CENTRAL EUROPEAN ACADEMY

LAW REVIEW

CENTRAL EUROPEAN ACADEMY

LAW REVIEW

VOLUME **I**

2023 | № **2**

RIGHTS | CONSTITUTIONAL | SPACE ACTIVITY | SUSTAINAB
GOVERNMENTS | EUROPEAN CHARTER | FRAMEWORK REGU
E LAW | IMPACTS | LEGAL SYSTEM | CIVIL RIGHTS | CONSTIT
RACT | FINANCIAL AUTONOMY | SELF-GOVERNMENTS | EUR
DICTION | DEVELOPMENT | CIVIL RIGHTS | CONSTITUTIONA

CEA
PUBLISHING

Central European Academy Law Review (Print)
HU ISSN 3057–8396 (Print) HU ISSN 3057–8442 (Online) DOI prefix: 10.62733

Publisher:
Central European Academic Publishing
1122 Budapest (Hungary), Városmajor St. 12.
E-mail: publishing@centraleuropeanacademy.hu
Prof. Dr. *Barzó* Tímea, Director-General

TABLE OF CONTENTS

FLAGSHIP STUDY

Cristian Dumitru MIHES*

Corporate compliance versus the right to silence of legal entities in Romania: The case of certain tax evasion offences

ABSTRACT: *The concept of 'corporate compliance' is difficult to translate into Romanian through a comprehensive formula. As yet, there is no specific regulation, although some incipient legislative framework could be applied. On the other hand, the right to silence of legal persons is not expressly regulated by law either. This circumstance generates two alternatives. Some believe that this right can be exercised, others do not. But, maybe more important points of view hold that the right to silence is only available to natural persons, not to legal persons, as expressed even by the European Court of Justice in its decision on 2 February 2021, DB v National Commission for Companies and the Stock Exchange (Consob), C-481/19. In these circumstances, we intend to analyse the relationship between prevention and compliance. We will try to argue that the exercise of a form of silence of the legal person should still be specific to legal persons, especially when discussing subjects with a major impact on the social environment, and the crimes provided in Law no. 241/2005, especially Articles 3, 4 and 5. Furthermore, we are trying to address the effect of implementing the SAF-T system in Romania, from the perspective of the efficiency of the right to silence for legal persons. In the end, all persons – irrespective of their nature – do have certain legal rights that are recognized as such by law. So, both natural and legal persons should have the right to silence and the right not to self-incriminate themselves, especially in criminal cases.*
KEYWORDS: *corporate compliance, criminal law, tax evasion, right to silence, legislative framework.*

* Associate Professor, Faculty of Law – University of Oradea, cristian.mihes@uoradea.ro. ORCID: 0000-0003-4615-4737.

https://doi.org/10.62733/2023.2.9-25

1. Introduction

Compliance can be defined as the act of adhering or conforming to a law, a rule or a certain requirement. The term 'compliance', taken from the English language and used directly in the economic and legal literature, signifies precisely this type of behaviour that adheres to certain norms, rules or even self-regulation.[1]

Compliance with laws, regulations, rules and policies is a part of business operations often referred to as corporate compliance. In the business environment, which is constantly changing, corporate compliance involves both prevention and supervision, as well as adaptation and making the changes necessary for the business to continue to function normally in the activity field in the community.

In a broad sense, corporate compliance represents a more extensive concept than 'simple' normative compliance (the one subsumed by norms and rules) because it could also include the field of promoting organisational ethics and corporate integrity.

The concept of corporate compliance is difficult to translate into Romanian through a comprehensive formula. Consequently, it is difficult to implement in our legislation.

The importance of corporate compliance for legal entities has been talked about and will increasingly be discussed as time goes by.[2] Currently, there is still no express, specific regulation, only a certain general, incipient legislative framework that could be applied to legal entities.

However, regarding the importance of corporate compliance for the activity of legal entities, the following aspects can be highlighted.

First, enforcing corporate compliance rules reduces the risk of possible civil, administrative,[3] disciplinary and criminal sanctions. In this regard, it has been shown that financial institutions are subject to a variety of compliance requirements not only to maintain the financial security of individuals and national economies but also to ensure that they do not enable transactions in support of money launderers, terrorists, drug traffickers etc.[4]

1 According to the Cambridge dictionary, the definition of the term compliance is as follows: 'the fact of obeying a particular law or rule, or of acting according to an agreement', available at: https://dictionary.cambridge.org/dictionary/english/compliance (Accessed: 3 February 2023); Stănilă, 2022, pp. 12–14.

2 RiskOptics, 2023.

3 An important case in this area is the UK Financial Conduct Authority (FCA) fine of Deutsche Bank £163m for exposing the UK financial system to potential financial crime when it failed to appropriately supervise the establishment of new customer relationships. For more details, please see Grensing-Pophal, 2020. Also, for details about the disciplinary procedure in Romania, see Onica Chipea, 2017, p. 291.

4 Grensing-Pophal, 2020.

There are legislative systems in which the conditions for mitigating forms of legal liability are included, including in criminal matters.

In this regard, we note that the U.S. Sanctions Enforcement Commission (U.S. Sentencing Commission) has established certain guidelines regarding the application of sanctions (Organizational Sentencing Guidelines). This created the possibility of applying milder sanctions when there were elements from which the application of corporate compliance rules emerged, especially when this compliance was voluntary. In practice, the assessment of the sanction is linked to the efforts of the legal entity in the direction of corporate compliance.[5]

Simultaneously, it reduces the risk of other situations that upset the life of the company, like strikes or spontaneous protests, and improves the efficiency of safety and security measures at work. Consequently, the number of legal proceedings in which the legal person is involved should decrease.[6]

From a customer and supplier perspective, enforcing corporate compliance instils confidence in customers and suppliers and increases competitive advantage.[7] From an employee perspective, employee retention will increase when workers know they are in a safe, professional and fair environment.

In social terms, corporate compliance has as its rationale the huge social impact that some (large) companies have and certain internal and external conduct consequences of these companies, their employees or their partners or collaborators. Corporate compliance requires openness, transparency and clear working procedures, which may sometimes be incompatible with the element of confidentiality that dominates the business environment or with the institution of the right to remain silent as part of the right to defence. This openness and transparency could collide with the right to remain silent.

In the case of companies, there are perspectives that state that the rights to remain silent and not to contribute to self-incrimination can be exercised. However, other important perspectives hold that these rights apply only to natural persons, not to legal entities.

Our initial approach started from a situation in judicial practice in relation to the exercise of legal entities' right to remain silent, regarding the offenses provided for by Law no. 241/2005. However, we noted that the problem must be approached from a

5 These rules imposed by the U.S. Sanctions Enforcement Commission (U.S. Sentencing Commission) are available at: https://www.ussc.gov/guidelines/organizational-guidelines (Accessed: 3 February 2023); Stănilă, 2020, pp. 61–62.

6 RiskOptics, 2023.

7 For example, in the business market, if you work with Google, Tesla, Coca Cola, etc., your credibility is higher. On the other hand, in case of illegal or even socially immoral behaviour on the part of the 'smaller' partner, there is a risk that the effects will also affect the main partner (company X, which is a partner, subcontractor of ..... 'did that and ...that').

broader perspective and decided to advance towards the specifics of the two crimes of tax evasion under Romanian law.

In judicial doctrine and practice, the right to silence concerns oral communications and particularly refers to the right to not speak and make statements.[8] In such a situation, the right to remain silent comprises the possibilities of not making statements that could incriminate oneself and not making any statements. We note here a first compliance 'contradiction' from the perspective of the (civic) obligation to cooperate with judicial bodies, which could not be imposed as long as the person in question uses the right to remain silent.[9]

In addressing the right to remain silent, we must also include in our approach the right (privilege) not to contribute to self-incrimination. This right, also known as the right not to incriminate oneself, is inextricably linked to the right to remain silent because it concerns not only communications (statements) but also material facts that may contribute to self-incrimination, such as the obligation to hand over certain documents.[10]

In our opinion, the two rights cannot be separated, and their contents do overlap, but this issue is not the subject of this paper.

From a formal perspective, we emphasise that neither the Charter of Fundamental Rights of the EU (the Charter) nor the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) explicitly provide for or expressly enshrine the right to remain silent or the right not to contribute to self-incrimination. Moreover, no reference is made through the rules to the existence of these rights in the charge of legal entities.

2. Recent jurisprudence and impact of the Court of Justice of the European Union and the European Court of Human Rights

A relatively recent decision of the Court of Justice of the European Union (CJEU) pronounced on 2 February 2021 in the case C-481/19, with parties D.B. (natural person) against the Italian Stock Exchange Commission ('Commissione Nazionale per le Società e la Borsa'; Consob), should clarify certain aspects related to exercising the right to remain silent once the case has been resolved. This case concerns sanctions imposed on a natural person (D.B.) for insider trading and failure to cooperate in an administrative investigation.

8 Udroiu, 2020, p. 18; Coman and Burcă, 2020.
9 Ibid.
10 Ibid.

In fact, on 2 May 2012, the Consob imposed sanctions on D.B. for insider trading and non-cooperation owing to his refusal to answer questions during a hearing. His appeal against the sentences was rejected, and he later appealed to Italy's Supreme Court of Cassation (Corte suprema di Cassazione).

On 16 February 2018, the Supreme Court of Cassation referred a constitutionality issue to the Constitutional Court of Italy (Corte constituzionale) regarding the provision of Italian law that served as the basis for the penalty for non-cooperation. After finding that such a provision was derived from Directive no. 2003/65, since replaced by EU Regulation no. 596/20146, the Italian Constitutional Court submitted a request for a preliminary ruling from the CJEU on 21 June 2019.[11]

The request to the CJEU sought to clarify whether the relevant provisions of Directive no. 2003/6 and Regulation no. 596/2014 allowed member states to (not) impose criminal sanctions on individuals who refuse to answer potentially self-incriminating questions during an investigation. In this direction, the CJEU was particularly asked to rule on whether Articles 47 and 48 of the Charter, which guarantee the right to a fair trial, include the right to remain silent.[12]

The CJEU recognised the right of individuals to remain silent during investigations related to conduct punishable by criminal sanctions:

> [...] they allow Member States not to sanction an individual who, in the course of an investigation carried out on him by the competent authority pursuant to the said directive or the said regulation, refuses to provide her with answers that may result in her liability for an illegal act subject to administrative sanctions of a criminal nature or her criminal liability.[13]

For this particular situation, the solution given by the CJEU establishes the connection and the relationship between the provisions of the Charter and the applicable ECHR.

The right to remain silent in the case of natural or legal persons is not expressly recognised by the Charter or by the ECHR, but it is 'a generally recognised international standard that is at the heart of the notion of a fair trial', which belongs to the

11 Perhaps we should recall the regulations incident to this particular matter: Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on the misuse of confidential information and market manipulation (market abuse); Regulation (EU) no. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Directives 2003/124/EC, 2003 /125/EC and 2004/72/EC of the Commission Text with EEA relevance.

12 In our opinion these provisions also enjoy the direct effect specific to the mandatory norms of the EU; in this regard, please see Pătrăuș, 2021, pp. 83–84.

13 Judgment of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84).

right to a fair trial, as regulated primarily by means of Art. 6 ECHR and established by the jurisprudence of the European Court of Human Rights (ECtHR).

Given that the rights enunciated in the Charter will have the same meaning as the rights enunciated in the ECHR, the CJEU found that Articles 47 and 48 of the Charter must be interpreted as including a right to remain silent for natural persons in line with previous jurisprudence and doctrine. In practice, the legal effectiveness of a fundamental right not expressly enshrined by the Charter or the ECHR is recognised. It speaks of the right to remain silent and the privilege of non-self-incrimination as an international standard that constitutes 'the core of the notion of due process under Article 6'.[14]

However, this right is not an absolute right,[15] and as such, when evaluating its incidence, three aspects must be taken into account: the nature and degree of coercion, the existence of any relevant guarantees in the procedure, and the use of any evidence obtained.[16]

In this regard, the ECtHR jurisprudence in the John Murray v. the United Kingdom case is mentioned, from the considerations of which it follows that

> [...] a conviction must not be based exclusively or mainly on the silence of the accused or on the refusal to answer questions or to testify himself; on the other hand, the right to remain silent cannot prevent the accused's silence—in situations that clearly require explanations from him—to be taken into account when assessing the persuasiveness of the evidence presented by the prosecution. Therefore, it cannot be said that an accused's decision to remain silent during criminal proceedings should not necessarily have any implications.[17]

However, the privilege against self-incrimination does not protect against making an incriminating statement per se but against obtaining evidence through coercion or pressure. It is the existence of duress that gives rise to the concern of whether the privilege against self-incrimination has been respected. For this reason, the court must first consider the nature and degree of coercion used to obtain the evidence.[18]

14 Council of Europe/European Court of Human Rights, 2022, p. 40.
15 Council of Europe/European Court of Human Rights, 2022, p. 42; John Murray v. the United Kingdom [GC], § 47; Ibrahim and Others v. the United Kingdom [GC], § 269.
16 Council of Europe/European Court of Human Rights, 2022, p. 42; Jalloh v. Germany (Grand Chamber), § 101; O'Halloran and Francis v. the United Kingdom (Grand Chamber), § 55; Bykov v. Russia (Grand Chamber), § 104; Ibrahim and Others v. the United Kingdom (Grand Chamber), § 269.
17 Council of Europe/European Court of Human Rights, 2022, p. 42; John Murray v. the United Kingdom [GC], § 47.
18 Council of Europe/European Court of Human Rights, 2022, p. 40; Ibrahim and Others v United Kingdom (Grand Chamber), para. 267.

Although it is obvious that these jurisprudential elements refer to natural persons,[19] we considered it important to highlight them because the same standards should also be recognised in the case of legal persons.

Returning to the findings and disposition of the CJEU decision of 2 February 2020, we consider that several important aspects must be highlighted as follows.[20]

The court appreciates that the right to remain silent is also violated 'in the situation of a suspect who, threatened with sanctions if he does not testify, either testifies or is punished for refusing to do so'.[21] Thus, both situations are considered—the situation in which the pressure of the authority paid off leading to the person unwillingly making statements and the situation in which the person was sanctioned precisely to omit making the requested statements.

The right to remain silent concerns the facts 'that directly question the person being questioned', but a broader perspective must be considered that also includes the facts that could indirectly activate or complicate the criminal liability or sanctioning of the person concerned.[22]

Because in contravention matters, the regulations in the member countries are not identical or fully harmonised, the Court, in its arguments, is also concerned with this situation. Thus, it is argued that the right to remain silent could be used in the misdemeanour framework, more precisely in 'procedures that can lead to the application of administrative sanctions that have a criminal character',[23] but under three conditions necessary to assess the sanction's criminal character: the legal qualification of the illegal act in domestic law, the nature of the illegal act itself, and the degree of severity of the sanction that the person risks.[24]

However, the Court does not absolutise this right to remain silent. In this sense, the considerations of the decision argue that the right to remain silent 'does not justify any non-cooperation with the authorities', drawing attention to the fact that

19 As Advocate General Pikamäe pointed out in his opinion, the ECtHR only ruled on cases that involved the right to silence of natural persons (Available at: https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:62019CC0481&from=EN).

20 Decision of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84); Jourdan, Powell, Raphaelson, Gidley and Abouzeid, *The European Court of Justice affirms the right to silence,* available at: https://www.whitecase.com/publications/alert/european-court-justice-affirms-right-silence (Accessed: 3 February 2023).

21 Decision of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, (ECLI:EU:C:2021:84), para. 39, second thesis; also in this regard, see the Court of EDO, 13 September 2016, Ibrahim and Others v. the United Kingdom (CE:ECHR:2016:0913JUD005054108), § 267

22 Judgment of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84), para. 40

23 Judgment of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84), para. 42; for details regarding the debate in Romania about the criminalisation and decriminalisation of misdemeanour, please see Ursuța, 2020, pp. 272–279.

24 Ibid.

the person has the duty to present himself and not to use 'dilatory manoeuvres' to delay his hearing.[25]

Simultaneously, from the construction of the arguments of the Court's decision, it appears that the right to remain silent is valid only for natural persons and not for legal persons.[26] It is important to underline that in the judgment, the Court traced the nuances of the present case to the previous jurisprudence of the CJEU formulated under the EU competition rules, which deal with legal entities' protection against self-incrimination. This jurisprudence states that a legal person cannot be forced to provide 'answers' that could imply the recognition of illegal anti-competitive behaviour but can be forced to provide information about facts and documents, even if they are used to establish anti-competitive behaviour. The CJEU judgment states that the narrower protection granted to legal persons under that jurisprudence cannot be applied by analogy when determining the scope of the right to silence of natural persons.[27]

As part of our discussion, we should also address some provisions of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on strengthening certain aspects of the presumption of innocence and the right to be present at trial in proceedings,[28] which contain common minimum rules regarding certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings.

From the beginning, we note that Article 2 of this directive expressly states that 'This directive applies to natural persons who are suspected or accused in criminal proceedings', which excludes the incidence of these provisions in the case of legal persons.

In the framework of Art. 7, the existence of the right to remain silent and the right not to contribute to self-incrimination for the accused persons is also expressly stated. Moreover, through the provisions of Art. 7 (4), 'Member States may allow their judicial

25 Judgment of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84), para. 41.

26 Judgment of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84), para. 48.

27 Decision of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84), paras. 45–47; Judgment of 18 October 1989, Orkem v Commission, 374/87, EU:C:1989:387, point 34 para. 34: 'Although (...) the Commission has the right to oblige the enterprise to provide all the necessary information regarding the facts of which it may be aware and to communicate to it, if necessary, the related documents that are in its possession, even if these may serve to establish, against itself or against another enterprise, the existence of an anti-competitive practice, the Commission would not have the right to infringe, through a decision requesting information, the right of defence of the enterprise'; here are also mentioned other judgments of the Court: Judgment of 18 October 1989, Orkem/Commission, 374/87, EU:C:1989:387, point 34; Judgment of 29 June 2006, Commission/SGL Carbon, C-301/04 P, EU:C:2006:432, point 41; and Judgment of 25 January 2007, Dalmine v Commission, C-407/04 P, EU:C:2007:53, point 34).

28 Published in the Official Journal of the European Union, L65/1 of 11 March 2016.

authorities to take into account the cooperative attitude of suspected and accused persons when pronouncing judgments'. Researching the sources that motivated such a distinct way of regulating the two rights, we note that the European legislator appreciates that at the current stage of evolution of national law and jurisprudence at the national and union levels, the legislation of the presumption of innocence at the union level as far as legal entities are concerned is premature.[29] For this reason, this Directive should not apply to legal persons. However, it is considered that this circumstance should not affect the application of the presumption of innocence to legal persons, as it is enshrined in particular in the ECHR and interpreted by the ECHR and the CJEU,[30] and that the presumption of innocence with regard to legal persons should be ensured by existing legislative guarantees and jurisprudence, the future evolution of which will determine the need for action at the union level.[31]

Under these conditions, we ask ourselves the question—how could the effectiveness of these rights be ensured if the law does not recognise them in the case of the legal person? What are the existing guarantees that rise to the level of the express consecration of these rights in the case of natural persons in conditions where 'legislation at the level of the Union of the presumption of innocence with regard to legal persons is premature'? It seems that we are in the presence of a lack of decisions taken by the European legislator.

We agree with the point of view previously expressed in the doctrine that a normative double standard was thus created.[32] The same author points out that

> The legislative history of the directive shows that the European Parliament tried to widen its scope to cover legal entities, however, the Council, supported by the Commission, rejected the approach of the European Parliament, referring to several recitals which have been incorporated into the recitals of the directive.[33]

The legal regime applicable to legal entities is not built in a perfect legal framework. In the specialised literature from Romania, substantive and procedural law problems have been reported in relation to the activation of the legal entity's criminal responsibility.[34] These are not few and concern the problems of interpretation and

29 Preamble of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016, para. 14.
30 Preamble of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016, para. 14.
31 Preamble of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016, para. 15.
32 Stănilă, 2020, p. 75.
33 Stănilă, 2020, p. 68.
34 Trandafir, 2021, p. 284 et seq.

application and the provisions of substantive (e.g. the demonstration of the subjective element, the approach to the organisational model) and procedural criminal law (e.g. the cumulation of the defendant's quality with the quality civilly liable in a criminal case).

From our point of view, the issue could be removed by recognising the right to remain silent in the case of legal entities. Thus, Art. 6 ECHR and Art. 48 of the Charter of fundamental rights of the European Union (CDFUE) contain the expression 'any person', without a distinction between the natural and legal person.

3. Law no. 241/2005 vs. The right to remain silent and right not to contribute to self-incrimination

We will now discuss certain provisions of Romanian law. The right to defence enshrined in Article 24 of the Romanian Constitution is guaranteed[35]. However, the content of this right is not expressly defined through the constitutional provisions or another law. As, a consequence, the task to determine the content of this right will be taken by courts through jurisprudence.

Under these conditions, the task of detailing the content of this right therefore rests with judicial practice. Thus, by considering some decisions admitting cases of unconstitutionality of some laws' provisions in Romania, the Constitutional Court ruled as follows:

> As for the right to defense, regulated in art. 24 of the Constitution, it gives any party involved in a process, according to its interests and regardless of the nature of the process, the possibility to use all the means provided by law to invoke facts or circumstances in its defense. This right implies participation in court hearings, the use of evidence, invoking the exceptions provided by the criminal procedural law, the exercise of any other criminal procedural rights and the possibility to benefit from the services of a defense attorney.[36]

We also emphasise the relatively recent practice in the matter of ensuring the right to defence, including the components of the rights to remain silent and not to contribute to self-incrimination, about which Professor Mihai Hotca stated that 'By Decision no. 236/2020, the Constitutional Court reconsidered its own jurisprudence,

35 "Art. 24 – Right to defense: (1) The right of defense is guaranteed. (2) Throughout the proceedings, the parties shall have the right to be assisted by a lawyer, chosen or appointed ex officio."

36 Decision 519 of 6 July 2017, published in the Official Gazette. no. 879 of 8 November 2017, para. 18; Stănilă, 2020, pp. 75–76.

more precisely the solution and considerations of Decision no. 519 of July 6, 2017 and, in this sense, took over the doctrine of living law'.[37]

We note that Art. 489 of the Criminal Procedure Code establishes the rule that in case of crimes committed by legal entities provided for in Art. 135 para. (1) of the Criminal Code in carrying out the object of activity or in the interest or on behalf of the legal person, the provisions of this code are applied accordingly. The exceptions and additions provided in this chapter are applicable in the procedure of the legal person's criminal liability and the provisions of the preliminary chamber procedure, which are also applied accordingly.

Under these conditions, we consider that the provisions of Art. 83 Criminal Procedure Code, which regulate the rights of the accused, are incidents in the case of natural and legal persons. As it was also emphasised in the doctrine, based on the fundamental principle of law, '*ubi lex non distinguit nec nos distinguere debemus*', there is no impediment to recognising all these rights for legal entities as well.[38]

The rights enshrined in Art. 83 Criminal Procedure Code[39] include the right to remain silent and the privilege of non-self-incrimination in the following form:

> [...] the right not to give any statement during the criminal trial, drawing attention to the fact that if he refuses to give a statement he will not suffer any adverse consequences, and if he gives statements they can be used as evidence against him.

Of course, there is the question of the person who can engage the legal entity in the direction of invoking and activating this right. This can only be the person who circumscribes the provisions of Art. 491 Criminal Procedure Code, which fulfils the function of representing the legal entity. Thus, the legal entity is represented by its legal representative when performing procedural acts. If there are certain

37 Hotca, 2020.

38 Stănilă, 2020, pp. 75–76.

39 Art. 83: Rights of the defendant – During the criminal trial, the defendant has the following rights: a) the right not to give any statement during the criminal trial, drawing his attention to the fact that if he refuses to give a statement he will not suffer any unfavourable consequences, and if he gives statements they can be used as evidence against him; a1) the right to be informed about the act for which he is being investigated and its legal framework; b) the right to consult the file, under the law; c) the right to have an elected lawyer, and if he does not appoint one, in cases of mandatory assistance, the right to have a lawyer appointed ex officio; d) the right to propose the administration of evidence under the conditions provided by law, to raise exceptions and to make conclusions; e) the right to make any other requests related to the settlement of the criminal and civil side of the case; f) the right to benefit from an interpreter free of charge when he does not understand, does not express himself well or cannot communicate in Romanian; g) the right to appeal to a mediator, in cases permitted by law; g1) the right to be informed about his rights; h) other rights provided by law.

impediments, the law regulates the situation of representation by a representative appointed by the legal entity.

If criminal proceedings have also been initiated against the legal representative of the legal person for the same or related facts, the legal person shall appoint a representative to represent it. In this case, if the legal person has not appointed a representative, such representative shall be appointed, as the case may be, by the prosecutor conducting or supervising the criminal prosecution, by the judge of the pre-trial chamber or by the court, from among the insolvency practitioners authorized according to the law.

The enshrinement of procedural rights, including the right to remain silent, through the provisions mentioned above is complemented and strengthened by other provisions of the Criminal Procedure Code. Thus, just as beyond the provisions of Art. 4 Criminal Procedure Code is the provision for the presumption of innocence without distinction between natural and legal persons. So we underline the judicial bodies' obligation to carry out the criminal investigation and trial respecting the procedural guarantees, the rights of the parties and the procedural subjects. This is to ensure that the facts constituting crimes may be ascertained in a timely and complete manner, no innocent person is held criminally liable and any person who has committed a crime is punished according to the law within a reasonable time.[40]

Within the provisions that regulate the right to defence, it is expressly mentioned that before being heard, the suspect or defendant is given the right not to make any statement.[41]

Moreover, the Romanian Constitution has a provision through which effect is given to the more favourable regulation when competition arises between the domestic and international provisions. Thus, Art. 20 of the Romanian Constitution, 'International Treaties on Human Rights', provides that the constitutional provisions regarding the rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights and other pacts and treaties to which Romania is a party; if there are inconsistencies between the pacts and treaties on fundamental human rights to which Romania is a party and between the internal laws, international regulations take precedence unless the Constitution or internal laws contain more favourable provisions.

In circumstances in which the working hypothesis is that no distinction has been made between the natural and legal persons, because of both entities being subject to the regulation of Romanian laws,[42] any international provisions that would not

40 Art. 8 of Criminal Procedure Code.

41 Art. 10 para. 4 of Criminal Procedure Code.

42 Of course, we could include in the discussion in the strict sense the differences between a Romanian citizen and a Romanian legal person, as an argument for the idea of different legal treatment of natural person citizens in relation to legal persons, especially because in the latter's case, the notion of citizenship is not unanimously recognised.

recognise the right to remain silent in favour of Romanian legal entities would not be effective from a legal point of view, and the more favourable provisions—those of the Romanian law described above—would be applied.

Considering this, we will proceed to the analysis of the ways in which the right to defence can be effectively exercised under the conditions in which the provisions of Articles 3, 4 or 5 of Law no. 241 of 2005 are applied regarding the prevention and combating of tax evasion. The three situations of incrimination concern the act of the taxpayer who does not restore, with intention or through fault, the destroyed accounting records documents within the term entered in the control documents (Art. 3 of Law no. 241/2005); the unjustified refusal of a person to present legal documents and assets from the heritage to the competent bodies to prevent financial, fiscal or customs checks within no more than 15 days from the summons (Art. 4 of Law no. 241/2005); and preventing, in any form, the competent bodies from entering, under the conditions provided by law, premises, sites or land, or the purpose of carrying out financial, tax or customs checks (Art. 5 of Law no. 241/2005).

Viewed in a broader sense, these incrimination hypotheses correspond to situations of non-compliance—a failure to restore or an act of refusal or obstruction—with the responsibility of the taxpayer, who in this situation is usually a legal person.

Compliance with the norm cited above would assume that the (legal) person only has the option of redoing the documents within the term stated in the control documents, under the conditions of Art. 3 of Law no. 241/2005, to present the legal documents and assets from the heritage to the competent bodies, under the conditions of Art. 4 of Law no. 241/2005, or to allow entry into premises, premises or land for the purpose of carrying out checks, under the conditions of Art. 5 of Law no. 241/2005. Another option is not allowed by law without the legal entity being assumed to have committed one of the crimes mentioned above.

Under these conditions, can he still invoke the right to remain silent?

Is the right to silence exercised through passive conduct—not redoing documents, not presenting documents—or passive obstruction, starting from the idea that through such conduct in the event of compliance, one would incriminate oneself?

In our opinion, although Romanian law recognises the right of legal persons to remain silent in criminal proceedings, in the above situations, it cannot be invoked in this form. Just as the CJEU ruled in the judgment mentioned previously, the right to remain silent is not absolute or equivalent to refusing to cooperate with the authorities, just as the obligation to cooperate is not absolute.

The right to remain silent can be exercised in the sense that the accused person does not contribute to his own accusation, and the accused person cannot be forced to fulfil obligations of a different nature (such as those from Arts. 3, 4 and 5 of Law no. 241/2015) that have the effect of proving the accusation against him.

The situation is even more complicated in the scenario where the SAF-T reporting system is applied.[43] It has several features[44] that practically, through the related reporting, transfer financial and accounting data from the taxpayer's 'custody' to the authority's database. Consequently, the tax authority will have a mirror of the taxpayer's financial accounting records. At that time, any exercise of any form of silence on the part of the taxpayer is without practical effect because all the information can be accessed by the authority, whether consent is given by the taxpayer or not.

4. Conclusion

We must reinforce the following principle: where the law does not distinguish, neither should we. Furthermore, we retain the responsibility of a legal entity owing to the actions of natural persons, whose right to remain silent we recognise. We thus arrive at the anachronistic situation in which only the legal entity will be held criminally liable, using its own statements as evidence, and those who compose its structure will be able to be defended by the right to remain silent. Does the person who makes statements on behalf of the legal entity, if not precisely the natural person who acts on its behalf, benefit from the right to remain silent? The answer is affirmative. The natural person`s right to be silent is not disputed anymore.

If we refer to the legal person as a legal fiction, we can look at things from another perspective—[45]a legal fiction has rights and obligations under the law, that is, the law recognises them. Are we not in the same situation as any individuals? We have now passed the moment when rights are asserted simply as natural rights and are

43 The SAF-T Fiscal Control Standard File is regulated by Art. 59^1 of Law 207/2015 on the Fiscal Procedure Code and by ANAF Order no. 1783/2021. 'The Standard Fiscal Control File (SAF-T) is an international standard for the electronic exchange of accounting data between companies/organisations and tax authorities. This standard was designed by the Organization for Economic Cooperation and Development in 2005, and since then it has undergone a series of refinements, the most recent version being – Taxpayer's guide for the preparation and submission of the D406 INFORMATION STATEMENT – STANDARD FISCAL CONTROL FILE (SAF – T)', available at: https://static.anaf.ro/static/10/Anaf/Informatii_R/SAF_T_Ghidul_D406_1712021.pdf (Accessed: 3 February 2023).

44 'The initiative arose as a result of the OECD's intention to implement a uniform reporting standard for multinational companies whose tax reporting has become, over time, more and more difficult to achieve and monitor by the authorities. Broadly speaking, the new standard aims to reduce the VAT collection deficit and digitise fiscal inspections. (...) In Romania, the need to implement such a system has become evident for several years, given that our country traditionally records the lowest share of tax revenues in GDP (27% in 2019, compared to the EU average of 40%) and the largest VAT collection deficit in the European Union (estimated at 37.4% for 2020, according to the latest data published by the European Commission).' – Boeriu, 2021.

45 The authorship of this view of the natural person is not entirely mine but is the result of discussions with Prof. Dannecker Gerhard (University of Heidelberg).

instead rights established and recognised by law. Rights are exercised since they are stipulated and protected by provisions of the law.

Thus, in both cases, the laws enshrines rights, so what reason is there for us to limit the exercise of some rights just because one subject is a legal fiction and the other a natural legal fiction?

One can argue that the legal entity`s right to be silent is exercised through the natural person that legally represents the legal entity. In our opinion, the right to remain silent of the legal entity is separate from the right to be remain silent of the natural person representing the legal entity, and both rights should be protected by law.

Bibliography

- Boeriu, V. (2021) *Raportarea SAF-T, obligatorie pentru marii contribuabili de la 1 ianuarie 2022. Ce presupune implementarea?* [SAF-T reporting mandatory for large taxpayers as of January 1, 2022. What does implementation entail?] [Online]. Available at : https://www2.deloitte.com/ro/ro/pages/tax/articles/raportarea-saf-t-obligatorie-pentru-marii-contribuabili-de-la-1-ianuarie-2022-ce-presupune-implementarea.html (Accessed: 3 February 2023).
- Coman, V., Burcă, D. F. (2020) *Dreptul la tăcere al suspectului/inculpatului, între privilegiu legal și circumstanță agravantă judiciară* [The suspect/defendant's right to remain silent, between legal privilege and judicial aggravating circumstanc] [Online]. Available at: https://www.juridice.ro/686101/dreptul-la-tacere-al-suspectului-inculpatului-intre-privilegiu-legal-si-circumstanta-agravanta-judiciara.html (Accessed: 3 February 2023).
- Council of Europe/European Court of Human Rights (2022) *Guide on Article 6 of the Convention – Right to a fair trial (criminal limb)* [Online]. Available at: https://www.echr.coe.int/documents/guide_art_6_eng.pdf (Accessed: 3 February 2023).
- Grensing-Pophal, L. (2020) *Examples of Costly Compliance Violations by Employees* [Online]. Available at: https://hrdailyadvisor.blr.com/2020/09/14/examples-of-costly-compliance-violations-by-employees/ (Accessed: 3 February 2023).
- Hotca, M. A. (2020) *Dreptul martorului la tăcere și la neautoincriminare (neautoacuzare)* [The witness's right to silence and to not self-incrimination (non-self-incrimination)] [Online]. Available at: https://www.qmagazine.ro/dreptul-martorului-la-tacere-si-la-neautoincriminare-neautoacuzare/ (Accessed: 3 February 2023).
- Jourdan, J., Powell, M., Raphaelson, I., Mark-Gidley, J., Abouzeid, F. (2021) *The European Court of Justice affirms the right to silence* [Online]. Available at: https://www.whitecase.com/publications/alert/european-court-justice-affirms-right-silence (Accessed: 3 February 2023).
- Onica-Chipea, L. (2017) *Dreptul muncii. Curs universitar* [Labour Law. Textbook]. Bucureşti: ProUniversitaria Publishing House.
- Pătrăuș, M. (2021) *Drept Instituțional European* [European Institutional Law]. București: ProUniversitaria Publishing House.
- RiskOptics (2023) *What is the HIPAA Security Rule* [Online]. Available at: https://reciprocity.com/resources/what-does-compliance-mean-in-business/ (Accessed: 3 February 2023).
- Stănilă, L. M. (2020) 'Dreptul la tăcere în cazul persoanei juridice' [The right to silence for legal entities], *Universul Juridic Journal*, 2020/11.
- Stănilă, L. M. (2022) 'Aspecte introductive privind obligația de conformitate și implicațiile sale în dreptul penal și procesual penal. Clarificări, delimitări și

precizări' [*Introductory aspects of the duty to comply and its implications in criminal law and criminal procedure. Clarifications, delimitations and clarifications*] in Stănilă, L. M. (ed.) *Corporate Compliance. Valențe penale și procesual penale*. București: Universul Juridic.
- *Taxpayer's guide for the preparation and submission of the D406 Information Statement – Standard Fiscal Control File (saf-t)* (2021) [Online]. Available at: https://static.anaf.ro/static/10/Anaf/Informatii_R/SAF_T_Ghidul_D406_1712021.pdf (Accessed: 3 February 2023).
- Trandafir, A. R. (2021) *Răspunderea penală a persoanei juridice* [Criminal liability of legal entities], București: C.H.Beck.
- Udroiu, M. (2020) *Fișe de Procedură Penală, Partea Generală, Teorie și cazuri practice* [Criminal Procedure, General Part, Theory and Practical Cases]. București: C.H. Beck.
- Ursuța, M. (2020) 'Dezincriminare și decontravenționalizare. Aspecte de drept material și procesual' [Decriminalization and decriminalization. Aspects of substantive and procedural law], in Miheș, C. (ed.) *In Honorem Valentin Mirișan: Gânduri, Studii, Instituții*. București: Universul Juridic.

Case-law

- Advocate General Pikamäe opinion in file C-481/19 (https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:62019CC0481&from=EN).
- CEDO decision: Bykov v. Russia (Grand Chamber).
- CEDO decision: Ibrahim and Others v. the United Kingdom, (Grand Chamber).
- CEDO decision: John Murray v. the United Kingdom (Grand Chamber).
- CEDO decision: O'Halloran and Francis v. the United Kingdom (Grand Chamber).
- Constitutional Court of Romania: Decision 519 of July 6, 2017, published in the Official Gazette, no. 879 of November 8, 2017.
- ECHR Judgment of 11 July 2006, Jalloh v. Germany, 54810/00, ECLI:CE:ECHR:2006:0711JUD005481000.
- ECJ Decision of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, (ECLI:EU:C:2021:84).
- ECJ Judgment of 18 October 1989, Orkem/Commission, 374/87, EU:C:1989:387.
- ECJ Judgment of 25 January 2007, Dalmine v Commission, C-407/04 P, EU:C:2007:53.
- ECJ Judgment of 29 June 2006, Commission/SGL Carbon, C-301/04 P, EU:C:2006:432.

ARTICLES

Roser ALMENAR*

Lift-Off of Space Governance in Spain: The Creation of the Spanish Space Agency

ABSTRACT: *The space sector represents a strategic industrial cluster in global terms that makes a major contribution to industry, environment, communications, and defence, amongst other domains. Outer space holds enormous potential, which has already been noticed by private operators who regard it as an appealing business opportunity. The importance of the space sector for the Spanish industry has remained constant and has only increased over the last few decades, making apparent the pressing need to bring together under a single public body the competences in space matters which are institutionally dispersed in our country. After several years of persistent demand from the Spanish space industry, the National Security Strategy was adopted in December 2021. This document raised the sector's hopes by announcing, as one of its lines of action, the intention to establish a Spanish Space Agency to promote the national industry and international cooperation with other similar organisations and/or organisations of interest in the field. In this context, since the adoption of the said Strategy, the Spanish space sector has been the target of a recent regulatory and institutional development, culminating in the creation of the long-awaited Spanish Space Agency on March 7th, 2023. Such an administrative evolution is the subject of this paper, whose main purpose is to conduct an analysis of all the provisions approved during the years 2021 to 2023 that concern our national space sector as a reference for those interested in the topic regarding what has happened in the Spanish space industry throughout recent years.*
KEYWORDS: *space industry, international cooperation, national security, Space Council, Spanish Space Agency.*

* Cañada Blanch Research Fellow, London School of Economics and Political Science (LSE). https://orcid.org/0000-0002-4228-8888. It should be clarified that this paper has been ex-post reviewed in 2024 to ensure its relevance and timeliness.

https://doi.org/10.62733/2023.2.29-56

1. Introduction

The significant role that Spain has played in the space community since its earliest development in the 1950s is undisputed.[1] The Spanish space industrial sector is characterised by its strategic significance from a worldwide perspective due to its specific weight in the overall industrial production, its role as a driving force for the innovative ecosystem and other industries, and its ability to reshape the national economy and labour market.[2] Spain is not only a member of some of the most relevant space-related international organisations, such as the European Space Agency (ESA) and the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT), but also participates in both ESA's main projects and optional programmes, such as Galileo, the International Space Station (ISS), and the Earth Observation Programme.[3] Moreover, Spain is an active contributor to the European Union Space Programme Agency (EUSPA) and ESA, with the latter being the largest source of return on Spanish public investment in the space industry.[4]

In 1963, in view of the then scientific and technological research progress in outer space, the National Space Research Commission (CONIE) was founded by means of Act 47/1963 of July 8th, which established a domestic structure that would enable the country to benefit from such industrial advancement and to avoid falling behind neighbouring countries.[5] Nevertheless, this primaeval public body instituted to coordinate and promote the programmes of the different national Research Services or Institutes was abolished following the entry into force of Act 13/1986 of April 14th, on the Promotion and General Coordination of Scientific and Technical Research, whose sixth additional provision stipulated that the functions of CONIE were to be assumed by the Inter-Ministerial Commission for Science and Technology (CICYT).[6]

1 Of particular note, for instance, is the interface in 1951 between the National Institute of Aeronautical Technology (INTA) and the US National Advisory Committee for Aeronautics (NACA), NASA's forerunner, for the exchange of information on aeronautical matters. See Muñoz Rodríguez, 2015, p. 588.
2 Royal Decree 158/2023 of March 7th, approving the Statute of the State Agency 'Spanish Space Agency', preamble (I).
3 De Faramiñán Gilbert, 2022, pp. 95–96.
4 Royal Decree 158/2023, preamble (I).
5 Act 47/1963, preamble.
6 CICYT was created by Act 13/1986 as a planning, coordination, and follow-up body for the then National Plan for Scientific Research and Technological Development. Nonetheless, its main competences were taken over by the Government Delegate Commission for Science and Technology Policy, in accordance with Royal Decree 326/2009 of March 13th, which allotted functions to it; and by the Ministry of Science and Innovation, pursuant to Royal Decree 1183/2008 of July 11th, which developed its basic organisational structure. See Royal Decree 332/2009 of March 13th, abolishing the Inter-ministerial Commission for Science and Technology provided for in Act 13/1986.

As time progressed, these tasks of national scientific-technological research and international representation of the sector were assigned by both Act 47/1963 and Act 13/1986[7] to the National Institute of Aeronautical Technology 'Esteban Terradas' (INTA)[8] and the Centre for Technological Development and Innovation (CDTI).[9] As of then, these two organisations have been in charge of managing Spain's presence in both ESA[10] and the European Union (EU) space programmes for the past decades, together with the different Ministries to which a series of competences in space matters have been allocated: Science and Innovation; Industry, Trade, and Tourism; Transport, Mobility, and Urban Agenda (formerly known as the Ministry of Development); and Defence. However, this institutional dispersion among diverse governmental entities was a source of concern and unease in the Spanish space industry, as our bordering countries already possessed a sole public body responsible for overseeing their national space activities.

Upon an initial attempt in 2005 by the Senate Committee on the 'Progressive increase of Spain's participation in the European Space Agency', instructing the government to constitute a Spanish Space Agency committed to coordinating and managing all the resources dedicated to space;[11] ten years later, in 2015, the Ministries of Economy and Competitiveness, Development, Defence, and Industry stepped up to the plate again. To this end, they declared the start of a series of works aimed at '*creating a body, let's call it an agency, national commission or general directorate*', integrating all these competences.[12] Despite five successive years of inactivity on this initiative, on May 27th, 2021, before the Joint Commission on National Security of the Congress and the Senate, Iván Redondo (the then Director of the Cabinet of the Presidency of the Government) announced the creation of a Spanish Space Agency.[13] For a moment, it was feared that this was yet another of the government's intentions, which, as had happened in previous efforts, would remain a dead letter.

7 This normative text was subsequently repealed by Act 14/2011 of June 1st, on Science, Technology, and Innovation, currently in force.

8 Act 47/1963, preamble. INTA was established in 1942 as a Public Research Organisation (OPI), specialised in aerospace research and technological development, attached to the State Secretary for Defence. See Royal Decree 925/2015 of October 16th, approving the Statute of the National Institute for Aerospace Technology 'Esteban Terradas', preamble.

9 Act 13/1986, sixth additional provision. CDTI is a state-owned business entity, dependent on the Ministry of Science and Innovation, which promotes innovation and technological development in Spanish companies, identifying priority technological areas and implementing management programmes to support technological innovation. See arts. 1 to 3 of Royal Decree 1406/1986 of June 6th, approving the Regulations of the Centre for Technological and Industrial Development; and art. 36 of Act 27/1984 of July 26th, on Reconversion and Reindustrialisation.

10 Giménez and Malet, 2023.

11 Sánchez Mayorga, 2021, p. 7.

12 La Vanguardia, 2015.

13 Guerrero, 2021; Pons Alcoy, 2022a, p. 10.

On this occasion, nonetheless, the position was maintained, as subsequently reflected in the 2021 National Security Strategy (published at the end of the year), in its nineteenth line of action, which sets as an objective the establishment of the long-desired agency. From that moment on, the Spanish legislator began to introduce gradual changes in the institutional structure of public administrations with the intention of progressively ensuring that, first, more funds would be allocated to scientific development and research in the space sector, and, second, that the bureaucratic procedures necessary to set up the future Spanish Space Agency would be carried out in a definitive manner.

For the purposes of this paper, an examination will be provided concerning the recent normative and institutional achievements in the quest for a Spanish Space Agency, comprising the period from 2021 to 2023, by delving into the various legal and policy documents issued during those years with respect to recognising the need for such an entity, and the ensuing creation of the same on March 7th, 2023. Accordingly, non-Spanish speakers are presented with a holistic and detailed overview of the road to the inception of the Spanish Space Agency from the ground up.

