advocated in Islam?* 1 Journal of Human Rights Law and Practice 1, 2018

⁸⁷ Assem, A.; Kamini, D., *Issues and Challenges of Saudi Female Labor Force and the Role of Vision 2030*, 7 International Journal of Economics and Financial Issues 4, 2017

facing in many sectors specially work. It could be said that the commitment of KSA to reduce the country's gender gap and preserve the rights of women is significant. Nonetheless, there is still more to be done in order to realize women's autonomy and empowerment compared to women around the world.

The GGGR Index classified Saudi Arabia as one of the most gender unequal countries in the world. In 2021 KSA has been ranked the 149th, at the bottom ten countries out of the 156 countries in reflecting gender gap in Economic Participation and Opportunity.⁸⁸ In the overall ranking reflecting the gender gap in the countries, Saudi Arabia in the bottom 10 countries.⁸⁹ is placed in the 147 nationally and internationally. Nonetheless, in 2022 the country's position has significantly improved, it is now the 6th MENA country in gender equality and is no longer in the bottom 10 of countries reflecting gender gap in Economic Participation and Opportunity.⁹⁰ This improvement points, on one hand, to the impact of legal reforms and other initiatives undertaken in the country to empower women and further improvements are yet to be seen. on the other hand, there are still more efforts to be done in line with legal reforms.

Legal reforms as a strategy are normally not enough by its own, there is always a need for combining strategies to legally empower women in any country. This has been alleged to be true for several reasons. Firstly, there are organisations such as CLEP who focused on legal reform to empower the poor, but they encounter several obstacles and criticisms. Therefore, the strategy of legal reforms in its own was not sufficient to empower women. Secondly, women in the country proved not to be significantly affected by politics and policies, other factors such as self-efficacy, family support and economic empowerment proved to play more roles in their lives and thus they are more likely to empower them.⁹¹ Therefore, emphasis should be put on the most factors affecting women's participation in the economy to empower them.

⁸⁸ World Economic Forum, Global Gender Gap Report 2021 < https://www3.weforum.org/docs/WEF_GGGR_2021.pdf > accessed 8th November 2021, 18.

⁸⁹ *Ibid.*

⁹⁰ World Economic Forum, Global Gender Gap Report 2022: Insight Report < https://www3.weforum.org/docs/WEF_GGGR_2022.pdf > accessed 25th March 2024.

⁹¹ Al-Rashdi, N.; Abdelwahed, N., *The Empowerment of Saudi Arabian Women through a Multidimensional Approach: The Mediating Roles of Self-Efficacy and Family Support*, 14 Sustainability 24, 2022.

In KSA, time is needed for the top down approach of legal reform to enter into the social fabric of nation.⁹² It is the most common way to change societal norms in the country⁹³, changes mostly start by legal decrees, implementations and then gradually a new standard of norm would be observed in the society. The new introduction of the new reforms is expected to take time to be fully accepted by the society. This is in analogy to the introduction of education for women in the country as an example, it took time for the people to get convinced about the significance of women's education and allow their girls to join schools, colleges, and universities. Therefore, actual change of women's status is always motivated from the bottom in the country.

Legally empowering women either by legal reforms- top -bottom- approach as adopted by KSA or bottom-up approach require understanding of the society and women in the society, outlining strategies to be adopted would accelerate the changes, combining those approaches with feminists and development approaches would also assist in accelerating and understanding the situation of women in the country. This paper suggests Naila Kabeer's theory of agency and CLEP developmental approach in empowering women to participate in the economy in KSA.

4. CONCLUSION

This paper has attempted to contextualise women's legal empowerment in employment in KSA by examining the legal reforms in the country related to women. It outlined the new areas opened for women recently in the country to encourage them to participate in the economy. The paper concluded how legal orders and decrees are the usual methods adopted in the country to change a societal habits or values. It has its advantages, but it tends to take long time for the change to take place similarly to the introduction of women's education in the country. The use of different approaches, that of bottom up, starting from changing people's minds and women's agency and self-conscious are expected to accelerate the process of changing women's status thus leading to more participation in the economy as aspired.

⁹²Pilotti, M.; Abdulhadi, E.; Algouhi, T.; Salameh, M., *The New and the Old: Responses to Change in the Kingdom of Saudi Arabia*, 22 Journal of International Women's Studies 1, 2021.

⁹³ Le Renard, A., *A society of young women: Opportunities of place, power, and Reform in Saudi Arabia*, Stanford University Press. 2014.

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Review paper

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MODULAR SYSTEMS - INTELLECTUAL PROPERTY RIGHTS AND LEGO BRICKS

ABSTRACT

This article uses the example of Lego bricks to show how companies combine individual intellectual property rights in order to achieve the best possible protection for their intellectual property. Lego uses the individual intellectual property rights like individual bricks in a building block system: Ever since the patent protection for Lego bricks has expired, the company tries to have the building block further protected via other intellectual property rights. Lego and its competitors take this approach even a step further while they seek protection for their products and against one another from the courts competent for intellectual property rights at EU level. This highlights the seemingly strong trust that not only Lego places in intellectual property law, its effectiveness and the associated EU case law. The main questions of this article are: Can it be deduced from these aforementioned observations that intellectual property law takes economic contexts into account to a particularly high degree and can it be further deduced that the application of intellectual property law results in effective and profitable solutions for economic practice, both at national and EU level? To answer this question, three court decisions concerning Lego bricks will be considered: 1) Court of Justice, 14 September 2010, C-48/09 P¹ (EU trademark); 2) General Court, 6. December 2023, T-298/22² (three-dimensional EU trademark); 3) General Court, 24 January 2024, T-537/22³ (design protection).

Keywords: Intellectual property law, EU trademark, EU design protection, Extension of protection period, European jurisdiction

1. INTRODUCTION

Companies use the instruments of intellectual property law to protect their products and thus their corporate values. According to a study published on 11

¹ ECLI:EU:C:2010:516.

² ECLI:EU:T:2023:781.

³ ECLI:EU:T:2024:22.

October 2022 jointly by the European Patent Office (hereinafter: EPO) and the European Union Intellectual Property Office (hereinafter: EUIPO), industries that make intensive use of intellectual property rights created around 29.7%⁴ of all jobs in the EU between 2017 and 2019⁵, a fact which shows the economic importance of intellectual property.

Often people talk about the challenges caused by the Europeanisation of national law: this article aims to show the extent to which standardisation has already been achieved concerning the protection of intellectual property and the extent to which EU law has already been harmonised on EU-level⁶. This article will use selected case law and rulings of the Court of Justice and the General Court to show the challenges and solutions that the Europeanisation and harmonisation of national law currently offers to solve three problems. These problems can be demonstrated best by the following example: The Danish company Lego is one of the best-known manufacturers of building blocks (modular system). There are three main legal problem areas this company has to face when it seeks protection for its clamping bricks:

1. How does EU law deal with attempts by companies to extend the protection of intellectual property rights after the expiry of the term of protection? In this context the following conflict of interests must be resolved: On the one hand, the protection of intellectual property rights must be strong enough and offer long enough protection to be attractive. On the other hand, however, the protection must not be so strong that the economy, innovation or individual design would be too severely restricted or even prevented. The Court of Justice's decision of 14 September 2010, C-48/09 P7 (EU trademark) and General Court's decision of 6 December 2023, T-298/228 (three-dimensional EU trademark) are considered in this regard.⁹
2. Lego applied for a patent for its clamping brick in 1958. Accordingly, the term of protection has now expired. However, Lego would like to maintain/extend the protection under intellectual property law for his

⁴ https://link.epo.org/web/ipr-intensive_industries_and_economic_performance_in_the_EU_2022_en.pdf, p.66, 26 April, 2024.

⁵ <https://www.epo.org/de/news-events/news/geistige-eigentumsrechte-schaffen-82-millionen-arbeitsplaetze-der-eu>, 26 April, 2024.

⁶ For a legal comparison between Hungarian and EU court decisions see: Kováts, B., *Can the shape of the Lego brick enjoy trademark protection? A comparison of the judgments of the Hungarian courts and of the Court of Justice of the European Union regarding the invalidity of the Lego brick trademark*, GRUR Int. 2019, p. 113.

⁷ ECLI:EU:C:2010:516.

⁸ ECLI:EU:T:2023:781.

⁹ ECLI:EU:C:2010:516 and ECLI:EU:T:2023:781.

products as long as possible.¹⁰ This article will show the strategies Lego applies to achieve this goal. Thereby it will look on a judgement, in which the General Court reached a verdict in favour of Lego.¹¹

3. Furthermore, the company's communication with its retailers and customers is also determined by the legal principles of intellectual property rights. The term Lego brick is in danger of developing into a generic term in the German-speaking world, which might mean that this term cannot be protected by intellectual property rights. In the interest of the company, Lego is endeavouring to prevent this development.

These three aspects show that at least Lego as a company places its trust in intellectual property law and the associated EU case law, because it seeks protection for its products in the law and in the courts, but also protection against competitors. The legal situation described in the following points follows the currently applicable law. As the history of the Lego brick begins with the first products sold in 1949 the former legal situation still is on some points mentioned, but in these cases the currently applicable law is cited as well.

2. FIRST BASIC BRICK: NATIONAL PATENT LAW AS PROTECTION FOR LEGO'S CLAMPING BRICKS

The Danish manufacturer Lego seeks to protect its products in the best way possible by intellectual property rights. We take a look at how this company from the beginning used the instruments of intellectual property to protect their products, goods or, to put it more abstractly, their corporate values.

2.1. Early protection in the time after the invention of clamping bricks

After the invention of the Lego brick the company secured protection for this product through patent law. As the European Patent Convention came into force in 1973, the company's only option in the time directly after the invention of the clamping brick was to seek protection through national patent law¹² – in Denmark it secured the patent on 28 January 1958 and in Germany on 4 April

¹⁰ Rahmatian, A., *Was ist an LEGO® eigentlich noch schützbar? Ein tour d'horizon durch das Immaterialgüterrecht*, MR-Int 2/2021, p. 52.

¹¹ ECLI:EU:T:2024:22.

¹² <https://www.epo.org/en/legal/epc>, 2 April, 2024.

1958.¹³ But the national patent protection¹⁴ alone was not sufficient to deal with all legal questions concerning the Lego brick when it came to the creativity of Lego's competitors. Lego's patent for the clamping brick was not undisputed for instance in Germany,¹⁵ as a competing Danish company tried to circumvent Lego's patent protection on the German market via the diversions of competition law.¹⁶ The starting point for the court proceedings that led to the judgement of the highest German Court for Civil Law, Federal Court of Justice (Bundesgerichtshof, hereinafter: BGH), on 6 November 1963¹⁷ was that Lego had succeeded in placing a completely new product in the German market for children's toys and now competitors tried to reclaim their share of the market by producing bricks compatible to the Lego brick. The conflict of interest centred on the question whether it followed from Lego's position in the market as a market developer that its product should enjoy an enhanced legal protection against compatible products from competing companies. The court decided that Lego enjoyed protection against the imitation of its products according to competition law. To reach this judgement the court focused on the specific moulding of the Lego brick and differentiated between such features of the brick that could be qualified as simply aesthetic and those that could be qualified as being dictated by the product's technical functionality. Features of a product that are caused exclusively by its technical functionality are not protected by the law, because regardless of the legal protection of the product it must be legally permissible to manufacture spare parts.¹⁸ In the above-mentioned case, the clamping bricks and the imitation products were primarily characterised by their functional design. In order to ensure the uniformity of the national legal system and to take Lego's patent for the clamping bricks into account within the

¹³ Bundesverband Deutscher Patentanwälte, *60 Jahre Lego – vom bunten Steckbaustein zum Roboter*: <https://www.bundesverband-patentanwaelte.de/patente/60-jahre-lego-vom-bunten-steckbaustein-zum-roboter/>, 2 April, 2024.

¹⁴ See for further information on the former legal situation: Nikolai, T., *Erstanmelder- oder Ersterfinderprinzip: eine vergleichende Untersuchung des deutschen und amerikanischen Patentrechts*, GRUR INT 1973, p. 169.

¹⁵ Harder, H. L. v., *Dem Markterschließer ein Monopol? - Bemerkungen zu den BGH-Urteilen Klemmbausteine und Buntstreifensatin*, GRUR 1969, p. 660.

¹⁶ For further information on competition law in this context please see: Riesenhuber, K., *Lego - Stein des Anstoßes*, WRP 2005, p. 1118; Ohly, A., *Designschutz im Spannungsfeld von Geschmacksmuster-, Kennzeichen- und Lauterkeitsrecht*, GRUR 2007, p. 736; Krüger, C., *Zur Klemmbausteine-Doktrin nach BGH Regalsystem und Einkaufswagen III*, GRUR 2016, p. 665; Schacht, H., *Wettbewerbsrechtlicher Leistungsschutz für technische Merkmale – Rettungsboot oder Havarist?*, GRUR 2017, p. 1204.

¹⁷ BGH, judgement of 6 November 1963, *Ib ZR 37/62 – Klemmbausteine*, GRUR 1964, p. 621-627 (with judgement on p. 621-625 and note on judgement by Ludwig Heydt on p. 625-627).

¹⁸ BGH, judgement of 6 November 1963, *Ib ZR 37/62 – Klemmbausteine*, GRUR 1964, p. 624; Harder, H. L. v., *Dem Markterschließer ein Monopol? - Bemerkungen zu den BGH-Urteilen Klemmbausteine und Buntstreifensatin*, GRUR 1969, p. 660.

framework of this uniformity, the court had to develop an argument with which Lego could also be protected from imitation products through competition law. The court argued that the imitator was exploiting Lego's building principle of the supplementary bricks to launch its products on the market, an unethical competitive practice. Therefore, the imitation of the Lego bricks by the competitor was deemed to be unethical and thus legally inadmissible.¹⁹

2.2. Term of the patent

Under the European Patent Convention²⁰ as well as under Patentgesetz²¹, patent protection ends after 20 years in accordance with Art. 63 EPC and Sec. 16 PatG. The term of protection begins on the day of the filing of the application for the invention²². After the Lego's patent for its clamping brick had reached the maximum period of patent protection according to national and EU-law, the protection ended and the Lego brick belonged to the state of art. But Lego's need for legal protection for its clamping bricks had not yet come to an end. The company had to look for new ways to protect its products from competitors and so trade mark law came into focus.

3. SECOND BRICK: TRADE MARK

After the expiry of the patent protection, Lego therefore intended to protect its product under trade mark law.

¹⁹ BGH, *judgement of 6 November 1963, Ib ZR 37/62 – Klemmbausteine*, GRUR 1964, p. 624ff; for the current discussion of this question see: Schacht, H., *Wettbewerbsrechtlicher Leistungsschutz für technische Merkmale – Rettungsboot oder Havarist?*, GRUR 2017, p. 1204.

²⁰ European Patent Convention, 5 October 1973 (Act of 21 June 1976, Federal Law Gazette 1976 II p. 649, 826, 915), in force in Germany since 7 October 1977 (Federal Law Gazette 1977 II S. 792); Revision Act of 29 November 2000 (Act of 24 August 2007, Federal Law Gazette 2007 II p. 1082, 1083, 1129), hereinafter: EPC.

²¹ Patentgesetz, 25 May 1877 (RGL. S. 501), revised by announcement of 16 December 1980 (Federal Law Gazette 1981 I p. 1); last amended by Article 1 of the Act of 30 August 2021 (Federal Law Gazette I p. 4074), hereinafter: PatG.

²² Cimniak, T., Einsele, R. *et alia*, PatG: *Erster Abschnitt: Das Patent und EPÜ: Dritter Teil: Die europäische Patentanmeldung – Artikel 75-89*, Fitzner, U. *et al.*, BeckOK *Patentrecht*, Munich 2024, 31th Edition, Status: 15.01.2024.

3.1. Protection of Lego bricks under EU and German trade mark regulation

Accordingly, Lego sought to register the Lego brick as a three-dimensional trade mark²³ within the meaning of the EU Regulation in force at the time and within the applicable German law of the time.²⁴ Today, the Community trade mark is codified in Regulation (EU) 2017/1001.²⁵ The relevant provisions of Regulation EC/207/2009 belonging to the relevant court decisions and the provisions of Regulation 2017/1001 currently in force are listed below. Although the harmonization of the national laws under EU law has made further progress this example shows how far the Regulation EC/207/2009 and the German Markengesetz²⁶ from 1994 were already in concordance. This is the reason why Lego's efforts to receive protection for the clamping brick failed on both levels – as it still would fail now under current law. Lego was and is confronted with the following legal situation:

At EU level, only the formal registration procedure is provided for the Community trade mark, according to which trade mark protection arises through registration of the sign in the register of the Community trade mark (Art. 6 Regulation 2017/1001). The application procedure for the European Union trade mark is governed by Art. 30 *et seq.* of Regulation 2017/1001.

Under Community and German trade mark law the EUIPO and the DPMA examine if the application fulfils formal and substantive legal requirements. Under German law, a formal examination (Sec. 36 MarkenG) and an examination for absolute grounds for refusal (Sec. 37 MarkenG) are carried out in the application procedure. However, only an obviousness test is carried out for cases of the risk of being misleading or bad faith. There is no examination of relative grounds for refusal *ex officio*, with the exception of the provisions of Sec. 10 MarkenG. In EU proceedings, the requirements of Art. 31 (3) and Art. 32 Regulation 2017/1001 as well as the payment of class fees within the period provided for this purpose are examined in accordance with Art. 41 Regulation

²³ Nordemann-Schiffel, A., § 4 *Entstehung des Markenschutzes*, Nordemann, A.; Nordemann-Schiffel, A., *Markengesetz*, Munich 2023, Margin nos. 10-17; Pohlmann, A., *Das Recht der Unionsmarke*, Munich 2018, chapter 2.

²⁴ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ L 78, 24.3.2009, p. 1–42, L 112/10, L 112/21, L 341/21, Community Trade Mark Regulation (CTMR), hereinafter: Regulation EC/207/2009.

²⁵ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ L 154, 16.6.2017, p. 1–99, L 2023/2411 hereinafter: Regulation (EU) 2017/1001.

²⁶ Gesetz über den Schutz von Marken und sonstigen Kennzeichen, Act of 25 October 1994 (Federal Law Gazette I S. 3082), last amended by Act of 8 October 2023 (Federal Law Gazette I S. 272), hereinafter: MarkenG.

2017/1001. Furthermore, an examination is carried out to determine whether the sign described in the application infringes absolute grounds for refusal (Art. 42 Regulation 2017/1001). If the application is not rejected, registration and publication will take place (Art. 46 and Art. 51 Regulation 2017/1001, Sec. 42 MarkenG).

As part of the three-dimensional trade mark, the shape of goods can also be protected as a sign (Art. 4 Regulation 2017/1001, Sec. 3 (1) MarkenG). At the same time, it is not possible to register a sign that consists exclusively of the shape of the goods, which is necessary to achieve a technical effect as a trade mark (Art. 7 Regulation 2017/1001; Sec. 3 (2) No. 2 MarkenG), as this is deemed by the law to be an absolute ground for refusal. Lego was equally unsuccessful before the BGH²⁷ and the Court of Justice²⁸ to argue that Sec. 3 (2) No. 2 MarkenG respectively Art. 7 Regulation 2017/1001 did not apply to its clamping brick. The BGH based its argumentation on the fact that the question of registration of the toy brick as a trade mark should be determined exclusively on the clamping knobs on the top of Lego's brick. The cuboid shape of the brick should not be taken into account for trade mark protection as it was and still is the basic shape of the product. In the eyes of the court, the knobs on the top of the brick have only a technical function and cannot be protected under Section 3 (2) No. 1 MarkenG. The knobs and the shape of the inside of the toy brick were and still are seen as part of the Lego clamping system. Therefore, the Lego brick had in the opinion of the court no features that were not technically necessary for its functionality. As technical components of the brick must be kept free in the interests of competitors, the BGH ruled it to be necessary to keep the brick free from trade mark protection.

In its judgement of 14 September 2010 (C-48/09 P), the Court of Justice drew the same conclusions and ruled that the clamping brick cannot be registered as a three-dimensional trade mark²⁹, as the trade mark consists exclusively of the shape of the goods, which is necessary to achieve a technical effect. This constitutes an absolute ground for refusal within the meaning of Art. 42, Art. 7 (1) lit. e No. 2 Regulation 2017/1001.

These court decisions were welcomed by legal professionals, as the therein offered solution was considered to be the best solution in the system of

²⁷ BGH, decision of 16. July 2009 (I ZB 53/07), GRUR 2010, p. 231-234; Schöne, V., *Legosteine ist nicht markenfähig – Anmerkung zu BGH, Beschluss vom 16.07.2009 – I ZB 53/07 – Legosteine*, GRUR-Prax 2010, p. 84.

²⁸ Court of Justice, 14 September 2010, C-48/09 P; ECLI:EU:C:2010:516.

²⁹ See also: Schabenberger, A., *Ein Legosteine kann keine Marke sein*, GRUR-Prax 2010, p. 431.

intellectual property rights. The successive accumulation of property rights in the specific way that was sought after by Lego is not considered desirable. The rule that patented inventions become public domain when the patent expires should not be altered, because the protection mechanisms of patent law would be undermined if trade mark protection would make it possible to obtain permanent protection for functional three-dimensional designs that are either not patentable or whose patent protection has already expired³⁰. This was certainly not the outcome Lego had hoped for, but it was not the only legal problem Lego had to deal with at the moment of the above-described judgements.

Up until this point, the afore-mentioned legal difficulties of Lego concerned the question if some specific products were protectable by intellectual property law. This was answered in the negative. Now Lego faced another problem: although some other products of Lego had successfully be registered as trade mark, a new legal issue arouse, which consisted of a very concrete danger that this trade mark protection might be revoked by the courts.

3.2. Reason for decline: is the term Lego brick a generic term?

Before the further developments are given, it is necessary to look on Lego's situation in the European market on a broader level to understand the importance of the later given court rulings. Lego's renewed efforts to obtain protection through intellectual property law for its clamping brick after the above-described set-back can only be fully understood if another danger for Lego's corporate values at that time is taken into account. Irrespective of the non-protectability of the standard clamping brick under trade mark law, the company name Lego is legally effective protected as a word mark.³¹ The effort to protect a company's product from imitation alone is not enough to secure the company's position in the market. It is necessary to protect additionally the trade mark sign itself. Therefore, in the following example, which concerns the sale of Lego's products in Germany but which is conceivable in other countries as well, it is shown that Lego successfully prevented that the word mark Lego developed into a generic term.

³⁰ Jaeschke, *Die Produktform als Corporate Identity?*, GRUR 2008, p. 755.

³¹ The legal need for protection discussed here is also an issue in other areas of law: Stiepe, Malte, *Urheber- und wettbewerbsrechtlicher Schutz von Werbefiguren (Teil 1 und 2)*, GRUR 2017, p. 652; 765.

A trade mark has several functions, but one of the most important functions is the function of origin:³² the relationship between product and manufacturer is to be protected by distinguishing products from different manufacturers and making it clear which goods are produced by which manufacturer. In practice, there is a real danger that the Lego brick has become just as name-giving for clamping bricks as Tempo handkerchiefs are for paper handkerchiefs in German. As the bricks - just like paper handkerchiefs - are not only produced by Lego or Tempo, other manufacturers might profit from the companies reputations if their products are labelled not by their true manufactures names but by the market leading companies names. This has led Lego into conflict with toy retailers. Retailers with analogue shops advertise their products on the YouTube platform - this also applies to shop owners who sell Lego products³³. Youtubers present building sets of clamping bricks in their videos, with one of them - the Youtuber "Held der Steine" ("Hero of bricks")³⁴ - being particularly successful in attracting attention and customers. In this videos very often clamping bricks not manufactured by Lego were nevertheless labelled "Lego". In principle, one could assume that it speaks in favour of the quality and success of the product if its trade mark sign becomes so popular that it is on everyone's lips and even displaces the manufacturer labels of other producers on the market for the same goods. But in this case, it presented Lego with a major legal challenge: the manufacturer must prevent its manufacturer's name from being used for all toy bricks in modular systems, as otherwise Lego would become a generic term. Once a trade mark has become a generic term, it is used by the consumer for all similar products on the market, regardless of who the actual manufacturer is. This means that, among other things, the origin function of the trade mark is no longer guaranteed. Generic terms must also remain free so that they can be used by anyone. For this reason, the development of a trade mark sign into a generic term stands in the way of trade mark protection (Art. 7 (1) lit. d Regulation 2017/1001; Sec. 8 (2) No. 3 MarkenG). If the sign that is to be registered as a trade mark is already generic when the application for registration is filed, this constitutes a ground for invalidity that could be asserted in invalidity proceedings pursuant to Sec. 53 (1) in conjunction with Sec. 50 MarkenG or on EU-Level pursuant to Art. 59 (1) lit. a, (2) Regulation 2017/1001. However, it is also possible for a designation that was initially registered as a trade mark to become a generic term after its registration. The development or conversion of a

³² Jaeschke, L., *Die Produktform als Corporate Identity? – Klemmbausteine und die Frage der Kumulation von Schutzrechten*, GRUR 2008, p. 750.

³³ Glöckner, J.; Kur, A., *Geschäftliche Handlungen im Internet*, GRUR-Beilage 2014, p. 40; 42.

³⁴ Dornis, V., *Krieg der Steine*, Süddeutsche Zeitung of 3 February 2021, <https://www.sueddeutsche.de/digital/lego-held-der-steine-streit-markenrecht-1.5194969>, 2 April, 2024.

registered trade mark into a generic designation constitutes grounds for revocation of the trade mark pursuant to Sec. 49 (2) No. 1 MarkenG or on EU-Level pursuant to Art. 58 (1) lit. b Regulation 2017/1001, which can lead to the trade mark being cancelled from the register of the DPMA if the legal requirements are met. The DPMA can only examine whether there are grounds for revocation of the trade mark upon written request in the context of revocation proceedings pursuant to Sec. 53 (1) in conjunction with Sec. 49 (2) No. 1 MarkenG, Art. 63ff. Regulation 2017/1001. The application for revocation can be directed at the complete cancellation of the trademark for all goods and services for which the trademark is registered or at the partial cancellation of the trademark. The opinion of the relevant public at the time of the decision on the revocation application is decisive for the assessment. Members of the relevant public are the consumers and end users of the goods and services for which the trade mark is registered, as well as, as a rule, the manufacturers, retailers, intermediaries or suppliers and providers of these goods and services. It can only be affirmed that the trade mark has become a common name if almost all of the relevant public perceive the trade mark as a generic name. According to case law, "almost all" means that only a completely insignificant proportion of the relevant public may still see an indication of origin in the trade mark.³⁵ The requirements for the assumption of a generic term are high in order to give trade mark owners a fair chance to disprove the assumption.³⁶ As Art. 58 (1) lit. b Regulation 2017/1001 states that a revocation can take place when in consequence of acts or of the inactivity of the proprietor, the trade mark has become the common name in the trade for a product or service in respect of which it is registered, a company like Lego cannot be too careful in view of the importance of the trademark as soon as it suspects that its trade mark sign might develop in a generic term. This is the reason why Lego took swift and harsh efforts to protect its trade mark by cease and desist-letters against some retailers concerning their activities on YouTube.³⁷ By these actions Lego successfully prevented the use of the words "Lego bricks" as a term labelling all clamping bricks and thereby it prevented the development of those words from a trade mark sign to a generic term. Nevertheless, Lego's efforts to obtain and maintain intellectual property rights led to counter-reactions of its competitors, which caused a series of General Court judgements concerning Lego's registered trademarks. But in these

³⁵ Schork, D., *MarkenG § 8 Absolute Schutzhindernisse*, Nordemann, A.; Nordemann-Schiffel, A., *Markengesetz*, Munich 2023, Marg. No. 252, 252a.

³⁶ Fezer, K.-H., Fesenmair, J., *MarkenG § 8 Absolute Schutzhindernisse*, Fezer, K.-H., *Markenrecht*, Munich 2023, 5th Edition, Marg. No. 426, 428ff., 434.

³⁷ Dornis, V., *Krieg der Steine*, *Süddeutsche Zeitung* of 3 February 2021, <https://www.sueddeutsche.de/digital/lego-held-der-steine-streit-markenrecht-1.5194969>, 2 April, 2024.

cases, Lego's preparatory efforts in defending its trade mark protection for specific products were successful.

3.3. General Court's rulings on already registered three-dimensional trade marks for Lego bricks

The three following judgements of the General Court all concern the claim request directed to the declaration of invalidity of the European Union trade mark registered on 23 June 2000 for Lego's toy-figures under number 50518. In all three decisions of the General Court the initial decision of the EUIPO to grant Lego's human-like toy figures trademark-protection was attacked by competitors of Lego – Lego only joined these court proceedings as an intervener. In contrast to the above-mentioned court decision denying the Lego's standard brick trade mark protection, the General Court ruled in its first two decisions T-395/14³⁸ und T-396/14³⁹ of 16 June 2015 that Lego's human-like toy-figures have characteristic human shapes and human faces as well as human expressions which are not determined by technical functions. Therefore, they were deemed protectable as a three-dimensional trade mark according to Art. 7 (1) lit. e No. 1 Regulation 40/94 (currently: Art. 7 (1) lit. e No. 2 Regulation 2017/1001).⁴⁰ In the third proceedings at the General Court concerning the trade mark registered under number 50518, the General Court made it clear in its decision T-298/22⁴¹ that Lego's little toy figure had to be evaluated not only as toy figure but also as clamping brick. Subsequently in the judgement not only the most important decorative and imaginative features of the figure in question (i.e. its human inspired shape and facial expressions) but also the technical components that made it a part in Lego's modular building block system had to be taken into consideration (i.e. the shape of hands and feet of the figure). The EUIPO had not considered these two aspects in the initial registration proceedings⁴². The General Court came to the conclusion that classification of the toy figure not only as toy but also as clamping brick with decorative and technical features did not necessarily hinder its protectability as three-dimensional trade mark. The applicant in invalidity proceedings like T-298/22 has the burden of proof. In the opinion of the General Court in case T-298/22, the applicant did not rebut the

³⁸ ECLI:EU:T:2015:380.

³⁹ ECLI:EU:T:2015:379.

⁴⁰ Elkemann, C., *Anm. zu EuG: Keine absoluten Schutzhindernisse für Klemmbausteinspielzeugfigur: Entscheidungsbesprechung zum Urteil v. 06.12.2023 - T-298/22*, GRUR-Prax (4) 2024, p. 95.

⁴¹ ECLI:EU:T:2023:781.

⁴² EUIPO, *Zurückweisung des Löschantrags für die 3D-Marke der Lego-Minifigur - Entscheidung vom 16.03.2022 - R 1354/2021-5*, GRUR-RS 2022, p. 5634, Margin nos. 68 et sequ.

finding that at least one of the essential characteristics of Lego's product in question is not inherent in the typical function of a toy figure or that of a brick figure.⁴³ Therefore, Lego's efforts to protect some of its clamping bricks that feature special mouldings, led to success at this point.

4. THIRD BRICK: PROTECTION UNDER DESIGN LAW

But Lego had still to deal with the question, how it might be possible to protect its standard-shaped clamping brick through intellectual property law. After the clamping block was refused protection as a three-dimensional trade mark, the company had to look into other ways of obtaining protection for the building blocks.

4.1. EU and German design law

In 2014, the *Geschmacksmustergesetz* was renamed the *Designgesetz*.⁴⁴ This law continues to protect aesthetic products, provided they possess novelty and individuality. In addition to the national protection to be applied for, design protection can also be applied for throughout the EU⁴⁵: the EU intellectual property right corresponding to the German Design Act is the Community design⁴⁶, regulated in the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.⁴⁷

On the one hand, Lego could have thought of the utility model to protect its product. This might have been an obvious solution because the utility model is also referred to as the smaller version of the closely related patent. However, the maximum term of protection for the utility model is 10 years, so that a solution for a longer time span was sought after. In contrast to the utility model, the design is protected for 25 years, which in direct comparison is the more

⁴³ ECLI:EU:T:2023:781, Margin nos. 70, 75, 91, 121, 138 and 169.

⁴⁴ Gesetz über den rechtlichen Schutz von Design, Act of 12 March 2004 (Federal Law Gazette S. 390), in the version published on 24 February 2014 (Federal Law Gazette I S. 122), last amended by Act of 10 August 2021 (Federal Law Gazette I S. 3490), hereinafter: DesignG.

⁴⁵ For further information on early harmonisation see: Ohly, A., *Designschutz im Spannungsfeld von Geschmacksmuster-, Kennzeichen- und Lauterkeitsrecht*, GRUR 2007, p. 736; 739.

⁴⁶ See further: Ohly, A., *Die Europäisierung des Designrechts*, ZEUP 2004, p. 298ff.

⁴⁷ Community design regulation, OJ L 3, 5.1.2002, p. 1–24, L 112, 10, L 157, 203, L 236, 33, L 389, 14, hereinafter: CDR.

favourable option for companies. Therefore, the question of whether the building bricks could be protected as a design will now be considered.

Like patent law, German design law is a purely formal law: an application must be filed with the DPMA (see Sec. 11 DesignG for the necessary content of the application), and protection arises upon entry in the register (Art. 12 CDR, Sec. 27 (1) DesignG). The design (Art. 3 CDR, Sec. 1 DesignG) protects two-dimensional or three-dimensional manifestations of an entire product or a part thereof, which result in particular from the characteristics of the lines, contours, colours, shape, surface structure or materials of the product itself or its ornamentation. The substantive requirements for design protection stipulate that the design must have novelty and individuality (Art. 4 (1) CDR, Sec. 2 (1) DesignG).

Novelty is given (Art. 5, 7 CDR, Sec. 2 (2), 5 DesignG) if no identical design has been disclosed before the filing date. The design applied for is compared with the closest previously known designs; the overall impression is decisive in the respective comparison. Disclosure presupposes that the design has been publicised, exhibited or used, but there is no disclosure if the design could not have been known to circles of experts operating in the EU (objective, relative concept of novelty).

A design has individual character (Art. 6 CDR, Sec. 2 (3) Design Act) if the overall impression that the design produces on the informed user differs from the overall impression produced by designs disclosed before the filing date. The informed user is a normative figure that stands between the average consumer and the average person skilled in the art of patent law. The informed user is familiar with designs, but has no encyclopaedic knowledge of the status of all designs. The degree of design freedom is taken into account: if it is low, even minor differences in the designs are sufficient to affirm the individual character of a design.⁴⁸ However, there are also exclusions here (Art. 8 (1) CDR, Sec. 3, 4 DesignG): If the design consists only of appearance features that are exclusively due to technical function, it does not receive protection.

Initially, the EUIPO granted the LEGO brick EU-wide design protection in accordance with the above-described provisions of the CDR in 2010. However, in the year 2016 a competitor of Lego - the Hamburg-based company Delta-Sports - objected to this protection and applied for the cancellation of the design

⁴⁸ Schramek, W., Wende, C., *VO (EG) 6/2002 Art. 5: Neuheit*, Vohwinkel, M., *Beck-Onlinekommentar Designrecht*, Munich 2024, Status: 15.08.2023, Margin nos. 4-12.

registration.⁴⁹ The competitor's application for invalidity was based on Article 8 (1) CDR. The competitor argued that the appearance of the LEGO brick derives solely from the fact that it must be possible to connect it to other LEGO bricks so that it can fulfil its function as a building and play brick. The appearance is therefore a technical solution, not an aesthetic one.

4.2. Court cases

As long as courts⁵⁰ have answered the above posed question in favour of the technical solution, they enabled other companies to also manufacture and sell clamping components – thus providing their products at a lower price as Lego does. With a different legal solution other suppliers may now no longer be able to manufacture their products in the classic form due to the protectable design of the Lego bricks. The economically importance of this legal question therefore lies in the possibility to prevent monopolies and to claim market shares. The EUIPO initially rejected the invalidity application, but the competitor successfully lodged an appeal and the EUIPO confirmed the technical function of the brick. Subsequently in 2019 the Board of Appeal of the EUIPO declared the protection of the design invalid.⁵¹ The Office stated that it had based its decision on the argument that all of the features of the stone were exclusively due to its technical function. According to Art. 8 (1) EDR there is no protection for designs that represent the only possible form of connection between the product and another product. Lego, considering the importance of the question, fought against this decision and brought an action against the EUIPO before the General Court, which led to the court decision T-515/19.⁵² The General Court stated in its judgement that the EUIPO had overlooked certain features of the brick, especially as the subject matter of the proceedings was not the typical thick Lego brick that first comes to mind, but a flat brick with a row of four studs in the centre of the top and two smooth surfaces next to the row of studs. The court criticised that the EUIPO did not take these smooth surfaces into account when examining Art. 8 (1) CDR.⁵³ According to the General Court, these surfaces do not exist for technical but for aesthetic reasons. Therefore, the EUIPO also should have analysed these specific features and should have

⁴⁹ EUIPO, decision of 10 April 2019, (R 31/2018-3), GRUR-RS 2019, p. 53946, Margin no. 2.

⁵⁰ See further: Hartwig, H., *Die Rechtsprechung zum Designrecht in den Jahren 2020 und 2021 (Teil I)*, GRUR 2022, p. 1273; 1276.

⁵¹ For the text of the decision see: EUIPO, decision of 10 April 2019, (R 31/2018-3), GRUR-RS 2019, p. 53946.

⁵² ECLI:EU:T:2021:155.

⁵³ Jestaedt, D., *Der Schutz modularer Systeme nach der GGV - Anmerkungen zur Entscheidung EuG T-515/19 – LEGO*, GRUR 2021, p. 830.

rejected the application of invalidity, if at least one of them does not exclusively serve a technical function. Furthermore, the contested brick should have been analysed if its features were not solely of a technical nature, but if they contained also so-called connecting features. Under a connecting feature the court understands features that must have a certain shape in order to be mechanically connected to other products. In accordance with Art. 8 (2) CDR these design features are also denied protection. However, there is a further exception for those features. According to this exception, new and unique connecting features may be protectable if they are interchangeable products within a modular system. Although this exception is obviously the case concerning Lego bricks, the EUIPO only examined the application under Art. 8 (1) CDR without examining the possible existence of connecting elements or the exception to this rule. Based on these arguments the General Court annulled the EUIPO's decision and referred it back for re-examination, specifically with the task to consider the smooth surfaces of the Lego brick and the exception for connecting elements.

The Board of Appeal of the EUIPO in reassessing this legal question relied on the provision that regulates an exception: According to Art. 8 (3) CDR, designs that are connecting elements and therefore in principle not subject to protection according to Art. 8 (2) CDR can exceptionally be protected if they are part of a modular system.⁵⁴ The EUIPO came to the conclusion that Lego bricks are part of a modular system and are therefore worthy of protection.

Therefore, the key question for Lego here is the same as in trade mark law and patent law: Here too, the court and the EUIPO had to ask whether the appearance of a Lego brick is of a purely technical nature. That this argument is accepted more cautiously in the case of design is due to the fact that design is very often functional. Therefore, a less strict approach is taken here than in trade mark law and the protectability is regularly affirmed. This applies in particular to features that must necessarily be copied so that assembly with another product is possible (Art. 8 (2) CDR, Sec. 3 (1) No. 2 Design Act). This is the so called "must fit" clause, that is very significant for spare parts: Car spare parts are therefore not protectable via design protection⁵⁵. Such parts are not excluded from protection per se, but the use and offering of these parts for repair purposes cannot be prevented: a corresponding amendment to the CDR has not yet been enacted, but in the meantime an equal regulation is established in Art. 110 No. 1 CDR.⁵⁶

⁵⁴ Geier, A., *Rein funktionale Merkmale eines modularen Systems sind schutzfähig – Lego*, GRUR-Prax 2021, p. 232.

⁵⁵ Kur, A., *Ersatzteelfreiheit zwischen Marken- und Designrecht*, GRUR 2016, p. 21.

⁵⁶ Hartwig, *op. cit.* note 50, p. 1273; 1276.

However, the legislator has provided a counter-exception to the must-fit clause, namely for component systems. For these, protection as a design is possible if they fulfil the requirements of Sec. 3 (2) DesignG. The definition in Sec. 3 (1) No. 2 of the Design Act describes the LEGO principle quite precisely, which is why it is also referred to as the "Lego clause". Of course, the studs of the Lego bricks are designed in such a way that only identical fitting pieces can be joined together, so the dimensions must also be designed in such a way that they fit. LEGO bricks are "must-fit parts" in this respect. The legislator was of the opinion that there is no need for such stand-alone modular systems to be kept free. Rather, systems should be able to be combined with each other so to make interoperability possible. However, the combination of different systems from different manufacturers would be prevented if a manufacturer could protect its connectors through design protection and thus achieve a virtual monopoly.⁵⁷

The distinction between Sec. 3 (1) no. 2 (no protection) and Sec. 3 (2) DesignG (protection) appears very confusing at first glance. It becomes more understandable when one considers the underlying meaning and purpose of the regulation. In the case of spare parts not eligible for protection under Art. 8 (1), (2), Art. 110 (1) CDR, Sec. 3 (1) No. 2 DesignG, the replacement and assembly of these parts are an exceptional case, such as accidents and repairs. In contrast, the consumer should have a free choice concerning modular system and not be subject to the monopoly of individual manufacturers, which is then also reflected in the prices. In the case of connectors for kitchen appliances, but also for game pieces and building bricks, the connectors are designed for assembly. Against this background, it is therefore reasonable for the consumer to opt for a specific modular system and the manufacturer should then also have protection for its connectors in order to be able to retain customers and amortise its development costs.

The General Court evaluated this question in its judgement T-537/22.⁵⁸ The court argued that a design is only not worthy of protection because of its function as a connecting element if all the design features serve the purpose of connecting the product with another product. In other words, there can be no protection if the form follows completely the function. With regard to the Lego brick the court came to the conclusion that its form does not follow completely its function because of one feature: the clamping brick features one smooth surface that does not serve the purpose of connection. In this case, it is the uselessness of a design

⁵⁷ *Ibid.*, p. 1273; Thiele, C., VO (EG) 6/2002 Art. 8: *Durch ihre technische Funktion bedingte Geschmacksmuster und Geschmacksmuster von Verbindungselementen*, Vohwinkel, M., *Beck-Onlinekommentar Designrecht*, Munich 2024, Status: 15.02.2024, Margin nos. 23-27.

⁵⁸ ECLI:EU:T:2024:22.

element that justifies the protection of the entire brick. In addition, the General Court joined the argumentation of the EUIPO concerning the fact that the exception of Art. 8 (3) applies here as the building block is part of a modular system.⁵⁹

5. CONCLUSION

In the introduction the following questions were raised: Can it be deduced from these aforementioned observations that intellectual property law takes economic contexts into account to a particularly high degree and can it be further deduced that the application of intellectual property law results in effective and profitable solutions for economic practice, both at national and EU level?

Design and trade mark lawyers Katja Middelhoff⁶⁰ and Amelie Sulovsky-Lehr⁶¹, who were both not involved in the aforementioned proceedings, consider especially the last mentioned judgement of 24 January 2024 (T-537/22)⁶² to be a ground-breaking addition to the case law, which "fundamentally strengthens the position of design owners on the market".⁶³ It is to be expected that Lego will now increasingly try to push perceived imitators of its products out of the market. However, the current judgement only relates to a specific brick, not to all Lego bricks. In particular, the question of the protection of the classic, two-row bricks is not affected by this last judgement.

