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ABOUT THE JOURNAL

Bratislava Law Review is an international legal journal published by the Faculty of Law of Comenius University in Bratislava, Slovakia (till the end of 2019 it was published by Wolters Kluwer in cooperation with the Faculty of Law of the Comenius University in Bratislava). It seeks to support legal discourse and research and promote critical legal thinking in a global extent. The journal offers a platform for fruitful scholarly discussions via various channels – be it lengthy scholarly papers, discussion papers, book reviews, annotations or conference reports. Bratislava Law Review focuses on publishing papers not only from the area of legal theory and legal philosophy but also other topics with international aspects (international law, EU law, regulation of the global business). Comparative papers and papers devoted to interesting trends and issues in national law that reflect various global challenges and could inspire legal knowledge and its application in other countries are also welcomed.

The Bratislava Law Review has adopted multidisciplinary and interdisciplinary, but also cross-disciplinary coverage. This is also the reason why members of the Bratislava Law Review Editorial Board are experts both in legal sciences and legal practice as well as in related disciplines – to ensure cross-cutting knowledge throughout all legal sciences, branches and fields of law. The Editorial Board consisting of foreign scholars-experts in the above fields, as well as a double-blind external peer review, provide a guarantee of the high standard of the contributions published. In this way, the Bratislava Law Review hopes to provide space for presenting a diversity of opinions and approaches to up-to-date legal issues and problems, aiming in this way to contribute to an overall rise in standards of legal science in the CEE region.

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HOW TO ENFORCE THE FUNDAMENTAL VALUES OF THE EUROPEAN UNION? / Jaap W. de Zwaan

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1. INTRODUCTION

This article contains the written, and slightly elaborated, version of a presentation the author made to the Bratislava Legal Forum Conference of 22 April 2021.

The topic of the Bratislava Legal Forum Conference: Law in Crisis and Crisis in Law, inspired the author to make a presentation about the state of play, in the European Union (hereafter also: EU or Union), with regard to the respect of its fundamental values.

The respect of the EU's fundamental values concerns a crucial problematic. Full respect is a precondition to allow an organisation to function properly.

2. THE EU AS A 'COMMUNITY OF LAW'

The Union is a rule-based organisation and European integration as a process is practised through law. The doctrine of the Court of Justice regarding the European Union

as a community of law has been confirmed in the Les Verts vs Parliament judgment of 1986 (Case-294/83).[1] Notably its consideration 23 is of importance.[2]

Actually, important components of the concept - the reference is in particular to principles such as supremacy, direct effect, indirect effect and interpretation in conformity - have been developed over the time in the jurisprudence of the Court of Justice. Some crucial, and at the time ground-breaking, Court decisions date back to the beginning of the integration process: the judgments Costa/ENEL and Van Gend & Loos.[3]

3. THE FUNDAMENTAL STANDARDS AND PRINCIPLES OF THE EU

All Member States of the Union are member of the Council of Europe and party to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[4] The commitment of the EU to accede to the European Convention (hereafter also: ECHR) is laid down in Article 6(2) of the Treaty on European Union (TEU).[5] Besides, according to Article 6(3) TEU the fundamental rights as guaranteed by the ECHR constitute general principles of EU law.[6]

On 7 December 2000 the Union adopted its own catalogue of fundamental rights and freedoms, the Charter of Fundamental Rights of the European Union. At that time the text had a purely political character. The Charter was adapted on 12 December 2007 and became legally binding by virtue of a reference, agreed upon in the framework of the negotiations for the Lisbon Treaty, in the Treaty on European Union.[7]

The fundamental values of the Union are listed in one of the first provisions of the Treaty on European Union, Article 2 TEU. In that provision it is said: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the

[1] CJEU, judgment of 23 April 1986, Parti écologiste "Les Verts" v European Parliament, C-294/83, ECLI:EU:C:1986:166. See about this subject matter also Mańko (2017).

[2] Consideration 23 reads: 'It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures, which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.'

[3] CJEU, judgement of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, C-26-62, ECLI:EU:C:1963:1; and CJEU, judgement of 15 July 1964, Flaminio Costa v E.N.E.L., C-6/64, ECLI:EU:C:1964:66.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms is available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed on 04.06.2021).

[5] That provision reads: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'

[6] Article 6(3) TEU reads: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

[7] See for the most recent version of the Charter: OJ C 326, 26.10.2012, p. 391–407. Article 6(1) TEU reads as follows: '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.'

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.'

At the same time the values of Article 2 TEU reflect the minimum conditions of EU membership: see the reference in Article 49 TEU.[8] That means that, when not respecting (anymore) these fundamental values and principles, the basis of a Member State's EU membership gets lost.

In connection with Article 2 TEU the provision of Article 4(3) TEU, reflecting the obligation of Member States to cooperate with the Union,[9] as well as the doctrine developed by the Court on the basis of that treaty provision, is equally important.

4. THE RISKS OF NON-RESPECT OF THE FUNDAMENTAL VALUES

Full respect of the EU's fundamental values all over the European Union - in the individual Member States as well as in the framework of the Union itself – assures the proper functioning of the organisational structures at the national as well as the EU level. That process has to be monitored closely and carefully.

In that sense the non-respect of the EU's fundamental values and principles may easily undermine, not only the working of democracy and good governance in the Member State concerned, but also the functioning of the EU institutions as well as the effectiveness and credibility of the Union as an organisation. In such a case the basic structures of the EU will be negatively affected, with all its consequences for acts of maladministration and the possible illegality of acts adopted by the institutions.

Such consequences should be prevented to occur at all price.

5. MONITORING AT EU LEVEL

5.1. The Rule of Law Framework

In recent years the Union has been confronted with events in some EU countries, which revealed threats to the rule of law. The Commission reacted in 2014 to these events by adopting a 'rule of law' framework to address such threats.[10] The objective of framework is to prevent emerging threats to the rule of law to escalate to a point where

[8] The whole Article 49 TEU reads: 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.'

[9] The wording of that provision is as follows: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

[10] Communication of 11 March 2014 from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158 (accessed on 04.06.2021).

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the Commission will be forced to trigger the mechanisms of Article 7 TEU. This is done in the first instance through dialogue with the EU country concerned.

The 2014 framework establishes a three-stage process:

- Commission assessment;
- Commission recommendation;
- Monitoring of the Member State's follow-up to the Commission's recommendation.

5.1 EU Justice Scoreboard

The EU Justice Scoreboard is an established tool of the Commission to analyse the trends in the justice systems in the Union. It is a comparative overview of the efficiency, quality and independence of justice systems in all EU Member States.

The 2020 Scoreboard was presented on 10 July 2020.[11] The Commission observed a continued improvement in the efficiency of justice systems in a large number of Member States. On the other hand, according to the results of an Eurobarometer search the perception of judicial independence amongst citizens in a number of Member States has continued to decrease.

5.2 Annual Rule of Law Reports

As from the autumn of 2020 annually Rule of Law reports will be drawn up by the Commission, reporting about the situation in the Union as well as in all 27 Member States. The first general report dates from 30 September 2020.[12] On that same day assessments of the situation in each Member State were published.[13]

The Rule of Law report covers four pillars: the justice system, the anti-corruption framework, media pluralism and other institutional issues related to checks and balances. For each pillar, the methodology practised by the Commission recalls the EU law provisions relevant for the assessment. It furthermore refers to opinions and recommendations from the Council of Europe. The country chapters rely on a qualitative assessment carried out by the Commission. They focus on a synthesis of significant developments in the Member State concerned since January 2019 and are introduced by a brief factual description of the legal and institutional framework relevant for each pillar.

The reports are the result of close collaboration with the Member States and rely on a variety of sources. For example, the Commission received written input from all Member States and from over 200 stakeholders. The Commission furthermore conducted more than 300 virtual meetings with the Member States, stakeholders and

[11] Communication of 10 July 2020 from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, 2020 EU Justice Scoreboard, COM(2020)306 final. Available at: https://ec.europa.eu/info/sites/default/files/justice_scoreboard_2020_en.pdf (accessed on 04.06.2021).

[12] Communication of 30 September 2020 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, COM/2020/580 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0580 (accessed on 04.06.2021).

[13] European Commission (2020a). 2020 Rule of law report - Communication and country chapters. Available at: https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en (accessed on 04.06.2021).

civil society. The methodology followed will continue to guide the preparation of the next editions of the annual Rule of Law report.[14]

The rule of law country reports are discussed in Council.[15]

6. INSTRUMENTS TO ENFORCE THE EU'S FUNDAMENTAL VALUES

6.1 Political Dialogue

In case tensions with the respect of the fundamental values of the Union do occur, political discussions can -or, rather, should- be started at political level, so the level of the European Council, the Council and/or the European Parliament.

Such dialogues do not require a specific legal basis in the treaties. They are inherent to policy-making, governed by principles such as good governance and/or good administration. And, of course, such discussions can also be held on the basis of the annual Rule of Law reports of the Commission, referred to a moment ago.

Now, obviously political discussions can only be useful when they are substantive and in depth in nature, and when specific conclusions are drawn. In practise, however, one gets the impression that the discussions in the Council organised on the basis of the 2020 Rule of Law report of the Commission are rather 'pro forma' and superficial. If that impression is correct, the whole instrument can hardly be considered credible. Anyway, here seems to be room for improvement.

Anyhow, political dialogue as a first means of action is the right approach. The way a country is managed is after all essentially a responsibility of politicians. That being so, such dialogues can only be useful if there is sufficient political will on the part of those politicians.

6.2 The Article 7 TEU Procedure

A special mechanism to combat breaches of the values of Article 2 TEU is included in Article 7 TEU, in practise referred to as the 'nuclear' option (see for the full text of Article 7 the separate frame).

The procedure reflects a careful and multilayer approach. Two stages can be distinguished: the determination of a 'clear risk' of a serious breach of the values of Article 2 (paragraph 1), and the determination of a 'serious and persistent breach' of those values (paragraph 2). On the other hand, the institutional modalities are restrictive in nature, which makes the overall credibility of the procedure doubtful.

Article 7 TEU

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the

[14] See for a further explanation: European Commission (2020b). 2020 Rule of law report. The 2020 Rule of law report monitors significant developments relating to the rule of law in all member states. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2020-rule-law-report_en (accessed on 04.06.2021).

[15] The (informal) Conference of European Affairs Ministers of 20 April for example discussed the findings with regard to Germany, Ireland, Greece, Spain and France.

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Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Once Article 7 is applied, the procedural stages are well defined:

- Dialogue with the Member State concerned: first paragraph;
- Recommendations of the Council: first paragraph;
- Determination by the Council of a clear risk of a serious breach: first paragraph;
- Determination by the European Council of the existence of a serious and persistent breach: second paragraph;
- The possibility to suspend certain membership rights, including the right to vote in the Council: third paragraph.

Special institutional arrangements are foreseen with regard to all stages of the decision-making under the Article 7 framework. For example, a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission is required to launch the procedure of Article 7. The decision making regarding 'a clear risk' of a serious breach of the values of Article 2 requires a majority of four fifths of the members of the Council (in practise that comes down to the support of 22 Member States) plus the consent of the European Parliament. Then, in order to be able to determine 'the existence of a serious and persistent breach' of the Article 2 values, a proposal by one third of the Member States or by the Commission is needed. The

decision-making in that regard requires a unanimous position in the European Council plus, also in this case, the consent of the European Parliament.[16]

In the context of the application of Article 7 TEU the Court of Justice has only limited jurisdiction. The Court can assess whether the procedural stipulations of the provision have been applied correctly.[17]

All in all Article 7 reflects essentially a political procedure. Moreover, as was hinted at earlier, in view of the extraordinary decision making modalities the provision is in practise difficult, not so say impossible, to apply.

In the meantime though, the Article 7 TEU procedure has been triggered twice: the first was started by the Commission in December 2017 against Poland, the second was initiated by the European Parliament in September 2018 against Hungary.[18]

6.3 Infringement Procedure

Of course, the traditional instrument to combat violations by Member States of their treaty obligations - violations of the EU's fundamental values can be qualified as such - is the so-called infringement procedure. The arrangements are included in the Articles 258, 259 and 260 of the Treaty on the Functioning of the European Union (TFEU). Actually, there do exist two variants of infringement procedures. The most practised is the one of Article 258 TFEU, in the context of which the Commission starts legal proceedings against a Member State. The arrangements of the other one are to be found in Article 259 TFEU, in the context of which another Member State acts as the initiator.

The infringement procedure has several stages, informal and formal ones:

- the Commission addresses the Member State in a written form;
- the submission of observations by the Member State concerned;
- the Commission delivers a so-called reasoned opinion;
- the Commission brings the matter before the Court.[19]

Once a judgment has been given, Article 260, first paragraph, TFEU becomes relevant. That provision states: 'If the Court of Justice (…) finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court'. In case of non-compliance with a judgement, the Commission can start a second procedure. In the framework of that second procedure the Court can, upon the initiative of the Commission, impose a lump sum or penalty payment on the Member State concerned.[20]

[16] For sure, in those contexts the position or vote of the Member State in question shall not be taken into account: Article 354, first paragraph, TFEU. The European Parliament acts by a two-third majority of the votes cast and representing the majority of its members: Article 453, fourth paragraph, TFEU.

[17] Article 269 TFEU, that reads: 'The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article. Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.'

[18] See European Commission (2020c). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2020 Rule of Law Report. The Rule of Law Situation in the European Union, 30 September 2020, COM(2020)580 final, p. 25. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=EN (accessed on 04.06.2021).

[19] In case a Member State initiates the procedure, it shall first bring the matter before the Commission: see Article 259, second, third and fourth paragraph, TFEU.

[20] Article 260(2) TFEU.

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Therefore, the Court has the final say at all stages.

Already several examples of infringement procedures, launched by the Commission, can be given where violations of human rights, fundamental freedoms and/or the rule of law values were at stake.[21]

6.4 Preliminary Ruling Procedure

The preliminary ruling procedure of Article 267 TFEU is the unique framework for cooperation between national courts and tribunals on the one hand, and the Court of Justice in Luxembourg on the other. In such a case the initiative is taken by a national court or tribunal, once doubts do exist with regard to the interpretation of provisions of EU law that have been invoked in the proceedings before that court or tribunal. The preliminary ruling procedure consists of a written and oral stage. Member States and the EU institutions can present their opinion about the question(s) that have been submitted to the Court. In view of its role to ensure the correct application of EU law,[22] the Commission always presents observations.

Before giving judgment, one of the Advocates-General who assist the Court, presents his/her opinion on the case concerned to the Court.[23]

Notably in the context of the obligation of Member States to provide for an effective legal protection system as referred to in the first paragraph of Article 19 TEU,[24] and of which the full independence of the national judiciary is an inherent element, already extensive experiences have been gained with the application of the preliminary ruling procedure.[25]

After the Court has given judgment, the national judge who referred the case to Luxembourg, decides the matter in light of the elements contained in the decision of the Court. In such a way the Luxembourg Court has the final say with regard to the correct interpretation and application of EU law provisions.

6.5 Regulation 2020/2092

A new instrument of secondary law, the Regulation 2020/2092 dated 16 December 2020, is of application since January 2021. The objective of the regulation is to protect the financial interests of the Union against violations, by Member States, of the rule of law. The regulation is formally called the 'Regulation on a general regime of conditionality for the protection of the Union budget'.[26] In concrete terms the regulation

[21] Recent examples are respectively CJEU, judgement of 24 June 2019, Commission v Poland, C-619/18, ECLI:EU:C:2019:531; CJEU, judgement of 5 November 2019, Commission v Poland, C-192/18, ECLI:EU:C:2019:924; CJEU, judgement of 18 June 2020, Commission v Hungary, C-78/18, ECLI:EU:C:2020:476; CJEU, judgement of 6 October 2020, Commission v Hungary, C-66/18, ECLI:EU:C:2020:792; and CJEU, judgment not yet delivered, Commission v Poland, C-791/19, opinion of the Advocate-General of 6 May 2021, ECLI:EU:C:2021:366.

[22] Article 17(1) TEU.

[23] Article 252 TFEU.

[24] The second sub-paragraph reads: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

[25] See for recent examples: CJEU, judgment of 17 December 2020, 'Openbaar Ministerie' v L and P, joined cases C-354/20 PPU and C-412/20 PPU,, ECLI:EU:C:2020:1033; and CJEU, judgment of 2 March 2021, A.B. and Others v Krajowa Rada Sądownictwa and Others, C-824/18, ECLI:EU:C:2021:153.

[26] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ EU L 433 I/1 of 22 December 2020. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R2092&from=EN (accessed on 04.06.2021).

aims to protect the EU's financial interests against any kind of fraud, corruption and conflict of interest from the side of Member States.

According to the mechanism, appropriate measures shall be taken when breaches of the principle of the rule of law in a Member State affect, or seriously risk affecting, the sound financial management of the EU budget or the protection of the EU's financial interests 'in a sufficiently direct way'.[27] In such a situation, the Commission 'shall' submit a proposal for an implementing decision to the Council, for adoption by qualified majority.[28]

Although there is not yet a practice that can be referred to, certainly the Member State that will be the addressee of such a 'sanction' decision, can lodge an appeal against that measure with the Court of Justice in Luxembourg.[29] So, also here the Court of Justice will have the final say.

Having said that, for Hungary and Poland this file is a controversial one. Both Member States deny that the EU possesses the competence to develop a system enabling the Commission to establish violations of the rule of law. For that reason they launched on 11 March 2021 an appeal with the Court of Justice against the adoption of the entire regulation.[30]

As mentioned, the focus of the new rule of law mechanism concerns in the first instance the protection of the EU's financial interests. The regulation thus is a special instrument. It cannot be considered a tool to combat breaches of the rule of law generally speaking.

7. THE MECHANISMS OF THE COUNCIL OF EUROPE

Since all Member States are members of the Council of Europe and party to the European Convention on Human Rights (ECHR), invoking the mechanisms of that Council can equally be an option to combat violations of human rights and fundamental freedoms.

In that regard, also in the Council of Europe context political discussions in the Committee of Ministers and/or the Parliamentary Assembly are the first remedies to think of.

The launching of an interstate application with the European Court of Human Rights in Strasburg is another. According to Article 33 ECHR namely 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.'

It seems that so far no Member State of the EU has invoked one of these mechanisms against another Member State. In a way that is surprising, since the values covered by Article 2 TEU can basically be protected by applying the mechanisms of the Council of Europe as well.

[27] Article 4(1). Although it is not immediately clear what is to be understood by 'sufficiently direct', the breach apparently has to be a serious one.
[28] Article 6 (9-11).
[29] By virtue of Article 263 TFEU.
[30] CJEU, Hungary v European Parliament and Council of the European Union, case C-156/21, available at: https://curia.europa.eu/juris/document/document.jsf?docid=240021&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=13846077 (accessed on 04.06.2021); and CJEU, Poland v European Parliament and Council of the European Union, case C-157/21, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=240048&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8482096 (accessed on 04.06.2021).

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Moreover, the Union is supposed – actually, that is a treaty obligation - to accede to the ECHR.[31] That accession has not been achieved yet.

8. THE SITUATION IN THE EU AT PRESENT

8.1. The Scope of the Problematic

Problems with regard to the respect of the EU's fundamental values and violations thereof have occurred, and still occur, in quite a number of Member States.

Dialogues at the political level to have these events discussed are ongoing. And, as has been mentioned,[32] the annual Rule of Law reports of the Commission, inter alia reporting about the rule of law situation in the Member States, will be discussed in Council. Organising political discussions is the right approach, as long as these discussions are thorough and in depth. Conclusions have to be drawn, and plans for improvement developed.[33]

On the other hand several legal proceedings have been brought before the Court of Justice in Luxembourg, either at the initiative of the Commission (Article 258 TFEU, the infringement procedure) or of a national court requesting the Court for guidance regarding the interpretation of the EU's fundamental values (Article 267 TFEU, the preliminary ruling procedure). More particularly Poland and Hungary have been, and still are, involved in serious discussions, more particularly regarding the respect of the independence of the national judiciary, the respect of the independence of the media, the freedom of education and the functioning of non-governmental organisations.[34]

Moreover, as stated earlier,[35] two complaints based on Article 7 TEU - the one against Poland, the other against Hungary – have been initiated. Meanwhile the Court dismissed on 3 June 2021 Hungary's action against the European Parliament's resolution triggering the Article 7 procedure.[36]

8.1 Historical Considerations

When assessing the merits of the rule of law situation in individual Member States, one must take into account that each Member State has a different history and traditions. Likewise all Member States have experienced different economic developments over the time.

In that context all Member States have developed their own system of government and democracy. Notably most of the new Member States have suffered under the severe consequences of the Cold War and communism. Only relatively recently

[31] Article 6(2) TEU. See also supra, chapter no. 3 of this paper.
[32] Supra, subchapter no. 5.3 of this paper.
[33] See also supra, subchapter no. 6.1 of this paper.
[34] A first prominent judgment regarding the principle of judicial independence is: CJEU, judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, C-64/16, ECLI:EU:C:2018:117. Other judgments regarding that same subject matter are: CJEU, judgment of 25 July 2018, LM, C-216/18 PPU, ECLI:EU:C:2018:586; CJEU, judgment of 7 February 2019, Carlos Escribano Vindel v Ministerio de Justicia, C-49/18, ECLI:EU:C:2019:106; CJEU, judgment of 19 November 2019, A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982; CJEU, judgment of 26 March 2020, Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others, Joined Cases C-558/18 and C-563/18, ECLI:EU:C:2020:234.
See for some recent cases and decisions, supra footnote 21 (infringement procedures) and footnote 25 (preliminary rulings procedure).
[35] Supra, subchapter no. 6.2 of this paper.
[36] CJEU, judgment of 3 June 2021, Hungary v European Parliament, C-650/18, ECLI:EU:C:2021:426.

an authoritarian style of regime and dictatorship was replaced by democracy and the market economy model in these countries.

8.2 The Economic Inequalities in the EU

The continuous economic inequalities existing between West and East in the Union are another important factor in this discussion. The reference here is more particularly to differences as regards standards and costs of living. In that sense, these inequalities can have an impact on the timing and the way Member States organise their societies as well as their systems of governance.

Again, we touch upon a phenomenon that concerns more particularly the new Member States rather than the older ones. Certainly, there are ways and means to overcome these differences. Think for example at the establishment of a programme similar to the EU New Generation Programme, adopted to assist the Member States to recover from the economic damage caused by the Covid-19 pandemic.[37] A similar programme could be developed in order to create more equality between the Member States in the Eastern and Western part of the Union. The financing of national projects and massive investments, by public and private entities, could be useful instruments to assist the Member States concerned. Anyway, as long as these inequalities between East and West do continue to exist, we must exercise some patience when looking after the full respect, by the Member States, of the EU's fundamental values.

8.3 The 'Red Lines'

On the other hand, what to do if a Member State clearly does not comply (anymore) with the minimum requirements of membership of the Union? Then the basis for its membership gets lost.

So, at least we have to draw some 'red lines' that we cannot allow a Member State to cross. The guarantee of full independence of the judiciary and of the media is of crucial interest in this regard. Both entities – the judiciary and the media - do not belong to the policy-making infrastructure of a country. They rather control the functioning of the partners - the legislator and the executive – involved in policy-making. The judiciary and the media must be enabled to perform these controlling tasks in complete independence.

9. WHO ARE THE ACTORS?

From the discussion it follows that in the EU context all relevant initiatives to survey the respect of human rights and the rule of law by the Member States have so far been launched by institutions, either the Commission or the European Parliament.

However, looking after the respect of fundamental values is not simply an issue to be compared with monitoring the implementation of EU law obligations by Member Statas, such as the correct and timely application and enforcement of EU regulations and directives. Supervising the respect of human rights and the rule of law, and actively countering violations thereof, is therefore not just a responsibility of the Commission or

[37] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ EU L 433 I of 22 December 2020, pp. 23-27. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.433.01.0023.01.ENG&toc=OJ%3AL%3A2020%3A433I%3ATOC (accessed on 04.06.2021).

the European Parliament. Here rather a primary responsibility of the Member States themselves is at stake.

What is more, the Member States have founded the Council of Europe and the European Union. It were also the Member States who have developed Europe's catalogues of fundamental rights and values, either in the framework of the Council of Europe (the European Convention of Human Rights) or the European Union (the Charter of Fundamental Rights).

Therefore, the EU's fundamental values reflect as it were the constitutional traditions common to the Member States, and vice versa. For this reason Member States should become much more active in surveying the respect of those values than happens today.

10. SANCTIONS

10.1 Suspension of Membership Rights

Once serious violations of the Union's fundamental values do occur, the suspension of 'certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council' – that is the wording of the third paragraph of Article 7 TEU - comes to mind.

So, essentially the focus is on membership rights. In that regard, the treaty thus specifies that the suspension of voting rights of the government concerned in the Council is the first option to think of. That certainly is an effective sanction. It would mean that, whereas the Member State concerned can, at least in principle, still participate in the discussions about policy-making, it is not able to influence the decision-making about the substance matter concerned.

The suspension of payments from one of the EU funds is another possibility. Here a comparison can be drawn with the effects of the application of the new instrument to protect the financial interests of the Union against violations of the rule of law.[38]

10.2 Does an Ultimate Sanction – Expulsion – Exist?

That said, does an ultimate sanction exist, so suspension of membership or, even, expulsion of the Member State concerned?

Contrary to the situation of a Member State aiming to withdraw from the Union,[39] there is no explicit legal basis for the expulsion of a Member State.

On the other hand, suspension of membership rights is a broader concept than referring, as is done in Article 7(3) TEU, to the suspension of voting rights in the Council. Therefore, at least in theory it seems that the wording 'suspension of certain of the rights deriving from the application of the Treaties to the Member State in question' includes suspension of the right of representation, thus the right of the Member State concerned to be represented in the institutions.

Such a consequence would imply in practise that, unlike in the case when voting rights are suspended, the Member State in question is not even able anymore to

[38] Supra, subchapter no. 6.5 of this paper.
[39] Article 50 TEU.

participate in the discussions about policy making of the Union. Basically, the result would come down to an expulsion of that Member State.

Remains the question of decision-making. That issue is slightly more complicated to handle. That is to say, of course the requirement of 'consent' of the European Parliament[40] is not problematic. It is only positive that the Parliament is fully involved in the decision making regarding such politically sensitive issues.

Rather the decision-making modalities in the (European) Council require a closer look. Because, whereas on the one hand there is a reference - in Article 7(3) TEU, with regard to the suspension of membership rights - to qualified majority voting, the determination of a serious and persistent breach of the Article 2 values – the issue mentioned in Article 7(2) TEU – requires unanimity (again, the vote of the Member State in question not being taken into account).[41]

Now, in a way it is logical that the decision-making modalities regarding the issuing of sanctions are simpler compared to the ones related to the preliminary determination of a serious violation of the Article 2 values. On the other hand, the requirements to determine such a violation are excessive. Indeed, in light of the nature of the decision concerned, it is not acceptable that all other Member States possess as it were a right to veto such a decision.

To that extent the arrangements of Article 7(1) TEU, according to which a majority of four fifths of the members of the Council (so, 22) will suffice to determine a clear risk of a serious breach by a Member State of the Article 2 values, are more appropriate. One also could think at alternative majority models: two thirds (18) or, possibly, three quarters (21) of the number of Member States.

In this context, by the way, inspiration can be drawn from the corresponding arrangements of the Council of Europe. In that regard, it is stated in Article 8 of the Statute[42] of the Council of Europe: 'Any member of the Council of Europe which has seriously violated Article 3,[43] may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.'

Now, first of all the Council of Europe practises an explicit formula regarding the cessation of membership of the organisation, whereas they are lacking in the EU context. Apart from that, the decision-making arrangements of the Council of Europe are more flexible compared to the ones in EU law. As a matter of fact, according to Article 20 (d) of the Statute of the Council of Europe, a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee is required for such a decision.[44]

So, on this point, there clearly is a need to improve the arrangements of EU law, more particularly the arrangements of Article 7(2) TEU.

Having said that, such an improvement would require treaty amendment.[45]

[40] The consent of the European Parliament has to be obtained by a two-third majority of the votes cast, representing the majority of its members: Article 352, fourth paragraph, TFEU.
[41] Article 354, first paragraph, TFEU.
[42] Statute of the Council of Europe is available at: https://rm.coe.int/1680306052 (accessed on 04.06.2021).
[43] Article 3 reads: 'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.'
[44] See about this subject matter also Dzehtsiarou and Coffey (2019).
[45] See for the procedural arrangements of treaty amendment: Article 48 TEU.

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What, apart from these decision making modalities, is just as important, is that there should be a mechanism of judicial control to assess the legality of (binding) acts adopted in order to enforce the EU's fundamental values. More particularly such a control should be made possible with regard to the decision – mentioned in Article 7(2) TEU - determining the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 - as well as to the decision – referred to in Article 7(3) TEU - regarding the suspension of membership rights. Now, as already discussed,[46] the control of the Court regarding these issues is by virtue of Article 269 TFEU for the moment limited to an assessment of the procedural requirements of Article 7. Essentially, therefore the provision of Article 269 TFEU should be deleted so that, as a consequence, Article 263 TFEU - containing the general regime for direct appeals against acts of the institutions - becomes of full application.

Be that as it may, if one indeed would aim to extend the scope of the Court's jurisdiction, again treaty change is required.

Finally but not least, when reflecting about imposing sanctions on a given Member State, politicians should mind whether the issuing of such far-reaching decisions may damage (disproportionally) the interests of ordinary citizens of the Member State concerned. That of course is a policy matter.

11. FINAL REMARKS

Democracy, good governance and effective judicial protection, at national and EU level, are principles whose proper functioning is completely dependent of the respect, by the Member States, of the fundamental values of the European Union. It is a crucial subject matter.

Violations of those values have to be combatted in an appropriate manner.

Certainly, in doing so we have to act with patience and comprehension. But also with determination.

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[46] Supra, subchapter no. 6.2 of this paper.

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STUDIES

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PARLIAMENTS VERSUS RAISING EXTREMIST MEMBER OF PARLIAMENT – AMENDMENTS TO CONSTITUTIONS NEEDED? / Manfred Dauster

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Abstract: *(Right-wing) extremism is on the rise across the continent. Propaganda and other activities affect European societies and parliaments. Extremists do not stop their activities in front of parliaments' buildings. As far as extremist performance within parliaments is concerned, parliaments may react to them using measures of order, as provided for by their Rule Books but cannot apply them to harmful activities outside the parliament in the ordinary (political) arena. Parliamentarian means of defence appear inadequate and at the end not efficient to defend our representative democracies. By comparing the present German constitutions in perspective of the German constitutional history, the article seeks to find „sharper armoury" for parliamentary defence. In conclusion, some consideration is given to constitutional amendment providing parliaments with the authority to expel the unruly Members of Parliament.*

Key words: *Manifestations of modern right-wing extremism; the historical right of parliament to get to expel its unruly members (Paulskirchen Constitution 1849); impeachments against Members of Parliament in constitutions of the 20th century do not go far enough and conflict with similar elements of criminal law; return to the Paulskirchen solution by amending current constitutions.*

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1. IMPACT OF EXTREMISTS ON OUR DEMOCRACIES

The world currently experiences historical times. Later contemporaries will probably associate 2020/2021 primarily with the Covid-19-pandemic. The pandemic, however, overshadows somewhat worrying trends that have been increasingly virulent for years. On the one hand, there are the populists (Rosanvallon, 2020) - often stocky or mixed up with conspiracy theories. On the other hand, there are the right-wing extremists, who like to use populist catchphrases or make use of conspiracy theories when they coincide with their views. They mirror political currents on the right edge of the political spectrum. Their protagonists use xenophobic, anti-Semitic, neo-fascist and anti-democratic statements, and join forces with tinged conspiracy theorists. In the context of Covid-19, public protest has been forming in Germany for some time against the measures taken by the German governments to contain the corona pandemic. The pandemic-demonstrators are increasingly joined by groups from the spectrum of political

right-wingers (Botsch, 2017; Kopke, 2017), who misuse the demonstrations as a welcome platform for their own purposes, and they do not shy away from violence. The storming of the Reichstag Building in Berlin on August 29th 2020, when right-wing participants of a peaceful demonstration against containing measures at the end of the demonstration stormed the stairs of the Reichstag Building while waving the "Reich Flag" and the "Reich War Flag", represent an illustrative example of the aforementioned. Police prevented them from forcefully entering the Parliament Building. The incident even prompted *Federal President* Frank-Walter Steinmeier to speak out publicly about his worries (Michael Sommer, 2020).

Right-wing extremists in Germany seek their advantages in expressions of legitimate civil disobedience. But this is only one piece in the mosaic of the right-wing scene in the Republic and elsewhere in Europe. The right-wing tendencies (*ECRI-Bericht Über Deutschland (Sechste Prüfungsrunde)*, 2020, pp. 20–28; *Rechtsextremismus in Deutschland Unter Besonderer Berücksichtigung Der Neuen Bundesländer (WD 1 - 3000 – 159/14)*, 2016; Fielitz et al., 2018; Fritz & Robertson-von Trotha, 2011; Jesse, 2017; Klärner & Kohlstruck, 2006; Pfahl-Traughber, 1999; Schubarth & Stöss, 2001) and their political protagonists have nothing in common with the legitimate anti-Corona demonstrations. Furthermore, extremist ideology of the right-wing scene is unfortunately in the process of becoming a commonplace perception in Germany (Apostel, 2020; Backes et al., 2019; Bedford-Strohm, 2020; Schellenberg, 2016a, 2016b; Sundermeyer, 2012). Anyone who opposes those right-wingers must expect himself to become a target. This affects Jewish fellow citizens (Ludyga, 2021) as well as Muslim communities, in fact all who the right-wing scene considers to be "different" or "foreign". Politicians of democratic parties on all levels and critical journalists (die medienanstalten - ALM GbR, 2019; Preuß et al., 2017) are regularly verbally attacked; these attacks often include their family members. Representatives of the authorities, even if they "only" fulfil their (legal) duties, are showered with threats (Mittler, 2020). Most of those threats are sent via anonymous email accounts (Zipursky, 2019). Unfortunately, it does not stop at these e-mail threats. The murder of the Regional President of North Hesse *Walter Lübcke* on June 1st, 2019,[1] or the assassination attempt on Cologne's mayor *Henriette Reker* on October 17th, 2015,[2] show appalling examples of the horrors that constant hate ideology can lead to.

It is questionable whether sufficient public awareness has already been developed when ordinary citizens recognize the risk of being targeted by right-wing extremist violence or hate speech if such right-wingers feel them not sharing their views. It is not possible to foresee under which specific circumstances threats and violence will occur and become reality (*Maßnahmen von Bundesregierung Und Unternehmen Gegen Hassreden („Hate Speech") Und Weitere Strafbare Meinungsäußerungen Im Internet*, 2016).[3] The protagonists of this kind of violence do not all walk around in combat boots

[1] The Frankfurt Higher Regional Court sentenced the main perpetrator to life imprisonment for murder and in doing so also determined the particularly severe nature of his guilt. The verdict is not final (valid). Germany, Frankfurt Higher Regional Court, 5-2 StE 1/20-5a-3/20 (28 January 2021).

[2] The Düsseldorf Higher Regional Court sentenced the perpetrator on two counts of attempted murder with grievous bodily harm, negligent bodily harm and grievous bodily harm to a total prison sentence of 14 years (Germany, Düsseldorf Higher Regional Court, III-6 StS 1/16 (1 July 2016)). Later, the Federal Supreme Court of Justice dismissed the defendant's appeal as ill-founded (Germany, Federal Supreme Court of Justice, 3 StR 454/16 (21 December 2016)).

[3] In the meantime, the legislator has reacted with the Federal Act on Combat against Right-Wing Extremism and Hate Crimes (2020). The law passed on June 18th, 2020 (Bohlen, 2020; Ceffinato, 2020; Eckel & Rottmeier, 2021; Geuther, 2020; Großmann, 2020; Haupt, 2021; Heim, 2020; Jung, 2020; Mantz, 2021; Matsumoto, 2020;

and military clothing. Such hate orators live as bourgeois citizens among us and in unidentified anonymity (Kaspar et al., 2017). No sections of the society are immune to right-wing extremist ideas. Even security-relevant professional groups, such as the military or the Police (Bundesamt für Verfassungsschutz, 2020; Deutsche Presseagentur, 2020b, 2020a; Janisch, 2020c; Müller-Arnold, 2020; Stegemann, 2020; Wernicke, 2020; Wernicke & Steinke, 2020),[4] make negative headlines (on racial discrimination and US policing see Rath, 2020). Among these "bourgeois", there are unfortunately also members of the right-wing groups in the parliaments of Germany. Other countries share similar experiences (cf. Bromell, 2021).

Hate speech and extreme right-wing ideology in all its forms have become an alarming social phenomenon in Europe (Chiarini, 2013; Cinpoeş, 2013; Flade & Mascolo, 2020; Georgiadou, 2013; Ghosh, 2013; Häusler & Fehrenschild, 2020; Langenbacher & Schellenberg, 2011; Marchi, 2013; Meiler, 2020; Minkenberg, 2013; Nagy et al., 2013; Pankowski & Kornak, 2013; Schellenberg, 2013) demanding our full attention. A "laissez-faire" attitude is anything but appropriate. If we let our attention falter, we should not be surprised that we figuratively hold out the words "Mene mene tekel u-parsim" (מנא, מנא, תקל, ופרסין).[5] Babylon's King Belshazzar and the divine warnings to him are perhaps far away in time. Closer to us is the history of the 20th century, in which, at the end of the 1920s at the latest, there were signs of coming disaster, which the democratic forces either did not understand or did simply neglect (Liebscher et al., 2020 with regards to the current situation). The social and economic circumstances in those days surrounding the rise of fascism (Kühnl, 1979, p. 85 et seq.; E. Nolte, 1971, p. 49 et seq.) might have been different from nowadays. However, it was the ignorance, negligence, and missing vigilance of democratic forces, which drove Europe into the abyss of the Second World War (Austermann, 2020, p. 98 et seq.).

It should not come as surprise that not only local councils but also parliaments in Germany (Deutsche Presseagentur, 2020c) have encountered such right-wing ideology and their representatives' political vulgarity. Not only in Germany but also in almost every

Reinbacher, 2020b; Sahin, 2020; Schiemann, 2021; Simon, 2020; Steinke, 2020a, 2020b; Virchow, 2017; Wiacek, 2019) and has been submitted to the Federal President for promulgation according to the German Basic Law (1949), § 82 (1), 1st sentence. The Act aims to improve the investigation and securing of traffic data, but also at tightening substantive criminal law. However, prior to the adoption of the law by the legislative bodies, the Federal Constitutional Court had tightened the requirements for access retained data by its decision (Federal Constitutional Court, 1 BvR 1873/13 and and 1 BvR 2618/13 (27 May 2020)). Due to the requirements of the Constitutional Court, the Federal President had doubts about the substantive constitutionality of the legislative resolution before him and felt prevented from promulgating the law (Janisch, 2020b; Mascolo & Steinke, 2020). The right of the Federal President to review the constitutionality of federal laws before they are enacted and promulgated is disputed among scholars (Berger, 1971; Hopkins, 2009; Mewing, 1977; Ossenbühl, 2007; Pohl, 2001; Stein, 2009). In the meantime, the Federal President and the Federal Government have agreed on re-drafting the Act and to submit the new draft to both Houses of Parliament for adoption (Janisch, 2020a). On March 30th, 2021, after the two Houses had adopted necessary amendments, the Federal President signed and promulgated the Act, which is now to enter into force (Press Release of the Federal President's Office (30 March 2021)).

[4] Police officers of the State Police of North Rhine-Westphalia had founded a private WhatsApp group and used this forum in order to send anti-Semitic, neo-Nazi and other news from the extreme right-wing spectrum to group members. Most of the group members behaved passively and "only" received the criminally relevant news and pictures. However, they remained silent for years and failed to report the incidents to their superiors. All 30 officials were suspended from duty with immediate effect. Criminal and disciplinary proceedings are still ongoing. Their aim is to remove all officials from service. The incident in the police district of Mühlheim/Ruhr is unfortunately not an isolated incident but represents the sad culmination of a worrying gain of knowledge in the security sector in recent years.

[5] Counted and weighed but perceived as too light (the prophecy of the fall of the Babylonian Empire and the death of its King Belshazzar).

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European country, right wing parties entered the parliaments with high election results. Not all members of parliament from the right-wing groups have their language under control. Unruly aberrations[6] of unparliamentary nature have become numerous in the plenary chambers of parliaments. Presidents of parliament still manage such outages in parliaments using parliamentary means of order when it comes to debates.[7] Imposed parliamentary means of order,[8] however, do not impress these contemporaries particularly. Moreover, in the eyes of their parliamentary and extra-parliamentary supporters, these members of parliament rather become a kind of heroes when they are subjected to measures of order or get removed from plenary chambers in parliaments. As far as Germany is concerned, such findings are very worrying in a country that experienced scenes of turmoil and vulgarity in its parliaments about 80 years ago when the new representative democracy under the Constitution of the Weimar Republic was doomed to seal its faith in the year of 1933 (Bracher, 1984, pp. 26 et seq., 257 et seq.). Are we back on such tracks? *„Principiis obsta. Sero medicina parata, cum mala per longas convaluere moras"*[9] (*Deutsche Einheit. Deutsche Freiheit. Gedenkbuch Der Reichsregierung Zum 10. Verfassungstag 11. August 1929*, 1929, pp. 159, 166, 220–222).