2. Recent developments within the space industry in Spain: Towards the creation of the Spanish Space Agency

2.1. 2021 National Security Strategy

In spite of the domestic space industry echoing for years the need for a space agency to take responsibility for bringing together the competences related to the design and operation of space activities in Spain, it was not until the end of 2021 that the yearning to set up a Spanish Space Agency was explicitly articulated for the first time in Royal Decree 1150/2021 of December 28th, approving the 2021 National Security Strategy.[14]

This National Security Strategy is the third of its kind drawn up by the National Security Council since the original National Security Strategy was approved in 2011 and revised in 2013, and it constitutes the strategic political framework of reference for the National Security Policy. Its goal is to analyse the geopolitical environment, specify the risks and threats that affect the security of the state, define the strategic

14 The 2021 National Security Strategy is based on the adoption of the European Security Strategy of December 12th, 2003. This strategy offered an analysis of the disparate security concerns and potential disruptions to the world order, such as terrorism, the proliferation of weapons of mass destruction, and organised crime, to which other global challenges were added, including cybersecurity, following the adoption in 2008 of the Report on the Implementation of the 2003 European Security Strategy. See Zafra Riascos, 2017, p. 172. For further details on this and other EU security and defence strategies, see Almenar Rodríguez, 2023.

lines of action in each operational setting, and promote the optimisation of existing resources, as provided for in art. 4(3) of Act 36/2015 of September 28th, on National Security; the content of which is fully reproduced in the preamble to Royal Decree 1150/2021.

The literal wording of the aforementioned clause also stipulates that the National Security Strategy in force may be reviewed after a five-year period or, when required, by a significant shift in the circumstances of the strategic environment. The main reason for the adoption of the new 2021 National Security Strategy laid precisely in the second scenario, as stated by President of the Government Pedro Sánchez:

> *the evolving circumstances, presented in Spain and globally by the situation of the COVID-19 pandemic made it necessary to bring forward the period of renewal of the National Security Strategy in force since 2017 in order to adapt it to the changing condition in the areas of National Security (...) which oblige all public authorities to deepen the way to guarantee the rights and welfare of citizens, ensuring the defence of Spain and its constitutional principles and values.*

Chapter III, which evaluates a series of risks and threats to national security,[15] including menaces derived from the use of cutting-edge technologies that add complexity to the protection of individuals' fundamental rights, is worth mentioning. By way of illustration, access to outer space is expressly cited as an example of these hazards and thereafter designated as a 'new area of competition' that is key to national security because of the services it provides and which require new areas of operation. Consequently, the vulnerability of the space sector is underlined on a two-fold basis.

On the one hand, it highlights the geopolitical, strategic, and commercial nature of outer space, taking the placement of satellite constellations and commercial launchers as a case in point, and voices a worrying trend in the market for the same. Several non-EU-based operators are positioning themselves in a dominant stance, threatening access to space services and launches. On the other hand, the absence of a specific Spanish legislative framework governing space activities and services is

15 As the present Strategy, the 2017 National Security Strategy (its predecessor), approved by Royal Decree 1008/2017 of December 1st, comprised in its Chapter IV the different threats and challenges that were perceived in relation to national security, about which it asserts: '*Such threats and challenges do not exist in isolation, but are interconnected, their effects cross borders, and often materialise in global common spaces, such as (...) outer space*'. The vulnerability of outer space is thus addressed. Nevertheless, unlike the 2021 National Security Strategy, the only reference to outer space is to satellite and anti-satellite technology and to the opportunities and risks they both entail.

emphasised,[16] which '*facilitates irregular activity in outer space, and makes it difficult to protect strategic assets such as satellite communications, positioning, and timing systems or earth observation satellites*'.

Such a vulnerability is due to the fact that these global common spaces, among which outer space is pinpointed, are '*connecting spaces characterised by their functional openness, lack of physical borders and easy accessibility*'. As a result, security in these domains is weakened since, owing to their extension, poor regulation, and the lack of sovereignty, the attribution of liability for the commission of crimes and/or felonies becomes more cumbersome. For this reason, it is necessary for Spain to adhere to international initiatives aimed at guaranteeing the peaceful use of outer space, especially those space programmes developed within the EU. International cooperation is a core principle of international space law, underscoring the need for the development of space security policies based on it and on which the collaboration of all the actors involved pivots.[17]

This scenario finally led to what, in my opinion, constitutes the most significant contribution of the 2021 Strategy to the space sector, that is, the proposal for the creation of a Spanish Space Agency (sixteenth line of action) in the following terms:

> *The creation of a Spanish Space Agency will aid to organise competences and establish a national policy to guide both the public and private sectors. This will maximise the return on investment, foster public-private partnerships, facilitate the dual use of space capabilities, and strengthen the national space industry in a clear and coherent manner. In addition, the Agency will represent Spain internationally in the space sector.*

In this vein, its nineteenth line of action identifies as an objective for space security to '*Create the Spanish Space Agency, with a component dedicated to National Security, to lead the effort in space matters, efficiently coordinate the different national bodies with responsibilities in the space sector, and unify international collaboration and coordination*'. Given the accelerated evolution of the sector in recent years due to the interest generated by private operators for the commercial use of outer space, it is essential for space competences to be centralised under a single specialised body that enables the efficiency of their exercise.

16 Such a disquiet has been repeatedly manifested in the Spanish space legal doctrine; see González Ferreiro, 2023; Harillo Gómez-Pastrana, 2023b; Díaz Díaz and Chaves Sánchez, 2023; Piris Cuiza, 2023; Harillo Gómez-Pastrana, 2022; De Faramiñán Gilbert, 2022; Moro Aguilar, 2021; González Ferreiro, 2021; González Ferreiro, 2019; Muñoz Rodríguez, 2015; etc.

17 See Mayo Muñiz, 2014.

2.2. The Aerospace Strategic Project for Economic Recovery and Transformation (PERTE) and the establishment of the Space Council

On March 22nd, 2022, the Council of Ministers approved the agreement, declaring the Project for the Aerospace Sector as a Strategic Project for Economic Recovery and Transformation (PERTE),[18] promoted by the Ministry of Science and Innovation.[19] This is an instrument of a public-private collaborative nature aimed at boosting science and innovation in the aerospace field, providing tools to the sector to face upcoming challenges including climate change, global security, and digital transition. Hence, its specific objectives in space matters are '*to improve the capabilities of the space sector in the design of payloads related to environmental control, quantum communications, and security in international cooperation; and to position the space sector on the European map for the commercial use of space*'.[20]

The strategic project is intended to strengthen the capacity of the space industry, allowing public administrations, companies, and research centres to work in continuous collaboration to encourage the development and incorporation of new technologies. Likewise, as it is a project of a distinctly international character, its aim is to consolidate Spain's position in the space sector through initiatives such as the creation of the Spanish Space Agency, which will contribute to coordinating space activities at the national level and foster Spanish participation in international programmes.[21]

For the purposes of the foundation of such an Agency, it is noteworthy Royal Decree 447/2022 of June 14th. Art. 1 of this regulation modified art. 18(1) of Royal Decree 139/2020 of January 28th, which lays down the basic organisational structure of the ministerial departments by adding a final letter d) to include the Commissioner for the Aerospace PERTE as a management body within the structure of the Ministry of Science and Innovation. In this sense, art. 2 of Royal Decree 447/2022

18 The Strategic Projects for Economic Recovery and Transformation (PERTE), as projects in general terms, are created within the framework of the Recovery, Transformation, and Resilience Plan, which constitutes the Spanish strategy to channel the funds delivered by the EU (e.g. the NextGenerationEU funds) to repair the damage caused by the COVID-19 crisis, and, through a series of reforms and investments, to build a more sustainable future. For further information, see https://planderecuperacion.gob.es/

19 See https://planderecuperacion.gob.es/noticias/el-gobierno-espanol-prepara-la-creacion-de-una-agencia-espacial-espanola-y-un-perte

20 See https://www.lamoncloa.gob.es/consejodeministros/referencias/documents/2022/refc20220322v02%20(2).pdf, p. 57.

21 *Ibid*. Amidst the initiatives for which the collaboration of the Spanish space sector is envisaged, the development of the Atlantic Constellation (an Earth observation satellite programme to monitor phenomena, namely climate change), together with Portugal, is remarkable. For more information, see https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/ciencia-e-innovacion/Paginas/2022/041122-constelacion-atlantica.aspx

also implemented modifications to the basic organic structure of the Ministry of Science and Innovation in two of its precepts by amending Royal Decree 404/2020 of February 25th.

1º. The wording of paragraph four of art. 1 was revised, in the same way as art. 18 of Royal Decree 139/2020, so that besides the executive bodies of the Ministry of Science and Innovation (established prior to June 15th, 2022), the Commissioner for the Aerospace PERTE was incorporated.

2º. An additional provision is introduced in the regulation (art. 7) that aims to develop the major functions of the Commissioner for the Aerospace PERTE (first paragraph), inter alia the promotion of the Spanish space sector through the adoption of different measures, strategies, and policies within the framework of the PERTE itself. Furthermore, it is also entrusted with the coordination of the activity of both the Aerospace PERTE Inter-ministerial Working Group and the Aerospace PERTE Alliance and with undertaking as many actions as needed for the establishment of the Spanish Space Agency, in particular, by advising and providing technical support to the Space Council in the performance of its functions and competences.

The following units reporting institutionally to the Commissioner for Aerospace PERTE (second paragraph) were also established: the Technical Space Office, which is responsible for most of the functions attributed to the Commissioner, and the Special Delegation for the Spanish Space Agency, tasked with dealing exclusively with matters relating to the creation and operation of the Agency,[22] specifically in coordination with the Space Council.

Regarding the latter, the Space Council was instituted by Royal Decree 452/2022 of June 15th, which creates and regulates its composition and functioning '*in order to guarantee the success of the future approval of a Statute for the Spanish Space Agency, as well as the constitution and operation of this public body*'.[23] These were the functions entrusted to it (art. 2):

a) To analyse and make a non-binding report on the functions and competences that correspond to the Spanish Space Agency.

b) To draw up a non-binding report on the statutes and initial action plan of the Spanish Space Agency[24] for submission to the ministerial departments to which this public body is attached.

22 In this regard, for the very functional rationale behind the creation of such a body, the Special Delegation for the Spanish Space Agency was abolished as of the date of entry into operation of the Agency, pursuant to the third additional provision, first section of the AEE's Statute.

23 Royal Decree 452/2022, preamble.

24 Reference should be made to art. 91(3) of Act 40/2015 of October 1st, on the Legal Regime of the Public Sector, according to which: '*The preliminary draft act for the creation of the public body submitted to the Council of Ministers must be accompanied by a proposal for statutes and an initial action plan, together with the mandatory favourable report of the Ministry of Finance and Public Administrations, which will assess compliance with the provisions of this article*'. Similarly, arts.

c) Any other function that is within the scope of the Council's own competences may be allocated to it.

The nature of its tasks demanded the joint work of every ministerial department with responsibilities in this area.[25] For that reason, it was set up as an interministerial collegiate body administratively integrated within the Ministry of Science and Innovation through the Commissioner for the Aerospace PERTE (art. 1). Moreover, these functions also conditioned its existence, as when the Spanish Space Agency was set up, the Space Council was dissolved, since its purpose had already been fulfilled (art. 6).[26]

As for its composition, the Space Council was composed of the Commissioner for the Aerospace PERTE (who held the Chair) and designated representatives from several Ministries (acting as Vice-Presidents), as well as a representative of each of the National Intelligence Centre and the Cabinet of the Presidency of the Government (art. 3). The Council operated in Plenary, meeting ordinarily a minimum of four times a year,[27] and its resolutions required a majority vote to be adopted (art. 4). Similarly, there was the possibility of assembling working groups on specific topics, such as the drafting of reports, if deemed fruitful; nevertheless, their proposals were not binding (art. 5).

92 (on the content and effects of the action plan) and 93 (on the content of the statutes, which the Space Council must respect when drawing up both documents in order to fulfil its mission) should also be taken into consideration. The Statute of the Spanish Space Agency was expected to follow the line of those approved for the State Aviation Safety Agency (see Royal Decree 184/2008 of February 8th, approving the Statute of the State Aviation Safety Agency) and the State Meteorology Agency (see Royal Decree 186/2008 of February 8th, approving the Statute of the State Meteorology Agency), among others.

25 Pons Alcoy, 2022a, p. 9.

26 Compliant with art. 96(1)(c) of Act 40/2015, establishing the dissolution of state public bodies when '*their purposes have been completely fulfilled, so that the survival of the public body is not justified, and this has been shown in the effectiveness control*'. Concerning the procedure for dismantling the body, the second section of the aforementioned art. 96 should be consulted. Accordingly, in the same vein as the Special Delegation for the Spanish Space Agency of the Ministry of Science and Innovation, the Space Council ceases to be operational in accordance with the second paragraph of the sole derogatory provision of the Statute of the Agency, whereby '*Royal Decree 452/2022 of June 15th, which creates and regulates the composition and operation of the Space Council, is repealed with effect from the entry into operation of the Spanish Space Agency*'.

27 It may also meet extraordinarily when so decided by the President, on their own initiative or at the request of at least half of its members. The first meeting for its formal constitution took place on July 11th, 2022. See https://www.ciencia.gob.es/Noticias/2022/Julio/El-Consejo-del-Espacio-se-reune-por-primera-vez-para-constituir-formalmente-este-organo-interministerial.html

3. Regulation of the Spanish Space Agency (AEE)

3.1. Characteristics, functions, and aims

After these bodies were instituted to render the Spanish Space Agency operational, Act 17/2022 of September 5th (amending Act 14/2011 of June 1st, on Science, Technology, and Innovation) gave significance to the aforementioned nineteenth line of action of the 2021 National Security Strategy, as it finally authorised the creation of the Spanish Space Agency (AEE),[28] attached to the Ministries of Science and Innovation and Defence.[29] Drawing upon the content of that line of action, which expressed that the AEE should have 'a component dedicated to National Security', it is not unexpected that the Agency is administratively dependent on two Ministries, showcasing a dual affiliation instead of a single one.

This authorisation is foreseen in the third additional provision of the Act, entitling the establishment of the AEE, the first paragraph of which describes its main characteristics and pursuits.

> *In agreement with the provisions of art. 91 of Act 40/2015 of October 1st, on the Legal Regime of the Public Sector, the creation of the State Agency 'Spanish Space Agency' is authorised, with the status of a state agency, attached to the Ministries of Science and Innovation, and Defence, which shall have as its general purposes, among others, the promotion, execution, and development of research, technological development, and innovation in the field of space, national security and defence, operations in the outer space field, satellite applications for the development of departmental competences, as well as the use of data furnished by satellites, and the technological and economic impact of the industry associated with the design, construction, operation, and maintenance of space systems, the strengthening of the national space industry, the state and international coordination of Spanish space policy, in full liaison with the European*

28 By means of this authorisation, the requirement enshrined in art. 91 of Act 40/2015, in relation to the creation of state public bodies by law, is fulfilled. Accordingly, this Act must establish '*the type of public body it creates, with an indication of its general purposes, as well as the Department of dependence or affiliation*', and '*where appropriate, the economic resources, as well as the peculiarities of its personnel, contracting, property, tax, and any others which, due to their nature, require a regulation with the status of law*'.

29 Regarding the Ministry of Defence, it is interesting to note the rechristening of the traditional Spanish Air Force as the new 'Air and Space Force' (through Royal Decree 524/2022 of June 27th, providing for the renaming of the Air Force as the Air and Space Force), therefore recognising the strategic and military importance of outer space to national interests. On this topic, see Díaz Díaz, 2022a.

> *Space Agency and with the space policies and programmes developed within the European Union and the international organisations to which Spain is a member, through the competitive and efficient allocation of public resources, the monitoring of the actions financed and their impact, and advice on the planning of actions or initiatives through which R&D&I policies are implemented in the sphere of competence of the General State Administration.*

Quoting MAYENCE, '*National space agencies are strange animals,*' since, under this terminological umbrella, a diversity of institutional structures can be embodied (ranging from administrative bodies to coordinating interdepartmental offices operating under national government authorities).[30] As for the AEE, its constitution has been conceived in the regulations as a state agency.[31] Following art. 108 *bis*, paragraph one of Act 40/2015 of October 1st, on the Legal Regime of the Public Sector:

> *State agencies are public law entities, endowed with public legal personality, their own assets, and autonomy in their management, empowered to exercise administrative powers, which are created by the Government for the fulfilment of the programmes corresponding to the public policies developed by the General State Administration within the scope of its competences.*

Its designation must necessarily and expressly include the indication of 'State Agency', together with the name it receives. Therefore, as a state agency (and, more generically, as a state public body) the regulations set out in Chapter II 'On State public bodies' of Act 40/2015 must be observed for its creation.

In addition, the third paragraph of the third additional provision of Act 17/2022 prescribes that:

> *The Government shall approve, within a maximum period of one year, the statute of the State Agency 'Spanish Space Agency', which shall ensure the balanced presence of the different ministerial departments with competences in science, innovation, defence, transport, and mobility, geospatial*

30 Mayence, 2023, p. 8.

31 '*In line with the actions identified, and after carrying out a comparative study of the possibilities granted by Act 40/2015 of October 1st, and assessing the potential functions to be assumed by a future Spanish Space Agency, it was decided to opt for the figure of the State Agency*'. See Order TER/947/2022 of October 4th, which publishes the report of the Consultative Commission for the determination of the headquarters of the future Spanish Space Agency and the agreement to open the period for the presentation of candidatures.

information, georeferencing, telecommunications, environmental control, security, industry, agriculture, and fisheries, among others, in its governing bodies.

The relevance of the same stands in art. 108 *ter* of Act 40/2015, the wording of which establishes that state agencies are governed by this same Act (alongside other rules of administrative law) and primarily by their own statutes. Consequently, this provision is significant in that the legislator imposed a one-year term on both the approval of the Statute, for which the Space Council was responsible, and on the Space Council body as such. Ultimately, upon the proposal of the Ministers of Science and Innovation, Defence, and Finance and Public Administration, on March 7th, 2023, Royal Decree 158/2023[32] was published in the Spanish Official State Gazette, approving the Statute of the Spanish Space Agency. It consists of 9 chapters and 43 articles covering the basic rules governing the organisation and operation of the AEE.

Its main purpose is '*to use space for the benefit, knowledge, and security of Spanish society, and to establish, promote, and coordinate all those activities and policies that enable research, technological, and industrial development and innovation in the field of space*' (art. 2(1)). National space agencies serve as the intermediary between public governance and the domestic space sector (including industry, academies, and users), and their key responsibilities are to facilitate the development of high-tech capabilities in relation to space, identify the needs for space products and applications, and coordinate the policy and legal framework for space activities.[33]

With respect to the Agency's objectives, the norm offers a dual-nature classification based on their scope: (a) the general aims (art. 2(2)), that is, those lines of action to be sought within the range of operation of the AEE (transliterating verbatim the content of the third additional provision of Act 17/2022), and (b) the specific aims (art. 2(3)), which seek to concretise these broad guidelines, and are as follows:

a) *To contribute to national security and to support actions to guarantee the security and defence objectives in relation to space set out in the National Security Strategy, the National Aerospace Security Strategy,*[34] *and the National Defence Directive.*

32 The means of publication of the Statute, that is, by Royal Decree, is noteworthy. This administrative figure is designed for the regulatory development of provisions provided for by law, which explains in legal terms the choice of such an instrument, and not any other, in view of the authorization of the establishment of the Agency under the third additional provision of Act 17/2022. Notwithstanding the fact that, in principle, Royal Decrees are restricted exclusively to cases of urgent need in the Spanish legal regime, as the AEE is a government creation, its use has been deemed appropriate. See Harillo Gómez-Pastrana, 2023a, p. 338; Medina Castro, 2023, p. 353.

33 Mayence, 2023, p. 8.

34 The adoption of a National Aerospace Security Strategy was approved by the National Security Council at its meeting of April 12th, 2019 (Order PCI/869/2018 of August 3rd, publishing the

b) *To promote, at European and international levels, the excellence of Spanish space-related science, innovation, and technology.*
c) *To stimulate and boost the national space industrial sector.*
d) *To defend the interests of national users and respond to the demands of public policies in international fora and decision-making groups in the space field.*
e) *To strengthen the necessary coordination to maximise the efficiency and effectiveness of the financial resources available for security, research, innovation, technology, development, industry, and programmes in the space realm.*
f) *To exercise national representation in the various international fora in the space field, providing coherence and supporting the interests of the different departments without prejudice to the rules of the second final provision of the Royal Decree.*
g) *To contribute to the space policies of the international organisations of which Spain is a member.*
h) *To foster and coordinate laboratories and technical establishments dedicated to technological development in the space sector that may be associated with the Agency.*
i) *To advance research in the space domain and ensure the publication of scientific work in this field.*

For the accomplishment of such goals, the AEE has been endowed with a large number of competences (art. 5), including the signing of bilateral or multilateral cooperation agreements, conventions, or other legal instruments with public bodies (e.g. space agencies) or private entities to guide the development of space activity;[35]

Agreement of the National Security Council, approving the procedure for the elaboration of the National Aerospace Security Strategy), and published by Order PCI/489/2019 of April 26th. On the National Aerospace Security Strategy, see González Ferreiro, 2021.

35 Some recent examples from shortly after the Agency became operational are prominent. By way of illustration, the first bilateral agreement of the AEE was the signature of a Memorandum of Understanding (MoU) with the Mexican Space Agency (AEM) for the establishment of a collaborative framework for cooperation in the use and exploration of outer space for peaceful purposes. See https://www.europapress.es/sociedad/noticia-espana-mexico-firman-acuerdo-explorar-espacio-ultraterrestre-fines-pacificos-20230629201316.html. Moreover, Spain's adherence to NASA's Artemis programme on May 30th, 2023, should be underscored, thereby becoming the 25th signatory to the Artemis Accords, which '*establish a practical set of principles to guide space exploration cooperation among nations, including those participating in NASA's Artemis program*'. See https://www.nasa.gov/press-release/nasa-welcomes-spain-as-25th-artemis-accords-signatory. Following this line of thought, HARILLO GÓMEZ-PASTRANA is of the opinion that '*the next logical step would be to sign a MoU with the Luxembourg Space Agency on similar terms as the other countries, bearing in mind that many of the countries that have adhered to the former [i.e., the Artemis Accords] are also signatories to the latter, and this action would come to reinforce the need to act in a coordinated manner in something as relevant in the not too distant future as the use of natural resources in space.*' See Harillo Gómez-Pastrana, 2023c, p. 72.

the elaboration of a National Space Policy proposal; the identification of national objectives and priorities in the outer space environment; the design and coordination of a National Space Strategy[36] for the implementation of the national space policy through the allocation of public resources;[37] the encouragement of public-private partnerships (PPPs) in the space sector;[38] and the elaboration of a domestic space law proposal.

To this effect, the AEE shall observe the general principles governing the action of Spanish public administrations in addition to the principles of autonomy, technical independence, transparency, effectiveness, efficiency, inter-institutional cooperation, and gender equality in the performance of its specific functions (art. 6). In accordance with its first additional provision, the entry into operation of the AEE is scheduled to take place with the constituent session of its Governing Board, which is to be held within a maximum period of three months from the entry into force of the Statute (i.e. the day after its publication in the Spanish Official State Gazette).[39]

3.2. Headquarters

Prior to the set up of the AEE, the determination of its headquarters was judged to be an overriding condition, considering that the locality housing it might constrain

36 As mandated by the third additional provision, fifth paragraph of Act 17/2022.

37 Both the proposal and the implementation of a national space policy, together with national and international representation, have been highlighted as core tasks of space agencies. See ESPI, 2019b, pp. 18–20.

38 Public-Private Partnerships (PPPs) are a commonly used mechanism for formalising relations between private actors and the public sector. It is primarily employed in the provision of operational public infrastructure, in which the initial investment is borne by the private sector, which earns a return on the investment through the public authority's long-term engagement to operate the system on a large scale to satisfy its own needs. PPP models place the responsibility of up-front funding on the private partner, along with the burden of technological risk, as ownership of the infrastructure remains with the latter. In exchange, the public sector's compromises substantially mitigate the commercial drawbacks, and the industry is afforded wider autonomy in the design and execution of the programme than under a traditional public procurement scheme. See Vernile, 2018, p. 9. However, there is a troublesome context surrounding this figure in the Spanish legal system, since Act 9/2017 of November 8th, on Public Sector Contracts, transposing into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU of February 26th, 2014, abolished public-private partnership contracts (introduced by Act 30/2007 of October 30th, on Public Sector Contracts (art. 11)) on the grounds of an apparent lack of practical usefulness (preamble (IV)), given that their purpose can be achieved through other contractual modalities, namely the concession contract. On this matter, see Medina Castro, 2023, pp. 364–365.

39 This session was held on April 20th, 2023, chaired by the AEE's President, Diana Morant. See https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/ciencia-e-innovacion/Paginas/2023/200423-morant-agencia-espacial-europea.aspx

some of its final characteristics,[40] justifying the urgent processing of the procedure.[41] For this purpose, the third additional provision of Act 17/2022, paragraph four, specifies that:

> *Pursuant to Royal Decree 209/2022 of March 22nd, which establishes the procedure for determining the physical headquarters of the entities belonging to the state institutional public sector and creates the Consultative Commission for the determination of headquarters, the choice of headquarters will be made following a transparent, open, and competitive procedure.*

In the course of developing this norm, the Ministry of the Presidency, Relations with Parliament, and Democratic Memory approved the following orders, publishing a series of Agreements during the months of October to December 2022, aimed at establishing the procedure for determining the physical headquarters of the AEE:

- Order PCM/945/2022 of October 3rd, publishing the Agreement initiating the procedure for determining the physical headquarters of the Spanish Space Agency.
- Order TER/947/2022 of October 4th, publishing the report of the Consultative Commission for the determination of the headquarters of the future Spanish Space Agency and the Agreement to open the period for the presentation of candidatures.
- Order PCM/1202/2022 of December 5th, publishing the Agreement of the Council of Ministers of December 5th, 2022, which determines the physical headquarters of the future Spanish Space Agency.

40 Order PCM/945/2022 of October 3rd, which publishes the Agreement initiating the procedure for determining the physical headquarters of the Spanish Space Agency; preamble. For instance, the ultimate decision to make Seville the headquarters of the AEE has been troublesome in terms of workforce, due to the fact that, despite being a brand new state entity, its structure relies on the integration of staff coming from other official institutions and departments in existence for decades, who reside together with their families in the city of Madrid (or its surroundings), where the official bodies, institutions, and academic and research centres bound to the national space sector are clustered. Consequently, the decentralization pursued by the Government has proved to be a conflictive process, since many of those who were offered positions within the Agency have rejected the relocation for this very reason. See Martín, 2024; Harillo Gómez-Pastrana, 2023a, p. 339; Pons Alcoy, 2022b, p. 11; etc.

41 Declared on the basis of art. 6(9) of Royal Decree 209/2022, it is accounted for as follows: '*In addition, the Spanish Space Agency will have as one of its objectives the management of the space programmes included in the Aerospace PERTE. Given that the deadlines for the implementation of this recovery programme are very short for the complexity of space projects, it is important that the Agency be operational in the shortest possible time, justifying the urgent procedure for choosing its headquarters*'. See *ibid*.

As declared in the fourth section, last paragraph, of the third additional provision of Act 17/2022, the first administrative step towards determining the physical headquarters of the AEE was to initiate the procedure by means of an Agreement of the Council of Ministers, in line with art. 6(1) of Royal Decree 209/2022.[42] In the present case, the adoption of the Agreement took place at the meeting of the Council of Ministers on September 27th, 2022, and was subsequently published in the Official State Gazette by Order PCM/945/2022 on October 3rd.

Following art. 6(2) of Royal Decree 209/2022, the Consultative Commission[43] was given a one-month period after receiving the Agreement to prepare a report containing the list of criteria to be considered to designate the physical location of the AEE (art. 3(2)(b) of Royal Decree 209/2022). As a result, at its meeting on September 29th, 2022, the Commission approved the report, which was communicated to the Council of Ministers at its meeting on October 4th, 2022, and published in Order TER/947/2022. The means for presenting candidatures were indicated in the latter, which had to be accompanied by a justification report and a briefing reflecting the level of compliance with the criteria established in the Commission's report (art. 6(4) of Royal Decree 209/2022). A period of one month was set from the publication of Order TER/947/2022, and by the deadline of November 7th, 2022, 21 applications were received.

The results were published in Order PCM/1202/2022 once the Council of Ministers had assessed the opinion submitted by the Consultative Commission with its recommendation.[44] Thus, by means of an Agreement of the Council of Ministers, approved at its meeting of December 5th, 2022,[45] Seville was designated the physical headquarters of the AEE (by considering it to be the one that best met the requirements requested), and has hereby been recorded in the fourth paragraph of art. 1 of the Statute.

42 It should be added that this norm enables the possibility of agreeing to initiate the procedure prior to the creation of the Agency. Nevertheless, to achieve this, it requires the Agreement instituting the proceeding to be complemented by a report stating the nature, functions, and number of employees, as well as other aspects considered pertinent to the choice of headquarters.

43 This Commission, affiliated to the Ministry of Territorial Policy, was the body that assisted the Council of Ministers in the process of choosing the headquarters. Chaired by the then Minister of Territorial Policy, Isabel Rodríguez, its members included representatives of the various Ministries. See https://www.ciencia.gob.es/Noticias/2022/Diciembre/El-Gobierno-acuerda-la-sede-de-la-Agencia-Espacial-Espanola-en-Sevilla.html

44 Despite the fact that art. 6(7) of Royal Decree 209/2022 foresees that the Consultative Commission's opinion '*may take into consideration localities which have not been nominated but which meet the criteria*', it was the decision of the Commission not to assess other localities, and to limit itself to evaluating only the candidatures submitted for this purpose.

45 In this respect, the maximum period of six months for adopting the Agreement on the determination of the Agency's physical seat was met, counting from the date of the Agreement to initiate the procedure (art. 6(8) of Royal Decree 209/2022).

3.3. Organic structure

The organic structure of the AEE is set forth in Chapter IV of the Statute (arts. 7–22) and is divided into five sections encompassing the several bodies that compose the Agency. This structure must be considered under the premise that all the departments and Ministries competent in space-related matters in Spain are involved to some extent. Some of these are self-evident, such as the two Ministries to which the AEE is ascribed (Science and Innovation, and Defence), whereas others are incorporated in certain aspects touching on space activities, including environmental issues, air traffic impact, and those directly linked to industry, economy, and tax aspects.[46]

3.3.1. Governing bodies: The Presidency and the Governing Board

According to art. 7 of the Statute, the two bodies entrusted with the governance and direction of the AEE are the Presidency and the Governing Board.[47]

The Presidency (art. 8) is taken over by the Minister of Science and Innovation, who becomes the highest institutional and legal representative of the AEE, together with the Chairperson of the Governing Board (arts. 9 and 10) (the collegiate governing body of the AEE[48]), with the command to oversee the fulfilment of its objectives, purposes, and functions. Other duties of the President consist mainly of convening meetings of the Governing Board; concluding collaboration agreements, MoUs, or any other legal instruments that may generate commitments and obligations for the AEE; seeking authorisation for any necessary budgetary variations; and proposing to the Governing Board, on the one hand, candidates for the position of Director of the AEE (subject to a report from the Minister of Defence), and, on the other hand, the appointment of members of the Supervisory Commission and of the Committees supporting the Directorates.

The Governing Board is composed of the AEE President, in addition to some vice-presidents and vocals coming from the diverse Ministries and appointed by the Presidency. Furthermore, the AEE's Director, a person representing the Presidency of the Government, the Director of the Department of National Security, and the Director-General of INTA serve as spokespersons. Four individuals with speaking but non-voting status are also present: one of recognised prestige from the scientific-technical field, one representative of the national space industry sector, another of

46 Harillo Gómez-Pastrana, 2023a, p. 345.

47 In accordance with art. 90 of Act 40/2015, the highest governing bodies of public entities are the Presidency and the Governing Board; however, the relevant statute may provide otherwise.

48 The Governing Board shall meet at least every six months, but may hold extraordinary meetings by decision of the Presidency or at the request of at least half of its members.

the workers, and the AEE Secretary-General. Their terms of office run for a two-year period, with the possibility of a one-time reappointment.

Among its main responsibilities, the Governing Board supervises and controls the AEE's actions, advises the Council of Ministers on the formulation of the National Space Policy, submits the National Space Strategy for approval by the Council of Ministers (through the Ministries of Science and Innovation, and Defence), controls the management of the AEE's Director, and demands appropriate responsibilities, as well as other budgetary and operational matters. In cases where the Board's decisions may have certain implications, a series of conditions will be required: for instance, where security and defence are affected, both a report from the Directorate of Security and Planning and the favourable vote of the persons representing the Ministry of Defence and the Department of National Security of the Presidency of the Government on the Governing Board will be mandatory, and for those concerning operational satellite navigation services for which the Ministry of Transport, Mobility, and Urban Agenda is responsible, the favourable vote of the person standing in for that Ministry on the Governing Board will be requested.

3.3.2. Supervisory and Permanent Committees

The Supervisory Committee (art. 12) is integrated by four members of the Governing Board appointed by the latter at the proposal of the Presidency. Its principal functions encompass reporting to the Governing Board on the execution of the budget; submitting to the latter reports of an economic-financial, budgetary, or accounting nature for consideration or approval; to acknowledge the important information the Agency is required to prepare and submit it to the competent bodies in compliance with the legislation in force; and analysing the results of the evaluation and monitoring actions carried out by any of the control bodies of the AEE, as well as proposing the corrections it deems necessary.

The Permanent Committee (art. 13) is in charge of preparing meetings of the Governing Board and supporting it in several of its duties, namely control tasks and the preparation of proposals and policies. Additionally, it forwards information on the AEE's action plans and strategic and operational objectives (among them, the criteria and procedures for the efficient control of their fulfilment), assesses the information prepared by the Supervisory Committee regarding the AEE's internal procedures and economic-financial management, and prepares and proposes to the Governing Board the AEE's information and communication plan. This Committee consists of the Director of the AEE and a representative of each of the corresponding Ministries, who are also joined by a representative of the National Intelligence Centre, the Cabinet of the Presidency of the Government, and INTA.

Both Committees shall meet at least once every two months and extraordinarily whenever deemed appropriate by the Chairperson or at the request of the Governing Body.

3.3.3. The executive body: The Directorate

The Directorate (art. 14) is the highest executive body in the AEE.[49] To choose the person serving as the AEE's Director,[50] the President of the AEE is asked to submit to the Governing Council (which is in charge of appointing the Director) up to three candidacies for such a position, whose selection is entrusted upon an ad hoc Selection Committee convened by the President and integrated by six persons of recognised national or international prestige covering the areas of public management, science, and innovation ecosystem, national security and defence, human resources, space industry sector, and international relations.

The Director is expected to possess prestige and experience in the management of organisations with competence in the space field and in relations with international organisations and space policy, as well as familiarity with the national space technological and industrial framework and acquaintance with ESA and European organisations competent in the field of space, among others. The term of service is five years and is extendable for an additional period of two years. Considering that this is an executive position, its major role is to lead, coordinate, and manage the AEE and to perform key duties such as executing the AEE's budget and other related budgetary management (including, but not limited to, expenditure and payment arrangements). The Director also exercises, upon delegation of the Presidency, the institutional and legal representation of the AEE, and designates a representative of the AEE to the National Aerospace Security Council.[51]

49 Pursuant to art. 17, the Directorate shall have a Support Unit, a technical assistance body intended for advising the Director of the AEE on international affairs in liaison with the competent Ministry, and for aiding the Director in the compilation of the inputs from the Agency's directorates for the preparation of the draft space law proposal and of the annual budgets.

50 As per the first transitory provision of the Statute, '*Until the Director of the Spanish Space Agency is appointed in accordance with the provisions of art. 14 of the Statute, this position will be held temporarily by the Commissioner for the Aerospace PERTE*'.

51 The 2017 National Security Strategy listed ensuring the security of outer space as one of its goals, and, to this end, prescribed the constitution of a National Aerospace Security Council. This was carried out by means of Order PCM/218/2020 of March 13th, which publishes the Agreement of the National Security Council creating and regulating the National Aerospace Security Council. With regard to its legal nature, it is provided that the National Aerospace Security Council is a support body to the National Security Council, as per art. 20(3) of Act 36/2015 of September 28th, on National Security.

3.3.4. Advisory bodies

The advisory bodies (arts. 15 and 16) consist of three support committees (collegiate advisory and consultative bodies of a permanent nature) belonging to the Directorates of Programmes and Industry; Science, Technology, and Innovation; and Users, Services, and Applications. In particular, the first is entrusted to the Committee for Coordination with Autonomous Communities, whose purpose is to analyse, propose, and bring together strategies and programmes at the international level with space policies of an inter-territorial dimension. The second assigned body is the Science and Technology Committee, whose role, as its name indicates, is to evaluate, counsel, and suggest actions related to Spain's scientific and technological space needs. Finally, the third incorporates the Space Technology Users and New Applications Committee, which is tasked with providing advisory services and gathering and proposing measures to meet the needs and requirements of users, both in the public and private sectors, in connection with space missions to be identified within the AEE's purview.

Every Committee is composed of 12 members (one of whom shall be elected Chairperson via the internal rules of procedure) appointed by the Governing Board, at the proposal of the AEE's President, out of experts of renowned national standing or with expertise in the respective subject matter. Their term of office lasts for five years, with one-third being renewed biannually. The Committees shall meet regularly every four months and on an extraordinary basis whenever the head of the Directorate of Assignment deems it suitable.

3.3.5. Organisational structure

In terms of its organisational structure, art. 17 of the Statute determines that the AEE operates through the following bodies:[52]

52 As of June 21st, 2023, the Governing Board approved the appointment of these individuals to take over these organs: Juan Carlos Sánchez (Brigadier General and advisor to the Second Air and Space Chief of Staff) was appointed Director of Security and Planning; Juan Carlos Cortés (Director of Space, Large Scientific Facilities, and Dual Programmes at CDTI) is the new Director of Programmes and Industry; Isabel Pérez (Deputy Director of Research, and PhD studies at ETSI Aeronautics and Space) was designated Director of Science, Technology, and Innovation; Nicolás Martín (advisor to the EU's Space Programme Committee) was named Director of Users, Services, and Applications; Julio Cárabe (Research Professor at the Centre for Energy, Environmental, and Technological Research (CIEMAT) in the Commission for the Aerospace PERTE) was elected Secretary General; and Eva Villaver (researcher at the INTA-CSIC Astrobiology Centre) was nominated Director of the Space and Society Office. See La Vanguardia, 2023; https://www.aee.gob.es/en/AgenciaEspacial/MisionOrganizacion/EquipoDirectivo.html

a) Directorate of Security and Planning (art. 18). Its primary responsibilities can be categorised into two main areas: (a) the implementation of space security strategies, at both national and international levels (i.e. EU[53] and NATO[54]), for which it supports the attainment of the objectives set out along their lines, harmonises the proposals of the different Directorates, including its own, for the preparation of the National Space Strategy, and integrates the plans of the Directorates within the framework of these strategies; and (b) ensuring the safety and sustainability of space assets, through their certification, monitoring of Space Surveillance and Tracking (SST) and Space Situational Awareness (SSA) activities, guaranteeing the reliable and safe conduct of space traffic, overseeing cybersecurity and the shielding of information from threats and risks, safeguarding the environmental sustainability of space activities, and establishing civil liability requirements for space operations, particularly insurance coverage and its supervision.
b) Directorate of Programmes and Industry (art. 19). It aims to monitor and administer national space-related programmes (i.e. the coordination of a National Space Programme) and the proper use of funding for their development, as well as the management of Spain's participation in international or multilateral space programmes belonging to organisations such as ESA. In addition, it promotes private and public investment in the space sector for the furtherance of national interests through the creation and fundraising of startups.
c) Directorate of Science, Technology, and Innovation (art. 20). Being responsible for R&D and technological advances across the entire space sector, this department is dedicated to the promotion and development of space technologies and scientific research in the space domain. To this end, it cooperates with universities and other public research institutions to foster the commercial exploitation of those technologies they have developed, and supports enterprises (especially SMEs) via programmes to boost innovation in the Spanish space industry, as well as to promote their collaboration with the above-mentioned organisations. It also coordinates ESA's scientific and technological development programmes, and encourages Spanish participation in international space science and technology cooperation projects.

53 On the EU Space Strategy for Security and Defence (whose proposal was brought forth jointly by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, Josep Borrell, on March 10th, 2023), see Almenar Rodríguez, 2023.

54 In 2019, NATO not only acknowledged outer space as a new operational domain (along with air, land, maritime, and cyberspace) (see Pons Alcoy, 2021), but also adopted an overarching Space Policy aimed at guiding NATO's approach to outer space, which can be accessed through the following link: https://www.nato.int/cps/en/natohq/official_texts_190862.htm

d) Directorate of Users, Services and Applications (art. 21), whose mission is the advancement and deployment of emerging technologies conducive to 'New Space'[55] applications (namely space tourism, orbital services, and space mining), both for public and private users, for which it shall coordinate between them in order to promote the use of these space applications in the two domains. Additionally, it enhances the development of the downstream[56] space industry and fosters the dual use of space and the utilisation of satellite services by enabling the creation of applications in different fields, such as navigation and data mining.
e) General Secretariat (art. 22), whose core competences are threefold. First, it is in charge of the management and administration of human resources, including the selection of staff, together with the planning and implementation of the occupational risk prevention policy. Second, it handles the AEE's accounting and budgetary management, the collection and payment of receipts, and the administration of the AEE's treasury. Third, from a legal perspective, it conducts the investigation of disciplinary proceedings within the scope of the AEE's competences, provides legal advice to the Directorate and its organisation for the exercise of said competences, and coordinates the AEE's stance in the field of space law.
f) Space and Society Bureau, which promotes public interest and awareness in outer space and the AEE's own projects through outreach campaigns.

4. Concluding remarks

These major institutional advances in space matters are a positive indication that Spain is finally progressing towards becoming a benchmark country in the space sector. On the one hand, the creation of the Space Council proved to be the definitive impetus needed to initiate the necessary actions to set up the Spanish Space Agency. In the words of DÍAZ DÍAZ, '*this initiative is of enormous importance for the Spanish*

55 'New Space' has been described as '*a disruptive sectorial dynamic featuring various end-to-end efficiency-driven concepts driving the space sector towards a more business- and service-oriented step*'. See ESPI, 2019a, p. 4. It has been suggested that the future of this momentum in the 'New Space' nascent ecosystem rests heavily on the implementation and success of new public policy. Most agencies are adjusting their strategies, approaches, and interaction methods with the private sector in order to adapt to and encourage the advent of private efforts, to establish new types of partnerships, and, to some degree, to redefine their role. This new environment allows for the sharing of costs and risks between the private and public sectors, potentially alleviating the financial burden on the public player. See ESPI, 2019b, p. 1.

56 That is, end-user services and applications, including the launcher and operations segments. See Royal Decree 158/2023, preamble (I).

space sector, since it continues the demands made by the industry, and, in our opinion, will position Spain among the countries with an organisation capable of better managing space activity'.[57] On a personal note, I believe that the creation of the Space Council was indeed a significant step forward for the Spanish sector, as it finally materialised the desire to establish the Spanish Space Agency, which had been expressed since March 2021, through a specialised body conceived for the sole purpose of drawing up and approving the Statute of the newborn Agency.

The importance of the creation of the Spanish Space Agency has not been contested. Neighbouring nations with similar space capabilities have national agencies that are responsible for coordinating space activities at the domestic level. Thus, with this measure, Spain will finally be able to reach parity with them through a public body of a similar nature to theirs, which will bring together all the space competences currently distributed among different Ministries in order to unify Spain's representativeness and voice in the sector. The rationale behind the creation of the AEE is mainly due to administrative efficiency and international visibility, as Álvaro Giménez Cañete, former Special Delegate for the Spanish Space Agency of the Government and current advisor to the entity, has pointed out:

> *Spain needed to consolidate its position at the international level in the space field, and this required a single voice and a sole image to advocate for us. The European Space Agency, the European Commission, NASA or any other organisation demanded an interlocutor in Spain, and there was none. They had to go and talk to one Ministry or another depending on the subject. This is why it was crucial for us to constitute it.*[58]

In conclusion, the value added by national space agencies is manifold, ranging from raising the visibility of national investments in outer space to regulating space operations by, for instance, implementing a national space law. For this reason, the role to be played by the AEE in the proposal and drafting of a space regulatory framework in Spain is paramount in order to foster a national space industrial network supporting 'New Space' initiatives and to attract both domestic and foreign investment, thereby enabling the emergence of a new Spanish industrial ecosystem in the field of space applications.