From a legal point of view, the same questions, for which patent law, trade mark law and design law each have their own solutions, arise repeatedly. It should always be borne in mind that these property rights are intended to create a fair balance of interests between companies and their competitors, but also towards the consumer. This explains why individual issues - as seen in the case of trademarks and designs - are resolved differently by different intellectual property rights. Although the individual intellectual property rights were not originally supposed to be combined in this way, the case law concerning the Lego brick demonstrates: the individual IP rights can be cleverly interlinked by companies in order to achieve maximum protection for a product. EU-wide

⁵⁹ Sulovsky-Lehr, A., *LEGO-Baustein durch „LEGO-Klausel“ weiter als Gemeinschaftsgeschmacksmuster geschützt*, GRUR-Prax 2024, p. 168.

⁶⁰ Redaktion, *EuG zur Eigenart des Lego-Bausteins: Der Schutz des Nutzlosen*, Legal Tribune Online, 24 January 2024, https://www.lto.de/persistent/a_id/53714/, 2 April, 2024.

⁶¹ Sulovsky-Lehr, *op. cit.* note 59, p. 168.

⁶² ECLI:EU:T:2024:22.

⁶³ Redaktion, *op. cit.* note 60, https://www.lto.de/persistent/a_id/53714/, 2 April, 2024.

advanced harmonisation is a major advantage for companies that operate skilfully. Laws, standards and court decisions can be used like bricks in a modular system in which through combination of the single components the best possible protection can be achieved for the company's corporate values.

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Preliminary communication

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THE ODYSSEY OF WRITTEN WITNESS STATEMENTS IN CIVIL PROCEDURE

ABSTRACT

In today's continuously evolving world, where change is the only constant, one enduring necessity remains: the imperative to adjust the legal solutions to the emerging trends. Echoing the epic odyssey of Odysseus, the aim to ensure a balanced approach between the oral and the written form of the civil procedure represents a profound journey through the modern challenges of the legal theory and practice. Originating in the ancient legal traditions, these principles adjust to the evolving nature of the courtroom practices. Without exception, this reflects on the legal position and evidentiary value of the written statements of the witnesses as well. Namely, the right to an oral hearing of a party's case, as a fundamental principle of the civil procedure, is an integral part of the right to a fair trial. However, the pressing need for expeditious and cost-effective administration of justice calls upon emphasizing, or even preferencing the written form in a manner that maintains balance and does not create a disproportionate focus to either of the principles. Given the potential significance of these changes, a careful examination of their benefits and drawbacks is required. Presented with such a legal conundrum, an emerging question persists: should these principles evolve at all? If so, to what extent should the evolution extend?

Keywords: civil procedure, evidence, written statements, witnesses

1. INTRODUCTION

Since ancient times in the Roman Empire, the legitimacy to rule over other people was primarily established by the principle of justice.¹ In a formal legal

¹Verboven, K.; Hekster, O., Introduction. In *The Impact of Justice on the Roman Empire*, Leiden, The Netherlands, Brill, 2018, https://doi.org/10.1163/9789004400474_002, 21 March 2024.

sense, justice entails application of the law to all parties equally.² As the law operates on facts, justice is dependent on factual truth.³ In the pursuit of justice within civil proceedings, judges diligently adhere to the evidentiary procedural rules, which serve as a legal framework for the admission, examination and evaluation of the evidence presented before the court. These rules vary depending on the national legislation and contribute to the process of formalization of the procedure. However, it must be highlighted that even though the form is essential to the proceedings, the civil procedure cannot and must not be reduced to the form alone.⁴ The formalization is imposed as a necessity in order to provide optimal content: the process of gathering the factual and evidentiary material has to be organized in a way which unbridles the burden of the court and places it primarily on the parties and their representatives.⁵ To achieve the intended level of effectiveness, this should be concentrated as much as possible in the preparatory hearing of the proceeding. The regulation of the rules of the evidence calls upon the epic odyssey of the oral and the written form of the proceedings which, retrospectively, are in a constant interplay. However, the goal remains the same: the pursuit of truth which will enable effective administration of justice.

Regarded as a subjective reflection of the objective reality, the concept of 'truth' is influenced by many contributive factors. In that regard, Engels imposes a very important question, "whether any, and if so which, products of human knowledge ever can have sovereign validity and an unconditional claim to truth."⁶ However, the absolute truth, or in the words of Engels - "the sovereignty of thought", cannot be fully realized "except through an endless eternity of human existence".⁷ Therefore, the idea of achieving absolute truth in civil proceedings remains even more unattainable. Within the court proceedings, the evidentiary rules are essential in getting the judge's perspective as close to the objective truth as possible. The legislator tailors the rules by choosing which principle of litigation process will prevail while achieving the highest degree of procedural economy. Different civil procedural systems may be characterized with

² Hock Lai, H., *A Philosophy of Evidence Law: Justice in the Search for Truth*, Oxford University Press, 2008, p. 6.

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⁴ Georgievski, S., *Basic principles for a civil procedure law: Reform of Civil Procedure in the Republic of Macedonia*, Faculty of Law 'Iustinianus Primus' in Skopje, Ss. Cyril and Methodius University in Skopje, Republic of Macedonia, Skopje 1995, p. 93.

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⁶ Engels, F., *Anti-Dühring*, Moscow, 1959, p. 79.

⁷ *Loc. cit.*

significant disparities, mainly because of the historical approach in the distinction between the Common Law and Civil Law families.⁸

North Macedonia is traditionally counted among the countries that belong to the civil law system. In retrospect, the Macedonian civil procedure was defined as inquisitorial and dominantly governed by the principle of oral form. However, as the social and economic changes required a procedure that would be an expression of contemporary needs, the prevalent principles evolved over time. As a holder of judicial power, the court proceeded to hold a monopoly over the implementation of the law, but the collection of evidence and fact-finding are left to the litigants themselves.⁹ The principle of written communication was straightened, mainly by transferring the activities to the preliminary procedure, which disburdens the main hearing, which, as a central stage of the legal proceedings, involves the most expenses.¹⁰ The court continued to maintain order during proceedings, and should decide whether some issues could be raised, that is, it decides on objections made in connection with the witness hearing.¹¹ Nonetheless, even the regime for witnesses who are orthodoxly examined orally has been increasingly raised as a question recently. There is an occurring tendency in the European regulations,¹² as well as some of the countries with traditional civil law systems,¹³ to introduce written witness statements in civil proceedings.

The aim of the paper is multi-dimensional, but the center of gravity are the written statements of the witnesses and their implication in practice. For that purpose, an evaluation of the European framework will be made, especially through the prism of ELI-UNIDROIT Model Rules of Civil Procedure (ELI-UNIDROIT MERCP).¹⁴ Furthermore, a comparative analysis will contribute to the understanding of the use of written witness statements in practice. Finally, the Macedonian legislation will be presented, by making a retrospective overview of the witnesses as a means of evidence and elaborating the possibility of introducing the written witness statements in Macedonian civil procedure. Therefore, the odyssey of the written witness statements continues in the sound

⁸ van Rhee, C. H., *Civil procedure beyond national borders*, Access to justice in Eastern Europe, Issue No. 1/2018, 2018, p. 15.

⁹ Georgievski, *op. cit.* note 5, p. 122.

¹⁰ *Loc. cit.*

¹¹ *Loc. cit.*

¹² For example, the ELI-UNIDROIT Model European Rules of Civil Procedure.

¹³ For example, Germany, Netherlands, France, Italy, Poland, Serbia, see Part 3 of the paper "COMPARATIVE OVERVIEW OF THE WRITTEN WITNESS STATEMENTS".

¹⁴ Model European Rules of Civil Procedure (ELI-UNIDROIT, Oxford University Press, 2021) (hereinafter: ELI-UNIDROIT MERCP).

of the question that echoed through history - which one should prevail, the principle of orality or the principle of written form of the civil proceedings?

2. REFLECTIONS OF THE ELI-UNIDROIT MODEL RULES OF CIVIL PROCEDURE

In order to increase efficiency, minimize costs and modernize civil procedure by implementing information and communications technology (ICT) applications, many countries are reforming their national legislations, thus, the European Union (EU) law is becoming increasingly significant.¹⁵ From that point of view, the ELI-UNIDROIT MERCIP are crucial in the process of harmonization of the European civil legislations. Published in 2021, they aim at adopting the ALI-UNIDROIT Principles of Transnational Civil Procedure to a European perspective in order to decrease the uncertainties of the parties litigating in unfamiliar settings.¹⁶ The adoption was developed in the light of *i*) the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; *ii*) the wider *acquis* of binding EU law; *iii*) common traditions in the European countries; *iv*) the Storme Commission's work; and *v*) other pertinent European sources.¹⁷ However, it has to be highlighted that the main goal of the ELI-UNIDROIT project is to take the best European practices as a touchstone regarding fairness, efficiency and speediness rather than to make rules that are acceptable in all of the European states.¹⁸ According to the above-mentioned sources, the goal of reaching the highest quality of justice is attainable by avoiding a specific emphasis on either oral or written form of the proceedings.¹⁹

The crystalized form of either of the principles is found only in specific stages in the proceedings. Regarding witness statements, the ELI-UNIDROIT MERCIP provide that 'ordinarily, witness evidence should be received orally. The court

¹⁵ Kramer, X., *Towards ELI-Unidroit Model Rules of Civil Procedure: Basic Premises and Challenges*, paper presented at the Bay Area Civil Procedure Forum, Hastings (San Francisco), 2016, p. 1.

¹⁶ ELI-UNIDROIT Model European Rules of Civil Procedure Dissemination Conference, February 2024, <https://www.uilhj.com/2024/02/06/eli-unidroit-model-european-rules-of-civil-procedure-dissemination-conference/> March, 2024.

¹⁷ See: ELI-UNIDROIT Model European Rules of Civil Procedure, <https://www.europeanlawinstitute.eu/projects-publications/publications/eli-unidroit-model-european-rules-of-civil-procedure/>, 29 April, 2024.

¹⁸ van Rhee, C. H., *Towards harmonized European rules of civil procedure: obligations of the judge, the parties and their lawyers*, Access to Justice in Eastern Europe, Issue No. 1(6)/2020, 6-33, p. 8.

¹⁹ ELI-UNIDROIT MERCIP, p. 73.

may, however and upon having received submissions from the parties on the issue, require that such evidence be given initially in writing.²⁰ Therefore, it can be seen that the oral witness statement is prescribed as a general norm, however, in exceptional situations the court may accept written evidence instead. In such circumstances, some of the deciding factors could be the complexity of the litigation, as well as the improvement of the case management of the case.²¹ The oral hearing of the witnesses is one of the purest manifestations of the adversarial principle, deeply rooted in the jurisprudence of the European Court of Human Rights (ECHR). The right to adversarial trial, in the words of the ECHR, “means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.”²²

However, such exceptions may be permitted only in accordance with Rule 18 of the ELI-UNIDROIT MERCP which refers to the oral and written form of the proceedings. In this rule, both of the forms are included by blending their benefits and applying them in different stages of the proceeding. Rule 18(1) expresses a particular preference to the written form in the initial phase of the proceedings, taking into consideration that written factual and evidential contentions are strong prerequisites for achieving accuracy in timely and cost-effective manner.²³ Regarding the witness statements, Rule 18 further provides that the court has discretion to allow evidence to be given by witness statements, to require it to be given orally or to combine the both approaches. However, if ‘a party requests it, the court must permit oral argument, and may permit oral examination.’²⁴ The flexibility is enshrined due to the tendency of the majority of European jurisdictions of reducing litigation time and cost while ensuring proportionality between the form of the procedure and the nature of the proceedings.²⁵ In other words, the rules are conceived to avoid the rigid form of the proceeding, while adhering to the fundamental rights requirements.²⁶

²⁰ ELI-UNIDROIT MERCP, Rule 115(1).

²¹ In regards to these circumstances, the comment of the ELI-UNIDROIT MERCP makes reference to Articles 4.4-4.10 of the IBA Rules on the Taking of Evidence in International Arbitration (2021) which elaborate the possibility of the parties to submit witness statements by each witness on whose testimony they intend to rely, the content of the statement, the situation if the party fails to appear at the evidentiary hearing etc. This may be regarded as *bona fide* to adapt the evidence-gathering strategies that proved to be effective in arbitration; ELI-UNIDROIT MERCP, p. 240.

²² Judgment of the European Court of Human Rights, Application no. 12952/87, Case of Ruiz-Mateos v. Spain, 23 June 1993, para. 63

²³ ELI-UNIDROIT MERCP, p. 73-74.

²⁴ ELI-UNIDROIT MERCP, Rule 18(2).

²⁵ ELI-UNIDROIT MERCP, p. 75.

²⁶ *Loc. cit.*

The court's dispositions and obligations prescribed in Rule 18 are further confirmed in Rule 115. First and foremost, as a norm, it is provided that 'witness evidence should be received orally.'²⁷In case the court allows the witness statements to initially be submitted in writing, the other parties have to be supplied with such evidence in advance of the hearing where the witness will give oral evidence.²⁸ This provision encapsulates the fundamental principle '*audiatur et altera pars*' according to which the parties must have an equal opportunity to be heard and their arguments considered under the law.²⁹ This principle may also entail direct examination of evidence,³⁰ hence, the importance of the oral statement of the witness.

3. COMPARATIVE OVERVIEW OF THE WRITTEN WITNESS STATEMENTS

Without doubt, each country aims at developing a legal system founded on the principles of the rule of law which enables the parties to efficiently pursue justice through the courts. In an effort to obtain that aim, the countries undertake different approaches which are under the influence of their historical, cultural and societal backgrounds. The comparative overview is essential in making assessments about the advantages and disadvantages of a particular legal solution and determining the best practices. For the purposes of the paper, an overview of the presence or absence of the written witness evidence will be made in several countries, with focus on the legislative regulations which introduced written witness statements in their civil procedure.

Generally, written witness statements are characteristic for the common law system, hence, the European countries that belong to the civil law system did not originally prescribe them in their legislations. The greatest influence was made by the Austrian civil procedural law, as it proved to be authoritative and exemplary for a long period of time. In that regard, the first country of observation will be Austria. Found in the constitution, the principle of orality is definitely one of the fundamental principles of the Austrian civil procedural

²⁷ ELI-UNIDROIT MERC, Rule 115(1).

²⁸ *Loc. cit.*

²⁹ Fellmeth, A. X.; Horwitz, M., *Guide to Latin in International Law*, 1 ed., Oxford University Press, 2009; "May the other side also be heard.", p. 41.

³⁰ Zabłocka, M., U ŻRÓDEŁ ZASADY 'AUDIATUR ET ALTERA PARS', *Zeszyty Prawnicze*, 16(4), 2017, p. 5–10.

law.³¹ Therefore, as a consequence of the principle of orality and directness, the parties do not exchange written evidence from witnesses prior to trial.³² Witnesses have to give their statements orally, since written testimony is not admissible before the Austrian courts.³³ The admission of such testimony would be contrary to the principle of immediacy and would constitute a substantial defect of the proceedings.³⁴ In sum, witnesses are obliged to appear, to testify orally, and to swear an oath.³⁵

However, comparative practice shows the increased tendency of introducing written witness statements as a substitute for the oral examination for achieving higher efficiency. One of the countries which incorporated the possibility of submitting written witness statements is Germany. The German Code of Civil Procedure³⁶ is based on combination of the oral and written form of the proceedings. Primarily, the principle of orality is accepted as a general rule.³⁷ However, when the public interest in an accelerated process outweighs the advantages of oral proceedings, the German Code of Civil Procedure departs from the principle of orality.³⁸ An interesting example in that regard is Section 377(3) which gives the court discretion to decide whether the evidence may be answered in writing, taking into consideration the nature of the content of the question and the characteristics of the personality of the witness.³⁹ However, such action bears the risk that the court might not obtain “authentic impression of

³¹Nunner-Krautgasser, B.; Anzenberger, P., *Evidence in Civil Law – Austria, Lex localis*, Book series Law & society, Maribor: Institute for Local Self-Government and Public Procurement, 2015, p. 5.

³²Oblin, K.; Neuburger, P., Q&A: conducting litigation in Austria, 2022, <https://www.lexology.com/library/detail.aspx?g=c001f3a8-dbb4-4e1d-868f-10abbb4708ca>, 29 April, 2024.

³³Bielez, H.; Krepil, P.; Peschek, E., *Litigation & Dispute Resolution Laws and Regulations Austria 2024*, <https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/austria>, 29 April, 2024.

³⁴Nunner-Krautgasser, Anzenberger, P., *op. cit.* note 32, p. 31.

³⁵*Ibid.*, p. 25.

³⁶ Code of Civil Procedure as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBl., Federal Law Gazette) I page 3202; 2006 I page 431; 2007 I page 1781), last amended by Article 1 of the Act dated 10 October 2013 (Federal Law Gazette I page 3786) and Book 10 last amended by Article 1 of the Act of 5 October 2021 (Federal Law Gazette I, p. 4607) (hereinafter: German Code of Civil Procedure).

³⁷ German Code of Civil Procedure, Section 128(1): “The parties shall submit their arguments regarding the legal dispute to the court of decision orally.”

³⁸ In some cases, it is up to the parties to choose the form (see: Section 128 of the German Code of Civil Procedure - Principle of oral argument; proceedings conducted in writing), in other cases the written form is obligatory (see: Section 251a, Section 307(2), Section 331(3), Section 331 of the German Code of Civil Procedure) - Wolf, C.; Zeibig, N., *Evidence in Civil Law - Germany, Lex localis*, Book series Law & society, Maribor: Institute for Local Self-Government and Public Procurement, 2015, p. 15.

³⁹Section 377(3) German Code of Civil Procedure.

the witness”.⁴⁰ For that reason, it has to be put into the witness’s attention that he may be summoned to be examined as a witness in order to “further clear up the question regarding which evidence is to be taken”.⁴¹ On the other hand, the parties are also entitled to ask the court to summon the witness in order to exercise their right to ask questions.⁴² Therefore, it can be concluded that written witness statements are not commonly used in German civil procedure,⁴³ even though the possibility exists. An interesting observation is that the effort to alleviate proof through restricted exceptions is a result of the German law’s rational formalism.⁴⁴ While these exceptions may guarantee legal certainty and equal application of the law, their application is limited due to the fact that such alleviations of proof are often based on judge-made concepts, rather than explicit law provisions.⁴⁵

From historical point of view, it seems that the Dutch civil procedure has always been more focused on documentary evidence.⁴⁶ It is even becoming more common to submit a written witness statement, which was traditionally mostly given orally.⁴⁷ This opportunity has its own advantages, especially when dealing with cross-border matters.⁴⁸ In this regard, a question may rise on the classification of the written witness statement: whether it is a witness evidence or documentary evidence. In the statutory sense, “witness evidence” refers only to oral statements given under oath before a court.⁴⁹ Therefore, the statement in writing submitted by a party which contains depositions of a witness should be

⁴⁰ Wolf; Zeibig, *op. cit.* note 39, p. 42.

⁴¹ *Loc. cit.*

⁴² Section 397 of the German Code of Civil Procedure.

⁴³ Although, “in interim relief proceedings, the parties may additionally rely on affidavits (i.e., a written witness statement given under penalty of criminal liability)” - Schrader, M.; Schmidt, J.; Wachtel, S.; Nettlau, H.; Peitzmeier, F.; Dietrich, M., *Introduction to German Civil Procedure 3: How Evidence in a German Civil Litigation Works*, German Law Series, 2023, p. 4, 5.

⁴⁴ Scherpe, J. C., *Alleviations of Proof in German and English Civil Evidence*, The Rabel Journal of Comparative and International Private Law, Bd. 80, H. 4, Oktober 2016, p. 888-925, p. 921.

⁴⁵ *Loc. cit.*

⁴⁶ Meerdink, E., In review: court procedure in Netherlands, 2022, <https://www.lexology.com/library/detail.aspx?g=c5b5b499-f150-42a9-aad9-e23bba430ae1>, 29 April, 2024.

⁴⁷ Borrius, Y.; Jager, C.; Buziau, E.; Balkema, M., *Litigation: The Netherlands*, The Legal 500 Country Comparative Guides, Legalease, 2023, p. 6.

⁴⁸ Roosjen, R., Examination of witnesses in the Netherlands, <https://www.maak-law.com/examination-of-witnesses-in-the-netherlands/>, 29 April, 2024.

⁴⁹ Driessen, G.; Saïd, N., *Rules of Evidence (Civil Proceedings) in the Netherlands: Overview*, Thomson Reuters, 2023, p. 6.

regarded as documentary (written) evidence.⁵⁰ Nonetheless, the judge will order an oral hearing if the party requests it or if the judge orders it *ex officio*.⁵¹

Similarly, perhaps even more prominently, the French civil procedure is marked by a strong preference of the written form and the tendency to avoid factual situations which are difficult to evaluate.⁵² The use of written statements was established in practice far before the New Code of Civil Procedure gave them an official legal framework.⁵³ Therefore, it is standard practice for parties to submit written statements by witnesses (“certificates” or “*attestations de témoins*”) as evidence.⁵⁴ The certificates can be “produced by the parties or at the request of the judge”.⁵⁵ The French Code of Civil Procedure prescribes the requirements of a valid certificate,⁵⁶ however, the failure to comply with the requirements does not by default mean its invalidation. It is up to the court to decide whether the written statements which are not in conformity with the prescribed content should be considered as evidence.⁵⁷ In any case, the judge can always hear the author of the certificate by way of an investigation.⁵⁸ It is important to point out

⁵⁰ van Rhee, C. H., *Evidence in civil procedure in the Netherlands: Tradition and Modernity, Evidence in Contemporary Civil Procedure Fundamental Issues in a Comparative Perspective*, Intersentia, Cambridge, Antwerp, Portland, 2015, p. 275; Roosjen, R., *Evidence in Dutch Civil Law*, 2023, <https://www.maak-law.com/evidence-in-dutch-civil-law/>, 29 April, 2024.

⁵¹ Art. 166. Dutch Code of Civil Procedure, <https://www.wipo.int/wipolex/en/text/228264>, 29 April, 2024.

⁵² Beardsley, J., *Proof of Fact in French Civil Procedure*, The American Journal of Comparative Law, Vol. 34, No. 3, Oxford University Press, 1986, p. 459.

⁵³ Oudin, M., *Evidence in Civil Law – France*, Lex localis, Book series Law & society, Maribor: Institute for Local Self-Government and Public Procurement, 2015, p. 35; Code de procédure civile available on the French law official website, Legifrance: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070716/LEGISCTA000006149656/#LEGISCTA000006149656, 29 April, 2024, (hereinafter: French Code on Civil Procedure).

⁵⁴ Laude, O., Renard, B., Rigaud, C., *Litigation & Dispute Resolution Laws and Regulations France 2024*, <https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/france>, 29 April, 2024.

⁵⁵ French Code on Civil Procedure, Article 200; It is interesting to point out that the French law official website has provided “*model attestation de témoin N° 11527*03*”: https://www.formulaires.service-public.fr/gf/cerfa_11527.do, 29 April, 2024.

⁵⁶ Art. 202. of the French Code on Civil Procedure

⁵⁷ Deloitte Touche Tohmatsu Limited, *Written Statements as Evidence Final Report*, European Union Intellectual Property Office, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/boards_of_appeal/studies/Written_Statements_as_evidence_en.pdf, 29 April, 2024; Oudin, M., op. cit. note 54, p. 35, 36.

⁵⁸ Art. 203 of the French Code on Civil Procedure

the role of the *huissiers*, known as “professional witnesses” which, *inter alia*, can prepare written witness statements (“*constats*”).⁵⁹

In Italy, the implementation of the “Cartabia reform” significantly altered civil justice, with the aim of making the proceedings more efficient and less costly. The constant use of electronic means and the need for digitalization are definitely among the main contributors to the reform. Now, for example, the judge can order the holding of the hearing by means of remote audio-visual⁶⁰ or to replace it by the filing of written notes⁶¹ provided that some specific conditions are satisfied. This novelty can be regarded as a string of enhancement of the principle of written form. Nonetheless, regarding the written form of the witness statements, Article 257-bis is crucial. Under this article, it is provided that the judge may, with agreement of the parties, order the taking of testimonial by requiring the witness to provide, in writing and in fixed deadline, the answers of the questions on which he has to be examined. The witness has to answer each question, sign the deposition with his authenticated signature on each side of the testimony sheet and send it in a sealed envelope. Authentication can be carried out by a notary or any other public official, otherwise, the testimony will be tainted by nullity.⁶² This provision is introduced as a result of Law 69/2009, on the basis of the institute “affidavit” which is well-established in the Anglo-Saxon system.⁶³ However, it has to be highlighted that normally, witnesses give their testimonies orally.⁶⁴

Serbia is a compelling example from the ex-Yugoslavian countries which implemented the written witness statements in their civil procedure in 2011. The legislator provided that, in addition to oral testimony, as a classic means of evidence, and instead of the direct hearing of witness in the proceedings, documents containing the statement of a person who has a sensory knowledge of disputed legal matters which are subject of proof can be used in a form of a

⁵⁹ “The constat is a (usually written) report relating “a certain number of [factual elements] likely to lead to legal consequences” in order to preserve them as evidence.” - Emerson, W. R., *The French Constat: Discovering More Efficient Discovery*, Boston University International Law Journal, Vol. 36, No. 1, 2018, p. 2.

⁶⁰ Article 127(3) of the Italian Civil Procedure Code 2023, <https://www.brocardi.it/codice-di-procedura-civile/>, 29 April, 2024.

⁶¹ Article 127*bis* and 127*ter* of the Italian Civil Procedure Code

⁶² Explanation of the art. 257 *bis* Code of Civil Procedure, https://www.brocardi.it/codice-di-procedura-civile/libro-secondo/titolo-i/capo-ii/sezione-iii/art257bis.html?utm_source=internal&utm_medium=link&utm_campaign=articolo&utm_content=nav_art_succ_top, 29 April, 2024.

⁶³ *Loc. cit.*

⁶⁴ Michele, S., Evidence in civil proceedings in Italy, <https://www.lexology.com/library/detail.aspx?g=b352ecc3-2741-41b5-becf-9ed7526118ec>, 29 April, 2024.

written statement, audio recording or optical recording.⁶⁵ The written statement of the witness must be certified in court or by a person exercising public authority.⁶⁶ However, the probative value of such document is significantly reduced since the court is unable to directly examine the witness credibility, thus, the witness is not at disposal to the opponent for cross-examination.⁶⁷ Consequently, even though these provisions were implemented for speeding up the procedure and reducing the costs, written witness statements are used as an exception to the adversarial principle of oral witness examination.⁶⁸

Written proceedings are gradually characterizing the Polish civil procedure.⁶⁹ Poland is an example of a country which incorporated the written witness statements in its legislation in the recent past. In 2019, the legislator introduced the possibility of taking evidence from witness examination in writing during the trial.⁷⁰ Namely, if the court decides, the witness shall testify in writing, by taking and signing an oath. The witness has an obligation to submit the text of the testimony to the court within the time limit set by the court.⁷¹ This is the only instance in which witnesses are allowed to submit their statements in writing.⁷² Previously, the written witness statements were only provided for in the European Small Claims Procedure, therefore, their introduction to civil procedure can be regarded as extension of the use of the already existing

⁶⁵Article 245(2) of the Serbian Code of Civil Procedure, ("Official Gazette of RS", no. 72/2011, 49/2013 - US decision, 74/2013 - US decision, 55/2014, 87/2018, 18/2020 and 10/2023 - other laws) (hereinafter: Serbian Code of Civil Procedure)

⁶⁶Article 245(2) of the Serbian Code of Civil Procedure

See also: Law on Public Records, ("Official Gazette of RS", no. 31/2011, 85/2012, 19/2013, 55/2014 - other laws, 93/2014 - other laws, 121/2014, 6/2015 and 106/2015), Article 88(1): "In the form of a notary's record ... a notary public can: ... 2) under the conditions stipulated in the law governing civil proceedings, within the framework of the legal aid procedure, hear a witness whose testimony is required or will be required in non-litigation or administrative proceedings".

⁶⁷Petković, I.; Stepanović, D., *Written statements of witnesses in civil and arbitration proceedings*, JPM Partners, Delta House, 2023, p. 5.

⁶⁸*Ibid*; Marosiuk, L., Stanković, N., Pendjer, S., Q&A: conducting litigation in Serbia, <https://www.lexology.com/library/detail.aspx?g=11a5cb35-3df4-4bf3-97ba-f81b762952f9>, 29 April, 2024.

⁶⁹Góra-Błaszczkowska, A., Oral and Written Proceedings in Polish Civil Procedure, <https://www.uv.es/coloquio/coloquio/comunicaciones/pi1gora.pdf>, 29 April, 2024.

⁷⁰Biała, M., Evidence from witness testimony in court proceedings in practice, Wolters Kluwer, OpenLEX, <https://sip.lex.pl/komentarze-i-publikacje/komentarze-praktyczne/dowod-z-zeznan-swiaodka-w-postepowaniu-sadowym-w-470139435>, 29 April, 2024.

⁷¹Art. 271¹ Polish Code of Civil Procedure, [https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-postepowania-cywilnego-16786199?unitId=art\(271\(1\)\)](https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-postepowania-cywilnego-16786199?unitId=art(271(1))), 29 April, 2024.

⁷²"Exception applies to mute and deaf people, cf. Art. 271 § 2 of the Code of Civil Procedure" - Rafał, L., *Written Witness Testimony*, Scientific Journal of Bielsko-Biala School of Finance and Law, 2022, nr 4, s. 26-29, bibliogr. 22 poz. Zeszyty Naukowe / Wyższa Szkoła Finansów i Prawa w Bielsku Białej, p. 26.

institute.⁷³ Even though they are used as exception, there is no doubt that the written testimonies are incarnation of the principle of written form. The most recent amendments of the Polish Code of Civil Procedure⁷⁴ demonstrate another way of evolution of both of the written and oral form: on one hand, electronic service of documents by an ICT service is enabled,⁷⁵ which presents the evolution of the written form – from paper based to electronic form. On the other hand, remote meetings are allowed by using technical devices enabling it to be held remotely,⁷⁶ which represents evolution on the oral form of the proceeding.

In England, until the beginning of the 1980s, the “gold standard” was that witnesses gave oral testimony and were examined directly before the court.⁷⁷ Written witness statements started being used in the 1990s and nowadays, their use became general practice in the English courts.⁷⁸ The Civil Procedure Rules⁷⁹ provide that any fact which needs to be proved by witnesses as means of evidence can be proved at trial, by their oral evidence in public and at any other hearing, by their evidence in writing.⁸⁰ A written witness statement is defined as “written statement signed by a person which contains the evidence which that person would be allowed to give orally.”⁸¹ It has to contain a statement of truth by the witness in their own language that they believe the facts in it are true.⁸² Therefore, the intention of the written statements is for the parties to become familiar with the content in order to expedite the proceedings. From 2021, witness statements are subject to additional requirements provided in the

⁷³*Ibid.*, p. 26.

⁷⁴ In March 2024, another set of amendments to the Polish Code of Civil Procedure entered into force, introduced by the Act of 7 July 2023 amending the Polish Code of Civil Procedure.

⁷⁵ Article 131¹, Article 131^{1a}. Polish Code of Civil Procedure

⁷⁶ Article 151(2) of the Polish Code of Civil Procedure

⁷⁷ Hawthorne, M., New English court witness statement rules have positive early effect, 2022, <https://www.pinsentmasons.com/out-law/analysis/new-english-court-witness-statement-rules-have-positive-early-effect>, 29 April, 2024; Rubino-Sammartano, M., Witness Statements: A Useful Tool or an Obstacle?, 2020, <https://littletonchambers.com/articles-webinars/witness-statements-a-useful-tool-or-an-obstacle/>, 29 April, 2024.

⁷⁸*Ibid.*

⁷⁹ Civil Procedure Rules, Part 32 – Evidence, Rule 32.2, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32#32.4>, 29 April, 2024, (hereinafter: Civil Procedure Rules).

⁸⁰ Part 32 – Evidence, Rule 32.2. of the Civil Procedure Rules

⁸¹ Rule 32.4. of the Civil Procedure Rules

⁸² Practice Direction 32 (hereinafter: PD32), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32#fn13 29 April, 2024; Rule 20: ‘I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.’, Rule 20.2.

Practice Direction 57.⁸³ The goal of PD57 “is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument”.⁸⁴ Furthermore, a distinction has to be drawn between a witness statement and an affidavit, even though they are often used interchangeably in common vocabulary. The affidavit is understood as a written, sworn statement of evidence.⁸⁵ Instead of statement of truth, it contains a jurat, which is a clause at the foot of an affidavit that authenticates it by showing when, where and before whom the actual oath was sworn or affirmed.⁸⁶

The conclusion that can be drawn is that written witness statements are an overwhelming trend reflected in the European civil procedural systems. Each country has undertaken different approach in regulating this matter, thus, their cultural and legal background are immensely important in the process of drafting and implementing the provisions.

4. THE NORTH MACEDONIAN PERSPECTIVE ON (WRITTEN) WITNESS STATEMENTS

The perspective of North Macedonia on the written witness statements can be regarded from two points of view: the current regulation of the witness statements in North Macedonia and the written witness statements with the new Macedonian Law on Civil Procedure.

4.1. The current regulation of the witness statements in North Macedonia

In North Macedonia, currently, written witness statements are inadmissible as evidence. The Macedonian Law on Civil Procedure,⁸⁷ diligently tailored after the Austrian example, prescribes orality as dominant principle by stating that “the court decides on the claim, as a rule, on the basis of an oral, direct and public hearing.” The provision demonstrates that the principle of orality is accepted as

⁸³ PRACTICE DIRECTION 57AC (hereinafter: PD57), <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-57a-business-and-property-courts/practice-direction-57ac-trial-witness-statements-in-the-business-and-property-courts#6>, 29 April, 2024

⁸⁴ *Mansion Place Limited v Fox Industiral Services Limited*, Case No: HT-2021-000033, [2021] EWHC 2747 (TCC), 199 Con LR 124, para. 37.

⁸⁵ Civil Procedure Rules - Glossary, available at the Official Ministry of Justice website, <https://www.justice.gov.uk/courts/procedure-rules/civil/glossary>, 29 April, 2024.

⁸⁶ para. 5.1.PD32

⁸⁷ Law on Civil Procedure (Official Gazette, No. 79/2005; 110/2008; 83/2009; 116/2010; 124/2015) (hereinafter Macedonian Law on Civil Procedure).

rule and the principle of written form is accepted as an exception. This is followed by the rule that the parties can take procedural actions in writing outside the hearing or orally at the hearing, provided that explicit form in which the procedural action can be taken is not provided by law.⁸⁸

Undoubtedly, the procedural actions can be taken orally or in writing. It is a question of choosing a working method in the procedure, and this, as can be concluded, is done between orality and writing as forms in which procedural actions can be performed.⁸⁹ However, having in regard the complexity of the procedure, none of these principles can be accepted to an extreme extent. For that reason, the Macedonian Law on Civil Procedure accepts both principles in combination – principle of orality is represented in the first-degree procedure, while principle of written form is characteristic for the procedure for legal remedies; principle of orality is fully accepted on the main hearing, while the principle of written form is highlighted in the preliminary procedure; in higher instances, principle of orality is enshrined as exception – if the Appellate court decides to schedule a hearing. Therefore, the witnesses in the Macedonian civil procedure are orthodoxly regarded as means of evidence which are archetypes of the principle of orality. This is confirmed by the legislative language used in the Macedonian Law on Civil Procedure, the lack of explicit provisions for written witness statements and the absence of court practice.

In the provisions which refer to the witnesses, the legislator operates with the phrase “to be heard as a witness”.⁹⁰ That is due to the fact that the only way in which witnesses can testify is orally, by direct examination by the court. There are some exceptions. Firstly, if the witness is deaf, he will be asked questions in writing and if he is mute, he will be asked to answer in writing. If the hearing cannot be conducted in this way, an interpreter will be called.⁹¹ If the court, contrary to the provisions of this law, refused the request of the party in the proceedings to provide an interpreter, and the party appeals, that will constitute a substantial violation of the provisions of the civil procedure.⁹² Secondly, the witnesses who, due to old age, illness or serious physical defects, cannot attend the summons, will be heard in their apartment or in the place where they are located.⁹³ The hearing may be conducted through a requested judge as well.⁹⁴ In any case, the judge who is conducting the hearing must respect the party's right

⁸⁸Article 13 of the Macedonian Law on Civil Procedure

⁸⁹ Georgievski, S., *op. cit.* note 5, p. 90.

⁹⁰ See: Articles 220-234 of the Macedonian Law on Civil Procedure

⁹¹Article 230(2) of the Macedonian Law on Civil Procedure

⁹²Article 343(2) point 8 of the Macedonian Law on Civil Procedure

⁹³Article 227(2) of the Macedonian Law on Civil Procedure

⁹⁴ See: Article 119(4), Article 210 of the Macedonian Law on Civil Procedure

to ask questions of witnesses. Otherwise, that will constitute a substantial violation of the provisions of the civil procedure.⁹⁵ In the first exception, the witness statements are taken in written form, but only because of the witnesses' inability to be taken orally, thus, they are taken directly at the moment when the hearing is being conducted. However, the parties and witnesses were not obliged to submit the written form before the hearing and subsequently, the opposing parties and their representatives were not previously familiar with the content of the statements. For that reason, it cannot be argued that written witness statements are accepted in Macedonian civil procedure in such situations. In the second exception, the principle of orality is preserved by the right of the parties or their representatives to directly ask questions of the witness.⁹⁶ The only obligation which the party proposing a certain person to be heard has is to designate what he should testify about, to state his first and last name, occupation and place of residence.⁹⁷ It can be observed that the party that proposes the witness only states the legally relevant facts on which the witness is going to testify,⁹⁸ without revealing the whole content of the statement or sending it in a written form.

The legal weight of the form in which the procedural actions are taken is perceived through the consequences of its violation. Therefore, some points should be noted. Primarily, the obligation to testify is a civil duty which has to be respected, because in contrary, the court may order that the witness be brought compulsorily and bear the costs of bringing him, and may also to punish him with a fine in accordance with law.⁹⁹ Considering that the infringements of the oral form of the procedural actions constitute substantial violations of the provisions of the civil procedure, it can be concluded that the legislator puts immense value to this principle.¹⁰⁰

⁹⁵Article 343(2) point 16 of the Macedonian Law on Civil Procedure

⁹⁶Article 287 of the Macedonian Law on Civil Procedure

⁹⁷Article 226 of the Macedonian Law on Civil Procedure

⁹⁸Janevski, A.; Zoroska-Kamilovska, T., *Civil Procedural Law*, 1st Book, Second Revised and Supplemented Edition, Skopje, 2012, p. 332.

⁹⁹Article 233(1) of the Macedonian Law on Civil Procedure,

¹⁰⁰ See: article 343 of the Macedonian Law on Civil Procedure: "(2) A substantial violation of the provisions of the civil procedure always exists, if: 1) the court was constituted irregularly, or if a judge or a lay judge who did not participate in the main hearing in accordance with Article 301 of this law participated in the rendering of the verdict, or if a person who did not have the capacity of a judge or a lay judge participated in the rendering of the verdict; ... 7) a party has not been given the opportunity to argue before the court due to illegal actions, and especially by missing service of documents; ... 8) contrary to the provisions of this law, the court refused the request of the party in the proceedings to provide an interpreter, and the party is complaining about that; 9) the court rendered a verdict without a main hearing, and was obliged to hold a main hearing; ... 16) contrary to the provisions of articles 244 and 287 of this law, the court violated the right of a party to ask questions of the opposing party, witnesses and experts"

4.2. The written witness statements with the new Macedonian Law on Civil Procedure

Having in regard the emerging trend of incorporating written witness statements in civil procedural jurisdictions and the need of expediting the proceedings, witness statements are subject to changes in the proposal of the new Macedonian Law on Civil Procedure. At the moment of writing the paper the new Macedonian Law on Civil Procedure is still pending in Parliament, even though it passed the stage of public debate. However, it is important to highlight that it introduces novelties regarding witness evidence by integrating written witness evidence in the Macedonian civil procedure. For that purpose, the expecting novelties will be previewed.

Namely, the newly inserted part “Written witness statements” contains the provisions regulating the matter. The legislator begins by providing that the court may decide instead of a hearing, to read the written statement submitted in accordance with the law. Nonetheless, the court must hear the witness if one of the parties requests a hearing. However, if the court evaluates that the hearing of the witness did not contribute to establishing the decisive facts, the party which requested such hearing will have to bear all the costs connected to it. From this nomotechnique of the legislator, it remains unclear whether the parties or witnesses must submit written statements together with the other documents of the case or whether they can decide if they would like to submit such statements in addition to the other documents.

Furthermore, it is provided that the party may submit written statement confirmed by a qualified electronic signature¹⁰¹ of the proposed witness or a handwritten signature certified by a notary, upon summons or with the consent of the court. In case the court calls the party to submit a written statement from the witness it proposed, but the it does not do so, the court will take the evidence by hearing the proposed witness, only if the party makes it probable that the attempt to secure a written statement from the witness was unsuccessful. There are some important remarks that can be concluded from these legal solutions. First, the use of electronic signature is enshrined by equating its probative value with the probative value of the handwritten signature certified by a notary, which is a step towards digitalization made by the Macedonian legislator. Second, even though the signature can be certified by a notary, this does not by any mean add another

¹⁰¹ A difference has to be drawn between “electronic signature” and “qualified electronic signature”, see Article 3(1) points 18 and 29 from the Law on Electronic Documents, Electronic Identification and Confidential Services, (Official Gazette, 101/2019; 275/2019).

(new) authority to notaries as trustees of the court.¹⁰² Third, if the court or the opposing party requests written statement and such statement is not provided, the witness will lose the right to appear and testify before the court. This is stipulated in order to avoid any possible dilatory tactics on behalf of the parties, their representatives or the witnesses.

The court may also directly call the person who has been proposed as a witness to give a written statement or answer certain questions, especially if, considering the substance of the questions or the person who has been proposed as a witness, it considers that this way of reporting the facts is enough. In the subpoena, the court must warn the witness that he may be called to testify in court even if he gives a written statement. By providing this, the legislator balances between the oral and the written form in the civil proceedings.

It can be summed that according to the proposed draft of the Macedonian Law on Civil Procedure, it would be up to the parties' discretion whether they would submit written witness statement or not. If the party submits such statement, the court can decide whether it is necessary to hear the witness at a hearing or not, but, if the opposing party requests oral hearing, then the witness is obliged to testify orally. On the other hand, if a party does not submit written witness statements of the proposed witness, the court or the opposing party may request a such statement. In such circumstances, the party must submit a written statement, otherwise, the possibility of the proposed witness to testify orally on a hearing will be lost. Then, the oral hearing will be possible by exception – only if the party demonstrates that the attempt to obtain a written statement from the witness was unsuccessful. Overall, the provisions are presentation of a blend of the inquisitorial and adversarial principles as well.