It is even more urgent in respect to the fact that that those contemporaries do not limit themselves to parliaments and their committees. They are also and especially active in the extra-parliamentary area, where, on the one hand, they are at best subject to only limited parliamentary controls by presidents of parliament or their presidency councils. On the other hand, they are cautious not to overstep the limits of criminal liability for offences of expression. Nevertheless, their propaganda echoes in the extra-

[6] Freedom of expression and freedom of the press according to the European Convention for Protection of Human Rights and Fundamental Freedoms, § 5 (1) and § 10 (1) (hereinafter: ECHR) are inextricably linked to the basic democratic constitution of European countries. Democracy without the confrontation of different opinions is inconceivable. This goes back to the classical democracy in Greece, when the marketplace (= ἀγορά [agora]) was the place where public opinion was formed (Cohen, 1995; Eder, 1995; Kenzler, 1999; Pabst, 2010). In contrast to the direct exchange of opinions in real discussion fora, the nowadays' phenomenon of hate speech is being characterized by anonymity of social media on internet fora where everybody can hide (Baldauf et al., 2018; Guhl et al., 2020; Papier, 2019, pp. 127–128). Moreover, we must not lose sight of the fact that words can hurt and even (figuratively) kill. Adequate protection against such words is therefore essential; case law of the Federal Constitutional Court often giving precedence to liberty of speech ("BVerfG, 14.06.2019 - 1 BvR 2433/17: Verletzung Der Meinungsfreiheit Durch Einordnung Einer Äußerung Als Schmähkritik (m. Anm. Gostomzyk)," 2019; Ladeur, 2020; Lange, 2020; Reinbacher, 2020a; Struth, 2019; Teichmann, 2020).

[7] Such means of keeping the order in plenary sessions are adjournment of the sitting (Rules of Procedure of the Bavarian Landtag, § 114 in the version promulgated on August 14th, 2009 - last amended on December 10th, 2014; Rules of Procedure of the Saxonian Landtag, § 97 (1), 3rd sentence) referral of a speaker on the substance of the case and removal of the floor (Rules of Procedure of the Bavarian Landtag, § 115; Rules of Procedure of the Saxonian Landtag (2019), § 95; Act no. 970 on the Landtag of Saarland, § 45 (2) – last amended on November 14th, 2018) giving a reprimand to a member of parliament if he takes the floor without having been admitted to speak and his/her exclusion from the sitting (Rules of Procedure of the Bavarian Landtag, § 116), reprimand and call to order in the event of infringing statements or interjections, exclusion from the sitting (Rules of Procedure of the Bavarian Landtag, § 117; Rules of Procedure of the Saxonian Landtag, §§ 96-97; Act no. 970 on the Landtag of Saarland, §§ 44-50; Rules of Procedure of the Landtag of North Rhine-Westphalia, §§ 36-39; Rules of Procedure of the [German] Bundestag, §§ 36-38 and § 40).

[8] The Constitutional Court of Hamburg in its judgement [HVerfG 3/17 (2 March 2018)] upheld the constitutionality of the exclusion, pronounced by the President of the Parliament (Bürgerschaft) on March 1st, 2017, of a member of the AFD-faction from the session of the Bürgerschaft as a repressive measure against a speech delivered by the member of the AFD which partially violated the dignity of the House.

[9] Publius Ovidius Naso (* March 20th, 43 BC in Sulmo; † propably 17 AC. in Tomis), Remedia Amoris. 91: "Resist the beginnings! Too late the medicine is prepared when the evils are strengthened by long hesitation." Carl *Severing*, the then Reich Minister of the Interior (SPD), made a pugnacious statement on the occasion of the tenth anniversary of the constitution day of the Weimar Republic on August 11th, 1929: "The German people's state would be bogged down with a nation of sleepyheads. ... Practice, resist, fight!"

parliamentary scope of politics. Whenever it comes to verbal abuse and hostile verbal attacks, these members of parliament move within a grey area, which is not accessible to the presidents of parliament. Nonetheless, their extra-parliamentary propaganda affects the parliaments in particular through social media, calls the reputation of parliaments before the voters into question, and in this way, saws off the supporting beam of democracy (E. Nolte, 1971). *Constant dripping wears away the stone*.

Against this background, the question as to whether it would be desirable for parliaments to have the means at hand to position themselves in an appropriate manner vis-à-vis the right (or left) protagonists who are harmful to parliaments may be examined. Such means should go beyond the existing parliamentary means of order and the criminal prosecution for offences of expression, such as incitement of the people or defamation.[10] Perhaps this will require some courage and determination, also perseverance, at least when new paths are to be taken. The defence of our democracy in Europe is well worth the effort.

2. LESSONS FROM CONSTITUTIONAL HISTORY

Modern constitutional law is not monolithic but should be seen within the tradition, which, in terms of the history of ideas, goes back to, at least, the Enlightenment of the 18th century. This long tradition was also marked by currents of social criticism, which did not spare parliaments after the 19th century had finally brought such people's representations to the countries of Europe. Parliaments, as we find them today, are children of the movement of constitutionalism of the 19th century. It seems worth looking back to those beginnings to get a better understanding of how parliaments today can stand up in the face of the extremism of their members.

2.1 Constitutionalism in the 19th and Early 20th Century

After the final defeat of Napoleon I, the German states joined together (alongside with other major European powers as for example the United Kingdom, the Russian Empire or the Kingdom of France) at the Congress of Vienna in 1815 that aimed for a new European Peace Order (Lentz, 2014; Siemann, 2016, pp. 487–543; Stern, 1999, pp. 186–188; Straub, 2014); and formed as a part of this endeavour the "German Confederation" through the "German Confederation Act" (Zeumer, 1913, p. 540/544). The "Confederation Act", which was integral part of the Vienna Final Act of June 9th, 1815 (Stolleis, 1992, p. 77 et seq.), left its members, above all the Empire of Austria and the Kingdom of Prussia as the largest German states, their full sovereignty under international law (Jansen, 2014). Also as a reaction to the freedom movements (Frotscher & Volkmann, 1997, p. 17/18; Krause, 2013; Kröger, 1988, p. 13 et seq.; Nipperdey, 1984, p. 82 et seq.; Schulze, 1985; Stern, 1999, pp. 183, 185) awakened in the German combat against the Napoleonic occupation system, the signatory powers of the "Confederation Act" promised by Article XIII of the Act that "constitutions" should take place in the member states of the German Confederation (Bermbach, 1991, pp. 145–167; Frotscher & Volkmann, 1997, p. 17/19; Mager, 1973; Wunder, 1978). This remained an endeavour, which members of the German Confederation did not completely comply with (Beschorner, 1877; Dippel, 2006;

[10] German Criminal Code, §§ 185 – 189, § 130 in the version of its promulgation of November 13th, 1998 – last amended on October 9th, 2020 (hereinafter CC).

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Lee, 1975).[11] Liberal (Stolleis, 1992, pp. 144 et seq., 156 et seq.)[12] constitutionalism movement of the 19th century (Bischof, 1859; Buddeus, 1833; Enzmann, 2012, pp. 23–35; Gundlach, 1904; Hammer, 1909; Heun, 2003, 2006; Köbrich, 1913; Krieghoff, 1894; Lucz, 1893; Passow, 1903a; Pistorius, 1891; Samuely, 1869; Steinbarth, 2011, p. 86 et seq.; Stolleis, 1992, pp. 172–176; Wolfram, 1930)[13] demanded the separation of powers, the guarantee of individual liberties (Böckenförde, 1964, p. 103 et seq.; Böckenförde, 1981, p. 387 et seq.; Frotscher & Volkmann, 1997, p. 17/21 et seq.; Heun, 2001, pp. 14/15, 17 et seq.; Janssen, 1990, p. 8 et seq.; Waldhoff, 2016)[14] and the guarantee of independent courts (Carsten & Rautenberg, 2015, pp. 54–99; Heun, 2001, p. 7; Stolleis, 1992, p. 116 et seq.) - all achievements of the French Revolution and the Napoleonic legal reforms.[15] The movement was either concerned with appropriate representations of the people vis-à-vis the respective national princes (Stolleis, 1992, p. 109 et seq.), who - and not the people! -

[11] (Princely) Degree on the Constitution of the Princedom of Schaumburg-Lippe, Basic Law on the Constitution of the Grand Duchy of Saxony-Weimar Eisenach, Constitution of the Kingdom of Bavaria, Constitution of the Grand Duchy of Baden, Constitution of the Kingdom of Württemberg, Constitution of the Kingdom of Hanover (replaced by the Constitution of 1833, which was abolished by Royal Degree of 1837 and then replaced by the new Constitution of the Kingdom of Hanover of 1840 which was abolished after annexation of Hanover by Prussia by Prussian Act on the unification of the Kingdom of Hanover with the Prussian Monarchy), Constitution of the Duchy of Braunschweig and Lüneburg, Constitution of the Grand Duchy of Hesse, Constitution of the Duchy of Saxony-Coburg-Saalfeld, Constitution of the Electoral Princedom of Hesse, Constitution of the Kingdom of Saxony (Beschorner, 1877), (imposed) Constitution of the Prussian State of 1848 and (revised) Constitution of the Prussian State of 1850.

[12] It should not be overlooked that conservative currents were also a mainstream.

[13] The most prominent representative was the liberal lawyer and political scientist Robert von Mohl with his monograph *Die Verantwortlichkeit der Minister in Einherrschaften mit Volksvertretun* (1837).

[14] Inseparably connected with fundamental rights is the substantive legal concept of 19th-century common German constitutional law, according to which any encroachment on freedom and property required a legal basis, or as Title VII, § 2 of the Bavarian Constitution described it: *"Without the advisory council and the consent of the Kingdom's Houses of Parliament, no general new law concerning the freedom of the person or the property of the citizen can be enacted, nor can an existing law be amended, authentically explained or repealed."* Even if constitutional law required the monarch's approval of the legislative resolution of the parliamentary chambers in order for a law to come into being, the (material) reservation of the law was a determinant for the competences of the national representations in the constitutional monarchies of the 19th century, which also underwent an expanding interpretation in the course of its development.

[15] German regions on the left bank of the Rhine, which were annexed by France under Napoleon, as well as the Kingdom of Westphalia, which Napoleon had created, and which was ruled by his brother Jérome experienced the Napoleonic legal reforms (Braun, 2011; Brosig, 2009, p. 4 et seq.).These reforms remained with those regions when they returned to Germany after the Congress of Vienna and represented a step forward towards Rule of Law and independence of judiciary. However, constitutionalism quickly came into conflict with restorative tendencies, especially on the part of the governments in Vienna and Berlin, soon after the German Federal Act had entered into force. Austria's State Chancellor Prince von Metternich (Kraehe & Sauvigny, 1966; Siemann, 2016, p. 638 et seq.) became the face of this restoration in Germany in the sense of a movement backwards. With regards to foreign policy he was supported in particular by Russia closely in pursuing common political goals in the so-called Holy Alliance of Throne and Altar, which originally encompassed Austria and Hungary, Prussia, Great Britain and Russia and, with the accession of monarchical France, developed into the Pentarchy, which in the first half of the 19th century essentially determined European politics of balance. In terms of civil liberties, too, constitutionalism was denied full success. Legal guarantees were indeed introduced by acts of parliament as for example the Criminal Code of the Kingdom of Bavaria of 1813, the Criminal Code for the Prussian States of 1851, the Criminal Code of the North German Federation of 1867 and finally the current Criminal Code of 1871 (Joecks, 2017; Weigend, 2007, p. 22 et seq.). Additionally, new Criminal Procedure Codes with rule of law guarantees were introduced (H.-H. Kühne, 2016). Finally, under the German Constitution, the Courts Constitution Act, the Civil Code and the Civil Procedure Code harmonized most of the national law within Germany (Brauneder, 2017; Dölemeyer, 2008; Kisse & Mayer, 2013, p. 3 et seq.; Mertens, 2004).

felt as the land's sovereigns[16] until they were finally overthrown from their thrones in 1918 by the November Revolution (D. Nolte, n.d.).[17] The constitutionalism of the 19th and early 20th century until 1918 also aimed to controlling monarchical governments so that responsibility of ministers became an issue (Heun, 2001). Most of the state parliaments of the "German Confederation" gained budgetary and fiscal (semi-) sovereignty (Friauf, 1968, p. 28 et seq.; Frotscher & Volkmann, 1997, p. 17/21; Heun, 1989, p. 38 et seq., 2001; Mussgnug, 1976, p. 48 et seq.).[18] Governments could only collect taxes and spend money in accordance with the approved budgets (Dreier, 1998, pp. 59, 69 et seq.; Friauf, 1968, pp. 223–228, 230–238; Heun, 2001; Kaminski, 1938, p. 43 et seq.; Löwenthal, 1914; Schefold, 1981, p. 146 et seq.; Wahl, 1981, p. 171 et seq.),[19] taxes and customs duties could only be levied to the extent that the state parliaments and, after 1871, the Reichstag[20] had passed tax and customs laws.[21] However, German governments remained focused on the monarchical heads of state and their prerogatives (Frotscher & Volkmann, 1997, p. 17/25; Heun, 2001),[22] who appointed and dismissed them, even against the will of parliamentarian majorities in respective representations of people. As the constitutions of the 19th century did not know governments depending on the political confidence of parliaments (Passow, 1903b), they instead provided for minister impeachments (Gerber, 1865, p. 184 et seq.)[23] as means of parliamentarian control over the princely governments.[24] However, those impeachments proved to be not very

[16] The Vienna Final Act of 1820 supplemented the German Confederation Act and described the monarchical principle in its Article 57: Since the German Confederation, with the exception of the free cities, consists of sovereign princes, according to the basic concept thus given, the entire power of the state must remain united in the head of the state, and the sovereign can be bound by the state constitution to the participation of the national representations only in the exercise of certain rights. Despite the revolutions of 1830 and 1848, this principle remained essentially valid throughout the entire 19th century - regardless of whether it was explicitly laid down in the constitutional charters or shaped thinking and state practice as an unwritten constitutional rule (Gerber, 1865, p. 94 et seq.; Heun, 2001). Constitution of the Kingdom of Bavaria, title I, § 1 (1), Constitution of the Grand Duchy of Baden, § 5 (1), Constitution of the Kingdom of Württemberg, § 4 (1) (Gerner, 1989), Constitution of the Grand Duchy of Hesse, § 4 (1), Constitution of the Electoral Princedom of Hesse, § 10 (1) (Ham, 2014), Constitution of the Kingdom of Saxony, § 4 (1), Constitution of the Prussian State of 1848, §§ 43 – 50, Constitution of the Prussian State of 1850, §§ 45 – 52, Constitution of the Kingdom of Hanover of 1833, § 6 and Constitution of the Kingdom of Hanover of 1840, §§ 5 – 6 (Frotscher & Volkmann, 1997, p. 17/25; Stolleis, 1992, p. 102 et seq.).

[17] This discussion has not come to an end. In other parts of the world it is still ongoing.

[18] Reich Constitution, § 69 et seq., Constitution of the Kingdom of Bavaria, title VII, § 1 et seq., Constitution of the Grand Duchy of Baden, § 53, Constitution of the Kingdom of Württemberg, §§ 109 – 118, Constitution of the Grand Duchy of Hesse, §§ 67 and 68.

[19] *In praxi*, fiscal policies were not without conflicts. Best known are the constitutional conflict between government and parliament in the Electorate of Hesse 1850 – 1852 and the conflict between government and parliament on the financing military reforms in the years between 1862 and 1866 which had Otto von Bismarck's appointment to the position of the Prussian Prime Minister on October 8th, 1862 as a side effect and though prevented King Wilhelm from abdication.

[20] Reich Constitution, § 4 together with § 5 (1).

[21] Nevertheless, the financing of the militaries remained an issue between governments and parliaments, as the Prussian constitutional conflict on military reforms between 1859 and 1866 proves best.

[22] Other areas were out of parliamentary influence *de lege lata*. The most important of these are military command, the cultivation of international relations and the areas of state emergency and civil protection in case of natural disasters.

[23] As means of parliament to defend the constitutional order.

[24] The impeachment of members of the Princely Governments for violations of the law or the Constitutions remained a constitutional sword throughout the entire 19th century until the collapse of the monarchies in 1918, which could not prove its sharpness even after that time, when, particularly as a result of the revolution of 1848, the countersignature of orders of the monarchs (under the conditions of constitutionalism, the

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effective (Dauster, 1989, p. 125; Greve, 1977, p. 55 et seq.; Kröger, 1972, p. 160; J.-D. Kühne, 1989, p. 49/64; J. D. Kühne, 1998, pp. 458, 574; Mehring, 2009, p. 304 et seq.; Schmitt, 1929).[25] As a result of developments in the course of the First World War and increasingly difficult internal conditions, members of the Reichstag joined the imperial government for the first time in 1917. Almost inevitably, this development culminated in a constitutional reform in autumn 1918, which made the Reich Chancellor dependent on the confidence of the Reichstag (E. G. Franz, 1997, p. 38/40; Machtan, 2013, pp. 341 – 468).[26] However, this parliamentarisation of the Imperial Government no longer had any influence on the further course of history (Nipperdey, 1984, p. 868; Stern, 1999, pp. 485 – 486).

The German constitutions in the 19th century focused on the introduction of representation of the people, on their powers vis-à-vis the monarch and on the protection of the representatives of the people in the exercise of their rights against executive (or judicial) infringements (immunity from prosecution, indemnity for votes and speeches within the plenary of the parliament). The constitutions did not spend any thought on elected representatives who neglected their duties, leaving it to the autonomous regulations within the parliament to sanction negligence or other misconduct of the elected representatives. Consequently, the constitutional law of the 19th century did not include impeachments against members of parliament as a correlate to charges against

constitutional achievement of the countersignature requirement was not per se a step forward, since it could put the countersigning minister in conflict situations between the monarch and parliament as long as the monarch prerogatively decided on the composition of "his" government alone without the participation of parliament (Ehberger, 2013, p. 19 et seq.) became accepted and the governments took responsibility for them (Reich or Paulskirchen Constitution, § 74, which did not enter into force). Nonetheless, the Paulskirchen Constitution reinstated the legal responsibility of ministers and referred corresponding charges brought by the Reichstag to the jurisdiction of the Reich Court (§ 126 lit. i [Reichsminister] and lit. k [Landesminister]) and waived the parliamentary responsibility of Reichsministers (in the modern sense)). The Reichstag was a bicameral parliament with a House of States (Paulskirchen Constitution, § 85 together with § 86) and the People's House (Paulskirchen Constitution, § 85 together with § 93). Each of the houses had the right to bring charges. The following Constitutions of the North German Federation and the Reich Constitution were completely silent on the responsibility of the Reich Government. Both constitutions did not know ministers but only the Reich Chancellor (with view on the German States: Constitution of the Kingdom of Württemberg, § 195 et seq.: impeachment before the State Court; Constitution of the Kingdom of Prussia, § 61: impeachment before all senates of the two supreme courts of the Kingdom; Constitution of the Electoral Princedom of Hesse, § 101) (Frotscher & Volkmann, 1997, p. 17/26; Starck, 2006). Such impeachment was not of practical relevance – neither in 19th century nor in 20th century, except in the constitutional conflict in Hesse-Cassel between the Prince Electoral and his government under its first minister Ludwig Hassenpflug on the one side and the parliament on the other side in 1850 (Ham, 2007; Kroll, 2010, pp. 43–66). The parliament impeached Hassenpflug four times, but he survived the impeachments in office (Bovensiepen, 1915; Enzmann, 2012; Grothe, 1996; Luther, 2002; Oetker, 1850; Popp, 1996; Scheuner, 1976; Steinbarth, 2011). With regards to the situation in Bavaria see Constitution of the Kingdom of Bavaria, title X, § 5. By the Act on the responsibility of ministers, the constitutional situation changed dramatically. The amendment to the constitution introduced formally an impeachment procedure against members of the government (Weckerle, 1930). Finally, the Act instituting the State Court of Bavaria, which had jurisdiction on impeachments of ministers (Schweiger, 1963).

[25] The reasons for the lack of effectiveness lay, on the one hand, in the non-controversial substantive-law prerequisites of a ministerial indictment (violation of the constitution and the law?, intent?, intention?). The formal requirements to be observed in the prosecution decision were high, the procedure before the competent courts based on the criminal proceedings was not adequate). Beyond that, however, the development went beyond this form of assertion of responsibility, because the political circumstances played into the hands of the parliaments and, in any case, at the end of the 19th century the princely governments became increasingly politically dependent on the parliaments. In focussing on the legal responsibility of members of government the institute of impeachment against ministers even proved contra-productive and prevented monarchical governments from becoming politically dependent from the confidence of parliaments.

[26] Amendment to the Reich Constitution (1871) of 1918.

ministers. There is one important exception to this rule which must not be overlooked: Sect. 114 of the Paulskirchen Constitution of 1849 (*Verfassung Des Deutschen Reichs Sammt Dem Reichsgesetz Über Die Wahlen Der Abgeordneten Zum Volkshaus Nach Der Amtlichen Ausgabe Der Reichsverfassung*, 1849) considered this point and gave each *House of the Reichstag* the right to punish its members for unruly behaviour and to exclude them in the extreme case (paragraph 1). However, sect. 114 para 2 required a two-thirds majority of the House's votes in favour of expulsion. The Paulskirchen Constitution left the details of such rules to the Rules of Procedure of the respective House, which were not enacted, as the Paulskirchen Constitution never entered into force.[27] The other German constitutions that had entered into force before 1918 apparently saw no need to deal with members of parliament who did not fulfil their constitutional duties or who opposed the representative bodies of the people. There were also extremist currents in the 19th century from the point of view of time and contemporaries. Obviously, they did not reach the parliaments and did not trigger any need for action there. The Paulskirchen Constitution, which emerged from the revolution of 1848, is an exception to this. Why sect. 114 was inserted into the text is dark and leaves room for speculation.

In summary, the 19th century provides explanations for impeachment of members of government. In that era, extremist currents stood in the focus of monarchical governments. What the governments regarded as "endangering the state" did not necessarily have to coincide with the views within the parliaments. Governments, however, had their own means of taking action against those they politically disliked or considered "endangering the state". Reich Chancellor von Bismarck was a master in dealing with the press, and he used it whenever he wanted to eliminate opponents or influence or change parliamentary majorities in order to achieve his goals. The "Kulturkampf" (Borutta, 2010; G. Franz, 1954) directed against the Roman Catholic Church in Germany and the Roman Catholic "Deutsche Zentrumspartei" (Amann, 2013, p. 32 et seq.; Bachem, 1932; Bebel, 1984, p. 29 et seq.; Bismarck, 1984a, p. 27; Evans, 1981; Stern, 1999, pp. 420–425), and the "Sozialistengesetze" ([Anti-] Socialist Laws) directed against the rising SPD (and the trade unions) (Bismarck, 1984b, p. 47; Matthöfer, 2017, p. 326 et seq.; Stern, 1999, pp. 425–428; Treitschke, 1984, p. 41 et seq.)[28] stood for this.

2.2 Interim - Period after 1918

After the 1918 revolution, the new republican constitutions (Grawert, 1989, pp. 381–504) at the level of the *Reich* as well as at the level of the *Reichsländer*, the federal states of the new Weimar Republic, made the governments at both levels depending on the confidence of the parliaments.[29] At the *Reich* level, only the *Reichspräsident*, the Head

[27] 28 governments of smaller German states agreed on the Paulskirchen Constitution, but Bavaria, Württemberg, Saxony and Hanover objected it (Stern, 1999, p. 261). At the latest, when the Prussian King Friedrich Wilhelm IV had rejected the imperial crown offered to him by the National Assembly on April 28th, 1849 (Pollmann, 1984, p. 304/305), the revolution of 1848 and the Paulskirche constitution had failed. What followed was restoration (Frotscher & Pieroth, 2017, p. 147 et seq.; Stern, 1999, p. 261/263).

[28] In particular: Reich Act against the Dangerous Aspirations of Social Democracy (1878).

[29] Constitution of Weimar Republic, § 54, Constitution of Anhalt, § 27 (2), 2nd sentence, § 35, Constitution of Baden, § 52 (1), 1st and 2nd sentence, § 53 (1), Constitution of the Free State of Bavaria, §§ 55 (1) (4), 58 (1), 59 (1) (2), Constitution of the Free State of Brunswick, § 33 (1) (2), Constitution of the Free Hanseatic City of Bremen, §§ 36 (1), 53 (1), Constitution of the Free and Hanseatic City of Hamburg, §§ 34 (1), 36 (1),

of State, did not need the *Reichstag*'s confidence, as he was directly elected by the voters[30] – as a second power centre beside the *Reichstag*, the Parliament of the Weimar Republic. Although after 1918 members of government depended on the confidence of parliament[31] , most of the *Reichsländer* and the *Reich* nevertheless upheld the impeachment of ministers as a parliamentarian control mechanism (Wittreck, 2004, p. 698 et seq.).[32] According to Article 59 1st sentence of the Constitution of Weimar Republic, the *Reichstag* had the right to impeach the *Reichspräsident*, the *Reichskanzler* or the *Reichsministers* before the *State Court* for the *German Reich* of having culpably violated the Constitution of Weimar Republic or any *Reich* Law (Anschütz, 1987; Finger, 1925; Jerusalem, 1930, p. 148 et seq.; Kühn, 1929, p. 16 et seq.).[33] Regarding impeachments against members of governments, the constitutions that came into force after the First World War hereby continued the constitutional tradition that had begun in the 19th century. The conditions however had changed. The parliaments were now able to force governments to resign by means of parliamentary votes of no confidence. The nature of the relationship between "political" responsibility of governments before the parliaments and the "legal" government accountability before the state or constitutional courts remained unclear, until the collapse of the democratic institutions after Hitler's seizure of power.

With view of the members of parliaments, the German constitutional history until 1918 had remained silent when it came to members of parliament impeachments as a

Constitution of the People's State of Hesse, §§ 37 (1) (2), 38 (1) (3), Constitution of the Land Lippe, §§ 26 (1), 35 (1), Constitution of the Free and Hanseatic City of Lübeck, §§ 7 (1), 14 (1); Promulgation of the Lübeckian Constitution , § 14 (1), 1st sentence, Constitution of the Free State of Mecklenburg-Schwerin , § 53 (1), 1st and 5th sentence, § 62 (1), Act on the New Version of the Basic Law of Mecklenburg-Strelitz, § 24 (2), Constitution of the Free State of Oldenburg, § 40 (1) (6), 1st sentence, Constitution of the Free State of Prussia, §§ 45, 1st sentence, 57 (1), 1st and 2nd sentence, Constitution of the Free State of Saxony, §§ 26 (1), 27 (1) (2), Constitution of the Free State of Schaumburg-Lippe, § 29 (1), 2nd sentence, § 38, Constitution of the Land Thuringia, §§ 35-36, 38, 39 (1), 40, Constitution of Württemberg, § 27 (1) (2), 2nd sentence, § 28 (all constitutions are collected and edited by Fabian Wittreck (2004)). As governments became dependent on the support and confidence of parliaments in their creation and in their existence, the German Länder were confronted for the first time with the question of what had to happen when parliamentary conditions did not permit the formation of majority governments. The phenomenon of minority governments, which had to seek majorities in parliament from issue to issue, is rather unpopular in Germany today – in contrast to Scandinavian countries; minority governments were formed extremely rarely after 1945 and were soon transformed into majority governments, often only after the dissolution of parliament that did not find necessary majorities (Klecha, 2010, pp. 12 et seq., 77 et seq.).

[30] Constitution of Weimar Republic, § 41 (1). Upon motion of the Reichstag concluded by two third majority, the Reichspräsident could also be dismissed by a national plebiscite (Constitution of Weimar Republic, § 43 (2) (Anschütz, 1987)

[31] Constitution of Anhalt, § 35, Constitution of Baden, § 53, Constitution of Bavaria, § 59 (1) (2), Constitution of Braunschweig, § 33 (3), Constitution of the Free Hanseatic City of Bremen, § 53 (1), Constitution of the Freie und Hansestadt Hamburg, § 36 (1), Constitution of the People's State of Hesse, § 38 (1), Constitution of the Land Lippe, § 35 (1), Constitution of Lübeck, § 14 (1), Constitution of Lübeck, § 14 (1), Constitution of the Free State of Mecklenburg-Schwerin, § 53 (1), 5th sentence, Constitution of Mecklenburg-Strelitz, § 25 (1), Constitution of the Free State of Oldenburg, § 40 (6), Constitution of the Free State of Prussia, § 57 (1), Constitution of the Free State of Saxony, § 27 (1) (2), Constitution of the Free State of Schaumburg-Lippe, § 38, Constitution of the Land Thuringia, §§ 38, 39, Constitution of Württemberg, § 28, Constitution of Weimar Republic, § 54.

[32] Constitution of Anhalt, § 39 (1), Constitution of Baden, §§ 60 et seq., Constitution of the Free State of Bavaria, § 70 (1), Constitution of the Freie und Hansestadt Hamburg, § 49, Constitution of the People's State of Hesse, §§ 47 et seq., Constitution of the Land Lippe, § 37 (1), Constitution of the Free State of Mecklenburg-Schwerin, § 62 (2), Constitution of the Free State of Oldenburg, § 69 (1), Constitution of the Free State of Prussia, § 58 (1), Constitution of the Free State of Schaumburg-Lippe, § 41 (1), Constitution of Thuringia of 1920, Constitution of the Land Thuringia of 1921, § 48 (48); Constitution of Württemberg, §§ 38 (1), 59 (1).

[33] Constitution of Weimar Republic, § 59.

contrast instrument to charges against members of government to constitutional courts. After 1918, the new *Reichsländer* constitutions widely followed this tradition. However, Article 23 para 1 of the Constitution of Anhalt, and sect. 39 para 2 of the Constitution of the Free State of Mecklenburg-Schwerin, allowed impeachments against members of their parliaments if a member of parliament was suspected of bribery or of serious breach of professional secrecy with regard to facts, which have been communicated in secret sittings of parliament.[34] Although at the end of the Weimar Republic not only the *Reichstag*, but also the state parliaments were marked by disturbances, unrest and highly unparliamentary scenes and failures, which emanated mainly from the communist and national socialist factions, the impeachment proceedings in the two *Reichsländer* remained practically irrelevant.[35]

While impeachments of members of government under the new democratic constitutions after 1918 may be seen as a special, traditional form of parliamentary control, such considerations do not apply to impeachments of members of parliament. The constitutional preconditions for such impeachments (bribery and betrayal of secrets) sound like criminal offences, and they may be as such. However, charges against members of parliament brought before the constitutional courts did not prevent ordinary judicial authorities from dealing with such allegations under criminal law and bringing respective members of parliament before criminal courts. Impeachments before constitutional courts and indictments before criminal courts were laid out in a kind of double track (Lammers & Simons, 1932, p. 404 et seq.). The constitutional impeachments of members of parliament have some similarities to disciplinary sanctions in common (on disciplinary power of parliaments Jan, 1925, p. 314/315; Schelhorn, 1924, p. 792/795), as we know them from civil service law. Disciplinary proceedings are also independent of criminal proceedings. Disciplinary sanctions are the state's response to breaches of loyalty by a civil servant. However, bribery and betrayal of secrets are grave felonies. They have repercussions on the body to which the member belongs. The effects of these repercussions on parliaments, vis-à-vis the public and vis-à-vis the voters bear the constitutional grounds for impeachments of members of parliament. They are less disciplinary tools than more means of institutional self-purification (Jan, 1925, pp. 314, 338; Schelhorn, 1924, p. 792/793).

[34] The motion for such an impeachment to be filed with the Constitutional Court (Constitution of Anhalt, § 39, Constitution of the Free State of Mecklenburg-Schwerin, § 66 (1) had to be made by one quarter of the statutory number of members of parliament (Constitution of Anhalt, § 23 (2), 1st sentence, Constitution of the Free State of Mecklenburg-Schwerin, § 39 (3), 1st sentence), and then required a majority of two-thirds of the statutory number of members of parliament to bring the charge (Constitution of Anhalt, § 23 (2), 2nd sentence, Constitution of the Free State of Mecklenburg-Schwerin, § 39 (3), 2nd sentence). Bavaria also introduced the impeachment of members of parliament by the Act amending the Constitution of the Free State of Bavaria of 1925 (Jan, 1925; Schelhorn, 1924). Simultaneously, discussions on the Reich level on introducing an impeachment against members of the Reichstag (Jan, 1925, p. 314/336) led to nothing.

[35] Constitution of Anhalt, § 23 (1) ruled: Members of Parliament may, at the request of the Diet, be brought before the State Court (§ 39) on charges of bribery and of serious breach of the duty of secrecy with regard to facts which have been communicated in secret session of the Diet. The duty of secrecy shall also extend to such proceedings of the committees for which the committee has decided on confidentiality. The State Court for Anhalt by judgement of June 25th, 1931 found two (former) Members of the Landtag für Anhalt guilty of corruption – by the way, the only guilty verdict of a German State or Constitutional Court in constitutional history of Germany (Bönnemann, 2007; Lammers & Simons, 1932).

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2.3 Modern Era after 1945

After the unconditional surrender of Nazi Germany on May 8th, 1945, the Allies very quickly ensured the reconstruction of the German states abolished by the Nazis (*Bavaria, Hesse, Bremen, Hamburg*), or else they established new German states or *Länder* (*Baden, Württemberg-Baden and Württemberg-Hohenzollern [later merged into Baden-Württemberg], Rhineland-Palatinate, Saarland, North Rhine-Westphalia, Lower Saxony, Schleswig-Holstein and Berlin [West]*).[36]

The *Länder* upheld the constitutional tradition from previous periods. As far as they did so, some of them enacted the impeachment of members of government before the constitutional court of each *Land*[37] although the new constitutions made governments depending on the confidence of parliaments.[38] Only few of them maintained the impeachment against members of parliament.[39] *Bremen* and *Hamburg* took a special

[36] In the process of Germany's reunification in 1990, the states of Thuringia, Saxony-Anhalt, Brandenburg, Saxony, and Mecklenburg-Vorpommern were added.

[37] Constitution of the Land of Baden-Württemberg, § 57, last amended in 2011, Constitution of the Free State of Bavaria, § 61, last amended in 2013, Constitution of the Free Hanseatic City of Bremen, § 111, last amended in 2019, Constitution of the Land of Hesse, § 115, last amended in 2011, Constitution of Lower Saxony, § 40, last amended in 2011, Constitution of Rhineland-Palatinate, § 131, last amended in 2010, Constitution of Saarland, § 94 (Rütters, 2017), last amended in 2013, Constitution of the Free State of Saxony, § 118, last amended in 2013. In summary, impeachment of members of government is allowed for any intentional infringement of constitution or of a law by a member of the government. Interestingly, in course of revising its constitution, the state of North Rhine-Westphalia dismissed the impeachments of members of government (including members of parliament) as no longer appropriate. Respective Article 63 of the Constitution of North Rhine-Westphalia (Schneider, 1985) was revoked in 2016 (Bovermann, 2016, p. 63/64; Heusch & Schönenbroicher, 2019, p. 571). Respective provisions (§§ 37 – 42) of the Act on the Constitutional Court of North Rhine-Westphalia, last amended in 2018 were also revoked in 2017 (Dauster, 1984, p. 289 et seq.; Kröger, 1972, p. 159 et seq.; Steinbarth, 2011, p. 267).

[38] Constitution of the Land of Baden-Württemberg, § 54, Constitution of Berlin, § 57, Constitution of Brandenburg, §§ 86-87, Constitution of the Free Hanseatic City of Bremen, § 110 (1), Constitution of the Free and Hanseatic of Hamburg, § 35 (3), Constitution of the Land of Hesse, § 114 (1), Constitution of Mecklenburg-Vorpommern, §§ 50 (2), 51 (1), Constitution of Lower Saxony, § 32 (1) (Busse, 1992, p. 134 et seq.), Constitution of North Rhine-Westphalia, § 61 (1), Constitution of Rhineland-Palatinate, § 99 (2), Constitution of Saarland, § 88 (2), Constitution of the Free State of Saxony, § 69 (1), Constitution of Saxony-Anhalt, § 72 (1), Constitution of Schleswig-Holstein, § 35 in the version promulgated on May 13th, 2008, Constitution of Thuringia, §§ 73-74. Bavaria installed a different solution. In terms of stabilizing the government, the Constitution did not formally introduce a vote of non-confidence. Instead, Constitution of the Free State of Bavaria, § 44 (3), 2nd sentence rules that the Prime Minister shall resign from office if the political situation does not anymore allow a trustful cooperation between him and the parliament (Lindner et al., 2017; Schweiger, 1999). Finally, if the Prime Minister does not resign, the question has to be submitted to the Bavarian Constitutional Court for decision (cf. Friesenhahn et al., 1958, p. 9 et seq.; J.-D. Kühne, 2003; Lindner et al., 2017; Reitzmann, 1997, pp. 264/265, 267).

[39] Constitution of the Land of Baden-Württemberg, § 43, Constitution of the Free State of Bavaria, § 61, Constitution of Brandenburg, § 61, Constitution of Lower Saxony, § 17, Constitution of Saarland, § 87; Constitution of the Free State of Saxony, § 118. As an example, the Constitution of the Free State of Saxony regulates the prerequisites of such impeachments: "A Member of Parliament who profitably abuses his or her influence or knowledge as a Member of Parliament may be brought before the Constitutional Court under indictment. The same shall apply to a Member of Parliament who deliberately brings to the attention of another person information whose secrecy has been decided upon in a session of the Diet or of one of its committees, in anticipation that such information will become public." In case of conviction of such members of parliament, the constitutional courts of Baden-Württemberg (Constitution of the Land of Baden-Württemberg, § 42 (1)), of Brandenburg (Constitution of Brandenburg, § 61 (3)), of Lower Saxony (Constitution of Lower Saxony, § 17 (3)), Saarland (Constitution of Saarland ,§ 85 (3)) and of Saxony may annul the member's seat in parliament. (Schweiger, 1999; Zeyer & Grethel, 2009). There have been unsuccessful attempts of impeaching members of government. Respective motions did not find necessary majorities (Krieg, 1985); see decision of Landtag of Carinthia to impeach a member of parliament to impeach a member of parliament (25 September 1990). The Constitutional Court of Austria dismissed the impeachment as inadmissible by decision no. 51/90 (13 October 1990).

path in that. Article 85 of the Constitution of the Free Hanseatic City of Bremen allows the Parliament (*Bürgerschaft*) to deprive a member of parliament who persistently and advantageously violates his or her duties as a member of parliament of his or her seat in parliament. Same is ruled by Article 7 para 2 of the Constitution of the Free and Hanseatic of Hamburg.

3. CONSTITUTIONAL LAW VERSUS CRIMINAL LAW: "DOUBLING THE EFFORTS?"

As far as impeachments against members of parliament under the rule of the constitutions of *Baden-Württemberg, Bavaria, Lower Saxony and Saarland* are concerned, legal preconditions for such charges focus on corruption and betrayal of secrets. This focus is also shared with the constitutions of *Bremen* and *Hamburg*. This rather limited scope of application raises questions with regards to the German Criminal Code.[40]

Sect. 108e of German CC penalizes "bribery and corruption of elected officials" (Hastedt, 2020; Peters, 2020) in the chapter "Criminal offences against constitutional organs and in elections and votes". Other types of corruption in the civil service are regulated in particular by sect. 331 et seqq. CC. The insertion of sect. 108e CC in the chapter on "the endangerment of constitutional organs and of democracy" suggests that the legislature derives the criminal nature of bribery of members of parliament from this context and gives it a particular significance.[41] Since sect. 108e CC entered into force in

[40] Hereinafter „CC".

[41] This significance given to the phenomenon is mirrored by procedural regulations. Offences pursuant to CC, § 108e are not dealt by district or regional courts, which have criminal jurisdiction over common crimes. Offences pursuant to sect. 108e CC are adjudicated by first-instance panels of the Higher Regional Courts (Courts Constitution Act ("CCA"), § 120b). The Higher Regional Courts are designed as appellate courts in the first place. CCA, § 120 also and primarily confers on those Higher Regional Courts at the seat of the Land governments as special jurisdiction the first-instance adjudication of so-called offences of state protection, such as high treason, treason against the Land, espionage or domestic and foreign terrorism and crimes arising from the Rome Statute, i. e. genocide, crimes against humanity, etc. The legislator found affinities of § 108e CC with such serious felonies, and that makes such offences according to § 108e CC even more special and in particular important, as it can be seen from two examples: After the change of government in 1969, the Social Democratic-Liberal Federal Government under Chancellor Willy Brandt opened a new chapter in German foreign policy of coexistence with the Federal Republic of Germany's socialist neighbours to the east, first and foremost the Soviet Union but also the second German state, the German Democratic Republic. This new Ostpolitik was highly controversial and met with the strongest resistance from the conservative CDU/CSU opposition. On April 24th, 1972, the opposition in the German Bundestag applied for a so-called constructive vote of no confidence against Chancellor Brandt under Article 67 of the German Constitution and proposed that the parliament elect the opposition leader Rainer Barzel as the new Chancellor instead of him. The opposition was quite sure of their cause. The government majority was in crisis; several members of parliament had left the government factions and had switched to the opposition. In the decisive vote on April 27th, 1972, to the opposition's bitter surprise, their motion failed to achieve the required majority. Very quickly, the suspicion became public that the government majority had bought opposition votes. The so-called "Wieland Affair" was born. Karl Wienand was the parliamentary managing director of the SPD at the time and was suspected of having organised and carried out the purchase of votes. Wienand denied the allegations and the affair remained unresolved for quite a long time (Baring, 1982, p. 396 et seq.; Bracher et al., 1986, p. 63; Der Bundesbeauftragte für die Stasi-Unterlagen, 2013, p. 265/267; Merseburger, 2013, pp. 644–645). Today it seems clear that the money for the vote purchase came from the government of the German Democratic Republic. The regime in East Berlin preferred to deal with a social-democratic government in the West instead of being confronted to a conservative government (Wolf, 1997, p. 261). Constitutionally, the affair had no consequences although voices could be heard that secret votes should be abolished in terms of more transparency. Another voting disaster remains unsolved to this day, although there were also allegations that only a vote buy could explain the voting results. After the state elections in Schleswig-Holstein on February

1994,[42] the offence did not however acquire much relevance in criminal practice (Bosch et al., 2017).[43] Sect. 108e CC shares this fate with the institute of the constitutional impeachment of members of parliament, as set forth by the constitutions of *Baden-Württemberg, Bavaria, Brandenburg, Lower Saxony, Saxony and Saarland*.