Having reviewed the achievements on space matters to date, it is worth making a final observation on such shortcomings as those that still exist in terms of the domestic regulation of the sector. The 2021 National Security Strategy placed special emphasis on the absence of national regulation of space activities, which not only

57 Díaz Díaz, 2022a, p. 15; Díaz Díaz, 2022b.
58 Martín, 2024.

favours the irregular nature of activities conducted in outer space but also hinders the protection of certain strategic assets. Therefore, now that the Agency has become operational, the next step must necessarily be the enactment of a Spanish law on space activities, as included in the AEE's remit. This is imperative for the Spanish space sector, which has demonstrated its great potential on countless occasions and accordingly deserves the protection the Spanish legislator may provide.

Bibliography

- Almenar Rodríguez, R. (2023) 'Una mirada estratégica al espacio ultraterrestre: a propósito de la Estrategia espacial de la Unión Europea para la seguridad y la defensa,' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 10, March 2023, pp. 51-61 [Online]. Available at: https://aedae-aeroespacial.org/boletin-10-marzo-2023/ (Accessed: September 28th, 2023).
- De Faramiñán Gilbert, J. M. (2022) 'Spain's Challenges in the Aerospace Field: Towards the Creation of a Spanish Space Agency and the Adoption of a Global Space Law,' *Air & Space Law*, 47(1), pp. 93-110 [Online]. Available at: https://kluwerlawonline.com/journalIssue/Air+and+Space+Law/47.1/20021 (Accessed: September 28th, 2023).
- Díaz Díaz, E. and Chaves Sánchez, E. (2023) 'El derecho nacional del espacio a examen: comparativa regulatoria de España e Italia,' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 12, October 2023, pp. 37-58 [Online]. Available at: https://aedae-aeroespacial.org/boletin-12-octubre-2023/ (Accessed: April 5th, 2024).
- Díaz Díaz, E. (2022) 'Iniciativas espaciales en España: Consejo del Espacio y Ejército del Aire y del Espacio,' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 7, July 2022, pp. 14-18 [Online]. Available at: https://aedae-aeroespacial.org/boletin-7-julio-2022/ (Accessed: December 15th, 2022).
- Díaz Díaz, E. (2022) *Oportunidades para el desarrollo de la industria espacial tras la creación del Consejo del Espacio* [Online]. Available at: https://elderecho.com/oportunidades-para-el-desarrollo-de-la-industria-espacial-tras-la-creacion-del-consejo-del-espacio (Accessed: December 15th, 2022).
- European Space Policy Institute (ESPI) (2019) *Executive Summary – Commercial Space Exploration: Potential contributions of private actors to space exploration programmes* [Online]. Available at: https://www.espi.or.at/wp-content/uploads/2022/06/ESPI-Executive-Summary-Commercial-space-exploration-1.pdf (Accessed: April 5th, 2024).
- European Space Policy Institute (ESPI) (2019) *ESPI Report 70 – Evolution of the Role of Space Agencies – Full Report* [Online]. Available at: https://www.espi.or.at/wp-content/uploads/2022/06/ESPI-Public-Report-70-Evolution-of-the-Role-of-Space-Agencies-Full-Report.pdf (Accessed: April 5th, 2024).
- Giménez, S. and Malet, L. (2023), *Spain – getting ready for the next steps in space exploration* [Online]. Available at: https://www.ibanet.org/spain-getting-ready-for-the-next-steps-in-space-exploration?sap-outbound-id=8A0C7F6496ADC805F28515AAB6BAE9F01353D9A3&utm_source=SAPHybris&utm_medium=email&utm_campaign=4101&utm_term=Space%20Law%20ebulletin%20Sep%2023___Spain%20%26ndash%3B%20getting%20ready%20for%20the%20next%20steps%20in%20space%20exploration&utm_content=EN (Accessed: September 29th, 2023).

- González Ferreiro, E. C. (2023) 'Principales ítems que debería incluir la Ley espacial española,' *Revista Española de Derecho Aeronáutico y Espacial*, 2023/3, pp. 371-421 [Online]. Available at: https://aedae-aeroespacial.org/wp-content/uploads/2024/01/R.E.D.A.E._2023_COLOR_OK_compressed-3.pdf (Accessed: April 5th, 2024).
- González Ferreiro, E. C. (2021) 'La regulación de las actividades espaciales como estrategia de seguridad y crecimiento nacional,' *Cuadernos de estrategia*, 208, pp. 213-294 [Online]. Available at: https://www.ieee.es/Galerias/fichero/cuadernos/CE_208_LosRetosDelEspacioExterior.pdf (Accessed: December 16th, 2022).
- González Ferreiro, E. C. (2019) 'Necesidad de una ley espacial española' [Online]. Available at: https://www.hispaviacion.es/necesidad-una-ley-espacial-espanola/ (Accessed: April 5th, 2024).
- Guerrero, T. (2021) 'El Gobierno anuncia por sorpresa la creación de una Agencia Espacial Española que Duque había descartado' [Online]. Available at: https://www.elmundo.es/ciencia-y-salud/ciencia/2021/05/27/60afd71cfdddfff39b8b45da.html (Accessed: December 16th, 2022).
- Harillo Gómez-Pastrana, R. (2023) 'Aproximación al Estatuto de la Agencia Espacial Española,' *Revista Española de Derecho Aeronáutico y Espacial*, 2023/3, pp. 334-350 [Online]. Available at: https://aedae-aeroespacial.org/wp-content/uploads/2024/01/R.E.D.A.E._2023_COLOR_OK_compressed-3.pdf (Accessed: April 5th, 2024).
- Harillo Gómez-Pastrana, R. (2023) 'Algunas consideraciones legales a tener en cuenta en los nuevos desarrollos de legislación espacial nacional (II),' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 13, December 2023, pp. 22-25 [Online]. Available at: https://aedae-aeroespacial.org/boletin-13-diciembre-2023/ (Accessed: April 5th, 2024).
- Harillo Gómez-Pastrana, R. (2023) 'Relaciones internacionales y las agencias espaciales: una muestra,' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 11, June 2023, pp. 68-72 [Online]. Available at: https://aedae-aeroespacial.org/boletin-11-junio-2023/ (Accessed: April 4th, 2024).
- Harillo Gómez-Pastrana, R. (2022) 'Algunas consideraciones legales a tener en cuenta en los nuevos desarrollos de legislación espacial nacional,' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 8, October 2022, pp. 14-19 [Online]. Available at: https://aedae-aeroespacial.org/boletin-8-octubre-2022/ (Accessed: April 5th, 2024).
- La Vanguardia (2023) *La Agencia Espacial Española ya tiene equipo directivo* [Online]. Available at: https://www.lavanguardia.com/vida/20230621/9058072/agencia-espacial-espanola-equipo-directivo.html (Accessed: September 28th, 2023).
- La Vanguardia (2015) *El Gobierno prepara una agencia espacial española que aúne las competencias* [Online]. Available at: https://www.lavanguardia.com/vida/20150612/54432792403/el-gobierno-prepara-una-agencia-espacial-espanola-que-aune-las-competencias.html (Accessed: December 16th, 2022).

- Martín, N. (2024) *El año uno de la Agencia Espacial Española: "En el espacio no hay paro, aquí falta gente"* [Online]. Available at: https://www.elindependiente.com/futuro/2024/02/21/el-ano-uno-de-la-agencia-espacial-espanola-en-el-espacio-no-hay-paro-aqui-falta-gente/ (Accessed: April 5th, 2024).
- Mayence, J.-F. (2023) 'A National Space Agency: what for?,' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 10, March 2023, pp. 8-12 [Online]. Available at: https://aedae-aeroespacial.org/boletin-10-marzo-2023/ (Accessed: April 5th, 2024).
- Mayo Muñiz, L. (2014) 'Cooperación internacional,' *Cuadernos de estrategia*, 170, pp. 93-118 [Online]. Available at: https://www.ieee.es/Galerias/fichero/cuadernos/Cuaderno_Estrategia_170.pdf (Accessed: December 14th, 2022).
- Medina Castro, J. (2023) 'La perspectiva administrativa del Estatuto de la Agencia Espacial Española,' *Revista Española de Derecho Aeronáutico y Espacial*, 2023/3, pp. 351-369 [Online]. Available at: https://aedae-aeroespacial.org/wp-content/uploads/2024/01/R.E.D.A.E._2023_COLOR_OK_compressed-3.pdf (Accessed: April 5th, 2024).
- Moro Aguilar, R. (2021) 'Necesidad de una legislación en materia espacial para el cumplimiento de nuestras obligaciones internacionales,' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 4, December 2021, pp. 23-24 [Online]. Available at: https://aedae-aeroespacial.org/wp-content/uploads/2022/01/Boletin-4.pdf (Accessed: April 5th, 2024).
- Muñoz Rodríguez, M.-C. (2015) 'Spain: Towards a National Space Legislation and a Spanish Space Agency?,' *Proceedings of the International Institute of Space Law*, 2015/58, pp. 587-599.
- Piris Cuiza, A. (2023) *Best practices and lessons learned from European space-faring nations in the development of a regulatory framework for activities in outer space in Spain* [Online]. Available at: https://dl.iafastro.directory/event/IAC-2023/paper/79649/ (Accessed: April 5th, 2024).
- Pons Alcoy, J. A. (2022) 'El proceso de creación de la Agencia Espacial Española cambia del paso lento al paso ligero,' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 7, July 2022, pp. 9-13 [Online]. Available at: https://aedae-aeroespacial.org/boletin-7-julio-2022/ (Accessed: December 14th, 2022).
- Pons Alcoy, J. A. (2022) 'Demasiados "novios" cortejan la futura sede de la Agencia Espacial Española,' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 8, October 2022, pp. 9-13 [Online]. Available at: https://aedae-aeroespacial.org/boletin-8-octubre-2022/ (Accessed: April 5th, 2024).
- Pons Alcoy, J. A. (2021) 'La OTAN incorpora el espacio ultraterrestre a su defensa,' *Revista Española de Derecho Aeronáutico y Espacial*, 2021/1, pp. 251-254 [Online]. Available at: https://aedae-aeroespacial.org/wp-content/uploads/2021/10/Revista-AEDAE-2021.pdf (Accessed: April 5th, 2024).

- Sánchez Mayorga, J. (2021) 'Reflexiones para la creación de una agencia espacial española,' *Observatorio Jurídico Aeroespacial*, Newsletter Nº 2, July 2021, pp. 7-8 [Online]. Available at: https://aedae-aeroespacial.org/wp-content/uploads/2021/08/BOLETIN-2-julio-OBSERVATORIO-JURIDICO-AEROESPACIAL-FINAL-28-JULIO.pdf (Accessed: April 5th, 2024).
- Vernile, A. (2018) *The Rise of Private Actors in the Space Sector*. Cham: Springer; https://doi.org/10.1007/978-3-319-73802-4
- Zafra Riascos, M. (2017) 'Posible arquitectura de la Seguridad Aeroespacial Nacional,' *Cuadernos de estrategia*, 192, pp. 147-184 [Online]. Available at: https://www.ieee.es/Galerias/fichero/cuadernos/CE_192.pdf (Accessed: December 14th, 2022).

Tomasz BOJANOWSKI*

Considerations Regarding the Model of Polish Preparatory Proceedings

ABSTRACT: *The subject of this article is the analysis of selected issues of the Polish model of preparatory proceedings. The author begins his considerations by highlighting historical and model issues, whereafter he discusses the goals of preparatory proceedings resulting from the Code of Criminal Procedure 1997. The next segment analysed is the forms and phases of preparatory proceedings. Further on, the article discusses the prosecutor's supervision of preparatory proceedings and the role of the judicial factor in this phase of preparatory proceedings. The last substantive subsection deals with the options for the termination of preparatory proceedings. It concludes with a final assessment of the model—divided into its advantages and disadvantages. In addition, the author derives de lege fereneda conclusions, which would contribute to the improvement of the current model of Polish preparatory proceedings.*
KEYWORDS: *criminal proceedings, criminal trial, preparatory proceedings, preparatory model, model of criminal procedure*

1. Introduction

Criminal proceedings can be defined as legally regulated activities aimed at implementing the norms of substantive criminal law.[1] The activity in question is regulated by the provisions of criminal procedural (formal) law, which shape the model of this procedure. An indispensable element of the criminal process is its stages. Simply put, it consists of individual stages (stages) that have characteristic features and specific actions (including procedural actions) taken in them.[2] It should be noted that the legislator is free to regulate the various stages of criminal procedure.

1 Grzegorczyk and Tylman 2022 p. 56.
2 Bojanowski 2023, p. 50.

* Ph.D. Candidate at Cardinal Stefan Wyszynski University in Warsaw, ORCID: 0000-0001-8294-0968.

https://doi.org/10.62733/2023.2.57-72

The subject of this article will be a discussion of selected issues of the Polish model of preparatory proceedings. At this point, it is noteworthy that not every modern system of criminal procedural law provides for this stage of proceedings (e.g., Anglo-Saxon[3]). As a rule, it is characteristic of continental systems. By way of exception, it may be limited, even in the realities of the continental system, for example, in a simplified procedure. This stage does not occur at all in proceedings initiated by private prosecution.[4] Nevertheless, it must be regarded as an indispensable element of criminal procedure, the purpose of which is to prepare a specific case before the stage of the judicial proceedings.

The pre-trial model should be defined as a set of basic elements of a specific system that allows it to be distinguished from others.[5] It must consider the many needs of the universally understood justice system (often in conflict with each other) as well as the reconciliation of social interests with the goods and values it is supposed to protect.[6] Ultimately, the model should be constructed in such a way as to provide tools to effectively detect and bring to justice the perpetrators of crimes, while guaranteeing suspects legitimate rights (procedural guarantees).[7]

In Poland, as a rule, criminal and preparatory proceedings are regulated by the Code of Criminal Procedure (CCP) of 1997.[8] It is worth mentioning here that earlier in Poland, there were two comprehensive penal procedures: the CCP of 1928[9] and the CCP of 1969[10]. Owing to the outlined subject of the article, that is, the model of the current preparatory proceedings, historical issues will not be analysed.[11]

It is worth mentioning that apart from the CCP, criminal procedural issues (related to preparatory proceedings) are also regulated by other legal acts, including: the Penal Fiscal Code Act[12]; the Act on the Liability of Collective Entities for Acts Prohibited under Penalty[13]; the Law on the Supreme Court[14]; the Law on Ordinary Courts Organisation[15];

3 Eichstaedt, 2009, p. 14.
4 Kruszyński 2004, p. 309.
5 Waltoś 1968, p. 9.
6 Grzegorczyk and Tylman 2022 p. 56; Wielec, 2017, pp. 149–277.
7 Grzeszczyk 1981 p. 3.
8 Act of 6 June 1997 – Code of Criminal Procedure, Journal of Laws 2022, item 1375, as amended.
9 Ordinance of the President of the Republic of 19 March 1928 Code of Criminal Procedure, Journal of Laws 1928 no. 33 item 313.
10 Law of 19 April 1969 Code of Criminal Procedure, Journal of Laws 1969 no. 13 item 96.
11 Eichstaedt, 2009, pp. 58-87.
12 Law of 10 September 1999 Penal Fiscal Code, Journal of Laws 2023, item 654.
13 Act of 28 October 2002 on the liability of collective entities for acts prohibited under penalty, Journal of Laws 2023, item 659.
14 Act of 8 December 2017 on the Supreme Court, Journal of Laws 2023, item 1093.
15 Act of 27 July 2001 Law on the System of Common Courts, Journal of Laws 2023 tem. 217, as amended.

the Law on the Public Prosecutor's Office[16]; the Police Act[17]; the Law on the Bar[18]; the Law on Legal Advisers[19]; the Act on the Internal Security Agency and the Foreign Intelligence Agency[20]; the law on the Central Anti-Corruption Bureau[21]; the Border Guard Act[22]; the Act on the Commissioner for Human Rights[23]; the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation[24]; the Act on the Recognition of Invalidity of Judgments Issued against Persons Repressed for Activities for the Independent Existence of the Polish State[25]; the Drug Abuse Act[26]; the Crown Witness Act [27]; and the Prison Service Act[28].

It should be pointed out that this is not a closed catalogue, but the indicated acts may have a significant impact on the proper criminal process and the model of Polish preparatory proceedings analysed in this study.

In summary, this article discusses and assesses selected aspects of the model of preparatory proceedings in the Polish criminal process. The author will analyse the objectives and functions of preparatory proceedings and discuss their forms and phases. In addition, it will point out issues related to the prosecutor's supervision of preparatory proceedings, the involvement of the judicial factor at this stage of the proceedings, and the conclusion of the preparatory proceedings. This analysis was based on methods appropriate for legal sciences—formal-dogmatic and theoretical-legal.

2. Objectives of the investigation

The objectives of this investigation should be highlighted against the background of the general objectives of the criminal process. The lack of clarification of this issue

16 Act of 28 January 2016 Law on the Public Prosecutor's Office, Journal of Laws of 2022, Journal of Laws 2022 item. 1247, as amended.
17 Act of 6 April 1990 on the Police, Journal of Laws 2023 item 171, as amended.
18 Act of 26 May 1982 Law on the Bar, t.j. Journal of Laws 2022 item. 1184, as amended.
19 Act of 6 July 1982 on legal advisers, Journal of Laws 2022 item 1166.
20 Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, Journal of Laws 2022, item 557, as amended.
21 Act of 9 June 2006 on the Central Anti-Corruption Bureau, Journal of Laws 2022, item 1900, as amended.
22 Act of 12 October 1990 on the Border Guard, Journal of Laws 2022, item 1061, as amended.
23 Act of 15 July 1987 on the Commissioner for Human Rights, Journal of Laws 2023, item 1058.
24 Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, Journal of Laws 2023 item 102.
25 Act of 23 February 1991 on the recognition of invalidity of judgments issued against persons repressed for activities for the independent existence of the Polish State, Journal of Laws2021 r. item. 1693.
26 Act of 29 July 2005 on counteracting drug addiction Journal of Laws 2023 item. 172, as amended.
27 Act of 25 June 1997 on the Crown Witness, Journal of Laws 2016 r. item 1197.
28 Act of 9 April 2010 on Prison Service, Journal of Laws 2022 item 2470, as amended.

may result in certain deficiencies in the argument, which is based on the complementarity of the objectives of the preparatory proceedings and the criminal process[29], as the essence of the adopted model.

Under Article 2 § 1, the purpose of the provisions of the Criminal Procedure Act is to structure criminal proceedings in such a way that:

1. the perpetrator of the offence has been detected and held criminally responsible, and the innocent person has not been held responsible;
2. through the correct application of the measures provided for in criminal law and the disclosure of the circumstances conducive to the commission of a crime, the tasks of criminal proceedings have been achieved not only in combating crimes but also in preventing them and in strengthening respect for the law and principles of social coexistence;
3. the legally protected interests of the victim are taken into account while respecting his dignity;
4. the case was resolved within a reasonable time.

On the one hand, the application of Article 2 § 2 should be based on true factual findings, which will express one of the main principles of the criminal process—material truth.[30]

On the other hand, pursuant to Article 297 § 1 of the CCP, apart from the objectives of the preparatory proceedings, its functions may also be defined, which include: 1) the preparatory function consisting in collecting and consolidating evidence on the basis of which the decision to bring an indictment is taken (essential function); 2) prophylactic based on the preparation of conditions preventing or hindering the re-offending accessory function; 3) relatively preliminary ruling, expressed in the effect of procedural decisions on decisions taken in other proceedings (accessory function).[31]

According to the theory of the criminal process, the objectives set out in Article 297 § 1 of the CCP are also called specific because their primary aim is to determine whether there is a factual basis for bringing an indictment within the meaning of Article 322 of the CCP.[32] However, the achievement of objectives is activated only if a specific procedural authority possesses the relevant knowledge.[33]

Pursuant to Article 297 § 1, the objectives of the preparatory proceedings are, respectively:

29 Grzegorczyk and Tylman 2022, p. 820.
30 Grzegorczyk and Tylman 2022, p. 820.
31 Waltoś and Hofmański 2020, pp. 505-510.
32 Stefański and Zabłocki, 2004, p. 294.
33 Świecki2023.

1. determining whether a criminal offence has been committed and constitutes a criminal offence;
2. detection and, if necessary, apprehend of the offender;
3. collection of data pursuant to Articles 213 and 214 of the CCP;
4. clarification of the circumstances of the case, including the determination of the victims and the extent of the damage;
5. collecting, securing and, to the extent necessary, consolidating evidence for the court.

The primary purpose of this investigation is to determine whether a criminal offence has been committed and whether it constitutes a criminal offence. If the answer is in the affirmative, the authorities will carry out further actions to achieve far-reaching objectives of the preparatory proceedings. However, if the answer is in the negative, the proceedings will be discontinued on the ground that they are devoid of purpose. When the competent authority considers that a criminal act has been committed, their task is to identify the perpetrator or perpetrators and apprehend them, and even to apply proportionate preventive measures in the form of, for example, pre-trial detention.[34] Another task of law enforcement agencies is to collect relevant so-called personal and cognitive data.[35] These data allow the identity of the accused to be established and any personal data that will help identify him or her and are relevant from the perspective of criminal proceedings. In preparatory proceedings, the circumstances of the case should be clarified to bring an indictment (there is no need to explain the case in a comprehensive manner).[36] The victims and the extent of the damage should also be determined so that they can participate in criminal proceedings (if they so wish). In addition, the purpose of preparatory proceedings is to collect, secure, and consolidate, to the extent necessary, evidence for jurisdictional proceedings. At this point, the evidentiary proceedings in preparatory proceedings are of key importance, and if procedural authorities make mistakes here, it is difficult to correct them at the next stage of the proceedings.

To sum up, the objectives of preparatory proceedings are clearly defined in the exhaustive catalogue in Article 297 § 1 of the CCP. It must be analysed in the light of Article 2 § 1 of the CCP vis-à-vis the general objectives of the criminal process. Based on the abovementioned provisions, the model of preparatory proceedings can be decoded, but it should be borne in mind that the shape of the model is ultimately determined by specific institutions and solutions resulting from specific regulations.[37]

34 Izydorczyk 2002, p. 27.
35 Waltoś and Hofmański 2020, pp. 418-419.
36 Grzegorczyk and Tylman 2022, pp. 820-824.
37 Grzegorczyk and Tylman 2022, p. 916.

3. Forms of procedure

Highlighting the objectives of preparatory proceedings indicated the general model of Polish preparatory proceedings. It also allows one to move on to selected substantive issues that need to be discussed. The first of these should include the forms of proceedings.

The CCP provides for two forms of preparatory proceedings, namely, investigation and enquiry, which can be discussed from both objective and subjective perspectives. As a rule, the investigation is formal and concerns acts punishable by a higher penalty. However, the enquiry is less formal and concerns crimes punishable by a lower penalty.

The investigation is generally conducted by the prosecutor. The CCP distinguishes between own investigations (Article 311 § l of the CCP) and investigations commissioned by the prosecutor to the police and other bodies with criminal procedural powers (Article 313 § 3 of the CCP) in full, in part, or for the purpose of performing a specific action.[38] Pursuant to Article 309 of the CCP, an investigation is obligatory in cases: 1) in which the regional court has jurisdiction to hear it at first instance; 2) for misdemeanours – when the suspect is a judge, prosecutor, officer of the police, Internal Security Agency, Foreign Intelligence Agency, Military Counterintelligence Service, Military Intelligence Service, State Protection Service, Marshal's Guard, Customs and Tax Service, or the Central Anti-Corruption Bureau; 3) for misdemeanours – where the suspect is an officer of the Border Guard, the Military Police, a financial pre-trial body, or a superior body over a financial pre-trial body, in matters falling within the competence of these authorities or of misdemeanours committed by these officers in connection with the performance of official duties; 4) for offences in which no investigation is carried out. In addition, the investigation may be optional, which results from Article 309 § 5 of the CCP, that is, in cases of misdemeanours in which an investigation is conducted, if the prosecutor so decides due to the importance or complexity of the case.

The investigation should last a maximum of 3 months; however, in justified cases, the investigation period may be extended for a further period of time as determined by the prosecutor supervising the investigation or the prosecutor directly superior to the prosecutor who conducts the investigation, but not longer than one year. In exceptional cases, it is possible to extend the investigation for a further specified period.

The enquiry is carried out by the police or other authorities authorised to do so within the scope of their competence. We distinguish between ordinary investigation and the so-called investigation (proceedings) to the extent necessary. The CCP once provided for the so-called simplified enquiry, but it was decided to abandon it.

As a rule, an enquiry is carried out in cases where an investigation is not mandatory. In addition, Article 325b § 1 of the Code of Civil Procedure provides for the

38 Kruszyński 2004, p. 313.

investigation of offences falling within the jurisdiction of the district court: 1) punishable by a penalty not exceeding 5 years of imprisonment, except that in the case of crimes against property only if the value of the object of the crime or the damage caused or threatened does not exceed PLN 200,000; 2) provided for in Articles 159, 254a, and 262 § 2 of the Penal Code; 3) provided for in Article 279 § 1, Article 286 § 1 and 2, and Article 289 § 2 of the Penal Code, if the value of the object of the offence or the damage caused or threatened does not exceed PLN 200,000.

Decisions to initiate an enquiry, refuse to open an enquiry, close an enquiry and enter a case in the register of offences, and close an enquiry and suspend it do not require a statement of reasons.[39] It is also possible to use the so-called registered redemption. An enquiry does not require a decision to bring charges nor close the investigation, provided that the suspect has not been remanded in custody. It is also possible to limit this form of proceedings to determine whether there are sufficient grounds for an indictment or other termination of the proceedings. Moving on to the deadlines, it should be noted that it should be completed within 2 months. The public prosecutor may extend this period to 3 months and, in exceptional cases, for a further specified period.

It is also possible to carry out an enquiry to the extent necessary, in accordance with Article 308 of the CCP. This happens before the formal initiation of preparatory proceedings, providing the opportunity to carry out procedural actions to the extent necessary, within the limits necessary to secure traces and evidence of the crime against loss, distortion, or destruction.[40]

4. Phases of the procedure

Polish criminal procedural law system provides for two phases of preparatory proceedings, namely, ‚in rem' proceedings[41], triggered by a decision initiating preparatory proceeding, and proceedings against a person (in personam), which begin with a decision to present a statement of objections.[42] The legislator decides to distinguish between phases of proceedings to organise specific procedural actions and make this phase of the proceedings more transparent.

On the one hand, the 'in the case' phase occurs when a crime has been revealed, but the procedural authorities are unsure of the identity of the perpetrator. Therefore, all activities are focused on finding the perpetrator and determining the circumstances of the act.

39 Kurowski 2015, pp. 64-70.
40 Janusz-Pohl and Mazur, 2010, pp. 81-91.
41 Kruszyński 2004, p. 306.
42 Cieślak 2011, p. 273.

On the other hand, the 'against the person' phase is a consequence of the actions taken in 'in the case' phase. However, there are also cases where the perpetrator is known at the time of crime detection: then the 'in rem' phase is omitted and the proceedings have only the 'in personam' phase. This phase of the proceedings begins with a decision on the presentation of charges, the issuance of which is conditional on the authority to obtain certainty that a specific person has committed a crime.[43]

If, during the 'in personam' phase, the authority conducting the proceedings becomes certain that the person against whom the decision to present charges has been issued has committed the act, then he should prepare and submit an indictment to the court, formally ending the preparatory proceedings and the 'in personam' phase.

Before initiating jurisdictional proceedings, the competent court formally examines the indictment. It may be returned by the court to apply to Article 337 § 1 of the CCP in order to remedy the deficiencies. Moreover, under Article 14 § 2 of the CCP, the public prosecutor may withdraw the indictment until the commencement of the trial at the first main hearing. However, in this case, the public prosecutor cannot bring another indictment in the same case.[44]

5. Prosecutor's supervision of the proceedings

One of the procedural authorities involved in preparatory proceedings is the prosecutor. The Polish legal system does not contain a legal definition of a prosecutor; however, pursuant to Article 1 § 1 of the Law on the Public Prosecutor's Office, the Public Prosecutor's Office consists of the Prosecutor General, the National Prosecutor, other deputy prosecutors of the General Prosecutor and prosecutors of common organisational units of the prosecution service and prosecutors of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, hereinafter referred to as the 'Institute of National Remembrance'.[45] The prosecutor acts as a public prosecutor, that is, he brings and supports the prosecution before the court. It is also responsible for conducting and supervising preparatory proceedings.[46]

According to the model of preparatory proceedings adopted, the prosecutor is *dominus litis* at this stage of the proceedings.[47] As indicated above, the prosecutor is investigating. It may delegate certain activities to other authorities.[48] At the same

43 Grzegorczyk 2008, p. 669.
44 Kmiecik 2010, p. 115.
45 Kardas 2012, pp. 7-49.
46 Chodkiewicz 2017, pp. 22-41.
47 Andrzejewski 2012, pp. 120–139.
48 Chodkiewicz 2017, pp. 22-41.

time, it provides guidelines and sets a deadline for the presentation of an investigation plan or a plan of specific investigative activities.

Due to the managerial role of the prosecutor in the preparatory proceedings, the legislator also granted him supervisory powers to the extent that he does not conduct proceedings. Its task is to ensure an efficient and compliant criminal procedure and its rules.[49]

Article 326 § 3 of the CCP indicates specific forms of supervision, which include: familiarisation with the intentions of the person conducting the proceedings, indicating the directions of proceedings and issuing orders regarding it; requesting the presentation of materials collected in the course of the proceedings; participation in the activities carried out by the investigators, conducting them in person or taking over the case for conduct; issuing orders or instructions; and amending and repealing orders and orders issued by the person conducting the proceedings.

It is also up to the public prosecutor to draw up an indictment in an investigation, to approve an indictment drawn up by the police in an investigation and bring it to court, or to issue a decision to discontinue, suspend, or supplement the investigation.[50] The prosecutor has 14 days from the date of closing the investigation or from receiving the indictment prepared by the police to take the indicated actions.

In addition, the public prosecutor is the instance control authority at this stage of the proceedings. *De jure*, he is responsible for the entire investigation; it must be carried out in accordance with the rules, respecting and informing about procedural safeguards, within a reasonable time.

6. Judicial factor in preparatory proceedings

The presence of a judicial factor in this phase of the proceedings is crucial; it is an expression of the measure of respect for human rights and freedoms in these proceedings.[51] Historically, Poland has had different models of judicial review of preparatory proceedings.[52]

Based on the CCP from 1928 to 1951 in Poland, an operative judicial body acted in preparatory proceedings: an investigating judge with a wide range of powers (evidence, decision-making, and control).[53] However, due to the Sovietisation of law in 1944, the judicial factor was limited. In 1951, the investigating judge was abolished, and

49 Kardas, 2012, pp. 7-49.
50 Kruszynski 2004, p. 328.
51 Eichstaedt 2008, pp. 391-398.
52 Eichstaedt 2009, pp. 58-87.
53 Eichstaedt 2008.

his powers were taken over by the prosecutor.[54] The court only performed incidental actions during preparatory proceedings. The CCP from 1969 petrified the changes introduced in accordance with the assumption of the Sovietisation of the law, while simultaneously allowing for the incidental presence of the court of a decision-making and supervisory nature.[55] In 1995, the wider presence of the judicial factor in preparatory proceedings was reverted, which was then used in the 1997 CCP.[56]

Under the current legislation, the judicial review of preparatory proceedings can manifest itself in three ways. The court may interfere in the preparatory proceedings by performing actions that include: decision-making—assumes the direct making of procedural decisions resulting from prior review of the preparatory proceedings in legal and substantive terms,[57] for example pre-trial detention (Article 250 § 1 of the CCP); control—exercising instance control of specific decisions of the preparatory proceedings authorities, that is, their examination of the correctness and comprehensiveness of the results of actions taken, for example,[58] appeal against a decision on securing assets (Article 465 § 2 of the CCP in conjunction with Article 293 § 4 of the CCP); evidentiary—taking certain procedural (evidence) actions reserved for the court, for example,[59] hearing a witness if there is a risk that it will not be possible to hear him or her at the hearing (Article 316 § 3 of the CCP).[60]

Since 1997, the model of judicial review of preparatory proceedings has been amended several times.[61] As a rule, these changes were not structurally interfering with the model because they maintained a balance between inquisitorial and adversarial with minor deviations. Only once was it decided to introduce an adversarial model of preparatory proceedings,[62] but this did not correspond to Polish conditions and the characteristics of jurisdictional proceedings, which is why it was quickly cancelled.[63]

However, the work on this amendment has allowed us to draw many interesting conclusions regarding the potential shape of criminal procedures, including the model of preparatory proceedings.[64] One of the postulates that appeared in the

54 Kulesza 1988, pp. 152-160.
55 Eichstaedt, 2009, p. 17.
56 Grzegorczyk and Tylman 2022, p. 922.
57 Malinowska-Krutul 2008, pp. 65-66.
58 Kulesza 1997, pp. 269–270.
59 Grajewski et al. 2006, p. 893.
60 Eichstaedt 2008.
61 Act of 27 September 2013 amending the act – Code of Criminal Procedure and some other acts, Journal of Laws 2013 item 1247.
62 Act of 27 September 2013 amending the act – Code of Criminal Procedure and some other acts, Journal of Laws. item 1247.
63 Act of 11 March 2016 amending the act – Code of Criminal Procedure and some other acts, Journal of Laws2016 item 437.
64 Kruszyński and Zbrojewska 2014, p. 55.

discussion was the introduction of a new judicial body—a judge competent in preparatory proceedings.[65]

To sum up, the participation of the judicial factor in preparatory proceedings should still be considered insufficient in relation to Western standards. Amendments that increase the participation of the judicial factor should be appreciated, for example, the proposal to introduce a 'friendly interrogation mode' for people with mental or developmental disorders, or the disruption of the ability to perceive or reproduce perceptions about which there is a justified fear that questioning in other ordinary conditions could adversely affect their mental state or would be significantly more difficult (Article 185e of the CCP).[66] Nevertheless, the model of judicial review of preparatory proceedings requires far-reaching changes in the spirit of increasing the presence of the judicial factor, which is always a measure of the observance of civil rights and freedoms at this stage of criminal proceedings.[67]

7. Options for terminating the procedure

From the perspective of this article, it is also important to discuss the ways in which procedural authorities conclude proceedings. This may take the form of three decisions: 1) the closure of proceedings (and the filing of an indictment with the court or a request to the court for a conviction at the hearing and the sentence of penalties and other penal measures agreed with the defendant), 2) discontinuation of proceedings (discontinuation of the investigation or investigation, application to the court for conditional discontinuance of proceedings, application from the court to discontinue the proceedings, and application of precautionary measures), and 3) stay of proceedings.

The decision to close proceedings should be made when the authority considers that the objectives of the preparatory proceedings have been achieved. In such cases, the authority conducting the proceedings should allow the suspect and his lawyer to finally familiarise themselves with the evidence.[68] Within 3 days of becoming acquainted with the material, the parties have the right to submit a request for the completion of the case file. In the absence of motions, the authority issues a decision to close the proceedings, announces them, or notifies the parties as well as their representatives and defenders.[69] Within 14 days of the closure of the investigation or the receipt of an indictment drawn up by the police in the enquiry, the prosecutor draws

65 Kruszyński and Zbrojewska 2014. p. 58.
66 Act of 13 January 2023 amending the Civil Procedure Code and certain other acts Journal of Laws 2023 r. item. 289, 535.
67 Waltoś and Hofmański 2020.
68 Wyciszczak 1995.
69 Tylman 1998, p. 69.

up an indictment or approves it and submits it to the court. An alternative solution is to apply to the court for a conviction at the sitting and the imposition of penalties or other penal measures agreed with the accused (Article 355 § 1 of the CCP).[70]

If the preparatory proceedings have not provided evidence to enable an indictment to be brought, the proceedings must be discontinued in accordance with Article 322 § 1 of the CCP. In such a case, pursuant to Article 323 of the CCP, the public prosecutor issues a decision on material evidence in accordance with the provisions of Articles 230–233 of the CCP. In the case of an enquiry, it is possible to discontinue and enter the act into the register of offences (Article 325f § 1 of the CCP).[71] If the conditions for the conditional discontinuance of proceedings are met, the prosecutor may also submit a request to the court to discontinue the proceedings (Article 336 § 1 of the CCP). If it is established that the suspect committed an act in a state of insanity and there are grounds for precautionary measures, the prosecutor, after closing the investigation, refers the case to the court with a request to discontinue the proceedings and apply protective measures.[72] The provision of Article 321 of the CCP shall apply *mutatis mutandis* (Article 324 § 1a of the CCP).

At every stage of the proceedings, also at the stage of preparatory proceedings, there is a possibility of absorption discontinuation.[73] This institution applies to cases of a misdemeanour punishable by imprisonment for up to 5 years, but only if the sentence imposed on the accused would be obviously pointless due to the type and amount of the sentence finally imposed for another crime, and the interest of the victim does not preclude it (Article 11 § 1 of the CCP).

Proceedings may be suspended if there is a long-lasting impediment to the proceedings, particularly if the accused cannot be apprehended or is prevented from taking part in the proceedings because of mental illness or other serious illness, the proceedings are suspended for the duration of the impediment (Article 22 § 1 of the CCP).[74] If the proceedings are not issued by the public prosecutor, they must be approved (Articles 325 and 325e § 2 of the CCP).

8. Summary

Notably, the Polish model of preparatory proceedings has evolved over the years. Initially, it was fully dependent on the legislation of the partitioning states. Then, in the Second Polish Republic, the legislator decided to create a model similar to that of

70 Waltoś and Hofmański 2020.
71 Kruszynski 2004, pp. 315-317.
72 Waltoś and Hofmański 2020.
73 Łagodziński 2004.
74 Czapliński 2014.

the French Republic. In connection with the process of Sovietisation, there has been a black period in the history of the development of the Polish model of preparatory proceedings since 1944. The judicial factor was limited, and an extensive apparatus for the prosecutor's office and services was created. This situation lasted until the nineties of the twentieth century. Along with the political changes, the legislator began to consider the observance of human rights and freedoms in the model of preparatory proceedings. The culmination point was the adoption of the CCP in 1997.

The abovementioned legal act has been amended several times over the last 26 years. However, its current sound does not differ drastically from that of the original version. It should be noted that the model of preparatory proceedings contained therein fulfils the basic framework resulting from legal acts of international rank binding in Poland, that is, the European Convention on Human Rights[75] and the International Covenant on Civil[76] and Political Rights. Nevertheless, there are institutions that need to be improved in the spirit of rule of law and objectivity.

The presence of a judicial factor in preparatory proceedings is still insufficient in relation to Western countries. It is worth considering the postulate of introducing a judge competent in preparatory proceedings, who would be an efficient body at this stage of the proceedings and somewhat guarantee the observance of civil rights and freedoms. In addition, it would be necessary to define a catalogue of its activities: decision-making, control, and evidence.

In addition to his or her tasks in the preparatory proceedings, the preparatory judge could also supervise the application of operational and reconnaissance activities by the competent authorities. What should be considered, given the connection between the matter and criminal proceedings?

In connection with the introduction of the institution of a preparatory judge in preparatory proceedings, the roles of the police (and other services with criminal procedural powers) and the prosecutor's office should be redefined. The activities of these authorities should be linked to the proposed judicial authority (preparatory judge).

The proposed changes would have a positive impact on the preparatory model. They would break with the post-Soviet and undemocratic traditions of criminal procedure and guarantee the rule of law, objectivity, and judicial protection of human rights at this stage of criminal proceedings.

75 Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, subsequently amended by Protocols Nos 3, 5 and 8 and supplemented by Protocol No. 2, Journal of Laws 1993 no 61 item 284.

76 The International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966, Journal of Laws 1977 no 38 item 167.

Bibliography

- Andrzejewski, M. (2012) 'Dominus litis postępowania przygotowawczego – sędzia śledczy czy prokurator?' in: Gil, D., Butryn, I., Jakieła, A., Woźniak, K.M. (eds.) *Współczesne problemy wymiaru sprawiedliwości*, Lublin.
- Bojanowski, T. (2023) 'Istota i przeznaczenie karnoprocesowe czynności operacyjno-rozpoznawczych',Lublin.
- Chodkiewicz, A. (2017) 'Prokurator jako organ nadzorujący postępowanie przygotowawcze', Veritas Iuris 1/2017.
- Cieślak, M. (2011), 'Problem gwarancji karnoprocesowych na tle nowej kodyfikacji' in Waltoś, S. (ed.) *M. Cieślak Dzieła wybrane*, t. IV, Kraków.
- Czapliński, M. (2014) 'Zawieszenie postępowania karnego w teorii i praktyce', Warszawa.
- Eichstaedt, K. (2008) 'Czynności sądu w postępowaniu przygotowawczym w polskim prawie karnym', Warszawa.
- Eichstaedt, K. (2009) 'Rola sądu w postępowaniu przygotowawczym a instytucja sędziego śledczego', Warszawa.
- Eichstaedt, K. (2009) 'Rola sądu w postępowaniu przygotowawczym a instytucja sędziego śledczego', Warszawa.
- Grajewski, J., Paprzycki, L.K., Steinborn, S. (2006) 'Kodeks postępowania karnego. Komentarz', t. I, Kraków.
- Grzegorczyk, T. (2008) 'Kodeks postępowania karnego oraz ustawa o świadku koronnym', Warszawa.
- Grzegorczyk, T., Tylman, J. (2022) 'Polskie postępowanie karne', Warszawa.
- Grzeszczyk, W. (1981) 'Uwagi na temat modelu postępowania przygotowawczego, Problemy Praworządności', Nr 7.
- Izydorczyk, J. (2002) 'Stosowanie tymczasowego aresztowania w polskim postępowaniu karnym', Kraków.
- Janusz-Pohl, B., Mazur, P. (2010) 'Wpływ czynności w niezbędnym zakresie na wszechstronne zabezpieczenie i utrwalenie materiału dowodowego', *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 72, z. 1.
- Kardas, P. (2012) 'Rola i miejsce prokuratury w systemie organów demokratycznego państwa prawnego', *Prokuratura i Prawo* 9.
- Kmiecik, R. (2010) 'Akt oskarżenia jako pisemna forma skargi oskarżyciela publicznego', *Prokuratura i Prawo*, nr 1–2.
- Kruszyński, P. (ed.) (2004) *Wykład prawa karnego procesowego*, Białystok.
- Kruszyński, P., Zbrojewska, M. (2014) 'Nowy model postępowania karnego ukształtowany nowelą do k.p.k. z 27 września 2013 r.', *Palestra* 1-2/2014.

- Kulesza, C. (1997) 'Postępowanie przygotowawcze. Rozwiązania modelowe' in: Kruszyński, P. (ed.) *Nowe uregulowania prawne w kodeksie postępowania karnego z 1997 r.*, Warszawa.
- Kulesza, C. (1988) 'Sędzia śledczy w polskim modelu postępowania przygotowawczego', *Państwo i Prawo*, nr 6.
- Kurowski, M. (2015) 'Zagadnienia ogólne i postępowanie przygotowawcze', Kraków.
- Łagodziński, S. (2004) 'Umorzenie i zawieszenie postępowania karnego w trybie art. 11 k.p.k. (analiza dogmatyczna i praktyka ścigania)', Warszawa.
- Malinowska-Krutul, K. (2008) 'Czynności sądowe w postępowaniu przygotowawczym', *Prokuratura i Prawo* 10/2008.
- Stefański, R.A., Zabłocki, S. (2004) 'Kodeks postępowania karnego. Tom II. Komentarz do art. 167-296', Warszawa.
- Świecki, D. (2023) 'Kodeks postępowania karnego. Tom I. Komentarz aktualizowany', LEX/el. 2023, art. 297.
- Tylman, J. (1998) 'Postępowanie przygotowawcze w procesie karnym', Warszawa.
- Waltoś, S., Hofmański, P. (2020) 'Polski proces karny. Zarys systemu', Warszawa.
- Waltoś, S. (1968) 'Model postępowania przygotowawczego na tle porównawczym', Warszawa.
- Wielec, M. (2017) 'Wartości – analiza z perspektywy osobliwości postępowania karnego', Lublin.
- Wyciszczak, S. (1995) 'Zamknięcie śledztwa lub dochodzenia', *Prokuratura i Prawo* 9/1995.

Legal sources

- Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, subsequently amended by Protocols Nos 3, 5 and 8 and supplemented by Protocol No. 2, Journal of Laws 1993 no 61 item 284.
- The International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966, Journal of Laws 1977 no 38 item 167.
- Ordinance of the President of the Republic of 19 March 1928 Code of Criminal Procedure, Journal of Laws 1928 no. 33 item 313.
- Act of 19 April 1969 Code of Criminal Procedure, Journal of Laws 1969 no. 13 item 96.
- Act of 26 May 1982 Law on the Bar, Journal of Laws 2022 item 1184, as amended.
- Act of 6 July 1982 on legal advisers, Journal of Laws 2022 item 1166.
- Act of 15 July 1987 on the Commissioner for Human Rights, Journal of Laws 2023, item 1058.
- Act of 6 April 1990 on the Police, Journal of Laws 2023 item 171, as amended.