The aim of the legislator, without doubt, is to enhance the current civil procedural rules by implementing novelties which may not be regarded as typical for the civil law system. However, following the ELI-UNIDROIT MERCIP whose goal is to take the best European practices,¹⁰³ the new Macedonian Law on Civil Procedure includes the possibility of submitting written witness statements in order to expedite the proceedings. It would also help the opposing parties to prepare for the witness testimony and the oral examination of the witness (if such examination is ordered). While the legislator makes a step towards digitalization by allowing written witness statements to be signed by a qualified electronic signature, it is silent on the possibility of giving evidence

¹⁰² That is the case in Serbia, see Part 3 of the paper "COMPARATIVE OVERVIEW OF THE WRITTEN WITNESS STATEMENTS".

¹⁰³ See: Part 2 of the paper "REFLECTIONS OF THE ELI-UNIDROIT MODEL RULES OF CIVIL PROCEDURE".

through video link or other electronic means which is an emerging trend in some European countries.¹⁰⁴ Some questions rise even before the rules enter into force. For example, what if the witness's oral statement is contradictory to his written statement? Will the written witness statement be taken into consideration even if the witness refuses to come? What if the witness dies after submitting his written statement - what will the evidentiary value be? What if the opposing party opposes the authenticity of the qualified electronic signature? What if both of the parties submit written witness statements and only one of them is invited to testify – will the equality of arms be infringed? Of course, it is reasonable that questions will be raised in practice after the law enters into force. However, without entering into speculation, it is expected that the courts will rely on their ability to evaluate the means of evidence. In other words, when in doubt, Macedonian courts always rely on free judicial evaluation. The extent of their freedom in regards to the written witness statements is yet to be seen.

5. ADVANTAGES AND DISADVANTAGES OF THE WRITTEN WITNESS STATEMENTS

The odyssey of the ever-lasting question continues: are the written witness statements more reliable evidence or is the witness's demeanor on the oral hearing the best way to evaluate the statement? There is no straight forward answer. It is certain that the blurring of the boundaries between the common law and civil law traditions have developed new practices within the courtroom.¹⁰⁵ However, it is important to reflect on both the advantages and disadvantages of the written witness evidence.

The main purpose of the written witness evidence is to shorten the duration of the main hearing. The submission of the written statements will enable the opposing parties and their representatives to familiarize themselves with the content of the statements. Such submission can be regarded as the ground for cross-examination because of which the parties and the representatives can prepare better. This is important because when a party suggests a witness to be heard, even though the matter of the testimony is stated, the judge and the opposing party are not familiar with the content of the statement that will be

¹⁰⁴ For example, Italy or Poland, see Part 3 of the paper "COMPARATIVE OVERVIEW OF THE WRITTEN WITNESS STATEMENTS" or England, see Civil Procedure Rules, Rule 32.3: "The court may allow a witness to give evidence through a video link or by other means."

¹⁰⁵ Gabrieli, A.; Alberstein, M., *Conflict Resolution Procedures Within the Courtroom: Between the Adversarial and Inquisitorial Traditions*, Volume 33 of Bar-Ilan Law Studies, Journal of the Faculty of Law, 2022, p. 89.

given. This means that an oral hearing has to be appointed, which could be subject to procedural abuse and, in any case, makes the main hearing lengthier and implies higher costs. But, for example, if the written witness statements are submitted in the preliminary stage, the judge will have insight into the statements and will be able to more easily determine whether a witness should be examined. If couple of witnesses are suggested, the judge may evaluate whether some statements match and evaluate if a witness does not necessarily need to be examined at an oral hearing. In general, the uncertainty of the content of the statement is minimized, the parties and the representatives have an opportunity to prepare better, the procedure is more concentrated on the preliminary stage which by default means less costs and the judge gets a better overall picture of the facts of the case. At the same time, the principle of equality of arms is preserved, as both of the parties have rights to submit written witness statements, thus, in most of the jurisdictions, they can require oral hearing in spite of the written statement in which case it is mandatory.

In order for the written witness statement to fulfill its purpose, it should be a true representation of what the witness perceived through his senses. However, in order to gain more value, a common practice for the lawyers or the other designated authorities is to draft them.¹⁰⁶ The risk of drafting a witness statement is the over-formalization of the process and deriving from the original statement of the witness. These concerns were raised by Lord Woolf in his report "Access to Justice"¹⁰⁷ where he stated: "Witness statements have ceased to be the authentic account of the lay witness; instead, they have become an elaborate, costly branch of legal drafting".¹⁰⁸ Of course, the silver lining is that despite the written statement, the law usually provides an opportunity for the witness to be invited to an oral hearing.

Having in regard that a trial relationship is made between the witness and the judge in the process of giving testimony, it has to be pointed out that such relationship is not only legal, but it is also psychological.¹⁰⁹ Therefore, can the demeanor of the witness be evaluated correctly if it is not directly perceived? However, the assessment of the witness's demeanor is a double-sided coin. On one side, the judge has the opportunity to draw conclusions on the credibility of the witness, based on his body language and oral expression. On

¹⁰⁶ From the given examples, the *huissiers* in France or the notary in Serbia, see Part 3 of the paper "COMPARATIVE OVERVIEW OF THE WRITTEN WITNESS STATEMENTS"

¹⁰⁷ Lord Woolf, *Access to Justice: Final Report*, 1996, para. 55.

¹⁰⁸ *Ibid.*

¹⁰⁹ "Acerebral communication with procedural compliance." - Pocora, M., Pocora, M. S., *Psychological Approach of Witness and Judicial Testimony*, AGORA International Journal of Juridical Sciences, No. 2 (2013), p. 172.

the flip side of the coin, the judicial assumption may despair from the cognitive reality due to multiple factors, such as his physical appearance, social status or additional features that could either distinguish them from the decisionmaker or make them more similar.¹¹⁰

It would be absurd to suggest that one of the forms is better than the other, especially if the differentiation in the legal traditions of the states is taken into consideration. Without a doubt, it is of immense importance that the provisions are drafted carefully by balancing the oral and the written form. However, the role of the judge is crucial because he determines the evidentiary value of the means of evidence, hence, the (written) witness statements.

6. CONCLUSION

It is only natural for the parties and their representatives to aspire to have expressive input in the decisions that affect them.¹¹¹ New judicial practices have been developed due to the reciprocal stimulation between the old legal traditions of the common law and civil law system.¹¹² However, the pursuit of truth in the modern legal systems is followed by incomparable challenges. In the wave of technological advancement, the legislators increasingly put focus on expediting the proceedings especially by strengthening the principle of written form of the proceedings. At the same time, in the words of the European Court of Human Rights: “*justice has not only to be done, it has to be seen, to be done*”.¹¹³ Therefore, the odyssey of the written witness statements continues, guided by a strong European tendency toward favoring the written form of the proceedings. While the advantages of the written statements are evident, the possible challenges that they could impose remain unprecedented. What is certain is that the written witness statements will be a subject undergoing intense study in future with the implementation of the new Macedonian Law on Civil Procedure shaped by the ELI-UNIDROIT MERCIP.

¹¹⁰ Spotswood, E., *Live Hearings and Paper Trials*, Florida State University College of Law, 38 FLA. ST. U. L. REV. 827, 2011, p. 882.

¹¹¹ *Ibid.*, p. 881.

¹¹² Gabrieli, Alberstein, *op. cit.* note 107, p. 153.

¹¹³ Judgment of the European Court of Human Rights, Application no. 71615/01, Case of Mežnarić v. Croatia, 15 July 2005.

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Review paper

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SOME REMARKS ON THE CONCEPT OF GLOBAL CONSTITUTIONALISM AND THE PROTECTION OF NATIONAL SOVEREIGNTY

ABSTRACT

Globalisation is a process that has brought new challenges not only to the economy, the labour market, and the environment, but also to constitutional law since regional and global international organizations are gaining increasing powers and competences, that traditionally belonged to individual nation states. These trends are often described by the concept of global constitutionalism. However, this concept is subject to a number of concerns in the legal literature. On the one hand, the truly global nature of the theory is questionable, on the other hand, its impact on national sovereignty raises several issues. This contribution will analyse the two main elements of global constitutionalism, that is convergence of constitutional solutions and constitutionalisation of international organizations. Regarding the convergence of constitutional solutions, it is important to underline that this process is developing in two main directions: the convergence of constitutional structures and the convergence of the protection of fundamental human rights and freedoms. As the latter direction is much more prevalent, the convergence of the protection of fundamental human rights will be analysed in more depth. As regards the other element of global constitutionalism, the constitutionalisation of international organizations, one can observe this disputable trend both at the regional and global level. After presenting all these elements of global constitutionalism, the paper will conclude with a brief overview of the reservations concerning the concept.

Keywords: *the concept of global constitutionalism, sovereignty, the convergence of constitutional solutions, constitutionalisation of international organizations*

1. INTRODUCTION

In an increasingly globalised world, it is becoming more and more difficult for the states to maintain their powers, as the decisions are mainly taken by universal (for example UN, WTO, WHO), regional (for example European Union, Arab

League) or sub-regional international organizations, rather than by national actors. In this way, constitutionalism has become in many cases globalised and increasingly internationalised, creating the legal concepts of global constitutionalism and multilevel constitutionalism. Nonetheless, these concepts are the subject of considerable academic discussion and criticism, and one can also observe considerable difficulties in defining them precisely.

According to some scholars, global constitutionalism can be defined as the scientific concept “that examines the effects of globalisation in constitutional law, that is seeks to detect and explore the effects of globalisation in constitution making, constitutionalisation, constitutional lawmaking and enforcement (constitutional justice, fundamental rights justice).”¹

Global constitutionalism can basically be approached from two perspectives. From a constitutional law perspective, it describes the convergence and approximation of different constitutional solutions. In contrast, from an international law perspective, the concept refers to the constitutionalisation of international law.²

From the first perspective, global constitutionalism, along the lines of convergence of constitutional solutions, can be divided into two main components. On the one hand, one can notice a structural, institutional convergence and, on the other, a convergence related to the protection of human rights.³ This convergence of constitutional solutions also raises the issue of multilevel constitutionalism and constitutional dialogue, as this process of bringing the constitutional solutions closer to each other is essentially a result of the dialogue between the different levels of regulation and enforcement. Multilevel constitutionalism appeared at the same time as the emergence of the global markets and is intended to describe the constitutional impact of national and supranational actors on each other.⁴ At the same time, the question arises as to how the transfer of certain, traditionally national powers to supranational level affects sovereignty of individual states? This question should be considered in the light of the provisions of national constitutions relating to international standards. These provisions indicate that, by joining certain international organizations, states have not relinquished their sovereignty, but have merely

¹ Chronowski, N., *Globális vagy lokális alkotmányosság?*, Jogelméleti Szemle, 4/2015, p. 20–21.

² *Ibid.*, p. 15.

³ Tushnet, M., *The Globalisation of Constitutional Law as a Weakly Neo-Liberal Project*, Global Constitutionalism, 1/2019, p. 31.

⁴ Sajó, A., Uitz, R., *A szabadság alkotmánya. Bevezetés a jogi alkotmányosságba*, HVG-ORAC Lap- és Könyvkiadó, Budapest 2019, p. 611.

transferred certain competences to the regional and global level, in order to ensure that some common, international objectives and goals can be easily achieved.

With regard to the international law approach to global constitutionalism, Christine Schwöbel highlighted four dimensions. According to this opinion, global constitutionalism can be understood as (1) a social constitutionalism, whereby global constitutionalism is based on a particular international social order; (2) an institutional constitutionalism, which focuses on the division of powers between international institutions; (3) a normative constitutionalism, that focuses on a system of shared norms and values and—unlike the institutional constitutionalism—does not necessarily have an institutional background; and (4) an analogical constitutionalism, which assumes a global constitutionalism based on existing constitutional orders.⁵

In the following, this contribution aims to analyse the concept of global constitutionalism in more detail along the lines of these two approaches. At the same time, in the second part of the paper, I would like to draw attention to all the objections and criticisms that are frequently raised in the legal literature in connection with global constitutionalism and which make this concept (in its current form) difficult to promote.

2. GLOBAL CONSTITUTIONALISM FROM A CONSTITUTIONAL LAW PERSPECTIVE: THE CONVERGENCE OF CONSTITUTIONAL SOLUTIONS

As mentioned above, the constitutional law approach is based on two main components: convergence of structural elements and convergence of the regulation of the protection fundamental human rights and freedoms. The two forms of convergence should not be confused. In the words of Dixon and Posner, “structural convergence occurs when the form of government—separation of powers for example—converges; convergence of rights occurs when states adopt similar constitutional rights.”⁶ Although structural convergence and the convergence of the protection of fundamental human rights can occur in parallel, they can also take different paths.⁷ However, as has been argued in the legal

⁵ E. J. Schwöbel, Ch., *Organic Global Constitutionalism*, Leiden Journal of International Law, 3/2010, p. 530–532.

⁶ Dixon, R.; A. Posner, E., *The Limits of Constitutional Convergence*, Chicago Journal of International Law, 2/2011, p. 404.

⁷ *Loc. cit.*

literature, the convergence of structural and institutional elements is relatively limited,⁸ hence in the followings, this chapter will focus on the convergence of the regulation of fundamental human rights and their protection.

Several pivotal factors have contributed to the approximation of fundamental human rights regulation at the national level, such as the transfer of judicial practice, the role of NGOs and the migration of constitutional law solutions,⁹ that is the incorporation of certain international standards into domestic law.¹⁰ Moreover, some international conventions contain specific provisions on the concrete steps that states must take in order to fulfill their treaty based obligations.¹¹ These kinds of provisions are key in promoting convergence.

At the same time, it is salient to note that two major theories have emerged concerning the relationship between international and national law, and these theories also influence convergence. According to the dualist theory, international and national law are separate, independent, they exist in parallel, with different sources of law and different spheres of application.¹² In contrast, the monist theory presupposes a single legal order, of which both national and international law are part. This theory is therefore based on the unitary structure of law.¹³

All in all, two main factors play a key role in the convergence of human rights regulations: regional and global international conventions, respectively the institutions that interpret (and in some case enforce) these international provisions.¹⁴ In essence, the convergence of standards and regulations of the protection of fundamental human rights and freedoms at the national level is the result of (1) the interaction of the different norms at national, regional, and international levels of multilevel constitutionalism, and (2) the constitutional

⁸ Tushnet, *op. cit.* note 3, p. 31.

⁹ Nevertheless, it is important to point out that the legal literature distinguishes between the concepts of constitutional borrowing and convergence. "Convergence can take place only against a background in which majority of states recognize a constitutional rule, and the members of the minority borrow from the majority." Dixon, R., A. Posner, E., *op. cit.* note 6, p. 408.

¹⁰ Chronowski, N., *Alkotmányosság három dimenzióban*, TK Jogtudományi Intézet, Budapest 2022, p. 19.

¹¹ Florea, F., *Implicarea statelor în procesul de formare a normelor juridice internaționale. Răspundere și sancțiuni internaționale*, Editura Universul Juridic, București 2023, p. 61.

¹² *Ibid.*, p. 62.

¹³ *Loc. cit.*

¹⁴ Sandholtz, W., *Human Rights Courts and Global Constitutionalism: Coordination through judicial dialogue*, *Global Constitutionalism*, 3/2021, p. 440.

dialogue¹⁵ that occurs between the institutions at these levels. For this reason, it is noteworthy to briefly highlight all the regional and global conventions and institutions that have an impact—through the concepts of multilevel constitutionalism and constitutional dialogue—on the convergence of national standards.

At global level, special mention should be made of the Universal Declaration of Human Rights (hereinafter: UDHR) adopted under the auspices of the United Nations on 10 December 1948. Although the UDHR is not a treaty but was adopted as a non-binding resolution,¹⁶ “it has undergone important changes in this respect. Its impact on the entire international human rights protection system has, over time, conferred a quasi-normative character on it, creating legal obligations for UN Member States.”¹⁷ Research in this area has shown that the rate of recognition and protection of the rights enshrined in the UDHR by national constitutions has increased significantly after 1948 (from 20 rights in 1948 to 35 in 2013).¹⁸

Among the global international conventions, it is also important to highlight the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both documents were adopted in 1966 by the United Nations General Assembly. Together with the United Nations Charter, these three documents (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights) form the so-called International Bill of Human Rights.¹⁹

All in all, at the global level, the first pillar—i.e. the normative standards—is well-developed and provides a general framework. At the same time, one can notice that, in parallel with these normative standards, the institutional part is underdeveloped, since no international institutions are taking binding decisions in the field of human rights protection at the global level. Even if one can notice

¹⁵ Constitutional dialogue may exist between national institutions (e.g., between national constitutional courts, or between a given Constitutional Court and the Ombudsman), or between national and international institutions. The latter, vertical constitutional dialogue is decisive with regard to convergence. What is more, convergence is mostly based on this kind of dialogue. For more on constitutional dialogue see: Drinóczi, T., *Az alkotmányos párbeszéd. A többszintű alkotmányosság alkotmánytana és gyakorlata a 21. században*, TK Jogtudományi Intézet, Budapest 2017, p. 46–49.

¹⁶ Universal Declaration of Human Rights, Proclaimed by the United Nations General Assembly Resolution 217 A (III), A/RES/3/217 A, 10 December 1948, Paris.

¹⁷ Selejan-Guțan, B., *Protecția europeană a drepturilor omului*, Editura C.H. Beck, București 2011, p. 8.

¹⁸ Sandholtz, *op. cit.* note 14, p. 448.

¹⁹ Selejan-Guțan, *op. cit.* note 17, p. 6.

specialized institutions that interpret and protect the different conventions, these institutions do not issue generally binding decisions. Examples of such institutions, operating under the auspice of the United Nations, include the United Nations Human Rights Council²⁰ or the Human Rights Committee (hereinafter: HRC).

Even if it does not issue binding decisions, a number of interesting findings have been made in the legal literature on the latter institutions. The HRC's main task is to monitor the implementation of the International Covenant on Civil and Political Rights. The HRC can adopt both state-specific comments (based on the reporting procedure) and general comments on some provisions of the Covenant.²¹ In addition, an optional inter-state complaint procedure also exists. Under this procedure the HRC tries to find amicable solutions. Moreover, the first Optional Protocol to the International Covenant on Civil and Political Rights created the framework for individual complaints. Nevertheless, it has to be noticed that "these complaints can be made by individuals, not by groups of individuals or legal entities."²²

One can observe that the HRC also maintains a judicial dialogue with the regional human rights courts, hence, the so-called cross-fertilisation occurs between them. However, it should be noted that "regional courts cite the HRC not because it holds some sort of superior authority [...] the HRC serves as a central reference point for the regional courts as they participate in the development of international human rights jurisprudence."²³ Based on these findings it is pivotal to note that the interrelation between the HRC and the regional human rights courts strengthens human rights protection, and dialogue between them promotes convergence.

At the regional level of multilevel constitutionalism, it is first and foremost salient to look at the European system of human rights protection. At this level,

²⁰ The United Nations Human Rights Council (UNHRC) replaced its predecessor, the United Nations Commission on Human Rights in 2006. Originally, the United Nations Commission on Human Rights was established in 1946 based on the provisions of Article 68 of the United Nations Charter, according to which: "[t]he Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." On this basis, the United Nations Commission on Human Rights and its successor, the UNHRC, operate essentially as a human rights protection body established under the United Nations Charter, unlike, for example, the Human Rights Committee, which was established and operates under a separate convention (under the International Covenant on Civil and Political Rights).

²¹ Selejan-Guțan, *op. cit.* note 17, p. 10.

²² *Ibid.*, p. 11.

²³ Sandholtz, *op. cit.* note 14, p. 451.

both pillars are clearly developed: there are conventions and also institutions which ensure that the provisions contained in these conventions are respected. The European Convention on Human Rights (hereinafter: ECHR) was signed in 1950 and entered into force in 1953. At the same time, the ECHR itself provided for the establishment of the European Court of Human Rights (ECtHR), which is responsible for interpreting the ECHR, investigating possible violations, and establishing whether there has been a breach of the ECHR. The role of the ECHR and the ECtHR is underlined by the fact that according to some scholars: “[t]he European Convention and the case law of the ECtHR have broadly been incorporated into domestic legal systems in Europe.”²⁴ Nonetheless, as it was highlighted in the legal literature, “the ECtHR’s case law is, by its nature, applied by individual states based on the voluntary acceptance of international principle of *pacta sunt servanda*.”²⁵

Besides, some elements of structural convergence can also be observed when scrutinizing the case law of the ECtHR and its impact on national law,²⁶ for example in relation to the principle of division of powers, organisation of justice or certain requirements of the legislative process. Furthermore, as regards structural convergence, it is important to highlight the role of the Venice Commission as well. The Venice Commission was established in 1990, under the framework of the Council of Europe, primarily to promote the constitutionalisation of the Central and Eastern European countries. Today, Venice Commission works basically as “a general international advisory body on constitutional law reforms.”²⁷

At the same time, regarding the regional level, Europe is not the only area worth mentioning. For example, in the case of Africa, the African Charter on Human and Peoples’ Rights (known also as the Banjul Charter) was adopted under the aegis of the African Union in 1981. Moreover, as in the European human rights protection system, an institutional pillar is functioning in Africa as well. The African Court on Human and Peoples’ Rights was established under a protocol of the African Charter on Human and Peoples’ Rights adopted in 1998.²⁸ The situation is more or less similar within the Organization of American States as well. The American Convention on Human Rights (also known as the Pact of San José) was adopted in 1969 under the auspice of this organization. At the

²⁴ *Ibid.*, p. 446.

²⁵ Poniatowski, M., *Content of the Right to Parental Responsibility in the Case Law of the European Court of Human Rights*, in: Sobczyk, P. (ed.), *Content of the Right to Parental Responsibility. Experiences – Analyses – Postulates*, CEA Publishing, Miskolc–Budapest 2022, p. 21.

²⁶ Chronowski, *op. cit.* note 10, p. 22.

²⁷ *Loc. cit.*

²⁸ Sandholtz, *op. cit.* note 14, p. 447.

same time, the inter-American system of protection is somewhat specific due to its dual institutional background since the adherence to the provisions of the Convention is guaranteed simultaneously by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

The provisions of all these global and regional human rights conventions, as well as the relevant principles of the case law of regional courts, can be incorporated into national legislation in a number of ways. The relevant legal literature highlighted, for example, that convergence can take place both at the level of national constitutional provisions and at the level of national judicial interpretation.²⁹ It goes without saying that, on the one hand, national constitutions incorporate regulatory models from international conventions.³⁰ The result of this reception is a kind of approximation in the field of protection of fundamental human rights. At the same time, this convergence has resulted in the emergence of a core of human rights that is widely recognized and protected by the national constitutions.³¹

Furthermore, it is also necessary to take into account how the constitution of each state relates to international conventions and treaties. For example, in Romania, according to Article 20 paragraph (2) of the Constitution “where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is party to, and the national laws, the international regulation shall take precedence, unless the Constitution or national laws comprise more favourable provisions.”³² This provision refers to the norms contained in international conventions and treaties, as an inherent part of the so-called “constitutional bloc”. Moreover, these international norms serve as a reference for constitutional justice.³³ Such constitutional provisions promote the convergence and the constitutional dialogue between human rights protection institutions situated at different levels of multilevel constitutionalism.

²⁹ *Ibid.*, p. 448.

³⁰ For example, in Romania the exception of non-retroactivity of the law was extended to the more favorable administrative law, during the constitutional amendment of 2003, by considering the relevant principles of the ECtHR. For details see: Stanciu, L. D., Safta, M., *Report of the Constitutional Court of Romania*, XVIII Congress of the Conference of European Constitutional Courts, Czech Republic 2021, p. 11. Online available on the following link:

https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/Questionnaire/National_Reports/English/Romania_-_Questionnaire_XVIII_Congress_of_CECC_eng.pdf, 29 February, 2024.

³¹ Chronowski, *op. cit.* note 10, p. 22.

³² The Constitution of Romania is available in English at the following link: <https://www.presidency.ro/en/the-constitution-of-romania>, 29 February, 2024.

³³ Toader, T., Safta, M., *Contencios constituțional*, Editura Hamangiu, București 2020, p. 438, 442.

In the context of the protection of fundamental human rights, the three levels of multilevel constitutionalism and the institutional background that guarantees the protection of these provisions are very clearly distinguished. The constitutional dialogue between these levels, the cross-fertilisation, the reference of the courts to each other's case law and the adoption of normative frameworks lead to the approximation, and convergence of national regulations.

3. GLOBAL CONSTITUTIONALISM FROM AN INTERNATIONAL LAW PERSPECTIVE: THE CONSTITUTIONALISATION OF INTERNATIONAL LAW

This idea is mainly “based on the observation that some international treaty-based organizations treat their founding documents, or certain [...] provisions thereof [...] as quasi constitutional.”³⁴ The international law approach to global constitutionalism is nothing more than the conception of international law as a constitutional order, which idea has spread mainly at the European level but is increasingly expanding at the international level as well.³⁵ Even if the European Union is the most prominent example, global international organizations, such as the World Trade Organization or the United Nations “are also increasingly subject to a constitutional discourse with the intention to check, regulate and assess the legitimacy of the politics of world trade policy, environmental policy, human rights policy and post-conflict policy.”³⁶ The most noticeable problem with this approach, however is that the conception of international conventions as quasi-constitutions is not the result of an explicit decision of the member states of the different international organizations. Besides, with regard to the European Union, one could observe that as soon as a document is treated as a constitution, it is subject to considerable concerns (for example, the Treaty establishing a Constitution for Europe was rejected both in France and the Netherlands). At the same time, it is noteworthy to assay the arguments that are used to justify the international approach of global constitutionalism.

Whilst one can observe significant differences between the functioning of different international organizations, legal literature has highlighted a number of common characteristics as well. These common elements are factors that can

³⁴ Chronowski, *op. cit.* note 1, p. 21.

³⁵ *Loc. cit.*

³⁶ Wiener, A.; F. Lang Jr., A.; Tully, J.; Maduro, M. P.; Kumm, M., *Global Constitutionalism: Human Rights, Democracy and the Rule of Law*, Global Constitutionalism, 1/2012, p. 5.

promote the constitutionalisation of these organizations. First of all, international organizations exercise power through law, therefore “they are subject to a high degree of legalization.”³⁷ Moreover, they adopt legislation that can affect individuals and states at the same time. In addition, international organizations have a complex relationship with states, since the latter, for example, play a key role in their foundation.³⁸

All these common features of international organizations, and in particular the legalization, can lead to the constitutionalisation of these international actors. At the same time, the international approach to global constitutionalism, i.e. the constitutionalisation of international organizations, is not based solely on the common features of the institutions, but also on some kind of presupposed change in international relations. For example, some scholars argue that international relations have switched from globalised to constitutionalized.³⁹ Besides, according to this approach, this switch can be considered a social phenomenon.⁴⁰

At the same time, other scholars tried to describe these changes in international relations along different theories. In this way, one can differentiate between several assumptions. According to Christine Schwöbel three major assumptions must be highlighted:

- 1st assumption: international relations between the individual nation-states have shifted from coexistence to cooperation;
- 2nd assumption: one can notice some kind of unity and homogeneity at international level;
- 3rd assumption: global constitutionalism can be described by universality.⁴¹

Nonetheless, all these assumptions - as we will see in the next section of this contribution - raise a number of concerns. Whatever the approach, it is clear that globalisation is leading to a constitutionalist and democratic deficit at national level.

The constitutionalisation of international organizations (both at regional and global levels) can be seen through a number of examples. The most striking is the case of the European Union, which was set up as a regional economic

³⁷ Fabbri, F., *The Constitutionalization of International Law: A Comparative Federal Perspective*, European Journal of Legal Studies, 2/2013, p. 6.

³⁸ *Loc. cit.*

³⁹ Wiener, A. *et al.*, *op. cit.* note 36, p. 5.

⁴⁰ *Ibid.*, p. 8.

⁴¹ E. J. Schwöbel, *op. cit.* note 5, p. 534–535.

organization, but which – due to the constant extension of its competences – now has some competences with possible constitutional features.⁴² At the same time, many Member States have reservations about the European Union's extension of powers and are trying to protect their sovereignty and constitutional identity. It is therefore pivotal for the debate on the future of the European Union to better reflect the specific interests of the Member States. For example, the content of the constitutional identity, which can differ from one Member State to another, should be defined through constitutional dialogue between the national constitutional courts on the one hand and the national constitutional court and the Court of Justice of the European Union on the other. Loyal cooperation should therefore serve as a basis in the relationship between the European Union and its Member State. A dialogue, in which both sides take into account the interests and the reservations of the other is of utmost importance.

The constitutionalisation of international organizations cannot be observed just at regional level. As Federico Fabbrini underlined: “the developments that have taken place in the EU are in no way *sui generis*.”⁴³ The United Nations itself is moving towards constitutionalisation, but sectorial international organizations (World Health Organization, regional human rights protection organizations, etc.) are also shifting in this direction.⁴⁴ For example, the “World Trade Organization agreement [...] does not simply prescribe rules governing international trade; it also sets up quasi-legislative procedures and adjudicatory institutions for interpreting and enforcing those rules.”⁴⁵ At the same time, the issues that arise with regards to the European Union, such as the democratic deficit, the protection of national sovereignty, and constitutional identity, also exist in relation to the constitutionalisation of global international organizations.

All in all, constitutionalisation of international organizations is a process that is currently ongoing and the outcome of which is unknown. At the same time, some states have reasonable reservations about this aspect of global constitutionalism. All these reservations can be overcome through loyal cooperation and dialogue between various national and international organs.

⁴² Fabbrini, *op. cit.* note 37, p. 7.

⁴³ *Loc. cit.*

⁴⁴ *Ibid.*, p. 8.; Wiener, A. *et al.*, *op. cit.* note 36, p. 4.

⁴⁵ Young, E. A., *The Trouble with Global Constitutionalism*, Texas International Law Journal, 3/2003, p. 528.

4. SOME REMARKS ON THE CONCEPT OF GLOBAL CONSTITUTIONALISM

As one can observe, global constitutionalism can be defined from both constitutional law and international law perspective. Nevertheless, whatever the approach, the concept of global constitutionalism itself raises a number of concerns. These issues are often discussed in the legal literature, drawing attention to the potential risks of the theory of global constitutionalism.

One of the most common objections is that the concept of global constitutionalism in fact is far from being global. On the one hand, the current theory is more a project of the Global North.⁴⁶ This Global North approach can also be observed in the convergence of the protection of fundamental human rights, where first generation rights are strongly guaranteed, but the protection of the right to property often takes precedence over second and third-generation rights.⁴⁷ Moreover, again referring to the convergence of the protection of fundamental rights, neither in Asia nor in the Middle East regional protection systems have developed, so for this reason again the concept cannot be considered global.⁴⁸ On the other hand, according to another opinion expressed in the legal literature, global constitutionalism cannot be considered global, because this interpretation could lead to the marginalisation of minority cultures.⁴⁹ It is a fact that the current developments do not always take into account national specificities, social, and cultural characteristics. Hence, according to some scholars “it is necessary to ensure that States are not subject to the imposition of constraints to which they have not freely adhered and that they retain their free will with regard to their national identity.”⁵⁰

At the same time, another issue of global constitutionalism concerns its effect on national sovereignty. Sovereignty became one of the main principles in international relations after the Peace of Westphalia, and as such essentially expresses that “the world is made up of sovereign states which do not recognise any power above them”⁵¹ Based on the traditional concept of sovereignty

⁴⁶ Tushnet, M., *op.cit.* note 3, p. 34.

⁴⁷ *Ibid.*, pp. 32–34.

⁴⁸ Sandholtz, W., *The ECtHR, Transregional Dialogues and Global Constitutionalism*, in. *Global Constitutionalism*, 3/2020, p. 548.

⁴⁹ E. J. Schwöbel, *op. cit.* note 5, p. 542.

⁵⁰ Mathieu, B., *Constitutional identity*, in. Raisz, A. (ed.), *International Law From a Central European Perspective*, CEA Publishing, Miskolc–Budapest 2022, p. 32.

⁵¹ Jakab, A., *Az európai alkotmányjog nyelve*, Nemzeti Közszerológálati Egyetem, Budapest 2016, p. 107.

legislation, enforcement and the resolution of disputes is in the hands of the states.⁵²

As one can notice, the classical concept of sovereignty is sometimes questioned in the current globalised world, where states are so interdependent (especially in economic, environmental and military issues) that inter-state cooperation is essential.⁵³ This inter-state cooperation entails the transfer of some elements of national competencies. However, this transfer of certain national competences does not imply the transfer of sovereignty. Hence, it is salient to distinguish between transfer of competences and transfer of sovereignty.⁵⁴ As it was mentioned in the relevant legal literature: “sovereignty also entails the right to freely delegate one’s own competences. The delegation of competences by a state for the purpose of their implementation at the international level [...] does not decrease sovereignty.”⁵⁵ It is true that some states have delegated certain competences to international organizations in order to exercise these competences jointly with other nations at international level for reasons of efficiency. Yet this transfer of competences does not imply the transfer of sovereignty. Moreover, this transfer only concerns those national competences which the states have designated when they set up or join an international organization. Thus, the subject of the transfer is essentially up to the decision of the states.⁵⁶

Besides, one of the most pivotal fundamental features of sovereignty is inalienability (alongside exclusivity and indivisibility).⁵⁷ The transfer of sovereignty to international organizations would be clearly contrary to the inalienable character of sovereignty, because limitations that affect the fundamental functions of the state are tantamount to the impossibility for it to be considered a sovereign state anymore.⁵⁸ Furthermore, the concepts that promote the divisibility of sovereignty are also “artificial and incompatible with the nature of sovereignty.”⁵⁹

⁵² *Loc. cit.*

⁵³ Jakab, *op. cit.* note 52, p. 107.

⁵⁴ In some cases, the transfer of sovereignty may also occur, for example in the case of unification of states. Czubik, P., *Sovereignty in International Law*, in: Raisz, A. (ed.), *International Law From a Central European Perspective*, CEA Publishing, Miskolc–Budapest 2022, p. 104.

⁵⁵ *Ibid.*, p. 99.

⁵⁶ For this reason, some authors have compared this transfer of competences, in a very figurative way, to the contract of donation known from private law, where the object of the donation is determined by the donor. For details see: *Ibid.*, p. 109.

⁵⁷ Florea, *op. cit.* note 11, p. 171.

⁵⁸ *Loc. cit.*

⁵⁹ *Loc. cit.*

All in all, “[t]he sovereignty of a state is not reduced by powers conferred on other entities of international law, as long as this conferral is reversible. On the other hand, the acquisition of these competences by another entity, either by coercion or judicial lawlessness [...], can be perceived as a threat to sovereignty.”⁶⁰ Once again, questions and objections that arise in relation to this transfer of competences can be resolved through loyal cooperation and dialogue between national and international actors based on mutual respect.

5. CONCLUSION

As already outlined above, cooperation between states is essential in today’s globalised world. The transfer of certain competences from national to international level, and compliance with the delegated powers can help to achieve common economic and (in some cases) political goals. One such objective is the protection of fundamental human rights.⁶¹ In this area, the emergence of international regulation and convergence has significantly improved the level of protection. Moreover, the protection of fundamental human rights is “a prerequisite for peace and stability not only within the boundaries of one State, but also in the context of international cooperation with other international subjects.”⁶²

Nonetheless, the transfer of competences cannot be considered a transfer or an abdication of sovereignty. The current concept of global constitutionalism (and especially its international law approach) tends to undermine sovereignty. The constitutionalisation of international organizations inevitably leads to the acquisition of new competences, often without these competences being explicitly transferred by the states. All these processes are aimed at creating a so-called global government or hierarchy. However, “[d]eveloping such a world order could only happen with the abandonment of not only state sovereignty, but also of democracy as the basis of their functioning.”⁶³ Such an outcome is neither optimal nor intended to be achieved considering the intention of the states. Therefore, rephrasing the current concept of multilevel constitutionalism and global constitutionalism is paramount. In the discussion about the ongoing international processes, one must consider the principles of state sovereignty and

⁶⁰ Czubik, *op. cit.* note 54, p. 112.

⁶¹ Other areas where international cooperation is essential and beneficial are for example environmental protection, crime prevention, international trade or scientific research.

⁶² Rusan Novokmet, R., International Peace and Security, in: Raisz, A. (ed.), *International Law From a Central European Perspective*, CEA Publishing, Miskolc–Budapest 2022, p. 75.

⁶³ Czubik, *op. cit.* note 54, p. 96.

loyal cooperation as well. It would be useful to simultaneously strengthen the common, international objectives (such as peace and security, the protection of fundamental human rights, equality, etc.) and the protection of sovereignty and constitutional identity of the states.

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COMPARATIVE ANALYSIS OF CONSTITUTIONAL SAFEGUARDS FOR DECENT LIVING STANDARDS: ROMANIA, SLOVAKIA, AND CROATIA¹

ABSTRACT

This comparative law article examines the legal frameworks in Romania, Slovakia, and Croatia concerning the protection of the standard of living. The research examines the constitutional aspects of defining a decent standard of living and evaluates mechanisms for its safeguarding. I explore how each country's socio-economic context influences living standards' determination and assess the effectiveness of legal protections and social policies. Employing a comparative legal methodology, the study scrutinizes constitutional texts, legal enactments, and judicial interpretations to understand similarities and differences in safeguarding living standards. By analysing constitutional provisions and implementation mechanisms, I contribute to understanding the intersection between constitutional law and socio-economic well-being. The paper underscores the diverse approaches of Romania, Croatia, and Slovakia, where Romania and Croatia explicitly embrace a welfare state concept, while Slovakia addresses living standards through fair work conditions and social assistance. Additionally, it highlights discrepancies in the implementation of constitutional safeguards and variations in methodologies for setting minimum standards of living. Overall, this study offers insights into legal frameworks' strengths and weaknesses, emphasizing the need for clearer guidelines and enhanced consistency in judicial rulings to better protect citizens' standard of living across the examined jurisdictions.

Keywords: constitutional safeguards, standard of living, comparative legal analysis, welfare state

1. INTRODUCTION

Ensuring a decent standard of living is a pivotal goal for nations across the globe, implicating various dimensions of legal, economic, and social policy

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frameworks. This paper explores the constitutional safeguards and legal mechanisms deployed in Romania, Slovakia, and Croatia, three European Union member states with shared historical trajectories transitioning from communist regimes to market-driven economies.

Despite their common heritage, these countries have adopted distinct approaches to encapsulate and protect the right to a decent living within their constitutional and legal orders. This analysis is particularly timely and relevant, considering the evolving socio-economic challenges confronting Central and Eastern Europe (CEE) and the broader European context.

The fall of communism and subsequent accession to the European Union mark significant milestones for Romania, Slovakia, and Croatia, catalysing extensive constitutional and legal reforms. These reforms have included efforts to redefine the role of the state in ensuring economic welfare and social protection for their citizens. Against this backdrop, the paper aims to dissect the constitutional articulations of a “decent standard of living” in these nations, examining the extent to which such frameworks provide a solid foundation for legal protections and social policies aimed at safeguarding living standards.

Employing a comparative legal methodology, this research scrutinizes the constitutional texts, legal enactments, and judicial interpretations relevant to the standard of living in the examined jurisdictions. This approach facilitates an in-depth understanding of the similarities and differences characterizing the legal safeguards for living standards in Romania, Slovakia, and Croatia. It also enables an assessment of the practical implementation and effectiveness of these legal frameworks in achieving their intended objectives.

This analysis sets the stage for a comprehensive review encompassing constitutional provisions, social rights, economic principles, and the enforcement mechanisms operative in Romania, Slovakia, and Croatia. By uncovering the nuances of legal frameworks and their operational realities, this paper contributes to the broader discourse on the constitutional underpinnings of social welfare and the pursuit of socioeconomic well-being within the European Union.

The first section of this paper, titled “Constitutional Safeguards of Decent Living Standards in Romania, Slovakia, and Croatia,” examines how the concept of a decent standard of living is articulated within the constitutional texts of these nations. It analyses constitutional provisions related to social rights, economic principles, and individual freedoms to understand how living standards are defined and protected. Additionally, the role of constitutional courts and other

legal mechanisms in ensuring the practical realization of these standards is explored.

The subsequent section, titled “Legal Implementation of the Right to a Decent Living,” investigates how constitutional principles concerning living standards are practically implemented and legally enforced in Romania, Slovakia, and Croatia. It evaluates legal frameworks, social policies, and governmental initiatives to assess the effectiveness of each country's approach in protecting citizens' standard of living.

2. CONSTITUTIONAL SAFEGUARDS OF STANDARD OF DECENT LIVING IN ROMANIA, SLOVAKIA AND CROATIA

To assess the safeguards of the standard of decent living in Romania, Slovakia, and Croatia, in this section of the paper I will analyse and compare the text from the constitutions of these countries. Then, since the texts of the constitutions are quite generic, I will look up for the case law of these countries' constitutional courts to find out how these courts interpreted the standard of decent living and how it is guaranteed.

2.1. Romania

Romania is defined as a social state by Article 1 para. (2) of the Constitution of Romania.² Article 47, named living standard, of the Constitution, under Title II – Fundamental rights, freedoms and duties, Chapter II – Fundamental rights and freedoms, states that “[t]he State shall be bound to take measures of economic development and social protection, of a nature to ensure a decent living standard for its citizens”. The 2nd paragraph of the article states that “[c]itizens have the right to pensions, paid maternity leave, medical care in public health centres, unemployment benefits, and other forms of public or private social securities, as stipulated by the law. Citizens have the right to social assistance, according to the law”.

Besides Article 47, there are other articles in the Constitution of Romania which are linked to the concept of social state and living standard. For example, Article 32, named “Right to education”, states that “[s]tate education shall be free,

² Constitution of Romania, Official Gazette, Part I, no. 767/31.10.2003, available on <https://www.presidency.ro/en/the-constitution-of-romania>, 2 April, 2024.

according to the law. The State shall grant social scholarships to children or young people coming from disadvantaged families and to those institutionalized, as stipulated by the law”, Article 34, named “Right to protection of health”, states that “[t]he organization of the medical care and social security system in case of sickness, accidents, maternity and recovery, the control over the exercise of medical professions and paramedical activities, as well as other measures to protect physical and mental health of a person shall be established according to the law”.

Also, the constitution also mentions that some special categories of people enjoy a special protection regime, such as children and young people, mentioned on Article 49 and disabled people, mentioned on Article 50.