All constitutional regulations on impeachments of members of parliament had entered into force before sect. 108e CC was adopted (Bosch et al., 2017; Fischer, 2020; Laufhütte et al., 2007, p. 402)[44] on a national level. Before sect. 108e CC had come into force, a practical need for elected representatives to be held accountable for corruption and betrayal of secrets before the state constitutional courts could be argued because of the lack of impunity. However, with the entry into force of sect. 108e CC, especially in its current supplemented, highly extended version, this argument can no longer be heard. However, it cannot be overlooked that both the impeachments of members of parliament and sect. 108e StGB can be based on common values of legal protection, which consist in the protection of the integrity of parliamentary opinion-forming processes against unfair manipulation and in the protection of related public confidence in the independence of the mandate holders (Eser et al., 2019). With regard to the constitutional regulations of the above-mentioned Länder, the reputation of the parliament not only vis-à-vis the other constitutional organs but also vis-à-vis the voters is a further value to be taken into account when it comes to protected legal values. The purpose of impeachment charges against members of parliament is to ensure that individual representatives who violate their duties as members of parliament may not harm the voters' trust in the people's highest representation. Any other view would encourage disenchantment with politics, thus in the long run, leading to a turning away from parliamentary elections.[45]

20th, 2005, the incumbent state premier Heide Simonis, the first woman to head a German state government, had to face her re-election. The majority ratios were conceivably close, but made re-election seem likely. In four rounds of voting held on March 17th, 2005, Heide Simonis missed the required majority by one vote (Schleswig-Holsteinischer Landtag, Plenarprotokolle, 16. Wahlperiode, no. 16/1 (17 March 2005)). Traumatised and embittered, Heide Simonis withdrew into her private life ("Statement of Heide Simonis of March 18th, 2005," 2005). Instead of her, the opposition leader Peter Harry Carstensen was elected Prime Minister in the 5th voting round on April 27th, 2005 (Schleswig-Holsteinischer Landtag, 16. Wahlperiode, no.16/2 (27 April 2005)). How the missing vote came about is still unclear today (Finkemeier, 2014, pp. 298 et seq., 398–402; Munimus, 2010). Despite their importance, the two incidents, which captured the national interest and the political interest for quite a long time had not any impact on the legal criminalization of improper influencing political proceedings in elected assemblies. The incidents in 1972 in the German Bundestag, the Lower House of Parliament, and 2005 in the Landtag of Schleswig-Holstein, even in their uniqueness, illustrate the crisis-like, even if only temporary, escalation of voting situations in parliaments. It does not seem far-fetched that the criminal prosecution of such crisis situations should be entrusted to a higher regional court. However, sect. 108e of the German CC owes its current version to the fact that Germany has acceded to a number of anti-corruption agreements at European and UN level and had to transpose these obligations into national law (see the explanatory memorandum of the government factions CDU/CSU and SPD on the draft Criminal Law Amendment Act - Extension of the criminal offence of bribery of members of parliament - of February 11th, 2014; critical of the incomplete transposition of international obligations into national German law (Eser et al., 2019; Fischer, 2020).

[42] 28th Criminal Law Amendment Act (1994).

[43] All reported cases between 2005 and 2014 affected the municipal level but not State Parliaments or international bodies.

[44] Prior to the adoption of sect. 108e CC, it was legally only hardly possible to prosecute corruption within parliaments or on the international level.

[45] Those constitutional rules of the Länder constitutions focus on the proper functionality of Länder parliaments and on proper implementation of democratic proceedings within these representations. Therefore, at first, the principle that federal law (in this case for example sect. 108e of the CC) supersedes law of the states, including their constitutional law (German Basic Law ("BL"), § 31) does not apply, as their scope of application of criminal and constitutional law is different. Article 103 para 3 of the BL (and respective State

Purchase of votes in municipal representations may not have outstanding impacts on the national public, sect. 108e CC, nevertheless, is dealing with them in the same way. Including municipal council votes into sect. 108e CC appears justified because municipal council decisions may have far-reaching significance for the local population and may provoke a regional public echo. Moreover, sect. 108e CC also protects the integrity of in-council decisions (Heintschel-Heinegg, 2015, § 108e, recital 3) and hereby the confidence of the local voters in them. From this point of view, it does not make any difference whether democracy "at the local" or "at the higher level" is concerned.[46]

While impeachments against *Länder* ministers (or other members of the state governments) were not filed since 1945, after reunification of Germany on October 3rd, 1990 impeachments against members of parliament experienced a revival – however, in a very special context. The population in the new, eastern German states was and is particularly sensitive to the repression that the communist SED[47] regime exerted on them. This is especially true of the permanent and persistent surveillance carried out by the Ministry for State Security (Stasi) of former German Democratic Republic (GDR) with its network of informers, which was unique in its extent globally. An ordinary citizen of the GDR could never be sure in his life whether his spouse or another member of the family had been recruited by the Stasi as an informal collaborator and enjoyed spying on his own family or on circles of friends in order to pass the information on to Stasi. Article 118 of the Constitution of the *Free State of Saxony*[48] in that context institutes impeachments

Constitutions), the so-called double jeopardy or principle of *ne bis in idem* does not prevent criminal prosecution paralleled by constitutional impeachments. Such paralleled proceedings are nothing unusual in Germany. In several different regulations, the law (of the Federation and of the States) imposes special professional and personal conduct obligations on members of certain professional groups (judges (Federal Act on Judges §§ 61 et seq., last amended in 2019, Bavarian Act on Judges and Public Prosecutors, § 52 et seq., last amended in 2018), civil servants (Federal Disciplinary Act, last amended in 2020), soldiers (Federal Act on Soldiers, § 43, last amended in 2020), physicians (Bavarian Act on the Practice of the Profession, Professional Associations and the Professional Courts for doctors etc., §§ 66 et seq.), notaries (Federal Act on Public Notaries, §§ 92 et seq., last amended in 2019), lawyers (Federal Act on Lawyers, §§ 112a et seq., last amended in 2017), tax consultants (Federal Act on Tax Consultants, §§ 89 et seq., last amended in 2020), the violation of which may have criminal law consequences. In addition, however, the persons concerned may also be punished under service or professional law. The prohibition of *ne bis idem* only covers criminal convictions within its scope of application. However, disciplinary or professional measures do not constitute criminal penalties or have a punitive character.

[46] Amtliche Sammlung der Rechtsprechung des Bundesgerichtshofs in Strafsachen (BGHSt) 51, pp. 44 et seq., margin 22 et seq. In view of the free mandate of the municipal deputies in the municipal parliament, the Federal Court of Justice did not consider the activity of the council members there to be the exercise of a public office, which in the case of bribery pursuant to CC, §§ 331 et seq. would lead to prosecution as ordinary crimes. The Federal Court of Justice set aside arguments to the contrary from German municipal constitutional law, which describes the municipal councils as the administrative organ of the municipalities. This is not unproblematic if municipal practice is taken into account. Elected counsellors of municipalities are sent to representative bodies of municipal companies to represent the interests of the city in there. Such municipal enterprises are often organised under private law or are independent institutions under public law. Decisions taken in such companies and their representative and supervisory bodies often have far-reaching financial consequences. The free mandate of city counsellors has not any effect there. Moreover, the sent counsellor is bound by directives as concluded by the city council. In such case taking bribes for the voting, CC, §§ 331 et seq. seem to be more appropriate than CC, § 108e (Bosch et al., 2017; Eser et al., 2019; Fischer, 2020).

[47] Sozialistische Einheitspartei Deutschlands.

[48] Constitution of the Free State of Saxony as amended in 2013, § 118: "(1) If there is a strong suspicion that a member of the Diet or the State Government, before his election or appointment; 1. has infringed the principles of humanity or the rule of law, in particular the human rights guaranteed by the International

against members of the government as well as against members of the Parliament of *Saxony*.

On several occasions, the *Saxon Landtag* decided to accuse members of parliament before the *Saxon Constitutional Court* in accordance with Article 118 para 1 of the Constitution, because there was evidence that members of parliament concerned had been employed by GDR Stasi before reunification and had provided it with spied information. None of the impeachment proceedings, however, reached the stage of the trial before the *Saxon Constitutional Court*. The impeachment charges failed for reasons of the statute of limitations[49] or other more formal reasons.

4. INTERIM RESUMÉ

The reasons why both the impeachment against members of government as well as against members of parliament had a rather symbolic significance in the constitutional practice of both the Weimar Republic and under the rule of the Basic Law of 1949 are, that it had become possible to assert and enforce the responsibility of the governments through other parliamentary means.[50] Against this background, the judicial impeachment of members of government procedure appears to be cumbersome and lengthy. This cannot be applied to the impeachment of members of parliament, as - apart of such impeachments wherever constitutionally possible - parliaments are only having means of order at hand, which have proved not being effective against unruly members of parliament. In constellations of parliament-damaging misconduct by members of parliament, it is more than unsatisfactory to refer endangered parliaments to outside assistance, for example to investigations by the public prosecutor's offices, of which no one knows what the turn out will be about.

Moreover, an unbiased look at the formal constitutional requirements for impeaching members of parliament is equally sobering. Parliamentary impeachments require at least a qualified affirmative majority within parliaments.[51] Parliamentary

Covenant on Civil and Political Rights of 19 December 1966 or the fundamental rights contained in the Universal Declaration of Human Rights of 10 December 1948; or 2.worked for the former Ministry for State Security/Office of National Security of GDR, and therefore, the continued holding of a mandate or membership in the State Government appears to be intolerable, the Diet may apply to the Constitutional Court for proceedings with the aim of revoking the mandate or office.
(2) The request for the impeachment must be made by at least one third of the members of the Diet. The decision to bring charges shall require a two-thirds majority in the presence of at least two-thirds of the members of Parliament, which must, however, be more than half of the members.
(3) Further details shall be laid down by statute, which may also regulate the loss of pension rights."

[49] Decision of Saarland Constitutional Court, Vf. 16-IX-98 (6 November 1998), Decision of Saarland Constitutional Court, Vf. 17-IX-98 (6 November 1998), Decision of Saarland Constitutional Court, Vf. 18-IX-98 (6 November 1998).

[50] In the Bavarian casino affair at the end of the 1950s, voices were raised calling for the indictment of members of parliament and government, but the Bavarian parliament did not move to do so. The parliament pointed out that the affair had been dealt with by the criminal justice system (Reinicke, 2014, pp. 460–461; Senfft, 1988). The Minister of Justice of Rhineland-Palatinate, Dr Heinz Georg Bamberger, came under criticism for incorrectly filling the position of President of the Higher Regional Court in Koblenz. On 16 November 2011, the CDU opposition's motion to have him brought before the state constitutional court was rejected by the majority of the state parliament (Koch-Baumgarten, 2020, p. 393/418).

[51] In *Baden-Württemberg*, the initiative for an impeachment needs at least one third of the statutory votes of the parliament (Constitution of the Land of Baden-Württemberg, § 42 (2), 1st sentence). The decision to bring an indictment requires a two-thirds majority if at least two-thirds of the members of the Landtag are present, but this must be more than half of the members of the Landtag (Constitution of the Land of Baden-Württemberg, § 42 (2), 2nd sentence). *Bavaria* requires similar quorum (Constitution of the Free State of Bavaria, § 61 (4), 1st sentence). For *Lower Saxony* see Constitution of Lower Saxony, § 17 (2), for *Saarland* see Constitution of Saarland, § 85 (2) and for the *Saxony* see Constitution of the Free State of Saxony, § 118 (2).

minorities or the opposition may initiate an impeachment but must then expect that the parliamentary majority will quickly close ranks behind the government member or the member of parliament concerned. A further weakness of the impeachment procedure results from the fact that state parliaments are not investigating authorities and that they have hardly any legal possibilities in the run-up to an impeachment to investigate the facts leading to such serious decision. There is no "parliamentary police". Current regulations in the Rules of Procedure of the *Bundesländer* concerned neglect this aspect almost totally. The hoped-for expectation that, in extreme, the parliament would install a committee of enquiry "equipped with weapons",[52] before an impeachment could be drafted and concluded, seems deceptive. Committees of enquiry in Germany's parliamentarian practice prove to take a long time and to be finally somewhat cumbersome. The facts that these committees bring to light often end up in contradictory assessments that follow the dividing lines between parliamentary majority and parliamentary minority.

Following an impeachment resolution within parliament, the state constitutional courts will deal with the allegations made. No experience has been gained in this respect so far. The laws governing the State Constitutional Courts contain only rudimentary provisions. This may prove to be a handicap in the event of a dispute.[53] Article 42 of the Act on the Bavarian Constitutional Court[54] and sect. 42 of the Act on the Constitutional Court of Rhineland-Palatinate[55] additionally refer to provisions of the Code of Criminal Procedure. In case of dispute, the referral will not help either, because constitutional courts have a different structure and working methods from criminal courts.

5. PROSPECTS: CONSTITUTIONAL AMENDMENTS NEEDED

If one considers what means should be given to the parliaments to defend themselves against right-wing (or left-wing) extremist members of parliament, if they disturb the reputation and thus the functioning of the parliaments, the impeachment against members of parliament, which is held in the state constitutions of *Baden-Württemberg, Bavaria, Lower Saxony, Saarland* and *Saxony*, does not seem to be a very effective means under the given legal regime. If there is no substantial rethinking, this finding will also overshadow the constitutional future.

[52] Constitution of the Land of Baden-Württemberg, § 35 (2) together with Act on the establishment and procedure of committees of enquiry of the Landtag, §§ 13 et seq., last amended in 2016, Constitution of the Free State of Bavaria, § 25 (3), (4) together with Act on the establishment and procedure of committees of enquiry of the Bavarian Landtag, §§ 11 et seq., last amended in 2009, Constitution of Lower Saxony, § 27 (2)-(4), Constitution of Saarland, § 79 (2)-(4) together with Act on the Landtag of Saarland, §§ 20 et seq., last amended in 2018, Constitution of the Free State of Saxony, § 118 (2) together with Act on Committees of Enquiry, §§ 13 et seq., last amended in 2009 (Wiefelspütz, 2003, p. 90 et seq.). In course of the Bavarian deliberations on amending the constitution of 1919 in 1925, participants exposed the expectation that such committees of enquiry would be established by *Landtag* in order to establish the facts and to collect the evidence needed (Jan, 1925, p. 314/330).

[53] If the Federal President is indicted under Basic Law, § 61, which is the only way to assert the constitutional responsibility of the head of state who is not accountable to Parliament (Steinbarth, 2011, p. 223/224), the Federal Constitutional Court may order preliminary investigations by a judge who is not involved in the case (Act on the Federal Constitutional Court, § 54, last amended in 2020. It must order such preliminary investigations if the Federal President or one of the accusing parliamentary houses so requests. It is highly questionable whether these preliminary investigations, which follow the indictment and precede the oral hearing on the charge under Act on the Federal Constitutional Court, § 55, can compensate for the procedural weaknesses that exist in the Bundestag and Bundesrat in a so-called "preliminary investigation".

[54] Last amended in 2018.

[55] Last amended in 2015.

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The constitutional situation in *Saxony* under Article 118 of the Constitution is unique. Article 118 sheds light on one aspect of Germany's coming to terms with its history prior to the German reunification of 1990. The provision of Article 118 of the Saxon Constitution additionally finds its explanation exclusively injustice committed by the former State party of GDR and the Stasi. The longer this injustice lies in the past and becomes history, the more irrelevant Article 118 of the Saxon Constitution becomes. It is foreseeable that the time will be ripe to delete Article 118 of the Saxon Constitution in its present form from the constitution, as it will have simply become obsolete (Steinbarth, 2011, p. 261).

Charges against members of parliament under the constitutions of suffer in their factual preconditions (corruption and betrayal of secrets) (Lindner et al., 2017; Schweiger, 1963; Zeyer & Grethel, 2009) from a competitive relationship with the correlating elements of (national) criminal law. Bribery and betrayal of secrets committed by members of parliament are better off under criminal law. In the event of criminal convictions, the criminal courts can also rule on deprivation of the ability to hold public office.[56] If one understands the purpose of the parliamentary indictments in their current version as a means of parliamentary self-purification and self-defence, the question arises under the aspect of sustainable constitutional policy whether they still have a real right to exist apart from the possibilities of criminal prosecution. It may be repeated in this context: parliaments are not investigating authorities. They lack the means of criminal proceedings and, moreover, of forensic experience. To this extent, the *Landtage* of *Baden-Württemberg, Bavaria, Lower Saxony* and *Saarland* can, should an impeachment be concluded, only expect that public prosecutors will provide them with the necessary factual and evidentiary material. This not only reverses the constitutional hierarchy in a certain way, but the proceedings within the state parliaments that lead to an impeachment are additionally largely unregulated. Impeachments are serious encroachments on the status of any member of parliament affected by them, even if they are only imminent. The internal rules of the parliament are however silent about his legal status with respect to the in-house-proceeding within parliaments. One may well ask whether his status rights or his fundamental rights (as a human being) require for example that he must be heard that he must be given access to files, etc.

There is a need for reform. This extends to the proceedings before the constitutional courts dealing with charges brought against members of parliament. It has already been pointed out above that those courts are not sufficiently equipped in terms of procedural law. It should also be borne in mind that corruption cases before the criminal courts often lead to complex proceedings lasting several months, even though the criminal courts are better positioned procedurally to design such complex proceedings and concentrate on substantial allegations. There is something surreal about the idea of a constitutional court entering a hearing, which will last several months. The judges of the *Länder* constitutional courts do not hold a full-time position at these institutions; they also perform their judicial duties there in a subsidiary office. They simply do not have the capacity to sit in court for several months on several days per week in an oral hearing against an allegedly corrupt member of parliament.

In its current version, the impeachment of members of parliament makes little sense in *Baden-Württemberg, Bavaria, Lower Saxony* and *Saarland*. Nor do the constitutional conditions for bringing charges in these *Länder* enable the parliaments to defend the representative democracies against extreme right-wing machinations in

[56] CC, § 108e (5) together with CC, § 45 (with view on members of the German Bundestag also see Federal Election Act, § 47 (1(3)), last amended in 2020; CC, §§ 331 et seq. together with CC, §§ 358, 45.

which members of this political group may be involved.[57] This applies all the more to those *Länder* whose constitutions are silent on the possibility of impeachments against members of their parliaments.

Nevertheless, if there is agreement that democracies do not have to stand by and watch even helplessly, as its institutions and values are damaged from within the constitutional institutions themselves or from outside the parliaments by extremists, then a serious question arises as to what the arsenal of a well-fortified democracy must be like in order to avert damage to itself and avert any damage. This is where Article 114 of the Paulskirchen Constitution of 1849 comes again into play and may guide a future discussion. Recourse to the Paulskirchen Constitution has nothing to do with constitutional romanticism or nostalgic constitutional history (Köhler, 2009). Contemporaries consider it to be the most progressive constitution at the time, and its principles and values are still valid today.[58]

By allowing the two houses of the *Reichstag* to deprive members of their mandate, the Paulskirchen Constitution enshrined to the *Reichstag* the responsibility of defending democracy by its own means and protecting parliamentary functioning and parliamentary prestige vis-à-vis voters. If parliaments resort to such measure, they expose themselves and cannot hide behind judicial institutions, as it would have been the *Reichsgericht* in case of the Paulskirchen Constitution. In dealing with the virulent extremism of today and probably of the future, parliaments must stand up and take responsibility for themselves and for the democracy they embody, and they must defend themselves accordingly. The clear assignment of responsibility to the parliaments in defending the representation of the people against any extremists deserves sympathy. Incidentally, the constitutions of *Bremen* and *Hamburg* follow the same path set out in the Paulskirchen Constitution. The first sentence of Article 85 para 1 of the Constitution of the Hanseatic City of Bremen[59] gives the *Bürgerschaft*, the Parliament of *Bremen*, the right to exclude a member of the *Bürgerschaft* if that member misuses his office to gain personal advantages for himself or another person, or persistently refuses to carry out the duties incumbent on him as a member of parliament, or violates the obligation of confidentiality. Similarly, Article 7 para 2 of the Constitution of the Free and Hanseatic City of Hamburg[60] provides for the exclusion of a member of parliament from the *Bürgerschaft*.

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[57] However, the fact that the constitutions of the other Länder do not provide for any possibility of bringing proceedings at all against their members of parliament is not a convincing argument against the arrangements in Baden-Württemberg, Bavaria, Lower Saxony and Saarland. The principle of constitutional autonomy applies. The limits of this principle are to be found in BL, § 28 (1), 1st and 2nd sentence. However, no uniformity in the constitutional law of the Länder can be derived from these limits.

[58] With regards to the influence of the Paulskirchen Constitution on the constitution making in Hesse after 1945 see Rainer Polley (1997, p. 47/55).

[59] The motion to initiate exclusion requires the support of one quarter of the statutory number of members of parliament. According to Constitution of the Hanseatic City of Bremen, § 85 (1), 2nd sentence, the parliament's committee on rules of procedure shall deal with the substance of the matter. According to its report, the member concerned shall be given a hearing in the plenary session of the Bürgerschaft (Constitution of the Hanseatic City of Bremen, § 85 (1), 3rd sentence). A decision on exclusion requires a majority of three-quarters of the statutory number of members or, if fewer but at least half of the statutory number of members are present, unanimity. Pursuant to Constitution of the Hanseatic City of Bremen, § 140 (1) together with Bremen Act on the Constitutional Court, § 25 (1), last amended in 2011, the expelled member of parliament may appeal to the Constitutional Court.

[60] Last amended in 2020. Applications for withdrawal of membership in the Bürgerschaft can be submitted by at least five members of parliament (Hamburg Bürgerschaft Rules of Procedure, § 16 (1) 1st sentence, last

If the constitutional legislators decide to make parliaments responsible in the fight against extremists, such decisions will only be successful if they also provide that a member of parliament may be expelled from parliament, if he or she wilfully undertakes to undermine the reputation and functions of the parliament. A provision to be included in constitutions not only in Germany could read:

(1) A Member of Parliament who abuses his or her position as such for gain for himself/herself or for others, who communicates facts to others, which he or she is obliged to maintain confidentiality by Rules of Procedure of the Parliament or by law, or who wilfully seeks to undermine or to jeopardise the reputation or the function of Parliament may be expelled from Parliament.

(2) A motion for expulsion may be submitted to Parliament by one quarter of the statutory members of Parliament. A Member of Parliament is expelled if Parliament so decides by a two-third majority of its statutory members.

(3) The procedure is subject to regulation by the Rules of Procedure of the Parliament or by law.

Constitutional rules (in Germany) do not object to such amendment. In particular, the independence of the mandate of a member of parliament[61] does not prevent such changes. Independence of mandate does neither represent a license for members of parliament to propagate what their extremist ideology might dictate to supporters nor does independence of mandate mean a personal or individual privilege.[62] Independence of mandate is inseparably and irrevocably linked to the parliamentary function and therefore has a serving character. Its intent and its purpose are about ensuring that opinions can freely be exchanged within parliaments uninfluenced by external forces and

amended in 2020. Neither the Constitution, nor the rules of procedure of the Hamburgische Bürgerschaft, nor Hamburg Act on Members of Parliament, last amended in 2020 regulates the withdrawal procedure. However, under Basic Law, § 103 (1), the member of parliament concerned must be granted a hearing in accordance with the law and must therefore be informed of the reasons for his or her exclusion. He must be given the opportunity to defend himself. The President of the Parliament is responsible for the procedure (Hamburg Bürgerschaft Rules of Procedure, § 3 (1)). Under Hamburg Bürgerschaft Rules of Procedure, § 16 (1(2)), the application for removal from office is dealt with in public in the plenary session of the Bürgerschaft (Hamburg Bürgerschaft Rules of Procedure, § 25 (1)), unless the Bürgerschaft decides, at the request of one tenth of the Members of Parliament, or the request of the Senate, to deliberate and vote in secret (Hamburg Bürgerschaft Rules of Procedure, § 25 (2)). The decision to expel the member from parliament is taken if three-quarters of the statutory members of parliament agree to it (Constitution of the Free and Hanseatic City of Hamburg, § 7 (2), 2nd sentence). The excluded member of parliament may appeal against the decision to the Hamburg Constitutional Court (Constitution of the Free and Hanseatic City of Hamburg, § 35 (3(2)) together with § 14 (2); Hamburg Act on the Constitutional Court, §§ 39a et seq., last amended in 2017. On the right to bring an action, see Hamburg Constitutional Court, HVerfG 3/17 (2 March 2018).

[61] Basic Law, § 38 (1), 2nd sentence reads: They [Members of Parliament] shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience; Constitution of the Land of Baden-Württemberg, § 27 (3), Constitution of the Free State of Bavaria, § 13 (2), Constitution of Berlin, § 38 (3), Constitution of Brandenburg, § 56 (1), Constitution of the Free Hanseatic City of Bremen, § 83 (1), 1st and 3rd sentence, Constitution of the Free and Hanseatic of Hamburg, § 7 (1), Constitution of the Land of Hesse, §§ 76-77, Constitution of Mecklenburg-Vorpommern, § 22 (1), Constitution of Lower Saxony, § 12, Constitution of North Rhine-Westphalia, § 30, Constitution of Rhineland-Palatinate, § 79 (2), Constitution of Saarland, § 66 (2), Constitution of the Free State of Saxony, § 39 (3), Constitution of Saxony-Anhalt, § 41 (2), Constitution of Schleswig-Holstein, § 11 (1), Constitution of Thuringia, § 53 (1). Nevertheless, The independence of the mandate of a Member of Parliament requires that the Constitution itself makes the necessary arrangements for the termination of the mandate (Badura, 1989; Zeyer & Grethel, 2009).

[62] Constitution of the Free Hanseatic City of Bremen, § 83 (1), 2nd sentence makes the point: They [Members of Parliament] are obliged to respect the law and *have a special duty of loyalty to the Free Hanseatic City of Bremen* (see also the appellative establishment of a duty of allegiance which applies to everybody pursuant to Constitution of the Free State of Bavaria, § 117, Constitution of the Free Hanseatic City of Bremen, § 9, 1st sentence, Constitution of Rhineland-Palatinate, § 20).

voices and that decisions can be taken without any external coercion or influence. Whether a member of parliament disturbs these principles by his or her behaviour can only be decided by parliament itself. In addition, an excluded member of parliament (in Germany) has the right to appeal an expulsion to the respective constitutional courts.

6. CONCLUSIONS

Parliamentary democracy is not a value in itself. It has to be worked for, even earned, every day. After 1945, there have seldom been times in Europe when parliamentary democracies have been attacked from the ranks of the members of parliament in the way that is, unfortunately, the case today. If parliamentary democracy has to be earned every day, it is high time for European parliaments to consider what defences they have against extremist attacks from within their ranks. When it comes to the anti-democratic behaviour of their members outside the parliamentary buildings and outside the parliamentary activity inside the parliaments, this finding will be sobering. Parliaments are powerless when it comes to this "extra-parliamentary" be-haviour, although the repercussions on parliamentary functions and the reputation of parliaments are palpable. A "jolt" is needed, as former German Federal President Roman Herzog once put it so aptly in a different context of needed economic and social reforms. This paper aims to contribute to such an initial stocktaking as a first step.

Then, in a second, no less important but also extensive as well as comprehensive step, it should be asked whether the parliaments in Germany and in the other countries are willing to take remedial action against their powerlessness to defend themselves. This second step, which also requires civil courage, is decided by each country and each parliament in its own autonomy, not only in terms of "whether" but also "how". This cannot be done without the involvement of the political and legal sciences. The step requires open discussion, also with the voters. It will therefore take time. If extremist tendencies increase, as there is much to suggest at present, the time factor will be a significant one. This paper, with its look back and its view on the present constitutional situation in Germany, has put forward a proposal for a solution that one would like to think is not well thought out, not sufficiently thought through or simply not feasible. This criticism is legitimate and most welcome. Perhaps banalities need to illustrate it better. Every association under private law will not tolerate members in its ranks who harm the association. Civil law provides the means to remove them. It does not have to go so far that the police and the public prosecutor intervene. Their standards for intervention are anyway different from those of associations, trade unions and political parties when it comes to damaging behaviour by their members. In political life, any member of the government who acts with damaging intent against his or her own government must expect to be dismissed by the head of government or the head of state. This does not yet work in the case of behaviour that is damaging to parliament.

If this paper, however imperfect, contestable or daring it may be, triggers discussions on the two levels mentioned, much has already been gained. A look back at the Paulskirche Constitution of 1849 shows that the unthinkable is conceivable. The first half of the 20th century has shown us all, also with the terrible consequences, how quickly, if there is a lack of inner will on the part of democrats, parliamentary democracies can erode. Let us recall the words of Johann Wolfgang von Goethe in his Sorcerer's Apprentice, where it says: "Lord, the trouble is great! The ghosts I called, the ghosts. Now I will not be rid of them". Europe also owes more than 70 peace and prosperity to its own parliamentary democracies as a common political culture. Whatever means of defence parliaments decide to use, these do no harm. Affected parliamentarians enjoy the

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protection of the rule of law and judicial review of measures directed against them. This judicial protection may have to be adjusted or extended if parliaments decide to fight back. However, such an expansion would then only be part of the considerations that this paper has addressed for the second level.

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REFLECTION OF DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON IMPARTIALITY AND INDEPENDENCE OF NATIONAL COURTS IN CONTEXT OF THE RIGHT TO A FAIR TRIAL / Alla Demyda

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Abstract: *The article focuses on the principle of impartiality and independence of judiciary as a part of the right to a fair trial according to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, an account will be taken of the case law of the European Court of Human Rights in matters of applications from national judges. The article considers the reflection of the decision of the European Court of Human Rights on the amendment of national legislations and the amendment of the provisions of the national constitutions regarding the principles of justice.*

Key words: *Council of Europe; European Court of Human Rights; case law; fair trial; impartiality; independence; legislative change; constitutional change; principles of justice; reform; disciplinary proceedings.*

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1. INTRODUCTION

Article 6, paragraph 1 of the European Convention on Human Rights[1] (hereinafter referred to as "Convention") claims that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law when deciding on civil rights or obligations or on any criminal offence the person is accused. Key aspects of Article 6 of the Convention are the rule of law and the proper administration of justice. As well, these principles are essential elements of the right to a fair trial.

The European Court of Human Rights (hereinafter referred to as "ECHR") has always been prominent and ensured the right to a fair trial. This guarantee is one of the fundamental principles of any democratic state under the Convention.

[1] Convention for the Protection of Human Rights and Fundamental Freedoms is available at the Council of Europe portal. See more in the Council of Europe. *Details of Treaty No.005: Convention for the Protection of Human Rights and Fundamental Freedoms*. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005 (accessed on 15.05.2021).

According to the interpretation of Article 6, paragraph 1 of the Convention we can assume that it enshrines the following elements of the right to judicial protection: a right to be heard; a fair trial; a public hearing and a statement of decision; hearing the case within a reasonable time; hearing the case by a court established by law; independence and impartiality of the judiciary.

Entin distinguishes among fundamental (the right of access to a court and the right to enforcement), institutional (independence and impartiality of the judicial power), procedural (adversarial process, equality of arms, reasonable time for legal proceedings) and special (criminal procedural safeguards provided for in Article 6, paragraph 2 and 3 of the Convention) elements of the right to a fair trial (2003, p. 86).

In this article, the study is being carried out in the context of the independence and impartiality of the court as an institutional aspect of the right to a fair trial, which is demonstrated by the existence of legally created judicial authorities entrusted by law to tasks of the administration of justice in the frame of its jurisdiction. At the same time, there is no correct "formula" for organizing a fair trial, this system can by completely different kind in different states and legal systems, which does not otherwise have a negative impact on the conducting of justice. The institutional aspect also regulates the relationship of courts with other public authorities, its independence, the status of judges, etc.

Berezhanskyi claims that the institutional aspect is closely linked to the legitimacy of the judiciary branch as part of the organization of state authorities. The legitimacy of judicial power is demonstrated by the recognition of the jurisdiction of the court by public opinion, recognition by the international community and the readiness of society to recognize and implement decisions (2017, pp. 191-196).

The independence and impartiality of the court in its decision-making is therefore, on the one hand, a structural element of the right to a fair trial in the administration of justice for each individual and, on the other, it guarantees the further recognition and enforcement of judicial decisions, what is a guarantee of the functioning of the mechanism of the judicial system.

The purpose of the article is to determine the reflection of the case-law of the ECHR on the impartiality and independence of the courts. In other words, the purpose of the study is to answer the following questions. What view of the impartiality and independence of the courts has the Council of Europe and the ECHR? Are the decisions of the ECHR an effective way of protecting the rights of judges of national courts? Do the decisions of the ECHR have an impact on increasing the level of fairness in the decision-making of national court judges? Does the case-law of the ECHR reflect the reform of the judicial power at the national level? Therefore, the article will aim at confirming or refuting the hypothesis that the decisions made by the ECHR guarantee the right to a fair trial, in particular, to proceedings by an impartial and independent court.

The research is carried out by a method of qualitative research, in particular through a text analysis tool. To determine the substance of research issues, research is carried out in this article on the basis of an analysis of the doctrinal literature, the Council of Europe legislation and selected ECHR decisions on complaints from national court judges. Special attention is paid to the decisions of the ECHR in the cases of *Volkov v. Ukraine* and *Harabin v. Slovakia*, due to the fact that these decisions brought significant legislative changes at the national level until the amendment of the Constitution of the defendant states, thus significantly emphasizing for a fair trial at the national level.

2. IMPARTIALITY AND INDEPENDENCE OF THE JUDICIAL POWER FROM THE POINT OF VIEW OF THE COUNCIL OF EUROPE

Attention to the issue of ensuring and promoting the independence of the judicial power at transnational level arose back in 1985 at the United Nations Congress on crime prevention and criminal justice in Milan, where the UN Resolution approved The Basic Principles on the Independence of the Judiciary,[2] which constituted recommending material on a minimum level of legitimate and independent justice in the Member States.

Among the most important documents related to the principles of judicial independence in Europe, it is worth mentioning the Magna Carta of Judges.[3] The final version of the document was adopted by the Consultative Council of European Judges (hereinafter referred to as "CCJE") in Strasbourg on November 17, 2010. This is one of the last codifications that introduces new aspects of the independence of the judiciary. According to Article 1 of the Magna Carta of Judges, its mission is to guarantee the existence of the rule of law and, at least, to ensure the proper application of the law in an impartial, fair, real and effective manner. Judicial independence must result from the law, be functional and financial. It must be guaranteed to other power authorities of the state, which are looking for justice, to other judges and society in general, through national legislation at the highest level (paragraph 3). While conducting their functions aimed at the application of justice, judges may not be subject to any regulations or instructions or any hierarchical pressure and must be bound only by law (paragraph10).

In addition to the Convention and the Magna Carta, among important documents of the Council of Europe (hereinafter referred to as "CoE") on the independence and impartiality of the judiciary are the European Charter on the Statute of Judges (1998), the recommendations of the Committee of Ministers of the Council of Europe and the statements of the Advisory Council of European Judges.

The European Charter of the Statute for Judges[4] was adopted on July 8-10, 1998 at a multilateral meeting on the status of judges in Europe organized by the Council of Europe, having regard to Article 6 of the Convention and the Fundamental Principles of Judicial Independence. The adoption of this document aims to increase the effectiveness of strengthening judicial independence, which is necessary to protect individual freedoms within democratic states; enshrining provisions aimed at ensuring guarantees of professional competence, independence and impartiality of judges in an official document written for all European states.

Among the available recommendations of the Committee of Ministers of the Council of Europe on this issue, it is necessary to highlight Recommendation No. R (94) 12 on the independence, competence and status of judges[5] adopted on 13.10.1994 at the 518th session and Recommendation No. CM/Rec (2010) 12 on judges:

[2] UN (1985). *The basic principles of judicial power independence. UN document no. A/COF.121/22/Rev. 1 59 (1985).* Available at: http://www.sudcovia.sk/sk/dokumenty/legislativa/326-osn-rez-o-nezsud85 (accessed on 15.05.2021).

[3] Magna Carta of Judges (Fundamental Principles) of November 17, 2010. Available at: https://rm.coe.int/magna-carta-slovakia/168063e446 (accessed on 15.05.2021).

[4] European Charter of the Statute of Judges of 08.-10. December 1998. Available at: https://zdruzenie.sk/wp-content/uploads/2016/10/1_europska_charta_statutu_sudcov_a_dovodova_sprava.pdf (accessed on 15.05.2021).

[5] Recommendation No. (94) 12 of the Committee of Ministers of the Council of Europe of October 13, 1994 on the independence, competence and status of judges. Available at: https://zdruzenie.sk/wp-content/uploads/2016/10/odporucanie_re_o_nezavislosti_sudcov_94_12.pdf (accessed on 15.05.2021).

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independence, efficiency and accountability[6] adopted on November 17, 2010 during the 1098th session.

The above recommendations concern the preventive measures that are necessary to ensure the independence of judges. As the most important measures, the Council of Europe states the following: (i) the independence of judges should be guaranteed in accordance with the provisions of the Convention at the level of national legislation (e.g. express provisions on it laid down in the Constitution or other legal texts); (ii) the executive and legislative powers are to ensure the independence of judges and not to take steps to threaten their independence; (iii) any decision relating to the service of judges must be based on objective criteria; (iv) the selection of judges must be made on merit with regard to their qualifications, integrity, ability and competence. The body deciding on the selection and career progression of judges must be independent of the government and state administration; (v) in the decision-making process, judges should be independent and act without any restriction, undue influence, coercion, threats or inappropriate interference, whether direct or indirect, by anyone or for any reason whatsoever.

These principles are broadly defined in the statements of the Consultative Council of European Judges (hereinafter referred to as "CCJE") adopted to the attention of the Committee of Ministers of the Council of Europe, namely: Statement No. 1 (2001) (CCJE) on standards relating to the independence of justice and the non-transferability of judges;[7] Statement No. 3 (2002) (CCJE) on the principles and rules governing judicial professional conduct, in particular in the fields of ethics, incompatible behaviour and impartiality;[8] Statement No. 17 (2014) on the evaluation of the work of judges, the quality of justice and respect for judicial independence;[9] Statement No. 18 (2015) on the status of the judiciary and its relationship with other state powers in a modern democracy.[10]

On April 13, 2016, the Committee of Ministers of the Council of Europe adopted the Action Plan of CoE No. CM (2016) 36 on strengthening the independence and impartiality of the judiciary.[11] It aims to identify ways in which the Council of Europe will

[6] Recommendation No. CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe of November 17, 2010 on judges: independence, efficiency and accountability. Available at: https://zdruzenie.sk/wp-content/uploads/2016/10/4_odporucanie_rady_ministrov_12_2010.pdf (accessed on 15.05.2021).

[7] Statement No. 1 (2001) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on standards relating to the independence of justice and the non-transferability of judges. Available at: https://rm.coe.int/stanovisko-c-1-2001-poradnej-rady-europskych-sudcov-ccje-do-pozornosti/168044ba5b (accessed on 15.05.2021).

[8] Statement No. 3 (2002) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judicial professional conduct, in particular in the fields of ethics, incompatible behaviour and impartiality. Available at: https://rm.coe.int/stanovisko-c-3-poradnej-rady-europskych-sudcov-ccje-do-pozornosti-vybo/168044baa5 (accessed on 15.05.2021).

[9] Statement No. 17 (2014) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the evaluation of the work of judges, the quality of justice and respect for judicial independence. Available at: https://rm.coe.int/ccje-2014-opinion-no17-sk/16809ec9cd (accessed on 15.05.2021).

[10] Opinion No. 18 (2015) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the position of the judiciary and its relation with the other powers of state in a modern democracy. Available at: https://rm.coe.int/16807481a1 (accessed on 15.05.2021).

[11] Action Plan No. CM (2016) 36 of the Committee of Ministers of the Council of Europe of April 13, 2016 on strengthening judicial independence and impartiality. Available at:

guide and support its Member States in implementing concrete measures necessary to strengthen the independence and impartiality of the judiciary. As such, the Action Plan represents a commitment by the Secretary-General and the Council of Europe as a whole to give the highest priority to cooperation with the Member States in order to further strengthen the independence and impartiality of the judiciary in Europe. The corrective measures that Member States may plan to address the problems identified are set out in the Appendix to the Action Plan. The Action Plan recognizes the diversity of legal systems and approaches to the division of competences in the Member States of the Council of Europe and the implementation of the measures listed in the Annex should take full account of this diversity. The urgency of these actions lies in the need to strengthen the independence and impartiality of the judiciary in cases where existing structures have been found not to guarantee the rule of law and democratic certainty. The Action Plan indicates the steps to be taken, on the one hand, to identify where formal legal guarantees of the independence and impartiality of the judiciary are lacking, while introducing or presenting the necessary structures, policies and practices to ensure that these guarantees are respected in practice and contribute to the proper functioning of the judiciary, as one of the three branches of power in a democratic society based on human rights and the rule of law.

It is a long-term objective to establish and ensure the proper functioning of effective mechanisms and other measures for complex fulfilment of obligations under the Convention, in particular as regards the guarantees referred to in Article 6 of the Convention relating to the right to a fair trial. These guarantees are elaborating with society and include not only formal legal guarantees of the independence and impartiality of the judiciary but also the establishment of the necessary structures, policies and procedures to ensure that these guarantees are respected and their contribution to the proper functioning of the judiciary in a democratic society based on human rights and the rule of law. Protection of the independence of individual judges and ensuring their impartiality is another key factor that needs to be addressed in the fight to guarantee the right to a fair trial. It is of great importance to build public confidence in the judiciary and to recognize more broadly the value of its independence and impartiality, for example by ensuring the transparency of the functioning of the judiciary and its relations with the executive and legislative power, by adopting active access by the judiciary or the courts to the media and by disseminating general information which must respect both the right of defence and the dignity of the victims.

3. INDEPENDENCE AND IMPARTIALITY OF JUDGES FROM THE POINT OF VIEW OF THE ECHR

The ECHR points out that the obligation on the state to ensure the decision-making process by an independent and impartial court pursuant to Article 6 paragraph 1 of the Convention is not limited to the application to the courts. This principle also requires the executive and legislative authorities, as well as any other body, regardless of their status, to respect and implement judicial decisions, even if they do not agree with those decisions. State respect for the authority of the courts is therefore an integral prerequisite for public trust in the judiciary and, more broadly, a prerequisite for the existence of the rule of law. The constitutional guarantees of an independent and

https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806442b9 (accessed on 15.05.2021).

impartial court are therefore not sufficient. They must be effectively combined with day-to-day administrative processes and procedures.