- Act of 12 October 1990 on the Border Guard, Journal of Laws 2022, item 1061, as amended.
- Act of 23 February 1991 on the recognition of invalidity of judgments issued against persons repressed for activities for the independent existence of the Polish State, Journal of Laws 2021 r. item 1693.
- Act of 6 June 1997 – Code of Criminal Procedure, Journal of Laws 2022, item 1375, as amended.
- Act of 25 June 1997 on the Crown Witness, Journal of Laws 2016 r. item 1197.
- Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, Journal of Laws 2023 r. item 102.
- Act of 10 September 1999 Penal Fiscal Code, Journal of Laws 2023 r. item 654.
- Act of 27 July 2001 Law on the System of Common Courts, Journal of Laws 2023 item 217, as amended.
- Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, Journal of Laws 2022, item 557, as amended.
- Act of 28 October 2002 on the liability of collective entities for acts prohibited under penalty, Journal of Laws 2023, item 659.
- Act of 29 July 2005 on counteracting drug addiction, Journal of Laws item 172, as amended.
- Act of 9 June 2006 on the Central Anti-Corruption Bureau, Journal of Laws 2022, item 1900, as amended.
- Act of 9 April 2010 on Prison Service, Journal of Laws 2022 r. item 2470, as amended.
- Act of 27 September 2013 amending the act – Code of Criminal Procedure and some other acts, Journal of Laws 2013 item 1247.
- Act of 27 September 2013 amending the act – Code of Criminal Procedure and some other acts, Journal of Laws item 1247.
- Act of 28 January 2016 Law on the Public Prosecutor's Office, i.e. Journal of Laws of 2022, Journal of Laws 2022 r. item 1247, as amended.
- Act of 11 March 2016 amending the act – Code of Criminal Procedure and some other acts, Journal of Laws. 2016 item 437.
- Act of 8 December 2017 on the Supreme Court, Journal of Laws 2023, item 1093.
- Act of 13 January 2023 amending the Civil Procedure Code and certain other acts, Journal of Laws 2023 r. item 289, 535.

Martina DRVENTIĆ BARIŠIN*

The Recognition of a Foreign Adoption– The Human Rights Principles and Croatian Reality

ABSTRACT: *Any person crossing a border wants to have his or her civil status recognised in the host country. Reasons of a personal nature primarily drive such an endeavour. Recognising one's personal status may also play a significant role in exercising many other rights. When a host state refuses to recognise the personal status or family ties already enjoyed in the territory of another state, this may constitute a breach of the individual's right to respect for private and family life and be contrary to the standard on the prohibition of discrimination. The difficulties arising in cross-border status recognition mainly stem from the pluralism of national legal systems. The Republic of Croatia has ratified many international documents whose provisions guarantee the right to personal status and has been bound by the EU's acquis communautaire. The national law, dispersed in several acts, has regulated the mere recognition of personal status acquired abroad. This research starts with an overview of the national legal regulation of cross-border recognition of status in the Republic of Croatia, focusing on recognition of the adoption established abroad. The research puts the national legal framework into the context of the human rights principles derived from the international and EU legal framework.*
KEYWORDS: *recognition of foreign civil status, right to free movement, respect to respect for private and family life, prohibition of discrimination, cross-border adoption, private international law, case law.*

* Martina Drventić Barišin, PhD, senior assistant at the Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek, ORCID: 0000-0002-0880-0382. This paper is a product of work that has been fully supported by the Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, under the project No. IP-PRAVOS-23 "Contemporary Issues and Problems to the Protection and Promotion of Human Rights".

https://doi.org/10.62733/2023.2.73-90

1. Introduction

There is a general interest of persons crossing a border that their status (e.g., the fact of birth, name, marriage/partnership, parenthood, death, etc.) is recognised in the receiving country.[1] Such an endeavour is primarily driven by reasons of personal nature, of the right of every individual to personal identity, which confirms their affiliation to a specific family or community.[2] The recognition of one's personal status may play a significant role in exercising many other rights, such as the right to reside within the territory of a specific country, the right to freedom of movement, the right to education, the right to healthcare, the right of access to public services and social programs, the right to family reunification, the right to employment, the right of children to parental care, the right to enter into marriage or comparable relations, as well as the right to divorce or dissolution of such ties, the right to acquire property, the right to inherit, among others.[3]

The cross-border effects of adoption also raise questions about exercising the aforementioned rights, stemming from the recognition of parenthood. Social and medical progress has led to a drastic decline in the number of babies available for national adoption. Parallel to this, the mass media has focused on children living in terrible conditions in undeveloped countries. Both have led to an increase in the number of international adoptions.[4] While the number of international couples and families is growing continuously, important differences between Member States of the European Union (EU) vis-à-vis the rules applying to adoption significantly impact adopters' ability and willingness to exercise their rights of free movement. Concerning the recognition of the effects of foreign adoption, particular caution is needed when assessing a child's best interests. In such cases, the child changes the family environment and the country of living. He or she moves to the country where he or she probably has never been or lived. Together with that, acting in such procedures should consider attention given to every individual case while bearing in mind the leading principle derived from the European Convention on Human Rights (ECHR)'s practice on no right to a child/right to adopt, and that adoption means 'providing a child with a family, not a family with a child'.[5]

1 The European Group for Private International Law, 2016.
2 Ronen, 2004.; Župan, 2019.
3 Kunda, 2020, p. 74.; Duić, Drventić, 2021, p. 226.
4 Orejudo Pieto de los Mozos, 2017, p. 15., Also see: Selman, 2022.
5 *Pini and others v. Romania*, App. No. 78028/01 and 78030/01, 22 September 2004.

2. Legal Framework for the Recognition of Foreign Status in the Republic of Croatia

The difficulties arising in cross-border status recognition mainly stem from the pluralism of national legal systems. National systems principally regulate personal and family status issues by enacting substantive legislation. Such regulation is usually considered justifiable, as it refers to internal situations whereby personal and family statuses reflect a person's affiliation to a particular culture or state.[6] For this reason, international co-operation is essential in the field of cross-border personal statuses. In private international law, there is a need to harmonise the rules on this matter to not only ensure more uniformity in terms of personal status but also avoid the so-called 'limping' status phenomenon.[7]

2.1. International Legal Framework

The Republic of Croatia has ratified many international documents whose provisions guarantee the right to personal identity. Croatia has committed itself to harmonising its national legislation with the accepted standards in connection to respecting human and children's rights. In this regard, Croatia is the contracting party to several international conventions dealing with matters of and the recognition of personal status.[8]

Based on the notification of succession issued on 8 October 1991, Croatia became party to several conventions. In the context of personal status, the most notable conventions are the Convention and Protocol Relating to the Status of Refugees,[9] the New York Convention Relating to the Status of Stateless Persons,[10] the Convention on the Nationality of Married Women,[11] and the Convention on the Rights of the Child[12], which have been effective in Croatia since 8 October 1991.

6 Van Den Eeckhout, 2005, p. 1.; Duta, 2017.
7 Župan, 2020, p. 125-169 and 141-148.
8 Župan, Drventić, 2022.
9 Convention Relating to the Status of Refugees [1951] UNTS, Vol. 189, p. 137, OG SFRY 7/1960, OG IT 12/1993.; Protocol Relating to the Status of Refugees of 31 January [1967], UNTS Vol. 606, p. 267, OG SFRY 15/1967, OG IT 12/1993.
10 New York Convention Relating to the Status of Stateless Persons [1954] UNTS Vol. 360, p.117, OG FNRY 9/1959, OG IT 12/93.
11 The Convention on the Nationality of Married Women [1957] UNTS, Vol. 309, p. 65, OG FNRY 115/58, OG IT 12/93.
12 The Convention on the Rights of the Child [1989] UNTS, Vol. 1577, p. 3, OG SFRY 15/1990, OG IT 12/1993. See: Article 8.

In view of foreign status recognition, the Republic of Croatia has been a Contracting State to the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents since 23 April 1993.[13] Since 8 July 1992, Croatia has been a Contracting State to the 1956 Paris Convention on the Issue of Multilingual Extracts from Civil Status Records to be used abroad (hereinafter referred to as the Paris Convention)[14], adopted within the framework of the International Commission for Civil Status (ICCS), as well as to the 1976 Vienna Convention on the Issue of Multilingual Extracts from Civil Status Records.[15] The 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter referred to as the Child Protection Convention) applies to situations of cross-border protection of children, and it has been in force in the Republic of Croatia since 1 January 2010.[16] As to the adoption, the Republic of Croatia has been a contracting party to the 1993 Hague Adoption Convention since 1 April 2014.[17] The European Convention for the Protection of Human Rights and Fundamental Freedoms, one of the most powerful international instruments for human rights protection after the establishment of the European Court of Human Rights (ECtHR), has been in force in the Republic of Croatia since 5 November 1997.[18]

2.2. The European Union

The *acquis communautaire* has been binding on the Republic of Croatia since it acceded to the EU on 1 July 2013. The Public Documents Regulation has been binding on all EU Member States since 16 February 2019.[19] As for the protection of children,

13 HCCH, Convention of 5 April 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. 12, OG IT 11/2011.

14 ICCS, the Convention (no. 1) on the Issue of Multilingual Extracts from Civil Status Records to be used abroad was signed in Paris on 27 September 1956, OG SFRY 9/1967, OG IT 6/1994.

15 ICCS, the Convention (no. 16) on the Issue of Multilingual Extracts from Civil Status Records was signed in Vienna on 8 September 1976, OG SFRY -8-26/1991, OG IT 6/1994.

16 HCCH, the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 34, OG IT 5/2009.

17 OG IT 5/2013.

18 The European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ETS no. 005, OG IT 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10. Other significant conventions applicable to status recognition are the 1968 European Convention on Information on Foreign Law, which has been in force in Croatia as of 7 May 2014 ([1985] ETS No. 062, OG IT 13/2013) and the Framework Convention for the Protection of National Minorities [1995] ETS no.157, OG IT 14/1997.

19 Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 OJ L 200, 26.7.2016, p. 1–136,

the Brussels II *bis* Regulation has been binding on the Republic of Croatia since 1 July 2013, replaced with its recast, effective since 1 August 2022.[20]

A long-term initiative is to regulate the cross-border effects of adopting in the EU. In 2011, the European Parliament adopted a resolution on International Adoption in the EU.[21] To date, the European Commission has not followed up on the 2011 Resolution with a legislative initiative. A new Resolution was issued in 2017.[22] A legislative initiative on cross-border aspects of adoption did not follow it.

Finally, in 2020, the European Commission announced measures to ensure that parenthood established in one Member State would be recognised in all other Member States.[23] Consequently, the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions, and acceptance of authentic instruments in matters of parenthood, and on the creation of a European Certificate of Parenthood was published at the end of 2022.[24] The Proposal states that its objective is to strengthen the protection of the fundamental and other rights of children in cross-border situations, including their rights to identity, non-discrimination, a private and family life, and succession and maintenance in another Member State, taking the best interests of the child as a primary consideration.[25] The Proposal excludes intercountry adoption from its scope as being governed by another international instrument.[26] Nevertheless, and most significantly, the Proposal introduced the rules for the recognition of domestic adoptions.[27] By providing this legal framework, the EU legislator establishes the legal protection

20 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 OJ L 338, 23.12.2003, p. 1–29; Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) ST/8214/2019/INIT OJ L 178, 2.7.2019, p. 1–115.

21 European Parliament resolution of 19 January 2011 on international adoption in the European Union, P7_TA (2011)0013, OJ C 136 E/24 of 11 May 2012.

22 European Parliament resolution of 2 February 2017 with recommendations to the Commission on cross border aspects of adoptions (2015/2086(INL)) (2018/C 252/02).; See: Hoško, 2017.

23 The initiative was included in the 2021 EU Strategy on the rights of the child. EU Strategy on the rights of the child, COM (2021) 142 final and also in the EU LGBTIQ Equality Strategy Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM (2020) 698 final.

24 Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood {SEC (2022) 432 final} – {SWD (2022) 390 final} – {SWD (2022) 391 final} – {SWD (2022) 392 final}, Brussels, 7.12.2022 COM (2022) 695 final 2022/0402 (CNS).

25 *Ibid*., p. 1.

26 *Ibid*., Art. 3.

27 *Ibid*., p. 13. It covers the recognition of the parenthood of a child irrespective of how the child was conceived or born, thus including children conceived with assisted reproductive technology, and irrespective of the child's type of family, thus including children with two same-sex parents, children with one single parent, and children adopted domestically in a Member State by one or two parents.

and guarantees that the domestic adoptions lawfully carried out in one EU Member State will be recognised in another. As Hague Convention adoptions are already subject to automatic recognition in EU Member States,[28] once the legal framework becomes effective, domestic adoptions will be also automatically recognised among EU Member States.

2.3. National Legal Framework

Regarding the recognition of public documents and foreign statuses, the applicable national legislation primarily includes the Private International Law Act,[29] together with the Act on Legalisation of Documents in International Legal Transactions,[30] the Civil Registers Act,[31] the Same-sex Life Partnership Act,[32] and the Personal Name Act.[33]

3. Cross-border Effects of the Adoption

Adoption with an international character is an institute of private international family law whereby the adoptive parent(s) acquire(s) parental responsibility for a child who is not their biological child, in which case there is an international component. It can manifest itself in the legal relationship of the adopter or adoptee, one of the parties to the adoption, with a foreign legal order. The connection between the parties to the adoption and the foreign legal system can be their citizenship, residence, or habitual residence.[34] Apart from the connection between the subjects of the adoption and foreign legal order, the international component could also be found in the fact that the adoption decision was made in a foreign country. In such a case, the question arises as to whether or how a foreign decision can acquire legal effects abroad.[35] Such effects are primarily related to the recognition of parenthood, which also entails several other rights, including the rights to education, healthcare, access to public services and social programs, inherit, among others.

28 All EU Member States are Contracting States to the Hague Abduction Convention. See: https://www.hcch.net/en/instruments/conventions/status-table/?cid=69.
29 Private International Law Act, OG 101/17
30 Act on Legalisation of Documents in International Legal Transactions, OG SFRY 06/73, OG 53/91
31 State Civil Registers Act, OG 96/93, 76/13, 98/19
32 Same-sex Life Partnership Act, OG 92/14, 98/19
33 Personal Name Act, OG 118/12, 70/17, 98/19
34 Hoško, 2019, p. 319.
35 *Ibid*.

Adoption can be international or intercountry, depending on the factual structure of the adoption and its international character. Adoption is considered international when the situation has any relevant foreign element, such as the nationality of the adopter(s), the adoptee, or the residence abroad of any of the parties. In intercountry adoption, the child moves from one country to another. To establish adoption, the adoptee moves from the country of his or her habitual residence to the country where the adoptive parents have their habitual residence (receiving country).[36]

The cross-border recognition of adoptions is regulated globally by the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter referred to as the Hague Adoption Convention).[37] This Convention provides, among other things, for the automatic recognition of adoption orders[38] and is subject to a limited number of exceptions.[39] The scope of recognition granted by the Convention includes the adoptive parent–child relationship,[40] parental responsibility,[41] and termination of the pre-existing parent–child relationship[42]. Nevertheless, it does not provide rules on applicable laws nor common definitions related to adoption. The enforcement and complaint mechanisms available to citizens are limited to international law instruments that are often lengthy and, among other things, require intermediation by state authorities. More fundamentally, the scope of the Hague Adoption Convention is limited; it only applies to situations where adoptive parents and the adopted child come from two different countries. The Hague Convention also only applies to adoptions that create a permanent parent–child relationship, although this would encompass both 'full' and 'simple' adoptions. Importantly, it does not cover the 'kafala' system or similar arrangements under Islamic law.[43]

The Convention does not apply where the sending or receiving state is not a party to the Convention and will not apply where the child is being adopted from a country in which the Convention is not in force.[44]

Therefore, the adoption of children from these non-contracting states is not automatically recognised and is subject to domestic law or bilateral agreements. Adoption cases in which the adopters and adopted child reside in one state are not covered by

36 Orejudo Pieto de los Mozos, 2017., p. 3.; Fronek, 2012.
37 HCCH, Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption.
38 Hague Adoption Convention, Art 23.
39 *Ibid.*, Art 24 and 25.
40 *Ibid.*, Art 26(1)a.
41 *Ibid.*, Art 26(2)b.
42 *Ibid.*, Art 26(1)c, but with an exception provided under Article 27.
43 See: Hayes, 2011.
44 There are 105 Contracting States to the Hague Adoption Convention. Status on the day 4 November 2022. https://www.hcch.net/en/instruments/conventions/status-table/?cid=69.

the Hague Adoption Convention and are subject to national law. National adoption laws vary significantly. There is no guarantee, neither for the child nor the adopter, that the status of the adoption and the legal consequences will be recognised if the family moves abroad. This situation can cause economic, social, and legal uncertainties for adopters while simultaneously endangering the best interests of the child. The lack of domestic legal recognition of adoptions may harm children's rights, including their rights to family life, non-discrimination, inheritance, and nationality.[45]

4. Recognition of a Foreign Adoption in Croatia

4.1. Recognition of Intercountry Adoptions: The Hague Adoption Convention

At the international level, the Hague Adoption Convention is the primary legal instrument applicable to cross-border adoptions. The Hague Adoption Convention sets out that adoptions must be automatically recognised in other Convention countries.[46] The Convention represents an important step towards coordinating and simplifying cross-border adoptions and is generally considered a highly successful international instrument.[47]

The Hague Adoption Convention provides for the automatic recognition of adoption orders by prescribing recognition through the operation of law. This supersedes the existing practice that an adoption already granted in the state of origin is to be made anew in the receiving state only to produce such effects and also prevents a revision of the contents of foreign adoption.

It only requires a certification made by the foreign authorities of the state where the adoption took place, attesting to the fact that the Convention's rules were complied with and that the necessary agreements were given.[48] Each Contracting State has the liberty to determine whether the competent authority will be administrative or judicial.[49] The Convention does not regulate the formal requirement of certification, even though the standardised form will have an advantage.[50] A Contracting State may refuse to recognise an adoption only if it is manifestly contrary to its public policy, considering the best interest of the child.[51] In addition, the Explanatory Report warns that the recognising state does not have the institution of adoption or that a

45 EPRS, 2016, p. 4.
46 Hague Adoption Convention, Art. 23.
47 Bartholet, 2015.
48 Hague Adoption Convention, Art. 23., Parra-Aranguren, 1993, para 402.
49 Parra-Aranguren, 1993, para 405.; Watkins, 2012.
50 *Ibid*., para 407.
51 Hague Adoption Convention, Art. 24.

particular form of adoption cannot be used as grounds to deny the recognition of foreign adoption.[52] Any Contracting State may declare that it will not be bound under the Convention to recognise adoptions made by an agreement concluded between the Contracting States under Article 39. This provision represents the compromise between the supporters and opponents of the possibility of future contracts among Contracting States on matters regulated by the Convention.[53]

As previously mentioned, the scope of the Hague Adoption Convention is rather limited, as it applies, among other things, only to adoptions made under the Convention. The Convention has been applicable in Croatia for more than eight years. However, data available for 2020 pointed towards the absence of intercountry adoptions in Croatia. The answers delivered to the HCCH showed the total number of zero Hague intercountry adoptions between 2015 and 2020.[54]

4.2. Jurisprudence of the ECtHR and CJEU

Together with the relevant legal sources elaborated above, the ECtHR and Court of Justice of the European Union (CJEU) court practice is equally relevant. The ECtHR addressed the recognition of adoption orders across national borders in *Wagner and JMWL v Luxembourg*.[55] The case involved a single woman from Luxembourg who adopted a child in Peru at an institute of full adoption ordered by the Peruvian court. The woman's attempt towards recognition for a full adoption in Luxembourg failed, as only a simple adoption was available to a single parent under national law. This meant that the child would retain a legal connection with her family of origin under Luxembourg law, even if Peruvian law did not similarly recognise that connection. The ECtHR found that the child had been subject to discrimination, contrary to Article 14 of the ECHR in conjunction with Article 8, on the right to respect for private and family life. The Court held that the Peruvian judgement resulted in a complete break from the family of origin. However, because of the decision of the Luxembourg authorities, no alternative legal link had been forged with the adoptive mother, leaving the child in a legal vacuum.[56] The ECtHR warned of many disadvantages for the child for not having acquired Luxembourg nationality, such as troubles with occupational apprenticeship and work permits. For more than ten years, the minor child has had

52 Parra-Aranguren, 1993, para. 428.
53 *Ibid*., para 429.
54 Questionnaire on the Practical Operation of the 1993 Adoption Convention, Prel. Doc. 3 of February 2020 for the Special Commission meeting in 2021, https://assets.hcch.net/docs/a6d8f3bf-7018-44ed-9dd3-fac2d602cb3e.pdf, p. 19.
55 *Wagner and J.M.W.L. v Luxembourg*, App no 76240/01, 28 June 2007.
56 *Wagner and J.M.W.L. v Luxembourg*, para 115.; Fenton-Glynn, 2016, p. 327.

to be regularly given leave to remain in Luxembourg and has had to obtain a visa to visit certain countries.[57]

The CJEU did not have an opportunity to provide its opinions on cross-border adoption cases. Still, the existing jurisprudence indicates its stand regarding recognising foreign decisions on 'new family forms'. The *Coman*[58] case concerned a third country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State by the law. In its reasoning, the CJEU had used the method of autonomous interpretation of the term 'spouse'. It asserted that the term 'spouse' was gender-neutral and must be understood as encompassing same-sex spouses, but only in the context of the Free Movement Directive.[59] It was clear that the qualification *lege communae* prevailed over *lege fori*. *Coman* requires even Member States with a constitutional ban on same-sex marriages to recognise the effects of same-sex marriages in situations that fall within the scope of EU law.[60] The CJEU ruling in the case of *SM*[61] overcame the discrepancies between Member States in the relationships they recognised under private international law for the purpose of family reunification, namely, the *kafala*.[62] Finally, in the most recent *V.M.A.* case,[63] while ruling on the free movement of a child of a same-sex couple, the CJEU clearly warned that status and family law regarding its cross-border effects could no longer be seen as separate from the impact of the EU law.[64] It is clear that with its judgments in the *Coman*, *SM*, and *V.M.A.* cases, the CJEU has embarked on a progressive path, with openness to diversity and new family forms, for the benefit of mobile Union citizens.

Research on national practice has pointed towards one case with a factual situation comparable to the abovementioned ones. The case concerned the simple adoption between the adoptive parent and adoptee before the municipality in Bosnia and Hercegovina. The foreign adoption decision established the child's new surname, which was entered into the birth registry, while the rights and duties between the parents were established without affecting the rights and responsibilities of the adoptee, her biological parents, and other relatives, in addition to the possibility of dissolving the

57 *Wagner and J.M.W.L. v Luxembourg*, para 156.
58 Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, 2018, ECLI:EU:C:2018:385.
59 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ L 158, 30.4.2004, p. 77–123.
60 Tryfonidou, 2016, Tryfonidou, 2016b.; Werner, 2019.
61 Case C-129/18, *M v Entry Clearance Officer*, UK Visa Section, 2019, ECLI:EU:C:2019:248.
62 Kroeze, 2020; Milios, 2020.
63 Case C-490/20, V.M.A. v. Stolichna Obsthina, Rayon Pancharevo, 2020, ECLI:EU:C:2021:1008.
64 Tryfonidou, 2021; Tryfonidou, 2022.

adoptive relation *ex offo* or by the adoptee.[65] When the issue of recognition of that adoption decision occurred before the court of first instance in Croatia, it refused to recognise it, explaining that the decision was made by an administrative body and not a judicial body. The appellate court upheld the refusal for different reasons. It considered that the case was related to the status matter of a Croatian citizen, and that, according to the Act in force at the time,[66] Croatian law should have been applied. According to that Act, if domestic law should have been applied on the status matter of a Croatian citizen, but it was not, the refusal of recognition would not have occurred unless the foreign decision substantially differed from the applicable law of the Republic of Croatia to such a question. Because family law stipulated only full adoption,[67] the refusal of recognition was well grounded. However, such an arrangement opened up the issue of potential contradiction to the right to family life, which was interpreted in the jurisprudence of the ECHR in Wagner. The current Act on Private International Law introduced the provision regarding the possible conversion of simple into full adoption,[68] which should change the outcome of such situations if they arose again. For now, there are no examples of how it works in practice.

4.3. Recognition of International and Domestic Adoptions: Act on Private International Law

The national law will apply to the recognition of a foreign adoption when there is a decision that cannot be recognised under the rules of the Hague Adoption Convention or bilateral agreements.[69]

The Act on Private International Law stipulates that the interested party initiates the recognition procedure by submitting a request for the recognition and confirmation of the legality of the foreign decision to the competent court in the Republic of Croatia.[70] Recognition will not occur if any of the negative assumptions are met. First, recognition will be refused upon the objection of the party against whom the recognition is sought if the proceedings in the country of the decision violated his or her right to be heard.[71] In adoption cases, this assumption could be fulfilled in relation to persons who normally consent to adoption, such as the adoptee's biological parents

65 Family Act of Federation of Bosnia and Herzegovina, OG 35/05.
66 Act Concerning the Resoluton of Conflicts of Laws with the Provisions of Other Countries in Certain Matters, OG SFRY 43/82, 72/82, OG 53/91, Arts 12 and 44.
67 Family Act, Art. 197.
68 Act on Private International Law, Art 43(5); Hoško, 2019.
69 For the complete list of bilateral agreements, see: Hoško, 2016, p. 18. – 21.
70 Župan, 2018, p. 10.; Župan, 2019b; Hoško, 2019a; Kunda, 2020; Kunda, 2022; Act on Private International Law, Art. 69.
71 Act on Private International Law, Art 68.

or his guardian, the adopter's spouse, and the adoptee.[72] Second, the recognition of a foreign decision will be refused if there is a final judgement of a Croatian court in the same matter and between the same parties, or a decision of a foreign court that has previously become final and is recognised or eligible for recognition in Croatia.[73] Recognition will also be refused if it will clearly be against the public order of the Republic of Croatia.[74] Finally, recognition can be rejected if Croatian courts have exclusive jurisdiction.[75] This rule is irrelevant for the adoptions because no exclusive jurisdiction is predicted for them. However, if the jurisdiction of a foreign court is exorbitant, a foreign judgement may be recognised.[76]

The case, which raised great public attention and provoked discussion at the end of 2022, at the same time, questions the existing legal framework which regulates intercountry adoptions with states that are non-parties of the Hague Adoption Convention.

The case concerned eight Croatian citizens (four couples) who had adopted children in the DR Congo. The adoption procedure was conducted in the DR Congo, and each decision was recognised in Croatian before the courts under the Act on Private International Law.

During their travel back to Croatia, together with the children, the eight Croatian citizens were arrested by the Zambian authorities on suspicion of child trafficking. They were brought into custody, and the children were placed in the Zambian child protection institution.

The couples were held in custody for months.[77] The procedure before the Zambian authorities ended at the beginning of July 2023, when they were able to return to Croatia together with their adopted children.[78]

The case raised the question of the adequacy and sufficiency of the existing provision of the general recognition provisions in the Act on Private International Law that were applied in the case. The major concern was the authenticity of adoption

72 Hoško, 2019b, p. 338.
73 Act on Private International Law, Art. 70.
74 *Ibid*., Art. 71.
75 *Ibid*., Art. 69.
76 Hoško, 2019b, p. 338.; Sikirić, 2019, p. 132.
77 Case facts at the moment are known only through the media. HRT Vijesti, Suđenje Hrvatima moglo bi potrajati nekoliko mjeseci, https://vijesti.hrt.hr/hrvatska/hrt-iz-zambije-hrvati-se-nalaze-u-kuci-na-nepoznatoj-lokaciji-10572718; Nacional, U Zambiji uhićena četiri hrvatska para koja su pokušala posvojiti djecu, https://www.nacional.hr/u-zambiji-uhicena-cetiri-hrvatska-para-koja-su-pokusala-posvojiti-djecu/; N1, Hrvati uhićeni u Zambiji još uvijek nisu optuženi ni za što, https://n1info.hr/vijesti/hrvati-uhiceni-u-zambiji-jos-uvijek-nisu-optuzeni-ni-za-sto/.
78 HRT Vijesti, Hrvati u Zambiji oslobođeni; očekuje se njihov povratak s djecom u RH, https://vijesti.hrt.hr/svijet/sud-odlucuje-o-sudbini-hrvata-u-zambiji-10809844.

decisions, such as those in the case concerned.[79] This concern resulted in lightning changes to the Act on Private International Law. The Act was amended with a new provision providing additional presumptions for recognising a foreign adoption decision coming from a non-party state of the Hague Child Adoption Convention. The new provision provides that such a decision can be recognised only when the court establishes the authenticity of such a decision in a diplomatic way and only if the applicant provides proof of the legalisation of such a decision according to the act which governs the legislation of public documents in international traffic.[80] In addition, the court would have to check whether the adoptive parents are entered into Croatia's register of prospective adoptive parents,[81] and the court is obliged to deliver a final decision on the recognition of foreign adoption decisions to the ministry competent for social welfare to enter the adoption into the adoption registry and to monitor the child's adaptation to the adoptive family.[82] The first paragraph of this new provision is not necessarily needed because the existing legal framework, the Act on Legalisation of Documents in International Legal Transactions, already provides for it.[83]

5. Conclusion

The evolution of adoption is directly related to the functions it has accomplished throughout history. Despite the motive of adoption, which may differ from humanitarian reasons (e.g., caring for abandoned and orphaned children) to self-fulfilment reasons (adoption as a recourse for infertile couples), it is considered a child-protection-based institution. Therefore, the emphasis of the institute of adoption should be placed on its protective role, which follows the best interests of a child as a paramount principle.

When deciding on the recognition of foreign adoption, the competent authorities of the state of recognition are saddled with the difficult task of finding the right balance between the child's fundamental rights, on the one hand, and national identity and public policy, on the other. Guidance for this kind of action can be found in the ECtHR and CJEU jurisprudences. The ECtHR advocates for the proportionality

79 Vrhovni sud Republike Hrvatske, Istraženo postupanje općinskih sudova u svezi s posvajanjem djece iz Demokratske Republike Kongo, https://www.vsrh.hr/istrazeno-postupanje-opcinskih-sudova-u-svezi-s-posvajanjem-djece-iz-demokratske-republike-kongo.aspx.
80 Act on Private International Law, Art 71a(1).
81 *Ibid*, Art 71a(2).
82 *Ibid*, Art 71a(3).
83 Act on Legalization of Documents in International Legal Transactions (Official Gazette 53/91). For detailed analyses see: Župan, Poretti, Golub, 2023.

and protection of legal expectations. Meanwhile, the CJEU points out that the status and family law regarding its cross-border effects can no longer be seen as separate from the impact of the EU law. The CJEU showed openness to diversity and new family forms to benefit mobile EU citizens.

Intercountry and international adoption cases are rare before Croatian competent bodies. Still, the available practice unnerves whether the Croatian authorities can follow the methodology of the right balance set by the ECtHR and CJEU. While deciding on the matter of recognition of foreign adoption, teleological interpretation should prevail over grammatical interpretation. The court's reasoning should be solidly considered and referred to in the jurisprudences of the ECtHR and CJEU. Special awareness should also be given to the effects of foreign adoption, namely, by stressing the rights to which the child will be deprived if the foreign adoption decision is not recognised in Croatia.

However, unfortunate events and public pressure have prompted legislative changes to the Croatian Act on Private International Law. The new provision is partly politically motivated and hasty, thus raising the question of necessity. Nevertheless, it brings improvements, considering that it prescribes the obligation that in non-Hague cases, the parents must be included in the Register of Adoptive Parents and that recognised foreign adoption decisions must be entered in the Adoption Register.

Bibliography

- Bartholet, E. (2013) ‚The Hague Convention: Pros, Cons and Potential', speech given at The Hague Convention On Intercountry Adoption: Past, Present & Future: The Hague Convention: Pros & Cons To Date; Potential For The Future, Available at: https://dash.harvard.edu/handle/1/10777663 (Accessed: 20 November 2022).
- Bayraktaroğlu-Özçelik, G. (2021) ‚SDG 5: Gender Equality' in R. Michaels, V. Ruiz Abou-Nigm and H. van Loon (eds.) *The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law*, Intersentia Online, Available on: https://www.intersentiaonline.com/permalink/13bf3dd6bba01dbb009623495f1db74b (Accessed: 17 November 2022).
- Duić, D., Drventić, M. (2021) ‚Identitet djece migranata u praksi europskih sudova' in Barbić, J., Župan, M. (eds.), *Identitet u prekograničnim privatnopravnim odnosima, Zagreb: Hrvatska akademija znanosti i umjetnosti*, pp. 225-263.
- Dutta, A. (2017) ‚Personal Status', in Basedow, J., Rühl, J., Ferrari, F., de Miguel Asensio, P., *Encyclopedia of Private International Law*, Chaltenham: Edward Elgar Publishing, pp. 1346-1350.; https://doi.org/10.4337/9781782547235.P.3.
- European Group for Private International Law 2016, "Declaration on the Legal Status of Applicants for International Protection from Third Countries to the European Union", *Netherlands International Law Review*, 63, Heidelberg: T.M.C. Asser Press by Springer-Verlag, 95–97.
- European Parliamentary Research Service, EPRS (2016) *Cross-border recognition of adoptions European Added Value Assessment accompanying the European Parliament's legislative owninitiative report (rapporteur: Tadeusz Zwiefka),* Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2016/581384/EPRS_STU(2016)581384_EN.pdf (Accessed: 20 November 2022).
- Fenton-Glynn, C. (2016) ‚Adoption in a European Perspective', in Scherpe, J. M. (ed.) *European Family Law Volume III, Family Law in a European Perspective*, Cheltenham: Edward Elgar Publishing Limited, pp. 311-340; https://doi.org/10.4337/9781785363054.00018.
- Fronek, P. (2012) ‚Foreword' in Gibbons, J. L., Rotabi, K. S. (eds.) *Intercountry Adoption: Policies, Practices and Outcomes,* UK: Ashgate, pp. xxv – xxvi.
- Garimella, S. R., Choudhary, S. (2022) ‚The 1993 Intercountry Adoption Convention: from ‚gift child' to safer adoptions' in Thomas, J., Gulati, R., Köhler, *The Elgar Companion to the Hague Conference on Private International Law*; Chaltenham: Edward Elgar Publishing, pp. 198-214; https://doi.org/10.4337/9781788976503.00027.
- Hayes, P. (2011) ‚The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention', *International Journal of Law, Policy and the Family*, 25(3), pp. 288–317, https://doi.org/10.1093/lawfam/ebr016.

- Hoško, T. (2016) *Posvojenje u međunarodnom privatnom pravu*, Doctoral Disertation, Zagreb: Pravni fakultet Zagreb.
- Hoško, T. (2017) ‚Automatic Recognition of Adoption Orders within the European Union – High Time to Act?', *The European legal forum = Forum iuris communis Europae,* 17(2), pp. 29-34.
- Hoško, T. (2019) ‚Novo uređenje međunarodnog privatnog prava u Republici Hrvatskoj – Zakon o međunarodnom privatnom pravu', Zakonitost, 1(1), pp. 19-31.
- Kroeze, H. (2020). ‚Chapter 10 Distinguishing between Use and Abuse of EU Free Movement Law: Evaluating Use of the "Europe-route" for Family Reunification to Overcome Reverse Discrimination' In Cambien, N., Kochenov, D., Muir, E. (eds) European Citizenship under Stress: Social Justice, Brexit and Other Challenges, Leiden, The Netherlands: Brill | Nijhoff, pp. 222–270; https://doi.org/10.1163/9789004433076_011.
- Kunda, I. (2020a) ‚Utjecaj međunarodnoprivatnopravnih rješenja Europske unije na status migranata' in Barbić, J. (ed.) *Položaj migranata u međunarodnom i europskom pravu*, Zagreb: Hrvatska akademija znanosti i umjetnosti, pp. 73-91.
- Kunda, I. (2020b) ‚Upućivanje na propise EU u Zakonu o međunarodnom privatnom pravu', in Barbić, J., Sikirić, H. (eds.) *Međunarodno privatno pravo – interakcija, međunarodnih, europskih i domaćih propisa,* Zagreb: Hrvatska akademija znanosti i umjetnosti, pp. 21-48.
- Kunda, I. (2022) *Zakon o međunarodnom privatnom pravu – neka otvorena pitanja, Priručnik za polaznike/ice Izrada obrazovnog materijala*, Pravosudna akademija, Available at: https://www.pak.hr/wp-content/uploads/2022/04/Zakon-o-MPP.pdf (Accessed 10 November 2022).
- Milios, G. (2020) ‚Defining 'Family Members' of EU Citizens and the Circumstances under Which They Can Rely on EU Law', *Yearbook of European Law*, 39, pp. 293–319; https://doi.org/10.1093/yel/yeaa009.
- Orejudo Prieto de los Mozos, P. (2017) ‚Adoption' in Basedow, J., Rühl, J., Ferrari, F., de Miguel Asensio, P., *Encyclopedia of Private International Law*, Chaltenham: Edward Elgar Publishing, pp. 21-29, https://doi.org/10.4337/9781782547235.A.3.
- Parra–Aranguren, G. (1993), Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, Available on: https://assets.hcch.net/docs/78e18c87-fdc7-4d86-b58c-c8fdd5795c1a.pdf (Accessed: 25 November 2022).
- Ronen, Y. (2004) ‚Redefining the child's right to identity', *International Journal of Law Policy and the Family*, 18(2), pp. 147-177, https://doi.org/10.1093/lawfam/18.2.147.
- Selman, P. (2002) ‚Intercountry Adoption in the New Millennium; The 'Quiet Migration' Revisited', *Population Research and Policy Review*, 21(3), pp. 205–225.
- Sikirić, H. (2019) ‚Zakon o međunarodnom privatnom pravu', *Pravo u gospodarstvu*, 58(5), pp. 817-896.

- Tryfonidou, A. (2019a) ‚The ECJ Recognises the Right of Same-Sex Spouses to Move Freely Between EU Member States: The Coman ruling', *European Law Review*, 44, pp. 663 – 679.
- Tryfonidou, A. (2019b) ‚The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as "Spouses": Case C-673/16, Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne', *Feminist Legal Studies*,27, pp. 211–221; https://doi.org/10.1007/s10691-019-09397-z.
- Tryfonidou, A. (2021) *Obstacles to the Free Movement of Rainbow Families in the EU*, Policy Department for Citizens, Rights and Constitutional Affairs Directorate-General for Internal Policies PE 671.505. Available at: https://www.europarl.europa.eu/cmsdata/257913/IPOL_STU(2021)671505_EN.pdf (Accessed: 15 November 2022).
- Tryfonidou, A. (2022) ‚The ECJ Recognises the Right of Rainbow Families to Move Freely Between EU Member States: The VMA Ruling', *European law review*, 4, 2022, pp. 534-549.
- Van Loon, H., Sindres, D. (2019) ‚Cultural identities: Wagner v. Luxembourg' in Muir Watt, H., Biziková, L., Brandão de Oliveira, A., Fernandez Arroyo, D. P. (eds.) *Global Private International Law,* Cheltenham: Edward Elgar Publishing Limited, https://doi.org/10.4337/9781788119238.00040.
- Van Den Eeckhout, V. (2005) *The personal status of migrants: still a matter of Private International Law? – The dark side of the picture*, Available at: https://openaccess.leidenuniv.nl/handle/1887/13853 (Accessed: 18 November 2022).
- Watkins, D. (2012) ‚Intercountry Adoption and the Hague Convention: Article 22 and Limitations Upon Safeguarding', Child and Family Law Quarterly, 24(3), pp. 389-409.
- Werner, J. L. (2019) ‚Das Coman-Urteil des EuGH – Art. 21 Abs. 1 AEUV als Grundlage eines ordre public européen', *Zeitschrift für europäisches Privatrecht,* 29, pp. 802 – 821.
- Župan, M. (2018) ‚Novi Zakon o međunarodnom privatnom pravu', *Hrvatska pravna revija,* 18(2), pp. 1-12.
- Župan, M. (2019b) ‚Dijete u međunarodnom privatnom pravu', in Župan, M. (ed.) *Prekogranično kretanje djece u Europskoj uniji*, Osijek: Pravni fakultet Osijek, pp. 259-293.
- Župan, M. (2019a) ‚Identity of a child in cross-border legal transit (naming law at focus)' in Pavlović, Z. (ed.) *Yearbook – Human Rights Protection: Protection of the Right's of the Child „30 Years After the Adoption of the Convention on the Rights of the Child*, Novi Sad: Provincial Protector of Citizens – Ombudsman; Institute of Criminological and Sociological Research in Belgrade, pp. 545-565.
- Župan, M. (2020) ‚Utjecaj ljudskih prava na suvremeno međunarodno privatno pravo' in: Barbić, J., Sikirić, H. (eds.) *Međunarodno privatno pravo – interakcija,*

međunarodnih, europskih i domaćih propisa, Zagreb: Hrvatska akademija znanosti i umjetnosti, pp. 125-168.
- Župan, M., Drventić, M. (2022) ‚Croatia. Legal Framework' *See Law Journal Special Edition*, 1(10), pp. 276-293.
- Župan, M., Poretti, P., Golub, J. (2024) ‚Strane javne isprave u digitalno doba', in: Barbić, J. (ed.), *Međunarodno privatno pravo i globalni trendovi*, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2024 (*in press*).

Asea GAŠPARIĆ*

Torture in respect to imprisonment: A Croatian perspective

ABSTRACT: *The discussion of strengthening prisoners' rights is rooted in human rights principles and the recognition of inherent dignity. Historically, torture was widely accepted, but enlightenment ideals led to its condemnation. International efforts and universal legal documents shaped global attitudes towards the prohibition of torture. This comprehensive analysis explores the safeguarding of individuals deprived of liberty, primarily from an international perspective, with a focus on the European Convention on Human Rights and its pivotal Article 3, which explicitly prohibits torture and inhumane or degrading treatment. The examination encompasses material and procedural obligations imposed on states, providing a nuanced understanding of the fundamental rights tied to human dignity and physical integrity. Significantly, the study delves into the jurisprudence of the European Court of Human Rights, emphasising cases involving Croatia and revealing persistent shortcomings in prison conditions.*
KEYWORDS: *torture, imprisonment, jurisprudence of ECtHR, prison conditions, prisoners' rights*

1. Introduction

Should we strengthen prisoners' rights? This question has become a major topic of discussion in the context of human rights and fair punishment. An important maxim is that all prisoners should be treated with respect due to their inherent dignity and values as human beings.[1] Definitions of imprisonment often include only the deprivation of liberty; however, considering the progressive growth of human rights in general, it should also include respect for the protection of other human rights that are guaranteed to prisoners in the same way as other people. In history, prisoners were treated like 'lower humans', and it was commonly thought that they deserved to

1 Basic Principles for the Treatment of Prisoners, 1990.

* Ph.D. Candidate at the Ferenc Deák Doctoral School of the University of Miskolc and Scientific Researcher at the Central European Academy, Budapest, ORCID: 0000-0003-2725-488X.

https://doi.org/10.62733/2023.2.91-106

be punished and degraded. It took centuries for human rights development to change common opinion. In the first half of the 20th century, the first legal act was drafted, providing a more humane approach to the treatment of those deprived of liberty and emphasising the inherent dignity and equal and inalienable rights of all members of society. Their right to human treatment, which includes the absolute prohibition of torture, should not be diminished but, on the contrary, be equal to those who are free. Although the torture of prisoners has historically been used as a widespread method of punishment, the current situation has changed, and torture has been viewed in a much stricter way with profound consequences. Inhumane treatment and torture, owing to their historical representation, are well known to the general public. It is a commonly accepted term to describe the deliberate infliction of severe pain or suffering on a person for reasons such as punishment, extracting a confession, interrogation for information, or intimidating third parties.[2] Looking at the historical context, one can say that the meaning of torture depends on the society and legal system within which it is defined. Considering the social, political, and economic changes throughout history, it was inevitable for torture to have different connotations at different points in the past.

2. Historical overview

History tells us of torture as far back as we can trace:[3] In the context of law, torture was systematically used in criminal procedures from the beginning of society and was itself universally viewed as a valid legal tool,[4] a moral and justified practice. Its methods date back to ancient Mesopotamia and Egypt. The first record of the use of torture as a means of extracting confessions dates back to the 21st century before Christ with the Sumerian Code of Ur-Nammu. This was the first written code prescribing torture and the situations in which it could be used. The Babylonian Code of Hammurabi, which uses *lex talionis* as its main policy, is commonly known as a very rigorous set of rules. To describe the severity of torture in that period, it is worth mentioning the trial by ordeal,[5] which was considered the 'judgement of God'. Both the above-mentioned historical Codes were led by the theocratic idea of law, which claims authority as interpreting law as the will of the gods and, as such, must be obeyed. Furthermore, the judiciary of Ancient Greece likewise knew and used torture.