The Romanian Constitution asserts the right to a decent standard of living without providing a precise definition thereof, leaving this task to be delineated in scholarly discourse and subsequently integrated into jurisprudence by the Constitutional Court and statutory law. Scholars acknowledge the complexity of this concept, attributing the phrase “decent standard of living” to the constituent legislator. They argue that, rather than explicitly guaranteeing such a standard, the Constitution should ensure “reasonable living conditions,” with the right to social security constituting one aspect of this broader framework.³

In recent academic literature exploring citizens’ rights and freedoms, the notion of a decent standard of living is depicted as encompassing not only reasonable living conditions but also the essential provision of food, clothing, and housing, thus ensuring a dignified existence. However, scholars caution against a rigid, universally applicable definition, noting the variable nature of this right across different socio-economic, political, and cultural contexts. For instance, in regions where access to clean drinking water is scarce, ensuring daily access to this vital resource becomes paramount in realizing a decent standard of living.⁴

Furthermore, scholars address the practical implementation of this fundamental right, recognizing the challenges faced by legislators in delineating concrete measures. They argue for a nuanced approach, granting legislators considerable discretion in navigating these complexities. Consequently, there is a call for a complementary role of constitutional courts rather than a primary one, emphasizing the importance of elected authorities and public policy experts in

³ Popescu, A., Tănăsescu, E.S. in Muraru, I.; Tănăsescu, E.S.; *Constituția României. Comentariu pe articole*, C.H. Beck, Bucharest, 2022, p. 415.

⁴ Enache, M., Deaconu, Ș., *Drepturile libertăților fundamentale în jurisprudența Curții Constituționale*, Vol. II, C. H. Beck, Bucharest, 2019, p. 154-155.

effectively implementing and upholding social rights within the framework of a functional democracy.⁵

In Romania, the right to decent living is not very well established in the case law of the Romania's Constitutional Court. In recent legal decisions, the Constitutional Court of Romania has grappled with issues concerning the preservation of decent living standards amidst various policy changes. In 2020, the Constitutional Court, through Decision no. 717/2020⁶, emphasized that the determination of a decent standard of living should be evaluated on a case-by-case basis, considering various factors such as the country's economic situation, available resources, societal development, culture, and organization. The Court highlighted the dynamic nature of assessing decent living standards and underscored the importance of considering contextual factors rather than establishing a rigid standard. Decision no. 785/2019⁷ addressed concerns raised by the Ombudsman regarding the impact of abolishing a public service on the right to a decent standard of living. While the court did not directly respond to the challenge, it emphasized the legislative freedom to ensure citizens' decent living standards within the constraints of state policy and available resources.

Previous cases have also highlighted the role of fiscal measures in upholding decent living standards. The Court affirmed that certain exceptions to tax obligations, established by the legislature, contribute to the legal framework supporting social protection measures for specific categories of taxpayers.⁸ Moreover, the Court underscored the constitutional obligation of the state to implement measures for economic development and social protection, ensuring a decent standard of living for citizens.

In another case concerning the suspension of salary increases for teachers, the Constitutional Court recognized that such measures infringed upon fundamental rights, including the right to work, social protection of work, and the right to a decent standard of living.⁹ These rights, enshrined in the constitution, encompass not only salary considerations but also the provision of reasonable living conditions necessary for a civilized and decent life.

⁵ Safta, M., *Drept constituțional și instituții politice*, Vol. I., Hamangiu, Bucharest, 2021, p. 332.

⁶ The Constitutional Court of Romania, Decision no. 717/06.10.2020, <https://legislatie.just.ro/Public/DetaliiDocument/236181> (Romanian), 2 April, 2024.

⁷ The Constitutional Court of Romania, Decision no. 785/28.11.2019, <https://legislatie.just.ro/Public/DetaliiDocument/223057> (Romanian), 2 April, 2024.

⁸ The Constitutional Court of Romania, Decision no. 426/09.06.2015, <https://legislatie.just.ro/Public/DetaliiDocument/170403> (Romanian), 2 April, 2024.

⁹ The Constitutional Court of Romania, Decision no. 1221/12.11.2008, <https://legislatie.just.ro/Public/DetaliiDocument/99719> (Romanian), 2 April, 2024.

In 1999, the Constitutional Court¹⁰ assessed the constitutionality of provisions in Government Emergency Order no. 40/1999 regarding tenant protection and rent regulation. Objectors argued that these provisions violated property rights and equality under the Constitution. They cited disparities in tenancy contract terms for state-owned versus privately owned properties.

However, the Court ruled that tenancy contract regulations didn't affect property rights. It justified tenant protection measures under constitutional provisions ensuring citizens' decent living standards and quality of life. The Court emphasized that the legislature balanced property rights with tenants' rights to housing. It concluded that the regulations didn't create unfair privileges or violate equality principles, as equal treatment is only mandatory for citizens in identical situations.

2.2. Slovak Republic

Constitution of the Slovak Republic¹¹ does not define the state as a welfare state. However, it mentions the standard of living in 2 articles, Article 36, and Article 39, both in the "Economic, social and cultural rights" section of the 2nd title of the Constitution, which refers to fundamental rights and freedoms.

Article 36 states that "[e]mployees shall have the right to fair and satisfactory conditions of work. The law shall ensure, in particular: a) the right to wages for the work performed, sufficient to secure a dignified standard of life, b) the protection from arbitrary dismissal and discrimination at work, c) the protection of safety and health at work, d) the setting of maximum working hours, e) appropriate rest time after work, f) the minimum admissible length of paid vacation, g) the right to collective negotiations".

Also, Article 35 mentions that "[c]itizens shall have the right to work. The State shall guarantee, within appropriate extent, the material welfare of those who cannot enjoy this right without their own fault".

The Article 35 is linked with Article 39 para. (2) which states that "[a]ny person suffering material need shall have the right to such kind of assistance that is necessary to secure his or her basic standard of life". Besides that, first paragraph

¹⁰ The Constitutional Court of Romania, Decision no. 224/07.12.1999, <https://codices.coe.int/codices/results/precis/81447B88-43EF-4779-2220-08DC225DC81B>, 2 April, 2024.

¹¹ Constitution of the Slovak Republic, Official Gazette no. 460/1992, available on <https://www.prezident.sk/upload-files/46422.pdf>, 2 April, 2024.

of the Article 39 states that “[c]itizens shall have the right to adequate material security in their old age, as well as in cases of incapability for work and death of the breadwinner of a family” thus regulating the pension system.

Slovakia’s Constitution also stipulates “right to free health care and medical equipment for disabilities” in Article 40, special protection of children in Article 41 and “right to free education at elementary and secondary schools” in Article 42.

In a comparative study¹², the Slovak Constitution was noted for its absence of explicit mention of a social state. Instead, Article 55 outlined principles resembling those of a social state, emphasizing a socially and ecologically oriented market economy. The Constitution's lack of the term “social security” was highlighted, with a more abstract formulation defining the right to appropriate material security in cases of explicitly defined social risks. Notably, the Constitution refrained from explicitly mandating state intervention in regulating or maintaining social insurance systems, except for provisions related to health protection. Despite the absence of explicit insurance principles in the constitutional text, particularly outside of health protection, it was emphasized that their implicit utilization in the legislative process was evident. The robust case-law of the Slovak Constitutional Court was cited as evidence of legislators' reliance on these principles in shaping Slovakia's social security system.

Slovakia’s Constitutional Court issued some decisions regarding decent standard of living. For example, in PL. ÚS 13/12 of 19-06-2013¹³, the Court examined a law aiming to raise nurses' wages, ruling that it didn't violate their right to a decent standard of living. Although economic considerations were deemed not grounds for unconstitutionality, the law failed the proportionality test due to its heavy financial burden on private health care providers, particularly small ones. The Court stressed that economic matters are best handled by legislative and executive branches.

Despite concerns, the law didn't breach other constitutional norms, as it didn't discriminate against nurses and justified wage increases based on their specific

¹² Kšiňan, J., *Comparison of Constitutional Aspects of Social Security Systems of Slovakia and Slovenia*, Soziale Aspekte der Verfassung der Slowakischen Republik, Wien, 2013, p. 51,

https://uniba.sk/fileadmin/praf/Pracoviska/Katedry/KPPPSZ/Publikacne_vystupy/A1301490_Soziale_Aspekte_SK_Kern.pdf, 25 April, 2024.

¹³ The Constitutional Court of Slovakia, Decision no. PL. ÚS 13/12 of 19-06-2013, https://www.ustavnysud.sk/documents/20121/78884/PL_13_12.pdf/a185aeed-54fe-a6fe-13fc-02b1f4666b58,

2 April, 2024.

characteristics. The Court declined to categorize health care providers as state or non-state, deeming it impractical due to mixed nature.

In a case regarding the pensions, the Constitutional Court¹⁴ asserted that the fundamental right to adequate material security, regulated by law in accordance with the Constitution, primarily encompasses ensuring sufficient material security in old age through the pension system. This system, based on social insurance principles, incorporates personal contributions, social solidarity, and state guarantees. The mechanism for annual pension adjustments, mandated by Law no. 461/2003 Coll., considers factors such as consumer price growth and average wage increases. These adjustments, integral to the social insurance system, ensure its functionality and reliability. Therefore, they are considered part of the constitutional right to adequate material security in old age.

In decision PL. ÚS 16/05-116¹⁵, the Constitutional Court emphasized, as in previous proceedings, that health insurance does not cover all health risks indiscriminately, but only those recognized as insured events. Thus, healthcare provided under insurance is not limitless but subject to legal conditions defining the scope and content of covered care. The Court cautioned against interpreting health insurance as an unlimited provision of free healthcare, as this would imply a universal and absolute solidarity-based system. Such an interpretation would likely necessitate funding from other sources, such as general taxation, without requiring further patient participation.

2.3. Republic of Croatia

In Constitution of the Republic of Croatia¹⁶, Article 1 states that “[t]he Republic of Croatia is a unitary and indivisible democratic welfare state”. Then, Article 56 states that “[e]ach employee shall be entitled to remuneration enabling him/her to ensure a free and suitable life for himself/herself and his/her family” while Article 63 states “[t]he state shall protect maternity, children and youth, and shall

¹⁴ The Constitutional Court of Slovakia, Decision PL. ÚS 16/06-39, <https://www.ustavnysud.sk/docDownload/91fcc873-9fd5-4a08-bbfd-e5c4928b21c6>, 2 April, 2024.

¹⁵ The Constitutional Court of Slovakia, Decision PL. ÚS 16/05-116, <https://www.ustavnysud.sk/docDownload/21f6f30d-0b16-4c6e-999b-f1ae62854142>, 2 April, 2024.

¹⁶ Constitution of the Republic of Croatia (consolidated text), Official Gazette no. 56/90, 135/97, 8/98 – consolidated text, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, available on <https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text>, 2 April, 2024.

create social, cultural, educational, material and other conditions promoting the achievement of the right to a suitable life”.

According to an analysis¹⁷, the State's responsibility extends to fostering social, cultural, educational, material, and other conditions conducive to the realization of a decent standard of living. The author underscores the importance of including environmental and health considerations among these “other conditions,” emphasizing that a healthy environment is indispensable for securing a decent life, especially for younger generations. This highlights the intrinsic link between decent living and environmental wellbeing, a fundamental aspect deserving recognition and protection within constitutional frameworks.

In Croatia, Constitutional Court issued several decisions relating to right to decent living. I selected the ones that I believe are the most relevant for this paper.

In a 2007 court decision,¹⁸ addressed unequal treatment regarding extra pay for night work, specifically concerning employees at the Ministry of Internal Affairs compared to officials in other departments. The court ruled this discrepancy violated constitutional rights against discrimination and for fair remuneration. However, the decision was not unanimous; one judge argued that including extra pay for night work in the constitutional guarantee of fair remuneration could broaden the scope of this right beyond its intended purpose. They advocated for a limited interpretation focusing solely on ensuring a decent standard of living for workers and their families.

In 2009, the court retained that the concept of a social state, integral to European constitutional identity and affirmed in the Constitution of the Republic of Croatia, embodies a normative framework for organizing a welfare state. Scholars emphasize its role in realizing social rights, advocating state intervention to ensure economic and social well-being. The social state operates on three main principles: enabling government intervention in the economy, promoting social rights and equality, and preventing the erosion of welfare state structures. Constitutionalizing social rights entails equitable redistribution of

¹⁷ Staničić, F., *Croatia: Constitutional Protection of the Right to a Healthy Life—Do We Need More to Safeguard the Environment and Future Generations?*, Constitutional Protection of the Environment and Future Generations, 2022, p. 153, https://real.mtak.hu/158060/1/CEA-ProfNet06Szilagyi-ConstitutionalProtectionEnvironment_EBOOK.pdf, 25 April, 2024.

¹⁸ The Constitutional Court of the Republic of Croatia, Decision No.: U-III-1600/2004 of 17 October 2007, <https://sljeme.usud.hr/usud/prakswen.nsf/9999C0D7DCF62AB2C1257E5F003E2279/%24FILE/U-III-1600-2004.pdf>, 2 April, 2024.

resources and balancing social goals with budget constraints. It guarantees individuals a minimum level of welfare essential for human dignity, extending beyond subsistence to include culturally implicit benefits. Fulfilling social state principles is intertwined with the rule of law, requiring authorities to undertake social activities through statutory means and in accordance with legal principles.¹⁹

This decision was later brought to reject other constitutional review request against laws.²⁰ In a 2015 decision²¹, the court affirmed that the Constitution guarantees employees the right to remuneration ensuring a decent standard of living for themselves and their families. However, the Constitution does not specify the exact amount or components of this remuneration, leaving it to be defined by law and collective agreements. The court clarified that stimulative supplements, specific working condition supplements, status supplements, and salary increases are not constitutionally guaranteed. Furthermore, it stated that holiday allowances and Christmas bonuses in the public service are not mandated by the Constitution. The decision also acknowledged the economic crisis faced by the Republic of Croatia and the necessity of reducing public costs. Withholding holiday allowances and Christmas bonuses was seen as a means of fiscal saving, contributing to the stabilization of the State Budget, despite their absence in the State Budget's quantitative share.

In response to the COVID-19 epidemic, restrictions were imposed to protect public health, affecting businesses and economic stability. These measures prompted concerns about the constitutional right to earnings and social security, crucial for ensuring a decent life, as stipulated in Article 55.1 of the Constitution, now Article 56. Decision from July 13, 2021, addressed the impact of these restrictions on fundamental rights, particularly access to justice and property

¹⁹ The Constitutional Court of the Republic of Croatia, Decision No.: U-IP-3820/2009 of 17 November 2009, <https://sljeme.usud.hr/usud/prakswen.nsf/75934C0CCA94571DC1257E5F003E7996/%24FILE/U-IP-3820-2009.pdf>, 2 April, 2024.

²⁰ The Constitutional Court of the Republic of Croatia, Decision No.: U-I-1694/2017 of 02.05.2018, <https://sljeme.usud.hr/usud/prakswen.nsf/fOdluka.xsp?action=openDocument&documentId=75FCDF0695D7B413C12584F7004784FE>, 2 April, 2024. Decision No.: U-I-3685/2015 of 04.04.2017, <https://sljeme.usud.hr/usud/prakswen.nsf/fOdluka.xsp?action=openDocument&documentId=E2FDAE001D835F1EC125833D0052ECD4>, 2 April, 2024.

²¹ The Constitutional Court of the Republic of Croatia, Decision No.: U-I-4405/2013 of 31.03.2015, <https://sljeme.usud.hr/usud/prakswen.nsf/fOdluka.xsp?action=openDocument&documentId=0370C61BF73CE809C125800B00295FF4>, 2 April, 2024.

rights.²² Despite recognizing the necessity of public intervention, the Constitutional Court assessed the proportionality of these measures, considering their aim to preserve social security and the right to a decent life amidst the crisis.

2.4. Discussion

The constitutions of Romania, Slovakia, and Croatia illustrate different approaches to the concept of a welfare state and the provision of social rights. Romania's Constitution explicitly defines the country as a social state, with Article 47 emphasizing the state's duty to ensure a decent living standard for its citizens through economic development and social protection measures. Additional articles, such as those guaranteeing the right to education and health protection, further underscore Romania's commitment to social welfare.

In contrast, while Slovakia's Constitution does not explicitly label the state as a welfare state, it includes provisions aimed at safeguarding the standard of living. Article 36 guarantees fair work conditions and adequate wages, while Article 39 ensures assistance for those in material need and adequate security in old age or incapacity for work. Similarly, the Republic of Croatia's Constitution declares the country as a welfare state, emphasizing entitlements to remuneration enabling a suitable life and the state's responsibility to protect maternity, children, and youth, as well as to create conditions conducive to a suitable life. These constitutions reflect varied approaches to social welfare, with Romania and Croatia explicitly embracing the concept of a welfare state, while Slovakia addresses social rights within a broader framework of ensuring a decent standard of living.

While Romania's Constitutional Court has made efforts to address the right to a decent standard of living, its jurisprudential framework remains insufficiently robust. Decision-making appears inconsistent, with contextual factors not consistently considered. In contrast, Slovakia and Croatia's Courts demonstrate a more balanced approach, weighing economic factors alongside constitutional rights. To enhance Romania's framework, clearer guidelines, stakeholder engagement, and increased consistency in rulings are recommended. This would better protect citizens' fundamental rights and advance social justice within the country. However, in all three countries, the constitutional courts seem to take a

²² The Constitutional Court of the Republic of Croatia, Decision No.: U-I-3403/2020 of 13.07.2021,
<https://sljeme.usud.hr/usud/prakswen.nsf/fOdluka.xsp?action=openDocument&documentId=6721D87833FC1489C12587E40041A3D7>, 2 April, 2024.

precautionary approach, refusing to assume the role of guardianship of right to decent living.

3. LEGAL IMPLEMENTATION OF THE RIGHT TO A DECENT LIVING

In this section of the paper, I will analyse how Romania, Slovakia, and Croatia implemented a safeguard to living standard regarding minimum wages, pensions system and social assistance. The reason I selected these three action domains is to see the practical implementation and legal enforcement of constitutional principles concerning living standards in Romania, Slovakia, and Croatia. Legal frameworks, social policies, and governmental initiatives are evaluated to determine the efficacy of each country's legal approach in protecting citizens' standard of living.

3.1. Minimum wage

In Romania, the minimum wage is fixed by the Government of Romania through Government's Decision, according to Article 164 of Law no. 53/2003 - Labour Code of Romania.²³ This article states that the minimum gross national monthly base wage guaranteed in payment, corresponding to the normal working schedule, is established by government decision, after consulting trade unions and employers' associations. In cases where the normal working schedule is, according to the law, less than 8 hours daily, the minimum gross hourly base wages calculated by relating the minimum gross national base wage to the average number of hours per month according to the approved legal working schedule.

Currently, there is no established mechanism for increasing the minimum wage in Romania. However, according to Emergency Government Ordinance no. 217/2000 regarding the structure of the minimum consumption basket for a decent living in Romania, as amended by Law no. 174/2020²⁴, the minimum consumption basket for a decent living constitutes the main element for

²³ Labour Code of Romania, Law no. 53/2003, Official Gazette, Part I, no. 345/18.05.2011, available on <https://legislatie.just.ro/Public/DetaliiDocument/128647>(Romanian), 2 April, 2024.

²⁴ Emergency Government Ordinance no. 217/2000 regarding the structure of the minimum consumption basket for a decent living in Romania, Official Gazette, Part I, no. 606/25.11.2000, available on <https://legislatie.just.ro/Public/DetaliiDocument/228843>(Romanian), 2 April, 2024.

establishing the guaranteed minimum gross national base wage and wage policies. Unfortunately, the minimum consumption basket has never been used to establish the minimum wage, as minimum consumption basket has never been calculated according to the law by the National Institute of Statistics, which is under Government's control.

In the past, the minimum wage was increased by political decision alone, left-leaning governments leaning to a bigger increase of the minimum wage, while right-leaning governments favoured a freeze or a smaller increase of the minimum wage.

According to Government's Decision no. 900/2023 for establishing the guaranteed minimum gross national base wage²⁵, starting from October 2023, the minimum wage is 3.300 Lei (RON), which is roughly EUR 663, and 2.079 Lei after taxes. However, according to a report from Friedrich Ebert Stiftung Romania and Syndex Romania issued in October 2023²⁶, the cost for the minimum consumption basket for a decent living was, in September 2023, 3.807 Lei, after taxes. Therefore, the minimum wage set by the Government is 1.728 Lei short (3.807 Lei – 2.079 Lei), after taxes.

In Slovakia, the minimum wage is fixed according to the Labour Code – Law no. 311/2001.²⁷ According to Article 120, the general rule in Slovakia is that the minimum wage is set by collective agreements. However, if the employee's wage was not set by collective agreement, the employer must pay the statutory minimum wage set for the degree of work difficulty.

The employer must classify each position according to a scale of difficulty levels, based on the most challenging tasks expected of the employee within the agreed-upon job description in the employment contract. The Labour Code includes an annex with the criteria for establishing the degree of difficulty of the work position.

According to Ministry of Labour, Social Affairs and Family of the Slovak Republic's Announcement no. 372/2023 Coll.²⁸, the current minimum wage is

²⁵ Government's Decision no. 900/2023 for establishing the guaranteed minimum gross national base wage, Official Gazette, Part I, no. 877/28. 09. 2023, available on <https://legislatie.just.ro/Public/DetaliiDocument/275787> (Romanian), 2 April, 2024.

²⁶ See https://romania.fes.de/fileadmin/user_upload/pdf-files/comunicat_Cosul_Minim_Trai_Decent_2023.pdf (Romanian), 2 April, 2024.

²⁷ Labour Code, Law no. 311/2001 Coll., <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2001/311/20240301> (Slovak), 2 April, 2024.

²⁸ Ministry of Labour, Social Affairs and Family of the Slovak Republic, Announcement no. 372/2023 Coll., <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2023/372/20230927> (Slovak), 2 April, 2024.

Slovakia is EUR 750 for the first degree of difficulty and EUR 1.330 for the most complex jobs.

In Croatia, the minimum wage is fixed according to Minimum Wage Act.²⁹The minimum wage within the meaning of this act is lowest monthly amount of gross wage paid for full-time work.

According to Article 5 and Article 6, the minimum wage is established once a year, no later than 31 October for the following year, by the Government of the Republic of Croatia at the proposal of the Minister competent for labour.

The Minister shall, considering the rise in the proportion of the minimum wage compared to the average gross wage paid in legal entities from January to July of the current year, inflation, wage dynamics, unemployment and employment patterns, demographic shifts, and the overall economic condition, and with particular attention to low-wage occupations and vulnerable employee groups, propose to the Government of the Republic of Croatia the minimum wage amount, after consultation with social partners. Typically, regular annual consultations with the social partners shall take place in September and October.

It is important to note that, in Croatia, the Minister shall set up an expert commission to monitor and analyse the development of the minimum wage, according to Article 7. The current minimum wage in Croatia is EUR 840.³⁰

In conclusion, the comparative analysis highlights diverse methods for setting minimum wages in Romania, Slovakia, and Croatia. Romania relies on government decisions but lacks a formal mechanism for adjustments, potentially leading to discrepancies between wages and living costs. In Slovakia, minimum wages are primarily determined through collective agreements, with statutory minimums for jobs lacking such agreements. Croatia employs a structured process involving consultations and expert commissions to propose minimum wage adjustments. These distinct approaches reflect each country's socio-economic context and policy priorities, influencing wage levels and labour market dynamics. In my opinion, the mechanism described above are not sufficient for safeguarding the decent living standard, because establishing the minimum wage remains a simple political decision.

²⁹ Minimum Wage Act, Official Gazette no. 118/18, 120/21, https://uznr.mrms.hr/wp-content/uploads/minimum_wage_act.pdf, 2 April, 2024.

³⁰ Regulation, Minimum Wage 2024, Official Gazette no. 125/2023, https://narodne-novine.nn.hr/clanci/sluzbeni/2023_10_125_1740.html(Croatian), 2 April, 2024.

3.2. Pensions

In this section, I will present how the old-age pensions are calculated in Romania, Slovak Republic, and Croatia. Also, I will assess if there is a minimum pension and how it is calculated.

Regarding the pension system, Romania implemented a pension system based on personal contributions, which are mandatory and are collected usually through employers, as a withholding tax. The system is regulated by Law no. 360/2023 regarding public pensions system.³¹

According to this law, the pension amount for old age is determined by multiplying the total number of points accrued by the insured individual with the value of the reference point. The value of the reference point represents the ratio between the pension point value at the time of the law's enactment and the average level of contribution periods under previous legislation, specifically level 25. At the law's enactment, the value of the reference point is 81 Lei.

Starting from the year following the law's enactment, the value of the reference point is annually increased at the beginning of each year, in January, by the average annual inflation rate, plus 50% of the real increase in the average gross wage earnings, definitive indicators known in the current year for the previous calendar year, communicated by the National Institute of Statistics. However, in practice, the value of the pensions' growth is set by the Government, as a political decision.

If the pension is lower than a certain amount, the pensioner will receive a difference, as a social allowance, according to Emergency Government Ordinance no. 6/2009 regarding social benefit for pensioners.³² The amount mentioned above is currently 1.281 lei, according to Emergency Government Ordinance no. 115/2023 on certain fiscal-budgetary measures in the field of public expenditure, for fiscal consolidation, combating tax evasion, amending, and supplementing certain normative acts, as well as for extending certain deadlines,³³ therefore no pensioner receives less than 1.281 Lei monthly.

³¹ Law no. 360/2023 regarding public pensions system, Official Gazette, Part I, no. 1089/2023, <https://legislatie.just.ro/Public/DetaliiDocument/276927>(Romanian), 2 April, 2024.

³² Emergency Government Ordinance no. 6/2009 regarding social benefit for pensioners, Official Gazette, Part I, no. 107/2009, <https://legislatie.just.ro/Public/DetaliiDocumentAfis/248219>(Romanian), 2 April, 2024.

³³ Emergency Government Ordinance no. 115/2023 on certain fiscal-budgetary measures in the field of public expenditure, for fiscal consolidation, combating tax evasion, amending, and supplementing certain normative acts, as well as for extending certain

Like the minimum wage, the minimum pension, composed of the pension and the social allowance mentioned above, is fixed by the political decision of the Government, through emergency government ordinance.

In Slovakia, the pensions are regulated through Law no. 461/2003 Coll. on Social Insurance.³⁴ This system is also based on points. According to Article 61-63, the personal assessment basis in the specified context is determined by aggregating assessment bases for the relevant calendar year, from which pension insurance contributions have been paid. The personal pay point, crucial for calculating retirement benefits, is computed by dividing the personal assessment base by the general assessment base, rounded up to four decimal places. If the pension insurance period lasted for a whole calendar year, a personal pay point of 0.3 is allocated; otherwise, it's prorated based on the duration of the period. The maximum personal pay point is set at 3. According to Article 11 para. (1), the general assessment base is 12 times the average monthly salary in the economy of the Slovak Republic as determined by the Statistical Office of the Slovak Republic for the relevant calendar year.

The average personal pay point, pivotal for pension benefit calculations, is calculated by summing personal pay points achieved in each calendar year and converting pension insurance days into years. An average personal pay point exceeding 3 is disregarded. Values below 1.25 are considered in full, while adjustments are made for averages between 1.25 and 3 based on specified percentages over the years. Additional adjustments are applied for averages below 1.0. The resulting average personal pay point is rounded up to four decimal places after adjustments.

According to Annex No. 3aa, the pensions growth formula is based on the 95% of the growth of the average monthly salary of the Slovak Republic as determined by the Statistical Office for the third quarter of the calendar year. The base for the growth is the pension value of the previous year, until 2005 when Article 64 para. (2) established the pension value to be 195 SKK.

Slovak Republic also established a minimum pension. According to Article 82b, the increase in old-age pensions to match the minimum pension is determined as follows: The minimum pension is either 145% of the subsistence minimum or a percentage increase based on the length of the pension insurance period. This

deadlines, Official Gazette, Part I, no. 1139/2023,
<https://legislatie.just.ro/Public/DetaliiDocument/277404>(Romanian), 2 April, 2024.

³⁴ Law no. 461/2003 Coll. on Social Insurance, <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2003/461/20231001.html> (Slovak), 2 April, 2024.

increase ranges from 2.5 to 7.5 percentage points for each additional year of the pension insurance period after 30 years.

In Croatia, the pensions system is regulated through Pension Insurance Act³⁵ from 2013. Value points for determining pensions in Croatia are calculated based on salaries and insurance bases earned since January 1, 1970, according to Article 81. Each year's salary or base is divided by the average annual salary of all employees for that year. For years after January 1, 2003, if the insured person earns a salary or base exceeding the maximum annual basis for calculating contributions, the maximum annual basis for that year is used to determine value points proportionally to the insurance seniority earned. One value point equals the average salary for one calendar year. Personal points for pension calculation are obtained by multiplying the average value points by the total pensionable service and the starting factor. The current pension value is the determined amount for one personal point.

According to Article 88 para. (5), the annual growth rate of pensions in Croatia is determined by combining the rate of change in the average consumer price index and the rate of change in the average gross salary of all employees from the previous calendar year. If the consumer price index contributes less than 45% to the overall rate, the growth rate is determined by 30% of the consumer price index change and 70% of the wage change. If the index contributes 45% to 55%, the ratio becomes 50-50. If the index contributes more than 55%, the ratio shifts to 70% consumer price index change and 30% wage change.

Croatia has also a minimum pension, like Romania. According to Article 90 para. (2), the lowest pension is determined for each year of pensionable service in the amount of 0.825% of the average gross salary of all employees in the Republic of Croatia in 1998 according to data from the Croatian Bureau of Statistics.

In summary, the pension systems in Romania, Slovakia, and Croatia share commonalities in their basis for pension calculation, often relying on a points-based system derived from contributions and average salary levels. Additionally, all three countries have established mechanisms for adjusting pensions to ensure a minimum threshold, with variations in how this is calculated.

Romania's pension system, governed by Law no. 360/2023, calculates pensions based on accrued points multiplied by a reference value, with adjustments made annually. Emergency Government Ordinance no. 6/2009 provides for a social

³⁵ Pension Insurance Act, Official Gazette no. 157/2023, https://narodne-novine.nn.hr/clanci/sluzbeni/2013_12_157_3290.html (Croatian), 2 April, 2024.

allowance to supplement pensions below a certain threshold, ensuring a minimum income level. Similarly, Slovakia's pension system, regulated by Act No. 461/2003 on Social Insurance, uses a points-based approach, with adjustments based on the average monthly salary and additional provisions for a minimum pension based on years of pension insurance.

Croatia's pension system, as governed by the Pension Insurance Act from 2013, calculates pensions based on value points derived from salary contributions since 1970, with adjustments made based on the annual growth rate determined by changes in the consumer price index and average gross salary. Furthermore, Croatia establishes a minimum pension amount based on a percentage of the average gross salary of all employees in 1998.

While all three countries implement a minimum pension, differences exist in the methodologies used for its calculation. Romania and Slovakia determine the minimum pension based on a percentage increase relative to the subsistence minimum or years of pension insurance, whereas Croatia sets its minimum pension based on historical salary data. These variations reflect the unique policy priorities and economic contexts of each country. In this context, it is difficult to assess if the minimum pension satisfies the right to a decent living. However, the idea of a minimum pension is a clear intent of the state to assure this right.

3.3. Social assistance

In this section, I will identify and assess the legal provisions of social assistance related to providing a minimum amount of money for people's basic needs in Romania, Slovakia, and Croatia. Although they are different kinds of forms of social assistance, I will be looking for the social assistance only to the basic needs, to compare how these countries implement such measure and how they safeguard the right to decent living.

In Romania, there was a recent reform of the social assistance policy for providing the allowance for the basic needs. Law no. 196/2016 regarding the minimum inclusion income³⁶ entered in force on January 1st, 2024, after almost 7 years of delays.

Article 3 of Law no. 196/2016 establishes the concept of minimum inclusion income, which provides financial support to ensure a minimum standard of

³⁶Law no. 196/2016 regarding the minimum inclusion income, Official Gazette, Part I, no. 882/2016, <https://legislatie.just.ro/Public/DetaliiDocument/265018> (Romanian), 2 April, 2024.

living for eligible families and individuals, as well as to prevent child poverty and promote their participation in education. This income is comprised of two forms of financial assistance: inclusion allowances and family allowances. The minimum standard of living is defined by Article 54 of Law no. 292/2011 regarding social assistance³⁷ and represents the threshold expressed in money that ensures basic needs such as food, clothing, personal hygiene, household maintenance, and sanitation. It is calculated in relation to the poverty threshold according to the methodology used at the level of the European Union member states.

According to Article 9, both families and single individuals without income or whose income does not cover the minimum standard of living may benefit from the minimum inclusion income if they meet the eligibility conditions provided by this law, and their adjusted monthly net income is up to 700 Lei.

Article 15 establishes the maximum monthly amount for the inclusion allowance, which varies based on the recipient's circumstances. For most individuals, it is set at 275 lei per month, while those aged 65 or older can receive up to 400 lei per month. The maximum allowance is determined based on family size, using equivalence coefficients outlined in Article 9 para. (2). Article 16 outlines how the inclusion allowance is calculated as the difference between the maximum allowance and the recipient's monthly net income. For individuals who are single and at least 65 years old, the adjusted monthly net income limit and the maximum allowance amount are both set at 400 Lei, according to Article 17.

The assistance provided to families with children under the minimum inclusion income program is determined based on the family's adjusted monthly net income and the number of children. Families with incomes up to 275 Lei receive varying levels of monthly aid, with amounts increasing according to the number of children. For single-parent families and those with adjusted monthly incomes up to 700 Lei, assistance amounts are similarly determined based on the number of children. The assistance aims to alleviate financial strain and ensure the well-being of families with children, contributing to poverty prevention and supporting children's participation in the education system as there is a condition for the children to participate in the education system and not record absences.

According to Article 91, the minimum inclusion income level, and its associated components, along with the assistance amounts for families with children, are subject to annual automatic adjustments, beginning each March. These

³⁷Law no. 292/2011 regarding social assistance, Official Gazette, Part I, no. 905/2011, <https://legislatie.just.ro/Public/DetaliiDocument/232139> (Romanian), 2 April, 2024.

adjustments are based on the previous year's average annual inflation rate, as officially reported by the National Institute of Statistics. If the inflation rate is negative, the minimum inclusion income and its associated amounts remain unchanged.

In Slovak Republic, the minimum income threshold is regulated by Law no. 601/2003 Coll. on the subsistence minimum and amending certain laws.³⁸ According to Article 2, the subsistence minimum for individuals or households assessed collectively is determined as follows: EUR 178.92 monthly for each adult individual, EUR 124.81 monthly for additional adults assessed together, and EUR 81.66 monthly per dependent minor or child.

Regarding the adjustments of subsistence minimum amounts, Article 5 states that the subsistence minimum amounts are subject to adjustment annually on July 1st, except under special circumstances. This adjustment is determined by multiplying the amounts specified in Article 2 by the growth coefficient of the cost of living for low-income households, as determined by the Statistical Office of the Slovak Republic. Low-income households are defined as those whose incomes fall within the lowest 20% of all households ranked by net cash income per person.

The increase in the cost of living for such households is measured from April of the previous calendar year to April of the current calendar year. If the adjustment coefficient is equal to or less than one, no adjustment is made. The adjusted subsistence minimum amounts are formally established by the Ministry of Labour, Social Affairs, and Family of the Slovak Republic based on data provided by the Statistical Office and published in the Collection of Laws of the Slovak Republic.

In Croatia, the social minimum income is regulated through Social Welfare Act.³⁹ The minimum social income in Croatia is called Guaranteed minimum allowance. According to Article 22, the calculation basis for the guaranteed minimum allowance is established annually by a decision of the Government of the Republic of Croatia.

The guaranteed minimum allowance is a provision extended to individuals or households who lack the financial means to cover their basic needs, as stipulated

³⁸Law no. 601/2003 Coll. on the subsistence minimum and amending certain laws, <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2003/601/20240101> (Slovak), 2 April, 2024.

³⁹ Social Welfare Act, Official Gazette no. 18/2022, https://narodne-novine.nn.hr/clanci/sluzbeni/2022_02_18_181.html (Croatian), 2 April, 2024.

by the Act. This allowance is granted based on specific eligibility criteria outlined in the legislation.

To qualify for the guaranteed minimum allowance, applicants' income sources and property ownership are assessed. There are exceptions to eligibility criteria based on circumstances. For instance, ownership of certain assets such as registered vehicles exceeding a specified value, or the existence of certain contractual agreements may disqualify applicants from receiving the allowance. Additionally, unemployed individuals must be registered as per the labour market regulations to be eligible.

The amount of the guaranteed minimum allowance is calculated as a percentage of a predetermined base, which varies depending on the category of the applicant. Different percentages are assigned to working-age individuals, elderly persons, single parents, and children, among others. Furthermore, allowances may be adjusted to accommodate specific circumstances, such as accommodation costs.

It's worth noting that the total amount of the guaranteed minimum allowance cannot surpass 150% of the gross minimum wage in the Republic of Croatia.

During the application process, the monthly allowance amount is calculated based on the applicant's income. Adjustments to the allowance amount are made continuously until a final decision on eligibility is reached. This ensures that the allowance amount accurately reflects the applicant's financial situation throughout the assessment period, which extends from the initiation of the application process until a decision is issued.

According to Government of Croatia, the guaranteed minimum allowance is EUR 150⁴⁰.

In conclusion, the analysis of social assistance provisions related to ensuring a minimum standard of living in Romania, Slovakia, and Croatia reveals both similarities and differences in their approaches.

In Romania, the recent implementation of Law no. 196/2016 establishes the concept of minimum inclusion income, providing financial support to eligible individuals and families to ensure a basic standard of living. The law outlines specific criteria for eligibility and determines the maximum monthly allowance based on various factors such as age and family size. Furthermore, adjustments

⁴⁰ See <https://gov.hr/en/guaranteed-minimum-benefit/714>, 2 April, 2024.

to the allowance amounts are made annually to account for inflation rates, ensuring that beneficiaries receive adequate support.

Similarly, in Slovakia, the subsistence minimum is regulated by Law no. 601/2003, with adjustments made annually based on the cost of living for low-income households. The subsistence minimum amounts are determined by the Statistical Office of the Slovak Republic and formally established by the Ministry of Labour, Social Affairs, and Family. This system aims to provide financial assistance to individuals and households in need, with allowances calculated based on specific criteria and adjusted regularly to reflect changes in living costs.

In Croatia, the social minimum income is governed by the Social Welfare Act, with the guaranteed minimum allowance serving as a provision for individuals or households lacking the means to cover basic needs. Like Romania and Slovakia, eligibility criteria are outlined, and the allowance amount is calculated based on predetermined bases, with adjustments made to accommodate specific circumstances. However, the total amount of the guaranteed minimum allowance in Croatia is capped at 150% of the gross minimum wage.

Overall, while each country has its own legal framework for providing social assistance, they share common goals of ensuring a minimum standard of living for vulnerable individuals and families. However, differences exist in the specific criteria for eligibility, the calculation of allowance amounts, and the mechanisms for adjustments, reflecting varying approaches to addressing social welfare needs. It is important to note that both Romania and Croatia have a more political approach, while Slovakia has a more data driven approach.

4. CONCLUSION

The constitutional frameworks of Romania, Slovakia, and Croatia exhibit diverse approaches to ensuring a decent standard of living for their citizens. Romania and Croatia explicitly embrace the concept of a welfare state within their constitutions, emphasizing the state's responsibility to safeguard social welfare through comprehensive measures such as economic development, social protection, and entitlements to education, health care, and minimum income. In contrast, Slovakia, while not explicitly designating itself as a welfare state, incorporates provisions aimed at safeguarding the standard of living through fair work conditions, assistance for those in need, and guarantees of material security in old age or incapacity for work. These differing approaches reflect each

country's unique socio-economic context and historical trajectory, shaping their strategies for addressing social welfare needs.

Moreover, the analysis of judicial interpretations and legal enforcement mechanisms reveals variations in the operational realities of constitutional safeguards for living standards in these countries. While all three nations have mechanisms in place to protect citizens' rights to a decent standard of living, there are discrepancies in the consistency and effectiveness of implementation. Romania's Constitutional Court, for instance, demonstrates inconsistency in decision-making and lacks a robust jurisprudential framework, suggesting a need for clearer guidelines and increased consistency in rulings. In contrast, Slovakia and Croatia exhibit a more balanced approach in their courts, considering economic factors alongside constitutional rights, although challenges persist in achieving optimal outcomes. However, constitutionality review does not represent an effective mechanism for safeguarding the right to a decent standard of living.

Furthermore, the comparative analysis sheds light on the mechanisms for setting minimum wages, pension systems, and social assistance programs in Romania, Slovakia, and Croatia. While all three countries have established measures to ensure a minimum standard of living, differences exist in the methodologies used, reflecting each nation's policy priorities and economic contexts. Romania and Croatia tend to adopt more political approaches, while Slovakia leans towards a data-driven approach in setting social welfare policies. Despite these variations, the overarching goal remains consistent: to provide a safety net for vulnerable individuals and families and promote socio-economic well-being within their respective societies. However, the minimum standard of life is not clearly defined, in a qualitative approach.

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Review paper

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THE RIGHT TO MINIMUM INCOME: GERMAN AND ECHR MODELS OF ITS JUDICIAL PROTECTION

ABSTRACT

This article delves into the German model and the ECHR model of judicial protection concerning the right to a minimum income, exploring their implications for minimum income policies. The German Federal Constitutional Court's "Hartz IV" judgment establishes a fundamental right to a subsistence minimum, emphasizing human dignity and imposing constraints on legislative actions in social protection. In contrast, the ECHR model evolves from the prohibition of degrading treatment to defending the right to private property, offering a potential avenue for safeguarding individuals against legislative regressions in social policy. The objective of this analysis is to assess the interplay between constitutional principles and social policy objectives in the context of minimum income schemes, considering the implications of these judicial models on the constitutionality and effectiveness of social legislation. By synthesizing insights from both models, this article contributes to the discourse on a rights-based approach to minimum income policies, highlighting the complexities and considerations involved in balancing individual rights with state obligations in the realm of social protection. While the Hartz IV model offers a robust framework for scrutinizing social policy decisions, its exportability to supranational courts requires careful consideration to ensure alignment with the principle of subsidiarity and respect for national legal systems' autonomy.

Keywords: *Minimum income, human dignity, social policy, judicial review, legislative regression.*

1. INTRODUCTION

The fact that the right to a minimum income¹ is not a recurrent object of study from a constitutional perspective should not surprise us if we take into account that it is rare in European constitutions to find an express recognition of this right. Despite this, the evolution of social rights and the transformation of the social state has led us to a situation in which it is increasingly common to find references to a constitutional right to have the minimum resources for subsistence guaranteed. However, the definition of its content is far from

¹ In this article, the terms “minimum income” and “subsistence minimum” will be used indistinctly.

peaceful.² For example, Jimena Quesada refers to the "right to guaranteed minimum resources" to refer to the provision by the State of the most basic needs: food, housing and clothing³, although in later works, when he refers to this right, he also refers to the basic needs of health and culture.⁴ A broader definition is provided by Vaquer who, in reference to the right to a vital minimum, defines it as the "right to minimum socio-economic and environmental conditions of subsistence without which they cannot enjoy their dignity or develop their personality".⁵ However, this broad conception runs the risk of overlapping with other social rights with a longer constitutional history, such as the right to housing, health protection or education. Therefore, in order to refer to this as an autonomous right, it will be convenient to refer to the definition of this right by Carmona Cuenca, who refers to this right as the "free disposal of minimum economic resources to meet the most pressing needs of human beings".⁶ In this sense, citizens can generally obtain these minimum necessary resources mainly in three ways: through the use of their own assets, through a salary or through state benefits.⁷ However, the usefulness of the right to the minimum subsistence as an autonomous right is most relevant in relation to the third manifestation of this phenomenon, that is, when the possibility of having minimum economic resources depends on the existence of public social benefits, due to the lack of assets or employment to cover them. The reason behind this is that the satisfaction of vital needs through one's own assets is already protected by the right to private property and such satisfaction through work is protected by the right to sufficient remuneration. The right to a subsistence minimum tries to respond to the "third way" of social benefits, in the absence of the vital needs being covered by the first two.