The term "independent" refers to the independence of the courts from other authorities (*Beaumartin v. France,* paragraph 38) as well as from the parties to the hearing *(Sramek v. Austria,* paragraph 42). The concept of judicial independence presupposes the existence of procedural guarantees that separate the judiciary from other bodies. In determining the independence of the body, the ECHR will consider the following criteria: the procedure for appointing judges and the length of their term of office; the existence of guarantees against external pressure (*Langborger v. Sweden,* paragraph 32; *Kleyn and others v. Netherlands,* paragraph 190). Judicial independence requires that individual judges be deprived of undue external influences or internal influences. The internal independence of judges requires the absence of instructions or pressure from other judges or persons performing administrative functions in court (*Parlov-Tkalchic v. Croatia,* paragraph 86; *Agrokompleks v. Ukraine*, paragraph 137).[12]

In Article 6 paragraph 1 of the Convention it is said that the court must be impartial within the limits of its powers. Impartiality usually implies the absence of prejudice or subjective approach. The existence of impartiality is determined on the basis of a subjective test which examines the personal beliefs and the conduct of a particular judge and on the basis of an objective test to check that the court has provided reasonable assurances for the exclusion of legitimate doubts of impartiality (*Micallef v. Malta,* paragraph 93). However, there is no significant difference between subjective and objective impartiality, since the conduct of a judge may not only lead to an objective suspicion by an independent observer of an impartiality mistake (objective test) but may also relate to the judge's own convictions (subjective test).[13]

These principles have found their real picture in the case of *Guthmundur Andri Astrathsson v. Iceland* (December 1, 2020, application No. 26374/18),[14] which concerns the denial of the complainant's right to a court established by law on the grounds of manifest and serious infringements of national rules in the procedure for appointing one of the judges of the newly established Court of Appeal. The complainant noted down that his conviction for an offence in the appeal proceedings was upheld by a court that was not "established by law" and which was not independent and impartial, thereby proving a violation of Article 6, paragraph 1 of the Convention. The complainant according to Article 6 paragraph 1 of the Convention argued that one of the three judges in the composition of the Court of Appeal had not been appointed in accordance with the relevant national law and, therefore, the prosecution brought against it was not determined by a "court established by law" within the meaning of that provision. In particular, the ECHR noted that there had been a breach of the legal framework for the appointment of judges, in particular by the Minister for Justice, when four new judges of the Court of Appeal were appointed. The Minister of Justice removed four candidates from the list of the most qualified candidates proposed by the independent evaluation committee and replaced them with four other persons, including the accused judge, without justifying such nominations. Valid legal guarantees that could have remedied a minister's breach, such as parliamentary procedures for voting on judges, have proved ineffective. The infringement concerns the unlimited influence of the executive and the thwarting of the

[12] Council of Europe/European Court of Human Rights (2013). *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)*, pp. 27-29. Available at: https://rm.coe.int/1680700aaf (66) (accessed on 15.05.2021).
[13] Ibid., pp. 29-30.
[14] ECtHR, Guthmundur Andri Astrathsson v. Iceland, app. No. 26374/18, 12 March 2019.

independence of the judiciary, thereby violating the very essence of the complainant's right to a fair trial.

The ECHR emphasizes that according to Article 6 paragraph 1 of the Convention, the court must always be "established by law". This expression reflects the rule of law, which is inherent in the system of protection introduced by the Convention and its protocols. A court, which is not set up in accordance with the intention of the legislature, will inevitably lack the legitimacy required by a democratic society to resolve legal disputes. The ECHR further reminds that "law" within the meaning of Article 6 paragraph 1 of the Convention does not include only legislative acts that establish the system and scope of authority of judicial authorities. This includes, in particular, provisions concerning the independence of the members of the court, the duration of their term of office and their impartiality. In other words, the expression "established by law" covers not only the legal basis for the whole existence of a court but also the compliance of that court with the specific rules governing it (paragraph 211-214).

In the case of *Guthmundur Andri Astrathsson v. Iceland* (paragraph 217), the ECHR summarized that compliance with the requirement for a court "established by law" had been examined in various contexts of Article 6 paragraph 1 of the Convention in particular: a court acting outside its jurisdiction; a referral to a particular judge or court; the change of judge without giving the appropriate reason required by national law; the tacit renewal of the term of office of judges for an indefinite period after the expiry of their term of office and their reappointment; a court hearing when some judges were disqualified; the participation of lay judges in hearings in contravention of the relevant national legislation.

Although the right to a "court established by law" is a separate right under Article 6 paragraph 1 of the Convention, the case law of the ECHR established a very close relationship between the particular right and the guarantees of "independence" and "impartiality". In that regard, the ECHR has held that a judicial authority, which does not fulfil the requirements of independence (in particular from the executive power) and impartiality, cannot be designated as a court for the purposes of Article 6 paragraph 1 of the Convention. The ECHR notes that the need to maintain public confidence in the judiciary and ensure its independence from other powers is the basis for each of these requirements. According to ECHR, the recognition of this close context and common purpose does not lead to the obscuration of their specific functions or their duplication, but only serves to strengthen their subjects and efficiency. In that regard, the ECHR points out that a review on the basis of a requirement of a 'court established by law' must not lose that common purpose. In this context, independence refers to the necessary personal and institutional independence, which is necessary for impartial decision-making and is therefore a prerequisite for impartiality. It characterizes, on the one hand, (i) the state of mind which indicates a judge's impermeability to external pressure as a question of moral integrity and (ii) a set of institutional and operational measures involving, on the one hand, a procedure by which judges may be appointed in a way that ensures their independence and the selection criteria are based on merits which must provide guarantees against undue influence and/or unlimited decision-making by other state powers, both at an early stage of the appointment of a judge and during the performance of his duties.

The issue of the court that is "established by law", especially in the context of the ECHR decision in the case of *Guthmundur Andri Astrathsson v. Iceland*, was also analysed by Ján Svák, who emphasizes that the Grand Chamber of the ECHR adopted a special three-step test based on the rule of law. The first step of the test identifies an objective and real breach of national courts in the selection and appointment of judges. In the

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second step, the infringement in question is assessed in terms of the nature and purpose of "court established by law", thus ensuring the ability of the judiciary to exercise its powers without outside interference and thus protect the rule of law and the division of powers. The third step considers the principle of subsidiarity, which imposes a joint responsibility between the Member States and the ECHR, where national authorities and courts must interpret and apply national law in the manner provided for in the Convention (2021).

Jurisdiction and trust in any judicial institution depend on the independence and impartiality of its judges. Unfortunately, there are a large number of problems in the judiciary in Europe. This is evidenced by the wide range of applications lodged by judges of the Member States of the Council of Europe concerning infringement of the provisions of the Convention relating to the guarantee of independence, inviolability and impartiality. In this context, we propose to examine some of the decisions of the ECHR to the subject of a breach of the independence and impartiality of the judiciary.

4. CASE-LAW OF THE ECHR ON APPLICATIONS FROM JUDGES OF NATIONAL COURTS

Cases considered by the ECHR after applications by judges of national courts can be conditionally divided into two groups. The first group mainly includes applications lodged by judges whose rights have been infringed. These include, in particular, a violation of the right to freedom of expression, the inviolability of judges and a violation of the presumption of innocence. Although these cases are not directly related to the violation of Article 6 of the Convention, the implementation of the protection of the rights of judges is of great importance for a fair trial. Moreover, in the course of the decision-making process, the ECHR has identified fundamental problems which occur in the practice of judges in the exercise of their competence and which directly affect the independence of the judiciary. The second group consists of cases, which have been the subject of a demonstrable breach of the independence and impartiality of the judiciary pursuant to Article 6, paragraph 1 of the Convention. Most of the infringements occurred in the course of disciplinary proceedings against judges.

In the first group of judicial cases of the ECHR, it is necessary to classify cases of *Pop Blaga v. Romania*, *Shuvalov v. Estonia*, *Corneliu Birsan and Gabriela Victoria Birsan v. Romania*, *Kudeshkina v. Russia*.

In the cases of *Pop Blaga v. Romania* (November 27, 2012, application No. 37379/02) and *Shuvalov v. Estonia* (May 29, 2012, applications No. 39820/08 and 14942/09) judges were accused of abuse of justice and even committing a crime. In those cases, however, the ECHR had to decide on the procedural aspects of the hearing against those judges, such as the illegally obtained evidence, the violation of the presumption of innocence, but also the conditions of detention of the accused judges.

The case of *Pop Blaga v. Romania* (November 27, 2012, application No. 37379/02)[15] concerned the preliminary examination procedure in criminal proceedings against a judge of the District Court of Bihore concerning the acceptance of a bribe by a judge in commercial proceedings. Referring to Articles 3 and 8 of the Convention, the complainant complained about the poor conditions of detention at the police department and the unlawful recording of her conversations, both by phone and in person. The ECHR has acknowledged infringements of Article 3 and Article 8 of the

[15] ECtHR, Pope Blaga v. Romania, app. No. 37379/02, 27 November 2012.

Convention. As regards the unfavourable conditions of detention, the ECHR noted that there was clearly no intention to humiliate the complainant during her one-month detention at the Oradea Police Department, but the absence of such an objective cannot rule out a breach of Article 3 of the Convention. The conditions of detention at issue, which the complainant had to endure for approximately one month, were subjected to tests of an intensity, which exceeded the necessary level of distress associated with detention. As regards the unlawful recording of interviews by an ECHR judge, it was pointed out that the recording of the complainant's telephone calls amounted to "interference by a public authority" in the exercise of the right guaranteed by Article 8 of the Convention. In order to comply with Article 8, paragraph 2 of the Convention, this intervention must comply with national law. As regards the secret supervision of public authorities, national law must provide protection against arbitrary interference with the rights guaranteed by Article 8 of the Convention.

In the case of *Shuvalov v. Estonia* (May 29, 2012, application No. 39820/08 and 14942/09)[16] there is a judge at the Harju Regional Court who was declared a suspect of accepting a bribe in the exercise of his jurisdiction in a criminal decision. The complainant, referring to Article 6, paragraph 1 and 2 of the Convention argued that the media coverage of the case in several television programmes and several newspaper articles, as well as the prosecutor's public statements, violated his presumption of innocence and caused the injustice of criminal proceedings against him. In the present case, the ECHR found that the information disclosed by the public prosecutor was a brief summary of the facts relating to a matter of general interest and that the complainant's right to respect for private life had not been infringed. This finding was also important in terms of the presumption of innocence. The court also considered the complainant's claim of a virulent media campaign initiated by the prosecutor and acknowledged that in certain cases the media campaign may adversely affect the fairness of the trial and give rise to state accountability. At the same time, the court stated that the media coverage of this case, in particular, did not constitute a virulent press campaign aimed at perverting the course of justice of the proceedings, nor found there was any indication that the interest of the media in the matter was generated by the prosecutor. According to the point of view of the court, the media coverage of this case did not go beyond what can be considered as informing the public about the judge's serious allegations and the state of the criminal proceedings. In the light of the above mentioned, the ECHR found that the complainant's right to the presumption of innocence had not been infringed and that there had been no breach of Article 6 paragraph 1 and 2 of the Convention.

As regards the principle of the inviolability of judges, a model example is the case of the partial waiver of the immunity of the Judge of the ECHR Cornelia Birsan and the subsequent decision of the ECHR in the case of the application of the case of *Cornelia Birsan and Gabriela Victoria Birsan v. Romania* (December 13, 2013, application No. 79917/13).[17] The wife of Judge Cornelia Birsan, a judge at the Romanian Court of Appeal, Gabriela, was suspected of committing crimes of corruption, in particular accepting bribes. Following a domiciliary visit of the complainant as part of a pre-examination of a criminal case, the issue of violation of the immunity of an ECHR judge occurred. The President of the ECHR has issued a statement where emphasized that immunity is also guaranteed to family members of judges of the ECHR and expressed concern that Romania had not requested the waiver of immunity from the ECHR. Upon receipt of a request from Romania, the ECHR decided during the plenary session to waive

[16] ECtHR, Shuvalov v. Estonia, app. No. 39820/08 and 14942/09, 29 May 2012.
[17] ECtHR, Corneliu Birsan and Gabriela Victoria Birsan v. Romania, app. No. 79917/13, 2 February 2016.

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the immunity of only Gabriela Birsan, to the extent directly necessary for the investigation. However, the ECHR decided that its decision was not retroactive, so that previous inspections were not in accordance with the provisions of Protocol No. 6 to the General Agreement on the Privileges and Immunities of the Council of Europe, since only the plenary session of the Court deprives judges of their immunity.

Corneliu and Gabriela Birsan lodged an application with the ECHR, referring to Article 6, paragraph 1, Article 8, 13 and 51 of the Convention. In particular, the complainants objected to domiciliary visit and interception of telephone calls, which resulted in an interference with their right to respect for their correspondence and their private and family life and home and the violation of immunity under Article 51 of the Convention. The ECHR noted that, in the context of criminal proceedings, the national courts have ruled that that house search and those interceptions are unlawful because they were carried out irrespective of the immunity provided for in Article 51 of the Convention. Furthermore, by judgment of the Supreme Court of Romania of October 20, 2014, the Court ruled that the immunity had been violated, annulled the eavesdropping of complainants and concluded that, following the cancellation of the results of the search, they had been deprived of any legal value and declared that the records collected through eavesdropping and searches could not be used as evidence. The ECHR thus concluded that the national courts had thus ruled on the substance of the application, while the complainants had succeeded in their national protection arrangements. It follows that, in case when an infringement of Article 51 of the Convention could give rise to liability of the State concerned before the ECHR, it is not possible in this case to rule on an infringement of the Convention.

The case of *Kudeshkina v. Russia* (February 26, 2009, application No. 29492/05)[18] concerns a violation of the complainant's right to freedom of expression as a result of the disciplinary proceedings that led to her being removed from judicial office in 2004 for critical statements about the judiciary in media interviews during her election campaign in 2003. The essence of the contentious statements was to criticize the role of the chief of the courts, including the chief of the Moscow City Court, for interference in the decision-making of individual cases under external pressure and the accusations that pressure on Moscow judges is a common issue. In the contested interviews, the ECHR peddling did not find anything to substantiate the claims made by the Russian state authorities to disclose confidential information. The ECHR found that the complainant indicated a very important matter of public interest, which had to be open to free debate in a democratic society. The ECHR stated that the complainant's arguments had been convincingly refuted in the context of the national proceedings and that its statements should be regarded as a fair statement on a question of major public importance. The ECHR also found that the disciplinary proceedings against the complainant did not respect important procedural guarantees, in particular as regards the impartiality of the Moscow City Court, which considered its appeal against its disciplinary sanction imposed, despite the fact that the appeal was decided by the same court. Its criticism gave rise to the imposition of a disciplinary sanction. The ECHR concluded that the way in which a disciplinary sanction was imposed was not ensured by important procedural guarantees. It also found that the sanction at dispute was disproportionately high and could have had a "chilling effect" on judges who wished to take part in a public debate on the effectiveness of judicial institutions. On the basis of those two conclusions, the ECHR noted that the State failed to strike the right balance between, on the one hand, the need to protect the reputation of the judiciary and, on the

[18] ECtHR, Kudeshkina v. Russia, app. No. 29492/05, 26 February 2009.

other, the need to protect the complainant's jurisdiction and the complainant's right to freedom of expression, thereby breaching Article 10 of the Convention. This case has revealed very important problems in the Russian judicial system affecting the independence and impartiality of the judiciary, even if the issue of independence and impartiality was not the subject of decision-making by the ECHR in this case.

The independence of the judiciary from the point of view of the case law of the ECHR in matters of applications of judges whose rights were violated has been examined in detail by the Czech researcher Kmec, who defined the groups of rights of judges whose violation most affects their independence. These are the right to respect for private and family life (Article 8 of the Convention), the right to freedom of expression (Article 10 of the Convention), the right to freedom of religion (Article 9 of the Convention), the right to freedom of association (Article 11 of the Convention) and the right to protection of property (Article 1 of Protocol 1 to the Convention). Jiří Kmec therefore noted that not only Article 6 of the Convention guarantees the protection of the independence of the judiciary, but other provisions of the Convention also contribute to this protection (2020, pp. 65-71).

To the second group it is necessary to classify cases of *Baka v. Hungary*, *Ermenyi v. Hungary*, *Ramos Nunes de Carvalho e Sa v. Portugal*, *Mitrinovski v. former Yugoslav Republic of Macedonia*, *Volkov v. Ukraine*, *Harabin v. Slovakia*.

Decision on the case of *Baka v. Hungary* (June 23, 2016, application No. 20261/12) and decision on the case of *Ermenyi v. Hungary* (March 22, 2016, application No. 22254/14) was adopted by the ECHR in similar cases concerning the undue and early termination of the mandates of complainants such as the Chief (case of Baka) and Vice-Chief (case of Ermenyi) of the Hungarian Supreme Court through legislative measures *ad hominem* adopted as part of a major judicial reform. The ECHR identified violation of Article 6 of the Convention, combined with an infringement of the complainant's right of access to the court and freedom of expression in the first case and a violation of the complainant's right to respect for private life in the second case (Articles 6, 8 and 10 of the Convention).

In case of *Baka v. Hungary* (June 23, 2016, application No. 20261/12)[19] was identified an early termination of the applicant's term of office from January 1, 2012 through legislative measures, thereby breaching his right of access to the court guaranteed by Article 6, paragraph 1 in the absence of legal measures for bringing the relevant action. The Court found that these measures were imposed because of the complainant's criticism of issues of public interest (planned major reform of the judicial system), thereby breaching Article 10 of the Convention, since no legitimate objective linked to judicial reform was pursued. The ECHR noted that the measures in question were not subject to review and could be difficult to reconcile with the independence and irrevocability of judges. Moreover, the ECHR found that the contested measures had a "chilling effect" which deterred not only the complainant but also other judges and presidents of the courts from participating in a public debate on issues relating to the independence of the judiciary (paragraph 173).

The case of *Ermenyi v. Hungary* (November 22, 2016, application No. 22254/14)[20] concerned early termination (i.e. three years and 10 months before the scheduled expiry of the term of office) of the complainant's mandate as Vice-Chief of the Hungarian Supreme Court at the same time as the President of that court, examined case Baka in Hungary. The ECHR found that the complainant's right to respect for her private

[19] ECtHR, Baka against Hungary, app. No. 20261/12, 23 June 2016.
[20] ECtHR, Ermenyi v. Hungary, app. No. 22254/14, 22 November 2016.

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life was violated (Article 8 of the Convention). Referring to its conclusions in the Baka case against Hungary, the ECHR reaffirmed that the alleged changes in the competences of the Supreme Judicial Authority could not or should not have led to the early termination of the mandate of its Chief. The same applies to the case of Ermenyi, whose appeal was the result of an appeal by the President of the Supreme Court. The ECHR concluded that, within the framework of the Convention, the contested measure did not pursue any of the required legitimate objectives referred to in Article 8, paragraph 2 of the Convention.

In these two cases, the case law of the ECHR focused on several aspects of the principle of the independence of the judiciary: independence from the parties to individuals of proceedings, independence from the executive and the legislative power, and the internal independence of the judiciary. However, all these aspects of the independence of the judiciary have been considered from the point of view of an individual right to a fair and public hearing by an independent and impartial court established by law. In other words, the wording of Article 6, paragraph 1 of the Convention leads to the ECHR to provide analysis of the question of the principle of independence of the judiciary in the framework of the rights of individuals involved in legal proceedings and not of the subjective right of judges to have their own right of independence guaranteed and respected by the state. The principle of judicial independence is not just a matter of its relations with the executive and legislative powers. This also applies to the independence of the judiciary in the system of the administration of justice itself. Judges must be exempted, according to their individual powers, not only from external influences but also from any internal influences. This internal independence of the judiciary means that judges do not receive instructions and are not subject to pressure from their colleagues or persons performing administrative duties in court, such as the chief of the court. The absence of sufficient guarantees ensuring the independence of judges within the judiciary, in particular against their superiors within the judicial hierarchy, makes it possible to consider the complainants' objections to the independence and impartiality of the court to be objectively justified.

The case of *Ramos Nunes de Carvalho e Sa v. Portugal* (March 21, 2016, applications No. 57728/13 and 74041/13)[21] arose from three applications against the Portuguese Republic brought by a Portuguese judge, Mrs Paula Cristina Ramos Nunes de Carvalho e Sa, who at the time served as a judge at the Court of First Instance in Vila Nova de Famalicao. The complainant objected under Article 6 paragraph 1 of the Convention. Particularly it considered the fact that it is not possible to establish its right of access to an independent and impartial court. This was a disciplinary procedure against the complainant carried out by the High Judicial Council. The proceedings concerned the complainant's offensive statements against the judicial inspector in connection with his assessment of the complainant's service. As the complainant was due to take maternity leave at the end of June 2010, she asked the Council to carry out an evaluation before her departure in order to be able to apply for vacancies in 2010. The High Judicial Council initiated three disciplinary proceedings against the complainant for insulting the judicial inspector for over-stretching the performance of the complainant's evaluation, thereby admitting breaches of the ethical standards of conduct of judges. Disciplinary sanctions were imposed on the complainant in disciplinary proceedings, in particular, the suspension of the service for 180 days for breach of duty of decency. On appeal to the Supreme Court, the complainant lost in court.

[21] ECtHR, Ramos Nunes de Carvalho e Sa v. Portugal, app. No. 55391/13, 57728/13 and 74041/13, 21 June 2016.

In examining the present case, the ECHR unanimously held that there had been no infringement of Article 6 paragraph 1 of the Convention, as regards the application alleging a lack of independence and impartiality on the part of the Supreme Court. At the same time, the ECHR decided that Article 6, paragraph 1 of the Convention was violated due to shortcomings in the proceedings against the complainant. The ECHR concluded that, in the circumstances of the case, taking into account the specific context of the disciplinary proceedings against the judge, the severity of the sanction (punishment) and the fact that procedural guarantees towards the High Council of Justice were limited, and taking into account a combination of two factors, namely: insufficient judicial investigation conducted by the Supreme Court and lack of consideration at the stage of disciplinary proceedings led to the fact that the complainant's case was not considered to be in accordance with the requirements of Article 6 paragraph 1 of the Convention.

The case of *Mitrinovski v. the former Yugoslav Republic of Macedonia* (April, 30, 2015, application No. 6899/12)[22] arose following an application lodged by judge Jordan Mitrinovski against Macedonia (the former Yugoslav Republic). The complainant argued that the chief of the Supreme Court, who initiated disciplinary proceedings against the complainant about his dismissal as a judge, was ultimately involved in the decision of the Supreme Judicial Council on his appeal. This led to the situation when the same member of the Supreme Judicial Council both filed charges against the judge and dismissed him. Such a dual role has led to the accumulation and conflict of powers incompatible with the principle of fair trial. Despite the fact that the above-mentioned considerations concerned only one member of the Supreme Judicial Council, his participation in the decision contaminated the whole procedure.

The ECHR recalled that impartiality generally indicates the absence of prejudice or bias. According to the settled case-law of the ECHR, the existence of impartiality within the meaning of Article 6 paragraph 1 of the Convention indicated according to: (i) a subjective test which must take into account the personal beliefs and conduct of a particular judge i.e. whether the judge in the case had any personal prejudice or bias; and (ii) an objective test, i.e. determining whether the court itself and its composition provided sufficient safeguards to rule out any legitimate doubts as to its impartiality. However, there is no division between subjective and objective impartiality, since the judge's actions may not only lead to objective doubts as to his impartiality from the point of view of an external observer (objective test), but may also raise questions about his personal beliefs (subjective test). In other words, justice must not only be proclaimed, it must also be done. This is a trust that the courts in a democratic society must inspire in the public eye. Thus, the ECHR claimed that the Supreme Judicial Council was not an independent and impartial court and that the complainant did not have access to a fair trial and thus the Article 6, paragraph 1 of the Convention was violated. The complainant's case has not been examined by an impartial court.

The case of *Volkov v. Ukraine* (January 1, 2013, application No. 21722/11) is very similar to the case of Mitrinovski. It differs from the case by the fact that the decision taken by the ECHR provoked significant legislative changes at the national level up to the amendment of the Constitution. Like the case of *Volkov v. Ukraine*, the decision in the case of *Harabin v. Slovakia* also provoked a constitutional change. In this context, it is appropriate to analyse these cases in more detail.

[22] ECtHR, Mitrinovski v. the former Yugoslav Republic of Macedonia, app. no. 6899/12, 30 April 2015.

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5. FAIR TRIAL IN THE CONTEXT OF THE ECHR DECISION IN THE CASE OF HARABIN V. SLOVAKIA

The case of *Harabin v. Slovakia* (November 20, 2012, application No. 58688/11)[23] arose on the basis of an application lodged by the President of the Supreme Court, Štefan Harabin. In particular, the complainant argued that his right to hear the case before an impartial court had been infringed in proceedings before the Constitutional Court leading to the imposition of a disciplinary sanction. Disciplinary proceedings against the complainant were initiated on the grounds that the complainant did not allow auditors to carry out financial control of the management of public funds in the Supreme Court. On June 29, 2011, the Constitutional Court found the complainant guilty of serious disciplinary wrongdoing and imposed a disciplinary sanction consisting of a 70% reduction of his annual salary in his term of office for a period of one year. The ECHR has held that there had been an infringement of Article 6 paragraph 1 of the Convention in provision for a disciplinary application against the complainant to be decided by an impartial court.

The ECHR emphasized that, in relation to the application in question, it was not its function to adopt any position as to whether the complainant was entitled to prevent auditors from the Ministry of Finance from carrying out audit. The role of the ECHR in the present case is solely to decide whether the complainant's rights under the Convention have been respected in proceedings before the Constitutional Court in which he was prosecuted for a disciplinary offence.

The ECHR is of the opinion that it is appropriate to deal first with the objection of the alleged lack of impartiality of the judges of the Constitutional Court. Impartiality means the absence of prejudice or bias. Its existence or absence may be established by a subjective and objective test. The position of the party concerned is important but not decisive; whether that concern can be regarded as objectively justified. In this respect, the impression may also have some meaning. It is about trust, which must rise in the eyes of the public. In a democratic society, this is the role of the courts. Thus, any judge who has a legal reason to fear a lack of impartiality must resign. Internal organization issues must also be considered. A relevant factor is the existence of national mechanisms to ensure impartiality, namely the rules governing the exclusion of judges. Such rules show the legislator's interest in removing any reasonable doubt as to the impartiality of the court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such interests. Furthermore, they are aimed at eliminating any indication of bias in order to ensure the absence of genuine bias, thus serving to promote the trust that the courts must invoke in the public. The ECHR therefore considers it a matter of substantial importance if, as in the present case, the Government initiates disciplinary proceedings against a judge in his capacity as President of the Supreme Court. Finally, public confidence in the functioning of the judiciary at the highest national level is at stake in such proceedings. It is therefore particularly important that the guarantees of Article 6 of the Convention apply to such proceedings.

According to the Action Report of the Committee of Ministers of the Council of Europe No. DH-DD (2015) 754 of July 2, 2015[24] concerning the state of enforceability of the decision in the case of *Harabin v. Slovakia* in the part of the implementation of individual measures, it is noted that the original request of the complainant of February 18, 2013 for resumption of proceedings, in the matter of disciplinary proceedings against

[23] ECtHR, Harabin v. Slovakia, app. No. 58688/11, 20 November 2012.
[24] Action report No. DH-DD (2015) 754 of 02. 07. 2015 concerning the case of Harabin v. Slovakia (Application No. 58688/11). Available at: http://hudoc.exec.coe.int/eng?i=DH-DD(2015)754E (accessed on 15.05.2021).

him by the Constitutional Court, was rejected for procedural reasons in accordance with at that time valid provisions of Article 131 of the Constitution of the Slovak Republic. Following the legislative changes of 2014, the possibility for the complainant to request a retrial in accordance with this judgment of the European Court of Justice (paragraph 178) was created. In this context, the Committee of Ministers of the CoE decided that no separate individual measures were needed.

In part of the general adopted measures, the Committee of Ministers of CoE noted that the relevant decision of the ECHR was published in the journal Judicial Review No. 2/2013 and a letter was sent to the President of the Constitutional Court asking all judges of the Constitutional Court to be informed of the above decision. In addition, legislative changes were adopted consisting in the amendment of paragraph 131 of the Constitution of the Slovak Republic by constitutional Act No. 161/2014,[25] adopted on June, 4, 2014 and effective from September 1, 2014. Following the amendment to the Constitution, amendments to Section 75, Section 75a, Section 75b of the Constitutional Court Act[26] were also adopted. The Committee of Ministers of CoE concluded that the Slovak Republic had thus fulfilled its obligations under Article 46 of the Convention and that all general and individual measures necessary for the implementation of the ECHR decision in the case of *Harabin v. Slovakia* had been taken.

The case of *Harabin v. Slovakia* has an effect on democratization by changing the wording of Article 133 of the Constitution of Slovakia. This amendment contains a number of other amendments, but in relation to that decision, the most significant addition is to the provisions on the right of appeal against the decision of the Constitutional Court. The ECHR granted to Štefan Harabin and acknowledged that the changes in staffing of the decision-making board were not in line with the need for the impartiality of the court that ruled in Harabin's disciplinary proceedings. In this context, the ECHR provided that the complainant should be allowed to apply for a retrial which would be impartial. However, this, as amended by Article 133 of the Constitution of Slovakia effective until August 31, 2014 was not possible. With regard to the decision of the ECHR, the legislator extended Article 133 of the Constitution of Slovakia and made it possible to re-examine the decision of the Constitutional Court if such an obligation arises in Slovakia by a decision of an international body by which it is bound. This, therefore, represents an additional possibility for complainants who, by reference to the case-law of the ECHR according to Article 46 the Convention will be able to initiate the opening of proceedings already concluded, which is, in other words, the introduction of effective means.

6. PROBLEMS OF THE JUDICIAL SYSTEM AS A DECISION OF THE ECHR IN THE CASE OF VOLKOV V. UKRAINE

In the case of *Volkov v. Ukraine* (January 9, 2013, application No. 21722/11)[27], the complainant complained of a violation of his rights under the Convention during the procedure for his demission from office as a judge of the Supreme Court. According to the ECHR the Volkov case revealed systemic problems in the functioning of the Ukrainian

[25] Constitutional Act No. 161/2014 of 04. 06. 2014 amending the Constitution of Slovakia No. 460/1992 as amended. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2014/161 (accessed on 15.05.2021).
[26] Act No. 314/2018 of 24. 10. 2018 on the Constitutional Court of Slovakia and on amendments to certain acts. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2018/314/20210101 (accessed on 15.05.2021).
[27] ECtHR, Volkov v. Ukraine, app. No. 21722/11, 9 January 2013.

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judicial system. In particular, the infringements found in the case indicate that the system of disciplinary proceedings against judges in Ukraine is not properly organized because it does not ensure sufficient separation of the judiciary from other branches of state power. Furthermore, it does not guarantee the misuse of disciplinary measures to the detriment of the independence of the judiciary, the latter being one of the most important values underlying the effective functioning of democracy. The ECHR admitted that, following the nature of the infringements found, Ukraine must take a number of general measures aimed at reforming the system of disciplinary proceedings against judges, in order to properly implement that decision.

Several points are important in terms of determining the legal mechanism for the return of Volkov to post. Firstly, in the case of Volkov, the ECHR took the decision, for the first time in the history of the organization, to restore the person against whom a violation of the Convention has been established. Secondly, the ECHR stressed that, in many cases, it was decided to restore the infringed right by repeatedly assessing the case at the national level. However, in the particular case, the ECHR does not see any sense of the establishment of such a measure, since it doubts the possibility of re-examination of the complainant's case in the near future and in accordance with the principles of the Convention. At the same time, the ECHR stated that it could not allow the complainant to remain in a state of uncertainty as to how to restore his right. The ECHR concluded that the situation at issue in the main proceedings did not, by its very nature, leave a genuine choice of individual measures necessary to remedy the infringed rights of the complainant guaranteed by the Convention.

This decision of the ECHR is not limited to addressing an individual's personal issue, but concerns the principles of the functioning of state power in Ukraine. The ECHR stated that this case reveals serious systemic shortcomings in the functioning of the Ukrainian judicial system. According to its decision, the following problems are the next: the absence of a real division of state power into legislative, executive and judicial, which causes political and other dependence of courts and judges; politicization of judiciary mechanism, which has significant political influence and its "manual" management; the dominance of subjective criteria in disciplinary proceedings against judges for oath-breaking, as evidenced by the work of the High Judicial Council, whose members combine four different functions in deciding on the demission of a judge for oath-breaking (initiation of appeal; verification in the submission of the stated circumstances of the activity of a judge; submission an opinion on the existence of grounds for demission by a judge; deciding on the merits of the application); legal uncertainty regarding the demission of judges for oath-breaking. In Ukraine, there is no limitation period for the demission of a judge on the grounds of breach of oath and the grounds for appeal are vague and ambiguous; the absolute defencelessness of judges against unjustified disciplinary action, in particular allegations of breach of a promise. Combined with the other circumstances mentioned above, this creates an atmosphere of fear in the judicial environment and leads to the complete dependence of judges.

The case of *Volkov v. Ukraine* was not the only one on this subject. On January 19, 2017 the ECHR took a decision in a similar case of *Kulikov and others v. Ukraine* (application No. 5114/09 and 17 other applications)[28], which arose from eighteen applications against Ukraine lodged by former judges for demission, in violation of their rights under Articles 6 and 8 of the Convention. On September 25, 2018, the ECHR took a decision in the case of *Denisov v. Ukraine* (application No. 76639/11)[29] following an

[28] ECtHR, Kulykov and others v. Ukraine, app. No. 5114/09 and 17 others, 19 January 2017.
[29] ECtHR, Denisov v. Ukraine, app. No. 76639/11, 25 September 2018.

application by judge Anatoly Denisov, where the complainant argued, in particular, that his demission from his position as President of the Court of Appeal had not been carried out in accordance with Article 6 paragraph 1 of the Convention and constitutes an unlawful and disproportionate interference with his private life. In both cases, the ECHR concluded that it was a violation of Article 6 paragraph 1 of the Convention in relation to all complainants as regards a breach of the principles of independence and impartiality.

The ECHR has stated that, as regards the objections under Article 6 paragraph 1 of the Convention, there was a lack of independence and impartiality while state authorities took decision in case of the applicant. The ECHR referred to its conclusions in the case of *Volkov v. Ukraine* and hereby concluded that the proceedings before the High Judicial Council and parliament revealed a number of structural and general shortcomings, which call into question the principles of independence and impartiality. The ECHR has decided that these findings are equally relevant to those applications.

The Committee of Ministers of the CoE added control of the implementation of the *ECHR* decisions in the cases of *Volkov v. Ukraine*, *Kulikov and others v. Ukraine* and *Denisov v. Ukraine*, into one group of cases concerning the injustice of the disciplinary system against judges who, regardless of the permanent period after the decisions have been taken, are still under supervision.

These cases have triggered significant reforms in the area of disciplinary accountability of judges, from constitutional and legislative changes to the practice of disciplinary proceedings. In the group of cases of *Volkov v. Ukraine,* the ECHR indicated a number of issues relating to the independence of judges that require legislative solutions on the part of Ukraine. In August 2020, the Ukrainian Centre for Legal Reform Policy carried out an analysis of the implementation of the decisions of the ECHR in the case group of *Volkov v. Ukraine* for the period of 2014-2020.[30] According to the analysis, Ukraine has significantly improved its legislation since 2014 to address the problems identified by the ECHR.

The first legislative change was the adoption in 2014 of an act restoring confidence in the judiciary in Ukraine,[31] which gave the court more powers to restore the violated rights of an unlawfully dismissed judge. Another amendment in 2015 was the adoption of the Act on ensuring the right to a fair trial,[32] which significantly increased the guarantees of independence and impartiality of members of the Higher Judicial Council and modified a fairer procedure for the demission of a judge on the grounds of breach of promise and introduced more disciplinary sanctions alternative to appeal.

The Act of Ukraine amending the Constitution of Ukraine (concerning justice) of June 2, 2016[33] adopted amendments to Articles 124-131, 147-149, 151, 153 of the Constitution of Ukraine on the regulation of the judiciary in Ukraine. The constitutional changes eventually aligned the composition of the Higher Judicial Council with the requirements for independence of this body (effective from 2019), the political authorities were removed from the decision-making of questions of disciplinary responsibility of judges (in particular, the demission of a judge). Although the adoption of constitutional

[30] Centre of Policy and Legal Reforms (2020). *Analysis of the progress of Ukraine in implementing the Volkov group of judgments of the European Court of Human Rights for the period of 2014-2020*. Available at: https://rm.coe.int/analysis-of-the-execution-volkov-group-cases-ukr/1680a06971 (accessed on 15.05.2021).
[31] Act No. 1188-VII of Ukraine of 8 April 2014 on restoring confidence in the judiciary in Ukraine, as amended. Available at: https://zakon.rada.gov.ua/laws/show/1188-18#Text (accessed on 15.05.2021).
[32] Act No. 192-VIII of Ukraine of 12 December 2015 on ensuring the right to a fair trial, as amended. Available at: https://zakon.rada.gov.ua/laws/show/192-19#Text (accessed on 15.05.2021).
[33] Act No. 1401-VIII of Ukraine of 2 June 2016 amending the Constitution of Ukraine (concerning justice). Available at: https://zakon.rada.gov.ua/laws/show/1401-19#Text (accessed on 15.05.2021).

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reform is generally a positive measure aimed at ensuring guarantees of the functioning of the judiciary, it has serious shortcomings, in particular the new Article 126, paragraph 3 of the Constitution of Ukraine provides for the commission of serious disciplinary infringements as grounds for the demission of a judge. At the same time, there is no legal definition of the concept of "serious disciplinary offence" in the national law, thus creating scope for illegal influence on judges. That legislative provision is contrary to the case-law of the ECHR.

In 2006, a new act on the judiciary and the status of judges[34] was adopted, which preserved and strengthened previous achievements in strengthening the system of disciplinary accountability of judges, in particular, to consolidate the procedure for appealing against a decision in disciplinary proceedings against judges of different levels. In 2016, the Act on the High Council for Justice[35] was adopted, which replaced the previous Act on the High Judicial Council and implemented a number of constitutional changes, in particular, the composition of the Justice Council and its disciplinary chambers, aligned with the requirements of the independence of this body and the impartiality of its powers, determined the possibility of revoking the council's decision by the court and resolved the further course of disciplinary proceedings after the annulment of such a decision.

In 2019, the Act amending the Act of Ukraine on the Judiciary and the Status of Judges and certain laws of Ukraine on the activities of judicial self-government bodies[36] was adopted. The adoption was initiated by the new President of Ukraine. The act was intended to change the composition of the newly created Supreme Court, the High Council for Justice and the Higher Qualifications Committee of Judges, as well as to change disciplinary procedures. However, some of its provisions do not comply with the provisions of the Convention, as pointed out by the Venice Commission. In particular, the Venice Commission noted that the Government appears to be open to further changes to the judicial system in order to eliminate the shortcomings of this act, which was adopted by an accelerated procedure without sufficient examination of the views of all the parties concerned. However, the Commission is deeply concerned that the act may lead to major changes in the composition of the Supreme Court following a change in the political majority. The Supreme Court has been comprehensively reformed on the basis of legislation adopted by a previous amendment to the legislation. Under the new act, it depends on the will of the respective majority in parliament whether or not the Supreme Court judges can remain in office. This is a clear threat to their independence and to the role of the judiciary under Article 6 of the ECHR.[37]

By decision of the Constitutional Court of Ukraine on March 11, 2001, in the case No. 1-304/2019 (7155/19) on the constitutionality of certain provisions of the Act on the Judiciary and the Status of Judges, the Act on Amendments to the Act of Ukraine on the Judiciary and the Status of Judges and certain Acts of Ukraine on the Activities of The

[34] Act No. 1402-VIII of Ukraine of 2 June 2016 on the judiciary and the status of judges, as amended. Available at: https://zakon.rada.gov.ua/laws/show/1402-19#Text (accessed on 15.05.2021).
[35] Act No. 1798-VIII of Ukraine of 21 December 2016 on the High Council for Justice, as amended. Available at: https://zakon.rada.gov.ua/laws/show/1798-19#Text (accessed on 15.05.2021).
[36] Act No. 193-IX of Ukraine of 16. October 2019 on amendments to the Act of Ukraine on the Judiciary and the Status of Judges and certain Acts of Ukraine on the Activities of Judicial Self-Government Bodies. Available at: https://zakon.rada.gov.ua/laws/show/193-20#Text (accessed on 15.05.2021).
[37] European Commission for Democracy through Law (Venice Commission) (2019). *Opinion CDL-AD (2019) 027-e on the Legal Framework in Ukraine Governing the Supreme Court and Judicial Self-Governing Bodies, adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019)*. Available at: https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)027-e (accessed on 15.05.2021).

Bodies of Judicial Self-Government, the Act on the High Council for Justice,[38] taking into account the conclusions of the Venice Commission, a number of legislative amendments that have been done were declared as unconstitutional. The Constitutional Court of Ukraine relied on the premise that regulated issues of disciplinary action and disciplinary liability of a judge must comply with the constitutional principle of the independence of judges.

According to the resolution of the Committee of Ministers of the CoE No. CM/Del/Dec (2020) 1383/H46-26 of September 29 - October 1, 2020[39] in supervising the implementation of the ECHR decisions in the Volk against Ukraine group of cases the Committee of Ministers of the CoE positively assessed the adoption of general measures related to judicial reform, especially in the area of judicial discipline through amendments to the Constitution of Ukraine, new laws and practical and organizational measures. At the same time, it assessed various measures in this group of cases with concern and expressed disappointment at the slow progress made in the proceedings towards the various authorities; urged the public authorities to close the proceedings without further delay by full reinstatement in the office of complainants, while considering the principles of legal certainty and ensuring compliance with the application of time limits in disciplinary proceedings. As regards general measures, the Committee pointed out that the fundamental principles of power-sharing, the structural independence of the judiciary and the irrevocability of judges are fundamental entities of judicial independence; reiterated that these principles should be strictly respected when adopting or amending legislation on the judiciary in order to ensure their compliance with the Convention and the case law of the ECHR. In this context, the Committee welcomed the decision of the Constitutional Court concerning the Act amending the Act of Ukraine on the Judiciary and the Status of Judges and certain laws of Ukraine on the activities of judicial self-government bodies; to call on the state, in response, to develop and adopt a legislative framework that takes full account of the relevant Council of Europe standards; noted with interest the parliamentary request to the Venice Commission for an opinion on the relevant draft law; called on the Ukrainian authorities to consult all stakeholders using the expertise of the Venice Commission in order to include its future recommendations in the legislative process.