2 Rodley, 2002, pp. 467–493.
3 Morgan, 1933, pp. 1–15.
4 Einolf, 2007, p. 102.
5 Trial by ordeal was an ancient judicial practice in which the guilt or innocence of the accused was determined by subjecting them to a painful, or at least an unpleasant, usually dangerous experience.

However, the leading philosophers of the time, Plato[6] and Aristotle,[7] introduced the concept of natural law. In this regard, the theory of natural law attributes to humans a sense of reasoning and a distinction between right and wrong, eventually leading to the introduction of natural justice. Although torture was part of laws, customs, and testimonies, it was mainly reserved for slaves, who were not perceived as human. Because torture was mainly used to obtain a confession, the truth acquired in that way was respected as the only possibility.[8] Although the use of torture was not considered a form of punishment but rather a way of obtaining the truth, as time passed, its use in society soon exceeded its legal limits. Torture was applied in situations where there was no substantial evidence and rapidly expanded its limits to grave crimes and small offences against property. Frequent usage of torture became widely accepted and experienced its greatest resurgence in the period of the Inquisition against heresy, cases of witchcraft, and political crimes, becoming the primary means for obtaining confession. Available data show that many trials performed in the 16th and 17th centuries reveal several tragic verdicts that ended with capital punishment and were reached by extorting the confession using the method of torture.[9]

The Age of Enlightenment introduced a new perspective and brought about many changes. As society began transforming, the renowned authors Voltaire, Rousseau, and Montesquieu developed new ideas regarding modifications to the trial procedure. With that in mind, distinguished Italian criminologist, jurist, and philosopher Cesare Beccaria wrote a book *On Crimes and Punishments*[10] in which he backed the principle of respect for the human rights of the accused, advocated public trials, and opposed torture and the death penalty. He imagines the criminal justice system as preventing crime instead of imposing punishment. Beccaria's book contributed to the abolition of torture by introducing the idea of improving living conditions with the aim of reducing crime. From a historical perspective, we have two points that could be taken as the beginning of modern criminal law: Beccaria's *On Crimes and Punishments* and the enactment of the famous Declaration of the Rights of Man and of the Citizen from 1789 as a response to the French Revolution.

At the beginning of the 19th century, European legislation no longer used torture as a legal means in trial procedures. However, this did not last long. At the beginning of the 20th century, with socialist agendas and ideologies, human and civil rights were put in second place. Consequently, torture again started to be used as an instrument for asserting ideology and revolutionary ideas and was used against 'enemies' of

6 See Kelsen, 1960.
7 See Burns, 1998.
8 More information about natural law can be found in Goldschmidt, 1974, pp. 396–397; Devereux, 2011, pp. 96–120.
9 See more in Wisnewski, 2010; Barnes, 2017.
10 Beccaria, 1872, pp. 11–78.

such an approach.[11] Although torture was implemented and foreseen in law, it was regularly used by secret civil and military forces on political dissidents, spies, and prisoners of war. The individual was subordinate to the political order and 'the higher cause' of the regime. To preserve political order at all costs, all means were permitted, and new methods of torture were introduced.[12] In the period during and after World War II, almost all countries in Europe, America, and Asia had specific kinds of camps where they would imprison and torture 'those who had a different opinion'. At that point in history, international humanitarian organisations began to react to this systematic use of repression. With the enormous devastation and suffering inflicted on civilians by war, new legal documents regarding the protection of human dignity were drafted to remind society of the ethical principles stated in the Declaration of the Rights of Man and of the Citizen.

3. Relevant legal documents

Rapid changes in social and political circumstances resulted in the adoption of the Universal Declaration of Human Rights[13] under the United Nations in 1949. Torture was seriously condemned in Article 5, which stipulates: 'No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment'. Following the post-war period and recovery from the devastation of war, several acts for the protection of human and civil rights were adopted at the initiative of the Council of Europe. The most prominent document that has continued in force until today is the European Convention on Human Rights,[14] which was adopted in Rome in 1950. Similar to the previous Convention, this Convention contains provisions on the prohibition of torture with the same expressions.[15] The United Nations General Assembly then adopted The International Covenant on Civil and Political Rights in 1966.[16] This document recognised the prohibition of torture in Article 7[17] as a fundamental value and right inherent to every person. Apart from the United Nations, whose aim is

11 "Enemies of the revolution" in the Soviet Union and China and "enemies of the political order" in fascist Germany and other nation of the Axis power.
12 E.g. sites for mass torture and execution instroduced in Nazi concentration camps and Stalin's gulags.
13 United Nations, 1948.
14 Council of Europe, 1950.
15 Council of Europe, 1950, Art. 3: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
16 United Nations, 1966.
17 '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*'

the maintenance of international peace and security and the promotion of the well-being of the people of the world, international non-governmental organisations for human rights protection have contributed to condemning torture as an unjustified and unacceptable way of conduct in the current level of civilisation. In 1975, Amnesty International introduced a new Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.[18] As stipulated in the preamble, its main purpose is 'recognizing that rights derive from the inherent dignity of the human person…' It is the first document that not only prohibits torture on an abstract level but also provides a definition, stated in Article 1 as follows: 'For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'. Furthermore, this Convention became an integral part of the national legislation of all States Parties, which are obliged[19] to take measures to prevent any act of torture in the territory under their jurisdiction and are required to extradite or prosecute every person suspected of torture in the territory under their jurisdiction, regardless of where the alleged torture took place.[20]

In response to global expectations, the national legislation of numerous states has adjusted to adhere to international human rights law, thereby reinforcing the prohibition of torture. In the Croatian legal system, the prohibition of torture is a constitutional category. The Constitution of the Republic of Croatia,[21] in its Article 17, among other constitutionally guaranteed freedoms and rights, mentions '*prohibition of torture, cruel or unusual treatment or punishment*'. The importance of human dignity in the Croatian legal order is shown through the fact that the prohibition of torture is, *inter alia*,[22] absolute and cannot be limited, even in circumstances of

18 United Nations, 1984.

19 Office of the United Nations High Commissioner for Human Rights, 2001.

20 The UN established the Comittee against Torture in 2002, a body of independent human rights experts that monitor implementation of the Convention against Torture by its States Parties. The monitoring is aimed at encouraging chanes, public condemnation following only if the changes have not been implemented.

21 Constitution of the Republic of Croatia, Official Gazette no. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

22 The same applies to right to life, cruel or humiliating treatment or punishment, the principle of legality of punishable acts and punishments and freedom of thought, conscience and religion.

immediate danger to the State.[23] The positive obligation of a State to forbid torture by law and conduct a proper investigation if torture occurs is recognised in the Croatian Criminal Code[24] under the specified crime of *Torture and other cruel, inhuman or degrading treatment or punishment.* Article 104 defines it as an act of a public official or another person who, at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, inflicts on another severe pain or suffering, whether physical or mental, for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, shall be punished by imprisonment of from one to ten years.[25]

4. Protection of the persons deprived of their liberty

As stated *supra*, the European Convention on Human Rights is a crucial international legal document. It contains just one provision about torture in Article 3: '*Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment*', under which three types of forbidden behaviour are listed: torture, inhumane treatment or punishment, and degrading treatment or punishment. The protection secured by Article 3 also extends to persons deprived of their liberty in a broad sense—those on remand, in custody, or detained in psychiatric institutions.[26] All State Parties have obligations arising from Convention provisions. These should be differentiated as material and procedural obligations of the state related to rights in Article 3. Material obligations include negative obligations understood as the prohibition of subjecting persons under state jurisdiction to torture or inhuman or degrading treatment or punishment, but also of not subjecting prisoners to conditions that would cause the violation of Article 3. Furthermore, positive obligations imply taking measures to prevent persons under state jurisdiction from being subjected to treatment contrary to guaranteed rights. Besides material obligations, the theory recognises procedural obligations, which entail a thorough official investigation of an alleged violation of rights under Article 3. Additionally, the Court may examine the complaint of failure to investigate even when it has already found that there is no substantive violation of Article 3 and may even accept the complaint in such

23 Brnetić, 2014, pp. 178–186.
24 Criminal Code of Republic of Croatia, Official Gazette no. 125/11, 144712, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.
25 Article 104 of the Criminal Code of Republic of Croatia, Official Gazette no. 125/11, 144712, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.
26 Akandji-Kombe, 2007, p. 21.

circumstances.[27] Such investigations aim to identify and punish those responsible in cases where there is reasonable suspicion that state officials have acted contrary to ensured rights towards persons deprived of their liberty. Article 3 protects the right to human dignity, as well as physical and mental integrity. A deeper analysis reveals that it promotes one of the fundamental values of democratic societies. It includes protection of the mental and physical integrity of the individual but also prevents states from subjecting individuals to mistreatment. It is an unconditional norm of international law—the so-called *ius cogens* –and an absolute and nonderogable human right. There are no restrictions on or derogations of the prohibition of torture, even in the most difficult circumstances (such as fighting terrorism and organised crime). When discussing fundamental human rights, it is clear that the same rights apply to those who are deprived of freedom. An important postulation for regulating the rights of prisoners at the international legal level was made more than 40 years ago in the case *Golder v. UK*.[28] The Court held that all convention rights belonged to prisoners, and they could be limited on the same grounds as for free people.

Torture occurs when someone deliberately causes serious and cruel suffering, physically or mentally, to another person for various reasons, such as punishment, intimidation, or to obtain information from them. Inhumane treatment or punishment is the treatment that causes intense physical or mental suffering[29] and degrading treatment or punishment that is extremely humiliating and undignified.[30] Regarding the definition of torture on the European level, it must be noted that the European Convention on Human Rights does not define torture as a specific term. Instead, the Court developed four elements of its definition through case law. First, the pain and suffering must be of a particular intensity and cruelty to constitute torture, causing severe mental or physical pain or suffering. In practice, a special stigma is placed on intentional inhumane treatment that causes very severe and cruel suffering (*Selmouni v. France*[31]). The second important element is intention, which implies the deliberate infliction of pain (*Aksoy v. Turkey*[32]). If the treatment reaches a minimum level of cruelty, it will be classified as inhuman or degrading, although not 'intentional' enough to be considered torture. Receiving information

27 Akandji-Kombe, 2007, p. 34.
28 Golder v. the United Kingdom, 1975.
29 E.g. serious physical assault, psychological interrogation, cruel or barbaric detention conditions or restraints, serious physical or psychological abuse in a health or care setting, and threatening to torture someone, if the threat is real and immediate.
30 Whether treatment reaches a level that can be defined as degrading depends on a number of factors. These include the duration of the treatment, its physical or mental effects and the sex, age, vulnerability and health of the victim. This concept is based on the principle of dignity – the innate value of all human beings.
31 Selmouni v. France, 1999.
32 Aksoy v. Turkey, 1996.

from that person or from a third party, extortion of statements, punishment for an act committed or suspected by this or a third person, intimidation, or coercion of this or a third person, or another reason based on any form of discrimination will be categorised as serious enough to be considered the third element (*Denizci v. Cyprus*[33]). Finally, to constitute an act of torture, it must be performed by a person acting in an official capacity.

It must be pointed out not only that Croatia strongly condemns any form of torture but also that as a State Party to all conventions mentioned above, it has a great responsibility to subordinate itself to the prescribed regulation, or else it could be brought in front of the European Court of Human Rights for not adopting the decisions delivered by the Court. Regarding Article 3, in the context of the human rights of people deprived of liberty, Croatia had been decided against in several cases at the ECtHR. The aforementioned case law is analysed below.

5. ECtHR jurisprudence

The first case in which the Republic of Croatia was convicted for the first time in the context of Article 3 related to the appropriate accommodation of prisoners was *Cenbauer v. Croatia*[34] in 2006. The case in question involved a situation in which a prisoner spent approximately 2 years and 3 months in a cell with less than 4 m^2 of space. There was no running water, and access to the common toilet was not possible during the night or when the prisoner was locked in the cell (they urinated in bottles). He was in the cell from 19:00 to 07:00 and for several hours during the day. Cells were dirty, with damp walls, and the overall hygienic conditions were poor. Only one year later, Croatia faced another judgement, *Štitić v. Croatia*,[35] in which the Court stated that the prisoner was locked in a humid cell without daylight for about 20 hours a day for 15 months. The very same year, in 2007, Croatia lost another case, *Testa v. Croatia*.[36] The prisoner suffered from chronic hepatitis C and was confined in an overcrowded cell with 2.4 m^2 of personal space and an old and partially broken bed. However, the environment was unsanitary and unsafe. The Court concluded that the lack of necessary medical care and assistance, combined with the prison conditions that the applicant had to endure for more than two years, reduced human dignity and aroused feelings of anxiety and subordination that could humiliate and disparage her. In addition, the Court stressed that if state authorities decide to place a seriously ill person in prison

33 Denizci and Others v. Cyprus, 2001.
34 Cenbauer v. Croatia, 2006.
35 Štitić v. Croatia, 2008.
36 Testa v. Croatia, 2007.

and keep him there, they must show special care in guaranteeing conditions that correspond to the special needs of that person resulting from his incapacity.

Furthermore, in 2008 there occurred another case, *Pilčić v. Croatia*.[37] The prisoner suffered from kidney stones, from which he endured considerable intermittent pain for a prolonged period. The penitentiary authorities failed to oversee the illness or implement the suggested procedures. The Court considered the period during which the prisoner was exposed to ill-treatment[38] when assessing whether any treatment of the prisoner led to a violation of Article 3 of the ECHR. After these judgements, Croatia had a respite until 2012, when the case *Longin v. Croatia*[39] was judged. The prisoner had asthma and allergies and was confined in a 16 m^2 room with seven other prisoners. The sanitary unit, together with the toilet, was located in the same room as their dining table. He could shower only once a week, was constantly locked in a room, and was only allowed to go outside for 2 hours a day. Two years later, in *Lonić v. Croatia,*[40] from 2014, the prisoner had an area of less than 3 m^2. Each cell had eight beds and cabinets. He spent 22 h per day in the cell and urinated in bottles for 11 months. The lack of personal space was not compensated for by freedom of movement during the day.

The case that had the greatest impact, not only on Croatia but on all of the signatory States, was *Muršić v. Croatia,*[41] delivered in 2016**.** The case concerned a prisoner who was held in an overcrowded cell. The rooms were dirty and poorly maintained. The sanitary unit was in the same room as the dining table, and the patient had no access to hot water for showering. He had less than 3 m^2 of personal space at his disposal for 15 days. In this noted case, the Court found a violation of Article 3 and concluded that if the personal space falls below 3 m^2, the deficiency is so serious that there is a strong presumption of a violation of Article 3. The burden of proof lies with the state. This indicates that there are factors that can compensate for this deficiency. The Court also highlighted three criteria for defending this assumption: First, the reduction of personal space must be short, occasional, and minimal. Second, it must be accompanied by sufficient freedom of movement and activity outside the cell. Finally, the prisoner must be placed in an institution that is considered an appropriate institution for prison, and there are no other aggravating circumstances. This case holds significant prominence and importance as a precedent, influencing not only the Croatian judicial system but also carrying implications for all States Parties to the ECtHR. After such a significant case and judgement, Croatia was again convicted in 2019 in the case *Ulemek v. Croatia.*[42] The

37 Pilčić v. Croatia, 2008.
38 In that regard, the state has the obligation to prevent ill-treatment; see Hassanová, 2023, p. 53.
39 Longin v. Croatia, 2013.
40 Lonić v. Croatia, 2015.
41 Muršić v. Croatia, 2016.
42 Ulemek v. Croatia, 2020.

prisoner was placed in an overcrowded cell with 7 other people. The cell had a 1.57 m^2 big toilet. He was allowed to spend just one hour outside the cell, and the rest of the time was locked in the cell. He was not entitled to adequate hygiene conditions, such as the possibility of a daily shower, and the cells had limited access to daylight. The last case concerning the relevant topic was from 2022, *Huber v. Croatia*.[43] In this case, the prisoner claimed that the cells were overcrowded. There was a lack of adequate hygienic facilities, privacy for the toilet, and fresh air and no restricted access to showers. To date, this is the last case in which Croatia has been found guilty concerning the inadequate conditions of detention.

6. Challenges in Croatia

Considering the number of cases in which Croatia lost in front of the European Court of Human Rights, it can be easily concluded that there are systematic deficiencies in the Croatian prison system, mostly related to a serious lack of appropriate private space for each prisoner and a lack of proper hygienic conditions. In addition to cases in which the Court stated the mentioned minimum multiple times, the European Prison Rules set up by the Council of Europe also share the same standard in Rule 18.[44] These Rules set minimal standards for the treatment of prisoners and are widely accepted even though they are not legally binding. According to certain indicators, the Croatian prison system has experienced some progress compared to the period before Croatia entered the EU. For example, poor prison conditions are no longer the subject of lawsuits at the European Court of Human Rights. Despite the improvement in living conditions in prisons, hygienic conditions, untidy buildings, insufficient health care for prisoners, and the inability to reduce the risk of criminal infections, there are still areas that cry out for positive changes.[45]

Looking at the statistics, the Croatian Ombudsman, in her report, pointed out the existing problems and shortcomings of the prison system. Owing to the spread of COVID-19 and the devastating earthquakes that struck Croatia in 2020, the Ombudsman analysed the conditions in prisons and warned about some deficiencies.[46] On the subject of COVID-19 and already present low hygienic standards, the prison administration had the difficult task of balancing prisoners' rights on the one hand and protecting the whole prison population on the other. At the time, certain epidemiological measures were implemented, and as the first wave of the pandemic weakened,

43 Huber v. Croatia, 2022.
44 European Prison Rules, 2006.
45 Getoš Kalac, Bezić, Šprem, 2021, pp. 106–107.
46 Croatian Ombudsman Report, 2020.

prisoners started to complain.[47] The accommodation conditions were still inadequate, and one prisoner complained that he was accommodated at the Diagnostic Centre in Zagreb in a room of 21 m^2, of which 1.57 m^2 of space was for sanitary facilities, with six other prisoners. Additionally, prisoners with chronic diseases also complained. As the Ombudsman explains, one prisoner, who suffered from an extensive form of ulcerative colitis, stated that he was placed in a room with ten others, with whom he also shared a sanitary facility. This led to the appearance of symptoms of the disease and caused a danger to his health. Although after some time, he was moved to a room with a smaller number of prisoners, it is unacceptable that he was accommodated in that way at all, as it could be a humiliating treatment and a possible violation of Article 3 of the ECHR.

In addition to the pandemic, the prison system has experienced earthquakes. While in the earthquake that hit in March in Zagreb, only the building of the Prison Hospital Zagreb was damaged and suffered minor material damage, a devastating earthquake in Sisak-Moslavina County significantly damaged the Prison in Sisak and the Glina Penitentiary. Owing to the resulting damage, the Prison in Sisak remains closed, and all prisoners have been transferred. In Glina, buildings were severely damaged, and 82 prisoners were transferred to other penal institutions. In addition, the prison in Karlovac was damaged. Under these extraordinary circumstances and the need to act immediately, prisoners' rights were placed second. In a report from 2021[48] regarding accommodation conditions in prisons, the Ombudsman stated that the overcrowding[49] of penal institutions and accommodation conditions which do not correspond to health, hygiene, spatial requirements, and climatic conditions are some of the most common reasons for complaints over the years. Furthermore, the Ombudsman underlined that the new Law concerning this matter does not prescribe a minimum personal space standard of 4 m^2, which additionally affects the accommodation conditions of persons deprived of liberty.

Likewise, the decision of the Constitutional Court in 2009[50] established that prisoners' constitutional right to human treatment and respect for dignity was

47 Some of the complaints were as follows: '*…there are sixty to seventy people in the building, and only three showers work, and it is very crowded, so it is difficult to maintain hygiene, the supplies we receive, that is, soap, shampoo, calodont, toilet paper are distributed every three months, which is impossible to, with a couple of packets of shampoo, one soap and four packets of toilet paper, you can maintain hygiene for three months…*'

48 Croatian Ombudsman Report, 2021.

49 Prisoners complaint: '*…I am currently in a cell measuring approx. 6x3 m, that's about 18 m^2, i.e. there are 6 of us person. Until recently, there were 5 of us and that was too much, and now a sixth bed has been added and it's one person staying in such a space is unbearable. … besides the six of us, there are 3 more bunk beds, a large dining table, a small table, a table for the TV receiver, and 5 chairs that take up 10m^2… Please you as a human being to imagine what its like in the morning when we all get up and each of us has to leave to the toilet and perform human needs. It takes an hour for the last one to come. So you please help me explain how to avoid bigotry in that little room…*'

50 Decision of the Constitutional Court of Croatia, U-III-4182/2008.

violated because the Government had been ordered to adapt the capacity of the Zagreb Prison within five years but still failed to do so. Furthermore, inadequate accommodation conditions in the Centre for Diagnostics in Zagreb were detected according to another decision of the Constitutional Court in 2020.[51] It stated that the applicant spent twenty-two hours a day in the cell in which he occasionally had less than 4m^2 of personal space, that the toilet was also located in that room, that there was no special ventilation for the toilet, and that food was served and consumed in the same room. According to the ECtHR, these conditions have been established as inhuman and degrading treatments.

When discussing the Croatian national legal system, continuous violations come to light of the right to adequate conditions in prison that the Committee for the Protection of Torture and Inhumane or Degrading Treatment or Punishment (CPT)[52] often warns about. The fact that the CPT, in several of its reports, highlighted that, for the first time since the CPT started visiting Croatia in 1998, there were evident difficulties in cooperation is alarming. Regarding the situation of appropriate accommodation for prisoners, they stated that it is crucial to use a common measuring rod when determining the minimum amount of living space that should be offered to each prisoner and to determine with precision the actual level of overcrowding in each prison cell, in each prison and in the prison system as a whole.[53] Referring to ECtHR jurisprudence, the report again emphasises the importance of drawing a line between 'desirable' standards on the one hand and 'undesirable' standards on the other. Additionally, for over 30 years (since the 1990s), the Committee has recommended minimum standards for personal living space in prisons, establishing 6m^2 in a single cell and 4m^2 in shared cells.[54] Respecting the CPT's recommendation, Croatia adopted new measures to improve living conditions[55] in prisons and prevent future violations of Article 3. In the last report from 2018, CPT was satisfied with the progress;

51 Decision of the Constitutional Court of Croatia, U-III-1192/2018.

52 CPT is the body set up to monitor the implementation of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

53 31st General Report of the European Committee for the Prevention of Torture, 2021, p. 27.

54 Council of Europe, 2015.

55 Report to the Croatian Government on the visit to Croatia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2017, p. 25. In that regard, for example, Osijek County Prison offered satisfactory material conditions of detention in terms of state of repair, hygiene, access to natural light and ventilation in most of its cells and sanitary annexes, had installed new PVC windows, and the courtyards in use were equipped. At Split County Prison, the situation was a bit different: 33 of the 49 cells in the five modules had been renovated since March 2016 and offered good material conditions of detention, but the remaining 16 unrenovated cells were less favorable; walls were crumbling, the sanitary facilities displayed signs of wear and tear, and the in-cell hygienic conditions left much to be desired. In Zagreb County Prisons the cells were recently renovated, the walls had been painted, furniture replaced and sanitary annexes fully partitioned.

however, serious levels of overcrowding were still observed. In that regard, the Committee recommended that the Croatian authorities ensure that the minimum requirement of 4 m^2 per prisoner in multiple-occupancy cells be respected and that this standard, which is also enshrined in national legislation, is attained.

The law in force regulating this matter at the time was the Law on the Execution of Prison Sentences of 1999.[56] It stated: There must be at least 4 m^2 and 10 m^3 of space in the dormitory for each prisoner.[57] At the time, prisoners were filing many complaints regarding the private space they had at their disposal. Because the Croatian legal system failed to protect their rights, some of the claims ended up before the ECtHR. Bearing in mind the number of violations Croatia was sentenced for, there were two options: to secure the conditions prescribed by the law or to change the legislature. The latter appears to be easier to achieve. With the goal of not receiving any more convictions at the European level, the Croatian Parliament passed a new Law on the Execution of Prison Sentences.[58] According to the legislator, the solution was simply to erase the given norm. Therefore, in the new Law, there was no explicitly stipulated norm regarding the number of square meters of floor space that each prisoner should have while in the cell, although the ECtHR determined that the personal space of an inmate should not fall below 3m^2.[59] This approach of the legislator could, in the future, result in serious remarks from the European Court, reminding us of the binding character of the Court's decisions. It is understandable that the State, on the subject of this question, does not want to guarantee something that cannot be provided and expose itself to possible lawsuits. On the other hand, the fact that the State took the line of least resistance in this situation raises an inevitable question: is it the best solution to simply erase standards we cannot comply with at the moment or should the State try to find a way to meet those same minimum standards, as in this case, the 4m^2 of floor space in shared cells stated by ECtHR?

7. Concluding Remarks

According to Zagorec,[60] the main purpose of implementing each of the ECtHR judgements is to correct the violation of that right in relation to the specific person who is the

56 Law on Execution of Prison Sentences, Official Gazette no. 128/99, 55/00, 59/00, 129/00, 59/01, 67/01, 11/02, 76/07, 27/08, 83/09, 18/11, 48/11, 56/12, 150/13, 98/19, 14/21.

57 Article 73 of Law on Execution of Prison Sentences Official Gazette no. 128/99, 55/00, 59/00, 129/00, 59/01, 67/01, 11/02, 76/07, 27/08, 83/09, 18/11, 48/11, 56/12, 150/13, 98/19, 14/21.

58 Law on Execution of Prison Sentences, Official Gazette no. 128/99, 55/00, 59/00, 129/00, 59/01, 67/01, 11/02, 76/07, 27/08, 83/09, 18/11, 48/11, 56/12, 150/13, 98/19, 14/21.

59

60 Zagorec, 2018, p. 432.

applicant (individual enforcement measures) but also to prevent similar violations in the future (general enforcement measures). For each State party of the Convention, the legislator is obliged to harmonise the national regulations with the requirements of the Convention, as interpreted by the Court. This *modus operandi* ensures the protection of prisoners in appropriate accommodations through the national legal system. State authorities must adopt effective measures to ensure that a person deprived of liberty resides in conditions that ensure respect for human dignity.

For the Croatian legal system, the case *Muršić v. Croatia* is the most important. In this case, the fundamental principles regarding inadequate conditions of imprisonment were established. The Court introduced the concept of a strong presumption of violation of Article 3 when the personal space available to the prisoner falls below 3m^2 of the floor surface. Considering this concept, the aforementioned presumption can only be rebutted if certain conditions are cumulatively met. Even though the Court has emphasised on many occasions that under Article 3 it cannot determine a specific number of square meters that should be allocated to a prisoner in order to comply with the Convention, in *Muršić v. Croatia*, the Court took the position that 4 m^2 of personal accommodation for prisoners should be a desirable standard that contracting states should fulfil. Some of the determinants that can warn of the (im) purposefulness of the prison system are the following: the number of prisons and their spatial distribution, accommodation capacity in relation to the number of prisoners, rational management of material and human resources, treatment aspects, security in prison, and the humane conditions of serving a prison sentence.[61] Conditions in prisons are certainly relevant factors that affect the quality of a prison system as a whole but also prevent possible convictions of the State before the ECtHR. Prison sentences should be carried out in a way that guarantees the prisoners respect of their basic human rights and human dignity, as expressly proclaimed by the Convention, following the rule of law and legal certainty. From the jurisprudence of the European Court, it is important to note that it directly reflects on national legislation but also on the courts. On the one hand, the Constitutional Court of the Republic of Croatia tried to adopt the standards set by the Court, but the decisions also stated that state authorities are obliged to adopt and implement effective measures to ensure that a person deprived of his liberty resides in conditions that ensure respect for prisoners' human dignity. However, it is evident that there are still repeated violations of the fundamental right to a proper accommodation of a prisoner.[62] In the end, we are left to wonder whether the continuous violations of prisoners' rights should be observed through the perspective of a flawed legislature, the negligence of authorities, or something yet to be discovered.

61 Getoš Kalac, Bezić, Šprem, 2021, p. 88.
62 Zagorec, 20018, p. 431.

Bibliogprahy

- 31st General Report of the European Committee for the Prevention of Torture, 2021, p. 27, Available at: https://rm.coe.int/1680a63c72. (Accessed: 22 November 2022).
- Akandji-Kombe, J.-F. (2007) *Positive obligations under the European Convention on Human Rights – A guide to the implementation of the European Convention on Human Rights* in Council of Europe Human rights handbook series, 7.
- An Operational Guide for National Human Rights Institutions, Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/PreventingTorture.pdf (Accessed: 16 November 2022)
- Barnes, J. (2017). *A genealogy of the torture taboo*. Taylor & Francis, pp. 1-192.
- Basic Principles for the Treatment of Prisoners, Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-treatment-prisoners (Accessed: 14 November 2022)
- Beccaria, C. B. D. (1764). 1872. *An essay on crimes and punishments. By the Marquis Beccaria of Milan. With a commentary by M. de Voltaire...*, pp. 11-78.
- Brnetić, D. Ustavna zaštita ljudskog dostojanstva, 2014, pp. 178-186, Available at: https://bib.irb.hr/datoteka/705372.Brneti_Kemerovo.pdf (Accessed: 16 November 2022).
- Burns, T. (1998). Aristotle and natural law. *History of Political Thought*, *19*(2), pp. 142-166.
- Constitution of the Republic of Croatia, Official Gazette no. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14
- Council of Europe, (1950). Convention for the Protection of Human Rights and Fundamental Freedoms, *Council of Europe Treaty Series 005*.
- Council of Europe, 2015, *Living space per prisoner in prison establishments: CPT standards*, Available at: https://rm.coe.int/16806cc449 (Accessed: 20 November 2022).
- Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, Available at: https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae (Accessed: 18 November 2022)
- *Council of Europe. (1950). Convention for the Protection of Human Rights and Fundamental Freedoms. In Council of Europe Treaty Series 005.*
- Criminal Code of Republic of Croatia, Official Gazette no. 125/11, 144712, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21
- Croatian Ombudsman Report, 2020, Available at: https://www.ombudsman.hr/hr/download/izvjesce-pucke-pravobraniteljice-za-2020-godinu/?wpdmdl=10845&refresh=60910e6b1d1601620119147 (Accessed: 18 November 2022)
- Croatian Ombudsman Report, 2021, Available at: https://www.ombudsman.hr/hr/download/izvjesce-pucke-pravobraniteljice-za-2021-godinu/?wpdmdl=13454&refresh=636288ebc67891667401963

- Decision of the Constitutional Court of Croatia, U-III 4182/2008, Available at: https://www.iusinfo.hr/sudska-praksa/USRH2008B4182AIII
- Decision of the Constitutional Court of Croatia, U-III-1192/2018, Available at: https://www.iusinfo.hr/sudska-praksa/USRH2018B1192AIII
- Devereux, D. (2011). Classical Political Philosophy: Plato and Aristotle in Klosko, G. (ed.) *The Oxford handbook of the history of political philosophy.* Oxford University Press, pp. 96-120.
- Einolf, C. J. (2007). The fall and rise of torture: A comparative and historical analysis. *Sociological Theory*, *25*(2), pp. 101-121.
- Getoš Kalac, A., Bezić, R. i Šprem, P. (2021). *"Ružno pače" hrvatskog kaznenog pravosuđa – zatvorski sustav u svjetlu domaćih i europskih trendova,* Godišnjak Akademije pravnih znanosti *Hrvatske,* XII (1.), pp. 106-107.
- Goldschmidt, V. (1974). 21. Essays in Ancient Greek Philosophy, edited by John P. Anton with George, L. Kusta. *Revue des Études,Grecques*, *87*(414), pp. 396-397.
- Hassanová, R.L. (2023). The Prohibition of Torture and its Implications in the European Legal Sphere. *Central European Journal of Comparative Law*, IV. 2023/1, pp.51-73.
- Kelsen, H. (1960). Plato and the doctrine of natural law. *Vand. L. Rev.*, *14*, 23.
- Law on Execution of Prison Sentences, Official Gazette no. 128/99, 55/00, 59/00, 129/00, 59/01, 67/01, 11/02, 76/07, 27/08, 83/09, 18/11, 48/11, 56/12, 150/13, 98/19, 14/21.
- Morgan, L. (1933). *The history of torture, Chicago*, pp. 1-15.
- Report to the Croatian Government on the visit to Croatia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 2017, p.25, Available at: https://rm.coe.int/16808e2a0e (Accessed: 20 November 2022).
- Rodley, N. S. (2002). The definition (s) of torture in international law. *Current Legal Problems*, *55*(1), pp. 467-493.
- UN General Assembly United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Treaty Series, 1465*, 85.
- United Nations (General Assembly), (1966). International Covenant on Civil and Political Rights, *Treaty Series*, *999*, 171.
- United Nations (General Assembly). (1966). International Covenant on Civil and Political Rights. *Treaty Series*, *999*, 171.
- United Nations (General Assembly). (1984). Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Treaty Series, 1465, 85.
- United Nations. (1948). *Universal Declaration of Human Rights*
- Wisnewski, J. J. (2010). *Understanding torture*. Edinburgh University Press, 1-260.
- Zagorec, M. (2018). Pravo na odgovarajući smještaj zatvorenika s osvrtom na presudu Europskog suda za ljudska prava "Muršić protiv Hrvatske ". *Policija i sigurnost*, *27* (4/2018), pp. 407- 434.

Mateusz KAŹMIERCZAK* – Filip ŽIVANOVIĆ**

Financial Autonomy of Local Self-Governments in the Republic of Serbia and the Republic of Poland – Comparative Analysis

ABSTRACT: *This contribution deals with the concept of financial autonomy of the local self-governments in the Republic of Poland and the Republic of Serbia. The main aim of this contribution is to confirm or disprove the hypothesis that in the abovementioned countries current legal system is in line with the financial autonomy requirements stipulated by the European Charter of Local Self-Governments. The research is conducted by applying basic methods of legal science, especially the method of scientific analysis. First, it provides a brief overview of the Charter's role, constitutional background of Serbia and Poland. Second, it present the regulation on local taxation in the abovementioned countries and its place within the local budgets. Third, it confronts the results of previous analysis with the requirements of the Charter. The authors argue, that in both countries, the requirements of the Charter are only partially met.*
KEYWORDS: *European Charter of Local Self-Governments, Financial Authonomy, Local taxes, Real Estate Tax, Local Budgets*

1. Introduction

In modern societies, the government plays a focal role in the concept of a country. It operates at the intersection of sovereignty, territory and population to provide security and satisfy citizens' needs. Notably, funding is crucial to a government achieving its goals. Thus, one of the basic powers of the government is to collect taxes (in a broad sense) as a basic form of financing public government. The state can delegate its authority to different levels of territorial government, which mainly depends on the constitutional order, that is, the type of territorial organisation. In both Poland and

* PhD student at the University of Gdańsk, specializing in the field of digital taxation. E-mail: mateusz.kazmierczak@phdstud.ug.edu.pl. ORCID: 0000-0001-8827-2550.
** PhD student Faculty of the Law University of Belgrade, specializing construction, FIDIC, tax, insurance and arbitration. E-mail: fzivanovic5@gmail.com. ORCID: 0009-0007-8844-6996.

https://doi.org/10.62733/2023.2.107-128

Serbia, there are local self-government units within this constitutional system. The role of local governments in effectively meeting the needs of citizens cannot be ignored.

During the different historical and constitutional frames, the treatment and regulation of the status of local self-governments has changed and reformed, especially in the context of financing, as a precondition for ensuring efficient performance of activities within the competence of local self-governments. The process of development of the local self-government was aimed to expand the competencies, autonomy and, in finality, expand the quantity of the number of local self-government, '*considering that the existence of a larger number of local governments enables the adjustment of their policies to the preferences of their inhabitants, which has a positive effect on the overall social welfare*'.[1]

Nowadays, in democratic states, there is no doubt that local government structures, being closer to citizens, are better able to identify their problems and, consequently, manage public funds more efficiently. However, having sufficient financial resources is essential for being able to perform these tasks. Therefore, it is advisable to ensure that an appropriate proportion of funds go directly to the local government to ensure its independence. Such principles were expressed in the European Charter of Local Self-Government, whose aim was to harmonise the standards of local government rules.

Therefore, the subject of this article is to analyse the general characteristics of the tax system at the level of local self-government in the Republic of Poland and the Republic of Serbia and to provide insight into the normative solutions governing the financing of local self-government, particularly in relation to the original, transferred and shared revenues. In this regard, the constitutional position of local authorities and their tax position and autonomy in relation to central authorities will be analysed, as well as the framework of competencies of local governments in the context of the nature of the revenues that finance local governments.

2. Role of the European Charter of Local Self-Government

In addition to the constitutional framework as a wide and comprehensive source of domestic law, the autonomy of local self-governments can be observed from the perspective of international law. From this perspective, the relevant source is the European Charter of Local Self-Government.[2] To provide sustainable local adminis-

1 Stigler, 1957, pp. 213-219.

2 This international convention lays down standards for protecting the rights of local authorities and requires the 46 member states of the Council of Europe—which have all ratified it—to comply with a number of principles.

tration, the Charter in Article 9 defines the types and principles of local authorities' financial resources:[3]

1. Local authorities, in accordance with the country's economic policy, will have the right to appropriate their own sources of financing, which they will dispose of freely, within their powers.
2. Sources of funding for local authorities will be appropriate to their duties prescribed by the constitution or law.
3. At least one part of the funds of the local authorities will come from local taxes and compensation, for which the local authorities, to the extent determined by the statute, have the right to determine the rates.
4. The funding systems on which the sources of funds of local authorities are based should
5. To be different and flexible enough to allow harmonisation, at most measures, with a real assessment of the costs for carrying out their activities.
6. The need to protect financially weak local authorities dictates the establishment of appropriate procedures or measures of financial equalisation, with the goal of correcting the consequences of the unequal distribution of financing sources, that is, the financial burden of local authorities. Such actions or measures may not restrict the rights of local authorities that they have within their jurisdiction.
7. Local authorities will, as appropriate, be consulted on methods on which they will be allocated redistributed funding sources.
8. As far as possible, funds transferred to local authorities will not have the character of earmarked funds. The allocation of these funds cannot jeopardise the discretion of local authorities to conduct policy within their powers.
9. To enable them to take loans for capital investments, it is vital to provide the local authorities with an access to the national capital market in accordance with the law.

As a member of the European Council, the Republic of Serbia joined the Charter in 2007. In the process of delivery of the ratification instruments, the Republic of Serbia gave the following statement: '*The Republic of Serbia, in accordance with Article 12 of the European Charter on Local Self-Government, will be considered obliged to accept the following provisions: Article 2; Article 3, paragraph 1 and 2; Article 4, paragraph 1, 2, 4 and 6; Article 5; Article 7, paragraph 1 and 3; Article 8, paragraph 1 and 2; Article 9, paragraph 1, 2, 3, 4, 5, 6, 7 and 8; Article 10, paragraph 1, 2 and 3; Article 11*'.

Such a statement is in accordance with the provision of Article 12 of the Charter, which provides that '*each party undertakes to consider itself bound by at least twenty*

3 Becirovic, 2012, p. 51.

Paragraphs of Part I of the Charter, at least ten of which shall be selected from among the following Paragraphs: Article 2; Article 3; Paragraphs 1 and 2; Article 4 Paragraphs 1, 2 and 4; Article 5; Article 7, Paragraph 1; Article 8, Paragraph 2; Article 9, Paragraphs 1, 2 and 3; Article 10, Paragraph 1; Article 11. In contrast, Poland has ratified the Charter as a whole, with no exceptions.

3. Constitutional regulations

The starting point for all further considerations must be a presentation of the structure of the local self-government. Territorial organisations depend on complex socio-political, historical and cultural factors and, as such, represent a political and legal framework that determines the status and legal position of all levels of government, including local self-government. In other words, the '*territorial and political organization of the state are largely determined by the way it has been formed, its cultural heritage, as well as the socio-political and economic characteristics of society*'.[4]

3.1 Serbia

The Republic of Serbia is defined as a unitary state with two autonomous provinces: the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija. The Constitution of the Republic of Serbia recognises the concept of local self-government by defining that the '*state power is limited by the right of citizens to provincial autonomy and local self-government*' (Article 12 of the Constitution of the Republic of Serbia). Bearing in mind that the Republic of Serbia is organised as a unitary country, with a dominant central government level and sub-central government levels consisting of local self-governments and autonomous provinces, we can divide it into two types of forms of local self-governments: municipalities (normally above 10 thousand citizens) and cities (with more than 100 thousand citizens). These limits on the formation of municipalities and cities can be alleviated for economic, geographical, and historical reasons, meaning that municipalities and cities may be formed even if the total population is less than 10 and 100 thousand, respectively.[5]

According to the Law of Territorial Organization of the Republic of Serbia (2007), the territory of the Republic of Serbia consists of 145 local self-governments: 117 municipalities, 27 cities and the capital city (Belgrade). In addition, in the Republic of Serbia, there are 24 districts, which are defined as administrative units without

4 Randjelovic and Vukanovic, 2021, p. 197.
5 Ibid., p. 199.

real functions and effective budgets. Such a level of governance is not recognised as a constitutional category but instead represents the tendency for the organisational optimisation of public governance.

The Constitution of the Republic of Serbia recognises and gives the right to local self-government for its own revenues, stipulating that '*the funds from which the competences of the Republic of Serbia, autonomous provinces and local self-government units are financed are provided from taxes and other revenues established by law*' (Art. 91, para. 1 of the Constitution of the Republic of Serbia). Additionally, Article 188 of the Constitution of the Republic of Serbia provides that '*the work of the local self-government unit is financed from the own revenue of the local self-government unit, the budget of the Republic of Serbia, in accordance with the law, and the budget of the autonomous province, when the autonomous province has entrusted the local self-government units with the performance of work within its jurisdiction, in accordance with the decision of the assembly of the autonomous province*'.

3.2 Poland

Poland is divided into three types of units. The basic unit of territorial self-government is the municipality (gmina), which in turn comprises districts (powiaty), including voivodships (województwa). Only municipalities and districts are commonly recognised as local governments within the meaning of the European Charter. Voivodships, in turn, are considered regions. Notably, there are also cities with district rights. In this case, there are two 'tiers' of local government in the same territory, each with its own income and expenditure.

The Constitution does not explicitly mention 'financial autonomy', but Article 167 indicates the resources of local self-governments:

1. Local government units shall be provided with a share of public revenues in accordance with the tasks falling to them.
2. The revenues of local self-government units are their own revenues and general subventions and earmarked subsidies from the state budget.
3. Sources of income of local self-government units are specified in the law.
4. Changes in the tasks and competencies of local self-government units shall take place together with corresponding changes in the distribution of public revenues

According to Article 165 sec. 2 of the Constitution: 'The sovereignty of local government units is subject to judicial protection.'

4. Statutory regulations and notion of local taxes

4.1 Serbia

At the lower legislative level, the most relevant source of legislation is the Law on Financing the Local Self-Government. Serbia began its socioeconomic transition after 2001. Within the framework of the overall reform of public administration and the public finance system, the process of fiscal decentralisation was introduced to strengthen the position of local governments. This resulted in the adoption of the Law on Financing the Local Self-Government in 2006. Although the initial law prescribed a systematic framework and objective criteria for the distribution of funds by individual local self-governments, the total level of prescribed funds for local self-government was somewhat higher than necessary[6] because of the existence of strong political support for the decentralisation process in the fiscally prosperous period before the 2008 economic crisis.

During 2009 (due to the global financial crisis), there was a large increase in the fiscal deficit (at the republic level), which required decisive measures such as savings. As one of the measures, the Government of Serbia prescribed a reduction in the amount of non-purposed transfers to local governments of 15 billion dinars, that is, by approximately 0.5% of GDP. Again, internal political circumstances led to changes in the Law in June 2011 and an excessive increase in the income of local self-government units. With these changes, the total funds of local self-governments increased by 40 billion dinars, which is 25 billion dinars more than the amount prescribed by the initial Law on Local Self-Government Financing in 2006.[7] Local self-governments' participation in salary tax increased from 40% to 80% (70% for the City of Belgrade), which resulted in regressive effects and was the most beneficial for the most developed local governments.

With the changes in tax laws in mid-2013, most funds extracted from the republic budget were transferred back from the local to the republic level of government. In May 2013, the salary tax rate decreased from 12% to 10%, whereas the social contribution rate increased from 22% to 24%.[8] As mentioned above, the total amount of taxes and contributions on wages remained practically unchanged, but 20 billion dinars were effectively returned from the local to the central level of government (since the salary tax belongs predominantly to municipalities and cities).[9]

Changes to the law in 2016 managed to reestablish the fiscal balance between the central and local levels of government, but the problem of horizontal imbalances

6 Fiscal Council of Republic of Serbia, 2017, p. 18.
7 Ibid., p. 19.
8 Ibid., p. 20.
9 Ibid., p. 20.

between individual local governments remained intact. Due to amendments to the Law on Financing of Local Self-Governments in 2016, 5 billion dinars were transferred from the local government to the central government, which, after many years, again established a vertical fiscal balance between the republic and local governments in practice.