This article explores the way in which this idea of a subsistence minimum has been defended judicially against legislative decisions. The judicial protection of the right to minimum subsistence is understood in this article as the judicial review exercised by the judiciary on legislative decisions, with the aim of preventing these decisions from depriving the individuals from access to the minimum economic resources to meet their basic human needs. With that end,

² Carmona, E., *El derecho a un mínimo vital*, Derechos sociales y tutela antidiscriminatoria, Thomson Reuters Aranzadi, 2012, p. 1577.

³ Jimena, L., *La Europa social y democrática de derecho*, Dykinson, 1997, p. 277.

⁴ Jimena, L., *El Ingreso Mínimo Vital como derecho fundamental social de nueva generación*, Igualdad ES, 8, 2023, p. 215.

⁵ Vaquer, M., *El Ingreso Mínimo Vital desde la óptica del derecho público: sus aportaciones al debate sobre el Estado social y autonómico*, Revista de Derecho Público, Teoría y Método, 5, 2022, p.117.

⁶ Carmona, E., *El derecho a un mínimo vital y el derecho a la renta básica*, Anuario de Derechos Humanos, 2017, p. 201.

⁷ *Loc cit.*

when a court, generally a constitutional court, exercises this judicial protection of the subsistence minimum, it establishes limitations on the freedom of the legislature in shaping social policy. These limitations can take the form of declaring legislative regressions as unconstitutional or mandating positive actions to the legislature.

This article will explore two models of judicial defense of the subsistence minimum, with the intention of highlighting the consequences deriving from these models. Firstly, the German model will be analyzed, focusing on the “Hartz IV” judgment of 9 February 2010. This model establishes a complex methodology of assessment of legislative decisions in order to determine the constitutionality of a reform of the German social protection system that established a subsistence minimum subsidy. This model, characterized by an exam of adequacy and consistency of the policy decisions and the mandate of positive obligations to the legislative, has been praised as a model deserving being exported⁸. For that reason, it is considered fundamental to explore its intrinsic implications.

The second model explored in this article will be the model followed by the European Court of Human Rights, exposing how, after showing signs of possible protection of the subsistence minimum based on the prohibition of degrading treatment (art. 3 ECHR), it has shaped a model of protection against legislative regressions on social policy, based on the right to private poverty (art. 1 P1 ECHR). The court has shaped a model that allows it to declare as contrary to the Convention legislative decisions that take away subsidies on which the satisfaction of basic human needs are dependent on.

Both models will be explored with the intention of establishing possible ways of judicial defense of the subsistence minimum that could be applied in European countries, analysing the implications that these models may imply.

2. THE GERMAN MODEL OF JUDICIAL DEFENSE OF THE SUBSISTENCE MINIMUM

The analysis of the German model requires a deep assessment of the judgment of the German Federal Constitutional Court of 9 February 2010, known as “Hartz

⁸ Leijten, I., *The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection*, German Law Journal, vol. 16, issue 1, 2015., p. 23-48.

IV”.⁹ The factual background to the judgment relates to a reform of the German social protection system which involved the creation of a social benefit which merged two previous benefits and became the new safety net for those in need, unable to obtain any other benefit and capable of entering the labor market. In response to this reform, two courts raised questions of constitutionality before the Federal Constitutional Court on the grounds that the amount was insufficient, and therefore, unconstitutional. The Court ruled by declaring the existence of a tacit fundamental right to the subsistence minimum and deriving from this a complex two-phase mechanism to control the constitutionality of the reform, the application of which implied the unconstitutionality of certain provisions on welfare benefits, considering them incompatible with articles 1.1, which enshrines the principle of human dignity, and 20.1, which declares the social state, of the Grundgesetz. Consequently, it ordered the legislator to enact new provisions respectful of human dignity, maintaining the applicability of the questioned provisions until the new legislation was adopted.

2.1. The jurisprudential enshrinement of a right to the subsistence minimum

The most relevant aspect of this judgment is the Court's conclusion that the guarantee of a "subsistence minimum"¹⁰ can be derived from the principles of human dignity (art. 1.1) and of the democratic and social state (art. 20.1). This decision represents the enshrinement in the German legal system of a genuine enforceable right to benefits that guarantee a minimum of dignified subsistence. This opens the door to controlling the constitutionality of the legislator's actions in the light of this fundamental right. This decision represents an innovation in German constitutional jurisprudence, which broadens the practical applicability of the concept of human dignity. Dignity had already been related to the subsistence minimum in jurisprudence¹¹, but the great difference brought about by *Hartz IV* is that there is a transformation of the guarantee of human dignity, which can now operate as a fundamental socio-economic right that guarantees people in a state of need the provision¹², by means of a legal norm, of the means

⁹ BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09.

¹⁰ *Ibid.*, para 13.3.

¹¹ Alexy considered, as soon as in 1993, that the existence of the fundamental right to the minimum subsistence minimum could already be deduced from the case law. Alexy, R., *Teoría de los derechos fundamentales*, Centro de Estudios Constitucionales, Madrid, 1993, p. 422.

¹² While it is true that the linking of the subsistence minimum to the concept of human dignity is not entirely new in German jurisprudence, it is also true that it had explicitly denied the consideration of the right to minimum resources as a fundamental right. On this topic, Carro, J.L., *Mínimo existencial y jurisprudencia. Hacia la construcción*

to achieve the indispensable material conditions for physical existence and for a minimum of social, political and cultural participation.¹³

2.2. The application of the right to a subsistence minimum in *Hartz IV*

The transformation brought about by this extension of the effectiveness of the concept of human dignity in the field of social welfare is concretely embodied in the *Hartz IV* judgment, which introduces an innovative way of constitutionally controlling changes in the social protection system. As indicated above, in the face of the reform of the system, and once the existence of a fundamental right able to justify the exercise of the constitutionality review had been recognized, the Court established a mechanism that operated in two phases.

The first phase is a *prima facie* adequacy test, which allows the Court to declare the amount unconstitutional in case of an “evidently insufficient” benefit to guarantee subsistence.¹⁴ The Court recognized that this control had to be applied with self-restraint, as it considered that the amount, being a political matter, must be fixed by the legislator.¹⁵ The second phase consists of an assessment of the “procedure to ascertain the subsistence minimum”.¹⁶ This test, in my opinion, becomes a complex and demanding test of reasonableness and non-arbitrariness, that aims to assess whether the legislative body, when setting the amount, has followed a transparent and appropriate procedure that responds to the real needs of individuals. It performs this control through four steps consisting of: (i) examining whether the legislative body has considered and described the objective of securing a dignified existence¹⁷; (ii) examining if it has chosen an appropriate method of calculation¹⁸; (iii) examining if it has used adequate and correct data for the calculation¹⁹; and (iv) controlling whether the chosen method of calculation has been applied consistently in all stages of the calculation.²⁰ As can be deduced from the characteristics of this test, it also imposes an obligation of transparency on the legislator.²¹ This is clear as the application of this test requires the legislative body to make public the method of calculating the

jurisprudencial de un derecho fundamental, Administración y justicia: un análisis jurisprudencial: liber amicorum Tomás-Ramón Fernández, Civitas, 2012, p. 3838.

¹³ BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09, paras.134-135.

¹⁴ *Ibid.*, para. 141.

¹⁵ *Loc cit.*

¹⁶ *Ibid.*, para. 142.

¹⁷ *Ibid.*, para. 143.

¹⁸ *Ibid.*, para. 142.

¹⁹ *Ibid.*, paras. 143, 167.

²⁰ *Ibid.*, para. 143.

²¹ *Ibid.*, para. 144.

amount of the benefit and to justify its application. This becomes a requirement of rationality and transparency in policymaking.

Applying this test to the specific case, the Court considered that the first three steps were satisfactorily fulfilled. The legislator intended to cover the needs of individuals for a dignified existence²² and had devised a method of calculation that met the requirements of the second step of the test.²³ This method consisted of resorting to statistical data on the spending patterns of the lowest income quintile of the population, with the aim of setting the amount of the benefit as a percentage of the expenditure of this sector of the population.²⁴ This percentage would be determined by subtracting from the expenditure of this demographic group those expenditures that were not considered necessary to meet the minimum needs for a decent life.²⁵ However, the fourth step of the test, known in the literature as the consistency requirement,²⁶ required that, when using this method, it shall be applied consistently and rationally, so that the determination of which expenses would be covered by the benefit and which would not, must be adequately justified in all steps of the calculation. This means that it is unconstitutional, at any stage of the calculation of the amount, to establish a percentage that is either a flat rate or not adequately justified by the method and the data that the legislator had decided to take into consideration.²⁷ The application of this step of the test, caused the declaration of unconstitutionality.

This examination was thoroughly carried out. It is illustrative of this point that the Court noted that the legislator's decision to only cover 89% of the clothing expenditure of the lowest income quintile of the population did not meet the consistency test.²⁸ This was on the grounds that the legislator's choice of such a percentage was justified by the intention to leave luxury items out of the coverage, without being able to verify that the lowest quintile of the population was, as a matter of fact, spending on clothing of this nature. This and other unjustified inconsistencies in the calculation led the Court to conclude that the amount had not been determined in line with the control parameter. It therefore gave the legislator until December 31st of the same year to amend the legislation, in order to bring the amount of the benefit into line with the

²² *Ibid.*, para. 147.

²³ *Ibid.*, para. 162.

²⁴ *Ibid.*, paras. 163-168.

²⁵ *Ibid.*, para. 171.

²⁶ Bittner, C., *Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010*, German Law Journal, 12(11), 2011, p. 1948.

²⁷ BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09, para. 171.

²⁸ *Ibid.*, para. 175.

requirements of the test.²⁹ Until then, it stated that the legislation would remain applicable.³⁰ In response, the legislator amended (albeit out of time) the amount, raising it moderately in line with the Court's indications.

2.3. The relevance of the judgment for the judicial protection of the right to minimum subsistence

These broad brushstrokes on the content of the *Hartz IV* judgment provide the necessary context to analyze the value of its argumentative construction as a model of judicial protection of the right to the minimum subsistence minimum. The judgment articulates a guarantee of the right anchored in the legal concept of human dignity in conjunction with the principle of the social state. This guarantee is characterized by the imposition of two parameters of constitutionality applicable to social welfare legislation, one of sufficiency, to be applied only in obvious cases, and a second one of rationality and non-arbitrariness, which in turn implies an obligation of transparency and consistency.

The second one operates as a quality requirement in policymaking, based on the statistical data used in the policy formulation and assessing the methodology followed. It intends to allow the legislator to maintain its political discretion in setting the level of protection, as long as it adequately justifies its decision. The legislature is then bound by the obligation to take into consideration the concrete needs of the individual, avoiding leaving the protection of this right entirely at the mercy of the legislator. This mechanism for the protection of the right to a minimum income has been suggested as a model to be exported.³¹ However, the application of this model implies certain conditions for the formulation of minimum income policies which will determine their constitutionality. The most relevant conditions that I believe can be extracted from the *Hartz IV* model are now exposed.

2.3.1. Conditions derived from the consideration of the right to minimum income as a fundamental right

The Court ruled that, as the right to a minimum income shall be considered a fundamental right, subsistence needs must be met at every time of the lives of the

²⁹ *Ibid.*, para. 216.

³⁰ *Ibid.*, para. 212.

³¹ Leijten, *op. cit.* note 8.

individuals.³² This conclusion has a series of consequences. Firstly, at the abstract level, this implies that something as common in compared social protection policy as a limitation on the number of years of entitlement would be contrary to this right and therefore unconstitutional.³³

Secondly, in Hartz IV, the Court established a positive obligation on the legislator, mandating the addition to the examined legislation of a clause ensuring that exceptional needs not foreseen in the calculation of the benefit would also be covered by the state. This implied that, until the legislative amendment mandated by the Court occurred, individuals were entitled to judicially claim state benefits, either in kind or in cash, to cover these special needs not covered by the social protection system.³⁴ This argument, taken to the abstract level, would mean that any legislative defect implying the lack of coverage of vital needs by the benefits established by a social protection system would allow the judicial claim of a benefit in order to cover these needs, without requiring prior corrective action by the legislator. In consequence, the judiciary is allocated a relevant role in filling the gaps of a social protection system, with potential budgetary consequences.

Thirdly, this conception questions the conditionality of minimum income policies. It is common in social welfare systems that include a subsistence minimum benefit, to condition the award of the amount to the active seek of employment or, at least, to the compromise of the individual to not turn down job offers. These configurations are hardly compatible with a fundamental right to this vital minimum that must be always satisfied, as the non-satisfaction of this conditions usually involves the withdrawal of the benefit. Consequently, following this model, any conditional minimum income scheme could be considered unconstitutional.

2.3.2. Impact on the policy-making process

The level of scrutiny exercised by the Court reduces the scope of the changes that a proposal for reform of the social protection system can experience as a result of parliamentary debate. The complexity of the standard required by this model of judicial protection in the definition of the minimum income amount imposes a big effort in the drafting of the piece of legislation at the ministerial level. Only a well-thought calculation methodology would be able to respect the degree of judicial scrutiny imposed by the Hartz IV model. Therefore, the

³² BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09, para. 140.

³³ Bittner, *op. cit.* note 26, p. 1955.

³⁴ BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09, para. 220.

incorporation of parliamentary amendments that damage the consistency of legislation may endanger its constitutionality. This becomes relevant if one considers that in the parliamentary debate, political compromise agreements of transactional nature are reached. These that can alter the content of a rule with the intention of achieving the necessary support for its approval, without any guarantee that these amendments will be able to improve, not even maintain, its consistency. Furthermore, it reduces the speed with which a reform of the social assistance system can take place in cases of economic crisis. A sudden reduction of these benefits as an austerity measure would risk the constitutionality of the measure because the requirement for transparency and statistical justification of the determination of the amount requires significant work at ministerial level. Moreover, this work will have to justify how a reduction driven by budgetary concerns is still guided by the real subsistence needs of individuals.

2.3.3. Conditions imposed on the development of social policy

The Court emphasized that the right to a subsistence minimum is a dynamic right, since the minimum level necessary for subsistence will depend on the socio-economic conditions of the moment. This implies an obligation to update the amount in accordance with these conditions, and implies, as occurred in a later judgement in 2012³⁵, the unconstitutionality of legislation by omission if the amount is not reasonably updated. Moreover, the dynamic character of the law is not only manifested in time, but if it is to meet concrete and changing needs, a necessary geographical dynamism also follows. It is difficult to justify that, in the face of compelling empirical findings proving substantial differences in the cost of living between regions, it is reasonable to set the same single existential minimum for the whole country. This criticism could be overcome by maintaining a uniform figure throughout the State if the amount was at least equivalent to the existential minimum that would be required in the region with the highest cost of living. Otherwise, the dignity of citizens living in that region would be violated. However, this could lead to problems in relation to the principle of equality by ensuring a better quality of life in those areas where the cost of living is cheaper.

2.4. A partial conclusion

Thus, we have seen the practical consequences of adopting an approach to the

³⁵ BVerfG, Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10.

right to the subsistence minimum as a fundamental right anchored in human dignity. Far from being trivial, accepting the model proposed by the German Federal Constitutional Court means incorporating, at the level of the parameter of constitutionality, a series of requirements that limit the legislator's scope of action in the field of social protection. While the virtues of the Hartz IV model are undoubted, it is also true that it ties the hands of the legislator and imposes obligations whose impact on social policy will have to be assessed in relation to each of the legal systems to which it is to be imported. This, as will be later discussed, is relevant when we refer to the exportability of this model to a different legal context.

3. THE MODEL OF THE EUROPEAN COURT OF HUMAN RIGHT

A model for judicial defense of the subsistence minimum can also be extracted from the case-law of the European Court of Human Rights. In this section, I will address firstly the unsuccessful pathway of the judicial defense based on the prohibition of degrading treatment. Then, I will describe the model based on the defense of the right to private property, ensuring respect for minimum income through a broad interpretation of the concept of private property.

3.1. Protection of the right to minimum income through the prohibition of degrading treatment

In the inadmissibility decision in *Laroshina v. Russia*³⁶, the European Court of Human Rights stated that a complaint concerning the insufficient amount of a pension could raise an issue falling under Article 3 of the Convention, which prohibits degrading treatment: "The Court considers that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment."³⁷ In this way, the Court has already established what a possible legal basis of such a right would be. However, in that case, it decided to reject the application, not because poverty was not protected under the umbrella of the ECHR, but because it considered that the financial resources available to the applicant placed her above the poverty threshold that would mark the limit of inhuman or degrading treatment.³⁸ Despite this, the Court did accept

³⁶ *Laroshina v. Russia* (Dec.), App. No. 56869/00 (ECtHR, 23 April 2002)

³⁷ *Ibid.*, para. 3.

³⁸ *Loc. cit.*

that truly extreme poverty could amount to a breach of the Convention if States did not comply with their obligation to remedy such poverty.

This case can be considered a milestone, particularly if we bear in mind that the ECHR does not contain social rights but civil and political rights instead. This reasoning is therefore relevant to the idea of the configuration of protection from poverty as a right of this nature, or at least susceptible of being protected by these rights. In addition to this idea, a second relevant idea to be drawn from the case law is that the authorities may infringe the prohibition of inhuman or degrading treatment, established by Article 3 of the ECHR, by omission. This reinforces the idea that the civil and political rights recognized by the Convention also give rise to positive obligations. Such a position of the Court has been followed in the subsequent cases of *Budina v. Russia* (2009)³⁹, although still without any condemnatory sentence that permits the confirmation of the doctrine. Despite this, it does appear that the Court considers that there is an obligation on states to guarantee the subsistence of those citizens who are incapable of securing it by their own means.

Even if we cannot find subsequent case-law that uses the prohibition of degrading treatment to articulate a model of judicial defense of a subsistence minimum, the ideas that lie at the essence of the reasoning exposed in these cases, also sustain the posterior line of reasoning that has allowed the Court to establish clear limits to legislative bodies in their decisions regarding social protection systems. This line of reasoning, based on the right to private property, will be described in the following sub-section.

3.2. Protection of the right to minimum income through the right to private property

3.2.1. Social benefits and property rights.

Article 1 of Additional Protocol 1 (hereinafter, art. 1 P1) is the only provision of the European Convention on Human Rights that recognizes a right of an economic nature.⁴⁰ This article recognizes that “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions

³⁹ *Budina v. Russia*, App. No. 45603/05 (ECtHR, 18 June 2009), para. 3.

⁴⁰ Aguilera, M., *El reconocimiento del derecho a la propiedad privada y los límites a su regulación* (art. 1 P1), La Europa de los Derechos. El Convenio Europeo de Derechos Humanos, Centro de Estudios Políticos y Constitucionales, 2014.

provided for by law and by the general principles of international law”.

The controversial nature of this right was concretized by the Court in 1979 in the *Marcks v. Belgium* case⁴¹, when it recognized for the first time that it was a true property right.⁴² It thus expressly established that this article guaranteed a property right.⁴³ The basic doctrine for determining the legal regime of the right to property recognized by this article came in 1982, with the case of *Sporrong and Lönnroth v. Sweden*.⁴⁴ The jurisprudential development of the concept of property recognized in Art. 1 P1 has characterized it as an autonomous concept, in the sense that it does not depend on the classification of possession and ownership elaborated by national law.⁴⁵ This is how the ECtHR ruled in the *Depalle v. France* case, which recognizes that "the fact that the domestic laws of a State do not recognize a particular interest as a 'right' or even a 'property right' does not necessarily prevent the interest in question, in some circumstances, from being regarded as a 'possession' within the meaning of Article 1 of Protocol No. 1."⁴⁶ In exercising the power to define this autonomous concept, the Court has expanded it to include not only possessions held by the individual, but also "legitimate expectations" of obtaining the enjoyment of a possession. This expectation must be based on a present and currently existing capacity to claim, and not on the hope of future recognition of a hypothetical property right. Thus, for an expectation to be legitimate, it must be based on a legal provision or a judicial decision on the property in question.⁴⁷ In this way, the case law of the ECtHR has been constructing the content of the right to property in a very broad manner, including credits, securities, stock market shares, economic interests or even the patrimonial result of an arbitration decision.⁴⁸ This broad construction has allowed it to include, as a legitimate expectation, the expectation to receive social security pensions, which could be considered as property protected by the provision. While initially the case law limited this recognition to cases where there was a direct connection between what was paid by the contributor and the pension granted⁴⁹, subsequent ECtHR decisions recognized the applicability of this right also to non-contributory pensions, although without any clear and

⁴¹ *Marckx v. Belgium*, App. No. 6833/74 (ECtHR, 13 June 1979).

⁴² Council of Europe, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights*, March 2024, https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_ENG, 4 April, 2024

⁴³ *Marckx v. Belgium*, para. 63.

⁴⁴ *Sporrong and Lönnroth v. Sweden*, App. Nos. 7151/75 and 7152/75 (ECtHR, 23 September 1982).

⁴⁵ Council of Europe, *op. cit.*, note 42.

⁴⁶ *Depalle v. France*, App. No. 34044/02 (ECtHR, 29 March 2010), para. 68.

⁴⁷ *Ibid.*, para. 63.

⁴⁸ *Aguilera, op. cit.* note 40.

⁴⁹ *Müller v. Austria*, App. No. 5849/72 (ECtHR, 16 December 1974).

consistent jurisprudential developments until the case of *Stec v. UK*.

3.2.2. The impact of *Stec v. UK*.

The *Stec v. UK* admissibility decision⁵⁰ was the first to state clearly that it was not justified to differentiate between contributory and non-contributory pensions when defining the content of Art. 1 P1. The Court had to decide on a case concerning the reduced income allowance and retirement benefit in the UK, both of which are financed by general taxation rather than by the National Insurance scheme. The complaint in this case concerned alleged discrimination. Ms Stec considered that she was worse off than men because, due to the higher retirement age for men, they would receive the more favorable benefit (which was the reduced earnings allowance) until the age of 65, rather than until the age of 60, which was the retirement age for women.

The relevance of the right to property in the case was instrumental to the review of the case under the non-discrimination clause of Article 14 of the ECHR. As the ECtHR itself established in the admissibility decision, Article 14 was understood as complementary, in the sense that it does not have an independent existence.⁵¹ Instead, it has effect in relation to other rights and freedoms. Thus, Article 14 only unfolds its effects and can only be violated when the facts of the case correspond to the subject matter of another fundamental right. This is why the court had to decide whether the applicant's right to property was being affected, which meant in the specific case, determining whether a non-contributory pension could be considered as property protected by Art. 1 P1.⁵² To this end, the ECtHR reviewed its previous case law to conclude that there are cases in which a distinction was apparently drawn whereby only contributory pensions were protected by Art. 1 P1. The case in which the ambiguity arises is *Gaygusuz v. Austria*, identifying thereafter two divergent lines of jurisprudence. The first involved a strict interpretation of the content of Art. 1 P1, limiting it to contributory pensions, and the second, a broad interpretation, including non-contributory pensions.⁵³

In the face of divergent jurisprudence, the Court established a clear position on the matter. In this respect, it presented an argument based on the diversity of social security schemes existing in the Contracting States, with different forms of

⁵⁰ *Stec and Others v. The United Kingdom* (Dec.), App. No. 65731/01 and 65900/01 (ECtHR, 6 July 2005).

⁵¹ *Ibid.*, para. 39.

⁵² *Ibid.*, para. 41.

⁵³ *Ibid.*, para. 46.

financing that are intertwined with each other, with contributory and non-contributory mechanisms in permanent relation. It is because of this strong connection between contributory and non-contributory pensions that the Court considers the distinction between them for the purposes of Art. 1 P1 to be artificial.⁵⁴ Furthermore, it held that, in the modern democratic state, many people are entirely dependent on social security and social benefits for their survival, so that they need a certain degree of security, developing a legitimate expectation of obtaining them if they fulfill the legal conditions for entitlement.⁵⁵ This expectation based on a right recognized by the legal system therefore fits in with the concept of legitimate expectation that the ECtHR has recognized as an integral part of the right to property in its jurisprudence.

Having concluded the inclusion of non-contributory pensions in the object of the right, the ECtHR qualifies the associated effect. It emphasizes that Art. 1 P1 does not create a right to acquire property, nor does it imply the existence of an imposition on States to establish a specific form of non-contributory pension in their social security schemes.⁵⁶ However, the inclusion of all types of social security benefits in the content of the right implies that, if a State creates a benefit scheme, whether contributory or non-contributory, it must do so in conformity with the rights recognized in the ECHR. It therefore considers that the case is admissible, which it will resolve the following year in its judgment of 12 April 2006, ruling that the alleged discrimination does not violate Art. 14 as it falls within the margin of appreciation of the Contracting States.⁵⁷

3.2.3. The development of the minimum income jurisprudence after *Stec v UK*.

The inclusion of all types of benefits in the subject matter of the right to property has led to the development of the ECtHR's social security jurisprudence.⁵⁸ Overcoming this distinction has allowed the Court to establish jurisprudential guidelines applicable to the social security systems of the 47 Member States, since if all benefits are covered by Art. 1 P1, the Court can grant the same degree of protection in all systems, creating a true European standard for the respect of human rights in relation to social security. The main jurisprudential development in this regard is the requirement that when a pension is suspended, reduced or

⁵⁴ *Ibid.*, para. 50.

⁵⁵ *Ibid.*, para. 51.

⁵⁶ *Ibid.*, para. 54.

⁵⁷ *Stec and Others v. The United Kingdom*, App. Nos. 65731/01 and 65900/01 (ECtHR, 12 April 2006),

⁵⁸ Leijten, I., *Social Security as a Human Rights Issue in Europe – Ramaer and Van Willigen and the Development of Property Protection and Non-Discrimination under the ECHR*, Heidelberg Journal of International Law, 73(2), 2013, p. 177-208.

withdrawn, there is an interference with the right which will require justification and compliance with the requirement of proportionality. This requirement, which the Court first introduced in *Kjartan Asmundsson v. Iceland*⁵⁹, has become more relevant after the expansion of the subject matter brought about by the *Stec* case, applying now to the integrity of social security benefits. Following this requirement, the Court has stated the high likelihood of a finding of a violation of the right in cases of complete withdrawal of a benefit, because of a serious impairment of the individual's living conditions.

The Stefanetti v. Italy case⁶⁰ is relevant in this respect. The applicants, Italian nationals, were affected by a legislative change concerning the method of calculating their pension rights which had the effect of reducing their retirement pensions by two thirds. The Court gave legal significance to the amount of the reduction in pension, which it considered to be excessive, without finding an objective justification of such a scale.⁶¹ In this analysis of proportionality and justification on a case-by-case basis, the ECtHR uses different criteria. One of the criteria used in this case, in addition to the magnitude of the reduction, is the fact that we are dealing with a contributory benefit. Although the judgment refers to the *Stec* case to recognize that the Court no longer distinguishes between contributory and non-contributory pensions, it proceeds to consider that, in determining the proportionality of a reduction, the level of contributions made by the beneficiary is relevant.⁶² It is worth stressing the problematic nature of this argumentation, since denying the differentiation between pensions in *Stec* and then recognizing that both types have different effects, grants differentiated protection to both types of benefits, without having clarified the borderline between the two and the effects derived from it, with perverse effects on legal security.

The lack of a clear boundary when entering the field of proportionality analysis is particularly worrying in a context where the Court is increasingly setting jurisprudential standards in the field of social security. The ECtHR is introducing the effect on the living conditions of the beneficiary into the proportionality test. In its guide to the interpretation of Art. 1 P1, it indicates that it follows from its case law the relevance of considering whether the withdrawal of the pension leaves the individual without other means of subsistence.⁶³ In *Fábian v.*

⁵⁹ *Kjartan Ásmundsson v. Iceland*, App No. 60669/00 (ECtHR, 12 October 2004), para. 40.

⁶⁰ *Stefanetti and Others v. Italy*, App Nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10 (ECtHR 15 April 2004).

⁶¹ *Ibid.*, para. 66.

⁶² *Ibid.*, para. 63.

⁶³ Council of Europe, *op. cit.* note 42.

Hungary, the Court recognized the importance of this factor, using it in the specific case to determine the proportionality of the suspension of a retirement pension as a consequence of the applicant's earning a salary for his work. The Court concluded that, as he still had sufficient means to subsist, there was no violation of Art. 1 P1.⁶⁴

In *Bélané Nagy v. Hungary*, the Court ruled in the opposite way using the same reasoning. The applicant loses his disability pension following a legislative change imposing new criteria excluding him from eligibility. The Court relies exclusively on the absence of any other source of income and his difficulties in obtaining this income, given his disability, to determine the proportionality of the withdrawal of the pension.⁶⁵ In this case, the legislator is precluded from establishing certain conditions for access to disability pensions, based on the situation of need in which the claimant finds himself. This argumentation imposes *de facto* certain minimum protection requirements on the social security system.⁶⁶ Even more so if one takes into account that the Court's argumentation to defend the applicability of Art. 1 P1 is based on the existence of a legitimate expectation of obtaining the pension, derived from the legislation in force before the legislative change. This legitimate expectation operates as a limit to less favorable legislative changes.

Consequently, it can be argued that it follows from the Court's judgment that a state cannot take steps backwards when it decides to establish a minimum safety net for individuals in need who have no alternative income. This has led some authors to argue that the Court is using a right of a civil nature, such as the right to property, to protect a socio-economic right, and therefore not protected by the ECHR, such as the right to social security.⁶⁷ This interference by the ECtHR in matters pertaining to social rights is reflected in the reference in its judgments to instruments designed to protect social rights, such as the reference in the *Bélané Nagy* case to the European Code of Social Security and ILO Conventions 102 and 108 to justify the applicant's right to obtain a benefit.⁶⁸

⁶⁴ *Fábian v. Hungary*, App. No. 78117/13 (ECtHR 5 September 2017), paras. 78-82.

⁶⁵ *Bélané Nagy v. Hungary*, App No. 53080/13 (ECtHR, 13 December 2016), paras. 123-126

⁶⁶ Leijten, I., *The right to minimum subsistence and property protection under the ECHR: Never the twain shall meet?*, European Journal of Social Security, 21(4), 2019, p. 307-325.

⁶⁷ Tsetoura, A., *Property protection as limit to deteriorating social security protection*, European Journal of Social Security, 15(1), 2013, p. 55-78.

⁶⁸ *Bélané Nagy v. Hungary*, para. 103.

3.3. Towards a European social security case law

The evolution in the interpretation of Art.1 P1 of the ECHR, expanding both the scope of its application and the effects of its application, with the introduction of a principle of proportionality of reductions, suppressions or suspensions of social benefits⁶⁹ which has served to place limits on the public authorities⁷⁰ when these measures have the effect of leaving the individual without alternative means of minimum subsistence. The doctrine of the ECtHR made explicit in *Moskal v. Poland* is that, while the Court has no jurisdiction to impose benefits, it does have jurisdiction to consider that a diminution of a benefit may interfere with the right to property.⁷¹ Clear evidence of this is the protection of the individual from a legislative change that deprived him of access to a benefit in *Bélané Nagy*. It is therefore not unreasonable to envisage a future expansion of the Court's intervention in this direction.⁷² It is worth noting, as stated before, that before the revolutionary effect of cases such as *Kjartan Asmundsson*, *Stec or Bélané Nagy*, the Court already recognised in the *Larioshina v. Russia* case, in which it declared an application admissible in 2002, that Article 3, which imposes a prohibition of degrading treatment, could justify a violation of Article 3 for a pension that is insufficient to ensure the physical and mental well-being of the applicant. This argument, together with the new doctrine developed by the Court, could eventually lead the Court to declare that an insufficient social benefit (or at least a reduction in it that would render it insufficient) would be contrary to both articles of the ECHR interpreted together. We will have to wait for new jurisprudential developments to determine whether we are on the way to a European right to a minimum subsistence income as proposed by some authors⁷³ and feared by others.⁷⁴

4. CONCLUSION

In conclusion, the exploration of the German model and the ECHR model of judicial protection of the right to a minimum income reveals a complex interplay between constitutional principles and rights and social policy objectives. The German Federal Constitutional Court's approach, exemplified in the "Hartz IV"

⁶⁹ In the *Kjartan Asmundsson* case.

⁷⁰ Including the legislator in the *Stefanetti* case.

⁷¹ *Moskal v. Poland*, App. No. 10373/05 (ECtHR, 15 September 2009), paras. 38-40.

⁷² Leijten, *op cit.* note 66.

⁷³ *Loc cit.*

⁷⁴ Bossuyt, M., *Should the Strasbourg Court Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations*, Human Rights Law Journal, 28, 2007, p. 321–332.

judgment, emphasizes the fundamental right to a subsistence minimum anchored in human dignity, imposing limitations and obligations on the legislative body in the realm of social protection. On the other hand, the ECHR model, evolving from the prohibition of degrading treatment to the defense of the right to private property, offers a potential avenue for safeguarding individuals against legislative regressions in social policy.

However, as the ECtHR is more and more likely to apply a model of judicial defense against the regression of minimum income schemes, the experience of the German model must be considered. Even though it offers a well-reasoned and argumentatively complex model that can serve as a good instrument to scrutinize social policy decisions, it imposes a series of conditions on social protection systems on which the constitutionality of the social legislation is made dependent. The direct application of the Hartz IV model by the ECtHR may not be desirable if we consider that, as pointed out in this article, the consequences are not minor. This is shown by the fact that the Hartz IV scheme has led to at least two more declarations of unconstitutionality of social policy legislation in Germany in 2012 and 2019. Therefore, though the Hartz IV model must be considered as an attractive benchmark, its exportability must be closely examined, specially in the context of supranational courts, whose self-restraint must be maximized in order to respect the subsidiarity principle that shall guide its action.

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IMPROVEMENTS AND CHALLENGES IN THE PROTECTION OF THE RIGHT TO WATER AND SANITATION UNDER THE AUSPICES OF THE UNITED NATIONS

ABSTRACT

Over the past few decades, we have witnessed a slow but steady convergence of certain aspects of the realms of environmental law and human rights law. While the list of rights set out in the Universal Declaration of Human Rights contains no specific reference to the environment as such, a high-quality environment is coming to be regarded as prerequisite for enjoyment of some of the most fundamental human rights. In this context, the protection of the right to water and sanitation raises several challenges, especially when it comes to claiming protection of these fundamental human rights. International law is shaping the protection of these rights mainly through quasi-judicial or judicial bodies providing indirect protection of these rights through other more recognized human rights such as right to life, right to privacy and family life etc. According to the United Nations (which has recognized right to water and sanitation as human rights in Resolution of General Assembly A/64/L.63/Rev.1) around 1.2 billion people live in areas of water scarcity, and another 1.6 billion people face economic water shortages. In this context, access to water and safe sanitation has recently emerged as a human right recognized at the universal level. However, the article will deal with the recognition of access to water and sanitation as a human right in various international legal instruments offering a comparative perspective by analysing the activities of different United Nations organs and agencies.

Key words: human rights, right to water, right to sanitation, United Nations, resolution

1. INTRODUCTION

The past few decades have seen a slow but steady convergence of certain aspects of the realms of environmental law and human rights. The issue of mechanisms for the protection of environmental human rights in public international law is a current topic that is constantly evolving and developing, which also determines the need for its scientific treatment. The right to water and sanitation, as articulated

within the framework of international law, has emerged as a cornerstone of global human rights advocacy and governance, with significant implications for public health, social justice, environmental sustainability, and international cooperation. Understanding its importance requires a nuanced examination of these interconnected dimensions. The protection of the right to water and sanitation is one of the fundamental preconditions for ensuring human dignity, health, and well-being. Significant progress has been made in recognizing these rights at the international level. However, despite advancements, numerous challenges persist in achieving universal access to clean water and adequate sanitation facilities for all individuals worldwide. The aim of this article is to explore the improvements made in the protection of the right to water and sanitation under the auspices of the United Nations (UN), particularly the General Assembly, the Human Rights Council and the High Commissioner for Refugees (UNHCR), as well as the ongoing challenges that hinder its full realization. By examining the legal, social, and environmental dimensions of this issue, we aim to provide a comprehensive overview of the current and diverse problems surrounding access to clean water and sanitation services. Through a critical analysis of international agreements that have been created under the UN mandate, and by examining the innovations and work of specialized agencies and programs associated with the United Nations, we will highlight the success achieved in advancing the right to water and sanitation. Additionally, we will delve into the persistent challenges of environmental degradation, and the impacts of climate change, which continue to impede progress in this vital area. This article aims to stimulate awareness and inspire action towards ensuring that these essential human rights are upheld for all individuals, regardless of their circumstances or background.

2. UNIVERSAL PROTECTION OF RIGHT TO WATER AND SANITATION UNDER INTERNATIONAL LAW

The inclusion of the environmental dimension in the human rights field has become necessary in recognition of the pervasive impact of local and global environmental conditions on the realisation of human rights.¹ It is a fundamental human right to have access to clean, affordable, and safe drinking water as well as sanitary facilities. They are essential to maintaining people's dignity and a good standard of living. In order to eliminate poverty, create harmonious and prosperous communities, and guarantee that no one is left behind on the path to sustainable development, people must have access to water and sanitary facilities. International human rights law obliges all states to work towards achieving

¹ Boer B., Introduction - *Environmental Law Dimensions of Human Rights*, Oxford University Press, 2015, p.1.

universal access to water and sanitation for all, without any discrimination, while prioritizing those most in need. The key elements of the rights to water and sanitation are:

- availability;
- accessibility;
- affordability;
- quality and safety; and
- acceptability.²

At the international level, the link between the enjoyment of human rights and an environment of a certain quality has been recognised in Principle 1 of the Declaration of the UN Conference on the Human Environment (Stockholm Declaration).³ The Stockholm Declaration was the result of discussions aimed at stabilising this human right to the environment. According to this document, man is both an autonomous being and a shaper of his environment, which provides him with nourishment and the opportunity for intellectual, moral, social and spiritual development. Principle 1 of the Declaration provides that *„Man has the fundamental right to freedom, equality and adequate living conditions in an environment of a quality that enables a healthy and dignified life, and bears a grave responsibility to protect and improve the environment for future generations.”* The main impulse for the drafting of this Declaration was primarily the factor of the scientific and technological development achieved by human society, which has given it the capacity to reshape its environment. Since the Stockholm Conference in 1972, countries have begun ambitious negotiations on international environmental conventions. Today, these conventions form the core of international environmental law and protection.

Over the years, the international community has attempted to address the situation through selected instruments of law. As the water and sanitation crisis became more pronounced in the final decades of the twentieth century, bringing negative health and economic consequences with it, human rights community became increasingly aware of the growing importance of water and sanitation. When the United Nations General Assembly adopted the Universal Declaration of Human Rights⁴ in 1948, human rights to water and sanitation were not explicitly included in the Declaration. This omission can be understood in the context of a time when colonialism was still a dominant force. Many countries whose populations suffered from a lack of access to water and sanitation were not directly represented

² United Nations, OHCHR and the rights to water and sanitation, <https://www.ohchr.org/en/water-and-sanitation>, 2 April, 2024.

³ Dupuy, P. M., *International environmental law*, second edition, New York: Cambridge University Press, 2018, p. 365-370.

⁴ General Assembly Resolution 217 A (III) of 10 December 1948.

at the negotiating table. The recognition of the human right to water in international law has occurred later, during a more intense development of human rights law, primarily through several international treaties.⁵ International treaties that explicitly enshrine the human right to water, which originated in the heart of the United Nations include the 1989 Convention on the Rights of the Child.⁶ Thus, Article 24 (2C) prescribes: „*To combat disease and malnutrition, including within the framework of primary health care, though, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution*“. In reviewing the Convention on the Right of the Child and its Articles, it can be argued that Article 24, following Article 27 (1) which declares: „*States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development comprehensively*“, sets out the right to water and sanitation. Article 24 grants each child the right to achieve the highest possible health level, which cannot be attained without access to an adequate amount of food and water with satisfactory standards for health, meaning that this right depends on the realisation of the right to a sufficient standard of living entailed in Article 27 of the Convention.⁷

The Convention on the Rights of Persons with Disabilities⁸, which defines the right of persons with disabilities to an adequate standard of living and states in Article 28 (2): „*States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures: (a) To ensure equal access by persons with disabilities to **clean water services**, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs*.” The text of the Convention was agreed at the United Nations in December 2006 and the purpose of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.⁹

⁵ Jankuv, J., *Mechanisms of protection of human environmental rights in public international law, in the law of the European Union and in the legal order of the Slovak Republic*. 1st ed. Prague: Leges, 2018, p. 74.

⁶ Convention on the rights of the child, 1989, Treaty no. 27531, Treaty Series, vol. 1577.

⁷ Sancin, V., Juhart, M., *The Right to Safe Drinking Water in International Law and in Slovenia's legal framework and implementation*, Journal of Agriculture and Environmental law 34/2024, p. 113.

⁸ Convention on the Rights of Persons with Disabilities, 2006, Treaty Series, vol. 2515.

⁹ Australian Humans Right Commision, United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), <https://humanrights.gov.au/our-work/disability-rights/united-nations-convention-rights-persons-disabilities-uncrpd>, 26 April, 2024.

On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women¹⁰ was adopted by the United Nations General Assembly. It entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it. By the tenth anniversary of the Convention in 1989, almost one hundred states have agreed to be bound by its provisions. The Convention was the culmination of more than thirty years of work by the United Nations Commission on the Status of Women, a body established in 1946 to monitor the situation of women and to promote women's rights. The article 14 declares: „ 2. *States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport, and communication.* The Committee on the Elimination of Discrimination Against Women confirmed the obligation of States parties to provide adequate water supply in its General Recommendation No. 24¹¹, because women and girls are often most affected by the lack of water accessibility, availability, and safety. This is often the case in rural areas, poor countries, and traditional communities, and also because several states have failed to recognize women's rights concerning access to water.¹²

Other international treaties recognise the right to water implicitly. Examples of this way of recognising the right to water are, for example, the provisions of Articles 11 and 12 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).¹³ Article 11 (ICESCR) enshrines in paragraph 1, "*...the obligation of States Parties to recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.*" It is true that the article in question, through a broader interpretation, also includes the right to a safe and sanitary environment. ICESCR in question was approved by the UNGA in 1966 and entered into force upon the deposit of the appropriate number of instruments of ratification. It is supplemented by a Protocol which regulates the procedure for individual complaints by which individuals challenge violations of

¹⁰ Convention on the Elimination of All Forms of Discrimination against Women, 19, Treaty Series, vol. 1249.