As we can see, as compared to the Slovak Republic, where the solution to the problem of independence and impartiality of legal proceedings according to the case of *Harabin v. Slovakia* was actually implemented by adopting one amendment to the Constitution of Slovakia, regardless of the permanent (seven-year) period of implementation of the decision of the ECHR in the case of *Volkov v. Ukraine* and the adoption of several new acts, as well as several amendments to the Constitution of Ukraine, Ukraine has still not been able to provide legal guarantees at the national level for the independent and impartial functioning of the judicial system.

7. CONCLUSION

The issue of the impartiality and independence of the judiciary is topical from the point of view of the Council of Europe, as evidenced by the large number of pieces of

[38] Ukraine, Constitutional Court of Ukraine, Case No. 1-304/2019 (7155/19) (11 March 2020). Available at: https://zakon.rada.gov.ua/laws/show/v004p710-20#Text (accessed on 15.05.2021).
[39] Decision No. CM/Del/Dec (2020) 1383/H46-26 of 29. 09. – 01. 10. 2020 concerning Oleksandr Volkov group v. Ukraine (Application No. 21722/11). Available at: http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2020)1383/H46-26E (accessed on 15.05.2021).

legislation that pay close attention to this issue. From the point of view of the Council of Europe, an impartial and fair trial is a guarantee of the rule of law. Although the Member States are entitled to choose independently national measures to ensure the right to a fair trial at the national level, the Council of Europe sets out in its legislation the basic principles of judicial independence, which concern both judges' independence from external influences and any internal influences on them.

The ECHR supports and extends this view of the Council of Europe by the need to carry out a subjective and objective test in assessing the impact on judges in each specific situation. This means that the perception of the judge of the degree of influence (subjective test) is as important as the manifestation of such influence (objective test). In the context of its decisions, the ECHR emphasizes that the independence and impartiality of courts are directly related to the requirement of Art. 6 of the Convention to a "court established by law". It follows that the independence of courts means their independence from other bodies as well as from the parties to the hearing and presupposes the existence of procedural guarantees and fulfils the objective aspect of the right to a fair trial.

The analysis carried out showed the fact that there was a large number of judges' complaints to the ECHR. This fact in itself shows that judges of national courts consider this way of protecting their (especially professional) rights to be effective. At the same time, as we can see, most of the ECHR's decisions were taken in favour of the judges, so the ECHR upheld their complaint. Moreover, the independence and impartiality of judges is a guarantee of a fair trial, which is directly enshrined in Art. 6 of the Convention, that is, it can be directly applied in decision-making. For this reason, we contribute to the conclusion that ECHR decisions are an effective way of protecting the rights of national judges.

The existence of the possibility for judges of national courts to lodge a complaint with the ECHR against a state which does not guarantee their independence and impartiality increases judges' conviction that they can act without fear or prejudice in their power independently of objective influence degree of fairness in the decision-making of judges of national courts.

The case law of the ECHR has a significant impact on the reform of the judiciary at the national level, in particular through general measures, the adoption of which leads to the adoption of legislative changes at the national level. The higher level of such a reflection is the constitutional reform, which is not only a theoretical possibility of solving the problem but has been demonstrated in practice in some Council of Europe states (for example in Slovakia and Ukraine in Harabin and Volkov cases).

The research carried out in this way showed that the issue of the independence and impartiality of the judiciary is given great attention by the Council of Europe itself in its documents and to the ECHR in its decisions. The guarantees of the personal rights of judges and their rights connected with the exercise of the duties of a judge is a guarantee of the judge's sense of security in decision-making. The existence of positive (in favour of judges) decisions of the ECHR guarantees judges a certain kind of freedom from pressure from other state authorities, in particular, through disciplinary, administrative or criminal proceedings. Thus, the judges ensure, on the one hand, that a fair trial is exercised and, on the other hand, they themselves are persons in need of guarantees of a fair judiciary. It can therefore be clearly stated that a judge who is guaranteed his own (personal and professional) rights and freedoms of decision is able to ensure a higher degree of justice for the parties. Therefore, when deciding on the independence and impartiality of judges, the ECHR pays considerable attention to the existence of systemic deficiencies at the national level, and the general measures taken in its decisions bring

about significant changes in national legislation up to changes in the Constitution. It can, therefore, be made clear that the hypothesis that the decisions of the ECHR is a guarantee of the right to a fair trial, in particular, that of an impartial and independent court, has been confirmed.

However, granting judges full freedom without the possibility of prosecuting them may result in impunity and, consequently, arbitral conduct in the performance of their duties. It is therefore of the utmost importance to ensure a balance between an effective mechanism for implementing guarantees of independence and impartiality of judges and a mechanism for their accountability (particularly, disciplinary proceedings). In its decisions, the ECHR shows the direction of implementation of these mechanisms, but their implementation itself falls within the jurisdiction of the contracting states. Thus, only time is an indicator of whether these mechanisms have been effective and effectively implemented at the national level.

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VISUAL AS MULTI-MODAL ARGUMENTATION IN LAW /

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Abstract: *Although the legal context is a formalized framework, in judicial proceedings there is also room for multi-modal argumentation. To the traditional logical mode, multi-modal argumentation theory has added three additional modes (the so-called "alternate" modes: visceral, kisceral, and emotional). They complement the logical mode in unclear legal cases, those with vague and ambiguous premises (both legal and factual). What is discussed here is visual argumentation as part of the visceral mode. Visual arguments can be appropriate in legal argumentation as evidence used to determine the lower premise. However, "thick" visuals invite alternate arguments to be applied in legal argumentation. This "invitation" is not exactly the same as with "thick" verbal texts because what is at issue are different semiotic resources.*

Key words: *visual argumentation; multi-modal argumentation; rhetorical argumentation; legal argumentation*

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1. INTRODUCTION

The existence of multi-modal argumentation is far from a novel idea. The purpose of its creation was to extend the traditional logical mode of argumentation to other non-logical and generally non-verbal modes of argumentation (Gilbert, 1994).[1] If a mode of communication is the manner or way in which people communicate, then the mode of argumentation will be the mode in which they argue, i.e. make claims and support them by reasons when they disagree. Apart from the logical mode, Gilbert also discusses the emotional mode, the kisceral (intuitive) mode, and the visceral (physical) mode[2] of which visual argument is a typical example. Within that theory, it is important that at least one premise (preferably reasons) is in an alternate (in this case, visceral) mode. This article deals with visual argumentation following Gilbert's theory of multi-modal argumentation. Therefore, a visual argument will be the one in which at least one

[1] Kress, a social semiotics scholar, even asserted that multimodality is "the normal state of human communication" (2010, p. 1).
[2] According to Gilbert, »these arguments are primarily physical and can range from a touch to classical nonverbal communication, i.e. body language, to force« (1997, p. 84).

premise is visual.[3] However, in my analysis of visual argumentation in law, I also borrow certain findings from another similar approach to the topic called multimodality (without a hyphen).[4] Both claim their origin in social semiotics, which had invented the term multimodality that Gilbert extended to argumentation theory. Both approaches would agree that if argumentation is only in one mode, it is called monomodal, while a combination of more than one mode constitutes multi-modal argumentation (see, e.g., for the multimodal approach, Forceville, 2020, p. 65). With respect to real-life arguments, it is very rare to find them in one pure mode only. When combined, they are designated as "multimodal ensembles" (Kress and van Leeuwen, 2001).

An example of such a visual argument, used in the legal context, would be the video of the beating of Rodney King by the police (in 1991) (Groarke, 2017, p. 12). King was violently beaten by LA police officers during his arrest for fleeing and evading on a LA road. A bystander filmed the incident from his nearby balcony and sent the film to a local news station (Koon and Deitz, 1992; King and Spagnola, 2012). The film clearly showed King being beaten repeatedly by the police. The structure of that quite clear visual argument (P → C) could be as follows: the conclusion (C): "King is being beaten brutally by the police" is supported by the premise (P): "Many harsh movements by the police officers hitting his body", where P is in a purely visual (thus non-verbal) form. Thus, a quite clear visual evidence was appropriately interpreted (or "translated" from the visual mode) to form a verbal antecedent.

Yet the relevance of visual arguments for legal procedures and legal argumentation has not generally been discussed until relatively recently (Groarke, 2017). Visuals (such as photos, videos, etc.) have indeed been part of legal proceedings since their technological invention, and paintings, drawings, sketches, etc., had even featured before. They are mostly used in such proceedings in the form of evidence – because we do not have visual legal provisions, but have not been discussed as separate arguments, where their non-verbal form would be analyzed in the face of general legal arguments that are verbal. They have been more or less taken for granted in the frame of legal syllogism. Why this traditional neglect for them? Perhaps because (formal) logic has dominated the field and such visuals have simply been taken as evidence, which is part of the lower premise of a legal deductive syllogism, where the only question was whether such evidence meets a certain standard of proof prescribed for the specific legal proceedings. With the advent of information technologies, the internet, social networks, etc., visuals have become more important in human communication than ever before. It also became obvious that they cannot be just "automatically" used in the logical skeleton of typical legal argument, especially because of their different semiotic resources than words. Thus, problems have appeared that need to be addressed additionally to examine the possibility of traditional (i.e. logical) legal arguments being influenced by multi-modality. From multi-modality, the so-called 'alternate' modes (i.e. emotional, kisceral, and visceral) are especially interesting, particularly in terms of seeing how they interact with the predominant logical mode in law, and what kind of dynamics they bring to the static character of traditional legal arguments.

[3] If there is some verbal text accompanying the visual, it may not change the point that the visual plays an important part in the argument. What is important is the view that the visual brings an additional dimension to merely verbal argumentation.

[4] A major difference between the two approaches is that, unlike the Gilbert's approach to multi-modality that discusses the four modes, multimodal theory of argumentation generally takes into account the following modes: visuals, written language, spoken language, bodily movement, sound, music, olfaction, taste and touch (see, e.g. Forceville 2020, p. 67). This approach generally falls within what Gilbert would call the visceral mode.

However, before any discussion on multi-modality and law begins, it should be stressed that the legal context is a special social context in which a greater level of formality applies than in other social situations. Thus, special rules of substantive and procedural law are enacted in order for courts with mostly professional judges to decide upon the most important social disputes, so their decisions have very important consequences for the whole of society. Hence there is a need for these decisions to be properly made and reasoned and, therefore, the basic rule of the legal context emphasizes its strong institutional and normative constraints. If a legal dialogue is about communicating on the basis of legal norms, legal argumentation cannot be free from using them. Nevertheless, legal systems are not immune to interpretative problems such as gaps, vagueness and ambiguity. The findings from visual (and multi-modal) argumentation theory only contribute to the notion of legal indeterminacy. Or proves, once again, its argumentative not demonstrative agenda (Perelman and Olbrechts-Tyteca, 1969, p. 13).

This article first discusses the existing formal constraints in law, in the form of legal provisions of a substantive and procedural character, which present necessary restrictions for any kind of multi-modal argumentative activity in that area. However, secondly, I analyze the importance of multi-modal visual arguments in the framework of legal argumentation, whereby I emphasize the role of visuals as evidence in the legal context, discuss the necessary semiotic "translation"[5] of visuals into their verbal dimension, and point to a difference between thick and thin visuals. Thirdly, and finally, based on the theoretical model of the use of visuals in the legal context presented in the first part, in the second I reconstruct a real legal case in a multi-modal manner and present some final thoughts about the problem in the conclusion.

2. FACING LEGAL INSTITUTIONAL CONSTRAINTS

In (modern) law, seen as a separate social system of legal norms, people have traditionally argued on the basis of legal norms from statutory, constitutional, and executive regulations provisions as well as the case law of courts. As a result, specific legal arguments developed on the basis of legal texts, or at least in (close or more relaxed) connection with them. In this respect, Perelman and Olbrechts-Tyteca discussed the relevance of starting points (1969), and the pragma-dialectical theory of argumentation of institutional constraints (Feteris, 2017), in the case of law – legal provisions, the consideration of which is necessary in order to argue legally.[6] This issue is of paramount importance for legal argumentation and disrespecting it leads to fallacious legal argumentation. The so-called "errors in law" include not only the absence of any legal provision referred to but, much more frequently, erroneous or improper legal norms being referred to in legal proceedings. Thus, in the context of law, the indispensable institutional starting points include both substantive as well as procedural legal provisions, since only both of them constitute complete legal texts as the necessary grounds in legal proceedings.

Moreover, logic and logical frameworks for making legal inferences and justifying them, whether they be simple or complex, have always been crucial for the legal world. This seems to be an axiom, at least regarding modern law. In order for the rule of law to apply, at least from the formal and internal point of view, in the context of the internal

[5] The quotation marks are used because no literal translation is applicable in this context, especially when unclear visuals are at issue.

[6] MacCormick would add that this makes "a restricted version of the arguable character of law" (2005, p. 17).

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justification of legal decisions (Alexy, 1989), the logical syllogistic argument seems to be an overarching form of legal argument. As a result, future legal practitioners are taught as early as in the first year of their schooling that the lower premise of the facts of a specific case must match the upper premise of a legal norm in order to come to a legal conclusion. However, in many legal cases, simple deduction as a method of formal logic does not suffice since as we have to additionally work on the premises (i.e. externally justify them (Alexy, 1989), often in the manner of informal logic. Accordingly, in the legal context, along with the deductive argument, which may even be called the "skeleton" legal argument, we could also add to such arguments of systemic, linguistic, historical or a similar character, to additionally explain the legal premise, and evidence to help establish the factual premise.

Considering the fact that not only typical logical and verbal arguments as traditional legal arguments can constitute arguments, but also other multi-modal arguments such as visual arguments, it is necessary to establish whether these alternate arguments can be valid ones in the legal context. In any consideration of this question, I should stress from the outset that, unlike general social communicative situations in which multi-modal argumentation can apply to its fullest extent, this is not entirely the case in the legal domain. As already mentioned, the law as a social subsystem has additional formal requirements, "starting points" or "institutional constraints." Therefore, this "golden" rule applies when we enter a legal discussion which also applies to legal argumentation: in order for discussion and argumentation to be valid in legal terms, one should argue by means of legal norms (legal rules and legal principles) only (or in connection with such). This follows from the overarching principle of the (modern) rule of law as the law based on legal norms.

To argue legally, one needs to assert a claim that is recognized by a legal norm: otherwise, his or her claim is rejected, and no legal argumentation ensues. The same rule applies to all participants in legal argumentation, whether they be parties, judges, prosecutors, or attorneys. All arguers and audiences participating in the legal discussion must follow this rule in order to make valid legal arguments.

But informal logic is still logic, albeit less formal and, given the described victorious position of the logical mode in law, why discuss multi-modal argumentation in law at all? Does this mean, therefore, that we need to discard its role in the legal domain altogether? I do not think so, but we will see below that by including multi-modal argumentation it becomes relevant in combination with legal norms as institutional constraints. And it might surprise us to see how uncertain a legal logical syllogism can be.

Still, to argue legally is to argue on the basis of legal norms, to subsume factual situations under them, and make legal conclusions. This is the basic requirement of the rule of law, as an ideal legal approach that is normative in character. Thus, visual arguments can also be appropriate in legal argumentation when, in a stronger or weaker manner, they are appropriately connected to legal norms. The previously mentioned video of King's beating by the police is an example of a visual argument within a broader legal argument whether such police's activity was unlawful. More specifically, the visual argument was found in the "battle" for the establishment of the lower syllogistic premise between the prosecutor and the policemen's defence counsel in that case.

3. VISUAL ARGUMENTS IN LEGAL ARGUMENTATION

3.1. Visual Arguments as Legal Evidence

As already mentioned, if a visual argument is to be part of an acceptable line of legal argumentation from a legal point of view, it needs to be connected to relevant legal provisions and their application to relevant facts. When dealing with visuals as facts or evidence to be used in legal proceedings, visual argumentation becomes an inseparable part of legal argumentation. Let me refer below to an example of another visual argument reported by Groarke (2017, pp. 17-18), and see how it was applied as legal evidence used by the court in that case.

The so-called "Keane controversy" was about "the question whether Walter or Margaret Keane was the American artist who painted "big-eyed" paintings of children, women and animals that were popular in the United States in the 1960s. Although the paintings were originally attributed to Walter, Margaret claimed that she was the real artist in 1970, initiating a long dispute. When she sued Walter for $3 million in 1986, the case was tried in the federal court in Honolulu. In an attempt to determine who the real artist was, Judge Harold M. Fong asked Margaret and Walter to paint a big-eyed child before the court [consisting of the judge and the jury]. While Walter claimed he had a sore shoulder and could not paint, Margaret painted a young boy in the manner of the well-established paintings. The painting became Exhibit 224 and, together with other considerations, it produced a judgment that awarded Margaret $4 million in damages. Margaret's act of painting was submitted as [non-verbal] evidence for the conclusion that she was the artist who painted the well-known big-eyed paintings." (Groarke, 2017, pp. 17-18).

The visual argument in that case reads as follows: Claim – Margaret's painting painted before the court is (almost) the same as the previous "big-eyed" paintings; Reason - [the painting itself], is an example of the non-verbal visceral mode.

This is not exactly the same as the legal argument in the logical mode, which was made previously in the lawsuit, and went in the following manner: Mp (the major premise consisting of legal norms): "Anyone whose copyright is violated, is to be redressed concerning their moral (recognizing authorship), or material rights (awarding compensation), respectively." In the Mp, copyright holders could be defined to include painters (a), as well copyright violations to include false authors pretending to be original ones (b). At the level of the factual premise of the legal argument, we have mp (the minor premise consisting of relevant facts) which reads in the following manner: "Margaret's copyright was violated since she was proved (by the evidence taken in the form of Margaret's painting before the court – the visual argument in that case!) to be the original author whose authorship had been stolen." Finally, what follows is c (the conclusion inferred on the basis of the minor premise subsumed under the major premise): "Margaret's copyright is to be redressed."

Thus, the above-mentioned visual argument (of Margaret's painting before the court) was used as legal evidence to prove the existence of the minor premise in that case so that the deductive syllogistic inference was possible by applying the relevant copyright provision to the described facts. By means of this evidence it was proved that Margaret was the original author, which meant that Walter stole the authorship of big-eyed paintings from her.

The use of visual arguments as legal evidence in legal cases has been commonplace for quite some time. With technological development, our societies have very much become visual, which means that the use of visual arguments will only increase. However, their use in legal proceedings to date to prove the existence of certain

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facts so that specific legal provisions are applied has been taken for granted somewhat. Here I try to show that this should not be the case as there are different visuals, some with multiple meanings discovered not until they try to be interpreted. And, what is important, we do not face exactly the same problems as when words are interpreted. As semiotic resources, visuals are different from words and never completely (or literally) translatable by them. Both visual and verbal arguments in their monomodal forms might be already complex, not to mention their multi-modal (visual-verbal) combinations. Thus, in the process of their use in legal proceedings in such a case, there seems to be plenty of room for different strategies that lawyers might use in order to persuade their audience about their positions.

3.2. Semiotic "Translation"

To qualify arguments which are constructed in everyday life as visual, they need to be made in a visual mode, where their reasons/premises are (non-verbal) visual, such as pictures, paintings, photographs, videos, drawings, sketches. As a matter of fact, it would be quite unusual if not impossible to find pure visual arguments. They are usually accompanied with some (verbal) text (in a premise or conclusion) and are in fact already as such multi-modal. In semiotics, it is held that every image (or visual) is polysemious (has multiple related meanings). Thus, the role of the verbal text accompanying a visual is to anchor and relay it. Anchoring helps to control it, by avoiding other meanings and keeping it away from any emerging connotations, while relaying is to fill the gap that the images cannot (Barthes, 1967).

However, in order to be used in a legal argument, in the case of evidence to enter the minor premise of a legal deductive syllogism, they need at some point to be verbalized. There are several reasons for this: legal provisions with possible sanctions for their violations are in a verbal form, the evaluation of evidence with all discussions in the courtroom is verbal. Such is the verbal justification of their application with a proper analysis in the reasoning of a judgment in such a form. Before such an inference is made, a legal norm has to be extracted from a relevant legal provision in view of the applicable facts, as well as legal facts extracted from brute, in this case visual, facts (supported by evidence) on the basis of the legal norm. Engisch illustrated the interdependence between the normative legal text and the description of the case with his metaphor of "looking back and forth" ("Hin- und Herwandern des Blicks")(1963, p. 15).

Therefore, a visual (e.g. evidence) needs to be translated into a verbal form to be subsumed under a verbal legal norm. However, as Kjeldsen notes, literal translation between different multi modes is impossible (2015).[7] The verbal means do not actually suffice to capture the rich information communicated by images to an audience (Kjeldsen 2016). However, some kind of semiotic translation of visuals into words is therefore necessary in the legal context, despite the fact that it constitutes something of a "leap." Translations across modes, for example from image to speech, are both possible and difficult and always achieved with enormously difficult selection, at a considerable level of generality (and in inevitably significant changes in meaning) (Kress 2010, p. 10). Blair claims that the verbal is to be understood as a placeholder for the visual, not a "translation" of it: verbal reconstruction rarely captures all that was expressed in the visual argument, but is a placeholder for it, and provides us with a reference for use in evaluating the cogency of the visual argument (2015, p. 220). Therefore, there is a risk of overemphasizing the role of the verbal over the visual by using merely linguistic properties

[7] Which Jung also claimed for his four cognitive functions (1971).

to assess the visual because some important features of images may remain outside of the linguistic perspective (Tseronis and Forceville, p. 15).

When the verbal mode is combined with the visual mode, it is wrong to assume that the verbal model conveys the standpoint while the visual mode is only the reasons in support of it, so that, it is simply used to appeal to the audience's emotions (Tseronis and Forceville, p. 15). The meaning conveyed by texts in which more than one semiotic mode is at play is never the sum of distinct parts of a multimodal text (Jewitt, 2014). The meanings of one mode and the meanings of others resonate so as to produce more than the sum of the parts (Bateman, 2014, p. 6).

But the "translation", whatever it may be, from the visual into the verbal logical mode is necessary in the context of legal argumentation. Otherwise, there is no way of confronting legal evidence in the visual form with facts that need to be in the verbal form so that a relevant legal provision is applied in a verbal form. Legal arguers need to "translate" their alternate arguments into the logical mode, the "language of legal norms and legal systems", to pass muster in terms of the rule of law.

In this case, a "semiotic translation" implies that various non-verbal 'semiotic resources' (or speech acts (Groarke and Tindale 2004)) need to be "translated" in the verbal mode in order to play some role in legal proceedings. This not only applies to visuals, such as pictures, photos, etc., but also to other physicalities from the visceral mode, including sounds, tastes, smells, although in this paper I limit myself to visuals. In certain cases, there is no problem with this since visual "reasons" can be more or less easily "translated" into (legal) words, about which there would be no major disagreements in the relevant legal community because the premises would be considered as clear. In such clear cases, the "translation" is unproblematic. As such, I refer below to semantically thin visuals (see also Kjeldsen, 2015). There are also other types of cases, where such a "translation" is far from smooth. In such cases, bridging a gap between the alternate modes and the legal logical mode is controversial due to various reasons, both visual and verbal. I call such visuals semantically thick ones (see also Kjeldsen, 2015). Kjeldsen calls the enthymemes, referring to a rhetorical syllogism in which either the premise(s) or the conclusion is left to be completed by the audience that has the task of "filling in the blank" by having recourse to contextual information (2017).

3.3. Semantically Thin, and Thick Visuals Inviting Alternate Arguments

The difference between semantically thin and thick visuals is reminiscent of the distinction between a figurative and abstract painting. When you sit in a gallery in front of a still-life painting, your thoughts would perhaps travel less far than in the case of an expressionist painting, although one would expect that figurative paintings, as works of art, would be still stronger in their messages than unclear legal texts, which have an institutional tendency to be as precise as possible.

Clearly understood visuals are semantically thin, which means that they do not invite different interpretations ("translations") from those that interpret them. In such cases, we can expect quite easy "translation" from their visual to the verbal mode. This means that there would be no substantial gap between the two modes. Recall that the example of the video of the Rodney King beating from the very beginning of this paper. Also, I mentioned that the prosecution and defence could have argued about the "translation" of the video. In fact, it was not very much disputed because the filmed beating of Rodney was quite clear. In such a non-problematic case, the visual mode and its reasons were easily "translated" into the verbal mode of the minor premise, thus producing the following figure:

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Figure 1: Easy "Translation" of Thin Visuals

Vr eT mp

Legend:
Vr = visual reasons
mp = minor premise
eT = easy translation

However, when it comes to unclear cases, one possibility is that legal premises are indeterminate: e.g. ambiguous,[8] or vague,[9] and need to be interpreted (in the narrow sense)[10] in order to be properly applied. But the problem can also be with the unclear factual premise. In our situation, this would apply to unclear visuals as evidence in the legal context, which are semantically thick. Consequently, the interpreters ("translators") of such evidence, arguers and audiences, would evaluate them differently, based on what meaning they glean from them. Therefore, because of unclear visuals, problems occur with their verbalization, i.e. "translating" them into the verbal mode. Thus, the following figure of a hard "translation" might apply:

Figure 2: Hard "Translation" of Thick Visuals

Vr hT mp

Legend:
Vr = visual reasons
mp = minor premise
hT = hard translation

In the event of thick[11] visuals being used as evidence to determine the legal facts, arguers and audiences have more room to rely on elements from outside the immediate legal framework, such as their personal values that they can read into the premises. This is more difficult when it comes to thin visuals in clear cases, where their perception and thus also evaluation are semantically narrowed down to a greater extent than in unclear

[8] By ambiguity in law I mean that a legal provision has several, at least two, meanings. For example, in *Smith v. United States*, 508 U.S. 223 (1993), the provision of Title 18 U.S.C. 924(c)(1) requires the imposition of specified penalties if the defendant, "during and in relation to . . . [a] drug trafficking crime [,] uses . . . a firearm." In that case the defendant offered to trade an automatic weapon to an undercover officer for cocaine, and the mentioned provision could have been understood in two possible ways: (a) the use of the firearm for the purpose of exerting force or violence concerning sellers of drugs or third parties who would prevent the deal; or (b) the use of the same as a good or payment method.

[9] I consider a legal provision 'vague' when it is very general. An example of such would be e.g. general legal principles ('rule of law') and general legal standards such as 'public interest,' 'reasonable person,' etc.

[10] Here I subscribe to the 'narrow' definition of interpretation, according to which we interpret legal provisions only when they are unclear (Wróblewski, 1992). Otherwise, we merely "apply" them to legal facts.

[11] If 'clear' can be associated with 'thin,' 'unclear' is not necessarily 'thick,' because thick would imply several meanings whereas unclear might entail none.

cases. In such cases, there are several possible interpretations of a thick visual and this means that arguers have more potential to be effective in suggesting their version of a reasonable interpretation to their audience.

The situation where thick visuals are used as evidence and invite several possible meanings for judges to consider is semantically quite similar to the problem of unclear texts, where the values of judges can also be discerned in their rulings. Thus, there would be no single answer but several possible directions, a factor which is often manifested in divided courts with the opinions of different judges on the table.

In this respect, semantically thick (legal) words, being part of the logical mode of the upper premise, present similar problems than thick visuals (as part of visual argumentation preceding the establishment of the lower premise). They both invite alternate modes of arguing (i.e. emotional and kisceral being intuitive arguments such as personal values), as not strictly legal materials in a legal case, to fill out "blank" (logical) legal arguments (see also Novak, 2020a, 2020b). Arguers such as judges are embedded in their social and psychological environments that they share with their audiences, and the legal logical mode through their arguments is only able to generalize clear legal situations. Since "a picture is worth a thousand words", it seems that (thick) pictures create greater semantical gaps than (thick) words, and when the two of them are combined the semantic problem is even exacerbated.

Thus, when visuals are part of legal argumentation, the visual and verbal modes interact. There are a number of different situations that can make the case clear or unclear. Already at the level of visual argumentation, there could be thin or thick visuals, which can also be accompanied by a thin or thick verbal text. Generally, a thin verbal text would anchor a thick visual, which could not be the case with a thick verbal text in combination with an either thin or thick visual. This becomes even more complex when visual argumentation enters legal argumentation, with the upper (legal) premise being represented by thin or thick words. Imagine "translation" and interpretation problems when thick visuals meet thick texts of legal norms.

Below, I present an unclear case with a thick visual, where the evidence provided an opportunity for judges to use different (multi-modal) argumentative-rhetorical moves to justify their decision on the case at hand.

4. A CASE ANALYSIS: *GRIMS V. MLADINA*

4.1 Facts and Legal Procedures

In March 2011, *Mladina*, a Slovene left-wing weekly, published the following photos entitled "Not Every Dr G. is Already Dr Goebbels"[12] in its satire feuilleton (*Mladinamit*):

[12] Capital letters in the Slovene original.

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Underneath the headline, the two photos were accompanied by the following text: "Our former associate, Sena Driskić, compared Dr Grims with Dr Goebbels on his Facebook profile. The editors of Mladinamit join his protest. It might seem that Dr Grims follows his role model, but he still lags behind him. He needs more training in manipulation. Sieg!"

In the editorial introduction of the same magazine, and in three texts of the following edition, Mladina's editors commented as to why they had made the comparison between Mr Grims, a prominent right-wing Slovene politician, and his family, with the family of Dr Goebbels, the Nazi minister of propaganda. They wanted to criticize Mr Grims' activities of political propaganda that largely focused on manipulating the general public, of which his latest reports about an alleged imminent threat from migrants to Slovenia were particularly bad examples.

Grims then sued Mladina before the District Court, which dismissed the lawsuit in July 2013, reasoning that Mladina criticized Grims' political activities to a justifiable extent in the manner of political satire. The court stressed that Grims took advantage of the media for his political promotion in the same manner as Goebbels. There was allegedly no direct comparison between the two families and both the pictures must have been understood in a broader context, together with the accompanying text.

Grims appealed and the appellate court reversed the first court judgement in February 2014 (No. I Cp 3057/2013), ordering Mladina to publish the judgement, apologize to Grims, and awarding him damages. The court reasoned that: "The publication of photographs can encroach on people's integrity more severely than words." They even mentioned the idiom "A picture is worth a thousand words". They continued: "Although the freedom of expression includes publishing photographs, when courts balance various interests or the freedom of expression against personality rights, they may need to separate the text from the published photographs, and make a separate balancing of the opposite interests in connection with the photographs." To support their reasoning, they cited ECtHR's Rothe v. Austria.[13] They added that photographs and

[13] There are certainly other cases in which the ECtHR did not evaluate pictures separately but in the entire context of the case. See, e.g., *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H v. Austria*, which the Slovene Court did not consider relevant in this case.

pictures cause multi-layered effects and highlighted the openness of non-verbal communication. Thus, in their opinion, journalists must be more careful when dealing with pictures and photographs. Moreover, despite the fact that Grims was a crafty politician, he was also the father of a family, and the journalists' criticism went way beyond the limits of a reasonable critique by comparing him with a mass murderer, who also agreed to poison all of his 6 children at his wife's behest.

In the judgement rendered on 10 September 2015 (No. II Ips 93/2015), the Supreme Court affirmed the appellate court's judgement. They reasoned that the photographs in that case, as a separate totality, went beyond the limits of the comparison of the methods of propaganda used by Grims and Goebbels. What was crucial was the comparison between the ideal family life demonstrated in both the photographs and the fact that the Goebbels had killed all of his children. In the judges' opinion, any criticism should not be more vulgar, insulting, intimidating and less dignified than the political activities criticized.

Mladina subsequently appealed to the Constitutional Court, which upheld (by Decision No. Up-407/14 dated 14 December 2016) the Court of Appeals' and the Supreme Court's decisions. They emphasized the general power of pictures (also emotional) and agreed to the separation between the photographs and the text when balancing the freedom of expression against the personality rights by the lower courts. They reiterated that the image of the father of a family during an Assumption-Day mass at Brezje, Slovenia's most famous pilgrimage site, should be protected from a comparison made with a mass murderer in another photo. The case was decided by seven votes in favor and two against. The dissenters pointed to the fact that the political satire in that case should have been protected under the constitutional freedom of expression, and that the majority erred when protecting the right of a father to safeguard the collective reputation of his family, which was allegedly not even argued in the case.

4.2. A Multi-Modal Reconstruction of the Case

To what extent is the above case multi-modally relevant? Was it not decided upon solely on the basis of the (legal) logical and verbal mode? Where can we discern the traces of multi-modal argumentation in this case?

In the process of justification, judges would usually be reluctant to admit that they are also – as other people normally are – trapped in a hermeneutic circle, as in their reasoning they would only say that they apply "objective" criteria. Therefore, judges' separate opinions would promise more materials for discerning their subjective views than majority ones whose style is generally more official. It is thus the task for legal academics in particular to reconstruct their decisions in a multi-modal way, along with the standard argumentative reconstruction of legal decisions as suggested by mainstream legal argumentation theory, which is usually concerned with what kind of legal arguments were used in legal decisions and whether they could be used in a better, that is more rational/reasonable, manner. This additional kind of 'multi-modal reconstruction' as suggested here will extend the mainstream argumentative reconstruction of the reasoning of legal decisions further. In contrast with mainstream reconstruction, the multi-modal reconstruction of legal, mostly judicial, decisions would follow a different aim than the mainstream reconstruction. It could be used as an additional tool to study the potential for multi-modal arguments and rhetorical devices to be used and would be secondary to typical legal arguments. It would provide us with additional information which would allow us to obtain insights into the argumentative and rhetorical colourfulness of the environment in which the legal logical mode is used.

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4.2.1 Logical and Visceral Argumentation

Lawyers used to the (legal) "robust" logical[14] (and verbal) mode will take such a case for granted. They would reason that there were simply two different legal positions in that case and one of them prevailed. However, a careful eye which is able to perceive the subtleties of multi-modal details will perhaps see such a case in a different light, finding both the premises indeterminate (the major vague, and the minor ambiguous due to the thick visual based on which that premise was established differently, at different court levels and by different judges).

First, the relevant legal norms (in the universal premise - Mp) in the case, as the logical mode's substance, in this case, were on one hand from the Code of Obligations (at the level of ordinary courts' procedures) and Art. 35 of the Constitution (the right to the protection of integrity and reputation, on the level of constitutional review). They provide the grounds for legal redress if one is "defamed by another person." On the other hand, Art. 39 of the Slovene Constitution, which was also potentially relevant, ensures "freedom of expression," which at the level of constitutional review failed to overrule the right not to be defamed as a personal right. Both Mps in this case are quite vague: on one hand, we have freedom of expression protecting political satire while, on the other, we have the father of a family who took them to mass and for that reason is compared with the family of one of the worst Nazis. In the whole procedure, it was unclear which position would ultimately succeed: on one side, there were the positions of the District Court and the Constitutional Court's dissenting minority, on the other the court of appeals, the Supreme Court, and the Constitutional Court's majority. This was certainly not visual vagueness or "thickness", but normative-legal. Constitutional norms, such as the freedom of expression and personality rights as applying in this case, are generally thick, and their balancing even contributes another dimension to their thickness.[15]

Second, in terms of the factual (particular) premise which was presented at the level of the constitutional review as challenging the court decision, the photographs were presented in the magazine in the visual (or visceral) mode, with a scant verbal explanation about the comparison. The text that initially accompanied the photographs tried to anchor them, obviously unsuccessfully as determined by the senior courts. Frankly, the initial verbal text published above the photographs was quite ambiguous (thick), whereas the editors' additional comments made the anchorage firmer by pointing to the reason why the politician was criticized in the mentioned manner. The final anchor had been accepted by the first-instance court, however not by the higher courts that retrieved it in order to make the photographs' comparison thick (again) in order to open the gate for them to introduce the argument/value of the reputation of a family father, as a personality right to be protected against the journalists' freedom of expression. Thus, the thick image "translated" in the said manner was then placed in the thick framework of balancing the two constitutional norms. The visual comparison of the two photographs was striking to the extent that the verbal anchor used could not achieve its purpose. However, the Constitutional Court's dissenting judges would share the same opinion.

In order for the photographs to be classified as legal facts subsumed under the relevant legal norm, despite some small verbal text, they needed to be "translated" to the verbal mode as a legal position pointing to the existence of (no) defamation. Notwithstanding the aid of such a "translation," the photographs compared were "thicker"

[14] What is typical for the legal logical mode are the: (a) form of logical argument (most frequently deductive syllogism), and (b) substance inclusive of legal norms (rules and principles) being the core of any legal system.
[15] Some theorists do not list the argument of weight or balancing among interpretative legal arguments, but among constructive legal arguments (e. g. Guastini, 2014, p. 407).

(Kjeldsen, 2015) than the words that tried to anchor them. Indeed, the judges made them such (i.e. thick) when they retrieved the verbal anchor used and found the personality right of the family father to be protected. Due to the vague legal provisions and the judges' divergent reasons with respect to the evaluation of the comparison of the two photos, the decision cannot simply be taken for granted as a kind of "neutral" application of the law. Thus, the case could have been understood in two different manners, by seeing either a crafty politician who deserved to be criticized (the lowest court and the dissenting minority) or an exemplary father who was worthy of protection (all the other judges). The case was not only normatively thick (vague) but also factually thick due to the thick visuals as evidence to determine the factual premise in this case.

Apart from the visceral mode, the kisceral mode as well as the emotional mode must have been relevant in this case. To see Mr Grims also as a father and not only an annoying politician necessarily entails that one should resort to family values and the father as a family protector. The judges expressed this openly when they stressed the importance of a comparison of the photographs in isolation from the accompanying text, which they said was an example of an admissible political critique. Also, the Nazi horrors that they despised and the family relations that they cherished, as emotional arguments – as used, certainly, in the "safe harbour" of legal logical syllogism, were also expressed by the judges.[16]

Therefore, in this case, the visceral argument (C – The Grims and Goebbels being two similar families; R – Their photos being published together) opened up room for other alternate arguments to step in, in the absence of a more precise argumentative framework concerning the comparison and given the vague legal provisions which applied. Thick visual evidence (actually, made thick by the courts) from the lower premise have met the thick words of the upper premise. But that is a typical situation in hard legal cases – in clear or easy cases, their premises tend to be clear. Consequently, the positions of the two judges were possible in that case: (a) if the comparison is considered in the context of the whole story, and Mr Grims were looked upon more as a prominent politician, then the political satire account would be supported; whereas (b) if the photos are taken separately from the text, his role as a father figure would be protected.

4.2.2 The Kisceral Argumentation of Values

In a hermeneutical situation, one which is all the more so apparent when unclear legal cases are resolved, what is important are also judges' inner (personal)[17] values that include both their intuitions and emotions. It is well-known that neuroscience and cognitive psychology connect cognition with emotions when values are psychologically experienced. According to Thagard, "values are mental (neural) processes that are both cognitive and emotional. They combine cognitive representations such as concepts, goals, and beliefs with emotional attitudes that have positive or negative valence" (2013). In the view of Oyserman, "values can be thought of as priorities, internal compasses or springboards for action". They are "implicit or explicit guides for action, general scripts framing what is sought after and what is to be avoided", and "ultimate rationales for people's action". They are at play on both the individual and group levels. Even at the individual level, they are internalized social representations or moral beliefs that people

[16] About the role of intuition and values, and their connection with emotions, see more below.
[17] Here I use the adjective "personal" (meaning subjective) because values in law can also be objective: as part of legal provisions such as, e.g., equality before the law and legal certainty that are in fact constitutional provisions.

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appeal to and are internalizations of sociocultural goals. "Values are not simply individual traits: they are social agreements about what is right, good, to be cherished." They contain cognitive and affective elements and have a selective or directional quality being internalized (2001).

Values most often give judges indications as to how to further construe legal premises. As already mentioned, as a rule, they are not directly and openly expressed in the written materials of judges' deliberations or their reasoning. Yet this is not to say that they were not present, and sometimes in a very influential manner. It seems that the less legal premises are determined, the more room there is for them to step in.

It should be stressed that for Jung, but also contemporary psychologists interested in cognitive science and neuroscience who base their findings on numerous experiments with human brain activities, there are two types of thinking – "fast" or automatic and "slow" or analytical, also termed System 1 and System 2 (Kahneman, 2011), which are very much related. Fast thinking relies on emotions and intuitions, to which I would also add physicalities, for which the right hemisphere of the brain is "responsible". In human evolution, this is the older part of the brain while slow thinking, which is more rational or what some call critical thinking, is more logical, analytical, technical and developed later in evolutionary terms. When it comes to multi-modes of argumentation, I would ascribe the (legal) logical mode to System 2, and other alternate modes to System 1.

Accordingly, in connection with the above-mentioned two systems of thinking, the problem with unclear cases is the following. In clear cases, as their counter examples, the premises of legal syllogism are very much developed, and in a modern legal system they are expected to be analytically, coherently, logically interrelated, and connected so that the principle of legal certainty is upheld. We could say that this an expectation for System 2 to operate. However, when there are gaps, ambiguities, and vagueness in the premises in the legal context of judicial proceedings, there is more room for System 1 to step in and direct the manner in which System 2 develops. This is an opportunity for values to step in for the initially unclear legal premises and do the job for them. A typical example of such is a constitutional review in which the clashes of values are commonplace because there are different judges with different worldviews.

Moreover, Mercier and Sperber claim that most reasons are "after-the-fact rationalization". Their main role is to "explain and justify" our intuitions but not in the process of intuitive inference itself. They are social constructs and are meant for social interaction, having "a central role in guiding cooperative or antagonistic interaction, in influencing reputations, and in stabilizing social norms." They continue that "the way we infer our reasons is biased in our favour. We want reasons to justify us in the eyes of others." And "they represent our inferences as rational in a different, socially relevant sense of the term where being rational means being based on personal reasons that can be articulated and assessed. To be socially shared they need to be verbally expressed" (2017, p. 110-144).