In 2018, these percentages changed again. Thus, the percentages of local self-government participation in salary tax (ceded revenue) on this basis are as follows:

- 74% participation of local self-governments
- 77% participation of cities
- 66% participation of the City of Belgrade

Based on the above, it may be concluded that in the fiscal relations between the central and local governments, two trends can be observed, which have been dominant from 2001 until today:[10]

1. The trend of fiscal decentralisation from 2001 to 2008, the phase which adopted the two most important laws for local self-government, the Law on Local Self-Government (2002 and 2007) and the Law on Financing Local Self-Government (2006), and adopted the current constitution of the Republic of Serbia (2006). The State Administration Reform Strategy in the Republic of Serbia was also adopted in November 2004, by which the Republic of Serbia opted for higher (fiscal) decentralisation and included it in the basic principles of the reform. During this period, the role of cities and municipalities and their fiscal autonomy were strengthened through the continuous transfer of competencies and funds, that is, sources of income for financing those competencies.
2. Trends of fiscal centralisation and pseudo-decentralisation between 2009 and 2015. The continuous suspension of the Law on Financing Local Self-Government and frequent changes in regulations caused the collapse of the local finance system and a significant decrease in city budgets and municipalities. This period was marked by:

a) The abolition, reduction or change in local self-government revenues, both the original revenues of municipalities and ceded revenues and transfers from the Republic level;
b) The transfer of new duties, expenses and costs without providing appropriate funds for financing at the Republic level; and
c) The vertical imbalance between income and expenditure caused by poor nonstrategic management of the transfer of competencies and accompanying sources of income for financing.

10 Aleksic, 2018, pp. 241-260.

4.2 Poland

Before conducting a similar analysis of Polish law, one point must be made: Under Polish law, it is not at all obvious which taxes constitute local taxes. Admittedly, there exists in the Polish legal system the Act of 12 January 1991 on local taxes and charges, which describes a certain catalogue of local taxes and charges. However, many authors assume that this catalogue does not exhaust all local taxes in the Polish legal system. Moreover, 'the definition of local taxes and charges is not contained in any legal act'.[11]

However, there is no universally accepted definition of local tax in the doctrine. The starting point for the definition of this concept must undoubtedly be the definition of a tax contained in Article 6 of the Tax Ordinance, according to which a tax is a public, gratuitous, compulsory and non-refundable pecuniary benefit for the benefit of the State Treasury, a province, a district or a municipality resulting from a tax act.

It is worth noting that in the Polish legal system, there is also an institution of self-taxation by the inhabitants of a municipality, which can be done through a municipal referendum, as referred to in Article 2(2)(2) of the Local Referendum Act of 15 September 2000. However, the doctrine recognises that, contrary to its name, self-taxation cannot be considered a tax because of structural differences. First and foremost, because of its voluntary rather than compulsory introduction, and also the fact that it is known for what purpose the funds from self-taxation are intended (and, therefore, a certain gratuity).[12]

Article 1 of the Local Taxes and Fees Act identifies property tax and vehicle tax as local taxes and market fees, local fees, spa fees, advertising fees and dog ownership fees as fees. Despite the difference in name, the fees described in this law are nevertheless taxes, as they fulfil the characteristics indicated in the abovementioned definition.[13] According to Prof. Etel, there is no basis for the statement that 'the local taxes and fees referred to in Article 168 of the Constitution are only those that are regulated by the referred law'.[14] In his view, this constitutional norm must be interpreted in light of the wording of the European Charter of Local Self-Government, which, in Article 9, stipulates the criterion that local taxes contribute to local budgets. Thus, he considers that local taxes are those benefits that meet two criteria together: 'they constitute revenue for the local government budget and the local government unit can determine their amount'.[15] Prof. Etel contrasts taxes that meet these two criteria with state taxes. According to him, the catalogue of local (self-government) taxes is as

11 Popławski, 2003, p. 5, cited in Etel, 2004, p. 42; Pahl, 2017, p. 19.
12 Etel, 2004, p. 24.
13 Pahl, 2017, p. 64.
14 Etel, 2004, p. 42.
15 Ibid., p. 43.

follows: real estate tax, agricultural tax, forest tax, vehicle tax, PIT in the form of a tax card, inheritance tax, all local fees and stamp duty. Importantly, the proceeds from all these taxes go to the municipalities. Currently, in Poland, neither the county nor the province has 'their own' taxes.[16] He also points out that agricultural tax and forest tax are outside the scope of the Local Taxes Act because a separate Act on agricultural tax and forest tax had not yet existed in Poland in 1991. Meanwhile, the creation of the Local Taxes Act simply rewrote the content of the old Local Taxes Act, which existed during the Communist era, rather than creating a new comprehensive regulation.[17]

Prof. Chojna-Duch points out that 'the real differentiation of local taxes and fees from state taxes in Poland (before 1986 called field taxes) can be talked about from the moment when municipal budgets were separated from the state budget economy and municipalities were granted constitutional guarantees of independence of financial management. This is because prior to that period local taxes and fees were in fact state sources of revenue, transferred to lower levels of state administration'.[18] She distinguishes between the concepts of a narrow scope of taxes and local fees covered by the Local Taxes and Fees Act—and a broader scope. Her understanding of the broader scope of local taxes corresponds to the definition of local taxes proposed by Prof. Etel. However, she would also include in this catalogue the mining fees regulated by the Act of 4 February 1994—Geological and Mining Law and Betterment Levy (opłata adiacencka) regulated by the Real Estate Management Act of 21 August 1997.[19]

B. Pahl believes that the characteristic feature of local taxes and charges is 'first and foremost the source of their revenue'.[20] In so doing, he considers only those benefits that are entirely influenced by local government units. For this reason, he does not consider the participation of local government units in the PIT and CIT local taxes, although they are undoubtedly an important source of revenue.[21] It is also worth pointing out that there is also a divergence of views as to whether these receipts are a municipality's own revenue (so e.g. Ruśkowski) or an influence of a different nature (so e.g. Denek, Chojna-Duch).[22]

Another important feature, in his view, is the right of local authorities to set the amount of taxes, interpreted broadly as influencing the elements that translate into the final amount, that is, both the tax rate and the tax base, allowances or exemptions.[23] As a result, the catalogue of local taxes in the broad sense includes, in his view,

16 Ibid., pp. 26-27.
17 Etel, 2011, p. 21.
18 Chojna-Duch, 1998, p. 346.
19 Ibid., p. 347.
20 Pahl, 2017, p. 20.
21 Ibid., p. 20.
22 Sygut, 2018, pp. 130-131.
23 Pahl, 2017, p. 21.

taxes and fees from the Local Taxes and Fees Act, in addition to agricultural tax, forest tax, inheritance tax, stamp duty and PIT in the tax card form.[24] B. Pahl believes that the concept of local taxes and fees should be understood narrowly by the catalogue of levies indicated in the Local Taxes and Fees Act.

In summary, the following criteria are given in the doctrine to define the concept of local taxes and fees: the competence of local bodies to determine the elements of the tax construction, the budget into which the taxes flow in their entirety, the relationship with the tasks of local bodies, direct implementation by the financial apparatus of the municipality and links with the environment and local relations. However, three predominate: the possession of tax authority by local bodies, the impact of revenues on the local budget, and the criterion of indications in the Law on Local Taxes and Revenues. An attempt to summarise the catalogues of local taxes and charges due to the application of one of these three criteria is presented in the following table.

Table 1 – Comparison of different catalogues of the local taxes in the doctrine.

Criterium	**Local taxes**	**Local fees**
Tax authority of local government	1. real estate tax 2. vehicle tax 3. agricultural tax – regulated by the Act of 1 November 1984 on the Agricultural Tax 4. forest tax – regulated by the Act of 28 September 1991 on the Forest Tax	1. market fee 2. local fee 3. spa fee 4. advertising fee 5. dog ownership fee
Explicitly mentioned in the Act on local taxes and fees	1. real estate tax 2. vehicle tax	1. market fee 2. local fee 3. spa fee 4. advertising fee 5. dog ownership fee
The tax goes entirely to the local government budget	1. real estate tax 2. vehicle tax 3. agricultural tax 4. forest tax 5. Tax on inheritance and donations regulated by the Act of 28 August 1983. 6. income tax paid in the form of a tax card – regulated by the Decree of the Minister of Finance of 17 December 1996 on the tax card 7. Tax on civil law transactions – regulated by the Act of 9 September 2000 on the Tax on civil law transactions	1. market fee 2. local fee 3. spa fee 4. dog ownership fee 5. stamp duty 6. mining fees – regulated by the Act of 4 February 1994 – Geological and Mining Law

Instead of introducing budgetary transfers between various segments of the local government, a system based on the allocation of specific taxes (and other revenues, as

[24] Ibid., p. 22.

discussed below) was created. Within these taxes, the key concept is the tax authority. The tax authority is defined in the Polish tax law doctrine as 'the granting to a public law entity of the right to take independent decisions in tax matters'.[25] It refers to competencies such as: 'legislating on taxes, collecting tax revenues for their own benefit and administering these revenues'.[26] Significantly, the Constitution guarantees tax authority to local government units only to a limited extent with regard to certain structural elements of the tax and to the extent designated by law.

Taxes are mostly administered by local authorities. However, state bodies administer Inheritance Tax, the Tax on Civil Law Acts and the Income Tax in the form of tax cards, albeit as municipal revenue. The rationale for doing so is that these benefits have a complex structure, and as a result, municipal tax authorities are not prepared to assess and collect them. Accepting this argument as valid undermines the need for municipal taxation authorities.

It is generally accepted that municipalities and districts constitute local communities within the Charter. However, their situation in Poland, in terms of having 'their own' taxes, is strongly differentiated. Specifically, municipalities are entitled to receipts from shares in the PIT (39.34%) and CIT (6.71%), real estate tax, agricultural tax, forest tax, vehicle tax, PIT in the form of a tax card, tax on inheritance and donations and tax on civil law transactions. Districts are entitled only to receipts from shares in the PIT (10.25%) and CIT (1.40%). Thus, it is evident that the scope of receipts in the district is significantly lower. The doctrine points out that this is probably due to the history of the formation of local governments in Poland. Municipalities still existed in the Polish People's Republic (when laws creating the first local taxes were created). Contrastingly, districts (and voivodeships) did not appear in Poland until 1 January 1999. At that point, it was no longer possible to create new taxes specifically for districts (as all relevant sources of taxation were already covered by taxes) or to deprive the municipalities of the taxes granted to them (especially as this already provides limited budget revenue, as discussed below).[27]

This disproportion was even more significant in cities with district rights. As A. Borodo rightly notes, 'districts have no tax source of their own (they only have shares in state taxes), cities with districts rights have more shares in state taxes (two as municipalities and two as districts) and a dozen or so of their own taxes'.[28] Interestingly, Poland also has a system of subsidies and contributions (which are generally considered to meet Charter standards). In the case of cities with district rights, there may be a situation in which the same single entity will, for example, be

25 Glumińska-Pawlic, 2003, p. 130, cited in Święch-Kujawska, 2015, p. 449.
26 Święch-Kujawska, 2015, p. 450.
27 Bury, 2000, p. 21.
28 Borodo, 2015, p. 32.

entitled to receive a subvention as a municipality and, at the same time, be obliged to pay a contribution as a district.[29]

5. Place of the local taxes within the local budgets

5.1 Serbia

Pursuant to Article 2 of the Law on Financing the Local Self-Government, three groups of local self-government financing instruments exist.

1. own-source revenues
2. ceded revenues
3. central-government grants (transfers)

Own-source revenues are revenue-raising instruments created, imposed and collected by local self-governments, which means that local self-governments are relatively free to decide on their characteristics, parameters and amounts. Such revenues include taxes and fees such as property taxes, local administrative and communal taxes, tourist fees, concession fees and certain fines and penalties.

From a theoretical perspective, local self-government revenues can be divided as follows:[30]

- common taxes (taxes administered at the central level at a rate that is determined at the central level, and income is shared with the local self-governments which collect taxes).
- block transfers (central government transfers that are not intended for specific purposes);
- local taxes (including property tax); and
- fees and charges.

These revenues are structured in the following manner when it comes to data on the local self-government disbursement of revenues per capita:[31]

Sources of budgetary incomes of local self-governments, 2010 (RSD per capita)			
	Belgrade	**Other 3 cities**	**Sample from 10 smaller units of local self-government**
Income tax	14 184	9 921	6 840

29 Ibid., p. 32.
30 World Bank Report no. 76855-YF, 2013, p. 18.
31 Ibid.

Sources of budgetary incomes of local self-governments, 2010 (RSD per capita)			
	Belgrade	**Other 3 cities**	**Sample from 10 smaller units of local self-government**
Property transfer tax	2 190	1 441	679
Transfers	3 340	3 808	4 889
Property tax	10 055	4 151	2 720
Fee for the usage of construction plots	5 112	3 437	698
Selling of goods and services	3 766	2 654	690
Voluntarily transfers	1 240	113	164
Mixed and non-defined income	2 123	648	326
Sale of immobility	309	51	18
Loans	7 104	252	1 030
Total	54 856	29 665	20 943

Assigned revenues represent the instruments created, imposed, and collected by the central government, which are then assigned to local self-governments based on statutory criteria. There are several types of assigned revenues, such as certain percentages of salary tax revenues, the full amount of other personal income taxes, inheritance and gift taxes and property transfer taxes. Central government grants are transfers provided from the central government budget to local self-government budgets in the form of non-purposed or purposed grants.

Non-purposed grants are divided into:

1. Equalization grant
2. General grant
3. Compensating grant
4. Solidarity grant

The main goal of non-purpose grants is to finance equalisation, which is aimed at assisting local self-governments in events when they underperform in terms of assigned revenues, causing their underdevelopment. In this respect, an equalisation grant is paid to local self-governments that have per-capita assigned revenues below 90% of the average per-capita assigned revenues of all local self-governments in the Republic of Serbia.

Compensation grants are designed to compensate local self-governments which lose revenue due to changes in the tax legislation imposed by the central government. This grant is aimed at compensating local self-governments for a small part of the

foregone (assigned) tax revenues so that the relative decline in the central and local governments' tax revenues remains the same.

The general grant is provided to all local self-governments. The maximum amount of the general grant is derived by subtracting the equalisation and compensation grants from the total amount of non-purposed grants. According to Article 42 of the Law on Local Self-Government Financing, there are several criteria based on which the amount of the general grant per local self-government is calculated:

Criteria	**Percentage of the general grant**
Local self-government population	65%
Total land area of local self-government	19.3%
Number of classes in the primary schools	4.56%
Number of primary schools	1.14%
Number of classes in the high schools	2%
Number of high schools	0.5%
Number of children entitled to childcare service	6%
Number of childcare institutions	1.5%

The amount of equalisation, compensation and general grants for each local self-government are corrected by the development coefficient, which ranges from 0.5 to 1, in order to protect underdeveloped local self-governments and to foster their economic growth. The amount of equalisation, general and compensation grants intended for the City of Belgrade are used to set funding amounts for solidarity grants disbursed to other local self-governments based on their level of development.

Purposed grants can take the form of functional or purposed grants in a narrow sense. Functional grants are aimed at providing funds to local self-governments needed to finance additional expenditures incurred by local self-governments due to a shift in the functions of powers from the central government to local self-governments. Similarly, the central government may provide purposed grants in a narrow sense to local self-governments, requiring them to use those grants solely to execute a specific duty as set out by the law. To ensure the transparency of disbursements, data on non-targeted grants provided to each local self-government must be disclosed in the state fiscal strategy. However, in practice, such data are not regularly disclosed publicly.

Additionally, considering the constantly developing urbanisation and the continuous necessity for the improvement of local self-governments, it has been noted that original revenues have become increasingly insufficient to satisfy the budgetary

needs of local self-governments.[32] Therefore, local self-governments are forced to use secondary sources of financing, such as bank loans and financing through the issuance of municipal bonds (which may be divided into short- and long-term bonds depending on the date of their effectiveness).[33]

5.2 Poland

At the level of the Constitution, Article 167 Sec. 2: The revenues of local government units are their own revenues, general subventions and earmarked subsidies from the state budget.

1. general subventions
2. earmarked subventions
3. own revenues
4. local taxes and fees
5. revenues from economic activities carried out by local units
6. shares in state taxes

Article 3 of the Act of 3 November 2003 on revenues of local government units stipulates that the revenues of local government units are their own revenues, general subvention, earmarked subsidies from the state budget and shares in revenues from personal income tax and corporate income tax. The revenues of local government units may include funds from nonrecoverable foreign sources, funds from the European Union budget and other funds specified in separate regulations.

It is, therefore, worth observing what the revenue structure data look like, as well as the structure of tax revenue of municipalities in Poland in 2021. The data are presented in the tables below.

Table 2. Structure of income in municipalities in Poland in 2021.

Type of income	Value in Polish zlotys	Percentage
Services	5 586 420 022.34	2.21%
Income from assets	9 391 504 699.52	3.72%
Earmarked subsidies	78 673 887 718.83	31.18%
Educational part of the general subvention	41 395 426 249.00	16.41%
General subvention (other than the educational part)	22 286 470 913.00	8.83%

32 Jakšić, 2023, p. 53.
33 Jakšić, 2022, p. 88.

Type of income	Value in Polish zlotys	Percentage
Taxes	93 243 331 270.78	36.95%
Other	1 743 194 928.64	0.69%
Total	252 320 235 802.11	100.00%

Table 3. Structure of the income from taxes in municipalities in Poland in 2021.

Tax	Value in Polish zlotys	Percentage
Agricultural tax	1 649 122 841.54	1.769%
Forest tax	306 470 071.61	0.329%
Real estate tax	26 117 025 842.63	28.010%
Vehicle tax	1 238 614 545.88	1.328%
Tax on inheritance and donations	418 026 345.10	0.448%
Tax on civil law actions	4 482 687 087.89	4.808%
PIT in form of the tax card	184 766 374.08	0.198%
Shares in PIT	53 157 792 929.00	57.010%
Shares in CIT	4 720 406 528.93	5.062%
Stamp duty	578 973 629.45	0.621%
Mining fee	387 601 503.20	0.416%
Market fee	1 843 571.47	0.002%
Total	93 243 331 270.78	100.000%

Unfortunately, the data show a huge share of earmarked subsidies and education as part of the general subsidy. Among tax revenues, the PIT and CIT shares dominate. Only income from property tax plays a significant role in municipality taxes. Thus, municipal budgets are effectively based on funding sources over which local communities have no influence.

6. Summary and remarks

6.1 Serbia

The description of the local self-government financing scheme suggests that the size of the local self-government budget depends on its size, level of development, functions, features of public services and so on, whereas the efficiency of expenditure size of the budget (structure of expenditures) and local tax revenue-raising efforts have no direct impact on revenue allocation by local self-governments. This means

that the local self-government financing scheme creates no systemic (positive) incentives in terms of (own-source) revenue or productive allocation of resources.[34] The total revenues of local self-governments in the Republic of Serbia (including central government grants) in 2019 amounted to EUR 2.7 billion, which is equivalent to 5.9% of the GDP.[35] In relative terms, local self-government revenues in the Republic of Serbia are considerably below the EU average (9.9% of GDP). However, when benchmarked against countries from the new EU member states of Central and Eastern Europe (CEE), which are comparable to the Republic of Serbia, the difference is notably smaller. Local self-government revenues in the Republic of Serbia account for 14% of consolidated government revenues, which is significantly below the EU-27 average (22%) and the new EU member state average (20.7%). This is a consequence of variations in territorial organisation as well as the vertical allocation of government functions.[36] As a result of changes in local self-government financing regulations and revenue collection efforts, the total local self-government revenue in the Republic of Serbia in 2019 rose by 15% in real time. In general, it can be determined that the position of local self-governments depends on several factors, of which the degree of urbanisation and population concentration is key, implying that the question of different positions of local self-government cannot be solved exclusively in the domain of local finances, but must be placed in the wider context of economic regional development.[37]

In the Report 'CG33'[38] of 18 October 2017 conducted by Monitoring Committee of European Council, it was noted that Serbia has responded positively to most of the previous recommendations made by the Congress of Local and Regional Authorities of the Council of Europe in 2011, in particular by ratifying the European Outline Convention on Trans-frontier Co-operation between Territorial Communities or Authorities and by signing the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority. In addition, several important legislative steps have been taken to modernise and strengthen local self-government, notably the adoption of laws dealing with the status of local government staff. The report underlines the importance of further implementing the Public Administration Reform Strategy and encourages Serbian authorities to continue their efforts to fight corruption, including at the local level. The report drew the authorities' attention to the temporary ban on the recruitment of public administration, the possibility of the dismissal of local government assemblies and the lack of transparent criteria for allocating State grants and resources

34 Randjelovic and Vukanovic, 2021, p. 201.
35 Ibid, p. 201.
36 Ibid, p. 201.
37 Brnjas, Dedeic, and Stosic, 2009, p. 224.
38 Congress of Local and Regional Authorities, 2017.

from reserve funds. The Congress of Local and Regional Authorities of the Council of Europe recommends that Serbian authorities provide adequate resources for local governments to perform their functions and maintain full responsibility for healthcare and education at the local level.

In the author's opinion, from a legislative point of view, it is necessary to ensure social and political support to reestablish the horizontal balance between individual local self-governments based on objective, measurable and transparent criteria (i.e. to introduce a legal framework enabling the development of local self-governments), and to legally prevent the central level of government from meeting the expectations of individual local governments, on an ad hoc basis, and granting them additional transfer funds beyond the amount prescribed by the Law on Local Self-Government Financing. From the perspective of compliance with the existing legal framework, it is necessary to establish an effective approach for firm and credible budget constraints at the local level that will prevent delays and irregular settlement of local self-government obligations. It is necessary to significantly increase the transparency and supervision of funds that local self-governments can spend without approval from the assembly (i.e. from their budget reserves).

6.2 Poland

At the constitutional level, the Charter's requirements have been met. However, the actual implementation of some of its provisions is questionable. Indeed, practice points to shortcomings in funding that lead to an inability to adequately implement the tasks of local governments.[39] At the municipal level, objections are formulated not so much in terms of the quantity but the quality of the powers granted. Unfortunately, at the county level, national regulations do not align with the requirements of the Charter,[40] leaving the district currently 'as strong (or weak) as the municipalities covered by it'.[41]

Paragraphs 1, 2, and 7 of Article 9 of the Charter are problematic. Paragraph 1 states that local authorities are entitled, within the framework of national economic policy, to appropriate their own financial resources, which they may freely dispose of within the scope of their powers. Paragraph 2 stipulates that the financial resources of local authorities should be commensurate with the obligations provided for in the Constitution and law. Paragraph 7, in turn, indicates that, as far as possible, grants to local authorities shall not be used to finance specific projects. The provision of grants

39 Teklak, 2013, pp. 118-119; Kowalik, 2013, p. 120.
40 Święch-Kujawska, 2015, p. 458.
41 Borodo, 2015, p. 31.

does not deprive local authorities of the fundamental freedom to implement policies within their own remit.

Regarding Paragraph 4 of the Charter (the principle of differentiation and flexibility), local governments have little influence on the rules for allocating subsidies. The system provides different sources of revenue; however, its flexibility is questionable. Flexibility is not provided by subsidies or general subvention, much of which is allocated to education.[42] In this context, an increase in the PIT and CIT shares can be viewed positively.[43]

J. Kowalik argues that the wording of Article 9(7) of the Charter (in particular, the words 'insofar as possible') means that 'no proportion of earmarked grants to other revenues of local governments can be considered inappropriate'.[44]

Article 9(5) of the Charter is implemented in Poland through a system of contributions.[45] Unfortunately, the consultation principle of Article 9(6) of the Charter is violated by both state and local governments in their relations with their residents.[46] By contrast, access to the capital market (Article 9(8) of the Charter) is possible, but there is a debt limitation of up to 60% of municipal income, which makes it practically impossible to use the capital market to any significant extent.[47]

J. Kowalik argues that 'none of the titles indicated in the Act meet the definition of own income, but only income similar to own income' because local governments do not influence in shaping their amount. In her view, this situation does not contradict Article 9(1) of the Charter, but neither does it fully meet this standard.[48]

The de lege ferenda comments of the doctrine can be summarised as follows. It is widely acknowledged that state taxes are not suitable for transfer to local government units because they are complex constructions with an elaborate system of implementing regulations and thus unsuitable for local governments' administration. In Poland, it is currently impossible to enact new tax revenues for districts. All real tax sources are taxed in our country.

The question then arises as to whether there is a realistic possibility of granting districts and voivodeship tax revenues, the shape of which, as required by the European Charter of Local Self-Government, would have an influence. Prof. Etel believes that the only possibility for realising this postulate is to provide districts and voivodships with tax allowances and shares in state tax revenues, but in such a way that, unlike the current legal form of shares, they could be regarded as constituting their

42 Kowalik, 2013, p. 124.
43 Ibid., p. 125.
44 Ibid.
45 Ibid., p. 126.
46 Ibid., p. 127.
47 Ibid., p. 127; Szewc, 2006, p. 145.
48 Kowalik, 2013, p. 119.

own income from these local government units. It is unrealistic to take away a part of the taxes from the municipalities and give them to the districts, as these local taxes are small; there is nothing to take from them. Prof. Etel believes that there should be more optional taxes and fees on the basis that their construction is fixed in the law and the municipal council only decides whether to levy this tax/fee in their territory. This would be beneficial because of the greater tax authority of municipalities and no increase in the risk of bad tax laws due to unprepared officials writing laws. He also proposes to make PIT in the form of lump sum and PIT from the clergy as local taxes (because of their similarities to the tax card) and give these revenues to districts and eliminate the taxes where the costs of administration exceed revenue – and not only in terms of taxes as such, but in the context of specific obligations, such as when the forest tax liability amounts to PLN 5 and it is more expensive just to serve the decision, or by changing assessment decisions into taxpayers' declarations, as the costs of annual assessment are high.

6.3 Final word

The above analysis shows that the Republic of Poland and the Republic of Serbia have tried to achieve the same objectives using different legislative measures. These differences give rise to different focus points in terms of interpretative doubts and problems with the application of the law. Despite these discrepancies, both systems face similar universal problems in providing local governments with financial autonomy. Thus, it seems, unfortunately, that in both countries, the requirements of the European Charter of Local Self-Government have only been partially met.

Bibliography

- Aleksic, V. (2018) *Fiskalna decentralizacija u Republici Srbiji*. Belgrade: Pravni fakultet Univerziteta Union u Beogradu.
- Becirovic, S. (2012) *Fiskalna decentralizacija u Srbiji*. Novi Pazar: Ekonomski izazovi.
- Borodo, A. (2015) 'Dochody powiatu a Europejska Karta Samorządu Lokalnego' in Ofiarska, M. (ed.) *Europejska Karta Samorządu Lokalnego a prawo samorządu terytorialnego*. Szczecin: Wydawnictwo Uniwersytetu Szczecińskiego
- Brnjas Z., Dedeic P., Stosic I. (2009) *Sistem finansiranja lokalne samouprave u Srbiji – stanje i perspective*. Belgrade: Beogradska bankarska akademija.
- Bury, A. (2000). 'Dochody powiatów i województw w świetle postanowień Europejskiej Karty Samorządu Terytorialnego', *Samorząd Terytorialny*, 2000/3.
- Etel, L. (2004) *Uchwały podatkowe samorządu terytorialnego.* Białystok: Temida 2.
- Etel, L. (2011) '20 lat ustawy o podatkach I opłatach lokalnych – kilka refleksji.', *Przegląd podatkowy,* 2011/4.
- Fiscal Council of Republic of Serbia (2017), Local Public Finance: Problems, Risks and Recommendations.
- Chojna-Duch, E. (1998) 'Problematyka podatków i opłat lokalnych w polskim systemie prawnym' in Piekara, A. (ed.) *Samorząd terytorialny. Zagadnienia prawne i administracyjne*. Warszawa: Wydawnictwo prawne.
- Glumińska-Pawlic, J. (2003) *Samodzielność finansowa jednostek samorządu terytorialnego w Polsce: studium finansowoprawne,* Katowice: Wydawnictwo Uniwersytetu Śląskiego.
- Kowalik, J. (2013) 'Finanse gminne w Polsce w świetle standardów Europejskiej Karty Samorządu Lokalnego' in Jaskiernia, J. (ed.) *Wpływ standardów międzynarodowych na rozwój demokracji i ochronę praw człowieka*Warszawa: Wydawnictwo Sejmowe
- Pahl, B. (2017) *Podatki i opłaty lokalne. Teoria i praktyka*. Warszawa: Wolters Kluwer.
- Popławski, M. (2003) 'Pojęcie podatków lokalnych', *Przegląd Podatków Lokalnych i Finansów Samorządowych*, 2003/7-8.
- Randjelovic S., Vukanovic S. (2021) *Fiscal Decentralization and Local Public Investment Policy in the Republic of Serbia*. Belgrade: Economic Horizons.
- Report of Congress of Local and Regional Authorities, "Local and regional democracy in Serbia", 18th October 2017.
- Stigler, G. (1957) *The Tenable Range of Functions of Local Government in Federal Expenditure Policy for Economic Growth and Stability.* New York: Columbia University.
- Sygut, E. (2018) 'Znaczenie podatków i opłat lokalnych w strukturze dochodów własnych gmin' in Ciupek, B. (ed.) *Podatki, finanse, przedsiębiorstwo,* Katowice: Wydawnictwo Uniwersytetu Ekonomoicznego.

- Szewc, T. (2006) *Dostosowanie prawa polskiego do zasad Europejskiej Karty Samorządu Terytorialnego*. Bydgoszcz-Katowice: Branta.
- Święch-Kujawska, K. (2015) 'Dochody podatkowe jednostek samorządu lokalnego a standardy wynikające z Europejskiej Karty Samorządu Lokalnego' in Ofiarska, M. (ed.) *Europejska Karta Samorządu Lokalnego a prawo samorządu terytorialnego*. Szczecin: Wydawnictwo Uniwersytetu Szczecińskiego.
- Teklak, P. (2013) *Obowiązywanie, wykładnia oraz realizacja przepisów Europejskiej Karty Samorządu Lokalnego w polskim porządku prawnym*. Wrocław: Prawnicza i Ekonomiczna Biblioteka Cyfrowa.
- World Bank Report no. 76855-YF (2013) *Srbija: Pregled finansija i rashoda lokalnih samouprava*, Belgrade.

Klaudia LUNIEWSKA*

Prohibition of torture and inhuman or degrading treatment in the Polish legal system from a criminal law perspective

ABSTRACT: *The purpose of this chapter is to analyse the Polish legal system in relation to the prohibition of torture and inhuman treatment from constitutional and criminal law perspectives. These issues will be presented based on the analysis of current regulations, as well as through the interpretation of the hitherto developed doctrine, in addition to the opinions of Polish authorities in the field of the protection of human and civil rights and freedoms. As part of these considerations, conclusions are also presented from an analysis of Polish jurisprudence regarding the prohibition of torture in correlation with the use of violence by public officials to extort confessions, the abuse of a person deprived of liberty, and the abuse of power, which are subject to a separate classification under Polish criminal law.*
KEYWORDS: *prohibition of torture, crime of torture, prohibition of inhuman and degrading treatment, abuse of power by public officials, extortion of confessions, abuse of a person deprived of liberty, legislation of the Republic of Poland, jurisprudence of the Republic of Poland.*

1. Introductory issues

Currently, the phenomenon of torture may seem to appear only in the context of considerations of the functioning of totalitarian and authoritarian states; for democratic societies, it is only a relic of the past. However, contrary to common expectations, torture is also a problem in various political systems today. Therefore, the current legislation of democratic countries introduces into their legal systems regulations aimed at prohibiting or penalising behaviours comprising inflicting physical or

* Lawyer, graduate of Faculty of Law and Administration of the Cardinal Stefan Wyszyński University in Warsaw. ORCID: 0000-0002-3546-3414, e-mail: klaudiakarolinaluniewska@gmail.com.

https://doi.org/10.62733/2023.2.129-149

mental pain intentionally on someone[1]. Moreover, democratic states also become parties to international acts that prohibit the use of torture and oblige states to introduce regulations into their legal systems that penalise behaviour that meets the criteria of torture. This chapter presents considerations for the prohibition of torture and inhuman treatment from the perspective of Polish constitutional and criminal law regulations. First, an international perspective will be presented regarding the grounds for the prohibition of torture in Poland, followed by an assessment from the perspective of the provisions of the Polish Constitution concerning the prohibition of torture. Subsequently, the currently functioning solutions in criminal law will be discussed, including sanctions for crimes that meet the characteristics of torture, as well as inhuman and degrading treatment. Next, the most important jurisprudence regarding the discussed matter will be analysed, and official statistics relating to the application of such criminal provisions will be presented. Additionally, attention is paid to key cases concerning the Polish state that were pending before the European Court of Human Rights (ECtHR), which referred to the prohibition of torture.

2. Grounds for the prohibition of torture in Poland resulting from international law

First, regarding international law, Poland, like other democratic states, is a signatory to numerous international acts under which it has undertaken to protect humans against torture, as well as inhuman or degrading treatment or punishment. The basic ones include, among others, the following: the Convention for the Protection of Human Rights and Fundamental Freedoms[2] (hereinafter: ECHR); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[3] (hereinafter: Convention Against Torture); the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[4]; the

1 See *Torture as a disgrace of the 21st century*, session 34 during III. Congress of Civil Rights, the Commissioner for Human Rights and Office for Democratic Institutions and Human Rights (ODIHR), https://bip.brpo.gov.pl/pl/content/panel/sesja-34KPO-zwalczanie-tortur-w-Polsce.

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

3 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984 (Journal of Laws of 1989, No. 63, item 378).

4 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, drawn up in Strasbourg on 26 November 1987 (Journal of Laws of 1995, No. 46, item 238)

International Covenant on Personal and Political Rights[5]; the Charter of Fundamental Rights of the European Union[6]; the Universal Declaration of Human Rights[7]; the Rome Statute of the International Criminal Court (hereinafter the Statute of the ICC)[8]; the Convention on the Rights of the Child[9]; the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence[10]; the Conventions on the Protection of Victims of War, signed in Geneva on 12 August 1949[11]; the Convention on the Rights of Persons with Disabilities[12]. Notably, according to Art. 7 § 2 (e) of the ICC Statute, 'torture' means the intentional infliction of severe pain or suffering, whether physical or mental, on any person in the custody or control of the accused. However, pursuant to Art. 1 of the Convention Against Torture, the term 'torture' refers to any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on any person to obtain information or confession from him or a third party, punish him for an act committed or suspected of being committed by him or a third party, intimidate or coerce him or a third party, or fulfil any other purpose based on any form of discrimination where such pain or suffering is caused by a government official or another person acting in an official capacity, at their direction, or with explicit or tacit consent[13]. Recalling this article is crucial from the perspective of further considerations because torture does not have a legal definition under Polish legislation. Therefore, it is accepted based on international acts and the related achievements of doctrine and jurisprudence[14].

5 International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966 (Journal of Laws of 1977, No. 38, item 167)
6 Charter of Fundamental Rights of the European Union (Official Journal of the EU.C.2012.326.391)
7 Universal Declaration of Human Rights (UN General Assembly Resolution 217 A (III) adopted and proclaimed on 10 December 1948)
8 Rome Statute of the International Criminal Court of 17 July 1998 (Journal of Laws 2003 No. 78, item 708).
9 The Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989 (Journal of Laws of 1991, No. 120, item 526).
10 The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, drawn up in Istanbul on 11 May 2011 (Journal of Laws of 2015, item 961).
11 The Conventions on the Protection of Victims of War, signed in Geneva on 12 August 1949 (Journal of Laws of 1956, No. 38, item 171).
12 The Convention on the Rights of Persons with Disabilities (Official Journal of the European Union, L., 2010, No. 23, page 37).
13 Art. 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Hassanová, 2023, pp. 51–73.
14 See Banaszak, 2012, p. 263; Sarnecki, 2003, pp. 1–3; Sobczak, 2013, nb 9; Pająk and Przychodzki, 2019.

3. Constitutional grounds for the prohibition of torture

The prohibition of torture, cruel, inhuman, or degrading treatment, and punishment is an absolute rule of international law. This prohibition cannot be waived or modified by other legal provisions *(ius cogens)*[15]. There is no difference in the case of the Polish Constitution—the Constitution of the Republic of Poland, on 2 April 1997[16] (hereinafter, the Constitution). Art. 40 of the Constitution directly prohibits torture and humiliation[17]. According to this provision, no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment; corporal punishment is prohibited. Para. 4 of Art. 41, which guarantees personal inviolability and freedom, confirms that every person deprived of liberty should be treated humanely[18]. When analysing both provisions cited above, they are concerned with the direct protection of human dignity[19]. Public authorities may not use torture under any circumstances because Art. 40 of the Constitution is absolute and may not be limited in any manner. This is closely related to Art. 30 of the Constitution, which expresses the principle of the protection of human dignity[20]. According to this provision, inherent and inalienable human dignity is a source of human and civil freedoms and rights[21]. It is inviolable, and the duty of public authorities is to respect and protect it. The analysis of jurisprudence shows that the prohibition of torture and cruel, inhuman, or degrading behaviour is derived precisely from the essence of human dignity[22]. Therefore, the prohibition of torture and cruel, inhuman, or degrading behaviour is absolute and may not be limited under any circumstances. Notably, earlier fundamental laws referred to the legal limits of punishment, an example of which is the prohibition of physical torment[23]. It is worth recalling Art. 98 of the Constitution of the Republic of Poland dated 17 March 1921[24], which provided that 'Prosecution of a citizen and imposition of a penalty is permissible only on the basis of the applicable law. Punishments combined with physical torment are not permitted and no one may be subjected to such punishments'. Art. 40 is also related to Art. 38, which states that the Republic of

15 Daranowski, 1986 pp. 97–109; Lis, 2017, pp. 43–45; Szpak, 2009, pp. 147–162; *Commentary on Art. 246* in Grześkowiak and Wiak, 2021.
16 Act of 2 April 1997 – Constitution of the Republic of Poland (Journal of Laws No. 78, item 483, as amended)
17 Ibid. Art. 40
18 Ibid. Art. 41.
19 Błaszczak, 2021, p. 472
20 See Dąbrowski, 2015, p. 67–84; Biśta, 2014, p. 62.
21 Art. 30 of the Act of 2 April 1997 – Constitution of the Republic of Poland (Journal of Laws No. 78, item 483, as amended)
22 See Bosek, p. 243
23 Safjan and Bosek, 2016.
24 Constitution of the Republic of Poland of 17 March 1921 (Journal of Laws No. 44, item 267)

Poland provides every human being with legal protection of life[25], and Art. 39 states that no one may be subjected to scientific experiments, including medical experiments, without their free consent[26].

As has already been indicated earlier, the Constitution, despite referring to the concept of torture, does not define it. Thus, related literature and jurisprudence refer to definitions formulated in acts of international law to which Poland is a party, as well as jurisprudence and literature referring to these acts[27].

4. Criminal law grounds for the prohibition of torture

In connection with counteracting the use of torture and in accordance with the provisions of the Convention Against Torture, it is the legislator's duty to shape criminal regulations in such a way that none of the forms of torture fall outside the scope of criminalisation. This also applies to the need to criminalise persons who would commit a crime in the form of an attempt or as an accomplice. In accordance with Art. 4(2) of the Convention Against Torture[28], although it is the state's competence to determine the level of penalties, the seriousness of the offenses related to the use of torture should be considered when determining culpability. An obligation has been imposed on each State to ensure that anyone who claims to have been subjected to torture in its territory has the right to lodge a complaint with competent authorities and have such a complaint dealt with expeditiously and impartially. Public authorities are also required to take measures to ensure that the complainant and witnesses are protected from any form of ill-treatment or intimidation in connection with his complaints or witness statements[29]. There is no difference in Poland, where everyone is guaranteed the right to a fair and public hearing of a case without undue delay by a competent, impartial, and independent court[30], and court proceedings are at least two-instance. Notably, in the Polish legal system, there exists the institution of the Commissioner for Citizens' Rights whose subject of activity is, among others, monitoring whether torture is used and whether human and civil rights are violated[31].

25 Art. 38 of the Act of 2 April 1997 – Constitution of the Republic of Poland (Journal of Laws No. 78, item 483, as amended)
26 Ibid. Art. 39.
27 See Banaszak, 2012, p. 263; Sarnecki, 2003, pp. 1–3; Sobczak, Commentary on Art. 4 in Wróbel, 2013.
28 Art. 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
29 Safjan and Bosek, 2016.
30 Art. 45 sec. 1 of the Act of 2 April 1997 – Constitution of the Republic of Poland (Journal of Laws No. 78, item 483, as amended)
31 Act on the Commissioner for Human Rights of 15 July 1987 (Journal of Laws of 2020, item 627)

In the event of suspicion of torture, the ombudsman has the right to report it to the relevant law enforcement authorities—the police or the prosecutor's office—with information about the possibility of a crime being committed, such as the abuse of a prisoner[32]. Moreover, pursuant to the Optional Protocol to the Convention Against Torture, the Commissioner for Human Rights has been performing the tasks of the National Preventive Mechanism since 2008—visiting places where people deprived of their liberty are detained[33]. As Poland is a signatory state of the ECHR, anyone can file a complaint with the ECHR on the principles set out in the ECHR, pointing to Art. 3, which guarantees freedom from torture and inhuman or degrading treatment or punishment[34].

In the Polish legal system, substantive criminal law was created under the Act of 6 June 1997 – the Penal Code (hereafter, the Penal Code)[35]. The Polish legislature has not decided to single out a separate crime of torture under the Penal Code, but jurisprudence and doctrine indicate that the use of torture may fulfil the characteristics of several prohibited acts. It is for the assessment of the law enforcement agency, and ultimately the court, to decide on the qualifications of the act. Most often, the court refers to the issue of torture in relation to Art. 231, Art. 246, Art. 247, and Art. 217 of the Penal Code[36]. Regarding the use of torture, some crimes can be committed by anyone; certain other crimes can only be committed by certain entities in certain circumstances and ways. For further consideration, the meaning of public officials under Polish criminal law should be clarified. In the Penal Code, the legal definition of a public official was included in Art. 115 §13. This provision contains an exhaustive list of entities, according to which a public official is any of the following: the president of the Republic of Poland; deputy, senator, councillor; Member of the European Parliament; judge, juror, prosecutor, officer of the financial body of preparatory proceedings or the body superior to the financial body of preparatory proceedings, notary public, bailiff, probation officer, trustee, court supervisor and administrator, person adjudicating in disciplinary bodies operating based on the Act; a person who is an employee of government administration, another state or local government body, unless he performs only service activities, as well as another person to the extent in which he is authorized to issue administrative decisions; a person who is an employee of a state control authority or a local government control authority, unless

32 Świeca, 2010, Commentary on Art. 14

33 Art. 1 § 4 of the Act on the Commissioner for Human Rights of 15 July 1987 (Journal of Laws of 2020, item 627)

34 Krzyżanowska-Mierzewska, 2013, p. 264-265.

35 Act of 6 June 1997 – Penal Code (Journal of Laws of 2022, item 1138, as amended)

36 See [online], https://bip.brpo.gov.pl/pl/content/sejm-o-zakazie-tortur-rpo-zabiegal-o-to-od-2-lat (Accessed: 15 November 2022); https://www.prawo.pl/prawnicy-sady/przestepstwo-tortur-nie-tylko-wobec-jencow-powinno-wejsc-do-kodeksu,70226.html (Accessed: 15 November 2022)

he performs only service activities; a person holding a managerial position in another state institution; an officer of an authority appointed to protect public security or an officer of the Prison Service; a person on active military service, with the exception of territorial military service performed at one's discretion; an employee of an international criminal court, unless he performs only service activities[37].

The offence of abuse of power regulated in Art. 231 of the Penal Code §1, which Polish courts regularly invoke in cases related to torture, may be committed only by a public official who, by exceeding his powers or failing to fulfil his duties, acts to the detriment of the public or private interest. This crime is punishable by imprisonment for up to three years. Notably, Art. 231 § 3 provides that if a public official committing the basic type of §1 acts unintentionally and causes significant damage, he is subject to a fine, the penalty of restriction of liberty or imprisonment for up to two years. Compared to §1, an act committed unintentionally and causing significant damage is subject to milder criminal liability. Art. 231 §2 provides for a qualified type, wherein if the crime was committed to achieve financial or personal gain, the perpetrator is subject to imprisonment for 1–10 years[38]. Therefore, the legislature increases the limits of criminal liability that may be incurred by a public official because of the existence of an objective in the form of a desire to achieve financial or personal gain. No one can be held criminally responsible for committing this crime except public officials. This is an individual crime that can only be committed by a specific entity[39]. Art. 231 §4 provides that §2 does not apply if the act meets the criteria of a prohibited act under Art. 228 of the Penal Code i.e. the crime of venality. In this situation, the subsidiarity clause of the Polish criminal law applies[40].