¹¹ Committee on the Elimination of Discrimination Against Women, Rep. of Comm. on Its Twentieth &

Twenty-First Sessions, 2 May, 1999, ch. I, 28, U.N. Doc. A/54/38/Rev.

¹² Marsha A. F., *The Human Rights of Women under the CEDAW Convention: Complexities and Opportunities of Compliance*, 91 AM. SOC'Y INT'L L. PROC. 378, 379–80, 1997.

¹³ United Nations General Assembly of 1966, International Covenant on Economic, Social, and Cultural Rights, Treaty Series, vol. 999.

their rights or freedoms guaranteed by ICESCR. However, there is no doubt that access to safe drinking water is an element of social development, as confirmed by the implicit recognition of water as a fundamental human right with the adoption of Article 11 of ICESCR. In November 2002, the Committee on Economic, Social and Cultural Rights adopted its General comment (GC) No. 15 on the right to water, defined as the right of everyone to sufficient, safe, acceptable, and physically accessible and affordable water for personal and domestic uses.

While ICESCR does not explicitly refer to the right to water, the Committee underlined that the right to water was part of the right to an adequate standard of living, as were the rights to adequate food, housing, and clothing. The Committee also stressed that the right to water was inextricably linked to the rights to health, adequate housing, and food. The GC no. 15 has also put forward three main criteria for satisfying the right to access to safe drinking water availability of water for sufficient and continuous use for personal and domestic needs of each person, quality of water that is free „*from micro-organisms, chemical substances, and radiological hazards that constitute a threat to a person's health, and the water needs to be physically and economically accessible to every person.*“ These criteria further confirm that access to water is generally treated as an element of social development in any society and should never be used as an instrument of political and economic pressure.¹⁴ Furthermore, GC 15 claims that the right to safe drinking water should also be derived from Article 12 of the ICESCR that recognises „*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*“ Furthermore, GC 15 claims that the right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1). The right should also be seen in conjunction with other rights enshrined in Universal Declaration of human rights, foremost amongst them the right to life and human dignity.

Within the UN, the right to water and sanitation can be protected indirectly, through other explicitly enshrined human rights. A good example of indirect protection of an environmental right within the jurisdiction of the Human Rights Committee. The Human Rights Committee is established by the International Covenant on Civil and Political Rights¹⁵ of 1966, as a monitoring treaty-body which supervises how States Parties to the Covenant respect their obligations

¹⁴ Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11, 2002, reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 2003, U.N. Doc. HRI/GEN/1/Rev.6 at 105.

¹⁵ United Nations (General Assembly), 1966, International Covenant on Civil and Political Rights, Treaty Series 999 (December): 171.

under this treaty. In the case of *Ominayak (Lubicon Lake Band) v. Canada*¹⁶, the link between the human right to the environment and the explicitly enshrined right of members of minorities to enjoy their own culture was clearly demonstrated. Chief Bernard Ominayak of the Lubicon Lake Band, Canada, filed a complaint alleging that Canada has denied members of the Lubicon Lake Band of Crees their right to self-determination and the right to freely dispose of their natural wealth and resources. Chief Ominayak alleged that Canada did so despite the Indian Act of 1970 and Treaty 8 of 1899, which recognized the right of the tribe to continue their traditional way of life. However, Canada has expropriated approximately 10 000 square kilometres of the tribe's land for commercial purposes. This denied the Lubicon Lake Band the means of subsistence and the right to self-determination, causing irreparable injury to tribal members.¹⁷ The complainant further alleged in the communication that the Government of Canada had violated his tribe's rights under article 1, paragraphs 1 to 3, of the Covenant by expropriating and subsequently destroying the aforementioned tribal territory for commercial reasons (oil and gas extraction). In the words of the tribal chief, the Government of Canada has deliberately used domestic political and legal means in such a way as to prevent or slow down the tribe's efforts to remedy the situation. In this way, industrial development in the area has progressively destroyed the tribe's native environment and economic base of life to the point of making it impossible for the tribe to continue to exist as a nation.

As it is clear, the substance of the communication was not directed against the violation of article 27 of the Covenant, but against the violation of the provisions of article 1 enshrining the right of peoples to self-determination and other related collective rights. In the case, the Committee found that the complaint was inadmissible in this respect because the individual complaints procedure under the First Optional Protocol could not be applied to the protection of collective rights within the meaning of article 1 of the Covenant. On the other hand, the Committee, on its own initiative, recognized the relevance of the communication to article 27 of the Covenant, which enshrines the rights of members of minorities. In this regard, the Committee noted that industrial development, coupled with the destruction of the environment and the economic basis of tribal life, could also make it impossible for the tribe to continue to exist as a nation. The Committee

¹⁶ *Lubicon Lake Band v Canada, Ominayak (on behalf of Lubicon Lake Band) v Canada*, Merits, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984, IHRL 2431, 26th March 1990, United Nations [UN]; Human Rights Committee [CCPR].

¹⁷ Icelandic Human Rights center, *Absence Of Protection Under The United Nations System*,

<https://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-property/absence-of-protection-under-the-united-nations-system>, 28 April, 2024.

acknowledged the link between the right to the environment and the rights of members of minorities as enshrined in article 27 of the Covenant, and ultimately found a violation of article 27 in relation to the right of members of a minority to share their own culture.¹⁸

As we have seen throughout this chapter, the international community is attempting to create international legal protection mechanisms at the universal level, but there is still a problem in the enforceability of these fundamental rights as there is currently no specialized judicial body to enforce and monitor environmental human rights. International legislation on the protection of human environmental rights could be significantly improved by more consistently defining the substantive environmental human rights in the form of an additional protocol, whether to the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, or in the form of a specific convention devoted to human environmental rights. If the international community opts for a special convention on human environmental rights, the supervisory mechanism of such a convention could include the creation of an International Court of Human Environmental Rights with a global jurisdiction, which would also have the power to receive complaints from individuals or the public concerned, including non-governmental organisations (NGOs).

While the above-mentioned Stockholm Declaration has led to the enshrinement of environmental human rights in national constitutions, national legal orders of individual states rarely enshrine elaborate mechanisms for these rights. The Human Rights Council's Universal Periodic Review has demonstrated that governments' concerns about human rights are rarely focused on the right to water and sanitation, even though international monitoring mechanisms like treaty bodies or special procedures offer the chance to evaluate states' efforts to realize this right.

3. PROTECTION OF THE RIGHT TO WATER AND SANITATION UNDER THE AUSPICES OF UNITED NATIONS

There is no doubt that water is an integral part of our daily lives. It is the essence without which an individual would not survive, and therefore there is also a need to ensure equal access to safe and clean water for all people on the planet. Today, more than a million of people live without access to safe drinking water, half

¹⁸ *Loc. cit.*

billion lack clean water for sanitation purposes and 1,5 billion children under age 5 die of water – borne disease.¹⁹ The increasing demands of a growing population combined with the effects of climate change, will exacerbate lack of access to water and sanitation for domestic uses. In fact, many experts argue that an unpredictable levels of supply of water could constrain socio-economic progress in the future. A scenario known as a "water shortage" occurs when there is not enough fresh water available to meet the demand of every human being, which is largely due to global population increase. Countries are categorized into five tiers based on the World Resources Institute's ranking of water stress: extremely high, medium-high, low-medium, and low baseline water stress.²⁰

There are 17 countries listed in the category of suffering from extremely high baseline water stress – *Qatar, Israel, Lebanon, Iran, Jordan, Libya, Kuwait, Saudi Arabia, Eritrea, United Arab Emirates, San Marino, Bahrain, India, Pakistan, Turkmenistan, Oman and Botswana*. Twelve of the countries are located in the Middle East and North Africa, areas of desert climate where there is a growing water demand.²¹ Globally, about 4 billion people, or half the world's population, are exposed to extremely high-water stress at least one month a year, according to the Aqueduct analysis. By 2050 the number could be closer to 60% of the entire population.²²

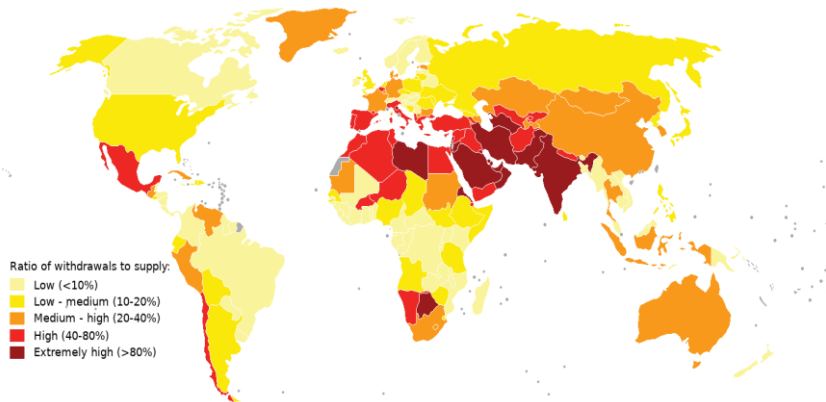
¹⁹ Salman, M.A., *The Human right to water and challenges of implementation, Proceedings of the Annual Meeting (American Society of International Law)* Vol. 106, Confronting Complexity Cambridge University Press, 2012, p. 44-46.

²⁰ Kuzma, S., Saccoccia, L., Chertock, M., World Resources Institute, 25 Countries, *Housing One-quarter of the Population, Face Extremely High Water Stress*, August 2023, <https://www.wri.org/insights/highest-water-stressed-countries>, 02 April, 2024.

²¹ 4 Countries with Water Scarcity in 2023, Earth.org, March 2023, <https://earth.org/countries-with-water-scarcity/>, 02 April, 2024.

²² Support the guardian, Extreme water stress faced by countries home to quarter of world population <https://www.theguardian.com/environment/2023/aug/16/extreme-water-stress-faced-by-countries-home-to-quarter-of-world-population>, 31 March, 2024.

Illustration no. 1:



Source: ²³ Desjardins, J., GREEN, *Extreme Water Shortages are Expected to Hit These Countries by 2040*

Significant progress has been made on 28 July 2010 in comparison to past few decades, since the right to safe and clean drinking water and sanitation was “recognized” as a human right that is essential for the full enjoyment of life and of all human rights.²⁴ In 2010, the Human Rights Council adopted Resolution 15/9 in which the Council affirmed “*that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity*”.²⁵ Although the two rights are interconnected, they are separate rights, as recognized by the United Nations (UN) General Assembly (UNGA) in Resolution 70/169.²⁶ In this document the General Assembly recognizes the right to a safe and clean drinking water and sanitation as a human right essential to the full enjoyment of life and all human rights.²⁷ The resolution called on States and international organizations to provide funding, build capacity and transfer technologies, particularly to developing countries, and to make every effort to ensure accessible, safe, clean and affordable drinking water and sanitation for all. The motivation for the adoption of the document was the fact that that million people do not have access

²³ See: <https://www.visualcapitalist.com/extreme-water-shortages-are-expected-to-hit-these-countries-by-2040/>, 01 April, 2024.

²⁴ United Nations General Assembly (UNGA), Resolution 64/292 of 28 July 2010, The Human Right to Water and Sanitation.

²⁵ Human Rights Council, Resolution A/HRC/RES/15/9 of 06 October 2010, Human rights and access to safe drinking water and sanitation.

²⁶ UNGA, Resolution 70/169 of 17 December 2015, The Human Rights to Safe Drinking Water and Sanitation.

²⁷ Maslem, M., *Legislation on water care in the Slovak Republic*, Praha: Leges, 2017, p. 10.

to safe drinking water and that more than 2.6 billion people do not have access to basic sanitation.

This resolution is a step in the right direction and represents the consensus of the international community expressed through the favourable votes on the resolution. In terms of the normative content of the two rights, the Human Rights Council reaffirmed in 2018 that:

- the human right to drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic use, and
- the human right to sanitation entitles everyone in all spheres of life, without discrimination, to have physical and affordable access to sanitation that is safe, hygienic, secure, socially and culturally acceptable, and provides privacy and ensures dignity.²⁸

However, billions of people are still living without safely managed water and sanitation. Marginalized groups are often overlooked, and sometimes face discrimination, as they try to access the water and sanitation services they need. As the United Nations Food and Agriculture Organization notes: „*A increasing number of regions are reaching the limit at which water services can be sustainably delivered. By 2025, 1,800 million people are expected to be living in countries or regions with “absolute” water scarcity, and two-thirds of the world population could be under “stress” conditions.*”²⁹ Implementing the rights-based approach to recognize the human right to water is among several international approaches addressing the challenge of providing life’s most basic element.

However, it seems appropriate to note that there are several major recent UN efforts to ensure that the essential needs of everyone for water and sanitation are met, and a few are noted here for illustrative purposes. First, the stand-alone water goal, Goal 6 of the Sustainable Development Goals (SDGs)—“*Ensure availability and sustainable management of water and sanitation for all*”—was adopted by member states of the United Nations on September 25, 2015, as part of a comprehensive and ambitious package, *the 2030 Agenda for Sustainable*

²⁸ United Nations, The Human Rights to Water and Sanitation in Practice Findings and lessons learned from the work on equitable access to water and sanitation under the Protocol on Water and Health in the pan-European region, November 2019, https://unece.org/fileadmin/DAM/env/water/publications/WH_17_Human_Rights/ECE_MP.WH_17_ENG.pdf, 01 April, 2024.

²⁹ Water Scarcity, FOOD & AGRIC. ORG. UNITED NATIONS on file with The University of the Pacific Law Review, April 2018, <http://www.fao.org/land-water/water/water-scarcity/en/>, 30 March, 2024.

*Development.*³⁰ This set of 17 goals and 169 targets addressing social, economic, and environmental aspects of development is aimed at ending poverty, reducing inequalities, and protecting the environment, and was published on January 21, 2016.³¹ The implementation of SDG 6 requires a paradigm shift; namely, water is regarded not just as a natural resource to be managed and used, but the access to safe, affordable, and reliable drinking water must be understood as a fundamental human right to that all people are entitled without discrimination, as it is indispensable to sustain healthy livelihoods and maintain dignity of all people, which is an essential precondition for eradicating poverty and building peaceful and prosperous societies.³²

The year 2023 marked the first major conference of the United Nations (UN) dedicated to water since 1977. In 1977, the UN Conference on Water was held in Mar del Plata, Argentina. Its goals were to assess the status of water resources; to ensure that an adequate supply of quality water was available to meet the planet's socio-economic needs; to increase water use efficiency; and to promote preparedness, nationally and internationally, so as to avoid a water crisis of global dimensions before the end of twentieth century.³³ The focus of the UN 2023 Water Conference (22-24 March) was on progress towards water- and sanitation-related goals, coinciding with the mid-term comprehensive review of the International Decade for Action, 'Water for Sustainable Development 2018–2028'. The United Nations World Water Development Report 2023 directly informed the UN conference discussions, describing how building partnerships and enhancing cooperation across all dimensions of sustainable development are essential to accelerating progress towards the Sustainable Development Goal for water and sanitation (SDG 6) and realizing the human rights to water and sanitation.³⁴

And third, it is the work of the various organisations and programs under the United Nations that, through their mandate, are involved in providing water for drinking and sanitation purposes for people who have limited access to

³⁰ UNGA Resolution 70/1 of 21 October 2015, Transforming Our World: The 2030 Agenda for Sustainable Development.

³¹ Nanda, P., *The Human Right to Water: Challenges of Implementation*, University of Denver.

³² Sancin, V., Dine, M. K., *Ensuring Access to Safe Drinking Water as an Imperative of Sustainable Development*, 2016, p. 95–108.

³³ Muhammad M. R., Varis O., *Integrated water resources management: evolution, prospects and future challenges*, Sustainability: Science, Practice and Policy, October 2005, p. 16.

³⁴ UN World Water Development Report 2023, March 2023, <https://www.unwater.org/publications/un-world-water-development-report-2023>, 2 April, 2024.

uncontaminated water. We will elaborate on this issue specifically in a forthcoming chapter.

4. ENSURING THE RIGHT TO WATER AND SANITATION THROUGH UNITED NATIONS SPECIALIZED AGENCIES AND PROGRAMS

Since international organs and specialized agencies and programs under the United Nations are active in different parts of the world and lend a helping hand in securing the right to water and sanitation, this article will look at their activities through specific cases. More specifically, we will focus on the work of the United Nations High Commissioner for Refugees (UNHCR) in collaboration with the World Health Organization (WHO) and the United Nations Children's Fund (UNICEF).

As part of UNHCR's work, we will highlight the provision of clean and drinkable water in sub-Saharan Africa, where climate change is the most accurate and access to drinking water is particularly difficult. UNHCR's work in the Sahel region primarily involves building and maintaining water sources such as wells and pumping stations, implementing technologies to purify water, improving access to water through boreholes, pumps and supporting community water management programmes. In addition, UNHCR works with local and international partners to identify and implement long-term solutions for water access to help improve living conditions for refugees and other vulnerable people in the area. UNHCR also provides safe and clean water through UNHCR WASH programmes, which aim to ensure that all forcibly displaced people in Africa have access to safe drinking water, safe sanitation and live in good sanitation.³⁵ As part of these WASH programmes, UNHCR provides advice, infrastructure upgrading, support for the operation, maintenance, and financing of systems to ensure potable and uncontaminated water. To prevent the spread of disease or to ensure that refugees have sufficient drinking water, UNHCR regularly rolls up drinking water in plastic barrels, builds toilets, and increases access to soap, detergents, and hygiene items in areas where water supply infrastructure is lacking.³⁶

An effective and innovative solution appears to be the UNHCR initiative, developed in the context of the refugee influx arriving in remote areas of Uganda,

³⁵ Harvey, B., Burt, M., Golay F., Schweitzer, R., UNHCR WASH MANUAL, *Practical Guidance for Refugee Settings*, January 2020.

³⁶ UNHCR, Water, sanitation and hygiene, <https://www.unhcr.org/what-we-do/protect-human-rights/public-health/water-sanitation-and-hygiene>, 2 April, 2024.

for constructing a reliable and effective monitoring system that allows UNHCR to address potential water shortages before they occur. It was in 2017, amidst the massive influx of people fleeing the conflict in South Sudan, that UNHCR's operation in Uganda played a significant role in ensuring the right to water.³⁷ As refugees were arriving in the remote and undeveloped northwestern region of the country, water supply was expensive and challenging to monitor, making it difficult to ensure a steady supply of sufficient, safe and accessible drinking water to meet the daily needs of refugees. As is well known, Uganda suffers severe negative effects of climate change, which may even cause the disappearance of coffee production, which would be economically devastating for the country. Due to climate change in Uganda, UNHCR has been playing a role in providing drinking water and water for sanitation purposes to refugees. In response to the lack of potable water for refugees in Uganda, a group of UNHCR engineers developed a reliable and cost-effective monitoring system that is being used in refugee camps in five different countries in Africa. It uses a series of smart water level sensors that are installed in tanks in water delivery trucks. The system enables operations to address potential water shortages before they occur and provides refugees with a reliable and readily available supply of clean water.³⁸

The UN Committee on Economic, Social and Cultural Rights, further elaborated on this and drew specific attention to UNHCR persons of concern and urged state parties of the International Covenant on Economic, Social and Cultural Rights to ensure that: „*Refugees, asylum-seekers, internally displaced persons and returnees have access to adequate drinking water whether they stay in camps or in urban area. ... should be granted the right to water in the same conditions as nationals.*”³⁹ UNHCR through its different monitoring mechanisms continues to assess the level of water and sanitation services and to analyse their impacts on the health and well-being of its persons of concern to enable better planning in these sectors. The majority of women and children in refugee camps are responsible for fetching water. Children are frequently pulled out of school to fetch water, which has an impact on their academic achievement. Long walks to gather water and lengthy lines at water stations can have significant negative social effects, including missed opportunity for productive employment, deteriorated health, and increased danger of harassment or violence. Through a number of initiatives aimed at raising the minimal level of services and incorporating concerns about gender, age, and diversity into programs, UNHCR has worked hard to address these

³⁷ UNHCR, The UN Refugee Agency, United nations human rights, *Climate Change, Displacement and Human Rights*, March 2022.

³⁸ *Loc. cit.*

³⁹ UNHCR, The UN Refugee Agency, *Public Health and HIV Section's Guiding Principles and Strategic Plans for HIV and AIDS Malaria Control Nutrition and Food Security Reproductive Health Water and Sanitation*, 2008-2012, p. 3.

important factors. Additional funds secured through private sector and more recently through special initiative of the High Commissioner are already yielding visible impacts in the delivery of water and sanitation services in several operations.⁴⁰

UNHCR also frequently works with WHO to help develop a series of guidelines on water quality, including guidelines on drinking water, safe use of wastewater and safe recreational water environments, to ensure safe drinking and clean water. The water quality guidelines are based on risk management and since 2004, the drinking water quality guidelines have included support for water safety plans to identify and prevent risks before water contamination occurs. Since 2014, WHO has been testing household water treatment products against WHO criteria for health effectiveness through the WHO international "system" for assessing household water treatment technologies. The scheme aims to ensure that distributed products protect users from pathogens that cause diarrhoeal diseases and to strengthen policy, regulatory and monitoring mechanisms at the national level to promote appropriate targeting and consistent and correct use of such products.⁴¹

When it comes to UNICEF, The Sustainable Development Goals (SDGs) of UNICEF, set an ambitious vision to achieve universal access to "safely managed" water and sanitation (including hygiene); defining a higher level of service, whilst prioritising the poorest and most vulnerable groups of people. The purpose of this new Strategy for WASH is to guide UNICEF's organization-wide contribution to achieving SDG 6: Ensure access to water and sanitation for all by 2030. It is designed to inform and support UNICEF's core planning and strategy processes, and to guide the implementation of programmes.⁴² UNICEF will maintain its focus on helping every child gain access to drinking water, sanitation and hygiene, including in schools and health centres, and in humanitarian situations when children are most vulnerable.⁴³ The Strategy signals increased engagement in "newer" areas such as adapting to climate change; services in small towns and informal settlements (urban); and engaging the private sector as a key partner beyond their traditional role of providing goods and services. It shows how WASH - programs can contribute to key outcomes across the life course of a child, and

⁴⁰ *Loc. cit.*

⁴¹ Bivins A., Beetsch N., Majuru B., Montgomery M., Sumner T., Brown J., *Selecting Household Water Treatment Options on the Basis of World Health Organization Performance Testing Protocols Environmental Science & Technology*, 2019.

⁴² UNICEF, New York, Strategy for Water, Sanitation and Hygiene 2016–2030, <https://www.unicef.org/media/91266/file/UNICEF-Strategy-for-WASH-2016-2030.pdf>, 1 April, 2024.

⁴³ *Loc. cit.*

how education and health systems can help deliver wider public health outcomes in WASH.

UNICEF's vision for WASH is the realization of the human rights to water and sanitation for all. This Strategy will help fulfil this vision and contribute to global efforts to meet the water and sanitation Sustainable Development Goal – SDG6 – and the broader SDG agenda, targeting priority interventions for children. UNICEF will focus on water, sanitation and hygiene in households and institutions, with two overarching objectives, which align with the first two SDG 6 targets:

1. By 2030, achieve universal and equitable access to safe and affordable drinking water for all;
2. By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations.

Executive Summary in UNICEF's Strategy for Water, Sanitation and Hygiene (2016-2030) UNICEF's core accountability will be to act where children do not have even a basic level of service.

5. CONCLUSION

In conclusion, it is important to assess that international law is confidently advancing and responding to the provision of the right to water and sanitation, whether in the context of protection through judicial or quasi-judicial bodies or international conventions that enshrine these rights, or through international organizations that take advantage of technological advances to achieve the provision of safe and potable water. Innovations in securing the right to water and sanitation have the potential to fundamentally change the lives of millions of people. The implementation of new technologies, sustainable infrastructures and innovative approaches can improve the availability, quality, and sustainability of drinking water sources.

There is no doubt that the UN is making progress in securing the right to water and sanitation, and also international law itself, as we have mentioned above, but the current state of affairs is not satisfactory. An excessive and intolerable number of illnesses and deaths are brought on by a lack of access to safe drinking water each year, indicating that progress toward achieving universal and equitable access to affordable, safe drinking water has moved far too slowly. In fact, it would be much more efficient to find a single and time-saving solution that ensures easy access to clean water for all individuals. As can be seen from the article, over time, various organisations such as UNHCR have been developing technical advances

that help to provide water even in hard-to-reach places, which may mean a slow acceleration of solutions to this global problem.

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Preliminary communication

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REDRAWING THE BOUNDARIES BETWEEN “US” AND “THEM”: DOES CITIZENSHIP ENHANCE INTEGRATION OR INCREASE EXCLUSION?

ABSTRACT

Since the beginning of the 21st century, revocation of citizenship policies against undesirable citizens have returned to the political agenda of many Western countries with surprising rapidity. For these reasons, the analysis moved not merely from the criteria for the acquisition of citizenship, but from the ways in which citizenship is involuntary lost. Indeed, it seemed interesting to analyze the functioning of a revocation measure, its impact, and its potential (un)justification in liberal societies, keeping in mind that a “punitive” sanction of this magnitude ultimately ends up eroding the essential core of the individual’s “right to have rights”. Through a comparative study of the citizenship legislation and jurisprudence on the topic developed in the United Kingdom and Italy, the aim is to answer a traditional question that is becoming increasingly pressing: up to what extent it is possible to guarantee the protection of individual’s fundamental rights in a context that considers security needs to be preponderant? Lastly, the possible intersections between the models of citizenship acquisition and the modalities of its revocation within the analyzed state legal systems are observed.

Keywords: *Revocation of Citizenship, National Security, Terrorism, Human Rights, Exclusion*

1. INTRODUCTION

The community of titular and potential titular of citizenship rights, traditionally identified and delimited by the term “citizenship”, is now experiencing unprecedented forms of (s)composition. It seems that citizenship legislations are structured in such a way as to exclude communities and limit rights in the context of contesting borders and national identity. Indeed, the perennial tension of citizenship as a status of equality as well as the concrete inequalities produced by nationality laws would explain the inclusion-exclusion dynamic of

individuals. Based on this pattern, the “opposite” of the citizen would be embodied by the “marginalized or excluded” person.¹

The facility with which states can adopt measures to deprive undesirable individuals of their nationality is changing radically.² Today it is possible to observe a trend towards the encouragement of citizenship revocation measures as an instrument for guaranteeing national security in a current context characterized by the crisis of multicultural policies in most of the liberal tradition countries and by the terrorism problem that, after 11 September 2001, has taken on global dimensions. In fact, in the early 2000s, two main factors contributed to the revival of the measure of withdrawal of citizenship in western legal systems. Firstly, frequent migration crises led to the introduction of new and stricter naturalization requirements within nationality laws, at the same time broadening the hypotheses of citizenship revocation. Secondly, the sharpening of the phenomenon of Islamist radicalization and the emergence of the figure of “foreign fighters” have been decisive. States’ fear of the terrorist threat has essentially left the revocation orders in a state of perpetual expansion throughout the West, and has depicted measures of particular severity, based on the view that citizenship is fully within the state domain and requires adherence to strict safeguards.

The approach to citizenship in the present study is based on the idea of citizenship as an instrument of differentiation rather than integration, of exclusion rather than inclusion. The key offered stems from the belief that the historical function of citizenship has been to separate and exacerbate differences between those who are “in” and those who remain – inevitably – “out”.

With reference to the methodology used, the present analysis considers two case studies as examples of contemporary liberal democracies in the Western world. The choice of the United Kingdom and Italy lies in the fact that these countries are considered, for different reasons, the archetypes of the two divergent models of granting citizenship, respectively: the “multicultural/pluralistic” model and the “ethnic-racial” model.

Specifically for the above reasons, this study examined the case of the United Kingdom, as it is significantly different from other models in continental Europe in view of the presence of multiple minorities rooted in the territory. In fact, the acquisition of British citizenship *iure soli* and *iure sanguinis* has been influenced

¹ Margiotta, C., *Cittadinanza*, in Caruso, C., Valentini, C., (eds.), *Grammatica del costituzionalismo*, il Mulino, Bologna 2021, p. 239-253, especially p. 242.

² See, *ex multis*, Honohan, I., *Just what’s wrong with losing citizenship? Examining revocation of citizenship from a non-domination perspective*, *Citizenship Studies*, Vol. 24(3), 2020, p. 355-370.

by the past of the British Empire.³On the other hand, Italy, anchored on the prevailing principle of “transmission” of citizenship *iure sanguinis*⁴, protects citizens by birth from the possibility of denationalization for security reasons, affecting only “acquired” citizens and producing a clear differentiation between citizens according to the way of citizenship acquisition. Here, moreover, in contrast to the United Kingdom, the ban on revocation appears to enjoy a constitutional status, according to the expansive interpretation of Article 22 of the Italian Constitution.⁵

2. THE CASE OF UNITED KINGDOM

In 2002, before any legislative amendment, the UK government presented a White Paper, *Secure Borders, Safe Haven*.⁶Accompanying this paper was the announcement that a set of new objectives to develop a policy would meet the needs of the country and the people arriving on the island and that would recognize the need for changes in citizenship, immigration and asylum sectors. The report presented in 2002 did not contain any comprehensive explanation of the actual motivations for this updating of the discipline in the above-mentioned subjects. However, it is highly probable that the sudden onset was linked to the fight against terrorism. Thus, on the basis of the White Paper *Secure Borders, Safe Haven* ushered in the adoption of a series of provisions aimed at progressively strengthening the discretionary power of the Secretary of State to revoke citizenship directed primarily at radicalized British citizens involved in terrorist acts.⁷

³ Porena, D., *Pregi e criticità dei modelli di cittadinanza multiculturale: il caso della Gran Bretagna*, in Conti, U. (ed.), *Elementi per una sociologia del terrorismo. Temi e prospettive di ricerca*, Rubbettino, Soveria Mannelli 2016, p. 105-112, especially p. 105.

⁴ Grosso, E., *Cittadinanza e territorio. Lo ius soli nel diritto comparato*, Editoriale scientifica, Napoli 2015, p. 52. The author refers to the fact that the predominant criterion for acquiring Italian citizenship is *ius sanguinis*, while *ius soli* is limited to “residual cases”. In fact, the only circumstances in which Italian citizenship is acquired *iure soli* are contained in Law no. 91/1992, art. 1, par. 1, letter b) and par. 2, and art. 4, par. 2.

⁵ Art. 22 Const.: «No person may be deprived for political reasons of legal capacity, citizenship or name».

⁶ Home Office, *Secure Borders, Safe Haven. Integration with Diversity in Modern Britain*. Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, February 2002: <https://assets.publishing.service.gov.uk/media/5a7ba528ed915d1311060959/cm5387.pdf>, 2 March, 2024.

⁷ Dicosola, M., *Il diritto alla cittadinanza: problemi e prospettive*, Maggioli Editore, Santarcangelo di Romagna 2022, p. 224.

The aforementioned goals outlined in the White Paper were turned into law later that year with the *Nationality, Immigration and Asylum Act 2002*⁸, which made a number of amendments to Section 40 of the 1981 *BNA*⁹ devoted precisely to the revocation of citizenship.

In particular, a major innovation was the extension of the Secretary of State's mandate for the Department of the Interior, who could henceforth deprive a person of citizenship if convinced that he or she had done something that seriously prejudiced the vital interests of the United Kingdom or a British overseas territory.¹⁰

Through the *Immigration, Asylum and Nationality Act 2006*¹¹, then, the United Kingdom introduced new amendments to the 1981 *BNA*, including new and broader powers to revoke citizenship. Although the law was proposed before the 2005 London attacks perpetrated by homegrown terrorists, its negotiation was probably influenced by the foreign fighters' attacks and the general increase of British citizens who were becoming radicalized.¹² In fact, shortly after the terrorist acts of 2005 and after declaring his intention to abandon all aspirations to ratify the 1997 Convention¹³, the British government has unveiled a new counterterrorism strategy with the aim of stripping citizenship from all those individuals with British nationality or dual citizenship involved in extremist actions. The main feature of the *Immigration, Asylum and Nationality Act* was related to the substitution of the test on the «vital interests» with one on the «conducive to the public good»¹⁴ in relation to citizenship revocation for misconduct or disloyalty. In addition, new amendments gave the Secretary of State broad power to withdraw the right of stay in the United Kingdom from any person whose exclusion was deemed to be precisely “serving the public good”. The clause contained no details on the level of proof required to make a revocation order. Indeed, it was enough for the Home Secretary to be «satisfied that deprivation

⁸ *Nationality, Immigration and Asylum Act 2002* (Royal assent: 7 November 2002).

⁹ *British Nationality Act*, 30 October 1981, whose main provisions took effect on January 1, 1983 by amending the *Immigration Act* of 1971.

¹⁰ *Ibid.*, Section 40, pt. (2): «the person has done anything seriously prejudicial to the vital interests of (a) the United Kingdom, or (b) a British overseas territory».

¹¹ *Immigration, Asylum and Nationality Act 2006* (Royal assent: 30 March 2006), par. 13.

¹² Crace, J., *Immigration, Asylum and Nationality Act 2006*, *The Guardian*, 19 January 2009, <https://www.theguardian.com/commentisfree/libertycentral/2009/jan/15/immigration-asylum-nationality-act>, 8 March, 2024.

¹³ *Immigration, Asylum and Nationality Bill*, Standing Committee, 8th and 7th session, 27 October, 2005.

¹⁴ Brown Prener, C., *Denationalisation and Its Discontents. Citizenship Revocation in the 21st Century: Legal, Political and Moral Implications*, Brill, Leiden-Boston 2023, p. 178.

[was] conducive to the public good»¹⁵, with no clarification about the types of misconduct and infidelities for which the Secretary of State could deem the revocation of citizenship satisfactory and favorable to the public security.

Later, the *Immigration Act 2014*¹⁶ made the third and most recent amendment to the 1981 *BNA* by carrying out an overhaul of the immigration system designed to remove key protections for Commonwealth citizens residing in the United Kingdom. In fact, the government reintroduced a provision under Section 40 of the British Nationality Act that allowed the revocation of citizenship of naturalized citizens, even if it involved statelessness.¹⁷ With the entry into force of the above-mentioned *Immigration Act 2014*, Subsection (4A) was inserted, which no longer required either the actual or timely acquisition of another nationality in order to legitimize such a revocation measure, thus succeeding in overcoming, albeit partially, the bastion of the prohibition against statelessness.¹⁸

2.1. Shamima Begum: „the ISIS bride“¹⁹

A proper illustration of both the gaps in the “reasonable grounds” test with regard to the deprivation of citizenship and some of the procedural implications arising from the lack of suspensive effect of an appeal was the case of Shamima Begum decided by the British Supreme Court.²⁰ The case began on the 19th of February 2019, when the British Secretary of State decided to strip this girl of her British nationality, obtained *iure soli*, on the basis that her return to the UK would be a reason for national security threat.²¹

¹⁵ *Immigration, Asylum and Nationality Act 2006*, par.13; section 56 *Deprivation of citizenship*, par. 1(2).

¹⁶ *Immigration Act 2014* (Royal assent: 14 May 2014), par. 22.

¹⁷ *Ibid.*, section 66; *BNA 1981*, section 40 (4A).

¹⁸ See Graziani, C., *La revoca della cittadinanza dinanzi la Corte Suprema del Regno Unito: fra profili sostanziali e garanzie procedurali*, DPCE online, n. 1/2021, p. 2719-2732, especially p. 2721.

¹⁹ Reference is made to the way Shamima Begum has been referred to by many newspapers, namely as the “ISIS bride,” see, for example, McDonald, A., ‘ISIS bride’ Shamima Begum loses appeal over loss of British citizenship,’ Politico, 22 February, 2023, <https://www.politico.eu/article/uk-isis-bride-shamima-begum-loses-appeal-over-loss-of-british-citizenship/>, 6 March, 2024.

²⁰ *Shamima Begum v. Secretary of State for the Home Department* [2021] UKSC 7, 26 February 2021, is the abridged name for three closely related proceedings being considered together before the Supreme Court of the United Kingdom: *R (on the application of Begum) v. Special Immigration Appeals Commission*; *R (on the application of Begum) v. Secretary of State for the Home Department*; *Begum v. Secretary of State for the Home Department*.

²¹ Dicosola, M., *La revoca della cittadinanza tra sicurezza nazionale e diritti. Note a margine del caso Shamima Begum*, Democrazia e Sicurezza-Nationality and Security Review, XI, n. 2/2021, pp. 161-191, especially p. 164.

The case concerned Mrs. Begum, a citizen of Bangladesh by descent, student born in London who, while still a minor, had left her home in Bethnal Green east London, in 2015²², and had moved to Syria for joining the Islamic State. After having embraced the struggle of this international paramilitary terrorist organization, she had married an ISIL fighter²³ «with her eyes open». ²⁴Precisely for these motivations, the girl's intention to return to England in 2019 gave rise to a public debate concerning the returning *jihadists*. More specifically, it was debated whether Begum had been trafficked, whether state authorities had failed in their duty of protection, and whether she remained *de facto* stateless; all issues considered directly relevant to assessing the legitimacy of a revocation decision. In fact, the government considered using its powers under Section 40 of the 1981 *BNAIN* in order to strip Begum of her citizenship status because her membership in ISIS was assessed as sufficient evidence to infer her radicalization that would pose a serious security risk to the country.²⁵

The question on the legitimacy of the revocation was a part of Begum's claim in his trial in the UK court system that was eventually rejected by the UK Supreme Court on the 26th of February 2021.²⁶ In fact, Mrs. Begum first appealed to the Home Secretary requesting to be allowed returning to England in order to take part in the appeal proceedings initiated before the *Special Immigration Appeals Commission*²⁷, and subsequently, since the Home Secretary had rejected the entry request, she appealed the rejection again before the SIAC along with the denationalization decision.²⁸ Both the revocation order and the denial of permission to entry into the United Kingdom were therefore contested by the appellant while in Syria in three separate proceedings at first instance initially before the *Special Immigration Appeals Commission* and then the *Court of Appeal*

²² Sabbagh, D., *Shamima Begum a victim of trafficking when she left Britain for Syria, court told*, The Guardian, 24 October 2023: <https://www.theguardian.com/uk-news/2023/oct/24/shamima-begum-victim-of-trafficking-when-she-left-uk-for-syria-court-told>, 8 March, 2024.

²³ Dicosola, *op. cit.* note 21.

²⁴ Sandford, D., Rhoden-Paul, A., *Shamima Begum knew about IS when she joined, UK lawyer says*, BBC News, 24 November 2022. This article points out how the executive's lawyers stated that Shamima Begum had joined the Islamic State “with her eyes open” in order to emphasize her guilt and her awareness of the consequences of this choice, <https://www.bbc.com/news/uk-63745251>, 7 March, 2024.

²⁵ Dicosola, *op. cit.* note 21, pp. 164-165.

²⁶ *Loc. cit.*

²⁷ *Shamina Begum v. Secretary of State for the Home Department*, SC/163/2019, SIAC, 7 February 2020.

²⁸ Graziani, *op. cit.* note 18, p. 2719.

*of England and Wales.*²⁹In particular, Begum claimed that the right to nationality as well as the fundamental rights of the person were violated.³⁰

There is one element of the *Shamina Begum* decision that is not insignificant and which focuses on the fact that the ancient Common law ties of subordination between the Crown and its subjects could have provided the elements of protection that were lacking in the legal framework in order to repatriate Begum. Therefore, the case became an issue of “subjecthood”³¹, meaning that the elements of protection and equity were lost and only the loyalty required of the subjects remained, with no guarantee of protection in return.

Concluding, five years after Shamima Begum’s British nationality was revoked, the *jihadist* bride’s long battle to return to England appeared to stall in 2023, after the SIAC ruled that although there was a «credible suspicion» that Begum had been trafficked for sexual exploitation in Syria, the assumption was «not sufficient» for her to win the appeal.³²

Having lost the appeal against the SIAC, however, Shamima Begum’s attorneys asked for a reversal of the Home Secretary’s decision before the Court of Appeals. Nevertheless, on the 23rd of February 2024, the Court of Appeals also rejected the charges³³ of Shamima Begum’s legal team and also ruled that the decision of citizenship withdrawing could be «harsh», but Begum had been in any case «the author of her own misfortune».³⁴

2.2. The most recent reforms

Probably in the wake of the events surrounding Shamima Begum, a new season of amendments to UK nationality legislation opened during 2022. In fact, the

²⁹ *Court of Appeal of England and Wales* or *Her Majesty’s Court of Appeal in England* or also *Court of Appeal* is the Court of Appeal based in London, one of the higher courts of England and Wales.

³⁰ Brown Prener, *op. cit.* note 14, p. 194-195.

³¹ Pougnet, R., *Citizenship Deprivation in the Courts: Unveiling States’ Constitutional Structures*, *European Constitutional Law Review*, Vol. 19(3), 2023, pp. 415-440, especially p. 438, coined the term “subjecthood-lite” to mark the fact that the entire case hinged on the issue of “subjecthood”.

³² Siddique, H., *Shamina Begum loses appeal against removal of British citizenship*, *The Guardian*, 22 February 2023: <https://www.theguardian.com/uk-news/2023/feb/22/shamina-begum-loses-appeal-removal-british-citizenship>, 9 March, 2024.

³³ *Shamina Begum v. Secretary of State for the Home Department*, [2024] EWCA Civ 152, 23 February, 2024.

³⁴ *Ibid.*, par. 138.

*Nationality and Borders Act 2022*³⁵, which originated from a draft law presented to Parliament in July 2021³⁶, in which a multitude of issues pertaining to citizenship, asylum, immigration, victims of slavery and human trafficking were addressed, has been approved and later became law on the 28th of April 2022. The most striking new feature is the introduction of the rule that the Secretary of State can “silently”³⁷ remove the British citizenship from dual nationals without prior notification, i.e., without any written communication that would guarantee the right of appeal. More specifically, under Section 10 of the *Nationality and Borders Act 2022*³⁸, Subsection 5(A) was inserted within Section 40 of the *British Nationality Act 1981*, relating to the revocation of citizenship, immediately after paragraph 5 on notifying the recipient of a revocation order. It is impressive how Subsection 5(A) introduced the possibility of removing British citizenship without notice.

This new clause indeed inaugurated a new and more flowery season of changes in the field of citizenship with manifestly restrictive implications toward the recipients of a revocation order and, at the same time, defined a broadening of the government’s discretionary powers regarding the granting of nationality.

3. THE CASE OF ITALY

The idea that the prohibition against the deprivation of citizenship for political reasons, under Article 22 of the Italian Constitution, as well as the recognition and protection of inviolable rights, under Article 2 Const., are extended to the individual, not only to the citizen, today is in crisis. In fact, the introduction of the provision according to which the loss of *status civitatis* could be a sanction for the commission of acts against the internal or international personality of the Italian state seems to oppose this long held concept.

More specifically, 2018 saw the adoption of a measure, known by the epithet “security decree” or also “Salvini decree”, Decree Law No. 113 of the 4th of October 2018³⁹, converted into law by Law No. 132 of the 1st of December 2018,

³⁵ *Nationality and Borders Act 2022* (Royal assent: 28 April 2022), par. 36.