It was Kelsen who said that "the interpretation of a statute, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value, though only one of them in the action of the law-applying organ (especially the court) becomes positive law". Kelsen asserted that when legal practitioners interpret laws by means of their cognition (logical and rational),[18] they could only establish what the frame of that law is and within it, there are "several applications possible". He

[18] Compare this with Jung's interpretation of cognition, which includes the irrational functions of perception, sensation and intuition.

contrasted his view with traditional jurisprudence, which claimed that it had found legal methods of how to correctly fill in the ascertained frame. He continued that "[t]raditional theory will have us believe that the statute, applied to the concrete case, can always supply only one correct decision and that the positive-legal "correctness" of this decision is based on the statute itself". Further, it would seem "as if the law-applying organ had to use only his reason but not his will, and as if by a purely intellectual activity, among the various existing possibilities only one correct choice could be made in accordance with positive law." … "All possible methods of interpretation developed so far lead only to a possible, not necessary, result, never to one which is alone correct." Thus, "it is futile to justify "legally" one at the exclusion of other." In such "it is not cognition of positive law, but of other norms that may flow here into the process of law-creation – such as norms of morals, of justice, constituting social values which are usually designated by catch words such as "the good of the people", "interest of the state", "progress," and the like" (1989, pp. 351-354).

Kelsen understood the problem that I indicate here perfectly. His criticism of apparently "legal" argumentation seems to refer mostly to the so-called unclear cases. In clear cases, his critique is, I must say, exaggerated. His conception of the legal "mode" is, however, close to what I understand here by the "legal logical mode": mostly legal norms of positive law composed in a body of laws that we call the legal system.

Thus, if legal premises are vague and ambiguous, which is a rule in unclear cases, there is room for values or arguments of values to have their say. They are not part of the traditional legal logical mode and thus, when basing their decisions and reasons on values, judges in unclear cases would argue that what they apply is strictly law, and that their reasons and arguments necessarily only follow from the legal text. This should certainly be criticized as it makes decision-making and reasoning less transparent by leaving out something that is tremendously important. In such cases, judges should admit that what they do is also legal policing and moral legislating, since the values behind their "legalistic" activity can be of moral, social, and political importance for their community.

Also, if factual premises are vague and ambiguous due to thick (visual) evidence to determine such, there is room for judges' values to step in. Thus, having both premises unclear complicates the case's argumentation even more. In the case at issue, provided the unclear upper premise(s), the judges retrieved the journalists' verbal anchor from the photographs compared, just to resort to the value behind the mentioned personality right of the family father that they disclosed and then protected.

Based on the above theoretical discussion of the importance of judges' values, can we discern them in the text of the reasoning of the decision? The perception of values as internal mental representations is to a great extent connected with intuition. This is the reason why the kisceral mode of argumentation is discussed, and this mode of argumentation is relevant for legal argumentation when legal arguers base their legal arguments on the values that they subscribe to. Certainly, these values need to be recognized by the legal order, however, it would be difficult to find a major value that has not been embedded in the constitution as the supreme legal act of a certain society. These values are directly referred to, or at least implicitly incorporated, in specific constitutional legal norms.

Well, it certainly follows from the majority reasoning of the decision that it explicitly emphasized the value of a father-protector image, which the majority recognized from the photograph of Grims and his family. Jung would explain that, apparently, the father archetype was well integrated into the majority of judges' personalities. His family role, or the role of a "family father" who wanted to protect the

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reputation of his family by suing the magazine, seems to be more important to them than the value of free speech, in which criticizing a prominent politician for his political activities is an important liberal value in limiting government and individual freedom. Moreover, the fact that Grims was the father of a religious family at a religious ceremony contributed further to protecting conservative values in society.

In the mentioned case, the kisceral argument read as follows: C – the value of a family (and family father) was violated; R – the photographs (in which an ideal Grims family was compared with the Nazi family). That kisceral argument was read into the following constitutional argument: C – the personality rights were unconstitutionally violated; R - when balanced against the freedom of expression, the personality rights were too much interfered with. However, the case was not decided kiscerally only but in an important connection between the kisceral and legal logical premises.

4.2.3 Emotional Argumentation or Rhetoric in the Case

In this case, in their "sober" logical reasoning, the judges used a number of emotionally loaded words to support their rejection of the photos' comparison, which is a proof that they resorted to certain emotionally loaded rhetorical devices, in order to be more persuasive in relation to their audience. They used the following emotional words: the "horrible" contradiction between ideal family life and "cruel" historical evidence; a "shocking" comparison; a general symbol of "evil"; the metaphorical dimension of "bestiality".

Despite the fact that emotions are very important in people's lives and in the (professional) activity of legal arguers and audiences, in this kind of research, where I examine lawyers' and judges' reasoning in the written text, one cannot expect them to enjoy a greater role. In justifying their decisions, lawyers rely on legal provisions and their reasonable interpretation. Emotions are rarely found, mostly only in the judges' separate opinion when they get more personal and sometimes make use of emotional rhetorical devices. I do not deny that another study, perhaps a psychological one which tries to get into the mind of judges, or a study focusing on the psychological dynamism in a courtroom where also a jury is involved, would prove that they have a greater role.

Emotional argumentation in that case would read as follows: C – the judges' emotions hurt; R – the photographs compared: the "horrible" contradiction between an ideal family life and a "cruel" historical evidence; a "shocking" comparison; a general symbol of "evil"; and the metaphorical dimension of "bestiality". This is not what one would suspect that the judges felt when seeing the comparison of the two photographs, but that is what they wrote in the text of the Constitutional-Court decision and can be found there as their rhetorical devices used, which may also have an argumentative value (Perelman and Olbrechts-Tyteca, 1969). As already mentioned, neuroscientists admit that perception of values is intuitive-emotional, thus when confronted with the photographs' comparison, they used the kisceral and emotional arguments to read them into the legal arguments.

Accordingly, was the use of the said emotional figures rhetorical or argumentative? I guess both aspects are possible. Rhetorical argumentation theorists claim that rhetorical figures (such as emotional figures used in this case) may be argumentative if they bring about a change of perspective and the adherence of the hearer (senior judges or other audience members); if that is not the case, they will be considered as an embellishment or a figure of style (Perelman and Olbrechts-Tyteca, 1969, p. 169).

5. CONCLUSION

The presentation of problems associated with the legal interpretation of visuals as evidence used to determine the factual premise, and how that interacts with the legal premise, seems to be innovative and important for legal argumentation scholarship. These relevant nuances seem to have been neglected so far.

When legal reasoning is taken descriptively, Beck claims that, apart from its scientific model in which judges follow legal topoi (such as legal provisions, established arguments and methods of interpretation and argumentation), we also need to consider its heuristic (non-formalist) model with extra-legal steadying factors (of a moral, economic, or political character) (Beck, 2012, pp. 24-27). These extra-legal steadying factors include a judge's need to attract public confidence in their judgments; the fact that they can(not) be always absolutely politically constrained and judicially self-restrained; their inclination to be politically fashionable and correct; adherence to their professional and institutional ethos that have particular characteristics; and an inability to always neutralize their personal elements (such as their personal beliefs, values and interests) when making and justifying their judgments (Beck, 2012, pp. 35-50).

The combination of the scientific and heuristic model to some extent converges with my multi-modal approach to legal argumentation. Firstly, there is a more formal framework for the logical mode. Secondly, there is also a multi-modal argumentative dimension of legal reasoning. It is this rhetorical aspect of argumentation (Tindale, 2004) that brings legal arguments closer to the real life of arguers and their audiences. When legal argumentation is taken as rhetorical argumentation, we not only recognize logical arguments (logos) but also kisceral (ethos), emotional (pathos), and visceral (physis) that arguers use in order to persuade their audiences (Novak, 2020a).

The mentioned approach is not a theoretical speculation but is built on analyzing the justifications of legal/court decisions. Beck's, as well as multi-modal "alternate" modes, should not be used to constitute independent premises because that would entail non-legal reasoning. To qualify as legally relevant, they must always be used in connection with legal norms, by giving them a certain meaning, especially when they are indeterminate.

Thus, although the legal context is a formalized framework, in judicial proceedings there is also room for multi-modal argumentation. In this respect, so-called unclear legal cases, those with vague and ambiguous premises, are particularly interesting. In these, it is possible to discern loci or "traces" of the mentioned multi-modal argumentation. They communicate the message that, for a realistic account of legal argumentation at least, one needs to take into account modes beyond the traditionally accepted logical mode.

Stemming from a descriptive point of view, it is important to realize the presence of the alternate modes in legal argumentation since the legal logical mode is reductionist. From a normative aspect it is, however, difficult to say how much of such heuristics is allowed for decisions to be still considered legal. It seems that only a general principle can be given that they must be relevantly linked to legal norms and potential deviations from that are evaluated by competent legal authorities on a case by case basis. This is, however, the material for another topic to be discussed, of fallacies of multi-modal arguments in legal argumentation.

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DIGITALISATION OF THE VALUE ADDED TAX – GREAT CHALLENGES / Peter Rakovský †

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Obituary Notice

It is with great sadness that we have to announce that the below article by Peter Rakovský will be one of the last ever published. Peter has suddenly passed away on 21 June 2021, aged 28. He was a dear colleague, close friend, a diligent scholar, and a professional with a lot yet to give to the world. He will be greatly missed.

The staff of Department of Financial Law of Comenius University in Bratislava, Faculty of Law.

Abstract: *This paper focuses on Value Added Tax (VAT), due to the importance of indirect taxes as one of the most vital tax revenue generators in the EU. VAT is more stable and contributes more to the tax mix than direct taxes. However, the VAT gap is still a serious problem for the national governments, as it reduces the overall tax revenue.[1] Tax authorities are looking for more opportunities to reduce the information asymmetries between them and the taxation subjects. Due to that, collection and analysis of big data seems to be an excellent opportunity to do so in the Slovak Republic as well. One of the biggest sources of big data in VAT in Europe and the world is formed by the so-called "real-time reporting" and electronic filing, since electronic filing is mandatory in the majority of EU countries nowadays. However, policy makers should bear in mind that the mere collection of data is not enough (Bal, 2014). The main subject of this paper is to find, analyse and take into account the most important measures of VAT in the context of digitalisation. In addition, this paper focuses on new trends and challenges for VAT in the Slovak Republic, which may follow the trends within the world.*

Key words: *VAT, invoice, transaction, proportionality, information, real-time reporting, tax law, Slovak Law*

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1. INTRODUCTION

The main hypothesis of the article is to evaluate the most important measures in the area of VAT in the context of digitalisation, mostly on new trends and challenges for VAT in Slovak Republic, such as real-time reporting and electronic filing and whether they can influence the budget of Slovak Republic. The methods used include abstraction, comparison, analysis, synthesis, induction, deduction, and summarization.

Modern VAT administration can provide almost total state control of the business at the transaction level. The information provided by the VAT administration system, together with the data of payment systems and databases administered by the customs authorities, is a valuable information resource for the state that allows it to monitor, plan, predict the financial and economic indicators of the country as a whole, which confirms the strengthening of the control potential of the value-added tax. Recently, the establishment of interstate control over business in the EU integration association has also been based on the VAT document flow, which demonstrates the new capabilities of the VAT administration system in terms of control over cross-border transactions. It cannot be overlooked that OECD work addresses the problems that arise from national VAT systems being applied as well. For example, the implementation of the OECD standards for the effective collection of VAT on online sales of goods, services and digital products (included in the 2015 BEPS Action 1 report) have continued to influence VAT reform in a growing number of countries worldwide (OECD, 2020, p.4).

The issue of tax compliance has been discussed numerous times in various articles, mainly due to the polarizing nature of the topic. For companies, compliance is often costly and causes a burden, while for tax administrations, compliance of taxable persons is essential for the goal that they want to achieve: obtain tax revenue. According to Barbone, compliance with the rules does not occur effortlessly, but instead, must be overseen by a certain agent (Barbone, Bird and Caro, 2012, p.2). Non-compliance is a serious issue for lawmakers in most of the countries in Europe, and throughout the world as well. Here we are talking about VAT gap again. According to that, one of the most important objectives of the tax administration should therefore be the reduction of the VAT gap (Krajcuska, 2013, p.5).

For VAT purposes, a special document is provided — an invoice. From the legal point of view, VAT Directive already knows the concept of e-invoice, which can be concluded from its article 218 so-called "Concept of invoice."[2] The relevant provision of the VAT Directive has been amended by the Council Directive 2010/45/EU of 13 July 2010 as regards the rules on invoicing (Directive 2010/45/EU). Directive 2010/45/EU introduced three main changes to the EU legal framework for electronic invoices (e-invoices): *"(i) a new definition of e-invoice;*[3] *(ii) the principle of technological neutrality; (iii) the principle of equal treatment among the paper and electronic invoices and iv) the concept of Business Controls that create a reliable Audit Trail (BCAT) as a mean to prove the e-invoice Integrity and Authenticity (I&A)."*[4] The changes have been introduced evenly across the EU. Even when the national provisions are slightly different from the text of the Directive, there appear to be no problems of incorrect transposition.[5] Moreover, Directive 2010/45/EU introduced a number of changes in the area of invoice issuance and content and amended three specific invoicing regimes: self-billing, simplified invoices and summary invoices.

[1] From the fiscal point of view, the so-called tax gap represents the difference between the potential revenue from the tax that would have been collected, had all economic entities behaved in accordance with the law, and the tax actually collected, and in 2018, its level was 26.9% in Slovakia.

[2] *„For the purposes of this Directive, Member States shall accept documents or messages on paper or in electronic form as invoices if they meet the conditions laid down in this Chapter."*

[3] *„For the purposes of this Directive, 'electronic invoice' means an invoice that contains the information required in this Directive, and which has been issued and received in any electronic format."*

[4] However, EU concluded the results of this concept as „the lack of clarity" in practice.

[5] E-invoice definition is implemented in Act. No. 222/2004 Coll. on value added tax, as amended, as well as via the following definition: *„an electronic invoice is an invoice which contains data pursuant to Section 74 and is issued and received in any electronic format; an electronic invoice may be issued only with the consent of the recipient of the goods or services."*

In the implementation of the offset (invoice) method of calculating VAT, which is widespread in the world, an invoice is a tool for the supplier to present the amount of VAT payable by the buyer (output VAT) as part of the cost of goods sold (services rendered). In turn, for the buyer, the invoice acts as a voucher (certificate) for acceptance of input VAT as a deduction. As we mentioned before, when taking into account that an invoice is a document form in itself, what is actually relevant is the data it contains. Thus, the digital invoice does not necessarily have to be a separate document. Rather, it needs to be a consistent set of data required by the applicable law and provided to the counterparty (and to the tax administrator in the reconciliation statement) (Kačaljak, 2020, p. 28).

"Circulation of falsified invoices leads to the illegal withdrawal of value-added tax from the budget, which is why tax administration systems for VAT administration are also based on invoices. An invoice draws up each transaction, respectively, the amount of information about invoices, as a source of information for analysing and controlling the movement of budget amounts and taxes from the budget, is enormous, and its processing is possible only using modern big data information technologies." (Vishnevskaya, Vishnevskiy and Melnikova, 2019, pp. 471-472). Big data are often being described as the backbone of the successful digital transformation (Sinclair, 2017). Moreover, we agree with the authors´ statement that *"the level of state control depends on the general level of digitalization of economy and the quality of information technologies used by tax authorities. The basis for building a modern VAT administration system is an electronic invoice built into the electronic document management system (EDS) in the B2B sector and in B2G electronic reporting"* (Vishnevskaya et al., 2019, p. 472). Another main idea connected with the e-invoice reporting is the plan to launch a goods traceability system as a response to the negative effects of uncontrolled movement of goods within EU countries, as well as "gray" imports. The richness and variety of data enable tax administrations to more effectively cross-check the data. Moreover, real-time reporting empowers the tax authorities to cross-check the data with respect to specific transactions in a negligible time distance and therefore more accurately. This is in line with the reasoning of Majdanska and Schoueri, who claim that technology developments and the use of big data can leverage the cross-checking element of control (2017). As a conclusion to big data use, we can conclude that there exist some advantages (preventing VAT fraud, reducing compliance costs and better interaction with taxpayers), but it cannot do without disadvantages (too complex, data privacy can be undermined and demand for the training of staff) (Krajcuska, 2018, p. 26).

2. EXCHANGE OF INFORMATION WITHIN EU – WHERE DO WE STAND AND WHERE WE SHOULD GO

As we have stated above, the exchange of information is not necessary only separately in one country, but must work on a broader level to tackle tax frauds. Within EU, most of the legislative activities focus on direct taxes. Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax lays down the conditions under which the competent authorities in the Member States responsible for the application of the laws on VAT are to cooperate with each other. In its article no. 1, it states that *"to that end, it lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions, and combat VAT fraud. In particular, it lays down rules and procedures for Member States to collect and exchange such information by electronic means."*

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As the European Commission states, "*while the tax authorities of Member States already exchange some information on business and cross-border sales on that basis, this cooperation relies heavily on the manual processing of information. At the same time, VAT information and intelligence on organised gangs involved in the most serious cases of VAT fraud are not shared systematically with EU enforcement bodies. Finally, a lack of investigative coordination between tax administrations and law enforcement authorities at national and EU level mean that this fast-moving criminal activity is not currently tracked and tackled quickly enough*" (European Commission, 2017).

3. E-INVOICE

EU states that the reduction of administrative burdens on businesses by Directive 2010/45/EU was triggered mainly by the following two sets of provisions: (i) e-invoicing requirements and (ii) the issuance and content of invoices, which simplified and harmonised the invoicing requirements (European Commission, 2020b, p. 3). As the biggest impact of Directive 2010/45/EU, EU sees on the reduction of administrative burden is due to the higher uptake of unstructured e-invoicing,[6] because of simplifications, which encouraged companies to switch from paper invoices to PDFs.[7] The financial cost savings generated through the cash accounting scheme that can be attributed to Directive 2010/45/EU have been estimated at about EUR 33 million over the 2014-2017 period across ten Member States (Slovak Republic included) (European Commission, 2020a, p. 26).

Directive 2010/45/EU did not distinguish between structured[8] and unstructured e-invoices. By not differentiating between the two e-invoice formats and enforcing the technology-neutrality principle, the Directive did not directly stimulate the use of automatically processable invoices and thus it did not lead to an increase in the uptake of structured e-invoices (European Commission, 2020) Moreover, EU concluded that there is no evidence of any significant impact of Directive 2010/45/EU on tax control or VAT compliance**.** The opinions expressed by tax authorities confirm that the effects of Directive 2010/45/EU when it comes to VAT compliance are, if any, rather limited. Commission stated that *"tax authorities and stakeholders are of the opinion that not more can be achieved by invoicing rules in the area tax control. Since the information from invoicing is not readily available to tax authorities, their focus is currently on systems assuring real-time reporting allowing better risk analysis and more targeted controls. At the same time, it is reassuring that the simplification and harmonisation of invoicing and e-invoicing requirements did not have any adverse impact on tax control activities"* (European Commission, 2020b, p. 5).

Moreover, the fight against tax frauds cannot be handled with just one measure. Nowadays, at the level of the EU, we can see a significant effort in the VAT area to take necessary further steps for the so-called "final regime of VAT", connected with the so called "general reverse-charge" mechanism. The final regime would in the end require replacing the current system consisting of an exempt supply in the EU Member State of departure of the goods and a taxed intra-Community acquisition of goods in the EU Member State of destination by a system of a single supply taxed in and in accordance

[6] Unstructured e-invoices refer to invoices transmitted electronically without a prescribed or specific format, e.g. an email with a PDF attachment or a fax received in electronic not paper format.
[7] Portable Document Format, a file format for capturing and sending electronic documents in the intended format.
[8] Structured electronic invoices refer to invoices issued, transmitted and received in a structured electronic format allowing their automatic and electronic processing.

with the VAT rates of the Member State of destination. A "destination-based" VAT system means that goods traded across borders are taxed in the country where they are consumed (the destination country) and at the destination country's tax rate, rather than where they are produced (the origin country). As a rule, the VAT will be charged by the supplier who will be able to verify the applicable VAT rate of any Member State online by means of a web portal (European Commission, 2017). Another condition for the final system of VAT is that the effective electronic notification of transactions involving goods and services delivered and received for all taxable persons, for the purpose of effective functioning and monitoring application of the general reverse-charge. This condition essentially seeks to prevent the transfer of fraud to the last stage of distribution of goods and services, i.e. degree of final consumption, where this mechanism can no longer be applied, i.e. where the supplier is obliged to apply VAT to the price of the goods or services supplied according to the standard rules of the common VAT system (Beno, 2020, p.12).

4. LEGISLATIVE ACTION OF THE MINISTRY OF FINANCE OF THE SLOVAK REPUBLIC

In direct taxation, the electronic filing is being further enhanced through the Open API initiatives (Slovensko.Digital., 2018) where the respective data requirements can be incorporated directly within the ordinary business processes. In other words, the business will no longer be required to separately produce and submit a certain piece of data, if this may be automatically submitted to the tax administrator by its (e.g.) accounting software. Now, as it is anticipated that the data necessary for evaluation of the amount of income or other values relevant for the administration of taxes will be gathered from third parties (ideally through integrated interfaces), forms will become redundant with respect to data collection. In fact, one may reasonably assume that the use of manually filled out forms for data collection presents a significant risk of error (Kačaljak, 2020, p.25). Further steps have been introduced in the VAT area as well.

In a recent period, the Ministry of Finance of Slovak Republic published preliminary information on the draft law on sending data to the financial administration from invoices of tax subjects.[9] According to the preliminary information, the intention of the draft law is to introduce the obligation of all taxpayers to issue an invoice from each business transaction within a specified period, in which case the obligation to record sales with the e-cash register client (Financial Administration, 2020) does not apply. At the same time, the introduction of the obligation to send selected invoicing data to the financial report before the final version of the invoice is prepared is envisaged. The taxpayer will be able to fulfil this obligation either through the accounting software it uses, which will also include a communication component certified by the financial administration, or a free state online application. Also on the part of the taxpayer in the position of the customer, the obligation to send the registered incoming billing data will be introduced in one of the above ways. The aim of this measure is to ensure that the financial report obtains information on the declared services for which the invoice is issued in real time (European Commission, 2017).

From our point of view, the so-called real time reporting of transactions subject to VAT is emerging within EU Member States, as well as outside the EU and that it is (among other things) also a basic condition for the introduction of a general reverse charge regime (see text above). For this reason, *a priori*, we do not see the intention as

[9] Preliminary information on the draft law on the transmission of financial administration data from invoices of tax subjects.

controversial, and rather assume that its widespread implementation throughout the EU is a matter of time.

However, at this stage (while the Slovak Republic would still be at the forefront) we would like to appeal that the invoicing regime, in addition to obtaining information for the Financial Administration, also pursues the goal of improving "comfort" for entrepreneurs and increasing their own protection against involvement in fraudulent chains (where given the available court rulings, we see that the consequences of participating in fraudulent chains also have a significant impact on small and medium-sized enterprises, who have found themselves against their will - worst of negligence in the chain). We suggest that in the draft stage the concept of real time reporting worked with: (i) the principle "once and enough" - where an already sent "preliminary" invoice issued by the supplier was automatically forwarded/registered on the customer's side through a state-managed system, so the customer would limit himself to simply confirming such an invoice on his side, with the possibility to download it to accounting software, and thus would save administrative burden associated with fulfilling this obligation; (ii) early warning system for customers - where, at the same time as the pre-invoice is delivered, the system administered by the Customer's State would inform about possible red flags on the supplier's side (list registration; low rating; the fact that it is a new company without assets and employees), which would also bring added value to entrepreneurs (some more prudent and solvent entrepreneurs use commercial tools such as *finstat* to control these red flags, but this also means that small and medium-sized enterprises in particular without such mechanisms carry a higher risk of involuntary participation in fraud); and (iii) the function of pre-filling pre-invoice data into tax return forms, recapitulative statements and control reports - this feature can be useful primarily for businesses that do not use sophisticated software (which already process these statements automatically). We believe that the construction of technological infrastructure for the functioning of these elements could also be financed from the development plan, as it fully falls within the framework of digital state administration.

5. *PRO FUTURO* PROPOSALS

Based on our analysis, we can predict the following business problems associated with the introduction of new systems:

- lack of time for introducing changes to the taxpayer accounting systems associated with a change in the format of documents and the accounting methodology in connection with the transition to party accounting;
- delay in the sale of goods at the time of receipt of the batch registration number (the problem is critical for sale on the basis of direct delivery, leads to an increase in storage costs, risks of loss of consumer properties of goods, etc.);
- technical difficulties in the implementation of bundles of goods, including traceable goods (Vishnevskaya et al., 2019, p. 474).

We note the main advantages of such a system of traceability:

- no additional reporting for traceability purposes;
- there is no need for taxpayer buyers to verify the reality of the lot number of the goods;
- information on traceable goods is available to the tax authority in real time (compared with the current system by the 25th day of the month

following the quarter of the transaction) (Vishnevskaya et al. 2019, p. 474).

6. REAL-TIME REPORTING V. PRINCIPLE OF PROPORTIONALITY

EU law system, especially in the meaning of CJEU case-law,[10] understands the principle of proportionality, together with the principles of legal certainty, equality, etc. constitute the general principles of EU law (Hartley, 2007, pp. 131-157), based on which interactions and interference by the state authorities to the taxpayer´s rights must be met. Four tests can be performed in order to establish whether the measure is proportionate: i) the measure must be appropriate, ii) the measure must pursue legitimate objective, iii) least restrictive effective means test and iv) so-called balance test - the measure cannot be disproportionate (costs v. benefits test). However, Sauter mentions that the latter two tests are often "applied as alternatives rather than complements". Based on the reasoning of Sauter, the least restrictive means test is applied most frequently (2013, pp. 447-448). Almost identical tests are highlighted by Ellis (1999) and Maliszewska-Nienartowicz (2008, p. 91). Therefore, *stricto sensu,* we can identify the following criteria in testing proportionality: suitability, necessity and proportionality in narrower sense. These sub-principles (referred further to as "criteria/factors") do not need to be fulfilled as a whole to declare a measure disproportionate. However, the order of the tests is crucial and must be followed (Rosenfeld and Sajó, 2012, p. 725). We can say that the reasoning of the interactions and interference to the taxpayer´s rights in the tax area, bearing in mind the principle of proportionality with the words "*should not go further than necessary.*" Instead, in the proportionality evaluation, the focus should lie on the specific aspects of these digitalization initiatives. Moreover, the design of certain projects should be re-evaluated due to the particular design flaws, which can be deemed disproportionate under the national laws of individual states. The problems are concentrated within the lack of data privacy (Daňko and Žárská, 2018, p. 183), unfeasible system of penalties and excessive compliance costs. It is now of great importance to integrate these two areas and to establish a minimum benchmark for the lawmakers and the judges. Currently, the framework of the proportionality principle is rather vague. It can be only abstractly assumed, how it can be applied on the digitalization projects (Krajcuska, 2018, p. 24).

7. CONCLUSION

After our analysis, we believe that we have proved the importance of the above-mentioned measures in the area of VAT in the context of digitalisation, mostly real-time reporting and electronic filling. Based on that, we can confirm our main hypothesis stipulated in the introduction. The effectiveness of the VAT administration system depends on the simplification and harmonization of invoicing and e-invoicing rules not just in Slovakia, but across the EU as well. Future regulation should have an overall positive contribution to its general policy objectives, namely i) the reduction of the administrative burdens on businesses, ii) the reduction of VAT frauds, iii) the proper functioning of the internal market, and iv) SMEs promotion.

[10] CJEU, judgement of 29 July 2010, Dyrektor Izby Skarbowej w Białymstoku v Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski sp. j., C-188/09, ECLI:EU:C:2010:454; CJEU, judgement of 19 September 2000, Ampafrance SA v Directeur des services fiscaux de Maine-et-Loire (C-177/99) and Sanofi Synthelabo v Directeur des services fiscaux du Val-de-Marne (C-181/99), ECLI:EU:C:2000:470; CJEU, judgement of 18 December 1997, Garage Molenheide BVBA (C-286/94), Peter Schepens (C-340/95), Bureau Rik Decan-Business Research & Development NV (BRD) (C-401/95) and Sanders BVBA (C-47/96) v Belgian State, ECLI:EU:C:1997:623.

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As a conclusion, in our point of view, these two factors and their combination are determinative for the type of system: 1) obligatory e-invoice 2) e-invoice release through a single state resource. The maximum possibilities from the point of view of control are provided by the e-invoice system, based on the obligation to issue electronic invoices on a continuous basis (for all categories of transactions through a single state resource, which gives the state an information database in electronic form on transactions in the country in real time, i.e. delayed by the statutory deadline for the release of e-invoice. The next step, which could optimize the data collection and VAT digitalisation, is the centralization of transaction data from disparate the electronic document management system providers in Slovakia governed by the state. Such measures will provide a reliable control system that operates in real time. On the other hand, the absence of the obligation of the e-invoice for all types of taxable transactions or the absence of a single state resource would predict tax frauds connected with VAT. Finally, building an effective traceability system without the obligation and centralization of e-invoice production is not, in our opinion, possible. In addition, the building of a strong e-invoice system is a necessary condition for the introduction of the final regime and general reverse-charge mechanism within EU.

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DEFAMATION ON SOCIAL MEDIA – CHALLENGES OF PRIVATE INTERNATIONAL LAW / Sandra Sakolciová

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Abstract: *There is no doubt that social media have become a very important part of many people's everyday life. The consequences of their usage is an increased engagement in defamation, most likely due to the aspect of anonymity present in the online environment. Such cross-border (or more precisely border-less) defamation raises difficult challenges in terms of jurisdiction and applicable law. These challenges, which will be analysed in more detail in the article, remain unresolved up until today. Moreover, negative effects occur not only within private international law itself, but status quo significantly influences the exercise of basic human rights, too. Besides analysing the existing EU legal framework and applicable case-law, the article also looks into the possible alternatives.*

Key words: *Defamation; private international law; human rights; EU law; freedom of expression; social media; Brussels I bis; Rome II*

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1. INTRODUCTION

Private international law is a set of rules which the national courts apply in order to determine whether they have jurisdiction to decide a case containing a foreign element and if so, to determine the national substantive law which should be applied. Even though private international law forms a part of national law, the ongoing "Europeanisation" of this branch makes it subject to regulations of the European Union. Very important unification activities are conducted also by the Hague Conference on Private International Law (see Lysina, Haťapka, & Ďuriš, 2016). In cases of defamation on social media, the questions of who will decide the case and according to which law are very important and challenging, because internet has no borders. Even though social media is not a new phenomenon and defamation that occurs there has been considered as raising some of the most difficult issues in private international law (Mills, 2015, p. 1), the existing situation has not changed for many years now. This article explains the impact of social media use on defamation, analyses the relevant legal rules existing within the European Union, examines the problematic issues concerning jurisdiction and applicable law in online defamation and presents possible alternatives. The legal concerns will be explained on illustrational cases.

2. THE IMPACT OF SOCIAL MEDIA ON DEFAMATION

Social media is considered by people who use it as a source of fun and relax, as a „newspaper" which they read to gain the newest information from their country and from the world, and definitely as a tool to communicate with their relatives or with anyone who uses the same social media platform. They are very popular both in terms of number of users and the average time the users spend there. Facebook alone has almost 2.5 billion users. In other words, if Facebook was a country, it would be the biggest in the world. As regards the time spent on social media platforms, the average in 2018 was 144 minutes per day which shows a 62.5% increase since 2012. It is estimated that people spend almost 7 years of their life time on social media. Paradoxically, not even 2 years are spent by socializing in the real "offline" world according to the statistics (BroadbandSearch, 2020). This means, that the opportunity to engage in (online) defamation is simply increased by the existence and frequent use of social media which make it so easy to write anything and send it to the world basically just by a click on a mouse.

It is crucial to point out how defamation changed with the time and technology. In the era of traditional media, such as newspapers, the published content was a product of thoughtful reflection (e. g. by professional journalists) which was usually subject to revision at more levels. On the other hand, the content on social media is mostly created in spontaneous and informal way by anyone who has connection to the internet. People do not need to study journalism or apply for a position in a radio or a TV to publish information across the world. The fact is that not only professional newspaper articles, but also the content we - basic users - publish on the internet deserves protection under the right of freedom of expression. This is, however, not how it is perceived by most of the social media users - it is rather just a simple "chatting" or "commenting". On the internet, people feel liberated to speak their minds as they please. Complex questions, such as when and where the publication is made and by whom it is deemed to be understood are not thought about at all (George, 2014, p. 136). As a result, defamation can be much more severe on the internet where the content is likely to reach a large number of recipients. Moreover, the dark side of the anonymity and impersonality of the online environment encourages people to write also hurtful, exaggerated or defamatory things about other people. As Patrick George in his article about social media accurately expressed – things that are nowadays said publicly on the internet, especially on social media, had probably lurked in the past in private conversations or went unsaid in peoples' private thoughts. All the hatred, trolling and defamation which happen so often now on social media are considered to be the antisocial phenomenon of these times (2014, p. 137).

3. JURISDICTION AND APPLICABLE LAW UNDER THE EU LAW

This part of the article analyses existing rules of the EU private international law concerning defamation and privacy rights including the relevant jurisprudence of the Court of Justice of the European Union (hereinafter referred to as the "CJEU"). It deals with two relevant regulations, namely Brussels I bis Regulation[1] (Jurisdiction) and Rome II Regulation[2] (Applicable law), and provides an important insight into their interpretation

[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

by the CJEU in the context of *offline* defamation (*Bier*, *Shevill*) and its later adaption to *online* defamation (*eDate Advertising*, *Bolagsupplysningen OÜ*).

a) Jurisdiction

In order to determine jurisdiction in civil and commercial matters (including defamation and privacy rights), the Member States of the European Union, except Denmark,[3] have to apply the rules contained in the Brussels I bis Regulation. However, if the defendant is not domiciled in the EU Member State, the jurisdiction of the courts shall be determined by national law of the respective Member State (Article 6 of the Brussels I bis Regulation).[4] The exceptions are contained in the Brussels I bis Regulation itself, namely in the Article 25 (when the parties have agreed that courts of a Member State shall have the jurisdiction – prorogation of jurisdiction), Article 18 (consumer contracts with professionals domiciled in a third state) and Article 20 (individual employment contracts, if the employer has some form of establishment in a Member State).

The general rule which determines jurisdiction in the matters of violation of privacy and personality rights is Article 4 (1) which stipulates that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. According to Article 7 (2) of the Brussels I bis Regulation, a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for *the place where the harmful event occurred or may occur*. In the case *Bier,*[5] the CJEU ruled on what should be understood under this phrase;[6] the place where the harmful event occurred could be both i) the place of event giving rise to the damage (*Handlungsort*) as well as ii) the place where the damage occurred[7] (*Erfolgsort*).[8] It is therefore up to the plaintiff, who has an option to commence proceedings at one of the aforementioned places (principle of ubiquity). Professors Vick and MacPherson see a negative aspect of this decision. In their opinion, the approach taken by the CJEU, which gives the plaintiffs a choice to decide where to sue, gives rise to forum-shopping (1997, p. 973).

The established principles were applied in the defamation context in a very important judgment in the case *Shevill.*[9] The case was about Ms. Shevill, an English student working temporarily in Paris, who claimed to have been defamed by the French newspaper called France-Soir, which printed an article accusing her of drug trafficking and money laundering. She brought a defamation suit before the British courts. France-Soir was mainly distributed in France – it is estimated that more than 237 000 copies were sold, whereas only 230 copies were distributed in England and Wales (only 5 in Yorkshire where Ms. Shevill resided). The newspaper therefore challenged the English

[3] In 2007, the European Community signed a treaty with Denmark, Switzerland and Norway, the new Lugano Convention, which is substantially the same as the 2001 Brussels I Regulation.

[4] In the Slovak Republic, international agreements will prevail over the national rules (Article 2 of the Act No. 97/1963 Coll. on Private International Law and the Rules of Procedure Relating Thereto).

[5] CJEU, judgement of 30 November 1976**,** Handelskwekerij G. J. Bier BV v. Mines de Potasse d'Alsace SA, C-21/76 (hereinafter referred to as "Bier").

[6] At the time the Bier case was decided, Brussels Convention of 27 September 1968 was in force and the Court interpreted the meaning of Article 5 (3), which has the same wording as the Article 5 (3) of Brussels I Regulation and the Article 7 (2) of the Brussels I bis Regulation, which is currently in force. Since the wording of the mentioned articles is the same, the case-law of the CJEU is still applicable and for the purposes of clarity it will be only referred to the Article 7 (2) of the Brussels I bis Regulation.

[7] See Bier, par. 19.

[8] The German phrases „Handlungsort" and „Erfolgsort" are used in the article due to their precision and clarity.

[9] CJEU, judgement of 7 March 1995, Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA, C-68/93 (hereinafter referred to as "Shevill").

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courts' jurisdiction on the grounds that the "*place where the harmful event occurred*" was in France and no harmful event had occurred in England.[10] The CJEU ruled that the plaintiff may (i) either bring proceedings before the court of the place where the publisher is established and seek recovery of the damages suffered worldwide or ii) enjoy the benefit of suing locally, but having to restrict the claim to the damages sustained within that forum (so called "mosaic principle"). The first possibility relates to the criterion of *Handlungsort* which is the place where the publisher of the newspaper in question is established since "*that is the place where the harmful event originated and from which the libel was issued and put into circulation*."[11] The second possibility was to sue according to *Erfolgsort*, i. e. the place where the publication is distributed if the victim is known in those places since that is the place where "*the injury caused by defamatory publication to the honour, reputation and good name of a natural or legal person occurs.*"[12] It follows that the courts of each Member State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his or her reputation have jurisdiction to rule on the injury caused in that state to the victim's reputation.[13] According to this analysis, Ms. Shevill - the plaintiff and the alleged victim of defamation, could sue in France and claim any and all damages suffered anywhere in the European Union or she could decide to lodge her suit in England, but only claim damages which were caused in England (Warshaw, 2006, p. 280).

There are different perceptions of the *Shevill* judgment. On one hand, there are opinions, that it favours plaintiffs, because it provides them with a possibility to strategically choose the forum, since the courts can basically always exercise jurisdiction as long as the person was harmed "in some way" in the given forum. Even though a plaintiff may seek limited damages in a place different than the place of where the publisher is established, it is often rendered irrelevant because by merely establishing jurisdiction, a plaintiff has raised considerable leverage for a settlement. The judgment does not provide any barrier to claim defamation in a forum, which has a minimum connection with the publisher, what may have a chilling effect on freedom of expression (Warshaw, 2006, pp. 281–282). On the other side, there are scholars who consider *Shevill* as striking a fair balance between interests of a publisher and an alleged victim (Kuipers, 2015). By distribution of the publication in a specific Member State, a publisher may reasonably foresee the jurisdiction of the courts of that Member Sstate.

The *Shevill* case concerned "offline" defamation and interpretation of the Article 7 (2) of the Brussels I bis Regulation in the context of traditional media (newspaper) which is distributed physically to designated states. The question that arises in the matter of "online" defamation is whether this approach is suitable also for new media where the form of content "distribution" differs. Guidance is given in the two aforementioned judgments of the CJEU, namely *eDate Advertising*[14] and *Bolagsupplysningen OÜ.*[15]

The *eDate Advertising* case was in fact two cases which the CJEU dealt with jointly. The first case *eDate Advertising GmbH* v X was about an alleged violation of privacy rights of a German citizen (referred to as "X") by a content published on an internet portal operated by a company based in Austria. The second one, Oliver Martinez and

[10] See Shevill, par. 3-15.
[11] Ibid., par. 33.
[12] Ibid., par. 29.
[13] Ibid., par. 30.
[14] CJEU, judgement of 25 October 2011, eDate Advertising GmbH v. X and Olivier Martinez and Robert Martinez v Société MGN LIMITED, joined cases C-509/09 and C-161/10 (hereinafter referred to as "eDate Advertising").
[15] CJEU, judgement of 17 October 2017, Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, C-194/16 (hereinafter referred to as "Bolagsupplysningen OÜ").

Robert Martinez v Société MGN Ltd, involved alleged violation of privacy rights by publishing information and photos on a website operated by the English company. The legal question that the CJEU had to deal with was how "the place where the harmful event occurred or may occur", as stipulated in the Brussels I bis Regulation, should be interpreted, if the case concerns a violation of personality rights on the internet. The CJEU ruled as follows:

„...in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seized."[16]

By this ruling, another head of jurisdiction, where the plaintiff could claim the entirety of damages for the harm suffered, has been added (Jütte, 2017). The CJEU explained how "centre of interests" shall be understood and ruled that *„the place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State."*[17] According to some authors (See Mills, 2015, p. 19), this definition is too vague and is likely to negatively influence publishers of online material.

The question of whether special problems arising with online defamation would justify a special jurisdictional rule seems to have been decided by the CJEU, which actually developed a special rule in its jurisprudence. CJEU appears to have introduced a *forum actoris* while it has always consistently held that such a forum is incompatible with the structure of Brussels I bis (Kuipers, 2015).

The previous cases involved natural persons, but the Court of Justice of the European Union clarified the situation as regards legal persons and their defamation in the online environment in the case *Bolagsupplysningen OÜ*, decided in October 2017. It involves an alleged violation of privacy rights on the internet and interpretation of the Article 7 (2) of the Brussels I bis Regulation. The main difference was that the injured party was a legal person that claimed not only damages but also rectification and removal of comments. The CJEU confirmed that the principles from *eDate Advertising* apply also to legal entities and ruled that: *"...a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located..."*[18] It further dealt with a question of where the centre of interests of such an entity is located, because the company had its registered seat in Estonia, but conducted most of their business in Sweden. According to the CJEU, centre of interests of a legal person reflects *"the place where its commercial reputation is most*

[16] eDate Advertising, par. 52.
[17] eDate Advertising, par. 49.
[18] Bolagsupplysningen OÜ, par. 22.