Another crime based on which the court sentenced a behaviour similar to torture was the forcing of a confession by an officer. This offence has been specified in Art. 246—a public official or anyone acting under his or her command who, for obtaining specific testimony, explanations, information, or statements, uses violence, and unlawful threats or abuses another person physically or mentally, shall be liable to imprisonment for 1–10 years[41]. It is an individual crime—it may only be committed by a public official or a person acting on his instructions[42]. When characterising the subjective side, this crime can only be committed intentionally, with direct intention, and with a special colour *(dolus coloratus)*. The perpetrator acts to obtain specific

37 Art. 115 §13 of the Act of 6 June 1997 – the Penal Code (Journal of Laws of 2022, item 1138, as amended)
38 Ibid. Art. 231.
39 Banaś-Grabek, Gadecki, and Karnat, 2020.
40 See Grześkowiak and Wiak, 2023.
41 Art. 246 of the Act of 6 June 1997 – the Penal Code (i.e. Journal of Laws of 2022, item 1138, as amended)
42 Mozgawa, 2021.

testimonies, explanations, information, and statements[43]. Art. 246 of the Penal Code provides for the protection of justice, dignity, bodily integrity, human health, freedom, and property. The perpetrator's behaviour may take the form of violence, unlawful threats, and other forms of physical or psychological abuse. Notably, abuse encompasses inflicting physical or mental suffering in a way different from violence or unlawful threats, which may occur through sleep deprivation, refusal to eat or drink, ridicule, or insults[44].

Another crime that may meet the criteria for cruel, inhuman, and degrading treatment and punishment is Art. 247 of the Penal Code. This sanctions the crime of mistreating a person deprived of liberty[45]. Pursuant to the wording of this provision, anyone who physically or mentally abuses a person legally deprived of liberty is subject to a penalty of imprisonment for 3 months to 5 years. Anyone can be the subject of a crime of the type specified above. However, in the type from Art. 247 § 3 of the Penal Code, the crime can only be committed by a public official under the obligation to prevent the ill-treatment of a person deprived of liberty. Therefore, the sanctioned behaviour of the perpetrator of the act under Art. 247 § 3 of the Penal Code comprises allowing, contrary to the existing obligation, the abuse of a person deprived of liberty. When analysing the subject matter, the causative action in Art. 247 § 1 and 2 of the Penal Code is defined as abuse—an act or omission comprising inflicting physical pain or severe mental suffering intentionally. The qualified type described in Art. 247 § 2 of the Penal Code comprises abuse combined with particular cruelty, for which stricter criminal liability is provided. Nevertheless, the crime under Art. 247 § 3 of the Penal Code comprises allowing, contrary to the obligation, the abuse of a person legally deprived of liberty. The crime is consequential (material) because its features include the effects of abuse. In practice, we often encounter situations in which a person legally deprived of liberty is allowed to be mistreated by a fellow prisoner or a subordinate public official[46]. Bullying involves several situations. In the literature on the subject, an exemplary enumeration from the perspective of abuse of prisoners, as well as in terms of the specificity of prison subcultures, was made by M. Jachimowicz, who pointed to such activities as follows: beating, kicking, pulling hair, twisting hands, throwing against a wall or floor, binding hands or feet, exposure to extreme cold or extreme heat, spitting on or being forced to perform humiliating actions, burning with a cigarette or iron, destroying or damaging property, contracting a venereal infection or HIV infection, sticking needles under fingernails or toothpicks in the head, insults, unlawful threats, intimidation, mockery, humiliation,

43 Grześkowiak and Wiak, 2021
44 Stefański, 2023.
45 Art. 247 of the Act of 6 June 1997 – the Penal Code (i.e. Journal of Laws of 2022, item 1138, as amended)
46 Grześkowiak and Wiak, 2021.

yelling and insulting the family of a legally deprived person, an order to eat meals in a toilet, a ban on eating meals at a common table, an order to wash toilets by hand, performing cleaning tasks out of turn, among others[47]. In the event that the victim takes his life as a result of abuse by the perpetrator, we deal with the convergence of provisions[48]. Subsequently, the cumulative qualification from Art. 247 § 1 or 2 in accordance with Art. 207 § 3 of the Penal Code should be applied[49].

As indicated in the literature on the subject, the provisions of Art. 246 and Art. 247 of the Penal Code were introduced into the Polish legal system to fulfil international obligations resulting from the acts of international law ratified by the Polish state, which prohibit the use of torture and other cruel, inhuman, or degrading treatments[50], which have already been mentioned at the beginning of this chapter.

Art. 207 of the Penal Code sanctions the crime of abuse. Pursuant to §1, anyone who physically or mentally abuses a person closest to him or another person remaining in a permanent or temporary relationship of dependence with the perpetrator is subject to the penalty of imprisonment from 3 months to 5 years. However, §1a introduces the offence of tormenting a helpless person due to their age, mental or physical condition. For this act, the legislature provided for a penalty of imprisonment of six months to eight years—a higher penalty. Nevertheless, according to §2, if the act specified in §1 or §1a was committed with the use of particular cruelty, the perpetrator of the act is liable to imprisonment for 1–10 years. If the result of committing any of the abovementioned acts is the victim's attempt to take his life, the perpetrator, pursuant to Art. 207 §3 of the Penal Code, shall be punishable by imprisonment for 2–12 years[51].

Art. 217 of the Penal Code describes a violation of inviolability. Pursuant to §1, anyone who hits a person or otherwise violates his bodily integrity is subject to a fine, restriction of liberty, or imprisonment for up to one year. The legislator provided for in §2 the possibility for the court to refrain from imposing a penalty in a situation where a breach of inviolability caused the aggrieved party to behave defiantly or if the aggrieved party responded with a breach of inviolability[52].

The legislator in Art. 118a §2[53] and Art. 123 §2 of the Penal Code[54] sanctioned the use of torture but in connection with the commission of another crime, such as mass murder. The legislature introduced into the Polish legal system qualified types

47 Gardocki, 2018.
48 See Gądzik, 2014, pp. 6–15.
49 Grześkowiak and Wiak, 2021
50 Stefański, 2023; Grześkowiak and Wiak, 2021.
51 Art. 207 of the Act of 6 June 1997 – the Penal Code (Journal of Laws of 2022, item 1138, as amended)
52 Ibid. Art. 217.
53 Ibid. Art. 118a §2.
54 Ibid. Art. 123 §2.

of crimes characterised by victims being subjected to torture, cruel, or inhuman treatment.

According to Art. 118a §2, anyone who takes part in a mass attack or at least one of repeated attacks directed against a group of people, undertaken to implement or support the policy of the state or organisation, is subject to criminal liability (e.g. torture or subjecting a person to cruel or inhuman treatment). To commit this crime, the perpetrator is liable to imprisonment for a period of not less than 5 years or 25 years[55].

Art. 123 §1 provides that criminal liability in the form of imprisonment for a period of not less than 12 years, 25 years imprisonment, or life imprisonment is imposed on anyone who, in violation of international law, commits homicide against persons who are 2) wounded, sick, shipwrecked, medical personnel or clergymen, 3) prisoners of war, 4) the civilian population of an area under military occupation or in which hostilities are in progress, or other persons benefiting from international protection under acts related to armed conflicts. The legislator in §2 provides for criminal liability in the case of subjecting the abovementioned individuals to torture and cruel or inhuman treatment, performing cognitive experiments on them, even with their consent, using them to protect a specific area or facility against military actions or their troops with their presence, or detaining them as hostages. To commit this act, the perpetrator is liable to imprisonment for a period of not less than 5 years or 25 years[56].

Notably, although the term torture was used in Art. 118a §2 and Art. 123 §2, the Polish legislator did not decide to introduce the definition of torture into the statutory glossary formulated in Art. 115 of the Penal Code. Therefore, it is up to the authorities to apply a given provision of the criminal act to specify this concept.

The Act of 6 June 1997–Executive Penal Code in Art. 4–lays down the rules for the execution of penalties and punitive, protective, and preventive measures[57]. Pursuant to §1 of this provision, penalties, penal measures, compensatory measures, forfeiture, security measures, and preventive measures are conducted humanely, with respect for the human dignity of the convict. Torture, inhuman or degrading treatment, and punishment toward a convicted person should be prohibited. However, according to §2, the convict retains civil rights and freedoms. Their limitations may have resulted only from the Act and a valid judgement issued on its basis.

Furthermore, it is worth pointing out the existence of the prohibition of evidence under Art. 171 §5 of the Act of 6 June 1997, the Code of Criminal Procedure, which can also be referred to as the prohibition of torture during interrogation. It states that it is

55 Ibid. Art. 118a.
56 Ibid. Art. 123.
57 Art. 4 of the Act of 6 June 1997 – Executive Penal Code (Journal of Laws 2023, item 127)

unacceptable to influence the interrogated person's statements by means of coercion or an unlawful threat, use hypnosis or chemical or technical means affecting the mental processes of the interrogated person, or control the unconscious reactions of his body in connection with the interrogation[58].

In Poland, there is an ongoing debate regarding the introduction of the separate crime of torture into the legal system. The National Mechanism for the Prevention of Torture, whose tasks are conducted by the Commissioner for Human Rights, supports the introduction of separate torture crimes into the Polish legal system. The Ministry of Justice argues that the current criminal law regulations are sufficient for the implementation of international obligations that bind the Polish state in the matter of introducing appropriate regulations into the legal system that guarantee the prohibition of torture. The Ministry pointed out that the following crimes function in Polish law, exhausting the scope of activities that correspond to the definition of torture under Art. 1 of the Convention against Torture: The crimes listed were as follows: violation of bodily integrity (Art. 217 §1 of the Penal Code), punishable threats (Art. 190 §1 of the Penal Code), forcing another person to behave by force or unlawful threat (Art. 191 §1 of the Penal Code), exceeding powers by a public official (Art. 231 §1 of the Penal Code), causing damage to health (Art. 156 and 157 of the Penal Code), abuse of a dependent person (Art. 207 §1 of the Penal Code), influencing a witness, court expert or the accused by force or threat (Art. 245 of the Penal Code), using force or threats to obtain testimonies, explanations, statements, or information (Art. 246 of the Penal Code), or mistreatment of a person deprived of liberty (Art. 247 of the Penal Code). Exceeding powers by an officer, and possibly also violation of bodily integrity, will constitute torture comprising ineffective physical impact (e.g. waterboarding), as well as psychological impact that does not exhaust the definition of unlawful threats (e.g. false information about the death of a loved one), if they do not concern a person deprived of liberty (Art. 247 of the Penal Code) or are not used to obtain specific testimonies, explanations, information, or statements (Art. 246 of the Penal Code) or influence personal evidence sources (Art. 245 of the Penal Code)—when they are committed, for example, to punish a person who is, at large, or for intimidating, exerting pressure or for any other purpose resulting from discrimination (torture may be committed under the conditions of Art. 57a of the Penal Code). As indicated by the Ministry of Justice in response to the remarks of the Commissioner for Human Rights, the definition of torture under Art. 1 of the Convention is fully reflected in Polish law. Nevertheless, because of its extensive and complex nature, the relevant provisions are located in different parts of the Penal Code, depending on the type of infringed goods, which is a specificity of Polish criminal law. Introduction to the CC

58 Art. 171 of the Act of 6 June 1997, the Code of Criminal Procedure (Journal of Laws 2022, item 1375, as amended)

of the definition of torture would not be significant from the perspective of human rights protection in Poland because it would only be a repetition of the provisions already in force in Polish law. Additionally, adopting the full wording of the definition of torture as a sign of only one crime violates the accepted rules of systematics in Polish criminal law[59].

The report of the National Mechanism for the Prevention of Torture for 2021 shows that, according to the authors, the dissemination of knowledge about torture serves to facilitate the monitoring of the accountability of perpetrators of such acts, contribute to their stricter punishment by the courts, and lead to an increase in awareness among officers and the public about the use of torture[60]. On 11 December 2022, a study by the National Mechanism for the Prevention of Torture was published on the crime of torture in Poland[61], containing descriptions of sentences issued for such acts against police officers, which were finalised in 2020. Based on this publication, the National Mechanism for the Prevention of Torture, operating in the Office of the Commissioner for Human Rights, raised the issue of the lack of a separate crime of torture in Poland. The National Mechanism for the Prevention of Torture postulates the introduction of, for example, an obligation to record hearings in audiovisual form. Areas requiring legislative or organizational changes in the operation of the state are indicated, including disseminating knowledge about the Mendez rules on conducting interrogations of persons detained by state officials, developing guidelines for interrogations and enquiries based on the Mendez rules and CPT standards, and introducing the definition of torture and other cruel, inhuman, or degrading treatment or punishment in the Polish legal system[62].

5. Police practice

It is crucial to present the frequency of initiating proceedings by Polish law enforcement authorities, as well as the number of detected crimes under Art. 231, 246, and 247 of the Penal Code, to show the practice of applying these provisions. The following findings were obtained from official statistics kept by the Polish Police from 1999 to 2020. The statistical data presented below refer to crimes that may, but do not always,

59 Reply of the Minister of Justice of 15 December 2015 to the letter of the Commissioner for Human Rights of 27 October 2015 on the issue of the criminalization of torture in Polish law (reference number II.071.4.2015ED).

60 Machińska, Kusy, Kazimirski, 2022, pp. 125–127.

61 Report: The crime of torture in Poland. Discussion of judgments in cases of offenses under Art. 246 and 247 of the Penal Code, which became final in 2020, Bulletin of the Commissioner for Human Rights, 2022, https://bip.brpo.gov.pl/sites/default/files/2022-12/Przestepstwo_Tortur_w_Polsce.pdf (20 December 2022).

62 Ibid.

violate the constitutional prohibition of torture. Only the analysis of individual case files can lead to an unequivocal statement regarding the number of crimes listed below that actually involved the use of torture.

Referring to police statistics, the largest number of crimes of abuse of power under Art. 231 of the Penal Code was found in 2013, with as many as 7,310 cases; in 2014, there were 4,861 cases. In 2020, 1,891 proceedings were initiated under Art. 231, and 1,476 cases were found. In 2019, 2,377 proceedings were initiated, and 1,734 crimes were found. In 2018, 2,708 proceedings were initiated, and 1,019 crime cases were found under Art. 231 of the Penal Code. In 2017, 2,784 proceedings were initiated, and 2,762 crime cases were found[63].

Analysing crime under Art. 246, over the years 1999–2020, 359 proceedings were initiated, while the number of crimes detected amounted to 208. According to the statistics, the highest number of crimes detected was 28 in 2006. In 2004, there were 25 cases. In 2013–14 and 2016–2020, no crimes were found under Art. 246 of the Penal Code. In 2015, there was only one such case[64].

According to police statistics, over the years, the number of proceedings initiated under Art. 247 of the Penal Code amounted to 1,868. Of these, 612 were identified as crimes. Most crimes under this provision were committed in 2003 (47 crimes); in 2001, this number was 45. For comparison, the fewest crimes were found in 2015, when 8 such crimes were recorded, and in 1999, when there were 10 cases. In 2020, there were 43 proceedings under Art. 247 of the Penal Code and 16 cases of committing a crime. In 2019, 65 proceedings were initiated, and 21 crimes were found. In 2018, 76 proceedings were initiated, and 20 cases were found[65].

According to the statistics presented by the Commissioner for Human Rights, 45 police officers were legally convicted in Poland for an offence under Art. 246 of the Penal Code (extortion of testimonies and information) in the years 2008–2017. In 2018, a final judgement was passed, convicting three police officers for an act under Art. 247 of the Penal Code (abuse of a person deprived of liberty). In the same year, a sentence was passed against four police officers for committing the offence specified in Art. 246 of the Penal Code[66].

63 Police Statistics Art. 231 of the Penal Code, https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-10/63570,Naduzycie-wladzy-art-231.html (26 October 2022)

64 Police Statistics Art. 246 of the Penal Code, https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-11/63593,Wymuszanie-zeznan-art-246.html (26 October 2022)

65 Police Statistics Art. 247 of the Penal Code, https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-11/63595,Znecanie-sie-nad-pozbawionym-wolnosci-art-247.html (26 October 2022)

66 Report: The crime of torture in Poland. Analysis of final judgments concerning crimes under Art. 231, 246 and 247 of the Penal Code. Bulletin of the Commissioner for Human Rights, https://bip.brpo.gov.pl/sites/default/files/Tortury_w_Polsce_Raport_KMPT_lipiec_2021.pdf (14 November 2022)

In conclusion, the analysis of Polish police statistics from 1999 to 2020 on crimes under Art. 231, Art. 246, and Art. 247 of the Penal Code revealed fluctuating numbers of proceedings and detected crimes, highlighting the evolving nature of applying these provisions.

6. Domestic case law on the prohibition of torture and inhuman, degrading treatment

An important criterion for assessing whether the law works properly is the analysis of jurisprudence and checking how legal regulations function in judicial practice. Regarding the most important jurisprudence of Polish criminal courts concerning cases that meet the criteria of cruel, inhuman, and degrading treatment and punishment, Art. 231 of the Penal Code (the crime of abuse of power), Art. 246 (establishing the crime of extorting testimony), and Art. 247 (sanctioning the crime of abuse of a person deprived of liberty) should be mentioned here.

The judgement of the Lublin Zachod District Court in Lublin is worth discussing[67], according to which three former police officers were found guilty of mistreating two detainees at a sobering-up station. They were beaten and hit in the vicinity of intimate places by a private taser (without service equipment). The justification indicated that the use of a taser in both cases met the definition of torture set out in the Convention against Torture. The court imposed a penalty of three years of absolute imprisonment, as well as compensation for the victims in the amounts of PLN 20,000 and PLN 30,000 and a ban on practising the profession of a police officer for six years[68].

In the judgement of the District Court in Kalisz on 29 September 2020, the court sentenced public officials for the crime of mistreating detainees. In August 2012, public officials arrested three young men suspected of stealing jewellery from a jewellery store. The victims were beaten with a truncheon on their feet, were pressed to the floor with a shoe, had water poured onto them, and were tased all over their body while they were handcuffed and did not resist[69]. In its judgement, the court did not refer to international standards regarding the prohibition of torture and did not state that there had been a violation of the prohibition of torture within the meaning

67 Judgment of the Lublin Zachód District Court in Lublin of 30 January 2018 (case no. IV K 717/17)

68 Cf. *Report: The crime of torture in Poland. Analysis of final judgments concerning crimes under Art. 231, 246 and 247 of the Penal Code,* Bulletin of the Commissioner for Human Rights, https://bip.brpo.gov.pl/sites/default/files/Tortury_w_Polsce_Raport_KMPT_lipiec_2021.pdf (Accessed: 14 November 2022), pp. 13–15.

69 See Convicting verdict on torture at the police station in Siedlce in 2012. Statement of the National Mechanism for the Prevention of Torture, https://bip.brpo.gov.pl/pl/content/skazujacy-wyrok-tortury-policji-oswiadczenie-krajowego-mechanizmu-prewencji-tortur (Accessed: 26 November 2022).

of Art. 1 of the Convention Against Torture. In the case of all five officers, the court ruled that the offence of Art. 246 in conjunction with Art. 231 § 1 of the Penal Code was committed. However, it differentiates between imposed penalties and penal measures. One officer was sentenced to two years and two months of imprisonment and was also sentenced to penal measures in the form of a ban on practising the profession of a police officer for eight years. The second officer was sentenced to 1 year imprisonment with a 3-year suspension, as well as penal measures in the form of a ban on practising the profession of a police officer for three years. The third officer was sentenced to one year and three months of imprisonment and penal measures in the form of a ban on practising the profession of a police officer for three years. Nevertheless, the fourth officer was sentenced to 1 year and 8 months of imprisonment, and penal measures were imposed on him in the form of a ban on practicing the profession of a police officer for six years. The last of the officers was sentenced to one year and ten months of imprisonment and was sentenced to penal measures in the form of a ban on practising the profession of a police officer for seven years. The mother and father of the deceased man who suffered torture during detention were jointly awarded PLN 10,000 as compensation for the harm suffered. Notably, a case is currently pending before the ECtHR, brought by the parents of the deceased man, who accused the Polish state of violating Art. 2, Art. 3, and Art. 6 of the ECHR[70].

A high-profile media case regarding the use of torture by public officials was the death of Igor Stachowiak at the Wroclaw Police Station in May 2016. In the bathroom of the police station, he was stunned by a taser and died. He was electrocuted, although he was handcuffed. This case was examined in the first and second instances. On 21 June 2019, the Wroclaw-Srodmiescie District Court in Wroclaw[71] found a policeman guilty of tasking with an electroshock weapon and sentenced him to two years and six months in prison. Three other police officers were also found guilty and sentenced to two years in prison. In February 2020, the District Court in Wroclaw[72] upheld sentences against former police officers who participated in the arrest of Igor Stachowiak. The justification indicated that police officers acted to the detriment of Igor Stachowiak's private interests by violating his dignity, bodily integrity, and right to humane treatment. According to the Court, the defendants also acted to the detriment of the public interest—the proper functioning of the judiciary. The Commissioner for Citizens' Rights appealed to the Supreme Court to set aside the judgement of the District Court in Wroclaw and remit the case for re-examination in the second instance[73], pointing out that the circumstances of the case had not been sufficiently investigated and that the obligation to explain the circumstances of the

70 Kryszkiewicz v. Poland, (ECHR, Application No. 17912/21), Pending.
71 Judgment of the District Court for Wrocław – Śródmieście in Wrocław of 21 June 2019, V K 180/18
72 Judgment of the District Court in Wrocław of 19 February 2020, Case IV Ka 1421/19
73 Case number in the Supreme Court: V KK 413/20.

death and establish responsibility for it rests on the law enforcement authorities and the judiciary. Therefore, a detailed explanation of the issues raised in the cassation appeal meets the standards developed based on Art. 2 of the ECHR[74].

7. Cases before the European Court of Human Rights against Poland for violation of the prohibition on torture

It is important to present the most important cases before the ECtHR against Poland for violating the prohibition of torture expressed in Art. 3 of the ECHR.

In the first case, I would like to recall the judgement of the European Court of Human Rights on 26 October 2000 in the case of Kudla v. Poland (application No. 30210/96)[75]. Although there was no violation of Art. 3 of the ECHR, it was a landmark judgement from the perspective of ECtHR jurisprudence. It emphasised the basic standard of human dignity, according to which, in relation to Art. 3 of the ECHR, 'The State must ensure that a detained person is kept in conditions that respect his or her human dignity, that the manner and method of detention do not expose him/her to distress and hardship, the intensity of which would exceed the unavoidable level of suffering inherent in detention, and that, given the actual conditions of imprisonment, her health and physical condition were adequately secured by, inter alia, providing her with the necessary medical assistance', the obligation of the state to ensure decent conditions of detention, or the general obligation to release from detention due to the state of health, was pointed out[76].

On 23 May 2019 (Kancial v. Poland, application No. 37023/13), the ECtHR found that Poland had violated the prohibition of torture and inhuman and degrading treatment. The reason for this was the use of excessive direct coercion during and after the arrest and the lack of appropriate explanatory proceedings. A resident of Gdansk was detained by an anti-terrorist group and the Central Investigation Bureau of the Police for suspicion of kidnapping. The man was beaten and tasered on the back, buttocks, and genitals, although he surrendered and was immobilised. The applicant complained to the prosecutor's office about the treatment during detention. The procedures were discontinued after a year. The Appellate Prosecutor's Office in Gdansk decided that there was insufficient evidence of a crime, and the taser was used in accordance with the regulations[77]. As indicated by the National Mechanism for the Prevention of Torture, this is a groundbreaking judgement emphasising the

74 See [online], https://bip.brpo.gov.pl/pl/content/sprawa-igora-stachowiaka-kasacja-rpo-od-wyroku-na-policjantow (Accessed: 11 November 2022)
75 Kudła v. Poland, (ECHR, Application No. 30210/96), Judgment 26 October 2000.
76 See Morawska, 2019.
77 Kanciał v. Poland, (ECHR, Application No. 37023/13). Judgment 23 May 2019

importance of the correct and proportionate use of coercive measures by authorised services and, above all, the key role played by a reliable investigation[78].

The judgement of the ECtHR on 5 November 2020 (Grzegorz Cwik v. Poland, complaint 31454/10) was important from the perspective of taking evidence. According to this judgement, in criminal proceedings, the use of evidence obtained as a result of the treatment of a person in violation of Art. 3 of the ECHR, regardless of whether the treatment is classified as torture, inhumanity, or degradation, results in the automatic recognition of the entire proceedings as unfair and in violation of Art. 6 of the ECHR. This effect occurs regardless of the probative value of the evidence and whether its use was decisive in securing the conviction of the accused. The ECtHR found that this principle also applies to the admission of evidence obtained from a third party as a result of the ill-treatment provided for in Art. 3 of the ECHR, if such ill treatment was inflicted by private individuals, irrespective of the qualification of such ill treatment[79].

8. Concluding remarks

The Polish legal system has not yet established torture as a separate crime. Although the Polish legislature uses the concept of torture in the Constitution and the Penal Code, it has not decided to introduce a legal definition. As the Polish Penal Code does not provide for a separate crime of torture, currently, perpetrators of cruel, inhuman, degrading treatment and punishment, including corporal punishment, are convicted for other crimes specified in the Penal Code. According to the jurisprudence of Polish courts, crimes such as the abuse of a person deprived of liberty, forced testimony by a public official, and the abuse of powers by an official are the most common grounds for bringing the perpetrator to criminal liability. The most severe punishment for these crimes is imprisonment for 1–10 years, and these crimes are subject to the statute of limitations on the same principles as other crimes. Notably, Art. 43 of the Constitution indicates that there is no statute of limitations for war crimes and crimes against humanity, but this does not extend to cases of torture against an individual. Considering the seriousness of crimes involving the use of torture, I believe that it is reasonable for the legislature to consider whether it should extend the limitation period.

The doctrine draws particular attention to the fact that, in connection with counteracting the use of torture and in accordance with the provisions of the Convention

78 See [online] https://bip.brpo.gov.pl/pl/content/policjanci-winni-nieludzkiego-i-poniżającego-traktowania-zatrzymanego-wyrok-europejskiego-trybunału (Accessed: 20 December 2022)
79 Grzegorz Ćwik v. Poland, (ECHR, Application No. 31454/10), Judgment 5 November 2020

against Torture, it is the duty of the legislator to shape criminal provisions in such a way that none of the forms of torture can fall outside the scope of criminalisation of criminal law. Analysing jurisprudence practices to date, although there is no separate crime of torture in the Polish Penal Code, some legal regulations in Poland meet the aforementioned international definitions of torture. The problem is the low severity of penalties for this type of crime, although the Act allows for the possibility of adjudicating a higher liability as well as a conviction for a qualified type in the event that the Act is committed with particular cruelty.

Undoubtedly, activities aimed at educating people about torture would contribute to reducing the phenomenon of torture and affect the awareness of ordinary citizens, law enforcement agencies, and representatives of the judiciary. The activities proposed by the Commissioner for Human Rights, comprising making society and public officials aware of criminal behaviour that violates the prohibition of torture, should be assessed as necessary and recommended for implementation. A public official, as an entity with a special professional position and competence related to the exercise of public authority, should enjoy special legal protection, enabling him to perform the duties entrusted to him. Simultaneously, he should be subject to increased criminal liability due to the role he performs and the power he wields. Therefore, it is necessary to train and make public officials aware of the forms that torture can take to prevent it. In this context, it is worth assessing the actions taken by plenipotentiaries and human rights protection teams in Polish police units that undertake information and dissemination activities on the jurisprudence of the ECtHR and ECHR concerning actions taken by the police. An element of this is the publication of selected ECtHR judgements on police websites, the coordination of the process of developing plans or reports on actions taken to implement judgements under general measures, and participation in the work of the interministerial Team for the European Court of Human Rights[80].

80 See [online], https://isp.policja.pl/isp/prawa-czlowieka-w-poli/orzecznictwo-etpc/12875,Europejski-Trybunal-Praw-Czlowieka.html (Accessed: 22 December 2022)

Bibliography

- Banaszak, B. (ed.) (2012), *Constitution of the Republic of Poland. Comment,* 2nd edn, Warsaw: C.H. Beck.
- Banaś-Grabek, M., Gadecki, B., Karnat, J. (eds.) (2020), *Penal Code. Special part. Art. 148–251. Commentary,* Warsaw: C.H. Beck.
- Biśta I., (2014) 'Prohibition of torture, inhuman or degrading treatment' in Jabłoński M. (ed.), *Implementation and protection of constitutional freedoms and rights of the individual in the Polish legal order,* Wroclaw.
- Błaszczak, Ł. (ed.) (2021), *Evidence in civil proceedings. Civil Procedure System*. Vol. 2, Warsaw: C.H. Beck.
- Bosek, L., *Gloss to the judgment of the Constitutional Tribunal of 26 May 2007, SK 25/07.*
- Convicting verdict on torture at the police station in Siedlce in 2012. Statement of the National Mechanism for the Prevention of Torture, Available at: https://bip.brpo.gov.pl/pl/content/skazujacy-wyrok-tortury-policji-oswiadczenie-krajowego-mechanizmu-prewencji-tortur (Accessed: 26 November 2022).
- Daranowski, P. (1986), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Palestra 30/10-11 (346-347).
- Dąbrowski, M. (2015), *The admissibility of torture as a method of combating terrorism in the light of the standards resulting from the Constitution of the Republic of Poland, international and European law*, Constitutional Law Review, No. 2 (24)/2015, DOI 10.15804/ppk.2015.02.04.
- Gardocki, L. (ed.) (2018), *Criminal Law System,* Vol. 8, 2nd edn, Warsaw: C.H. Beck.
- Gądzik, Z. (2014), *The crime of abuse, which results in the victim taking his own life: analysis of court files,* Przegląd Prawno-Ekonomiczny, No. 26.
- Grześkowiak, A., Wiak, K. (eds.) (2021), *Penal Code. Comment.* 7th edn, Warsaw: C.H. Beck.
- Hassanová, R.L. (2023), *The Prohibition of Torture and its Implications in the European Legal Sphere*, Vol. IV. Central European Journal of Comparative Law. 2023/1. ISSN 2732-0707.
- Krzyżanowska-Mierzewska, M. (2013), 'Complaint to the European Court of Human Rights for violation of rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms' in Romańska M. (ed.), *Non-instance legal protection measures*, Warsaw: C.H Beck.
- Lis, E. (2017), *Jus cogens norms in judgments and advisory opinions of the Inter-American Court of Human Rights*, Studia Prawnicze, No. 210, 2/2017, Warsaw: Polish Academy of Sciences Institute of Legal Sciences.
- Machińska, H., Kusy, M., Kazimirski P. (eds.) (2022), *Report of the Commissioner for Human Rights on the activities of the National Mechanism for the Prevention of*

Torture, Inhuman, Degrading Treatment or Punishment in Poland in 2021, Bulletin of the Commissioner for Human Rights, No. 2.
- Morawska, E (ed.) (2019), *Poland before the European Court of Human Rights. Leading cases: Kudła v. Poland 2000*, Warsaw: C.H. Beck.
- Mozgawa, M. (2021) 'Commentary on Art. 246' in Budyn-Kulik, M., Kozłowska-Kalisz, P., Kulik, M., Mozgawa, M., *Penal Code. Commentary,* 10th edn, Wolters Kluwer, Warsaw.
- Pająk, M., Przychodzki, M. (2019) 'Legitimization of the use of torture – legal and philosophical aspects' in Piskorski, J. (ed.), *Essence, factuality and legitimacy of criminal law*, Warsaw: C.H. Beck.
- Police Information Service: European Court of Human Rights, Available at: https://isp.policja.pl/isp/prawa-czlowieka-w-poli/orzecznictwo-etpc/12875,Europejski-Trybunal-Praw-Czlowieka.html, (Accessed: 22 December 2022).
- Police officers guilty of inhuman and degrading treatment of the detained. Judgment of the European Court of Human Rights in the case of Kanciał against Poland, Available at: https://bip.brpo.gov.pl/pl/content/policjanci-winni-nieludzkiego-i-poniżającego-traktowania-zatrzymanego-wyrok-europejskiego-trybunału, (Accessed: 20 December 2022)
- Police Statistics Art. 231 of the Penal Code, Available at: https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-10/63570,Naduzycie-wladzy-art-231.html (Accessed: 26 October 2022).
- Police Statistics Art. 246 of the Penal Code, Available at: https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-11/63593,Wymuszanie-zeznan-art-246.html (Accessed: 26 October 2022).
- Police Statistics Art. 247 of the Penal Code, Available at: https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-11/63595,Znecanie-sie-nad-pozbawionym-wolnosci-art-247.html (Accessed: 26 October 2022).
- Reply of the Minister of Justice of 15 December 2015 to the letter of the Commissioner for Human Rights of 27 October 2015 on the issue of the criminalization of torture in Polish law (reference number II.071.4.2015ED).
- *Report: The crime of torture in Poland. Discussion of judgments in cases of offenses under Art. 246 and 247 of the Penal Code, which became final in 2020*, Bulletin of the Commissioner for Human Rights, 2022, Available at: https://bip.brpo.gov.pl/sites/default/files/2022-12/Przestepstwo_Tortur_w_Polsce.pdf (Accessed: 14 December 2022)
- *Report: The crime of torture in Poland. Analysis of final judgments concerning crimes under Art. 231, 246 and 247 of the Penal Code,* Bulletin of the Commissioner for Human Rights, Available at: https://bip.brpo.gov.pl/sites/default/files/Tortury_w_Polsce_Raport_KMPT_lipiec_2021.pdf (Accessed: 14 December 2022).

- Safjan, M., Bosek L. (ed.) (2016), *Constitution of the Republic of Poland. Vol. I. Commentary on Art. 1-86,* Warsaw: C.H. Beck.
- Sarnecki, P. (2003) '*Commentary on Art. 40'* in Garlicki, L. (ed.), *Constitution of the Republic of Poland. Commentary*, vol. III, Warsaw: Sejm Publishing House.
- Sobczak, J. (2013) 'Commentary on Art. 4' in Wróbel, A. (ed.), *Charter of Fundamental Rights of the European Union. Commentary,* Warsaw: C.H. Beck.
- Stefański, A. (ed.) (2023), *Penal Code. Comment*. 6th edn, Warsaw: C.H. Beck.
- Szpak, A. (2009), *Evolution of the definition of torture in the jurisprudence of the International Criminal Tribunal for Crimes in the former Yugoslavia, Problems of Contemporary International, European and Comparative Law*, 7(2), https://doi.org/10.26106/z29p-jx11;
- Świeca, J. (2010), Act on the Commissioner for Human Rights. Commentary, Warsaw: C.H. Beck.
- The crime of torture, not only against prisoners of war, should be included in the code, Available at: https://www.prawo.pl/prawnicy-sady/przestepstwo-tortur-nie-tylko-wobec-jencow-powinno-wejsc-do-kodeksu,70226.html (Accessed: 13 October 2022).
- The Sejm has started work on including the prohibition of torture in the Penal Code. The Commissioner for Human Rights has been striving for this for two years, Available at: https://bip.brpo.gov.pl/pl/content/sejm-o-zakazie-tortur-rpo-zabiegal-o-to-od-2-lat, (Accessed: 13 October 2022).
- The Supreme Court adjourned the hearing on the death of Igor Stachowiak, Available at: https://bip.brpo.gov.pl/pl/content/sprawa-igora-stachowiaka-kasacja-rpo-od-wyroku-na-policjantow (Accessed: 23 October 2022).
- *Torture as a disgrace of the 21st century*, session 34 during III. Congress of Civil Rights, the Commissioner for Human Rights and Office for Democratic Institutions and Human Rights (ODIHR), Available at: https://bip.brpo.gov.pl/pl/content/panel/sesja-34KPO-zwalczanie-tortur-w-Polsce (Accessed: 12 October 2022).

Miklós Vilmos MÁDL*

‘Making the Invisible Visible’: Legislation on Transboundary Aquifers

ABSTRACT: *This article addresses an area of international law that is not often discussed, namely, the challenging management of transboundary aquifers. Following a short introduction to the importance and topicality of transboundary aquifers and how universal international law instruments deal with them, this article dives into an analysis of existing bilateral and multilateral cooperations of transboundary aquifers by systematically examining these systems based on the forms of cooperation, their institutional structures, whether they employ quantitative and qualitative measures and how they resolve disputes. Drawing from the experiences of the analysed cooperations, the article proposes a step-by-step path to improve the management of these resources. The article argues that it is possible to successfully prevent wasting resources by invoking the idea of giving more attention to these resources, establishing an international instrument to provide a minimal level of protection to transboundary aquifers and setting up cooperations to manage the given resources.*
KEYWORDS: *transboundary aquifers, shared resources, international cooperation, water law, best practices in managing shared aquifers.*

1. The Importance of Transboundary Aquifers

The regulation of transboundary groundwaters is an inexplicably neglected field of international law. Legislations regarding surface waters are plentiful — there have been at least 3,600 treaties concerning these[1] — but the same cannot be said about waters under our feet. This phenomenon is extraordinarily bizarre, as groundwater’s importance and future value are substantially higher than that of their surface counterparts. But what is this significance exactly? Overall, only 2.5% of the water on earth is freshwater, out of which 30% can be found in the form of groundwater and only 1%

1 Szilágyi, 2013, p. 37.

* Ph.D. Candidate at the Ferenc Deák Doctoral School of the University of Miskolc and Scientific Researcher at the Central European Academy, Budapest. ORCID: 0009-0003-9645-5594.

https://doi.org/10.62733/2023.2.151-171

in the form of surface water. To put it in another perspective, on Earth, we have 23 times as much freshwater available in groundwater than in surface water.[2] However, its significance does not only lie in its sheer quantity but also in the fact, that owing to the protection of the surrounding matter, groundwater is generally far cleaner than surface water bodies. Yet despite its importance, none of the existing binding or non-binding international treaties provide a meaningful solution to parties that wish to cooperate. In addition to the lack of universal legislation, the situation is not much better at the local level. Of the 468 known transboundary aquifers,[3] some form of cooperation exists only in 6 cases.

Fortunately, this lack of legislation has not yet resulted in a global humanitarian crisis, but that does not mean the possibility does not exist. According to UNESCO's 2019 UN World Water Development Report, at least two billion people live in countries facing high water stress.[4] However, this number is not constant as the current tendency of population growth combined with the unsustainable use of these resources will make it even worse. This terrible situation should be taken seriously even by states not currently facing a water deficit as it can result in mass migration towards them. Presently, every tenth migrant's reason for moving is the lack of water,[5] and no data suggest that the situation will improve in the future. Another terrifying but not impossible outcome of the lack of proper regulation is the appearance of conflicts over shared resources. This prospect is proven by studies observing a steep rise in recent years in the number of conflicts emerging over water.[6]

The future does not look too promising as the sovereigns at the moment do not seem to be fully aware of the importance of these transboundary resources. This lack of attention towards these resources must change as they will be crucial for humanity's survival.

In the following sections, the author will briefly discuss the definition of groundwater and the problems with the existing universal legislations. The article will go into more detail regarding the six existing cooperations, and finally, it will also present a roadmap, which aims to help achieve better management of these resources.

2. What Is Groundwater

The waters under our feet should not be imagined as being situated in caves filled with water. Groundwater is the water found in the saturated zone where all the pores

2 Dempsey, 2021, p. 1.
3 IGRAC, 2021, p. 2.
4 WWAP, 2019, p. 1.
5 The World Bank, 2021, p. 2.
6 Pacific Institute, 2022, p. 1.

between the particles are filled with water. The upper boundary of this saturated zone is the water table, which separates it from the unsaturated zone, where the pores between the particles are filled with air and water.[7] Those rock pools that store water and from which water can be economically abstracted are called aquifers. Aquifers can be differentiated into unconfined aquifers, which are close to the surface, and confined aquifers, which are closed off by a relatively impenetrable rock layer.[8] The benefit of confined aquifers is that they are less prone to contamination. To sum up, groundwater should be imagined as a pore-filling water body.

3. Universal Pieces of Legislation

Within public international law, legislation of transboundary aquifers has a short history of sixty years. When we discuss these legislations, two main problems surface. First, when creating most existing legal instruments, the focus was not on transboundary aquifers, which were included by the creators only as an afterthought. The first major international document that included transboundary aquifers was the non-binding 1966 Helsinki Rules, which aimed to discuss the use of transboundary waters. This lack of special focus is also apparent in the two existing binding instruments, namely the Convention on the Law of the Non-Navigational Uses of International Watercourses (1997) and the Convention on the Protection and the Use of Transboundary Watercourses and International Lakes (1992). The 1997 Convention mainly focused on surface waters, and what's more, its second article stated that the convention is only applicable to transboundary aquifers that are connected to surface waters.[9] This requirement of a connection might not strike us as a significant issue, but there are numerous occasions when these resources are not connected to surface waters. The 1992 Convention, as its name suggests, did not focus on groundwater, but when defining the term transboundary water, it used the word 'any', implying that it applies to every form of groundwater.[10]

The other main issue with the existing instruments is that they are not binding except for the two conventions mentioned above. This is especially saddening in the case of the 2008 Draft Articles on Transboundary Aquifers, which codified the

7 Mádlné Szőnyi et al., 2013, pp. 43–44.
8 Thompson, 2016, p. 2.
9 United Nations: Convention on the Law of the Non-Navigational Uses of International Watercourses 1997. Official Records of the General Assembly, Fifty-First Session, Supplement No. 49 (A/51/49), 3.
10 United Nations Economic Commission for Europe: Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992.

customary laws of transboundary aquifers.[11] As noted, these regulations do not really help those states that wish to cooperate over their shared resources. The draft articles were only influential in being used as a guide when the parties concluded cooperations regarding the Guarani and the Iullemeden–Taoudeni/Tanezrouft aquifers.[12]

4. Case Studies

As previously mentioned, there are six existing cooperations over transboundary aquifers. These are related to the Genevese aquifer system (Switzerland, France), Nubian Sandstone aquifer system (NSAS; Chad, Egypt, Libya, Sudan), North Western Sahara aquifer system (Algeria, Tunisia, Libya), Iullemeden–Taoudeni/Tanezrouft aquifer system (Algeria, Benin, Burkina Faso, Mali, Mauritania, Niger, Nigeria), Guarani aquifer (Argentina, Brazil, Paraguay, Uruguay) and the Al-Sag/Al-Disi aquifer system. Concerning these, we will discuss the following four issues: the forms of cooperation, institutional structure set up by the parties, qualitative and quantitative actions taken by the states to preserve these resources and the settlement of disputes.

4.1. Forms of Cooperation

The first important aspect worth discussing is the forms of cooperation and the goals the parties aim to reach. For all mentioned aquifers, except for the Iullemeden–Taoudeni/Tanezrouft aquifer, the states have entered into binding agreements, but each solution is worth discussing in greater detail because they differ greatly.

4.1.1. Binding Agreements

We will first discuss the binding agreement of the Genevese Aquifer Convention. The Genevese aquifer, 10% of which is situated on the territory of France and 90% on the border of Switzerland, provides freshwater to 700,000 people.[13] The cooperation became extremely necessary in the 1970s as the water levels decreased by seven meters because of the unregulated resource overexploitation.[14] The respective canton of Switzerland and the prefecture of France entered into a Convention in 1978, which remained in force for the next 30 years. In 2008, after a few amendments, the convention

11 Greenop, 2021, p. 51.
12 Eckstein and Sindico, 2014, pp. 39–40.
13 Cobos, 2018a, pp. 116–127.
14 Cobos, 2018b.

was renewed for another 30 years.[15] With this cooperation, the parties aimed to set up an artificial recharge system and manage the aquifer together. An essential aspect of this case is that the two sides realised the importance of subsidiarity and the resource's regional importance; thus, they implemented the cooperation on a local level where all the parties contributing to the success bore the competencies and interests.