³⁶ *Nationality and Borders Bill*, 141 2021-22, 6 July, 2021.

³⁷ See Siddique, H., *New bill quietly gives powers to remove British citizenship without notice*, The Guardian, 17 November 2021: <https://www.theguardian.com/politics/2021/nov/17/new-bill-quietly-gives-powers-to-remove-british-citizenship-without-notice>, 11 March, 2024.

³⁸ *Nationality and Borders Act 2022*, section 10, *Notice of decision to deprive a person of citizenship*.

³⁹ Decree-Law of 4 October 2018, No. 113 (G.U. n. 231 of 4 October 2018).

regarding immigration and public safety.⁴⁰ By far the most problematic and incisive innovation comes from Section 14(1)(d) of Decree Law No. 113/2018, which has inserted Section 10-*bis* into the framework of Citizenship Law No. 91/1992. This provision introduced for the first time since the Constitution entered into force the concept of “revocation” of citizenship addressed to those who had been convicted of acts related to terrorism.

Significantly, according to the same provision, Italian nationality may be withdrawn in the case of a final conviction for the crimes specified in Section 407, paragraph 2, letter a, No. 4, of the Code of Criminal Procedure, as well as for the crimes listed in Section 270-*ter* and 270-*quinquies*.², of the Criminal Code⁴¹: (a) to the foreigner who, upon reaching the age of eighteen years, can prove that he or she has resided legally without interruption on the soil of the Republic and who has manifested his or her intention to become an Italian citizen within one year of the aforementioned date pursuant to Section 4, paragraph 2; (b) to those who are married to an Italian citizen who has complied with the conditions set forth in Section 5; (c) to the foreigner who has been granted citizenship by a decree of the President of the Republic, if he or she reflects the requirements set down in Section 9. Revocation of citizenship shall be adopted, within three years after the judgment of conviction becomes final, by decree of the President of the Republic, upon the proposal of the Minister of the Interior.⁴²

⁴⁰ Law of 1 December, 2018, No. 132 «Conversione in legge, con modificazioni, del decreto-legge 4 ottobre 2018, n. 113» (G.U. n. 281 3 December 2018).

⁴¹ Section 10-*bis*, Law of 5 February 1992, No. 91. Namely: association for the purposes of terrorism and subversion of the democratic order (Penal Code, Section 270 *bis*); assistance to associates (Penal Code, Section 270 *ter*); attack against the head of government (Penal Code, Section 280); devastation, looting and massacre (Penal Code, Section 285); civil war (Penal Code, Section 286); kidnapping for the purposes of terrorism or subversion (Penal Code, Section 289 *bis*); political conspiracy by association (Criminal Code, Section 305); murder (Criminal Code, Section 422); offences committed for the purposes of terrorism or subversion of the constitutional order and punishable by law with five to ten years' imprisonment (Criminal Procedure Code, Section 407(2)(a)); reconstitution of subversive associations whose disbandment had been ordered (Criminal Code, Section 270(3)). These offences also include common, albeit particularly serious, conduct, i.e. criminal conspiracy in cases where arrest *in flagrante delicto* is mandatory (Criminal Code, Section 416 and Criminal Procedure Code, Section 380(2)(m)); mafia-type conspiracy (Criminal Code, Section 416 *bis*); kidnapping for the purpose of robbery or extortion (Criminal Code, Section 630); conspiracy for the purpose of illegal trafficking in narcotic drugs or psychotropic substances (Presidential Decree No. 309 of 1990, Section 74).

⁴² Section 10-*bis*, Law of 5 February 1992, No. 91.

3.1. Possible unconstitutionality of the provision introduced in 2018

Some scholars⁴³ have speculated that the provision introduced in 2018 might primarily conflict with the “negative” right to citizenship as enshrined in Article 22 of the Constitutional Charter, which in fact prevents a measure of citizenship deprivation on political grounds. More appropriately, denationalization could contradict what has emerged from the extensive interpretation of the prohibition against the withdrawal of nationality under which any mode of its revocation in consideration of the political views of the person concerned and the interests of the state at large would be unconstitutional.

More problematic is the reference to the principle of equality and the prohibition of discrimination based on personal conditions referred to in Article 3 of the Constitution, which guarantees Italian citizens equal treatment without distinction of political opinion.⁴⁴ Apparently, these prerogatives are violated by the denationalization measure introduced by the 2018 decree⁴⁵ that possess an inherent discriminatory component. In fact, this measure deals unreasonably differently with objectively similar situations by establishing that only citizenship acquired under Sections 4, paragraph 2, Section 5 and Section 9 of Law No. 91/1992 can be revoked. The withdrawal of the citizenship is applicable thus only in the comparisons of those who have become Italian citizen by means of a voluntary request, marriage or naturalization. On the contrary, those who are citizens *iure sanguinis*; those who were born in Italian territory, if they are children of unknown or stateless parents or if they are children of individuals unable to transmit their nationality according to the regulations of their state of origin; as well as those who have acquired citizenship through adoption by Italian parents or those who are descendants of Italian citizens (citizens by benefit of law) are excluded from this measure.

The described provision appears to create *de facto* two normatively and qualitatively different categories of citizenship: one acquired at birth, irrevocable,

⁴³ See, *ex multis*, Algotino, A., *Il decreto “sicurezza e immigrazione” (decreto legge n. 113 del 2018): estinzione del diritto di asilo, repressione del dissenso e disegualianza*, *Costituzionalismo.it*, n. 2/2018, pp. 167-199, especially p. 192; Dicosola, M., *Il diritto alla cittadinanza*, *op. cit.* note 7, p. 237; Ruotolo, M., *Brevi note sui possibili vizi formali e sostanziali del d.l. n. 113 del 2018 (c.d. decreto “sicurezza e immigrazione”)*, *Osservatorio costituzionale*, n. 3/2018, p. 173-176, especially p. 175.

⁴⁴ Art. 3(1) Const.: «Tutti i cittadini hanno pari dignità sociale e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali».

⁴⁵ Section 14 par. 1, let. d), *Capo III Disposizioni in materia di cittadinanza*, Legislative decree No. 113/2018.

and another obtained because of a request/application, potentially revocable.⁴⁶In fact, the applicability of this disposal to certain categories of citizens, while excluding others, significantly calls into question the guarantee of the non-discrimination principle⁴⁷and seems to create two “types” of citizens. The status of all citizens belonging to the second category, as opposed to the first, is perpetually *sub iudice*, there being no time limit beyond which acquired citizenship could no longer be revoked.⁴⁸

In conclusion, from the analysis of the various profiles of unconstitutionality of the decree-law in question, it can be deduced how the right to citizenship is a right of exclusion since it divides individuals into two categories, citizens “by birth” and citizens “by application”, whose rights are unequal. It is certainly true that the characteristic of citizens is to benefit from a privileged status compared to foreigners, but it is also true that there still remains significant discrimination in the adoption process, content and rationale proper to the “security decree”.

3.2. The first circumstance of citizenship revocation due to terrorism

On the 27th of March 2019, for the first time ever in Italian republican history, then Interior Minister Matteo Salvini formally proposed a revocation order. Indeed, he forwarded to the Quirinale the letter with the decree to revoke the Italian nationality according to then newly introduced “security decree” against Abderrahim Moutaharrik, accused of terrorism offenses.

The protagonist of the case, dubbed “the ISIS boxer” because he was a former kickboxing champion, was born in Morocco in 1988, and became an Italian citizen in April 2015. A resident of Lecco with two children and a Moroccan wife,

⁴⁶ Bacis, D., *Esistono cittadini “di seconda classe”? Spunti di riflessione in chiave comparata a margine del d.l. n. 113/2018*, DPCE on line, n. 1/2019, p. 935-940, especially p. 939. On this issue, Bertolino, C., *Paradossi della cittadinanza nella legge di conversione del decreto legge c.d. “Sicurezza”*, federalismi.it, n. 3/2019, p. 1-9, in particular at p. 7 the author states that “shortcomings” are evident.

⁴⁷ Dicosola, *op. cit.* note 7, p. 238. Dicosola additionally notes on p. 257 that, like Italy, citizenship revocation measures are reserved for individuals who obtained citizenship after birth with similar discriminatory effects in Belgium, Cyprus, Finland, France, Ireland, Malta and the Netherlands.

⁴⁸ Resuming the status distinction made by Curreri, S., *Prime considerazioni sui profili d’incostituzionalità del decreto legge n. 113/2018 (c.d. “decreto sicurezza”)*, federalismi.it, n. 22/2018, pp. 1-14, especially p. 13. It must be consider the similar conclusions drawn by several authors, *ex multis*, Algostino, A., *Il decreto “sicurezza e immigrazione”*, *op. cit.* note 43, p. 191; Calvo, M., *Cittadini per sempre vs. cittadini eternamente sub iudice*, Dirittifondamentali.it, n. 1/2019, p. 1-28, especially p. 11-12.

Moutaharrik was intercepted planning an attack on sensitive targets, including the Vatican, during the Easter week of 2020.⁴⁹

More specifically, in February 2017, “the ISIS boxer” was sentenced to six years in prison on charges of association for the purpose of terrorism, instead his wife, Salma Bencharki, to five years in prison.⁵⁰ The order for the application of the precautionary measure of custody in prison had as its object the Islamist radicalization of the Italian citizen of Moroccan descent and the organization of the departure of his family nucleus for the purpose of affiliation with the Islamic State.⁵¹ Therefore, the judgement was based on the result of telephone and environmental interception activities that revealed an indication of “extreme alarm for state security and, in any case, for international security” (in Italian: «estremo allarme per la sicurezza dello Stato e, comunque, per la sicurezza internazionale») consisting of the “call to arms”, i.e. *tazkia*.⁵²

Subsequently, on the 13th of August 2019, the Lecco Police Department adopted a measure of immediate removal from the territory of the Republic at the proposal of the Minister of the Interior against the 29-year-old woman of Moroccan origin, wife of the kickboxer. At the same time, Moutaharrik’s spouse was notified of the revocation of her Italian citizenship ordered by decree of the Head of State, pursuant to Section 14(1)(d) of d.l. 113/2018⁵³. Therefore, the denationalization followed the *res judicata* sentence of six years’ imprisonment.⁵⁴

The case examined inherent in the adoption of the measure of revocation of citizenship, the first of its kind in the Italian history, demonstrates how Italy, after introducing the possibility of denationalization in 2018, has also taken care to

⁴⁹ La Repubblica, *Viminale: “Via la cittadinanza al pugile dell’Isis”. Prima richiesta in Italia, deciderà il Quirinale*, 22 March, 2019, https://www.repubblica.it/cronaca/2019/03/22/news/revoca_cittadinanza-222216477/, 15 March 2024.

⁵⁰ Messina, M., *Terrorismo, sei anni di carcere al campione marocchino di kickboxing arrestato in Italia*, La Stampa, 14 February 2017: <https://www.lastampa.it/cronaca/2017/02/14/news/terrorismo-sei-anni-di-carcere-al-campione-marocchino-di-kickboxing-arrestato-in-italia-1.34653634/>, 22 March 2024.

⁵¹ Tribunale di Milano, Giudice per le indagini preliminari, *Ordinanza di applicazione della misura cautelare della custodia in carcere*, proceeding No. 1489/2016 Mod. 21 <https://media.laregione.ch/files/domains/laregione.ch/docs/4bk4/9skz.pdf>, p. 2.

⁵² *Ibid.*, p. 6.

⁵³ Questura di Lecco, *Associazione con finalità di terrorismo: espulsa dall’Italia e rimpatriata in Marocco*, 27 August, 2019.

⁵⁴ Ministero dell’Interno, 3 September, 2019: <https://www.interno.gov.it/it>, 16 March, 2024.

implement it immediately, essentially following a trend that has emerged for some time on the European and non-European continent.⁵⁵

4. COMPARISON BETWEEN REVOCATION INSTITUTIONS

In terms of comparison, the United Kingdom is distinguished by the particular extent of the state government's power in disposing of the power to revoke citizenship and, symmetrically, by the reduced guarantees reserved to the individual who is the recipient, with specific reference to the right to citizenship. Thus, Section 40 of the *British Nationality Act 1981*, as amended in 2002, 2006, 2014, and 2022, is to date one of the most problematic provisions on denationalizationsince it does not seem to meet the standards, albeit mild, imposed by the International Law. Most perplexing is this law's attribution of wide discretion to the Secretary of State, whocan adopt a measure depriving a person of citizenship based on his speculations.

In addition, the introduction of the rules whereby citizenship can only be deprived to naturalized citizens even if they later become stateless is not exempt from criticism. More recently, the entry into force of the *Nationality and Borders Act 2022*introduced the possibility that a revocation order can even have no previous notification. The new provision has therefore raised numerous doubts as to the definition of an unprecedented power to revoke citizenship almost secretly, without the need for any prior communication, and which effectively results in the denial of the right to appeal for those affected.

The British Supreme Court, after some initial attempts to set the right to citizenship against denationalization powers, definitively upheld its constitutionality, holding that the right to citizenship could be balanced against the public interest in national security. The majority of citizenship revocation cases in the United Kingdom have given prominence to the relevant legal standards of jurisdiction, access to the courts and statelessness, rather than a thorough assessment of the facts and merits of the case. From this perspective, the Supreme Court's major rulings on this issue focused more on the legal framework than on fundamental rights.The abovementioned legal formalism was evident in the Supreme Court's decision on

⁵⁵ Raimondo, F., *Il privilegio della cittadinanza: la revoca come strumento di contrasto al terrorismo. La riforma nel contesto europeo*, Forum di Quaderni costituzionali, n. 2/2019, p. 1-4, especially p. 1. The author highlighted how Italy has followed the path of other European states and countries outside Europe, such as Australia and New Zealand.

the famous case of Shamima Begum⁵⁶, the student stripped of her British citizenship in 2019 for leaving the country, heading to Syria, and embracing the cause of the Islamic State. The question is wrapping itself around a long and complex appeal that was defined by the SIAC on 22 February 2023 as «a case of great concern and difficulty».⁵⁷On this occasion, the SIAC ruled that, although there was a suspicion that Begum had been recruited and was a victim of human trafficking for the purpose of sexual exploitation, the fact was not deemed “sufficient” for the Secretary of State’s decision to revoke her British citizenship to be unlawful.

In Italy, in the memory of the dramatic abuses perpetrated during the interlude of the fascist regime, the ban on the revocation of citizenship for political reasons enjoys constitutional status. However, Section 14(1)(d) of Decree-Law No. 113/2018⁵⁸ introduced a form of citizenship revocation on the basis of restrictive interpretations of constitutional provisions, with the consequence of concretely weakening the effects of the constitutional dictate.⁵⁹Section 10-*bis* of Italian Nationality Law No. 91/1992, in addition to raising doubts of compatibility with Article 22 of the Constitution on the prohibition of being deprived of citizenship for political reasons, appears to be in conflict with the principle of equality and the prohibition of discrimination on the basis of personal conditions, as set out in Article 3 of the same Constitution. In fact, Section 10-*bis* introduced new possibilities to revoke citizenship by drawing a distinction between citizens *iure sanguinis*, whose citizenship cannot be revoked, and those who have acquired citizenship after birth, whose status is instead flexible, in the event that they commit the offences listed in the same provision.

In the Italian case, it can be observed a similarity with the British system, more precisely with Section 66 of the *Immigration Act 2014*, in the part, which provides that the Home Secretary may invoke the revocation order when the subject constitutes a serious prejudice to the vital interests of the State.

Nevertheless, there are discrepancies. In the final analysis, the revocation of citizenship in the United Kingdom is ordered on the exclusive initiative of the British Secretary of State based on discretionary suppositions not supported by a measure of the judicial authority, whereas the Italian Minister of the Interior can

⁵⁶ *Shamima Begum v. Secretary of State for the Home Department* [2021] UKSC 7, 26 February, 2021.

⁵⁷ *Begum v. Secretary of State for the Home Department*, SC/163/2019, SIAC, 22 February, 2023, par. 210.

⁵⁸ Decree-Law of 4 October, 2018, No. 113, (G.U. n. 231 of 4 October, 2018).

⁵⁹ Dicosola, M., *Da cittadini a stranieri. Quali garanzie per il diritto alla cittadinanza?*, DPCE online, n. 3/2023, p. 2579-2596, especially p. 2589- 2590.

only act following a definitive conviction which has become final. It must be considered, however, that a discretion similar to that of the British Home Secretary’s power of revocation is not alien to the Italian Minister of the Interior, who may discretionally choose the cases in which to adopt that measure.⁶⁰

Moreover, the peculiarity of the 2018 “Salvini decree” and Section 40 of the 1981 *BNA* lies in creating statelessness situations since a revocation order is not limited to dual nationals.

Between the two countries examined in this study, Italy is the most likely to target “non-blood” citizens while granting favorable treatment, inherently discriminatory, to *pleno iure* citizens. In contrast to Italy, which protects *iure sanguinis* citizens from the possibility of being denationalized, the UK can revoke citizenship even from citizens “by birth”, as happened in the case of Shamina Begum, a British citizen by *ius soli*. Finally, the comparison with respect to the institution of the withdrawal of nationality has shown that the legal system that is furthest from respecting the principles of the International Law is the UK, since the discretionary power of revocation does not seem comparable to the Italian legal system. It is also true that, with respect to the prohibition in the International Law of arbitrary deprivation of nationality and, in general, of the reduction of statelessness, Italian legislation does not appear to meet entirely these standards either. Although the 1981 *BNA* is the most problematic, the nationality revocation provisions of Italy and UK seem to have vague language that risks punishing unpredictable behavior. With regard to procedural safeguards, it appears that the laws place a low burden of proof on governments for both the alleged conduct justifying denationalization and the prohibition on rendering individuals stateless.

4.1. The influence of nationality acquisition models

The results above-described lead to significant reflection on the possible “contamination” of the ways in which individual countries choose to revoke citizenship and the models of citizenship acquisition followed, as well as on the possible indirect proportionality between the requirements for obtaining *status civitatis* and the denationalization criteria. In other words, is it possible to hypothesize that states, which set stringent requirements for the acquisition of nationality, such as passing a citizenship test with a high level of linguistic knowledge, then follow more flexible ways of revoking it, and vice versa?

⁶⁰ Bacis, *op. cit.* note 46, p. 935-940.

In this regard, it seems interesting to summarize the historical-political events within the framework of which the citizenship legislations of the United Kingdom and Italy were formulated.

The British model appears markedly different from other continental European models in view of the presence of multiple minorities, born *inter alia* because of the vast dominions of the British Empire, who make up a multi-ethnic and multi-cultural tissue with a numerical consistency of aliens sometimes greater than that of the original indigenous national group.⁶¹ Thus, on the evolutionary choices regarding the British nationality, the “weight of imperial heritage”⁶² and the consequent desire to build a nation by embracing different ethnicities, without any intention to encroach upon them, cannot be overlooked.⁶³

Indeed, the United Kingdom currently boasts a traditionally liberal discipline in immigration and citizenship. This was made possible by the fact that, following the Second World War, the idea of citizenship in the “national” sense replaced the imperial citizenship concept of the *civis britannicus sum*⁶⁴ dominant at that period, which entailed the need to preserve the spirit of *Britishness* among the peoples of the Commonwealth.⁶⁵ Therefore, the *British Nationality Act 1981* currently in force, albeit amended, was the product of a shift in the issue of nationality from the imperial to the national level. Moreover, this Act resulted from the perceived need to create a common status for all citizens of the United Kingdom that was distinct from that of former colonies.⁶⁶

The British pluralistic and liberal tradition has shaped the granting of the British nationality according to a model defined by doctrine as “pluralistic” and “inclusive”, or “multicultural”⁶⁷, since integration is seen as a consequence of citizenship already achieved. In fact, the latter would be an instrument to reduce the areas of social and cultural marginalization and promote peaceful coexistence within society.⁶⁸ The UK has therefore built its nationality archetypal by facilitating the preservation and growth of the different ethnic-cultural identities present

⁶¹ Porena, *Pregi e criticità dei modelli di cittadinanza multiculturale*, op. cit. note 3, p. 105.

⁶² Porena, D., *Il problema della cittadinanza. Diritti, sovranità e democrazia*, Giappichelli, Torino 2011, p. 24.

⁶³ Joppke, C., *Immigration and the Nation-State. The United States, Germany and Great Britain*, Oxford University Press, New York 1999, p. 250-251.

⁶⁴ Porena, *Il problema della cittadinanza*, op. cit. note 62, p. 29.

⁶⁵ Milani, G., *Cittadini jure linguae. Test linguistici e cittadinanza in Europa*, Giuffrè, Milano 2017, p. 290.

⁶⁶ *Ibid.*, p. 294.

⁶⁷ Porena, op. cit. note 3, pp. 107-108.

⁶⁸ *Loc. cit.*

among its population.⁶⁹This approach has favored more flexible and less strict naturalization policies aimed at overcoming situations of discrimination.

British nationality in the current legal framework can be acquired through three ways: *iure soli*, *iure sanguinis* or by naturalization, whose residence time is shortened as it amounts to five years.⁷⁰

With regard to Italy, on the other hand, an ethnic-racial concept can be found in the principles governing the Italian nationality. In fact, within the Law of 5 February 1992, No. 91, *Nuove norme sulla cittadinanza*, there seems to emerge the idea that citizenship is not acquired, but rather transmitted “through heredity”, neglecting in fact the link with the territory, therefore with the community of co-citizens and with the national culture.⁷¹Thus, the identity and patriarchal element, which has permeated the original approach since the pre-unification codifications, seems to have been maintained despite the various changes that have taken place recently.⁷²For this reason, even in the current system, the criterion of transmission of citizenship *iure sanguinis* prevails and birth on the soil of the Italian Republic is a residual principle in relation to it.

Therefore, as far as the acquisition of the Italian *civitatis status* is concerned, there have not been any major innovations in the last thirty years, apart from some modernization measures, despite the fact that the migratory balance has reversed.⁷³Indeed, at a time when the Italian Republic began to welcome a considerable number of immigrants from other continents, there was a need to adapt and update the nationality act.⁷⁴More concretely, in relation to the stable presence of immigrants in the territory, alongside the principle of *ius sanguinis*, rules linked to birth in the territory and residence were introduced. Therefore, a profound process of «de-ethnicisation»⁷⁵ should have been developed. By contrast, Italy still seems shortsighted when faced with the need to change the requirements for access to its citizenship considering the new situation on Italian territory. For these reasons, Italy displays considerable rigidity in the way citizenship is acquired.⁷⁶

⁶⁹ *Ibid.*, p. 108.

⁷⁰ Porena, D., *Il problema della cittadinanza*, *op. cit.* note 62, p. 32.

⁷¹ Porena, D., *C'è spazio anche in Italia per una concezione “culturalista” della cittadinanza? Brevi profili comparatistici e spunti di riflessione in vista di una revisione della legislazione nazionale*, *federalismi.it*, n. 2/2012, p. 1-24, see p. 18.

⁷² *Ibid.*, p. 16-17.

⁷³ Porena, D., *Il problema della cittadinanza*, *op. cit.* note 62, p. 189-190.

⁷⁴ This change in migration flow in Italy is well described in Milani, G., *Cittadinanza e integrazione. L'influenza del diritto comparato sulla disciplina italiana e sulle proposte di riforma*, *federalismi.it*, n.4/2018, pp. 2-22.

⁷⁵ Margiotta, *op cit.* note 1, p. 245.

⁷⁶ Gatti, A., *Forme e contenuti delle nuove cittadinanze: una prospettiva di diritto comparato*, in Di Stasi, A., Baruffi, M. C., Panella, L. (eds.), *Cittadinanza europea e*

Italy can be studied as a kind of archetype of the models structured around the concept of “ethnic” citizenship.⁷⁷ The approach to nationality is restrictive; in fact, the provisions regulating the acquisition of Italian nationality and, in particular, the rules on the language skills that the individual must demonstrate are the result of an approach that considers the *status civitatis* as a privilege and a prize to be achieved.

In the face of legislation that tends to hinder the acquisition of citizenship, only weak forms of socio-cultural inclusion of the citizen candidate are provided for. It would thus seem that the legal system is uninterested in providing integration paths for the applicant, almost as if it considered the very difficulties of access to the naturalization procedure as a test to assess the applicant's actual predisposition to integration.⁷⁸

In view of that, it may be stated that Law No. 91/1992 proves to be, at the same time, too rigid and not very updated. In fact, one of the few incisive interventions in recent years was the introduction of Section 9.1, which made both naturalization *iure matrimonii* (under Section 5) and naturalization after years of legal residence on Italian territory (established by Section 9) subordinate to a good Italian language proficiency (B1 CEFR level). This intervention was proposed within the same “security decree” No. 113/2018 that introduced Section 10-*bis* inserting the possibility of revocation of Italian nationality due to terrorist conduct. More specifically, a broader citizenship reform introduced stricter nationality provisions.

Consequently, it clearly emerges in this context how the same *ratio* consisting of the desire to preserve ethnic identity and *italianità*⁷⁹ characterizes denaturalization

cittadinanza nazionale. Sviluppi normativi e approdi giurisprudenziali, Editoriale scientifica, Napoli 2023, p. 99-132, especially p. 123.

⁷⁷ Lippolis, V., *Cittadinanza e identità nazionale*, in *Fondazione Magna Carta*, 1 December, 2009: <https://fondazionemagnacarta.it/2009/12/01/cittadinanza-e-identita-nazionale/>, 17 March 2024. The author links the way citizenship is conferred to belonging to the same ethnic or racial community, in the view that individuals are the product of the nation. See also Porena, D., *Il problema della cittadinanza*, *op. cit.* note 62, p. 232.

⁷⁸ Gatti, *op. cit.* note 76, p. 126.

⁷⁹ Meaning “Italian-ness”, this word indicates the belonging to the Italian civilization, history, culture, and language, especially the consciousness of this belonging. Mirko Tremaglia was considered the representative of the “italianità” (see Ministero degli Affari Esteri e della Cooperazione Internazionale 2012). He was the Minister for Italians in the world who cared about the “cultural-historical” dimension of Italians, so much so that he cultivated with great zeal the memory especially of the sacrifices that Italians had to face in order to establish themselves. The memory of the events that saw the rooting of Italian communities in so many countries, keeping the link with the country of origin, in Tremaglia’s eyes was fundamental to strengthen the sense of identity and civic consciousness of the Italians themselves in their homeland

and naturalization. This approach is clearly dictated by the distinction of citizens into two classes with preferential treatment reserved for citizens “by blood” over those who, having acquired citizenship in the course of their lives and not having inherited it at birth, may lose it involuntarily for reasons of public security.

Compared to Italy, which recently introduced rules on the revocation of citizenship, the United Kingdom had long since provided for nationality requirements linked to an adequate knowledge of English or the successful completion of an examination on the knowledge of UK’s institutions, history, culture, political and economic system and, more generally, the fundamental principles of the country.⁸⁰

The United Kingdom’s belonging to the multicultural model, hence the tendency to include ethnic minorities through non-restrictive legislation, seems, however, to have produced a sort of “boomerang effect” whereby this country has used, from 2002 to the present day, several amendments aimed at progressively strengthening the discretionary power to revoke citizenship. This power, proper to the Secretary of State is broader than the one of the Italian Minister of the Interior, and it is mainly directed towards radicalized British citizens involved in terrorist acts. As a result, the British judges take an adamant position in considering legitimate the Home Secretary’s decision to deprive Shamina Begum of British nationality, despite the various appeals lodged by the young woman from 2019 to 2024, revealing a focus on legal formalism, rather than respect for the principles protected by the ECtHR.

Italy, on the other hand, seems to have adopted a different stance, which, on the contrary, belongs to the ethnic model of granting citizenship and has extremely rigid rules for the acquisition of Italian citizenship, introduced mainly through the “security decree”. It is true that in the provisions on the deprivation of Italian citizenship, a discriminatory element clearly emerges against “non-blood” citizens, but it is also true that the cases in which citizenship can be revoked as a punishment for terrorist actions are circumscribed.

From the comparative analysis, therefore, with respect to the adherence to a specific model for the acquisition of nationality, the possibilities of citizenship revocation are placed in a diametrically opposed position. On this view, restrictive requirements for the acquisition of nationality would correspond to a lower propensity to revoke it. Conversely, the provision of more flexible criteria for the acquisition of nationality would make denationalization easier. Thus, evaluations

⁸⁰ See the *life in the UK test*.

concerning the revocation of citizenship are today certainly influenced by the parallel moment of granting citizenship.

5. CONSLUSION: WITHDRAWAL OF CITIZENSHIP AS A MEANS OF DEFENSE AGAINST TERRORISM OR AS A WAY TO RESTORE BORDERS?

Withdrawal of citizenship as a sanction against radicalized citizens is undoubtedly a legitimate aim for states, which have the power to deprive individuals who act in a manner detrimental to the interests of the country of their citizenship. Indeed, the European Court of Human Rights has specifically noted⁸¹ how terrorist violence constitutes a serious threat to human rights. The ECtHR is indeed careful not to underestimate the extent of the danger posed by terrorism and the threat it poses to society. Consequently, the European Court of Human Rights considers it legitimate, in the face of such a threat, for States Parties to take a firm stance against those who contribute to terrorist acts. However, among the possible measures to fight terrorism, the revocation of citizenship is characterized by the particular gravity concerning the violation of the rights of the individual who is its target.

Following the rise of ISIS, it appears that an unprecedented form of banishment has reappeared. This is the case of the UK's citizenship deprivation system against people suspected of involvement in ISIS, without a criminal trial, or in any case with weak judicial enquiry and exceptionally low standards of proof. In reconstructing the function of denationalization in the UK, it seems evident a reference to a kind of ostracism, a *sui generis* practice of regulated exclusion of members of a community, by which the Athenian political power could decide to send certain citizens into exile as a means of constructing and reinforcing both state power and the norms of citizenship.⁸² This form of exclusion occurred where the behavior of these individuals was, according to common opinion, seriously contrary to the public interest in the protection of the state, but also such as to render the individual “unworthy” of belonging to the people.⁸³

Furthermore, it is possible to observe a “tendency to revoke” naturalization proceedings for reasons of public order that has taken hold in many western legal

⁸¹ European Court of Human Rights (ECtHR), *Said Abdul Salam Mubarak v. Denmark*, 74411/16, 22 January, 2019, pt. 44.

⁸² Gray, B., *From exile of citizens to deportation of non-citizens: ancient Greece as a mirror to illuminate a modern transition*, Citizenship Studies, Vol. 15(5), 2011, p. 565-582.

⁸³ For an in-depth analysis, see Forsdyke, S., *Exile, ostracism, and democracy: the politics of expulsion in ancient Greece*, Princeton University Press, Princeton 2005.

systems, apparently in response to the recruitment policies of *jihadist* terrorism, although it would sometimes seem to be a measure with a more political and symbolic valence than of a punitive nature. This statement gives the impression to fit the Italian case. In fact, the Minister of the Interior, using the measure of revocation against those who have acquired Italian citizenship during their life and have not inherited it by birth, does not seem to adequately solve the problem of affiliation to the Islamic State. For this reason, it could happen that an Italian citizen by birth perpetrates terrorist attacks in the national territory. The danger or threat to the system is therefore not effectively removed. On the contrary, what matters is answering the question: what would make denationalization compatible with the Italian legal system from the point of view of constitutionality?

This study shows the prevalence in the legislations of the countries analyzed of an exclusionary approach in the discipline of denationalization and a use of citizenship for defensive purposes with respect to the migration phenomenon. In particular, the regulations on the revocation of citizenship in the legal systems addressed would determine the risk of a certain ethnic group being disproportionately targeted by a revocation order, such as people of Arab origin or Muslim religion. These provisions seem to feed the construction of the *topos* of the “enemy” against whom to canalize the problem of public security within a process of criminalization and social stigmatization.

From this perspective, enemy is the one who has been excluded from the protection of the state, to which the rules of its legal system no longer belong, since he has involuntarily lost his *status civitatis* because of the ascertainment of specific criminal responsibilities.

It is precisely at this point that an exacerbation of the exclusionary function of borders becomes legitimate. The concept of the “exclusivity” or “exclusion” of citizenship returns, inevitably perpetrating an opposition between “us” and “them”.⁸⁴In this dynamic, it is always the government, with the predisposition of deprivation of nationality measures, that draws the boundary between “us” and “them”, between “friend” and “enemy” in the *Schmittian*⁸⁵sense of political

⁸⁴ Gupta, A., Ferguson, J., *Beyond “Culture”: Space, Identity, and the Politics of Difference*, in *Cultural Anthropology*, vol. 7(1), 1992, p. 6-23, emphasizes how apparently the world is divided into “ourselves” and “others”, a historically constituted division.

⁸⁵ Schmitt, C., *Le categorie del ‘politico’*. *Saggi di teoria politica*, in Miglio, G., Schiera, P., (eds.), *il Mulino*, Bologna 1972, pp. 111-112. In these pages Schmitt specified that the enemy is only the public enemy: enemy is the *hostis*, not the *inimicus* in the broad sense; the *πόλεμος* not the *εχθρός*”.

opposition, decreeing the possibility of losing the *status civitatis* as a result of a decision following the determination of a criminal responsibility.⁸⁶

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⁸⁶ Cavasino, E., *Ridisegnare il confine fra “noi” e “loro”: interrogativi sulla revoca della cittadinanza*, Diritto, Immigrazione e Cittadinanza, n. 1/2019, p. 1-37, especially p. 24.

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NAVIGATING POLITICS AT THE EDGE: SAFEGUARDING THE EU'S EXTERNAL BORDERS AMID IMMIGRATION DISCOURSE

ABSTRACT

This paper investigates the nexus between the effective protection of the European Union's (EU) external policies and the increasingly politicized discourse surrounding immigration while taking France as a case study. The EU has sought to fortify its external borders to manage migration flows, mitigate security risks, and uphold Schengen Area principles. However, these efforts have been accompanied by political debates and polarization, as member states grapple with divergent interests, values, and approaches to immigration governance. This abstract examines the rise of the politicization of immigration and the new challenges facing the EU's border protection measures, considering factors such as rising nationalism, populism, and external pressures. Through a systematic review of relevant academic literature and policy documents, this paper aims to discern patterns and trends in EU immigration discourse over time. By critically examining the language and messaging used by past politicians, it seeks to elucidate the evolution of attitudes and policies towards immigration within the EU. This comparative analysis provides valuable insights into the underlying factors shaping contemporary immigration discourse and policy trajectories. Additionally, by drawing on historical perspectives, this paper aims to contextualize current debates and shed light on potential future developments in EU immigration governance.

Keywords: Politicization, immigration, policies, France, borders

1. INTRODUCTION

EU migration policy has become a hotly debated issue in international and European politics, with numerous interpretations, perceptions, and narratives. The EU's role in migration policy has been a contentious topic for decades, with earlier waves of migration sparking discussions and policy changes. However, the current debate feels particularly heated due to the surge in migration from the Middle East and Africa starting around 2015. This influx coincided with a rise of populism in

Europe, leading to a strong politicization of the issue and intense debate about the EU's role and power in managing migration. This paper investigates the EU's role and power in terms of migration policy and the politicization process of the EU immigration policies.

It is highly argued that the EU is internally divided in this regard, the divisions within the European Union regarding migration are multifaceted and extend beyond simple political disagreements. While mainstream political forces may share similar approaches to migration, significant divisions persist based on various factors. Geographical disparities play a crucial role, with Southern and Eastern European countries often serving as primary entry points for migrants, leading to different perspectives compared to Northern and Western European counterparts. Economic factors also contribute, as countries with stronger economies prioritize attracting skilled workers, while economically weaker nations focus on regulating migrant influxes to protect domestic labour markets. Cultural and social attitudes vary across member states, influencing integration policies, while historical legacies and colonial ties shape perceptions of responsibility towards migrants. Furthermore, debates over migration intersect with discussions about national sovereignty and identity, with some countries emphasizing border control and identity preservation. These divisions underscore the complexity of migration politics within the EU and the challenges of reaching consensus on comprehensive migration policies despite shared overarching goals.

On the one hand, proponents of more liberal immigration policies, including many economists, present compelling arguments for why the EU requires more immigrants. One such reason is that the European population is ageing, which suggests that pension systems are under stress. Immigrant inflows are advantageous in this context as they may moderate the rate of ageing and, as a result, reduce pressures on the pension system. On the other hand, several European countries have substantial levels of anti-immigrant sentiment. According to Boeri,¹ negative attitudes towards immigration are first and foremost related to the impression of a monetary burden. Some Europeans are concerned that immigrants would drain state resources as recipients of large social transfers implemented in Europe to combat social marginalization. As a result, in addition to tightening migration laws, numerous national governments are restricting migrants' access to welfare.

The following examination of questionable practices regarding development and human rights is also indicative of the rhetoric-reality gap. This research will

¹ Boeri, T., *Immigration to the land of redistribution*, IZA Discussion Paper No. 4273, 2009, p. 1 - 42.

conduct a thorough analysis of the disparate positions held by member states and investigate internal disputes within the Union over immigration policy. The present paper aims to examine the many interests of European Union member states, including economic, social, and security considerations that have a substantial bearing on immigration regulations. The study aims to examine how these divergent national interests intersect or coincide, posing challenges or promoting agreement in the development and implementation of EU immigration regulations. It would also highlight how these nuances impact public discourse and political narratives both inside and beyond the EU, so contributing to the politicization of these policies.

2. THE INSTITUTIONAL FRAMEWORK OF THE EU IMMIGRATION POLICIES

First and foremost, the institutional arrangements and framework of EU migration and asylum policy need to be demonstrated, laying the groundwork for understanding the EU's role as an actor and power. Migration policy is a shared competence of the EU and the Member States, which means that both can pass legally binding legislation. It started with the 1985 Schengen Agreement, which abolished internal borders and established a common external EU border, requiring shared management², shaped internal migration policy. The Maastricht Treaty and the Amsterdam Treaty granted later the EU competence in the matter, with the 2009 Lisbon Treaty refining the division of competencies.³ The 1999 Tampere Presidency Conclusions, which established the goal of "establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention" (European Council, 1999), was a critical step as well. The Global Approach to Migration and Mobility was revised in 2011 and established the framework for international migration cooperation. Its four pillars are "legal migration and mobility, irregular migration and human trafficking, international protection and asylum policy, and maximizing migration and mobility's development impact."⁴ While EU laws establish frameworks for asylum, border management, and integration within member states, agreements with third countries play an important role in managing migration flows at their

² Faure, R.; Gavas, M.; Knoll, A., *Challenges to a comprehensive EU migration and asylum policy*. Overseas Development Institute, 2015.

³ European Parliament, Directorate-General for Internal Policies of the Union, Neframi, E., Division of competences between the European Union and its Member States concerning immigration, European Parliament, 2011.

⁴ European Commission, 2011., See: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/global-approach-migration-and-mobility-gamm_en, 23 May, 2024

source and along transit routes. These agreements often encompass various aspects, including cooperation on border control, readmission of irregular migrants, development aid, and diplomatic dialogue. Two types of agreements regarding migration governance between the EU and third countries are under the Global Approach: Mobility Partnerships and a Common Agenda on Migration and Mobility (CAMM). However, there are several reasons why the EU is perceived as a deeply divided actor on this issue.

For starters, the institutional structure creates conflict. In the case of migration policy, the European Commission has the authority to enact specific measures and negotiate agreements with third-party countries. However, the Council must agree, and Member States can decide whether to sign the Mobility Partnerships or accept a certain number of migrants, limiting the Commission's power. The policy agendas of the two institutions do not always coincide, as the Council prefers a more restrictive approach than the Commission. The Council, as an intergovernmental institution, is influenced by home affairs ministries, which in turn act on the Member States' often sceptical and negative perceptions of migration in their respective domestic policies.⁵

These feelings are amplified in the sensitive policy area of migration, which has significant implications for national sovereignty. On the other hand, international negotiations on migration policy are complex and frequently require issue linkage, which is problematic because the Commission does not always have full authority over other policy areas. When interests do not align, as in the EU's migration negotiations with other countries, issue linkage, defined as "the simultaneous discussion of two or more issues for joint settlement"⁶, is required. Typically, the EU seeks to cooperate on the readmission of irregular migrants, frequently including third-country nationals due to difficulties in determining a migrant's citizenship, which is marked by non-reciprocity and thus asymmetric interests. As a result, additional incentives are required to encourage negotiations and agreements.⁷ However, due to the nature of the competency division, the task of providing significant mobility incentives falls to Member States that may be hesitant to do so⁸ and this complicates negotiations even more. Furthermore, divergent attitudes towards migration can be found in Member States' domestic

⁵ Hampshire, J., *Speaking with one voice? The European Union's global approach to migration and mobility and the limits of international migration cooperation*, Journal of Ethnic and Migration Studies, 42(4), 2016, p. 571-586.

⁶ Poast, P., *Issue linkage and international cooperation: An empirical investigation*, Conflict Management and Peace Science, vol. 30, no. 3, 2013, p. 287.

⁷ Jurje, F., Lavenex, F., *Trade agreements as venues for 'market power Europe'? The case of immigration policy*, JCMS: Journal of Common Market Studies, year 52, no. 2, 2014, p. 320-336.

⁸ Hampshire, *op. cit.* note 5, p. 571-586.

politics. They experience varying levels of migration depending on historical ties and geographic location, which, in combination with labour market structures and demographics, influences their need for migration and thus their policies.⁹ The interests of Mediterranean countries, particularly Spain, Italy, and Greece, which have been heavily impacted by migrants arriving by sea, differ greatly from those of others who do not want to increase solidarity mechanisms. For example, one of these controversial policies and laws is the Externalized immigration policies and the Dublin Regulation.

2.1. Politicization through Externalized Immigration Policy

In practice, externalizing migration allows the EU to reduce its responsibilities and legal obligations at the expense of migrants and asylum seekers' lives. Externalization also highlights the gap between the EU's rhetorical commitment to norm promotion and the realist pursuit of its interests. This paradox is especially evident in the case of Turkey. Human rights violations and violations of democratic principles in Turkey are publicly condemned (European Commission, 2021). In the 2016 EU-Turkey Statement, the EU used incentives such as visa liberalization, the prospect of EU membership, and financial aid to reach an agreement. This allows the EU to avoid responsibility by facilitating the return of all irregular migrants who arrived on Greek islands from Turkey (European Commission, 2016b). The human rights implications are severe: Turkey does not recognize non-Europeans as refugees, and only Syrian nationals are eligible for temporary protection¹⁰, leaving individuals in a precarious position.