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firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities."[19]

b) Applicable law

The Rome II Regulation on the law applicable to non-contractual obligations[20] which came into force on 11 January 2009, expressly states that it does not apply to the issues of defamation, as well as of privacy rights. The relevant Article 1 (2) g) of the Rome II Regulation stipulates that "*non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation are excluded from its scope.*" However, this exclusion was intended to be temporary, because the regulation contains a review clause in Article 30 (2) which required the Commission to carry out a study on choice of law in the context of defamation and privacy rights by the end of 2008.[21] Accordingly, the Commission issued a comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality (European Commission, 2009). This study revealed that in the majority of the Member States, the infringement of personality rights is governed by the general conflict of law rules on the law applicable to non-contractual obligations (only five EU states adopted a special conflict of law rule dealing with defamation) and the mostly used criterion is *lex loci delicti commissi*. However, the criterion of law of the place where "the delict was committed" is not interpreted uniformly by national courts (2009, p. 6).

The Slovak Republic is among the countries where infringement of personality rights is governed by the general conflict of law rules relating to non-contractual obligations, namely by Article 15 of the Act No. 97/1963 Coll. on Private International Law and the Rules of Procedure Relating Thereto. According to this article, the pertinent court has right to determine that applicable law is either the law of the state where i) the damage occurred (*lex loci damni infecti*) or of the state where ii) the event giving rise to the claim for damages occurred (*lex loci delicti commissi*). This provision expressly stipulates applicable law and shall not be understood as a choice of law (Lysina, Štefanková, Ďuriš, & Števček, 2012). To our knowledge, there is no case-law providing relevant interpretation of the specified criteria in the internet context .

Based on results of the survey presented by the Commission, correspondents (over 10 000 professionals) were divided in their opinion as to which conflict rule should be used. The majority was in favour of allowing the damaged party to choose, based on the criterion of *locus damni*. Unsurprisingly, press and media associations were clearly in favour of using the criterion of the place in which the publisher is established (2009, p. 7).

Even though it is clear that reaching a consensus among the various existing interests is difficult, it is not plausible to leave the situation as it is now. The vast majority of professionals, namely 85% of the respondents are in favour of harmonization of the law applicable to defamation and therefore consider it necessary for the European Commission to do something on this issue (2009, p. 8).

[19] Ibid., par. 41.

[20] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[21] Art. 30 (2) of the Rome II Regulation: „Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data."

4. PRACTICAL EXAMPLES AND LIABILITY OF SOCIAL MEDIA

At this point, the analysed rules and principles will be applied in two illustrational cases. The first case considers a typical clash between freedom of expression and privacy rights in traditional media: *A famous Czech newspaper accused a well-known Slovak lawyer of plagiarism. The Slovak lawyer has office in Prague and practises mainly in the Czech Republic. Surprised and ashamed by the article, he files a suit in the Czech Republic to obtain damages suffered to his reputation which resulted in loss of clients.* This is obviously a case of "offline" defamation. The Czech courts would confirm their jurisdiction based on EU law, as there is no doubt that Czech Republic is the place where the harmful event originated and from which the libel was issued and put into circulation (*Handlungsort*).[22] There is also no doubt that the damage occurred in the territory of the Czech Republic, where the Slovak lawyer has practised law and had a certain reputation which suffered due to the published article (*Erfolgsort*). If the Slovak lawyer wished to sue in Slovakia, he could take advantage of the principles established in the *Shevill* case and sue locally. He would, however, have to restrict the claim to the damages sustained in Slovakia which would probably occur due to the proximity of both countries but their extent would be likely lower than in the Czech Republic where he has the office and majority of clients. Nevertheless, it was reasonable to sue before the Czech courts, as he could claim all the damages including damages suffered in Slovakia. The Czech courts would determine the law applicable to the dispute according to the Czech private international rules, since defamation is excluded from the scope of the Rome II Regulation.[23]

The second illustrational case reads as follows: *There is a group on Facebook, which is dedicated to private international law. This group has hundreds of members from all over the world, especially professors and other legal scholars as well as practitioners interested in discussing topics of private international law and sharing relevant information and opinions. One day, an Austrian professor shares an article accusing a French professor (a group member living already for 2 years in Hungary) of plagiarism. Lots of comments appear under the article throughout the week, some of them include further accusations and insults. The French professor, surprised and ashamed by the article and the comments, wants to file a suit in his home country to obtain damages suffered to his reputation.* Assessing jurisdiction in this case is more challenging as in the first one. At first, we need to know who the French professor is going to sue. There are three most probable possibilities, namely 1) the Austrian professor for publishing the article, 2) the users for publishing their defamatory comments and/or 3) Facebook for not deleting the defamatory content.

In the first two options, the French professor could choose between the place in which the publisher of the content (Facebook) is established and the place in which the centre of his interests is based (Hungary).[24] If he did not want to sue in any of these countries, but in his country of origin (France), he could choose to use the advantage of the jurisdictional rule established in *eDate Advertising* and sue in the state, where the online content is or was accessible (but restrict his claim to damages accordingly). The fact that the French professor can lodge his claim in any country where the content was

[22] See Shevill, par. 33.
[23] The courts would firstly check if there is any international agreement before applying the national rules. There is a bilateral agreement between both countries, namely the Treaty between the Slovak Republic and the Czech Republic on Legal Aid provided by Judicial Bodies and on Settlements of Certain Legal Relations in Civil and Criminal Matters from 29.10.1992. This treaty, however, does cover the present matter.
[24] See eDate Advertising, par. 52.

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accessible could potentially lead to three negative effects. First of all, it can give rise to the threat of harassment suits (Vick & MacPherson, 1997, pp. 985–988). Due to the universal nature of the internet, content posted online can be accessible basically in every country in the world, with some exceptions of countries with a regime which prevents people from accessing internet freely, such as North Korea or China. Therefore, it is not excluded that an alleged victim would file a suit against the publisher in many jurisdictions, not because it would be more practical (the mosaic principle), but because it would negatively influence the publisher. Secondly, it may support the phenomenon called "libel tourism" which is a type of an already mentioned forum shopping. Forum shopping in private international law as a strategy or possibility of the claimant to choose forum is not always considered to be negative (see Lysina, 2017). There are countries, such as the United Kingdom, where it can be beneficial for the plaintiff to claim damages for the harmed reputation because of the strong level of protection. There can be also other advantages which could be motivational to file a suit in a specific country, such as a tendency to award high compensation, small court fees and similar. Plaintiffs may bring multiple lawsuits in different countries and actively seek a jurisdiction where they are most assured of success (Warshaw, 2006, p. 277). Lastly, but in our opinion most importantly, forum shopping can undermine human rights. If publishers (including journalists or academics) know that they can be subject to basically any jurisdiction, it could prevent them from publishing certain information, even though they consider it to be subject of public interest. This can have a chilling effect on freedom of expression and therefore negatively impact not only individuals and enjoyment of their basic rights, but also the society as a whole.[25] Moreover, according to Council of Europe, other rights, such as right to a fair trial or right to an effective remedy could be impaired too.[26]

As regards the third possibility, if the victim (the French professor) would like to sue Facebook for not deleting the comments, he would have to look into its "Terms of Service" which contain an agreement on jurisdiction and applicable law. The wording of the relevant term is as follows: "*If you are a consumer and habitually reside in a Member State of the European Union, the laws of that Member State will apply to any claim, cause of action or dispute that you have against us, which arises out of or relates to these Terms or the Facebook Products ("claim"), and you may resolve your claim in any competent court in that Member State that has jurisdiction over the claim. In all other cases, you agree that the claim must be resolved in a competent court in the Republic of Ireland and that Irish law will govern these Terms and any claim, without regard to conflict of law provisions.*" Accordingly, Hungarian law will apply to the claim and jurisdiction will be determined according to the relevant (above analysed) provisions of the Brussels I bis Regulation. For assessing the liability of Facebook for not removing defamatory comments, Member States of the European Union will have to rely on the Directive on electronic commerce.[27] This directive regulates liability of internet service providers, such as social media, for third party content (i. e. content which was published by third persons – the users). More on liability of internet service providers (see Sakolciová, 2019).

This example case is not an extreme situation to prove that there is a specific loophole in the private international law. This, we believe, could be a very common

[25] Council of Europe: Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the Protection of Journalism and Safety of Journalists and Other Media Actors, 13 April 2016, p. 33-34.

[26] Council of Europe: Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states, DGI(2019)04.

[27] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

situation, as there is a huge number of "interest" groups (such as the private international law Facebook group from the illustrational case) and fan pages with members and followers from all over the world. Defamation on social media poses new challenges for the protection of reputation and for the protection of freedom of expression due to their specific features. It is required that law-makers react promptly and adequately adapt the rules to the current situation.

5. ALTERNATIVES

Creating conflict of law provision that would strike a fair balance between the protection of privacy rights of victims and preserving legal certainty of the publishers as regards their potential liability for publishing illegal content, which is an important factor for protection of freedom of expression, is truly a difficult task. All rules have their advantages and disadvantages. Should it be the place where the damage occurred, the place of establishment of the victim, or the place of establishment of the publisher?

For example, the *place of establishment of the publisher* has the benefit of one single applicable law, aspect of foreseeability (at least to the publisher), but it favours freedom of expression on the cost of victims of defamation. The "*Erfolgsort*" favours plaintiffs and causes that place of injury in a globalised world may be difficult to determine (Kuipers, 2015). Although facially neutral, the connecting factors at least implicitly favour the protection of one fundamental right over the other (Kuipers, 2011, p. 1701). The main advantages of application of the *lex fori* criterion is the time and costs reduction involved in litigation, better quality of judgments, as well as the possibility to take into account public policy concerns of the forum because personality rights, privacy or data protection are based on constitutional values (von Hein, 2016). The disadvantage is that there would be as many potentially applicable laws as there are potentially competent jurisdictions. Moreover, it favours the plaintiff and supports forum shopping. This problem shows the close connection between the applicable law and jurisdiction, especially the special jurisdiction under Article 7 (2) of the Brussels I bis Regulation. According to von Hein and Bizer, this parallel presupposes *„that special jurisdiction is applied in a restrictive way to avoid an excessive application of the lex fori to cases that are merely connected to the state of the forum."* The authors, however, point out that certain infringements of privacy rights committed via social media may be closely connected to a different legal order than to the one of the forum. In their article, they suggest that applying the law of the common habitual residence of plaintiff and defendant will be usually more appropriate than applying the *lex fori* (2018, pp. 237–238).

There have been many proposals of new rules or amendments of the existing law. For example, the Committee on Legal Affairs of the European Parliament proposed in May 2012 to amend Rome II Regulation by adopting a conflict of law rule concerning privacy rights and defamation. The proposed provisions were formulated as follows:[28]

Recital 32a

This Regulation does not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. In particular, the application of a provision of the law designated by this Regulation which would have the effect of significantly restricting the scope of those constitutional rules may, depending

[28] European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI)).

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on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (ordre public) of the forum.

Article 5a

Privacy and rights relating to personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.

2. However, the law applicable shall be the law of the country in which the defendant is habitually resident, if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.

3. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.

4. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.

The survey conducted by the European Commission showed that "*in the absence of a minimum level of harmonisation of Member States' substantive laws, it will be hard to reach an agreement acceptable to all stakeholders on a single set of conflict-of-law rules*." The recommendation proposed in the study is to adopt a directive which would incorporate i) certain minimal essential aspects (based on the Charter of Fundamental Rights of the European Union and Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms) and ii) a self-limited rule based on the criterion of the place in which the publisher is established. This criterion works in favour of the freedom of expression, however, the minimal material harmonisation will ensure that an adequate standard of protection of right to privacy and reputation will be provided to all media users (European Commission, 2009, p. 8).

Another proposal worth consideration was introduced by Assistant Professor Dr. Jan-Jaap Kuipers. He suggests that a possible alternative would be to use a so called "principle of closest connection." He suggested that struggle towards absolute predictability should be abandoned and wider margin of appreciation in applying this principle should be given to national courts. The following conflict of law rule should be incorporated into the Rome II Regulation: "*The law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country with which it is most closely connected.*" The courts applying the principle of closest connection would consider relevant criteria such as the place of establishment of the publisher, of the victim, the place where the most of the damage materialized, the language of the publication, domain name and similar. Assistant Professor Kuipers compared the use of the criteria to a sliding scale in that if one of the criteria would not play any role in an individual case, the remaining criteria

would gain importance. Accordingly, the Rome II Regulation should be understood as not preferring *in abstracto* one criterion over the other (2011, pp. 1701–1705).

The exclusion of defamation from the scope of EU law may reflect a rejection of the regulation's purely private law perspective or it could reflect a rejection of the idea that harmonised EU rules are appropriate in this matter (Mills, 2015, p. 12) especially due to strong public policy inherent in defamation law. The conflict between freedom of expression and the right to privacy is a very sensitive issue for many states. This subject has even been called "the perfect arena for cultural clashes" (Nielsen, 2019, p. 37). Indeed, it is often difficult and politically sensitive to apply law of a foreign country with different traditions and as the current situation shows, it is also difficult to reach a compromise and create common rules.

Unlike the Rome II Regulation, the Brussels I bis Regulation does not exclude defamation and privacy rights from its scope. However, there have been some proposals as regards the application and interpretation of the relevant provisions of the latter regulation as well. As already indicated above, the connection between applicable law and jurisdiction could mean, that a unified provision on applicable law may require amendments to the jurisdictional rules. While general jurisdiction is „neutral" from the conflict of law perspective, special jurisdiction indicates a significant connection between the forum and the legal question at hand. For this reason, the authors Bizer and von Hein claim that simply agreeing on the criterion of *lex fori* determining the applicable law in defamation cases would not solve the forum shopping problem, unless the available fora are limited as well. Moreover, they also call for development of comprehensive common rules on jurisdiction concerning third-state defendants who are excluded from the scope of the Brussels I bis Regulation (2018, pp. 237–238). In his article, Meier points out that extending the scope of application of Brussels I bis Regulation to defendants domiciled in third states could lead to broad imposition of European values. This may cause, that third states would react negatively to such a trend, e.g. by not recognizing and enforcing European judgements unless they respect cultural values of those states (2016, p. 504).

Advocate General Bobek is also in favour of limiting available fora in the online defamation cases. In the *Bolagsupplysningen OÜ* case, he took the opportunity to voice his opinion on the need to depart from the previous case law interpreting jurisdictional rules. In his *Opinion*, Advocate General Bobek suggested limiting the jurisdictional competence for online infringements of personality rights only to (two) jurisdictions: i) state where the publisher has its domicile and ii) state where the plaintiff has centre of his interests. Courts of these states would have full jurisdiction to adjudicate on the totality of damages.[29] Centre of interests of natural and legal persons should be based on "*the factual and social situation of the claimant viewed in the context of the nature of the particular statement.*" This suggestion aims*"…at giving jurisdiction to the court that will be situated at the centre of gravity of the specific dispute."*[30] The Advocate General Bobek considered the borderless nature of the internet to be a reason to revisit the previous case-law, namely *Shevill* and *eDate Advertising*, which enables plaintiffs to file a suit in all member states. In his view, such multiplicity of fora hardly reconciles with principles of predictability of jurisdictional rules and sound administration of justice that lie at heart of the Brussels I bis Regulation.[31]

[29] Opinion of Advocate General Bobek delivered on 13 July 2017, Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, C-194/16, par. 97.
[30] Ibid., par. 100-101.
[31] Ibid., par. 71-91.

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6. CONCLUSION

Internet and new technologies as well as law develop and change over time. However, both develop at a different pace. While technologies are progressing every day, law often remains left behind, too rigid and inflexible to catch up. This article analysed the relevant provisions of the Brussels I bis Regulation and the Rome II Regulation as well as the important case law of the CJEU providing interpretation of the established rules in the online context. It has been shown that the existing private international law provisions at the EU level are either not satisfactory or absent. The *status quo* may lead to negative consequences, such as making use of harassment suits, libel tourism and disregarding appropriate balance between individual human rights (which currently heads towards diminishing freedom of expression). In the author's view, these challenges could be best tackled by solutions that take into account the specific circumstances of an individual case and – using the words of Mr Kuipers – do not prefer in abstracto one claim over the other. In that sense, the potential available fora should be limited as well. As AG Bobek suggested, the place where the gravity of the dispute lies should play the key role.

Despite the urge to find solutions and amendments to the legal framework, but no action has been taken yet. To conclude, it is argued that the existing territorial regulation of online defamation should be reconsidered and therefore, further research on this topic is strongly encouraged.

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DISCUSSION PAPERS AND COMMENTARIES

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INDUSTRY 4.0, LEGAL PROTECTION OF THE EMPLOYEE AND INTERCULTURAL IMPACT OF LABOUR MIGRATION / Aleš Kainz

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Abstract: *Industry - Industry 4.0 [I4.0] is the main topic of discussions and proposals for innovative changes. In the last five years, inside industry sectors took place the intellectual clashes among digitisation, robotisation and automation. These concepts have been combined with performance, efficiency gains, steady economic growth, employment, labour migration, and increasing labour productivity in all managerial or economic forums. In particular, the European Union [EU] is one of the foremost leaders in improving workforce quality, given the increasing share of robotics and automation. The competitive pressure, beset on individual EU member states by countries with low-cost labour, is increased by assessing economic growth, increasing labour productivity, and setting social-law standards in the EU.*
On the other hand, increasing the automation of production plants leads to increased employment pressure and contributes to managed labour migration. This migration is mainly about the pressure on competencies, quality, number of employees and the negative development of the demographic curve in the EU. All this reflects the demand for more robust legal protection for workers in the field of social assistance and legal regulations generally linked to a rapid change in labour market conditions. The resulting mix will have a significant impact on the economy's performance and competitiveness.

Key words: *Industry 4.0; Employment protection legislation; Productivity; Labour law and migration; Intercultural behaviour*
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1. INTRODUCTION

In a globalised, economically connected and knowledge-based society, we are talking about an industrial revolution of a new type. Historically, we can define the three essential milestones: the first industrial revolution starting up sweatshops and machine drives by natural elements. The second industrial revolution is introducing mass production using electricity. Finally, the third industrial revolution connected the automation of production controlled by electronics and computing. All industrial revolutions were closely related to man, mover, or instrument for introducing change and

were associated with a jump in labour productivity, economic growth, well-being, and scientific and technological progress.

The I4.0, as first presented by the German Institute for Research and Development and comprehensively supplemented at the Hannover Engineering Fair 2011 (Kawano, 2015), is significantly different. We are talking about the fourth industrial revolution connected with cyber-physical systems (Mařík, 2016) playing a significant role. These systems should represent a decentralised intelligence to help complete networked intelligent objects and independent control systems with real and virtual interdependence, i.e., mutual exchange of information and decision-making independently of users (Tomek & Vávrová, 2017). The very nature of such management systems is independent of external interventions, i.e., user influence. Is it the purpose of scientific and technological progress to help the human community move its standard of living forward?

Labour law aims to reduce or blunt social disparities between social classes, i.e., establishing a balanced status between employee and employer status (Kratochvíl, Cícha, & Jurča, 2017). We ensure such a balance, as the superior protection, used when we look at employees as the weaker side of employment relations. We find the soft side mainly insubordination or within the basic need to have a job to meet our family's needs.

The concept of labour migration based on the combination of the words migration and work, where migration is understood as a change in the place of long-term residence, and we do not distinguish, in this case, for what purpose it occurs. It is the decision of an individual or group to change their residence place without changing their nationality. If we are talking about changing long-term residence by reason to look for other working conditions, it is necessary to apply the economic paradigm of the invisible hand of markets; competitive advantage and the associated maximum usability of the offered labour force. We can follow the law of supply and demand. It ensures the movement of the workforce and directs it to the places of its best use (Dušek, 2020).

The impact of intercultural behaviour on contemporary society is evident. This obviousness is perhaps why it is not often considered one of the fundamental factors in labour law and labour migration. The history of intercultural relations comes back to the emergence of the human community. Still, it has never reached the level of influence and greatness in today's globalised world. Previously, only people from specific fields of human activity or condition had the opportunity to contact foreign cultures. Today, even the most isolated and marginalised groups of people can communicate around the world. The intercultural connection has become a reality of everyday life for almost all of us (Kainz, 2012).

2. THEORETICAL BACKGROUND

Industry 4.0 is called the beginning of a new industrial revolution. The fourth industrial revolution concept has been directly connected to the German Ministry of Industry initiative. The basic idea is the digitisation and robotisation of all processes. Based on independently functioning cyber-physical systems which can self-learn. This system can learn more and improve itself (Rohrbach, 2017) in functional units that can work effectively without human hand intervention. Furthermore, the internet of things creates an interconnected or mutually informed technology network by connecting machine control systems to the internet (Floerkemeier, Langheinrich, Fleisch, Mattern, & Sarma, 2008).

Labour law, its modern evolution, is related to the downfall of the feudal order and the rapid commencement of capitalism. The rapid onset of the Industrial Revolution and the development of related technologies, in the period of the 18th - 19th century, showed the need to describe the relationships more accurately between essential economic resources, as capital and work, where are the employer - the owner of capital and the employee - the bearer of the work. The disequilibrium of employer-employee relations, linked to the employee's dependence on remuneration for the work done, has proved to be further unsustainable. (Löwisch, Caspers, & Klumpp, 2019).

Labour migration exists all the time and in all regions of the world. The retrieval for more favourable jobs is still the primary motivation for migration today and explains why working migrants account for a significant share of international and internal migration populations. In addition to work, other reasons for migration include conflicts, wars, political persecutions, family reunifications, educational opportunities, and climate changes.

The intercultural background must combine preparation for business meetings and precisely identify cultural differences and behaviour stereotypes. We can apply and appropriately use the courtesies rules and regulations of trade etiquette, which can help provide reasonable conditions for the success and improvement of business communication efficiency. Cultural competence refers to the ability to cooperate effectively with people of different cultures. This ability consists of four parts: the first two parts deal with the first stage (self-cooperation). They are based on awareness of one's cultural view of the world and attitudes towards cultural stereotypes and recognising cultural differences. The other two parts relate to the interpersonal and organisational level. It is about knowledge of different cultural customs and worldviews and knowledge of the skills that intersect with cultures.

Within this framework, cultural competence development represents the ability to understand, interact with, and effectively interact with people across cultures. When working in a global business environment, knowing the impact of cultural stereotypes and cultural differences is key to achieving international business success. Improving cultural awareness helps build international competencies and understand the business partners behaviour across the global business spectrum.

3. RESEARCH METHODOLOGY

The paper is drafted as a theoretical essay or essay, in the sense of Anglo-American scientific research (Werro & Dedek, 2017). Comparing current knowledge of the topics mentioned above looks for weak and healthy places in their links. The author uses an analytical-synthetic approach to link subtopics and adds his view of possible future results and solutions. The author´s synthesis theoretical framework describes particular topics and an effort to connect them to increase familiarity with the Czech Republic subject.

4. THEORETICAL RESULTS

Despite many positive expectations, increasing labour productivity, limiting the impact of human work, reducing costs, increasing production, reducing error rates and increasing work safety, a view of the socio-economic effect of robotisation and automation on the labour market is essential. This kind of doubt has accompanied the human race since ancient times when Aristotle writes in his Politics, "A servant in art and

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craft is a kind of instrument...and therefore a slave is a kind of soulful instrument. Instead of many tools, it is an instrument if every tool could perform its work when ordered or see what to do in advance… if thus shuttles wove and quills played the harps of themselves, master-craftsmen would have no need of assistants and masters no need of slaves". (Aristotelés, 2009), any automation would lead to job losses. This idea shared in many economic theories, such as the J.M. Keynes theory. The IP 4.0 is a revolutionary change of individual working or production processes with the help of robots, independent control and automatic units controlled by computers and the interconnection of their "sensory organs" using the internet of things. Each occupationally qualified population, i.e., a group affecting economic consumption, given their income, is divided into two primary groups: a group of skilled workers and a group of less qualified workers. Suppose we improve the technology (A2) suitable for less-skilled workers to the technology (A1) suitable for a group of qualified people only. In that case, increasing the relative number of qualified employees will reduce their wages and decrease the relative number of less qualified workers in the short term, within three years.

The risks arising from IP 4.0, which threaten jobs, will arise even without individual companies or 'states' help. From the point of view of neoclassical theory, automation should not affect the global or closed economy; that is, the Czech Republic, with a small open economy, being at risk. Nevertheless, on the other hand, we cannot ignore 'digitalisation's potential to create new jobs and business opportunities. In this case, the ratio created to extinct jobs is two to five (Frey & Osborne, 2017).

The EU labour law on the subsidiarity principle belongs under the responsibility of every national law system. The fundamental pillars are the Fundamental Charter of Rights and Freedoms, the European Convention for the Protection of Human Rights, and the European Social Charter. The EU legislative process undoubtedly influences the systems of law, and its observance is under the supervision of the European Commission and the European Court of Justice (Steiner & Woods, 2009).

In the Czech Labour Law, the central concept is not an employment contract or dependent work independently, but a labour-law relationship strongly linked to dependent work performance. The performance of the dependent activity is further divided into individual and collective. Individual activities are significant for Industry 4.0. According to the history of industrial revolutions, this is the 'employer's investment activity and the associated job losses. The point is to find a balance between working 'relationships' flexibility and an effort to ensure the 'employee's social security to the 'employer's greatest possible freedom in employment relations. A database of Indicators of the Organisation for Economic Cooperation and Development [from now on referred to as the OECD], the so-called EPL index, "Employment protection legislation – Legal protection of employment" is used for the necessary comparison and research of the readiness of the legal system in the field of labour law. The research methodology based on OECD research measured the strictness of protecting 'workers' rights and determining its direct impact on the labour market. The EPL is described for each OECD country using 21 points divided into three primary areas; 1. Protection of long-term employed workers against individual redundancies, 2. Regulation of temporary, short-term forms of employment and 3. Specific requirements for collective redundancies. In 'today's scientific world, two different mainstreams of perceptions clash with the impact of strict legislative protections on unemployment dynamics. On the one hand, they are opinions that confirm the mutual influence of the two concepts (Barbieri & Cutuli, 2016; Heyes & Lewis, 2014), and on the other hand, some views reject that influence (Avdagic, 2015; Schhmann, 2014).

If we focus on further developments, the forecasts show that because of unequal demographic developments and significant global labour market disparities, supply and demand for labour migrants could continue to increase, contributing to increased migratory flows. Considerable attention has been paid to why labour migration appears to be associated in some cases with positive development outcomes, but not in others, and which policies can help maximise the benefits of migration while minimising its costs. The scientist debates over the impact of migration on the 'economy's development reflected in many theoretical models and empirical research describing labour migration. Simple models try to describe and explain the reasons why people move from place to place. The pull factors encourage people to move from one area to another. The push factors are reasons for unfavourable conditions in areas where people live and encourage them to emigrate.

5. THEORETICAL PROPOSALS

A. The proposed solution and the inevitability are to increase expenditure on education and science to at least the EU28 average, from the current 1.94% of GDP - 2020 to 2.5% of GDP.

B. To prepare targeted legislation changes, especially in the Constitution, the Electoral Act, the Act on the Residence of Foreigners in the Territory of the Czech Republic and the Act on Citizenship. Their correct intention can influence and manage the process of who can enter or legally reside in the host country, when his family can move in and under what conditions, and who can obtain citizenship of the country or how to obtain the right to vote and therefore have a profound impact on social norms, values and institutions.

C. However, it can be generalised that the Union does not have exclusive competence in labour law. This legislation still belongs to the individual Member States and is influenced through EU policy by primary law, i.e. the directives adopted. In the field of labour, migration it is necessary to divide legislation into existing, touching and applicable directly (in the Czech Republic, e.g. Act No. 326/1999 Coll. on the Residence of Foreigners in the Czech Republic) and relevant indirectly (the Constitution, the Basic Charter of Rights and Freedoms, Social Security, Taxes, etc.). Within the basic principles of law, it is primarily about protecting personal rights, the safety of the labour migration process and legislation to promote labour migration.

D. If somebody has practical experience in employing EU, EEA workers and sending our workers abroad, this is an area that is not sufficiently well processed in the Czech literature. The author thinks the MPO published one more practical brochure, but it is not an "explicit science". Legal literature still describes the judgments of the Court of Justice of the EU, to a great extent, without focusing on current developments. Moreover, it is often an academic treatise on the law, but no longer on the extent to which it is applied or enforced. Here, therefore, the author certainly sees considerable potential for further development of the topic. For example - which countries create more suitable conditions for labour migration, and which countries are the architects of obstacles? In practice, from the point of view of companies, sending "employees" means something completely different from harmonising legislation at the EU/EEA level for officials in Brussels.

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6. CONCLUSIONS

Combining the IP 4.0 themes, cultural relations with the legal protection of employees and labour migration are currently mainly political topics. In the 'writer's opinion, it is necessary to seriously start looking at their labour legislation effects. After comparing available ideas and articles, the Czech Republic is ready to deal with the situation, especially in individual working relationships. However, the author does not think that is entirely true. It is all about coping with the supposed pressure on unemployment and a better-skilled workforce. 'Rohrbach's research (2017) shows that IP 4.0 will affect 19% of German companies within two years, 53% of companies within five years and 77% within ten years. The interdependence of our economies is a determining prerequisite for following a similar scenario in the Czech Republic.

According to the resolution of the Government of the Czech Republic (Vláda ČR, 2016), IP 4.0 is here, and we must be prepared; let us invest in new technologies, change school policy, science, put more money into "meaningful" research. Let us support retraining today of qualified employees at the age of 25-54; let us identify areas and prepare retraining courses. In the legal field and from the point of view of labour legislation, we need to work intensively on more flexible individual relations. The foreign 'workers' site is limited to general employment and specialists such as doctors and researchers. Above all, in the areas of part-time work, the conclusion of atypical employment contracts and the creation of shared employment relationships, we must find a familiar and workable solution. Efforts to understand the differences in the legal and cultural values of newly arrived workers are entirely disappearing. Their understanding and preparation in this area will be the fatal difference between success and failure in their integration—the possibility of successful self-enforcement in the labour market. Simplicity in employing foreign labour and reducing bureaucracy has been discussed for the last few years. We are members of the Visegrad group, where this platform directly encourages adopting common strategies in all the areas mentioned above. If we do not adapt, we will remain dragged out of economically more robust or faster-responding states.

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THE LEGISLATION OF THE REPUBLIC OF SERBIA IN THE FIELD OF PREVENTION OF CORRUPTION IN PUBLIC PROCUREMENT /

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Abstract: *The public procurement as a process by which governments, as well as other bodies governed by public law, purchase products, services, and work, create the cost to the state budget, and taxpayers. The high value of transactions and close interaction between public officials and businesses expose public procurement to corruption risk. According to the Serbian legislation, violation of public procurement rules can be qualified as misdemeanour or crime. The specific crime of abuse in public procurement has been introduced in the criminal legislation by 2012 amendments to the Criminal Code. In addition to the repressive response to the corruption in public procurement, the potential abuses can also be prevented by other measures. To prevent irregularities and decrease vulnerabilities to corruption, a new Law on Public Procurement was passed in December 2019.*
Therefore, in this paper, authors analyse criminal provisions aimed to deter possible offenders, but also assessed other non-criminal provisions and the functioning of control mechanisms, such as supreme audit and internal financial control in the Republic of Serbia. In the paper, authors strive to make recommendations for improving the prevention and repression mechanisms against abuse in public procurement procedures.

Key words: *prevention; abuse; public procurement; external and internal financial control*

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1. INTRODUCTION

Public procurement is the government activity most vulnerable to corruption (OECD, 2016). The 2014 EU Anti-Corruption Report highlights the significant risks of corruption in the context of public procurement, due to deficient control mechanisms and risk management in EU Member States (European Commission, 2014). As a major interface between the public and the private sectors, public procurement provides multiple opportunities for both public and private actors to divert public funds for private gain. Public procurement is also a major economic activity of the government, where corruption has a potential high impact on taxpayers' money. In the European Union, public authorities spent approximately 2 trillion annually on public procurement, which

represents around 14% of the GDP (European Commission, 2021). In OECD countries, existing statistics suggest that public procurement accounts for 12% of GDP, and 29% of government expenditure (OECD, 2019). In addition to the volume of transactions and the financial interests at stake, corruption risks are exacerbated by the complexity of the process, the close interaction between public officials and businesses, and the multitude of stakeholders.

Significant corruption risks arise from a conflict of interest in decision-making, which may distort the allocation of resources through public procurement. Moreover, bid rigging and cartelism may further undermine the procurement process (OECD, 2016, p. 6). Lack of transparency and accountability were recognized as a major threat to integrity in public procurement (OECD, 2005).[1]

Public procurement is increasingly recognized as a central instrument to ensure efficient and corruption-free management of public resources. In this context, the role of procurement officials has changed dramatically in recent years, to cope with the demand for integrity in public procurement. Countries have devoted efforts to ensure that public procurement procedures are transparent and promote fair and equal treatment; public resources linked to public procurement are used in accordance with intended purposes; procurement officials' behaviour and professionalism are in line with the public purposes of their organization; systems are in place to challenge public procurement decisions, ensure accountability and promote public scrutiny.

In Serbia, public procurement continues to be perceived as an area particularly vulnerable to corruption (European Commission, 2020, p. 28). One of the challenges that Serbian authorities are facing is realistic planning of public procurement and monitoring of contract awards and contract implementation. An additional problem is a small number of bidders per public procurement, which raises concern of trust in the system. For example, in Serbia on average there was 2.5 bidders per public procurement. However, positive trends should be noted. The use of negotiated procurement procedures is significantly reduced from 17% of all public procurements in 2013 to 4% in 2019.[2] Public authorities in Serbia on average spent 3.7 billion euro annually, which is around 8% of the GDP. Having in mind value of public procurement, it is clear this area contains corruption risk, but also state is interested to ensure protection against possible abuses.

It is important to note that in the defence and security sector, special provisions apply, and they are excluded from the general rules on public procurement.[3] This is especially important, having in mind the values of these procurements.

[1] Corruption thrives on secrecy. Transparency and accountability have been recognized as key conditions for promoting integrity and preventing corruption in public procurement. However, they must be balanced with other good governance imperatives, such as ensuring an efficient management of public resources – "administrative efficiency" – or providing guarantees for fair competition. In order to ensure overall value for money, the challenge for decision makers is to define an appropriate degree of transparency and accountability to reduce risks to integrity in public procurement while pursuing other aims of public procurement.

[2] Annual report of the Public Procurement Office for 2019, available at: http://www.ujn.gov.rs/izvestaji/izvestaji-uprave-za-javne-nabavke/ (accessed on 17.06.2021).

[3] At the EU level the "Defence" Directive 2009/81/EU was adopted on July 13, 2009 (the full name is: Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security). The Directive is applied to all contracts concluded by the contracting authorities in the field of defence and security:

The research subject in this paper are shortcomings of the Republic of Serbia anticorruption rules in public procurement. Over the last two decades, Serbian authorities implemented broad legislative reform in public procurement area to decrease corruption risk.[4] To prevent corruption in public procurement, amendments to the Criminal Code were adopted in 2012, and a new criminal offence was introduced with the aim to criminalize abuse in public procurement. In addition, in 2019, a new Law on Public Procurement was passed. Having in mind European Commission's assessment of the progress in prevention of corruption, it seems that in the upcoming period, it is necessary to make additional efforts in public procurement area to align public procurement legislation with the 2014 EU directives on public procurement, and continue strengthening capacities of relevant institutions (European Commission, 2020, pp. 28, 73). Therefore, we start with the hypothesis that national regulations still contain provisions that may contribute to violations of the general principles of public procurement, and there is a need to strengthen rules on prevention of corruption in the public procurement. To confirm this assumption and provide options for improvement, authors in the first part of paper highlight the reasons for the adoption of the new Law on Public Procurement in 2019. Then, by using the dogmatic-legal method, authors identify the advantages of the new rules compared to the previous and highlighted disadvantages of certain provisions in the new Law. In the second part, authors analyse the provisions related to the fight against corruption in the field of public procurement. In the same chapter, authors refer to the competence and results of the work of special departments of higher public prosecutor's offices for the fight against corruption, based on the analysis of the annual report on the work of the Republic Public Prosecutor's Office. A special part of the paper is dedicated to the assessment of control mechanisms, specifically civil supervision in the field of public procurement, external audit, and internal financial control in public sector institutions. Bearing in mind that the Republic of Serbia is the EU candidate country, in the last section, we analyse the alignment of Serbian legislation with EU *acquis* in the field of public procurement. In that chapter, authors analyse the content of the Screening report from 2015, which provides direction for legislative amendments and preparation of 2019 Law on Public Procurement. To assess the progress in the field of public procurement after the adoption of the new law, the paper also looks at the content of the European Commission's Progress Report on Serbia from 2020.

2. SHORTCOMINGS OF ANTI-CORRUPTION MEASURES

The Serbian legislation incorporates preventive and repressive measures against corruption in public procurement. Part of the preventive measures are included in the Law

- for the supply of *military equipment* including any parts, components and/or subassemblies thereof as well as works, supplies and services directly related to the equipment for any and all elements of its life cycle;
- for the supply of *sensitive equipment*, including any parts, components and/or subassemblies thereof as well as works, supplies and services directly related to the equipment for any and all elements of its life cycle;
- *works and services for specifically military purposes or sensitive works and sensitive service.*

[4] Direction of reforms in public procurement were defined in several policy documents: Public Procurement Development Strategy for period 2011-2014, next Strategy was adopted in 2014 and the latest Program in 2019 for period until 2023. In 2002, Serbia adopted first Law on Public Procurement. To address challenges identified in implementation new Law was adopted in 2008. 2012 Law on Public Procurement was adopted with the aim to prevent corruption. In addition, Serbian authorities were discussion options of addressing corruption risk through criminal law provisions.

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on Public Procurement,[5] while repressive measures are regulated by the Criminal Code,[6] and as misdemeanour offences regulated by the Law on Public Procurement.

Strengthening integrity in public procurement was identified as one of the Government's priorities, which was reflected in the adoption of the Public Procurement Development Strategy for the period of 2014-2018. As one of the strategic goals of public procurement reform, the full harmonization of domestic regulations with EU *acquis* and their full implementation in practice was identified.[7] The harmonization of national legislation with EU directives in the field of public procurement should have aimed at increasing the transparency and flexibility of public procurement procedures, reducing administrative burdens, using electronic means and the way of proving criteria for qualitative selection of economic entity, issued by the competent authorities.

The new Law on Public Procurement was adopted in 2019, with the aim to overcome shortcomings identified in 2012 Law on Public Procurement.[8] The 2012 Law on Public Procurement was adopted to prevent corruption, however some of the instruments envisaged in the Law did not produced expected results or did not get needed support (i.e. civic monitor). One of the key challenges of 2012 Law was an effective control of public procurement contract performance.

To overcome the identified challenges, the 2019 Law on Public Procurement established a new mechanism for improvement of effective control of public procurement contract performance. It also includes rules on application of the principle of transparency, competition and establishment of public procurement e-portal. According to the article 154, paragraph 2 of the Law on Public Procurement the procuring entity is obliged to control the execution of the public procurement contract in accordance with the conditions specified in the procurement documentation and the selected bid. The manner of monitoring the contract implementation is not prescribed by the Law on Public Procurement, but it is left to be regulated by the internal rulebook of the public sector institutions. Criteria and guidelines regarding the manner of checking the quantity and quality of delivered goods, provided services or performed works, could be established and published by the Public Procurement Office bearing in mind its jurisdictions. In accordance with the principle of transparency, it is necessary to include the obligation to publish minutes or reports on the performed control on the public sector institutions website. Mentioned criteria and guidelines should be established and published in accordance with the jurisdiction of the Public Procurement Office of the Republic of Serbia. The Law on Public Procurement also prescribes the obligation to communicate and exchange data electronically through the public procurement portal between public procurement authorities and bidders. Public procurement portal should contribute to increase flexibility of public procurement procedures and reduction of administrative burdens.

Although the new Law was adopted to overcome shortcomings identified in the previous Law, there are still remaining challenges. The key issue are exemptions from regular public procurement procedure that are envisaged in the special laws (i.e., the Law on Special Procedures for the Realization of Projects for Construction and Reconstruction of Line Infrastructure Facilities of Special Importance for the Republic of

[5] The Law on Public Procurement, *The Official Gazette of the Republic of Serbia,* no. 91/2019.
[6] Abuse in public procurement, Article 228 of the Criminal Procedure Code, *The Official Gazette of the Republic of Serbia*, no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.
[7] Public Procurement Development Strategy in the Republic of Serbia for the period 2014-2018, *The Official Gazette of the Republic of Serbia,* no. 122/2014.
[8] *The Official Gazette of the Republic of Serbia,* no. 91/2019.

Serbia).[9] The exemptions introduced through special laws enable the most valuable public procurement to be implemented outside the rules prescribed by Law on Public Procurement. Although the new Law was supposed to increase competitiveness in the public procurement procedure in accordance with EU standards, its provisions still leave an opportunity to distort the principles of competition. Such regulations are common in the field of infrastructure construction and reconstruction projects. Articles 37 to 48 of the Law on Public Procurement prescribe that in urgent cases, as well as in cases of jeopardizing the implementation of the project if a preliminary feasibility study has been done, the Government may decide not to apply public procurement rules to the project or its individual phases and activities. In that case, a special project for the selection of a strategic partner is being applied to implement a project of special importance for the Republic. In accordance with Article 39, paragraph 3 of the Law on Public Procurements, the Government shall issue a regulation on the manner of selection of a strategic partner for each project individually. These exemptions can jeopardize principle of transparency and competition and create opportunities for abuses.

Instead of exemptions from regular public procurement envisaged in the special laws, the rules related to public-private partnerships should be applied in line with EU *acquis*. To implement infrastructure project through public-private partnership, it is necessary to strengthen anti-corruption guarantees in the Law on Public-Private Partnerships, and align it with the EU Directive 2014/23/EU. Rules on transparency should be strengthened, including introduction of the obligation to publish all concluded contracts on websites of the public sector institutions.

3. REPRESSIVE MEASURES AIMED AT COMBATING ABUSES IN PUBLIC PROCUREMENT PROCEDURES

The crime of abuse in public procurement has been introduced in the criminal legislation of the Republic of Serbia by 2012 amendments to the Criminal Code. The crime of abuse in public procurement contains a blanket disposition that refers to the definitions incorporated in the Law on Public Procurement, which was amended several times since 2012 (Stojanović, 2013). The Criminal Code identifies different modus of execution of crime of abuse in public procurement, first group of actions performed with the aim to influence the decision making and selection of the bidder, while second group of actions could be performed only by contracting authority official, which are abusing own position and violate law on public procurement or other legislation, and cause damage to public funds.

Envisaged sanction for abuse in public procurement is imprisonment from six months to five years, while for serious form of crime, when value of public procurement is higher than 1.2 million euro, it could be 10 years of imprisonment. The Criminal Code envisages leniency program, if the responsible person from the bidding company voluntary discloses the fact that the offer is based on false information or restricted agreement with other bidders, or that he has undertaken other unlawful actions with the intent to influence on the decision of the contracting authority prior to issuance of decision on selection of bid, may be remitted from punishment (Matić Bošković, 2017). The introduction of leniency program is in line with the EU *acquis* in the area of competition protection, where impunity from fines and reduction of fines in cartel cases is envisaged. The European Commission will grant immunity to company, which is the

[9] *The Official Gazette of the Republic of Serbia,* no. 9/2020.

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first to submit evidence that in the Commission's view may enable it to adopt a decision to carry out an investigation in connection with an alleged cartel.[10]

In addition to substantive criminal law provisions, reforms were focused on improvement of the institutional structure to fight abuses of public funds. From March 2018, the specialized departments for fight against corruption were established in four higher prosecutor offices in Belgrade, Novi Sad, Kraljevo and Nis.[11] Goal of the establishment of these specialized departments was to put special focus on fight against corruption and specialization of prosecutors for these specific crimes, as well as better coordination with other authorities responsible for detection, prevention and investigation of corruption. If the value of public procurement is higher than 6.8 million euro, the case will be within competence of the Specialized Prosecutor Office for Organized Crime. However, in 2019, the Specialized Prosecutor Office for Organized Crime did not have any case of abuse in public procurement. It is too early to conclude if the establishment of specialized departments in the higher prosecutor offices resulted in a better track record in the fight against corruption. According to the 2019 Annual Report of Republic Prosecutor Office[12] there is an increase in number of investigated cases of abuse in public procurement as well as in number of indictment and number of convictions. In 2016, the prosecutor offices received charges against 68 persons for abuse in public procurement, while in 2019, specialized departments received 262 criminal charges. The specialized departments were dealing with 10,516 criminal charges in 2019, so abuse in public procurement presented[13] only 2,5% of their total workload. Numbers of convictions in the same period also showed significant increase from only two in 2016 to nine in 2019. However, prosecutors did not conduct financial investigations in parallel with criminal, and there was no seizure of assets, as one of the most important tools for fight against corruption.

The new Law on Public Procurement prescribes misdemeanour sanctions for both procuring entity and bidders who act contrary to the provisions of the Law. However, that approach could cause problems in practice, since the legal description of the misdemeanour overlaps with the content of criminal offence of abuse in public procurement prescribed by Article 228 of the Criminal Code.

The Criminal Code prescribes criminal liability for a person who violates the law or other regulations on public procurement by using his position, exceeding the limits of his authority or failing to perform his duty, and thus causes damage to public funds. Article 236 of the Law on Public Procurement prescribes as misdemeanours activities that represent a violation of the law by the person employed in the procuring entity, the responsible person and the representative of the procuring entity. However, the Criminal Code does not prescribe any circumstance or amount of money, due to which such conduct of the said persons, which would undoubtedly cause damage to public funds, would justify criminal sanction.

Article 228, paragraph 1 of the Criminal Code prescribes a criminal sanction for a person who, in connection with public procurement, submits a bid based on false information, or contrary to the law agrees with other bidders, or takes other illegal actions, in order to influence the decisions of the contracting authority. However, Article 237 of

[10] Similar solution is envisaged in the article 69 of Serbian Competition Protection Law, *The Official Gazette of the Republic of Serbia*, no. 51/2009, 95/2013.

[11] The Law on organization and jurisdiction of state bodies in suppression of organized crime, terrorism and corruption, *The Official Gazette of the Republic of Serbia*, no. 94/2016, 87/2018.

[12] 2020 Annual report was not available in the moment of writing article.

[13] Annual reports on work of public prosecution are available at: http://www.rjt.gov.rs/sr/informacije-o-radu (accessed on 17.06.2021).

the Law on Public Procurement prescribes many activities of bidders that can be simultaneously subsumed under the legal description of the criminal offense of abuse in connection with public procurement.

Overlapping criminal offenses and misdemeanours can contribute to double criminal sanction or, through application of the *ne bis in idem* principle, someone could avoid criminal sanction. This situation can lead to legal uncertainty. Therefore, it is necessary to amend Article 228 of the Criminal Code of the Republic of Serbia, according to which only serious violations of the provisions of the Law on Public Procurement should constitute a criminal offense.[14]

4. PREVENTIVE MEASURES AIMED AT COMBATING ABUSES IN PUBLIC PROCUREMENT PROCEDURES

In addition to principles of transparency and competition that should ensure level playing field and prevent corruption in public procurement, the Serbian legislation also introduced additional instruments. Some of these instruments received support from the public and civil society organizations, however, never produced expected effects, while other solutions were more traditional like oversight of State Audit Institution and internal financial control, but also had limited effects.

From the aspect of preventive measures, the very important institute in public procurement procedure was a civic monitor, established by 2012 Law on Public Procurement. The role of monitor was to oversee the high value public procurement process, which included continuous oversight of the procedure and access to all documentation. The object of supervision, according to previous Law on Public Procurement, were public procurements whose estimated value was more than a billion dinars (approximately 10 million euros). In addition to the fact that all documents from the public procurement procedure were available to the civic monitor, he could present his opinion and recommendation to the procuring entity, but he could also request additional explanations from the procuring entity. In accordance with previous Law on Public Procurement, during such procedure, the civic monitor had two roles: monitoring and analysis on the procedure, as well as indicating on the regulation violations, which was reflected in the submission of requests for protection of rights and reporting of corruption cases.[15]

However, the institute of civic monitor has not achieved full potential in practice. One of the reasons was the lack of reaction of state bodies that received civic monitors' reports on the irregularities. That fact, as well as the high costs of supervision, which was

[14] About the problem of overlapping criminal offenses and misdemeanour see Matić Bošković and Kostić (2020).

[15] Article 28. of the Law on Public Procurement of the Republic of Serbia, *The Official Gazette of the Republic* of Serbia, no. 124/2012, 14/2015 and 68/2015. In accordance with the mentioned article, as a civic monitor could be appointed a person from the ranks of prominent experts in the field of public procurement or in the field related to the subject of public procurement, as well as an association dealing with public procurement, prevention of corruption or conflict of interest may also be appointed as a civic monitor. The conditions and criteria for the appointment and manner of work of the civic monitor were regulated in more detail by the Public Procurement Administration (since the entry into force of the new Law on Public Procurement Procedure, its name is the Public Procurement Office), which also appointed him. Prior to the appointment of the civic monitor, the procuring entity could not initiate a public procurement procedure. This type of control was supposed to be an effective means of controlling the legality of conducting public procurement procedures, and thus public spending. The institute of civic overseer was regulated by the Ordinance on the civil overseer, *The Official Gazette of the Republic of Serbia,* no. 29/2013. More about the institute of civil overseer in Dobrašinović (2013).

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performed without monetary compensation, had a demotivating effect on civic monitors (Šarić and Stojanović, 2018). The new Law on Public Procurement abandoned the mentioned institute.

The abuses in public procurement can also be prevented by internal financial controls and external audit. Internal financial controls, which means the financial management and control and internal audit, should support users of public funds to perform public procurement in accordance with regulations, internal acts and contracts. Financial management and control mean a system of policies, procedures and activities that are established and regularly updated by the manager of the public funds user. However, in the Republic of Serbia, financial management and control has not been established for most public funds users, although the obligation to establish it was prescribed already in 2007.[16] If we assess the reports of the State Audit Institution on the audit of the final account of the Republic of Serbia budget in the last five years, and the reports on the audit of financial reports of direct budget funds users during 2019, it seems that the system of financial management and control in the public sector is not fully implemented. Given the competences of internal audit and the fact that it is established in some public funds users much earlier than financial management and control, a question arises whether it exercises its powers in an adequate manner. The findings and opinion presented in the audit report should be an instruction for further actions of the audited entity to prevent further irregularities (Šuput, 2012, p. 162). Therefore, it is important to improve the system of financial management and control in each public sector institution and to establish a professional and efficient organizational unit for internal audit. Internal audit action is important for the prevention of irregularities within the institution, but their possibilities in terms of reporting irregularities to the competent authorities are limited. Employees in certain institutions are unable or in fear to report certain criminal activities of their superiors. The reason for that is often fear from their revenge (Šuput, 2014, p. 322). Bearing in mind that persons performing internal financial control and internal audit in public sector institutions are persons employed in these institutions, they could be easily in the above-mentioned situation.

External audit of budget funds performed by the State Audit Institution of the Republic of Serbia is an important mechanism for controlling public spending. In accordance with international standards, these institutions are independent bodies that audit the legality and purposefulness of public spending and in all modern democracies are an indispensable part of the institutional control of public spending (Šuput, 2015). The procedure of filing a criminal charge is regulated by the Criminal Procedure Code. In accordance with it, state bodies are obliged to report criminal acts, which are prosecuted *ex officio*, and which they found out about while exercising their powers.[17] Bearing in mind the independence of the State Audit Institution, it can be expected that its auditors will be more objective in their work and without fear to report the irregularity to competent

[16] The basis for its establishment was first defined in 2006 by the Budget System Law. Its provisions define the elements of internal financial control in the public sector: internal audit and financial management and control, while it is regulated in more detail by two ordinances adopted in 2007: Rulebook on Joint Criteria and Standards for Establishing, Functioning and Reporting of the System of Financial Management and Control in the Public Sector and the Rulebook on Common Criteria for Organization and Standards and Methodological Instructions for Internal Audit Acting and Reporting in Public Sector. The report on the audit of the final account of the budget of the Republic of Serbia for 2016, no 400-534/2017.03/31, Belgrade, 29th of December 2017, 11; The report on the audit of the final account of the budget of the Republic of Serbia for 2017, no 400-575/2018-03/36, Belgrade, 14th of December 2018, 23, 43 and 37, Audit report on financial reports and regularity of operations of the Ministry of Youth and Sports for 2018, no 400-213/2019-03/12, Belgrade 2nd of December 2019.

[17] Article 281 of the Criminal Procedure Code of the Republic of Serbia.

authorities. However, the only question is whether that institution will be willing to do so in the case of irregularities in procedures that are exempt from the application of the Law on Public Procurement in accordance with a special law or government decision.[18]

5. EUROPEAN ACCESSION AS AN INCENTIVE TO STRENGHTEN PUBLIC PROCUREMENT IN SERBIA

Public procurement is important for the EU single market and creation of a level playing field for businesses across Europe.[19] In the process of EU accession, the public procurement is not only one of the foundations on which the EU internal market rests, but also the foundation of system of integrity and accountability, which is essential for the consolidation of the rule of law and functioning of the democracy. Whole chapter of the EU accession negotiation is devoted to public procurement – Chapter 5. However, Chapter 5 is closely related to Chapter 23 – Judiciary and Fundamental Rights, in the segment related to the fight against corruption.

Relevance of the public procurement for EU and prevention of any corruption or fraud during the procedure is confirmed through the establishment of European Public Prosecutor's Office, as the first EU independent and decentralized prosecution office with the power to investigate, prosecute and bring to justice crimes against the EU budget, such as fraud, corruption, or serious cross-border VAT fraud. Article 3(2) of Directive 2017/1371 defines the criminal offences of fraud affecting the Union's financial interests in respect of non-procurement and procurement-related expenditure. These rules show readiness of the EU to fight against abuses in public procurement and prevent future crime, through sending message that criminal justice system is engaged in the prevention and fight against any abuses in this area. It is expected that Serbia as the EU candidate country has the same approach to public procurement.

The general principles governing the area of public procurement in the EU originate from the founding treaties and the jurisprudence of the Court of Justice of the EU, and relate to the principles of the transparency, equal treatment, competition and non-discrimination.

On the basis of the Screening report prepared by the European Commission in early February 2015, it was assessed that Serbia has reached a sufficient level of alignment with the EU acquis, as well as that the negotiation on Chapter 5 can be opened (2015). A key challenge in the coming period is to strengthen capacity to plan, monitor and oversight all phases of public procurement and enforcement of legislation. When it comes to achieving full compliance of legal regulations, it is advised that Republic of Serbia should closely track the latest changes in European legislation in the field of concession and public procurement. In addition, Serbia allows for exemptions, which are not in line with the EU *acquis*, such as the exemption of procurement conducted in pursuant to international agreements, which under EU law are only permitted exceptionally, and in case these agreements have been concluded in conformity with the Treaties (European Commission, 2015, p. 13). The same opinion and concern was expressed in the 2019 EU Report on Serbia, where it was recommended that intergovernmental agreements concluded with third countries and their implementation should not unduly restrict competition, and should comply with the basic principles of

[18] This does not refer to the control of actions in accordance with the provisions of the Law on Public Procurement, but to the legality of spending public funds. In such situations, it is not possible to assess the justification of exemption from the application of the provisions of the Law on Public Procurement.
[19] About the importance of public procurement in the EU see Kalesná (2019, p. 69).

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public procurement, such as transparency, equal competition and non-discrimination. The legislation on defence and security procurement contains too many exemptions that are excessively applied without justification, and remain to be aligned with the relevant EU Directive (European Commission, 2019, pp. 59–60).

In 2020 Report European Commission (2020, p. 73) noticed that the adopted Law on special procedures for linear infrastructure projects could seriously undermine the effective implementation of the Law on Public Procurement as it allows for the exemption of projects "of special importance for the Republic of Serbia" from public procurement procedures. The new Law undermines the added value and effective implementation of the new Law on Public Procurement. Through allowing the circumvention of national legislation, as well as EU rules and standards in the mentioned way, Serbia, according the EU opinion maintains serious discriminatory rules in the field of public procurement (European Commission, 2020, p. 73). In addition, Serbia did not ensure full alignment with the 2014 EU directives on public procurement and amendments of the Law on Public-Private Partnerships and Concessions is needed to align with EU acquis. Aim of the amendments is to ensure that projects financed from public funds are subject to public procurement procedures and that intergovernmental agreements concluded with third countries do not restrict competition. In addition to legislative amendments, Serbia should improve administrative capacities of relevant institutions, specifically the Public Procurement Office, the Commission for Public-Private Partnerships and Concessions, the Republic Commission for the Protection of Rights in Public Procedures, and the Administrative court.

The State Audit Institution of the Republic of Serbia found irregularities in 9,6% of inspected procuring entities in 2019, marking a significant decrease from 12,1% in 2018, and a notable increase from 7,4% in 2017. The Government's Anti-Corruption Council has noted that current framework of internal and external control over the expediency of public procurements in large public utility companies is both inadequate and prone to abuses. Such contracts represented 27% of the total number and 44% of the total value of concluded contracts in 2019. The relevant institutions should investigate these claims and continuously monitor these processes on both state and local level (European Commission, 2020, p. 74).

Bearing in mind the abovementioned, it can be concluded that the Republic of Serbia needs to further harmonize the Law on Public Procurement with the EU *acquis*, as well as the Law on Public-Private Partnership and Concessions. The process should not be viewed exclusively from the aspect of harmonization with European standards, but primarily from the aspect of protection of public finances and taxpayers' money.

6. CONCLUSIONS

In this paper, authors have started with the hypotheses that national regulations still contain provisions that may contribute to violations of the general principles of public procurement, and that it is needed to make additional efforts to improve corruption prevention measures in public procurement procedures. Authors identified shortcomings in the legislative framework, so the hypotheses have been confirmed.

Despite the fact that the new Law on Public Procurement of the Republic of Serbia contains certain solutions important for improving legality, efficiency and transparency of public procurement, its provisions still contain shortcomings. The key issues are exemptions from regular public procurement procedure that are envisaged in the special laws in the field of infrastructure construction and reconstruction project. These exemptions enable the most valuable procurement to be implemented outside the

procedure prescribed by Law on Public Procurement, which is not in line with EU standards and principle of competitiveness in the public procurement procedure. The mentioned approach should be limited and instead of exceptions, the public-private partnership should be used to implement infrastructure project. However, it requires strengthening of anti-corruption guarantees in the Law on Public-Private Partnerships and Concessions, including introduction of the obligation to publish all concluded contracts on websites of the public sector institutions.

Serbian legislation provides adequate repressive measures for investigation, prosecution, and sanctioning for abuses in public procurement procedures. However, the overlap of criminal offences and misdemeanours can contribute to double sanctioning or avoidance of criminal sanction through the application of the *ne bis in idem* principle, so it is necessary to amend Article 228 of the Criminal Code of the Republic Serbia to ensure that only serious violations of the Law on Public Procurement constitute a criminal offense, either through the introduction of a threshold for the value of public procurement, or the caused damage.

Instead of improvement of rules regulating the civic monitor system as a control mechanism, the new Law of Public Procurement abandons that institute. However, the Serbian legislation incorporates other repressive tools, but their application in practice should be ensured. According to the Serbian State Audit Institution's reports, financial management and control in the public sector almost do not exist. Bearing in mind the importance of financial management and control for the prevention of irregularities, these institutes should be established in all public sector institutions. In addition, managers of public sector institutions should further improve existing knowledge about the role and importance of internal financial controls.

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A LEGAL MODEL OF AIR PROTECTION IN POLAND – SELECTED ISSUES / Ewa Radecka

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Abstract: *This article attempts to discuss selected elements of a legal model of air protection in Poland synthetically in order to provide Slovak readers with some overview of the same, which may, subsequently, become the starting point for an international scientific discussion in this field. The author firstly describes the background of the present poor quality of air in Poland, and afterwards presents a brief analysis of reasons why the air should be understood as a common good subject of state protection. Eventually, the author classifies air protection instruments in Poland and discusses the selected ones.*

Key words: *Polish environmental law; air protection; energy policy; low emissions*

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1. INTRODUCTION

The importance of air protection, especially in the context of the underscored climate change in a global perspective, is undisputed. This issue is even more important from the research perspective, taking into account that there are legal instruments in Poland (every year greater and greater) intended for such protection, however, they seem to be completely ineffective, which has been pointed out in various reports and datasets.[1]

[1] Various sources should be listed here:
1) the WHO compilation, which shows that the list of 50 most polluted cities in Europe starts with two Bulgarian cities (Vidin and Dimitrovgad), although as many as 36 cities out of 50 included in this dataset are in Poland (see Myllyvirta & Howard, 2018);
2) the decision of the Court of Justice of the European Union (CJEU, judgment of 22 February 2018, European Commission v Republic of Poland, C-336/16, ECLI:EU:C:2018:94 concerning air protection in Poland) states a failure of a Member State to fulfil its obligations;
3) Environmental Implementation Review 2019, Country Report - Poland specifying that "there has been no progress on improving air quality. Limit values for particular matter, benzo(a)pyrene and nitrogen oxides continue to be exceeded" (see *The EU Environmental Implementation Review 2019, Country Report - POLAND*, 2019);
4) the report of the Supreme Audit Office, which shows that a) the scale of pollution proves the ineffectiveness in fulfilling the obligations incumbent on public authorities; b) public authorities are not sufficiently active in fighting for clean air (see Supreme Audit Office, 2018);
5) the report of the Polish National Health Fund, which shows that "a likely cause of increased mortality in 2017 is an abrupt deterioration of air quality, which may result in rapid health consequences in particularly vulnerable people, including cardiovascular system problems" (see Polish National Health Fund, n.d.);

It should also be remembered that the current poor quality of air in Poland is the result of numerous circumstances that are strongly intercorrelated. A number of various factors contribute to such quality of air in Poland and they include, for example a significant dependence[2] on the national economy on fossil fuels,[3] low use of energy from renewable sources[4] (in particular wind energy),[5] the so-called low emission[6] (sometimes strongly associated with energy poverty)[7] as well as low use of e-mobility.[8]

However, going back to the topic of the wide range of legal instruments that theoretically serve air protection, the most critical instruments will be presented below, while considerations regarding the Polish definition of environmental and air protection will represent the starting point.

2. AIR AS A COMMON GOOD

Air, which is a part of the environment,[9] is subject to protection, which is understood as taking or abandoning actions enabling preservation or restoration of natural balance and consists in particular of:

a) reasonable shaping of the environment and environmental resources management in accordance with the principle of sustainable development,

6) Air quality in Europe – 2020 report - the greatest impact on premature deaths, which is attributed to PM 2.5, is recorded, among others, in Poland. Moreover, underestimation in concentrations in 2009 is noticed (see e.g. footnote 62 of report of the European Environment Agency, 2020).

[2] According to the Energy Policy of Poland until 2040 (Notice of the Minister of Climate and Environment of March 2, 2021, Monitor Polski of 2021, item 264; hereinafter: EPP 2040) the share of coal in the generation of electricity from 2030 should be no more than 56%.

[3] Decarbonisation – also in the context of air protection – should an important long-term goal. The decarbonisation process, in particular for the Upper Silesia region (currently the largest mining centre in Europe), will have to imply a very profound energy, economic and social transformation which must be based on deliberate and comprehensive "just transition" plan agreed with the society.

[4] Poland was obliged to achieve in 2020 at least 15% share of energy from renewable sources in the gross final consumption, including at least 10% share of renewable energy used in transport [see Article 3 of Directive 2009/28/EC of April 23, 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, pp. 16–62)]. According to data of the Central Statistical Office, the share of renewable energy in 2019 reached 12.18% in gross final energy consumption (see Główny Urząd Statystyczny, 2020).

[5] For more detailed information see Radecka & Nawrot (2019).

[6] Understood as emission of combustion products of solid, liquid and gaseous fuels to the atmosphere from emission sources (emitters) located at a height of not more than 40 m. There are different types of emission: transport emission, emission resulting from heat production for central heating and domestic hot water as well as industrial emission. Combustion products contributing to the occurrence of low emission include, among others, the following gases: carbon dioxide CO_2, carbon oxide CO, sulphur dioxide SO_2, nitrogen oxides NO_x, polycyclic aromatic hydrocarbons, e.g. benzo(a)pyrene and dioxins as well as heavy metals (lead, arsenic, nickel, cadmium) and suspended particulate matter PM10, PM2.5. (Kaczmarczyk et al., 2015, p. 144).

[7] Energy poverty consists of incineration of waste, sludge and flotation concentrates, usually in buildings with a low energy performance.

[8] In one of the versions of the EPP 2040 (as of January 29, 2020), greatly ambitious goals were assumed, i.e. reaching 1 million electric vehicles in 2025. Unfortunately, the starting point for the preparation of the then version of EPP 2040 (data from August 2019) was 6672 electric passenger cars (see PSPA, 2019). The mentioned 1 million of vehicles results from the Electromobility Development Plan, to which the final version of EPP 2040 refers (see Ministerstwo Energii, n.d.).

[9] According to Article 3(39) of the Environmental Protection Law Act of April 27, 2001 (uniform text, Journal of Laws of 2020, item 1219 as amended; hereinafter EPL), "environment" shall mean the totality of natural elements, including those transformed as a result of man's activity, in particular the land surface, minerals, waters, air, animals, plants and climate as well as interactions between such elements.

b) counteracting the pollution,[10]

c) restoration of natural elements to their proper status (see Article 3 (39) of the EPL).

Undoubtedly, environmental protection is the responsibility of the state. In this respect, we should refer at least to Article 5 or Article 74 of the Constitution of the Republic of Poland of April 2, 1997.[11]

According to Article 74(1) of the RP Constitution, the objective of public authorities with regard to environmental protection is to ensure ecological safety, understood in the doctrine as "*the state of stable and undisturbed coexistence of a human being and the environment, related to the fulfilment of basic life needs and it guarantees respect for the subjective rights resulting from the right to the environment*" (Korzeniowski, 2012, p. 67). It is a state in which "*the levels of a nuisance to the environment (especially in the form of pollution), as specified in legal regulations, will not be exceeded during the ordinary exploitation of environmental resources*" (Korzeniowski, 2017, p. 256).

The second of the abovementioned provisions, i.e. Article 5 of the RP Constitution specifies that the Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development. The definition of the later term is specified in Article 3(50) of the EPL, according to which "sustainable development" shall mean "*a socio-economic development which integrates political, economic and social actions, while preserving the natural equilibrium and the sustainability of basic natural processes, with the aim of guaranteeing the ability of individual communities or citizens, of both the present and future generations, to satisfy their basic needs*". This development, as it results from the above-mentioned definition, is the key concept relating to the economic and social development (from the global to local level) and which symptomatically does not only refer to environmental issues, but it also takes into account the social and economic concerns. In this context, the idea of intergeneration of justice or the integration of policy, economy and social activities with the basic environmental requirements are equally important (see e.g. Bukowski, 2009). Moreover, it is necessary to underline the significance of sustainable development within the whole air protection idea, while emphasizing that sustainable development constitutes an arc ensuring compatibility of actions taken in the field of air protection.

The above-specified legal framework provides the basis for treating the environment, including air, which is a part of the environment, as a protected good, and its protection as one of the basic values that should be guaranteed by the legal system.

3. SELECTED INSTRUMENTS OF AIR PROTECTION IN POLAND

Generally, the instruments of air protection in Poland can be divided as follows:

a) regulatory, including subgroups of instruments of the following nature:

- individual (e.g. a permit for releasing pollutants into the air[12] or a greenhouse gas emission permit),[13]

[10] According to Article 3(49) of the EPL, "pollution" shall mean emissions, which may have harmful effects on human health or the quality of the environment, result in damage to material property, impair the aesthetic values of the environment or interfere with other legitimate uses of the environment.

[11] Journal of Laws No. 78, item 473 as amended; hereinafter: RP Constitution.

[12] Cf. Article 187 et seq. of the EPL.

[13] Cf. Article 53 et seq. of the Act on the management system of emission of greenhouse gas and other substances (uniform text Journal of Laws Of 2020, item 1077 as amended).

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- general (so-called anti-smog resolutions);[14]

b) planning (i.e. at the national/ central: National Air Protection Programme,[15] National air pollution control system[16] or at the local/province level: short-term action plan);[17]

c) economic (including fees for releasing gases and particulate matter into the air[18] or administrative fines).[19]

An interesting issue, both for Polish and Slovak readers, could be the so-called anti-smog resolutions (general regulatory instrument) or planning instruments.

The first of the aforementioned instruments, i.e. anti-smog resolutions, are adopted by sejmiki (the regional councils) by way of a resolution in order to prevent a negative effect on human health or environment, implement restrictions or prohibitions in installations where fuel combustion takes place (Article 96(1) of the EPL).[20] The draft of the resolution prepared by the voivodship executive board (zarząd województwa) is subject to the procedure of issuing an opinion of the competent commune head (wójt), mayors (burmistrz) or presidents of cities (prezydent miasta) as well as staroste (starosta).

This resolution obligatory specifies:

1) boundaries of the area where restrictions or prohibitions are implemented,[21]

2) types of entities or installations for which restrictions or prohibitions are implemented;

3) types or quality of fuels approved for use, or fuels the use of which is prohibited in the area, or technical parameters or technical solutions or emission parameters of the fuel combustion installations, approved for use in this area.

Article 96(7) of the EPL also specifies optional elements of this resolution.[22]

This act does not apply to installations for which an integrated permit, or a permit for releasing gases or dust into the air, or a notification is required.

[14] See Article 96 of the EPL and e.g. resolution of the Sejmik *[Regional Council]* of Silesia Voivodship of April 7, 2017, no. V/36/1/2017 [online], available at: https://powietrze.slaskie.pl/content/uchwala-sejmiku-nr-v3612017 (accessed on 04.05.2021).

[15] See Article 91c of the EPL and the National Air Protection Programme [online], available at: https://powietrze.gios.gov.pl/pjp/content/show/1000607 (accessed on 04.05.2021).

[16] Resolution no. 34 of the Council of Ministers of April 29, 2019 Monitor Polski, item 572.

[17] Cf. Article 92 of the EPL and the resolution of the Sejmik of Silesia Voivodship of December 18, 2017 r., no. V/47/5/2017111.

[18] See Article 272 et seq. of the EPL.

[19] See Article 298 et seq. of the EPL.

[20] It should be emphasized that the provision on anti-smog resolutions has recently evolved from a one-sentence regulation to an extensive formula in the present form. See in historical terms more in Olejarczyk (2015) and in Olejarczyk & Możdżyń (2015).

[21] These resolutions may cover the area of only one voivodship. Not all Polish voivodships requiring such type of legislative intervention have such acts of local law. A good example of the above is the Świętokrzyskie voivodship, where the permissible standards of the concentration of suspended particular matters PM 2.5 and PM 10 are exceeded many times a year. These levels are specified by the Regulation of the Minister of Environment of August 24, 2021 on the levels of certain substances in the air (Journal of Laws of 2012, item 1031 as amended).

[22] Such as:

1) the manner or purpose of using fuels that is subject to the restrictions specified in the resolution;

2) period of validity of restrictions or prohibitions during a year;

3) obligations of entities subject to the resolution to the extent necessary to supervise over the implementation of the resolution.

It should also be emphasized that the Environmental Protection Law Act provides for criminal liability for failure to comply with the restrictions, orders or prohibitions specified in the said resolution of the sejmik. A person committing these types of acts is subject to a fine[23] that, according to the Code of Petty Offenses,[24] shall range between PLN 20 and PLN 5,000 (Article 24).

The practical application of the anti-smog resolutions in the fight for the appropriate quality of air is increasing every year,[25] and not only in the context of an increased number of adopted resolutions, but also the number of audits and inspections carried out by authorized bodies and also penalties imposed on this basis (see Sumara, 2018). As an example, the anti-smog resolution for the Silesia Voivodship can be mentioned, which from September 1, 2017 (in principle)[26] prohibits combustion of the following products in installations:[27]

- lignite and fuels produced with its use (e.g. briquettes);
- sludge and floto-concentrates as well as mixtures produced with their use;
- coal fuels with a mass fraction of less than 3mm exceeding 15%,
- biomass with humidity in the working condition over 20%.

The types of installations for which the restrictions and prohibitions are implemented with regard to their operation include the installations in which solid fuels are burned, in particular a boiler, fireplace and stove, if:

1. they provide heat to the central heating system, or
2. they give off heat, or
3. they give off heat and transfer it to another medium.

The second type of the instruments includes planning instruments. It is impossible to describe all of them, even in synthetic terms. Nevertheless, it is worth mentioning that recently, also in this scope and as a result of the necessity to adapt to the EU requirements, the catalogue of instruments has been extended, at least in terms of improving the quality of air (i.e. the National Air Pollution Control System).[28]

It would seem that these are immensely significant solutions with a system feature, which could result, for instance, from the principle of planning and programming which is the basis of Article 8 of the EPL (according to which, it is required to take into

[23] Additionally, it should be mentioned that this provision has only recently found its practical application. Previously, there was a problem with specifying which authorities are entitled to impose fines for this "environmental" offense.

[24] The Code of Petty Offenses Act of May 20, 1971 (uniform text Journal of Laws of 2019, item 821 as amended).

[25] In 2014 there were only two resolutions adopted (for Małopolskie and Silesia Voivodships). At present, the following resolutions can be listed:

- of the Sejmik of Małopolskie Voivodship of January 23, 2017, no XXXII/452/17,
- of the Sejmik of Silesia Voivodship of April 7, 2017, no V/36/1/2017,
- of the Sejmik of Mazowieckie Voivodship of October 24, 2017, no 162/17,
- of the Sejmik of Wielkopolskie Voivodship of December 18, 2017, XXXIX/941/17,
- of the Sejmik of Lower Silesia Voivodship of November 30, 2017:
  - XLI/1405/17 for the Wrocław Commune,
  - XLI/1406/17 for health resorts in Lower Silesia,
  - XLI/1407/17 for the remaining part of the voivodship.

[26] A number of exceptions as to the validity period of the resolution have been implemented under Article 8(2).

[27] There is no definition of "installation" in the resolution, thus it refers to the legal meaning of this concept resulting from the Environmental Protection Law Act, i.e. "installation" shall mean a stationary unit, a set of stationary technical units (...), building structure which is not a technical unit (or a set of technical units).

[28] Adopted to transpose Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC (OJ L 344, 17.12.2016; hereinafter referred to as NEC).

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account the principles of environmental protection and sustainable development in policies, strategies, plans and programmes). Unfortunately, nothing could be further from the truth. An in-depth analysis often leads to a conclusion that various types of documents/acts concerning air protection are not consistent with each other, some solutions are random and that the state's ability to achieve its goals is overestimated (see Radecka, 2020). The inability to draw conclusions from the mistakes made is also visible. A clear example of which is the fact that the National Air Pollution Control Programme does not enjoy the status the features of generally applicable law. This, in turn, means that such documents can only have an impact on the internal level. Pursuant to Article 93(1) of the RP Constitution, resolutions of the Council of Ministers (in this form the National Air Pollution Control Programme was adopted – note made by ER) shall be of an internal character and shall bind only organizational units subordinate to the organ which issues such acts.[29] It is also noticeable that the obligations and responsibilities related to air protection have been clearly assigned from the central level to the voivodship level, for example, the abovementioned anti-smog resolutions and short-term actions plans. Such a bold statement - about shifting the burden of responsibility for air quality to the local level - could be made, taking into consideration the issues already raised above. It is also not indifferent that the government program „Clean Air"[30] is ineffective.[31]

4. CONCLUSION

Protection of air, which is a common good, should be guaranteed by the legal system. However, it cannot be a fictitious protection based only on numerous regulations without any sanctions. An effective and successful air protection should not only consist of implementation of new legal regulations – we have enough of these in Poland already. It should be based on the development of efficient regulations applicable in specific social and economic realities, assuming extensive/strong integration and cooperation of actions taken between the authorities (mutual merging of planning within that scope). It would be worth considering an amendment to the existing legislative solutions so that the adopted regulations could become a real weapon in the fight for good air quality.

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[29] See Article 111 of the Nature Conservation Act of April 16, 2004 (uniform text Journal of Laws of 2020, item 55 as amended) and the program for the conservation and sustainable use of biological diversity (approved under the resolution of the Council of Ministers).

[30] The aim of the "Clean Air" programme is to reduce the emission of harmful substances (from heating single-family houses with the use of obsolete sources and low-quality fuel) into the atmosphere. This program offers co-financing for the replacement of old and ineffective solid fuel heating appliances with modern heat sources that meet the highest standards as well as for the accompanying building thermomodernization works (see more in 'Program Czyste Powietrze', 2021).

[31] This state of facts illustrates, for instance, a small percentage of beneficiaries participating in the programme, problems with obtaining a loan to finance the project as well as the remarks raised by the European Committee (cf. Radecka, 2020).

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REVIEWS

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PHELAN, WILLIAM: GREAT JUDGMENTS OF THE EUROPEAN COURT OF JUSTICE. RETHINKING THE LANDMARK DECISIONS OF THE FOUNDATIONAL PERIOD. CAMBRIDGE UNIVERSITY PRESS, 2019/ Ondrej Blažo

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William Phelan, currently Associate Professor at the Trinity College Dublin, focuses in his research on European legal history, particularly the creation of the EU legal order via judicial activism, as well as trade policy within the ambit of the WTO and its interaction with the EU legal order. Several papers published on these topics are worth mentioning: Why do the EU Member States accept the Supremacy of European Law? Explaining Supremacy as an Alternative to Bilateral Reciprocity, Journal of European Public Policy, 18, (5), 2011, p766 – 777; Open International Markets without Exclusion: Encompassing Domestic Political Institutions, International Organization, and Self-Contained Regimes, International Theory, 3, (2), 2011, p286-306; What is Sui Generis about the European Union? Costly International Cooperation in a Self-Contained Regime, International Studies Review, 14, 2012, p367 – 385; Supremacy, Direct Effect, and Dairy Products in the Early History of European Law, 2014; In Place of Inter-State Retaliation: The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies , Oxford, Oxford University Press, 2015, 1 - 208pp; Supremacy, Direct Effect, and 'Dairy Products' in the Early History of European Law, International Journal of Constitutional Law, 14, (1), 2016, p6 – 25; Diagonal Enforcement in International Trade Politics, 2016. In a such subject of research it is inevitable to become fascinated by the work of Robert Lecourt whom W. Phelan devoted several of his papers, e.g. The revolutionary doctrines of European Law and the Legal Philosophy of Robert Lecourt, European Journal of International Law, 28, (3), 2017, p935 – 957.

These three lines of research joined together in Phelan's monograph "Great Judgments of the European Court of Justice. Rethinking the Landmark Decisions of the Foundational Period" published by Cambridge University Press in 2019.

Reference made to "rethinking" the great judgments of the European Court of Justice is definitely provoking and captivating for the reader. Particularly in these days when even solid pillars of the European integration are "rethought": rule of law and values of the EU are "rethought" by Mr. Orbán's Hungary, independence of judiciary is "rethought" by Mr. Kaczyński's Poland and the supremacy of the EU law and judicial monopoly of the Court of Justice of the European Union are "rethought" by the Federal Constitutional Court of Germany (and also under scrutiny of the Constitutional Tribunal of the Republic of Poland). Phelan's monograph is positively not about this type of rethinking (although unescapably he had to deal with the questions of the approach of the Member States' constitutional courts to supremacy of the EU law over the constitutions of the Member States. Thus W. Phelan's book is more on "reminding" us of the greatness of judgments of the foundational period of European integration and monumentality of the intellectual activity of judges and other lawyers at the European Court of Justice and it is more about contemplating on landmark judgments rather than rethinking in the sense of challenging them.

The way how W. Phelan "rethought" landmark judgments is explained in the introduction of the monograph – "…identify the European legal order's special distinctions based on concrete divergences from the fundamental organizing principles of more common forms of international trade treaty." (p. 1) "Rethinking" is therefore the return back to the roots of the European integration, the European integration that departed from traditional international-trade-treaty model to create something *sui generis*. W. Phelan shows us that individual-centred model of integration was not its intentional and primary goal, but a unique solution provided by the landmark judgments of 1960s and 1970s aimed to strengthen and vitalize the common (single/internal) market. Therefore, the impact of these judgments is twofold: they glued European states together into a common market prohibiting them unilateral solutions (traditional for international law) and they involved an individual as a central enforcement power of the European integration who can claim their rights at national courts.

W. Phelan like a medieval bard tells a story of nine landmark judgments: Pork Products of 1961 (7/61), Van Ghend en Loos of 1963 (26/62), Costa v. ENEL of 1964 (6/64), Diary Products of 1964 (90&91/63), International Fruit of 1972 (21-24/72), Van Duyn of 1974 (41/74), Simmenthal of 1978 (106/77), Sheep Meat of 1979 (232/78) and Internationale Handelsgesellschaft of 1970 (11/70). The story of each of the judgments is described more-less in the same structure: situation setting, Advocate General's opinion, rationale of the judgment, context in the case law (i.e. judicial "predecessors" and "successors" of the judgment in issue) and finally the confrontation of the solution of the European integration model vis-à-vis international-trade-treaty model. Although some can consider this structure of chapters too repetitive and too rigid, this firm framework is the hidden beauty of W. Phelan's work – storytelling. Storytelling about heroes (Robert Lecourt and his fellows and successors) battling together against fragmentation of the European market, gluing Europe's nations together in order to avoid falling to the spiral of economic and political selfishness that could have led to another violent conflict. W. Phelan tells us the story of every judicial case as a new challenge for "our heroes", describes their victory, the consequences of their actions and finally contemplates and provides a "moral", i.e. his own evaluation. Within this framework, comprehensive and articulated analysis develops, discussing and confronting literature from the times of R.

Lecourt and his companions to the 21st century and thoughts of R. Lecourt appear as a silver thread across the whole book.

Along with the abovementioned constant framework of all chapters, W. Phelan uses unique instruments for argumentation, e.g. comparison of the structure of Van Ghend en Loos judgment and International Fruit judgment (pp 140-142) or "International Fruit in reverse" (p. 148) that, in W. Phelan's opinion, conveys the logic of direct effect rather better that the text of Van Ghend en Loos itself (p. 149).

The selection of the "landmark" judgments is apparent – judgments as Van Ghend en Loos, Costa v. ENEL, Van Duyn, Simmenthal or Internationale Handelsgesellschaft are well-known by every law student in the European Union. However, some of them, in particular Sheep Meat, was elevated to the "pantheon" of the European judgments by W. Phelan on the same criteria that apply to all judgments analysed in the book – whether they explained departure from traditional model of trade treaty and contribution to the new legal order/legal order of its own.

The analysis of stories of nine landmark judgments is crowned by the final essay "States and Individuals in the Great Judgments of the European Court of Justice, 1961-1979". In this essay the author suggests that understanding of early judgments of the European Court of Justice as mere tools to accomplish the economic purpose of the Treaty of Rome rather than purely focused on the rights of an individual per se may perhaps disappoint some readers (p. 234). It cannot and may not. These judgements helped to remove frontiers between nations just sixteen years after the end of a bloody war and employed individual rights of an individual as a tool for amalgamation of national economies, only sixteen years after an era, when rights of an individual were diminished and almost annihilated. Hence these judgments became a cornerstone not only for European integration itself but also for the longest period of peace in Europe. Moreover, this understanding of the landmark judgments shows why the European integration is unique in contrast to other "trade blocks".

Indeed, the development of the European integration has moved steadily forward from the times of 1960s and 1970s and value-oriented and individual-oriented legal framework is embedded currently in the Treaty of Lisbon and one could argue why W. Phelan did not confront the landmark judgments with the current legal situation. The answer is, in fact, provided by the author himself – the book is more about departing and differentiation from the traditional international-trade-treaty system rather than on efforts to create a new legal system.

Finally, even though W. Phelan states that the book is neither a casebook nor a coursebook (p. 12) it can be definitely recommended for reading to students of advanced studies in the European Union law who have relevant understanding of the content and context of the landmark judgments of the European Court of Justice.

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