The question is whether the EU is then responsible for human rights violations occurring outside of its borders as a result of externalization presents a conundrum. There isn't a single, widely recognized legal framework that specifies how much the EU is legally liable for human rights abuses brought about by externalization policies that take place outside of its boundaries. However, the case of the European Convention on Human Rights (ECHR) creates a complex situation regarding externalization. While Article 6 of the Treaty on European Union (TEU) expresses a commitment to human rights, the EU hasn't fully joined the ECHR enforcement system. This results in an accountability gap, where the EU might avoid direct responsibility for human rights violations during externalization. However, the European Court of Human Rights rulings hold EU member states accountable for violations by partner countries, creating an uncertain legal

⁹ *Ibid.*

¹⁰ Frelick, B.; Kysel, I. M.; Podkul, J., *The impact of externalization of migration controls on the rights of asylum seekers and other migrants*, Journal on Migration and Human Security, year 4, no. 4, 2016, p. 190-220.

landscape. These externalization practices also damage the EU's reputation and limit its leverage to push for human rights reforms in partner countries. The stalled accession process between the EU and ECHR, fuelled by concerns about sovereignty and institutional fit, further weakens the bloc's ability to hold itself and its partners accountable. To move forward, the EU must reconcile its human rights goals with migration control. This could involve reinvigorating the accession process, strengthening human rights standards in externalization agreements, and increasing transparency to address potential violations. Ultimately, the EU needs a sustainable approach to migration management that respects human rights.

When it comes to other issues involving the EU's externalization initiatives, courts and other legal authorities may interpret and implement international law differently. While some advocate for a more expansive view of the EU's responsibilities, highlighting its duties under human rights legislation, others assert that it may be difficult to hold the EU legally accountable for extraterritorial abuses because of intricate political and jurisdictional considerations. Legal perspectives may differ and these topics are frequently debated by courts, international organizations and legal scholars. Therefore, the precise legal boundaries and liabilities regarding the EU's responsibility for human rights violations occurring outside its borders due to externalization remain subjects of discussion and legal interpretation as the EU's assistance in wrongful acts can only be condemned if the conditions were known, which is difficult to prove.¹¹ Similarly, non-governmental organizations (NGOs) and the UN High Commissioner for Refugees have criticized provisions such as the problematic 'safe third country' regulation, which allows the EU to deny asylum to those who have previously travelled through other countries deemed safe.¹² At best, highlighting this "defensive exclusion more than inclusive-cooperative security or strong support for human rights and democratic norms",¹³ can be interpreted as very contingent liberalism, exposing the EU's realist side.

As a result, externalizing migration allows the EU to reduce its responsibilities and legal obligations at the expense of migrants' and asylum seekers' lives. Externalization also highlights the gap between the EU's rhetorical commitment

¹¹ Vara, J. S.; Matellán, L. P., *The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries*. In T.M.C. Asser Press eBooks, 2021, p. 315–331.

¹² Borchelt, G., *The safe third country practice in the European Union: A misguided approach to asylum law and a violation of international human rights standards*, Columbia Human Rights Law Review, vol. 33, no. 2, 2002, p. 473-526.

¹³ Smith, M.H.; Youngs, R., *The EU and the global order: Contingent liberalism*, The International Spectator, vol. 53, no. 1, 2018, p. 53.

to norm promotion and the realist pursuit of its interests. Delving deeper into the details of the externalization of EU migration policy reveals a complex web of challenges and implications. One critical aspect is the reliance on third-country partnerships, often with nations in North Africa, the Middle East, or Sub-Saharan Africa, to stem migration flows before they reach EU borders. These partnerships typically involve providing financial assistance, technical support, and capacity building to strengthen border control, enhance asylum systems, and tackle migrant smuggling and human trafficking networks. However, such collaborations raise significant ethical, legal, and practical concerns. For instance, there are questions about the accountability and transparency of these arrangements, as they may lack clear mechanisms for oversight and monitoring of human rights abuses. Reports of migrants being subjected to violence, extortion, and exploitation in transit countries highlight the risks associated with externalization.

Furthermore, externalization strategies often rely on deterrence measures to dissuade migrants from embarking on perilous journeys to Europe. This may involve intercepting migrant boats at sea, conducting joint maritime patrols, or establishing processing centres in third countries. Critics argue that these measures prioritize border control over protection obligations, potentially leading to violations of international law, including the principle of non-refoulement. This can be seen in the case of Libya, externalization of EU migration policy has raised significant concerns about human rights violations. Libya has a well-documented history of human rights abuses, including reports of torture, arbitrary detention, and exploitation of migrants. Externalization efforts have involved cooperation with Libyan authorities to intercept migrant boats at sea and prevent them from reaching EU borders. However, this collaboration has led to migrants being detained in overcrowded and unsanitary detention centres, where they are subjected to abuse, extortion, and inhumane conditions. Many migrants lack access to legal representation and face prolonged detention without proper judicial oversight. The reliance on Libya as a partner in migration management has exacerbated human rights abuses and undermined efforts to protect the rights and dignity of migrants. Moreover, externalization can exacerbate existing inequalities and power dynamics between the EU and third countries, as negotiations may be driven by EU interests rather than mutual cooperation. There are concerns that externalization agreements may serve as a form of political leverage or bargaining chip, leading to the imposition of conditions that undermine the rights and dignity of migrants. Another critical issue is the lack of long-term solutions inherent in externalization strategies. While they may temporarily reduce migration pressures at EU borders, they fail to address the root causes of migration, such as poverty, conflict, and climate change. Without comprehensive approaches that address these underlying factors, externalization merely serves as a stopgap measure that

perpetuates cycles of vulnerability and instability for migrants and host communities alike.

In summary, while the externalization of EU migration policy may offer short-term benefits in terms of border control and migration management, its long-term implications raise serious ethical, legal, and humanitarian concerns. As such, there is a pressing need for a more holistic and rights-based approach to migration governance that prioritizes human dignity, protection, and solidarity across borders. This duplicity is especially evident in the case of Turkey as mentioned. Human rights violations and the breaking democratic principles in Turkey are publicly condemned (European Commission, 2021). In the 2016 EU-Turkey Statement, the EU used incentives such as visa liberalization, the prospect of EU membership, and financial aid to reach an agreement. This chasm also exists in migration policy. The rhetoric emphasizes the importance of migrant-centred policies that prioritize human rights and dialogue (European Commission, 2011). In its discussions with African partners, the EU claims to be focusing on migration management and creating opportunities for mobility and legal migration. In practice, the restriction of irregular migrations is more important. As a result, the EU prioritizes its interests in Mobility Partnerships with other countries. Its commitment to creating opportunities for legal migration remains ambiguous, whereas its demands for border management and readmission from other countries are very specific and concrete.¹⁴

2.2. The Dublin Regulation and the Complexities of EU Asylum Politics

Europe's one of the main issues regarding immigration is its struggles to see itself as a full-fledged actor in the international arena. The reasons for this void are well known: rather than sharing a common understanding of what the European Union's role is or should be in the world, the 27 Member States hold opposing views, depending on their respective histories or political, diplomatic, or economic clout in the world. If we look at the "largest" European countries, their positions on the concept of "European power" - because this is the issue at hand - are all extremely different: Often hesitant (Germany), and increasingly ambiguous from France's perspective, even though it has championed this cause in the past. In the face of so many contradictions, the European Union frequently appears as an absent or ambiguous actor. Even without attempting to replace its members' national diplomacy, which would be unrealistic, Europe appears to struggle to establish a complementary foreign policy to that of the States.

¹⁴ Zanker F., *Managing or restricting movement? Diverging approaches of African and European migration governance*, Comparative Migration Studies, 7(17), 2019, p. 1-18.

The Dublin regulation, which is responsible for examining asylum applications was supported by several countries like France that defended the principle of the first-entry country being liable for processing asylum claims. This regulation, however, has been criticized for placing a disproportionate burden on countries like Greece, Italy, and Spain, leading to debates and tensions within the EU about burden-sharing and reforming this system. France has actively participated in talks and negotiations around the Dublin Regulation at EU forums. Through these interactions, France has backed the regulation's duty allocation principles and participated in discussions about how to put them into practice. Position in EU Summits and Council Sessions: French delegates have advocated for the Dublin Regulation and talked about its implementation at EU summits and Council sessions. They are trying to get member states to agree on upholding the regulations' fundamentals.

Overall, the EU's involvement in the externalization of migration policy through controlling immigration demonstrates a self-interest approach. As a result, Mobility Partnerships, or CAMMs, are means of externalizing because other states take on the responsibility of readmitting migrants, tightening border controls, or establishing migration centres. This practice raises several ethical concerns. At its core, the goal is to "prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims".¹⁵

To deepen our comprehension of this approach, France serves as a pertinent case study for elucidating the disjunction between policy rhetoric and politicized discourses.

3. POLITICIZATION AND THE NEW IMMIGRATION BILL IN FRANCE

3.1. On a National level

Given its long history and varied cultural legacy, France has always struggled with the complicated problems relating to immigration laws and their politicization. Being a country at the intersection of Europe and having a transcontinental colonial heritage, historical, social and political factors have influenced France's immigration policies. Immigration discussions have been crucial to French

¹⁵ Frelick, B.; Kysel, I. M.; Podkul, J., *op. cit.* note 10, p. 190 - 220.

identity, national security, and social cohesion from the post-war period to the present.

France's shortages of labour during World War II led to the country's post-war reconstruction efforts being fuelled by the recruitment of foreign labours, mostly from former colonies in North Africa and sub-Saharan Africa. This signalled the start of a surge of immigration that would have a significant long-term influence on French politics and society. However, the immigration wave also increased hostilities, sparking discussions about multiculturalism, integration and national identity. As a result, different immigration laws were enacted by succeeding French administrations with the goals of controlling immigration, encouraging assimilation, and resolving social injustices. The challenges of immigration have been navigated, yet French immigration laws have frequently become entangled in controversy and politicization. This goes back to the fact that France's immigration policies exhibit a remarkable dynamism, characterized by frequent reforms occurring roughly every 2-3 years since the 1980s. This legislative churn, documented by the Brookings Institution, creates a landscape of uncertainty for immigrants aiming to settle in France. For instance, a skilled worker navigating the process under one set of regulations might suddenly face entirely new requirements just a few years later, impeding their integration prospects. Public opinion on immigration in France mirrors this complexity, with reports suggesting both a rise in negativity towards increasing immigration levels, as well as a growing positive sentiment. This ongoing debate underscores the challenge of striking a balance between openness and concerns over economic and social impacts. For a deeper understanding of this issue, resources such as French government websites providing details on current immigration policies, reports by the French Observatory for Migration Studies (OFCE), and polls conducted by reputable institutions like the Pew Research Centre offer valuable insights into evolving public attitudes and policy dynamics.

In recent years, the politicization of immigration has intensified, fuelled by factors such as globalization, terrorism threats, and the resurgence of nationalist movements. Debates over immigration have become increasingly polarized, with competing narratives shaping public discourse and political agendas. From debates over religious attire to discussions on asylum and border control, immigration remains a contentious and divisive issue in French politics. Some of these immigration policies that generated debate and controversy are related to legislation and regulations, such as changes to deportation and asylum procedures. For instance, the new law called the "Law for Strengthening and Controlling Immigration and Integration", also known as the "LOMINI" for its French abbreviation was passed in December 2023 and aims to control immigration and improve integration in France was considered by lawmakers to be a questionable

law that threatens to limit the rights of asylum seekers and migrants. The draft law is scheduled to be debated in the French Senate beginning November 6, 2023, and was sent to the National Assembly in December. The bill was introduced in February by the government, but the debate was postponed in March due to a lack of support in parliament (Immigration Et Intégration - Sénat, n.d.).¹⁶

One of the law- affected areas is the Right of Soil (*jus soli*) vs. Right of Blood (*jus sanguinis*). Before December 2023, any child born on French soil automatically became a French citizen at age 18, regardless of their parents' immigration status. This was the traditional form of *jus soli*. As of December 2023, a new immigration law partially dismantled the automatic path to citizenship. Now, children born in France to at least one foreign parent who was not born in France need to apply for citizenship between the ages of 16 and 18. They must also fulfil residency requirements during their childhood and meet other conditions. It is important to indicate that this applies only to children with one foreign parent not born in France. If both parents were not born in France, the child still automatically becomes a citizen under the older rule. Parts of the new immigration law, including the changes to *jus soli*, have been struck down by the French Constitutional Council. The final verdict may still be pending. It's difficult, however, to say definitively whether further changes to *jus soli* are planned. The current government has expressed support for the current system, but the issue remains politically charged.

Also, the current family reunification policy where France allows spouses, registered partners, and minor children of legal residents to apply for family reunification visas has witnessed more rest tightens the criteria for family reunification, making it more difficult for some families to qualify. This has been criticized by immigrant rights groups, who argue that it will further strain family ties and lead to more irregular immigration.

Some of the point of the 2023 bill contain other concerns such as:

- Provisions to weaken existing safeguards for both foreign nationals ordered to leave France and those forcibly removed from the country.
- A provision that allows the withdrawal or refusal of a residence permit for someone who violates "the principles of the Republic."
- Provisions to limit asylum seekers' right to appeal and administrative procedures relating to migrants.
- Inclusion of a limited provision to end migrant child detention under the age of 16, which would not protect children in French overseas territories, particularly Mayotte, or those detained at borders or airports.

¹⁶ Immigration et intégration - Sénat. (n.d.). Sénat. <https://www.senat.fr/dossier-legislatif/pjl22-304.html>, 23 May, 2024

The draft law would allow authorities to issue a departure order even if a person falls into a category or categories protected by existing law. Existing safeguards apply to personal and family circumstances, such as those who arrived in France before the age of 13, have a long-term residence in France, or are the spouse or parent of a French national. ("France: Immigration Bill Threatens Rights," 2023).¹⁷

According to Human Rights Watch, the draft law would allow authorities to disregard these safeguards if the foreign national's behaviour is deemed to be "a serious threat to public order," despite the bill's use of the terms "serious threat" and "public order" (France: Immigration Bill Threatens Rights, 2023). The bill would also eliminate protections for expulsion, which is an administrative measure used to remove a foreign national from French territory. An expulsion order can be issued under current law against a foreign national living irregularly in France who is deemed a "serious threat to public order," including if they demonstrate behaviour considered detrimental to the "fundamental interests of the state," "engage in terrorism," or "encourage discrimination, hate, or violence." Foreign nationals are currently protected from expulsion in the same way that they are protected from an order to leave France. The bill broadens the circumstances under which people in those protected categories can still be expelled if they are deemed a "serious threat to public order," removing one of the few safeguards for those in the so-called protected categories. A person can be expelled under current law if they have served at least a 5-year prison sentence. Anyone convicted of an offence punishable by a 5-year prison sentence could be expelled under the proposed law, even if they received a much shorter sentencing to the contentious nature of this legislation.

The French Constitutional Council also reviewed the proposed legislation and identified specific measures that violated fundamental rights principles. These measures included restrictions on family reunification for certain immigrants and limitations on access to social benefits for undocumented immigrants in specific situations. Due to the Council's objections, the government was forced to revise the law, removing these unconstitutional provisions. Consequently, the final version of the law passed in January 2024 was significantly less restrictive than originally proposed. It now focuses on managing foreign worker stays and offering a pathway to documented status for some undocumented immigrants in specific labour sectors. This case demonstrates the importance of checks and balances

¹⁷ France: Immigration Bill Threatens Rights, Human Rights Watch, November 6, 2023, See: <https://www.hrw.org/news/2023/11/06/france-immigration-bill-threatens-rights>, 23 May, 2024

within a legal framework, particularly when navigating sensitive topics like immigration policy.

3.2. On the EU level

The immigration policies of the European Union are becoming more politicized due to the impact of the nation's immigration priorities and concerns at home on EU-level debates. France has historically had a big say in how EU immigration policies are shaped and affected, and it has also done a lot to politicize those policies. France's participation in EU immigration policies has frequently been influenced by its security interests, internal issues, and geographic location as a migrant front-runner. France has made it explicitly the necessity of strict border controls and security protocols inside the European Union. The country's position on EU immigration laws has been impacted by problems including organized crime, terrorism, and the perceived dangers of uncontrolled migration. These worries frequently result in calls for more stringent border surveillance and security-focused measures, which can polarize discussions over migration inside the EU. In the current landscape, countries like Sweden and Germany, historically known for their more open immigration policies, have witnessed a notable shift towards embracing stricter anti-immigration stances. Political parties such as the Sweden Democrats and Alternative for Germany (AfD) have gained traction by advocating for tighter border controls and reduced immigration rates. This change can be attributed to a variety of factors, including rising concerns about cultural assimilation, economic strain on social welfare systems, and perceived threats to national security. As a consequence, these policy shifts have had profound effects on the respective countries, leading to heightened social tensions, increased polarization within communities, and reshaping the political landscape as populist movements gain momentum.

Despite the controversy of the new immigration bill of France in 2023, it does not directly affect EU immigration and immigration policies as it applies only to national legislation within France. However, it can indirectly influence the broader conversation and approach to immigration within the EU in several ways. The French bill, being controversial and seen as restrictive by some, can fuel discussion and criticism of similar tendencies in other EU countries. This could lead to calls for reforms and stricter immigration policies across the bloc. The potential domino effect also is considered an indirect factor since some EU countries might see the French bill as a precedent and introduce similar legislation, tightening overall immigration regulations within the EU.

Furthermore, the focus on controlling irregular migration within France could indirectly push for strengthening internal EU borders, impacting the free movement of people within the Schengen and it could affect also migration patterns within the EU. Non-EU immigrants who are unable to obtain legal status in France may attempt to move to other Schengen countries, potentially leading to increased pressure on internal borders.

On the other hand, the emphasis on integration measures in the French bill might inspire other EU countries to prioritize similar policies aimed at fostering social cohesion among existing migrant populations. However, it is important to emphasize that the EU has its own separate immigration framework which member states must adhere to and that France's national law cannot override these EU regulations. There are diverse views on immigration within the EU, therefore, the French bill might not be universally welcomed or replicated. Eventually, the ultimate impact of the French bill on broader EU immigration policy will depend on various factors, including ongoing political debates and future legislative initiatives.

4. CONCLUSION

When it comes to migration policy, the EU is more of a realist, self-interested power than the 'Normative Power Europe' that it likes to portray itself as a civilian actor promoting universal values and human rights.¹⁸ This criticism is not limited to migration but also to other issues, forming a pattern. For example, the EU proclaims to be a supporter of human rights, peace and democracy and thus has human rights clauses in treaties. Those, on the other hand, are used selectively and rarely in countries where the EU has interests. Realist interests include historical ties, commercial interests, such as energy provision, or security concerns, as some nations are perceived as allies in the fight against terrorism. As a result, from a realist standpoint, sanctions become a foreign policy tool that is used only when there are aligned interests rather than promoting liberal norms regardless of potential personal gains and losses.¹⁹ As a normative actor, the EU has a poor compliance record and because of the public commitment to norm promotion, this rhetoric-reality gap is more pronounced than for other actors.²⁰

¹⁸ Manners, I., *Normative power Europe: A contradiction in terms?*, JCMS: Journal of Common Market Studies, year 40, no. 2, 2002, p. 235-258.

¹⁹ Del Biondo, K., *Norms or interests? Explaining instrumental variation in EU democracy promotion in Africa*, Journal of Common Market Studies, year 53, no. 2, 2015, p. 237-254.

²⁰ Carbone, M., Keijzer, N., *The European Union and policy coherence for development: Reforms, results, resistance*, European Journal of Development Research, year 28, no. 1, 2016, p. 30-43.

Tensions exist within the institutional arrangement as a result of competing interests at the supranational and intergovernmental levels. As it is a shared competence and Member States retain important capacities, the Union's power is weakened, especially in negotiations requiring issue linkage. Reluctance to pool sovereignty, disparities in domestic attitudes towards migration, and competing narratives exacerbate the divide. More importantly, on this policy issue, the EU fails to be the normative, liberal power that it is frequently portrayed as, instead promoting its interests. This realist behaviour is visible in the disparity between migration rhetoric and political standpoints which demonstrates the role of politicization. Furthermore, development funds are being misappropriated for security purposes, and aid is being made contingent on migration cooperation. The externalization of migration policy has serious implications for human rights. As a result, how normative considerations of morality and universal values are sacrificed in favour of self-interest will be investigated.

The politicization of EU immigration policies emerges as a complex interplay of divergent national interests, internal divisions within the Union, and evolving socio-political dynamics. This research has scrutinized the intricate web of factors contributing to the multifaceted nature of immigration policymaking, offering crucial insights into the EU's approach to managing one of its most contentious issues. At its core, the European Union's immigration policies grapple with the amalgamation of member states' politically diverse interests. Economic concerns, such as labour market demands and demographic shifts, often collide with social considerations encompassing cultural preservation and integration challenges. Simultaneously, security imperatives fuel debates surrounding border control and the management of irregular migration. These competing interests, often shaped by historical, geographic, and socio-economic factors, culminate in internal divisions within the Union.

Europe must be able to define a small number of goals that are aligned with its most pressing interests as the Union's actions risk being inconsistent. At the moment, Europe must make choices and focus its efforts where they are most needed: restoring stability to a volatile Neighbourhood, "reviewing" a transatlantic partnership that requires a new dynamic as we approach a change in the White House (the 2024 elections), and determining the type of relationship (not naive but realistic) to develop with Russia in the context of the Ukrainian crisis and other future uncertainties.

This research illuminates the stark disparities among member states, manifesting in varying attitudes toward immigration. Northern and Western European nations, with robust economies, tend to prioritize labour market needs and are comparatively more open to immigration. Conversely, some Eastern and Southern

European countries, grappling with economic fragility and different socio-cultural landscapes, exhibit more stringent immigration stances, emphasizing border security and sovereignty. These divergent perspectives catalyze heated debates within EU institutions, hindering a consensus on unified immigration policies. Disagreements frequently surface during negotiations, impeding the swift enactment of comprehensive strategies. As a result, the EU often navigates through a patchwork of policies, compromises, and temporary solutions rather than presenting a cohesive and enduring approach to immigration management. Moreover, the politicization of EU immigration policies extends beyond internal deliberations. It reverberates through national political arenas and public discourse, shaping electoral agendas and influencing public opinion. Political actors strategically utilize immigration as a rallying point, amplifying narratives that resonate with their constituents. This further deepens the polarization within member states and across the Union, impacting not only policy formulation but also societal cohesion and trust in EU institutions.

In conclusion, the research underscores that the politicization of EU immigration policies is not solely a consequence of external pressures or global migration trends but an intricate interplay of divergent national interests, internal divisions, and evolving socio-political dynamics. Understanding and addressing these complexities are imperative for the European Union to navigate this contentious issue effectively. A concerted effort toward fostering dialogue, seeking common ground, and balancing diverse interests is crucial to moving towards more cohesive, inclusive, and sustainable immigration policies within the EU.

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Review paper

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PROTECTION OF THE REPUTATION OF THE LEGAL ENTITIES IN TERMS OF HUMAN RIGHTS

ABSTRACT

Whether there is a right to reputation or not can no longer be a matter of question since the status of the right to reputation has been developing for decades from the context of the two articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR). However, the right to protection is not listed among the rights and freedoms in the ECHR, it is now organically included in particularly two articles. Having Article 8 and Article 10 suggesting that the right to reputation should be understood as human right, the European Court of Humans Rights (hereinafter: ECtHR) established the value of the right to reputation. Through the way, not only natural persons are included but legal entities are also given the right to reputation due to several judgements by the ECtHR. This paper focuses on essential steps of the way how the right to reputation has still been developing due to the cases the ECtHR.

Keywords: *right to reputation, legal entity, human rights*

1. INTRODUCTION

In terms of the question of the right to reputation, it is needed to reach to the Universal Declaration of Human Rights (hereinafter: Declaration) which is a milestone in the history of humankind. The Declaration has globally and regionally inspired human right treaties as a permanent basis. In Europe, the European Convention on Human Rights (hereinafter: ECHR) was the first measure to make the human rights stated in the Declaration binding. However, the right to reputation is not so evidently fundamental as it seems to be.

2. THE RIGHT TO PROTECTION OF REPUTATION BEING CONSIDERED AS A HUMAN RIGHT

As for the protecting reputation, ECHR Article 12 provides that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.¹ However, ECHR is a milestone in the European countries, regarding human rights and freedom, privacy was included in the document but not reputation. Regarding the right to respect for private and family life Article 8 of the ECHR provides: “(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”²

However, ECHR was summoned with the intention of having parallel importance with the Declaration, Article 8 in the ECHR is different to the relevant Article 12 in Declaration with the omission of the phrase of “nor to attacks upon his honour and reputation”. According to the preparatory documents of the ECHR, the omission is deliberate in the view of “not to refer to all provisions of the Article in question but only to those specifying the content of the freedom provided for in the resolution.”³

Expressly, the ECHR refers to reputation only in Article 10. It guarantees the right to freedom of expression and identifies a number of proportionate restriction on the exercise of the right providing that “(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (...) (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety,

¹ Art. 12. of the Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette - International Conventions, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010, 13 /2017 (hereinafter: ECHR)

² Art. 8. ECHR

³ Preparatory work on Article 8 of the European Convention on Human Rights, Council of Europe, 1956., p. 3, <https://www.echr.coe.int/documents/d/echr/echrtravaux-art8-dh-56-12-en1674980>, 11 December, 2023.

for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The Article 8 and Article 10 consequently includes the protection of reputation but as a degree of the right of the protection of reputation is not given as a human right.

3. THE RIGHT TO PROTECTION OF REPUTATION DEVELOPED BY ECtHR CASES

The last 20 years, the ECtHR held that the protection of reputation institutes the part of the right manifested in Article 8. In many cases⁴, the ECtHR began to act towards the person’s reputation as part of the right to respect for private life by Article 8.⁵ Mentioning only the case of *Lindon v. France*, it was a good example of the new approach setting out in the judgement: “(...) freedom of speech has on occasion shown excessive sensitivity and granted over-protection in respect of interference with freedom of expression, as compared with interference with the right to reputation. (...) The right to reputation should always have been considered as safeguarded by Article 8 of the Convention, as part and parcel of the right to respect for one’s private life.”⁶ (...) “The right to reputation, having the same legal status as freedom of speech, as explained above, is entitled to effective protection so that under any circumstances any false defamatory statement, whether or not it is malicious and whether or not it may be inevitable for an uninhibited debate on public issues or for the essential function of the press, should not be allowed to remain unchecked.”⁷

On the other hand, in the case of *Pfeifer v. Austria* it was stressed out “that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights concerning the Austrian courts’ failure to strike a fair balance between the protection of freedom of expression and the right of the applicant to have his reputation safeguarded.”⁸

⁴ E.g. *Cumpana v. Romania* [2004], *Chauvy v. France* [2004], *White v. Sweden* [2007], *Lindon v. France* [2008], *Pfeifer v. Austria* [2009]

⁵ <https://inform.org/2010/10/26/is-there-a-right-to-reputation-part-1-heather-rogers-qc/>, 11 December, 2023.

⁶ *Lindon v. France* [2008]

⁷ *Ibid.*, p. 42.

⁸ Press release issued by the Registrar, European Court of Human Rights, Chamber Judgement, *Pfeifer v. Austria*, 2007.

Despite there is an ongoing battle between the protection of reputation versus the freedom of expression, nowadays the protection of reputation is gaining more importance in the light of threats in the digital space. The over-important nature of the online sphere results severe harms of the reputation not only natural persons but also legal entities. Just as natural persons corporations also have reputations to protect, as a reference paper based e.g. the law-cases in the UK emphasizes it.⁹ It concludes that it is more difficult for companies to bring claims, a number of court decisions in the UK showed that companies were able to assert their rights under the law to protect their reputation. However, the common law requires companies to establish that the words complained of have caused or are likely to cause 'serious financial loss'. Whether the loss is 'serious', it depends on the particular circumstances assessed on a case-by-case-basis. In other words, there is no 'one size fits all' approach to assessing whether the loss suffered, or likely to be suffered is 'serious'.

Reputation is important because it can influence how others interact with the legal entity. It can also impact the entity's success or opportunities. On the other hand, the term of reputation can be understood as opinion and estimation about someone. It measures the character of a certain and entity i.e. how much respect, admiration, credibility, or trust the entity has earned. The law is obliged to protect the image someone appears to have. Also, "reputation capital is the value of the intangible assets of a business, such as reviews, word of mouth, brand identity, and stakeholder trust, and reputation capital can increase the perceived value of products and services, stock price, and company valuation".¹⁰

Based on several business reports and references, reputation is an essence of any business, therefore corporate reputation is the valuable intangible resource of a company. It can be measured in money, financial and social influences, as well as share in the market. There is no question to dispute that in the digital age the reputation is at a higher risk, and it can be easily damaged in the online world via reviews, comments, as well as on the social media platforms. For a business the consequences of reputational damage can go to the be extreme including termination of business. What is more, it can take a long time and can be costly to recover from reputational damage. Significant resources might be needed for rebranding, relaunching a public relations campaign, reimplementing new policies and procedures, and regain the trust of its stakeholders.

⁹ <https://www.financierworldwide.com/protecting-corporate-reputation>, 11 December, 2023.

¹⁰ Kent Campbell: *What is Reputation?*, <https://blog.reputationx.com/whats-reputation>, 27 December, 2023

Non-pecuniary damage was linked to company's reputation in the judgement of the ECtHR¹¹, saying "(...) non-pecuniary damage suffered by such companies may include heads of claim that are to a greater or lesser extent 'objective' or 'subjective'. Among these, account should be taken of the company's reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team".¹²

In Hungary based on the Civil Code¹³, sanctions for violating personality right can be no-fault sanctions, grievance award¹⁴ and liability for damages¹⁵. Based on the verity of infringement anyone whose personality rights have been overstepped may claim the establishment of the violation by the court. In case of the violation be ceased, the person committing the violation is forbidden from continuance, or is obliged to give appropriate satisfaction and publicity at his own expenses. In case of the violation established, several scenario of the ending can happen i.e. ending of the injurious situation, the restoration to the situation existing prior to the violation, as well as the destruction of things produced through the violation or the depriving such things of their unlawful character. In Hungary, grievance award was introduced that means that any person whose personality rights have been violated may claim a grievance award for non-material harm done. Conditions of pay grievance award are governed by the rules on liability for damages. In this case, apart from the fact of the violation is established, there is no need to prove further loss, and the court determines the amount taking into account the circumstances of the case, in particular the gravity, the occasions and the degree of the fault of the violation. Liability for damages is also on option in Hungary when the person who suffers the damage of his personality rights can claim compensation from the person committing the violation.

¹¹ Case of *Cominersoll S.A. v. Portugal*, 35382/97, Judgement 6 April, 2000.

¹² *Ibid.*, Point 35. Further in the Concurring opinion of Judge Rozakis joined by Judges Sir Nicolas Bratza, Caflisch and Vajic: "I do not see why, in matters of compensation, the Court should be obliged to deviate, even partly, from such an approach and why it should be prevented from accepting, without any reservation, implied or otherwise, that a company may suffer non-pecuniary damage, not because of the anxiety or uncertainty felt by its human components, but because, as a legal person, in the society in which it operates, it has attributes, such as its own reputation, that may be impaired by acts or omissions of the State."

¹³ Act V of 2013 on the Civil Code, Magyar Kozlony, Hungary Official Journal, Vol. 31. 26 February, 2013., p. 2382-2664.

¹⁴ *Idib.*, 2:52.

¹⁵ *Ibid.*, 2:53.

3.1. Protecting the Right to Reputation of the Legal Entities

Cases are brought before the ECtHR for violations of Article 10 of the ECHR. Andras Koltay says that on some issues the ECtHR raises the bar for freedom of expression.¹⁶ Andras Koltay concludes that the ECtHR's practice has focused on issues such as the protection of political speech, the discussion of public affairs and the freedom to criticise public figures. At the same time, Andras Koltay also argues that for other types of opinions, such as hate speech, the ECtHR does not set a standard and is content to lay down certain general principles. Speaking about the future of gatekeeper regulation, Andras Koltay notes that individual states – and on this topic he is not only talking about EU member states, but also gives examples from US case law – do not have the exclusive right to set limits on freedom of expression. In his conclusion it is stated that the history of the right to freedom of expression is entering a new phase, which will be no less exciting and unpredictable than any that has gone before.

3.2. There is No Full Responsibility for Comments in the Online Sphere

The ECtHR primarily censures the applicant for defamation of a legal person on civil or criminal grounds. The exception is where the legal person has brought proceedings under Article 8 ECHR to protect its reputation. The ECtHR has extended the scope of Article 8 to cover the protection of reputation. It may also be concluded that, in weighing the freedom of expression protected under Article 10 against the restrictions imposed by the national state for the protection of reputation, the ECtHR, with its language tilted towards expression, considered the domestic restrictions excessive and unnecessary in a democratic society, widening the scope of freedom of expression. The ECtHR later included Article 8 ECHR in its analysis, thus weighing reputation directly against freedom of expression. The ECtHR accepted that Article 8 ECHR also protects the reputation of legal persons. It further stated that there is a difference between a commercial company's interest in its commercial reputation and the reputation of an individual. While the latter may affect dignity, the commercial reputational interest lacks a moral dimension. On this basis, the ECtHR has taken a more tolerant approach to opinions concerning legal persons in the face of perceived offences.

The reputation of a legal person in the online space was affected by the case of Hungarian Content Providers Association (hereinafter: HCPA) and Index.hu Zrt.

¹⁶ Koltay, Andras: *Gatekeepers of the Internet and the Article 10 of the ECHR: the new subject of the press freedom (Az internetes kapuorok es az Emberi Jogok Europai Egyezmenyenek 10. cikke: a sajtoszabadsag uj alanyai)*, Allam-es Jogtudomány, 2017, Vol. 4., p. 129-140.

v. Hungary. On 5 February 2010, HCPA published an opinion entitled 'Another unethical business conduct on the internet' on two real estate websites operated by the same company. According to the opinion, the two real estate websites initially offered users a free advertising service for 30 days. However, the service became subject to a fee after the 30-day free period had expired, and users were not notified in advance. This was possible because the service provider could unilaterally modify the terms of use, which users had accepted when registering on the website. The opinion pointed out that the service provider only removed outdated advertisements and personal data from the website once the due fees had been paid. The opinion noted that the provider's conduct was unethical and misleading. Users responded to the review in pseudonymous user comments, which included vulgar language. The index.hu news portal's Prodigal Lobster consumer blog also wrote about the opinion, and the full text of the opinion was published. Index.hu also published the comments of users who reacted under a pseudonym. The company running the websites concerned has brought an action for defamation. The Hungarian courts found both HCPA and Index.hu Zrt. liable for publishing the offending opinions and comments, but disputed that the defendants were merely intermediary service providers. The Hungarian courts found that the offensive opinions and comments were capable of damaging the reputation of the applicant. The applicants lodged a constitutional complaint on 3 January 2013, essentially challenging the court's decision to hold them responsible for the content of the comments, but the Hungarian Constitutional Court dismissed the complaint.

The applicants brought the proceedings for breach of the freedom of expression under Article 10 ECHR, in which the ECtHR also addressed the legal liability of the operators of internet news portals for opinions and comments published. The ECtHR stressed that the right to protection of reputation is protected by Article 8 ECHR as part of the right to respect for private and family life.

The Court of Justice must ascertain whether the national authorities have struck the right balance between the sometimes conflicting values protected by the ECHR when considering the necessity of interfering with freedom of expression in order to "protect the reputation and rights of others". Tension may arise between freedom of expression, protected by Article 10 ECHR, on the one hand, and the right to privacy enshrined in Article 8 ECHR, on the other. The Court has held that, in substance, the rights guaranteed by Articles 8 and 10 ECHR deserve equal respect.

In the case of Hungarian Content Providers Association and Index.hu Zrt. v. Hungary, the ECtHR also examined the legal basis and purpose of the interference and whether it was "necessary in a democratic society". The ECtHR found that the underlying article concerned the business practices of two major real estate

websites which were misleading and prejudicial to their customers. This implied that the public interest justified allowing a debate on a public matter that involved many consumers and internet users and provided for an exchange of information. In the past, the conduct in question had already led to a number of complaints to consumer protection bodies and a number of proceedings had been brought against the two companies operating real estate websites. The article cannot be considered as a publication without factual basis or as a publication that provokes unduly offensive comments. The ECtHR considered that it was a matter of value judgments or opinions. They were in fact a condemnation of business conduct, and were partly influenced by the personal frustration of the commentators at being deceived by the company in question. The terms used in the comments were offensive, one was explicitly vulgar, but the use of vulgar terms is not in itself determinative of the value of an offensive expression. In the ECtHR's view, style as a form of expression forms part of communication and as such is protected together with the content of the expression. The ECtHR also found that, although the expressions used in comments belong to a low stylistic stratum, they are frequently used in communications on internet portals. At the time the article and the contested comments were published, investigations into the applicant company's business conduct were already underway.

In this context, the ECtHR was not convinced that the comments in question could have had any further significant impact on the attitudes of the consumers concerned. The Hungarian courts did not assess whether the comments had reached a sufficient level of seriousness and whether they had been published in a manner which might actually harm the professional reputation of a legal person. The ECtHR found a breach of Article 10 of ECHR. In its decision of 2 February 2016, the ECtHR ruled that a content provider cannot necessarily be held liable for comments posted by users for the user content placed on them. The case is of particular importance because in June 2015 the ECtHR ruled the opposite in the highly publicised and considered landmark case of *Delfi AS v. Estonia*, which held that websites and portals could be liable for comments posted on their sites.

3.3. The Public Interest is a Priority over the Protection of Reputation

Protecting the reputation of businesses was also a central issue in the case of *OOO Regnum v. Russia*. The electronic news portal *OOO Regnum* reported information disseminated by local police and the state consumer protection agency about mercury poisoning following the consumption of a branded juice-based drink. The drinks, marketed under the brand name in question, were produced by at least two legal entities, one of which has filed a defamation case against *OOO Regnum* in the commercial court. The Russian Commercial Court ruled against *OOO*

Regnum, finding that three news items published on a website owned by the plaintiff company had damaged the business reputation of a private commercial company and ordered OOO Regnum to pay substantial damages to the private commercial company which produced them. OOO Regnum alleged infringement of its right to freedom of expression.

The ECtHR examined whether the interference with the applicant company's right to freedom of expression was "necessary in a democratic society". Whether the interference in question was proportionate to the legitimate aim pursued and struck a fair balance between the right of a commercial company to a reputation and the right of an electronic media to freedom of expression. While the right to protection of reputation is guaranteed by Article 8 ECHR as part of the right to respect for private life, the concept of 'privacy' is a broad one, encompassing the physical and mental integrity of the individual. However, an attack on a person's reputation must reach a certain level of seriousness.

When deciding on a conflict between two equally protected rights under the ECHR, the ECtHR has to weigh the competing interests, in relation to which the ECtHR has considered as relevant principles, for example, whether the publication contributed to the public interest dispute, the degree of awareness of the person concerned, the prior conduct of the person concerned, the content, form and consequences of the publication. As the applicant is a commercial company, the ECtHR notes that it has previously accepted that the interest of a private company in protecting its reputation may be equivalent to a wider economic interest. According to the ECtHR, it is for the State to consider what means it provides in national law for a company to challenge the truthfulness of allegations that threaten its reputation. However, the ECtHR emphasises that there is a difference between the interests of the reputation of a legal person and the reputation of an individual as a member of society. Based on the ECtHR, when the right to freedom of expression in the media must be weighed against the right of a commercial company to a reputation, the relevant criterion is whether the publications in question concerned a matter of public interest, and what the content, form and consequences of the publications were. Before weighing the general interest in protecting public health and providing information about potential health risks, the interest and duty of the media to report on such risks and the reputational interest of a commercial company, national courts must convincingly demonstrate the existence of an overriding social need. As for the ECtHR, the district court in Russia did not put forward any arguments as to why it attached greater importance to the reputational interests of a commercial company than to the public's interest in being informed about a serious matter such as mercury poisoning caused by commercial foodstuffs. The ECtHR found that the Russian court had not provided

'relevant and sufficient grounds' to justify an award of damages for the alleged damage to the reputation of a commercial company.

3.4. Protection of Reputation in Cases of Legal Entities and Natural Persons

The recent judgment of the ECtHR in *Freitas Rangel v. Portugal* is an important milestone in the assessment of the reputation of legal persons. *Freitas Rangel* was convicted of insulting a legal person for statements he made about the professional association of judges and prosecutors during a hearing before the Parliamentary Committee on Ethics, Society and Culture, which affected freedom of expression and the Portuguese media. He was also fined euro 6,000 and ordered to pay euro 25,000 to both associations in compensation for non-material damage. The applicant made contested statements about freedom of expression and the media and how they are influenced by politics and the economy. He alleged that the associations shared confidential information with journalists in order to further their political aims. These issues were matters of general community interest and their discussion before Parliament was part of a political debate, an area where a high level of protection of freedom of expression is generally guaranteed and the authorities thus have a narrow margin of discretion. Furthermore, as the parliamentary session was open to the public and journalists were present, it is not surprising that in the days following his speech his statements were widely disseminated in the online media. Immediately after the sitting, he was interviewed by a journalist who was present during his speech and was interviewed again the next day, in which he reiterated his views.

Reputable and well-known professional bodies, professional associations of judges and prosecutors, have often been invited to present their views to Parliament on legislative proposals concerning the functioning of the judiciary. The domestic courts have assumed that the plaintiff only made statements of fact which he knew to be false and defamatory against these bodies. However, most of his allegations consisted of personal opinions, the veracity of which could not be proven. The only contested factual allegation was his claim concerning the sharing of confidential information, which could be considered to be more general in nature about the sharing of information between the two organisations. Although probably an exaggeration and therefore unfortunate wording, his comments could be interpreted as illustrative of a wider social criticism of the misuse of the judiciary in politics and the media, a public interest issue which he believed to be true.

The ECtHR found that protecting the reputation of a legal person did not have the same force as protecting the reputation or rights of individuals. The ECtHR also

noted that the journalist applicant, as an invited expert, had expressed his views before a parliamentary committee, but that his speech should have been afforded a higher level of protection, as parliamentary and political speech. Notwithstanding this, the Lisbon Court of Appeal based its decision solely on the right to the reputation and good name of the bodies, without taking due account of or examining in detail the criteria of the ECtHR case-law. Finally, the ECtHR referred to the fact that the amounts of compensation were disproportionate to any damage to the reputation of the bodies. Such severe sanctions may have a dissuasive effect on the exercise of freedom of expression by persons invited to participate in debates on matters of general public interest and institutions. In conclusion, the ECtHR's judgment of 11 April 2022 held that the Portuguese courts had not provided relevant and sufficient reasons to justify interference with the applicant's freedom of expression and had exceeded their discretion to restrict public interest litigation. Furthermore, there was no reasonable proportionality between the restriction of the applicant's right and the legitimate aim pursued. However, it was important to note that the protection of the reputation of a legal person does not have the same force as the protection of the reputation or rights of individuals.

4. CONCLUSION

As a conclusion we can come to the point when it can be stated that the protection of the reputation was not that obvious as it seemed to be at the first sight. Especially, as for the protection of the reputation of the legal entities. Through a relatively long way with the development of society that can change throughout time along with the society progresses, based on the judgements of the ECtHR understanding Article 8 and Article 10 of the ECHR, the freedom of expression and the protection of reputation are linked as two fundamental concepts. We can also declare that a democratic society is not able to function properly without adequate protection given to both, although the protection of reputation is not given the status of a human right in the ECHR. In terms of the developed and incorporated right to reputation, it is evident that one should not exist without the other and only together they can safeguard our fundamental and included rights and freedoms.

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