The next binding agreement was contracted in connection with the Nubian Sandstone Aquifer System, the grandest known aquifer, which serves as the most crucial source of freshwater in its region. In the case of this fossil aquifer, the cooperation started long before the agreement was established. First, Egypt and Libya started an informal cooperation formalised in 1992 by setting up a Joint Authority for the Management of the NSAS. Sudan and Chad joined this Joint Authority in 1996 and 1999, respectively.[16] The Joint Authority's purpose was to conduct research related to the aquifer, to organise trainings and, most importantly, to optimise and balance the abstractions.[17]

The following binding agreement concerns the North Western Sahara aquifer system. The parties here followed an extremely pragmatic three-phase approach. In the first phase, they conducted thorough research on the aquifer; in the second phase, they built up the basis for the cooperation and analysed the different uses of the aquifer; finally, in the last phase, they drew up the permanent consultation mechanism in the form of a ministerial declaration.[18] The Consultation Mechanism was set up in an existing international organisation, namely the Sahara and Sahel Observatory (OSS), and aimed to provide a framework for the cooperation of the parties.[19]

The states also chose a binding solution for the Guarani aquifer, which is mostly a fossil resource that serves as an essential source of freshwater for the approximately 92 million people living in its territory.[20] The parties concluded a research project on the area and created a strategic action plan that proposed multiple ways to go forward. From the proposed options, the states selected the idea of a binding agreement. The Guarani Agreement was formulated in 2010, but owing to the lengthy ratification process, it only came into force in 2020.[21] The cooperation mainly aims to preserve the quality of the aquifer.[22]

15 Cobos, 2018a, pp. 116–127.
16 Constitution of the Joint Authority for the Study and Development of the Nubian Sandstone Aquifer Waters 1992.
17 Constitution of the Joint Authority for the Study and Development of the Nubian Sandstone Aquifer Waters 1992.
18 AbuZeid, Elrawady, and CEDARE, 2015, p. 8.
19 Déclaration des Ministres des Ressources en Eau des Pays Partageant le Système Aquifère du Sahara Septentrional 2006.
20 Sindico, 2011, p. 257.
21 Villar, 2020, pp. 1–2.
22 Acuerdo sobre el Acuífero Guarani 2010.

The last binding agreement was concluded for the Al-Sag/Al-Disi aquifer. According to the World Resources Institute, both Jordan and Saudi Arabia face high water stress, so the aquifer plays a crucial role in mitigating this challenge.[23] Despite the outstanding importance of the resource, agricultural abstractions were not sustainable, and by 2000, water levels had dropped significantly.[24] The parties realised the danger of this and entered into an agreement in 2015 mainly to preserve and manage the aquifer by setting up certain zones where abstractions are prohibited or only allowed for municipal use.[25]

4.1.2. Non-Binding Agreement

There is only one aquifer, the Iullemeden–Taoudeni/Tanezrouft, for which the parties have not yet established a binding agreement, as they are only at the stage of a memorandum of understanding (MOU) which could project they will deepen their cooperation. The MOU was decided upon in 2014 but has not been signed by all the states. Nevertheless, the details of the proposed MOU will be included in this study as it is a detailed and interesting document. In the MOU, the sovereigns aim to set up a consultation mechanism for the protection and management of the aquifer.[26]

4.2. Institutional Structures

After discussing the basis of the cooperations, the next issue to be discussed is the institutional structures the parties have set up. We can differentiate between agreements with the sole goal of setting up institutions to work out the rules for every emerging issue and those focused on other matters.

4.2.1. Agreements Focused on Setting Up Institutions

The Nubian Sandstone Aquifer Agreement, which set up the Joint Authority in Tripoli, belongs in this category. Its main body is the Board of Directors, which consists of

23 Hofste, Reig, and Schleifer, 2019, pp. 1–4.
24 UN-ESCWA and BGR (United Nations Economic and Social Commission for Western Asia; Bundesanstalt für Geowissenschaften und Rohstoffe), 2013, pp. 308–310.
25 Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Kingdom of Saudi Arabia for the Management and Utilisation of the Ground Waters in the Al-Sag/Al-Disi Layer 2015.
26 Observatoire du Sahara et du Sahel, 2017, p. 21.

three members from each county, meets every fourth month and, as a general rule, decides by simple majority. The board is headed by a chairman, who is responsible for signing contracts on behalf of the Joint Authority and represents the body in front of courts and international organisations. In addition to the Board of Directors, the Joint Authority has two branches, the Executive General Director and the Administrative Body, which are mainly responsible for the implementation and execution of decisions. The tasks of the Joint Authority are quite diverse, as it is responsible for conducting common research on the aquifer, establishing joint trainings and, most importantly, rationing consumption from the aquifer.[27]

Also belonging to this group is the Consultation Mechanism of the North Western Sahara aquifer system. The very short Ministerial Declaration only discusses the role of the Consultation Mechanism. As stated previously, the states opted to construct their organs in an already existing international organisation, the OSS. The Consultation Mechanism's main organ is the Coordination Unit. Besides this organ, the parties have set up a technical committee and, for the sake of political legitimation, a council that consists of the ministers responsible for water.[28]

4.2.2. Agreements Not Focused on Setting Up Institutions

The MOU of the Iullemeden–Taoudeni/Tanezrouft aquifer is interesting from an institutional point of view. It aims to set up a consultation mechanism, as in the case of the North Western Sahara aquifer and contains a detailed institutional structure; therefore, it could be considered a cooperation only focused on setting up the institutions. However, a close comparison of the two previously mentioned solely organisational agreements and the MOU reveals a key difference—while the MOU specifies a very detailed organisational structure, it also contains numerous provisions that are not necessarily connected to the organs but more to the state of the aquifer. Conversely, in the case of the Nubian and North Western Sahara aquifers, the provisions almost exclusively concerned institutions. According to the MOU, the Consultation Mechanism aims to set up rules about conservation and the facilitation of sustainable management, among other things. The Consultation Mechanism itself has a legal personality and thus is able to sue others and enter into contracts. Within the Consultation Mechanism, the states have created the decision-making Council of Ministers composed of the ministers responsible for water, an executive secretariat responsible for the execution of decisions, a permanent scientific and

27 Constitution of the Joint Authority for the Study and Development of the Nubian Sandstone Aquifer Waters 1992.

28 Déclaration des Ministres des Ressources en Eau des Pays Partageant le Système Aquifère du Sahara Septentrional 2006.

technical committee in charge of giving advice, national committees responsible for implementation (which operate next to the ministries in charge of water) and a coordination unit assembled within the framework of the aforementioned OSS in control of coordination.

The Genevese Aquifer Convention also belongs to this category. The respective territories of the two countries have created the Genevois Aquifer Commission, which consists of three members from each side. It is headed by one member from each side and convenes at least once a year. The commission has varied tasks, and its main function is to propose a water usage plan that takes into account the possible extraction needs of the signatories. In addition, the commission may also appoint representatives to monitor the implementation of the convention. The commission also plays an important role in the financial side of the cooperation by monitoring the investment and operational costs of the artificial recharge system.[29]

The Guarani Aquifer Agreement is also a member of this group. Despite the relatively long agreement, the parties have devoted only one short article to a common institution, the commission, consisting of four members. According to the agreement, the commission's task is to coordinate the cooperation among the states to comply with the aims of the agreement, and it is also responsible for setting up the agreement's rules.[30]

The last cooperation in this group is that for the Al-Sag/Al-Disi aquifer. The states have set up the Joint Saudi/Jordanian Technical Committee composed of five representatives from each of the two states and headed by representatives of the respective ministries responsible for water. According to the agreement, the committee is responsible for three different things: the supervision of the implementation, overseeing abstractions from the aquifer and collecting and exchanging data concerning the aquifer. It must be mentioned that decision-making is not one of the roles of the committee.[31]

4.3. Qualitative and Quantitative Provisions

Another interesting issue is the qualitative and quantitative measures implemented by the cooperations. Before we discuss the concrete provisions, it must be noted that all six cooperations include qualitative actions but not quantitative measures, as this

29 Convention on the Protection, Utilisation, Recharge and Monitoring of the Franco-Swiss Genevois Aquifer. International 2008.

30 Acuerdo sobre el Acuífero Guarani 2010.

31 Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Kingdom of Saudi Arabia for the Management and Utilisation of the Ground Waters in the Al-Sag/Al-Disi Layer 2015.

is a more contested issue. It is quite easy to understand that preserving quality is in everyone's interest, as an aquifer is an interconnected system which can be greatly affected by pollution. However, the case is extremely different for the disputed quantitative distribution of water possibly because borders themselves cannot stop excessive abstractions from the system. Thus, states do not feel obliged to extract only as much water as is located in their part of the aquifer. As lists of the qualitative measures would be excessive, in the following section, I will only focus on the most important ones while devoting more attention to the few existing quantitative provisions.

4.3.1. Cooperations That Set up Quantitative Limitations

The best example of a quantitative measure can be found in the Genevese Convention. As noted, the two sides have set up an artificial recharge system, but this was only financed by the Swiss side, as the French region decided to look for alternative sources. Nonetheless, the French side declared that if the system were built, they wished to enjoy its benefits as well.[32] In order to compensate for this unequal situation, the parties declared in the convention that the French side will be limited to a maximum abstraction of five million cubic meters per year and must pay a fee for crossing two million cubic meters of extraction, defined in the convention. The idea behind this provision was that a party unwilling to invest in the qualitative preservation of the aquifer—in this case, the artificial recharge system—shall be allowed only limited abstraction. Regarding quality, the convention has provisions on monitoring quality through common means, identifying and responding to situations affecting quality and the responsibility for pollution. Regarding the imposition of responsibility, it is worth noting that for pollution resulting from the artificial recharge system, only the Swiss side is liable.[33]

The next cooperation that contains quantitative measures is the Nubian Sandstone Aquifer Agreement. Here, the quantitative measures are not as well-defined as in the case of the Genevese aquifer, but the agreement contains some indirect references that are worth mentioning. When the agreement defines the Joint Authority's tasks, it states that it shall ration water consumption. This vague objective can be interpreted in many ways, but it most likely requires that countries not abstract more than what is situated

32 Cobos, 2018, pp. 116–127.

33 Convention on the Protection, Utilisation, Recharge and Monitoring of the Franco-Swiss Genevois Aquifer. International 2008.

in their territory.[34] On the qualitative side, the Joint Authority shall conduct studies in relation to desertification, which is a great risk in the region.[35]

The Iullemeden–Taoudeni/Tanezrouft aquifer's MOU also contains not-so-concrete provisions on this issue. The previously mentioned national committees are responsible for ensuring the resource's rational and equitable use. Even though the text of the MOU is not entirely clear on this issue, I believe that Article 13, which discusses equitable and reasonable utilisation, is connected to the national committees' task of ensuring rational and equitable use. If we accept this despite the linguistic differences between rational and reasonable, we can find a deeper meaning of what rational and equitable water use actually means. According to the document, in relation to rationalisation, the parties should take into account the regions' different social needs and other available water resources, among other things. When it comes to qualitative measures, the MOU has a long list of internationally well-known principles, such as the polluter pays and non-damaging use.[36]

4.3.2. Agreements Without Provisions on the Protection of Quantitative Attributes

I classified the Al-Sag/Al-Disi aquifer as a cooperation that does not contain any provisions on quantitative issues because there are no such direct or indirect references in the agreement. However, the situation is not so simple as qualitative measures may have an effect on the volume of abstractions and thus on the aquifer's quantitative attributes. Accordingly, it should be qualified between the two categories, but as there is no reference to quantitative measures in the agreement, it shall be classified in this category. However, what are the provisions affecting the quantity? The two states have defined a protected and management area. In the 10-km-wide protection zone, after five years, they must eliminate all activities dependent on abstractions of groundwater, so no water can be extracted there. In the management area, they can extract water but only for municipal use, and the digging of wells has to be per the standards approved by the two states. Thus, there is no reference to rationalisation or lesser abstraction. The goal of the states was not to preserve the quantity but to stop agricultural extractions and the accompanying pollution in certain areas.

34 Obviously, as this is a system from which any abstraction will affect the whole aquifer, this rationing only makes sense if the states do it knowing how much water is situated in the territory of each country.

35 Constitution of the Joint Authority for the Study and Development of the Nubian Sandstone Aquifer Waters 1992.

36 Memorandum of Understanding for the establishment of a Consultation Mechanism for the Integrated Management of the Water Resources of the Iullemeden, Taoudeni/Tanezrouft Aquifer Systems (ITAS) 2014.

Nevertheless, the aquifer's extent is much greater than the zones of the agreement, so outside of the management area, water can be abstracted without any limitation. Moreover, as aquifers are interconnected systems, these outside abstractions will affect the whole system, including the two aforementioned zones. However, the complete ban on extractions in the protected zone and the partial ban on extractions in the management zone may indirectly affect the whole system. In these areas, the number of abstractions will certainly decrease; thus, the inhabitants will have to stop agricultural activities or look for alternative resources (outside the zones). The search for alternative sources may not happen, which will preserve the water quantity of the aquifer. In terms of qualitative provisions, the zones must be mentioned again as they primarily aim to protect the qualitative attributes of the resource. The agreement specifically states that in the management area, injecting any pollutant into the groundwater is not allowed.[37]

The North Western Sahara aquifer system also belongs to the second group. As we have previously discussed, the goal of the parties was to set up the Consultation Mechanism, so unsurprisingly, they did not discuss quantitative issues. The Ministerial Declaration is also reticent about qualitative issues but mentions that the Consultation Mechanism must conduct studies on the aquifer, identify critical areas and develop relevant action plans, and finally, produce a yearly report on the state of the aquifer.[38]

No quantitative provision is included in the Guarani Aquifer Agreement, as the parties presumably did not consider it necessary because of the aquifer's size. Nevertheless, Article 4 states as a general aim that the waters of the aquifer should be used in a reasonable, sustainable and equitable manner. I think this article aims more at not wasting the waters of the aquifer than at limiting its abstraction. With regard to qualitative measures, the agreement is much more eloquent and states that the parties shall promote the environmental protection of the aquifer. When significant harm is caused, the responsible party must take all the necessary steps to eliminate it. Additionally, if a state fears that another signatory's action will negatively affect the quality of the groundwater, they can stop the activity during the consultations. Finally, the agreement requires the parties to cooperate in identifying critical and especially boundary areas that need special attention. In practice, this could be similar to the zones set up in the case of the Al-Sag/Al-Disi aquifer.[39]

37 Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Kingdom of Saudi Arabia for the Management and Utilisation of the Ground Waters in the Al-Sag/Al-Disi Layer 2015.

38 Déclaration des Ministres des Ressources en Eau des Pays Partageant le Système Aquifère du Sahara Septentrional 2006.

39 Acuerdo sobre el Acuífero Guarani 2010.

4.4. Settlement of Disputes

From a lawyer's perspective, it is also fascinating to study how the parties handle disputes. Of the six cooperations, only in three cases have the parties decided on the means of dispute settlement. Accordingly, I will discuss the Guarani Agreement, the Genevese Convention, and the Iullemeden–Taoudeni/Tanezrouft Memorandum of Understanding.

In the case of the Genevese aquifer, it must be noted that the Convention stipulates that its interpretation shall be resolved according to Swiss law. In case a dispute emerges between the two parties, as a first step, it must be resolved through conciliation in the framework of the Franco-Genevese Regional Committee, which is one of the oldest institutions of the Franco-Swiss transboundary cooperations. If the dispute is not solved in this way, the case should be brought to the Franco-Swiss Consultative Commission for Problems of Neighbourliness.[40]

In case of a dispute, the states of the Guarani aquifer must notify the previously introduced commission (which is a common body). The first step involves the parties deciding to settle disputes through direct negotiations. If this step is not successful, that is, the dispute is not solved within a reasonable time or is only partially resolved, they will solicit the commission to analyse the case and give recommendations. If the issue remains, the states will seek to resolve it through an arbitration procedure established by the countries.[41]

The Iullemeden–Taoudeni/Tanezrouft aquifer's MOU also expresses a multi-level dispute settlement process. As a first step, if a dispute arises between the signatory states, they must resolve it through conciliation or other peaceful means. If the parties are unable to reach a consensus, they should seek to resolve it through the Council of Ministers (decision-making organ). If they do not reach a satisfactory solution, the dispute will be brought to the Conciliation Commission of the African Union. Finally, if the dispute cannot be resolved through all the aforementioned options, it must be decided by the International Court of Justice (ICJ).

In case of these solutions, it can be observed that the parties first seek more direct and cheap solutions and only if these do not bring satisfactory results do they turn to more official and expensive solutions.[42]

40 Convention on the Protection, Utilisation, Recharge and Monitoring of the Franco-Swiss Genevois Aquifer. International 2008.

41 Acuerdo sobre el Acuífero Guarani 2010.

42 Memorandum of Understanding for the establishment of a Consultation Mechanism for the Integrated Management of the Water Resources of the Iullemeden, Taoudeni/Tanezrouft Aquifer Systems (ITAS) 2014.

4.5. Conclusion of the Cooperations

In summary, I would like to highlight a few points about the cooperations that can serve as examples when creating new agreements. The Genevese Convention itself is a good example as it has successfully managed the aquifer for more than 40 years while preventing overexploitation. The key to success can be found in two things. First, it was not two states but two local territories that cooperated, ensuring throughout the creation and implementation of the convention that local knowledge and interest would be involved. The second reason for success was that the parties took an extremely pragmatic approach by always promoting the protection of the resource. It is worth highlighting that the North Western Sahara aquifer's Consultation Mechanism followed a very sensible route by first conducting research on the area and then deepening interparty relations. The Nubian Sandstone Aquifer Agreement is another good example owing to its detailed decision-making procedures. The Guarani Aquifer Agreement should be appreciated for setting up an agreement despite the aquifer not being in danger. For the Iullemeden–Taoudeni/Tanezrouft aquifer, the step-by-step dispute settlement merits serious attention. Finally, with regard to the Al-Sag/Al-Disi aquifer, the protected and management zones are something that could be useful in other cases as well. Parties with shared resources should consider these best practices in order to achieve better management of their groundwaters. However, there are certain steps that international law should take before this can happen. In the following sections, I will attempt to explain these in detail.

5. De Lege Ferenda

How exactly can international law develop? As a result of my previous research, with great respect towards the scholars of this field, I have set up a simple and, in my opinion, effective approach that aims to achieve better management of these shared resources. The proposal consists of three consequent steps. The first step is acknowledging the importance of these resources, the second is the creation of a binding international document that contains the basic principles of transboundary groundwaters, and the third is the creation of regional bilateral and multilateral agreements. I will now explain these steps in depth.

5.1. Acknowledging the Importance of Transboundary Aquifers

First, states must recognise the importance of these shared resources and the fact that cooperation is indispensable for their proper management. The significance of

transboundary aquifers is gaining increasing attention in academic circles, but the question remains whether this interest will spread to the sovereigns that actually share these resources. Unfortunately, I believe that this is doubtful with our current approach, which emphasises the benefits of this field. At present, states are only aware of the benefits of these resources and believe that cooperation would hinder the advantages they derive from them. It seems likely to me that the only way to induce the sovereigns to think about the necessity of cooperation is by highlighting the dangers of mismanagement. In the following sections, I would like to highlight a few issues that may secure the necessary attention.

The first thing that has to be pointed out is the issue of contamination. Aquifers are generally quite resilient towards pollution owing to the surrounding matter, but digging wells and other waterworks compromises this resilience. If the parties do not conduct these actions with care and dedication to ensure that the water stays clean then disasters await. In case of contamination, the quantity of the aquifer remains, but it may become unusable.

Regarding contamination, two points should be mentioned. First, it is imperative to understand that if an aquifer is polluted, especially a fossil aquifer, the consequences will not disappear naturally, at least not in a short period. There are artificial cleaning methods, but these are currently extremely costly and difficult to carry out.[43]

The second issue is that if contamination occurs in any part of the aquifer, it will affect the whole resource. As I have previously pointed out, groundwater must be viewed from a systematic perspective. These are interconnected systems where contamination can affect the whole aquifer, and borders will not stop this contamination. As an example, a country like France, which only has a small share in the Genevese aquifer, can pollute the aquifer to Switzerland's detriment simply by digging wells carelessly. For Switzerland, it is obviously a much more substantive resource, but in the absence of cooperation, they cannot prevent such an event from happening. To sum up, without cooperation we are at the mercy of others, and we cannot guarantee the future of water quality.

The second issue worth emphasising is the danger of overexploitation. Groundwaters are generally great sources of freshwater. Moreover, their benefits can be enjoyed for centuries in case of natural or artificial recharge. Unfortunately, however, in many instances, the rate of recharge (if present) does not match the rate of abstraction, which is when overexploitation occurs. Concerning overexploitation, again two points must be made. First, states must exercise great caution when exploiting their fossil aquifers as they will either never recharge or will only do so over centuries. Plans for abstractions must take into account that these resources are not infinite,

43 Li et al., 2021, pp. 1–10.

and the parties should consider using such good quality water only for certain purposes (for example, to provide drinking water).

Second, a systematic approach is needed. Parties sharing groundwaters must be cognizant of the fact that if any exploitation occurs within the system, it will impact the whole resource. Thus, just as in the case of contamination, without cooperation, a party by its borders with a small share in the aquifer can overexploit the resource by itself, which is not a favourable outcome.

Hopefully, the least likely, but perhaps the most alarming, possibility that can make states think about the joint management of shared resources is the danger of conflicts emerging over them. Unfortunately, conflicts over valuable resources are not uncommon on both the intrastate[44] and interstate levels.[45] The question of whether conflicts can emerge over shared aquifers is quite contested within the scholarly world. Some believe that states are much more likely to cooperate over shared waters than to enter into conflicts,[46] but there is a different perspective according to which conflicts over waters are common and their incidence is accelerating.[47] We must take the following facts into account. First, the population is still growing at a rapid pace; we have already reached eight billion people and hand in hand with this, our water needs are growing. Second, the available freshwater resources are disappearing because of climate change and overexploitation.[48] Third, despite new technologies, the need of water for agriculture is increasing.[49] Therefore, we can state that as the demand is growing and the supply cannot keep pace with it, known good-quality freshwater is gaining increasing importance. This means that these resources will be more important for the sovereigns in the future, and when sharing these scarce supplies with others, terrible conflicts can arise in the absence of cooperation.

These three issues can serve as motivators for state action, but how do we bring it to their attention? One possibility is scientific events like this year's World Water Day, which focused on groundwater, or the UNESCO's Water Summit on Groundwater, both of which are great starting points for raising state awareness. However, I believe that in this process, major international organisations with a focus on water must take a leading role.

44 Tabb, 2007, p. 2.
45 STWR, 2014, pp. 19–20.
46 Brooks and Trottier, 2014, p. 212.
47 Pacific Institute, 2022, p. 1.
48 Kohli, 2022, p. 2.
49 The World Bank, 2022, p. 3.

5.2. Creation of a Binding Document Containing the Basic Principles of Transboundary Aquifers

As previously discussed, a number of international documents have been created to handle the issues of transboundary groundwaters, but none of them tick all the necessary boxes. Thus, after the respective countries' interests and motivations have been raised, work can begin on a binding document that focuses on transboundary aquifers. In my opinion, the proper management of transboundary groundwaters cannot be solved solely via international treaties. There is a need for local cooperation that can reflect the specialities of a given aquifer, but these regional solutions can be more successful if they are built on a common basis encompassing the most basic principles of transboundary groundwater. It is a challenging task to construct such a document; if it is too vague, it will not serve its purpose, and if it is too detailed, the states might not sign it as it would require giving up too much of their sovereignty. Beyond keeping the balance, in the creation process, groundwater experts, namely hydrogeologists, must be included. I will now mention a few principles that I believe are essential to include in such a treaty. The first two principles are theoretical and the last three are practical.

The first principle is the well-known principle of *equitable and reasonable utilisation*. This term in itself is quite void, but the example of the Convention on the Law of the Non-Navigational Uses of International Watercourses could be followed as it lists relevant factors like social needs and the dependent population that should be taken into account when applying this principle.[50] In the planned document, the relevant factors must be listed, otherwise the principle could be misinterpreted.

The next principle is the *requirement of a systematic approach*. As previously noted, no proper management can be reached without this principle. Despite its importance, it has not been mentioned by any of the legal instruments that regulate transboundary aquifers. This approach requires the states to always be cautious with their actions as they affect the whole system.

Of the practical principles, the most important is the *requirement to create bilateral and multilateral agreements*. As this treaty will only aim to set up the basic principles on which local solutions can be built and these principles are void if no local solutions are created, the treaty must require the creation of such regional cooperations.

Another crucial principle is the *requirement to create common standards and means of inspections* concerning a particular aquifer. Without these, the parties cannot accurately measure the qualitative and quantitative attributes of the aquifer. Moreover, in the absence of these common results, the parties cannot improve the

50 United Nations: Convention on the Law of the Non-Navigational Uses of International Watercourses 1997. Official Records of the General Assembly, Fifty-First Session, Supplement No. 49 (A/51/49).

state of the resource. If states do not set these provisions at the beginning of the cooperation, it is destined to fail.

Finally, it is also important to state the *need for a common body that manages the aquifer*. As we noted in every case we analysed, a common organ was responsible for managing the aquifer. The treaty does not need to set up a strict structure but must necessitate setting up a common body devoted to the resource.

Obviously, this is not an exhaustive list. There are quite a few other provisions that should be included in such a treaty, which would require extensive cooperation with legal and groundwater experts. In this short list, I mentioned the provisions that should be considered non-negotiable when constructing such an important instrument.

5.3. Creation of Bilateral and Multilateral Agreements

The previously discussed basic principles must be the basis for local cooperation. However, this level requires the creation of solutions that are adapted to the aquifer's specification and the needs of the region where it is situated. When it comes to local solutions, the most important thing is that all the states that are party to the aquifer should be a part of the cooperation. If a country is left out, the principle of a systemic approach has already been breached. The first step that the parties should take before creating the local agreement is setting up a common means of inspection to research the aquifer. Without this initial source information, the parties cannot create an agreement that can sufficiently answer the needs of the area. After the common inspection of the aquifer comes the creation of the agreement. Aquifers differ from each other, so the local solutions will differ as well. Certain solutions that have proved their value in previous cases are worth considering by the states. In the following sections, I will list a few points that states should consider as necessary if they wish to manage their shared aquifers successfully.

One of the most important and basic aspects of any cooperation is the *exchange of information*. States cannot cooperate successfully unless they have sufficient data on what the other parties are doing with the aquifer. It is necessary to use a common means of inspection, preferably one used before the agreement materialises. It is also essential to exchange this data, otherwise the parties cannot obtain a clear view of the qualitative and quantitative changes in the aquifer. Furthermore, information must be shared quickly, for if it is not, there is no chance of mitigating the dangers. This exchange of information is also vital because all the qualitative and quantitative actions, like limits on abstraction, are only possible if we have data from all parties.

The next important issue the states should decide on is that of *common organs*. Earlier, I noted that all the analysed case studies included some sort of common

institutions but with different forms. Nevertheless, some good practices are worth considering. The institutional structure should include a decision-making body where the parties could be represented by their respective ministries responsible for water. This could be a platform for discussions, making decisions according to the changes in the aquifer's state and supervising the implementation of the agreement. A second body worth considering is a common scientific organ that researches the area, collects qualitative and quantitative information from the parties, develops the means of inspection and gives its scientific opinion to the decision-making body. Finally, there is a need for a legal organ that can help in the interpretation of the agreement and the settlement of disputes. It could also give its opinion to the decision-making organ.

Also worth including in the agreement are the *qualitative and quantitative actions* that the states plan to take. With respect to quality, it is worth discussing how the states are going to prevent pollution, what sort of warning mechanism they will set up to battle pollution, what quality standards they aim to reach, who is responsible for pollution and to what standards the wells need to comply to not harm the quality. Regarding quantity, the actions differ greatly from one aquifer to another, but the least the states should do is indicate how much water belongs to each country. I think that in the future, especially in some arid regions, it will be necessary to limit countries' abstractions to the amount situated within their territory. Obviously, such a system presupposes that every abstraction is recorded.

Lastly, I would like to mention the settlement of disputes. Disputes occur in any form of cooperation, so it is better to regulate how they must be settled than to not have a solution when they arise. Dispute resolution should preferably begin with direct negotiations. The parties should then try to settle the dispute through the common organs. Following that, they should move to the regional court of arbitration and finally to the ICJ.

Of course, there are many issues that have not been touched upon here. However, if the states are to agree on the matters listed above, the management of these shared resources would be much more successful than it is now.

Conclusion

In this article, I briefly discussed the importance of these shared resources and the inadequacy of current legislations. Nevertheless, all hope is not yet lost, and as we have seen, there are several highly promising local solutions from which many conclusions can be drawn. Finally, I proposed a plan for better management of these resources. I believe that by following a similar route to what I have presented, we can enjoy the benefits of these immensely important resources without worrying about conflicts emerging over them.

Bibliography

- AbuZeid, K. Elrawady, M., CEDARE, (2015) North Western Sahara Aquifer System (NWSAS) 2012 *State of the Water Report*. Cairo: CEDARE.
- Acuerdo sobre el Acuífero Guarani 2010.
- Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Kingdom of Saudi Arabia for the Management and Utilization of the Ground Waters in the Al-Sag/Al-Disi Layer. 2015.
- Brooks, D. B., Trottier, J. (2014) 'De-nationalization and de-securitization of transboundary water resources: the Israeli–Palestinian case', *International Journal of Water Resources Development*, 30(2), pp. 211-223.
- Cobos, G. (2018) 'Interview with Dr Gabriel de Los Cobos' Coursera [Online]. Available at: https://www.coursera.org/lecture/international-water-law/2-3-4-case-study-the-genevese-transboundary-aquifer-switzerland-france-interview-5oBWG (Accessed: 20 November 2022). (Cobos, 2018b).
- Cobos, G. (2018) 'The Genevese transboundary aquifer (Switzerland-France): The secret of 40 years of successful management.', *Journal of Hydrology: Regional Studies*, 20, pp. 116-127. (Cobos, 2018a).
- Constitution of the Joint Authority for the Study and Development of the Nubian Sandstone Aquifer Waters 1992.
- Convention on the Protection, Utilisation, Recharge and Monitoring of the Franco-Swiss Genevois Aquifer. International. 2008.
- Declaration des Ministres des Ressources en Eau des Pays Partageant le Systeme Aquifere du Sahara Septentrional 2006.
- Dempsey, C. (2021) 'Water on Earth' Geography Realm [Online]. Available at: https://www.geographyrealm.com/water-earth/ (Accessed: 21 November 2022).
- Eckstein, G., Sindico, F. (2014) 'The Law of Transboundary Aquifers: Many Ways of Going Forward, but Only One Way of Standing Still.' *Reciel*, 23(1), pp. 32-42.
- Greenop, M.A. (2021) 'The United Nations International Law Commission's Draft Articles on Transboundary Aquifers.', Max Planck Yearbook of United Nations Law Online, 24(1), pp. 36-81. [Online]. Available at: https://doi.org/10.1163/18757413_02401003 (Accessed: 22 November 2022).
- Hofste, R. W., Reig, P., Schleifer, L. (2019) '17 Countries, Home to One-Quarter of the World's Population, Face Extremely High Water Stress.' World Resources Institute [Online]. Available at: https://www.wri.org/insights/17-countries-home-one-quarter-worlds-population-face-extremely-high-water-stress (Accessed: 17 November 2022).
- IGRAC, (2021) 'Transboundary Aquifers of the World (update 2021)' IGRAC [Online]. Available at: https://www.un-igrac.org/sites/default/files/resources/files/2021TBAMap_UNESCO%20Version.pdf (Accessed: 22 November 2022).

- Kohli, R. (2022) 'Water sources are disappearing. How can we adapt?' UNDP [Online]. Available at: https://climatepromise.undp.org/news-and-stories/water-sources-are-disappearing-how-can-we-adapt (Accessed: 29 November 2022).
- Li, P., Karunanidhi, D., Subramani, T., Srinivasamoorthy, K. (2021) 'Sources and Consequences of Groundwater Contamination', *Archives of Environmental Contamination and Toxicology*, 83(4), pp. 1-10.
- Mádlné Szőnyi, J., Czauner, B., Simon, Sz., Erőss, A., Zszemle, F., Pulay, E., Havril, T. (2013) *Hidrogeológia*. Budapest: Eötvös Loránd Tudományegyetem.
- Memorandum of Understanding for the establishment of a Consultation Mechanism for the Integrated Management of the Water Resources of the Iullemeden, Taoudeni/Tanezrouft Aquifer Systems (ITAS) 2014.
- Observatoire du Sahara et du Sahel, (2017) 'Joint and Integrated Water Resources Management of the Iullemeden – Taoudeni/Tanezrouft Aquifer Systems and the Niger River.' Gicresait Project Summary Report, [Online]. Available at: http://www.oss-online.org/sites/default/files/2022-11/OSS-GICRESAIT-Synth-Finale_En.pdf (Accessed: 18 November 2022).
- Pacific Institute, (2022) 'Water Conflict Chronology' Pacific Institute [Online]. Available at: http://www.worldwater.org/conflict/map/ (Accessed: 22 November 2022).
- Sindico, F. (2011) 'The Guarani Aquifer System and the International Law of Transboundary Aquifers', *International Community Law Review*, 13(3), pp. 255-272.
- STWR, (2014) 'A primer on global economic sharing' STWR [Online]. Available at: https://www.sharing.org/sites/default/files/images/PDFs/A%20primer%20on%20global%20economic%20sharing%2C%20STWR%2C%20June%202014.pdf (Accessed: 28 November 2022).
- Szilágyi, J. E. (2013) Vízjog: Aktuális kihívások a vizek jogi szabályozásában. Miskolc: Miskolci Egyetem; ISBN: 9789633580165.
- Tabb, W. K. (2007) 'Resource War' Monthly Review [Online]. Available at: https://monthlyreview.org/2007/01/01/resource-wars/ (Accessed: 28 November 2022).
- The World Bank, (2021) 'Going With The Flow: Water's Role in Global Migration' The World Bank [Online]. Available at: https://www.worldbank.org/en/news/feature/2021/08/23/going-with-the-flow-water-s-role-in-global-migration (Accessed: 21 November 2022).
- The World Bank, (2022) 'Water in Agriculture' The World Bank [Online]. Available at: https://www.worldbank.org/en/topic/water-in-agriculture (Accessed: 29 November 2022).
- Thompson, D. (2016) 'What is an Aquifer and How does it Work?' DTN prosper in a dynamic [Online]. Available at: https://www.dtn.com/what-is-an-aquifer-and-how-does-it-work/ (Accessed: 22 November 2022).
- UN-ESCWA and BGR (United Nations Economic and Social Commission for Western Asia; Bundesanstalt für Geowissenschaften und Rohstoffe), (2013) Inventory of

Shared Water Resources in Western Asia.Chapter 10 Saq-Ram Aquifer System (West). Beirut: UN-ESCWA e-ISBN. 978-92-1-056032-0.
- United Nations, Convention on the Law of the Non-navigational Uses of International Watercourses 1997. Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).
- United Nations Economic Commission For Europe, Convention on the Protection and Use of Transboundary Watercourses and International Lakes.
- Villar, P. C. (2020) 'The Agreement on the Guarani Aquifer enters into force: what changes now?' International Water Law Project Blog [Online]. Available at: https://www.internationalwaterlaw.org/blog/2020/11/16/the-agreement-on-the-guarani-aquifer-enters-into-force-what-changes-now/ (Accessed: 17 November 2022).
- WWAP (UNESCO World Water Assessment Programme), (2019) The United Nations World Water Development Report 2019: Leaving No One Behind. Paris: UNESCO.

Zsófia NAGY*

An Overview of Ethical and Legal Considerations of Assisted Reproductive Techniques

ABSTRACT: *With the constant evolution of technology in the field of medicine, new ethical questions must be answered. In particular, medically assisted reproduction triggers bioethical disputes nowadays, despite the idea that reproduction without sexual intercourse is not newfangled. When discussing techniques such as artificial insemination, gamete donation, post-mortem fertilisation, in vitro fertilisation, and surrogacy, the traditional concepts of parenthood, genetic filiation, reproductive autonomy, and human dignity are placed under exposition. The sensitive nature of these bioethical issues is present in the diversity of the legislation in Europe and is markedly enstamped in the hesitant attitude of the European Union and the Council of Europe.*
KEYWORDS: *artificial insemination, gamete donation, surrogacy, post-mortem fertilisation, human rights, bioethics*

1. Introduction

As man is both a social and natural creature, procreation has been an instinct of humankind, and, moreover, by having children, we fulfil both biological and social desires. The need for the protection of the family is responsible for the basic increment of such notions. However, when conditions are not met to safely and naturally procreate, man searches for new horizons to reach his goal of establishing a family with a child to gain fulfilment of a wholesome family life. This disturbance can be embodied in the infertility of one or both of the individuals of the couple. Infertility[1] is a medical condition, more precisely a disease according to the World Health

1 Defined in World Health Organization (WHO). International Classification of Diseases, 11th Revision (ICD-11) Geneva: WHO 2018 as a disease of the male or female reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse.

* Ph.D. Candidate at the Ferenc Deák Doctoral School of the University of Miskolc and Scientific Researcher at the Central European Academy, Budapest. ORCID: 0009-0002-9342-1965

https://doi.org/10.62733/2023.2.173-201

Organization (WHO), which can affect both the male and female reproductive systems. This medical problem is not newfangled; it has affected many people through time. Thus, the man of today has come up with a solution and treatment based on the scientific knowledge available.

In modern circumstances, although the motivations behind turning to assisted reproductive techniques (ARTs) have changed, founding a family with a child has become closely related to the embodiment of personal autonomy, freedom to found a family, and reproductive freedom.

Advancements in technology have paved the way for more options and techniques vis-à-vis assisted reproduction, including in vitro fertilisation (IVF), gamete and embryo donation, and artificial insemination (AI). These techniques are designed to 'treat' infertility or other medical conditions that make reproduction risky for women (e.g., heart or eye disease, which increase sterilisation). Moreover, surrogacy provides a solution for so-called social infertility, meaning that the law makes it difficult or impossible to adopt a child for certain members of society, for example, gay couples and single men.[2]

Among ARTs, surrogacy introduces more complexities into a generally simply defined familial bond between the parent and child, as the woman who delivers the child will not be the one who will raise him or her.

2. History of Assisted Reproductive Techniques

Modern techniques in connection to assisted reproduction were introduced in the 1970s; however, the concept of reproduction without actual sexual intercourse has been prevalent since biblical times. First, the tale of Abraham and Sarah from the Old Testament Genesis describes the problem and solution of infertility in a marriage. Abraham's wife, Sarah, was unable to get pregnant; nevertheless, she wanted Abraham to secure an offspring. In her despair and determination to assure succession, she asked their servant, Hagar, to bear a child from Abraham, whereafter the delivery let Sarah be the baby's mother with all the consequences of motherhood, regardless of the lack of a biological relationship between them. In this story, not only was the concept and aim of surrogate motherhood presented but also was the understandably sensitive aftermath between the two women, who both insisted on their maternal status, manifested. This conflict eventually ended with Hagar's banishment from Abraham's community, together with her son Ishmael, after Sarah's and Abraham's son was born. In this story, the tough moral considerations of surrogacy are illustrated.

2 Soniewicka, 2019, pp. 46-47

The story is ancient, but the method is new.[3] Nowadays, surrogacy is the most discussed technique, as other ARTs do not differentiate the individual who intends to raise the child from the one who has a genetic relation to him or her at such depths. The facts regarding child delivery and biological/genetic connections are conflicting.

Medical science has worked on developing assisted reproduction methods since the 19th century. The process and history of AI, gamete donation, IVF, and surrogacy will be discussed in the following subchapter.

2.1. Artificial Insemination

One type of assisted reproduction that takes place inside a woman's body is AI, which is one of the easiest and cheapest medically feasible options. The procedure during which the sperm of a donor is injected into a female reproductive tract, when the woman is in her ovulation period, facilitates conception. This technique can use the gamete of the husband or partner of the woman (homologous AI), or a donor (heterologous AI).

A great discovery in embryology, which had an impact on the further development of ARTs, mainly AI, was introduced by Lazzaro Spallanzani, an Italian physician, and Carl Ernst Von Baer, an Estonian embryologist. Spallanzani performed AI on viviparous animals (mainly dogs) and demonstrated the necessity of spermatozoa for fertilisation. His contribution in 1779 confirms that the development of the embryo starts only if the sperm and oocyte make physical contact.[4] Baer (known as the 'father of embryology') studied the stages of animal embryo development and successfully discovered the mammalian ovum[5] in 1827, while presenting an undisputable observation of the human ovum.

A verified successful attempt can be linked to John Hunter, an English scientist, whose interest in human reproductive anatomy pushed him to perform this technique in the late 18th century, and he was the first to provide a documented report on the application of AI.[6] Various attempts were later made by American physician J. Marion Sims, credited as the 'father of modern gynaecology'. His experiments lacked empathy and humanity, as he openly used very controversial methods during his

3 Navratyil, 2012, p. 88

4 Sharma, Saxena, and Singh, 2018b, p. 12.

5 Ovum, plural ova, in human physiology, single cell released from either of the female reproductive organs, the ovaries, which is capable of developing into a new organism when fertilized (united) with a sperm cell. See more: The Editors of Encyclopaedia Britannica. 'ovum'. Encyclopaedia Britannica, 22 Nov. 2010 [Online]. Available at: https://www.britannica.com/science/ovum (Accessed 5 February 2023).

6 Wagoner, N. (2017) John Hunter (1728–1793). Embryo Project Encyclopaedia. ISSN: 1940-5030 [Online] Available at: http://embryo.asu.edu/handle/10776/11421. (Accessed: 12.12.2022)

work (e.g., using slaves as experimental subjects without their consent, treating women without respect).[7]

These revolutionary physicists have pushed the barriers of procreation since the 18th century; however, legal reactions to this new phenomenon were vague. More significant research and dialogue were initiated in the sphere of the social sciences, where different bioethical and medical committees tried to navigate the debate on the admissibility of assisted reproductive procedures.

What ethical challenges are associated with AI? First, regarding homologous AI, the following question arises: Is it acceptable to separate procreation and marital community?[8] This assumption is especially not permissible according to some churches. Concerning the Catholic Church, Pope Saint John Paul II, in his encyclical titled 'Evangelium Vitae' (The Gospel of Life) from 1992 describes why any form of assisted reproduction should be prohibited. He touches upon the area of embryo protection, which is relevant in connection to IVF and will be comprehensively elaborated upon in later chapters.

He writes as follows: '*The various techniques of artificial reproduction, which would seem to be at the service of life and which are frequently used with this intention, actually open the door to new threats against life. Apart from the fact that they are morally unacceptable, since they separate procreation from the fully human context of the conjugal act, these techniques have a high rate of failure: not just failure in relation to fertilization but with regard to the subsequent development of the embryo, which is exposed to the risk of death, generally within a very short space of time. Furthermore, the number of embryos produced is often greater than that needed for implantation in the woman's womb, and these so-called "spare embryos" are then destroyed or used for research which, under the pretext of scientific or medical progress, in fact, reduces human life to the level of simple "biological material" to be freely disposed of*'.

The issue of this separation is also relevant when the procedure is to be conducted on couples who live in a non-marital union. As alternative forms of unions besides marital ones are becoming increasingly popular, most legal systems in Europe recognise such relationships. Non-marital unions, cohabitation, and *de facto partnerships* in most legal systems are under protection and become equal to the status of marriage.[9] Nevertheless, when heterologous AI is in question, the quality, consistency, and dynamics of any form of relationship should be examined.

Although the Catholic teaching mostly forbids ART, other churches (e.g., Evangelic, Protestant) and Judaism in their critical approach do not completely condemn the existence and use of such technologies.

7 Holland, 2018, p. 1.
8 Hidegvéginé and Sáriné, 2018, p. 111.
9 Barzó, 2021, pp. 297–301.

The Community of Protestant Churches in Europe in 2017 published a collection of guidelines, namely, the 'Before I formed you in the womb…' A Guide to the Ethics of Reproductive Medicine from the Council of the Community of Protestant Churches in Europe, in which the recent comprehensive contemplations on the topic of ART and other biomedical issues connected to reproduction are presented. The paper highlights that ART, as a form of medical progress, is ethically acceptable in itself. Notably, IVF is considered a blessing from God for infertile couples who yearn to have children. Moreover, cryopreservation[10] is not rejected, as it has not been shown to endanger or damage the embryo. The document warns about the potential risk of the objectification of human life (of the in vitro embryo) and encourages paying attention to the social problems that lead to embryo 'freezing'. The attitude towards embryo and gamete donation is positive, as long as the child's right to identity is ensured in the future, although the practice of surrogacy is unacceptable.[11] Overall, the Protestant teachings focus on the protection of the right to life of the embryos but support medical techniques that do not endanger the embryos and treat infertile couples to have a child on their own.

The Jewish theological approach is even more open to the techniques of medically assisted reproduction. First, the biblical commandment to 'Be fruitful and multiply, fill the earth and subdue it'[12] encourages the spread of and access to ARTs. The main Jewish scripture, the Torah, is flexible towards assisted reproduction, as reflected through the infertility problems and solutions the tales of Sarah, Rebecca, and Rachel present. The conservative approach enables embryo research, as the foetus has no humanness until the 40th day since the date of conception. This perception, which also applies to the in vitro embryo, supports the progressive approach towards ARTs, as the usage and handling of embryos do not raise moral questions. Surrogacy is an acceptable method of infertility treatment; however, access is restricted to married heterosexual couples and single women. Thus, due to religious considerations, non-traditional families cannot participate in such treatment. Notably, though there are differences between the conservative and orthodox Jewish teachings, they are both open to ARTs.[13]

Nevertheless, the emergence of ARTs has represented a breakthrough in medical science concerning infertility treatment, and its importance has been enhanced after WHO classification. The various techniques and constant scientific innovation in the field of genetics have enabled the treatment of involuntary childlessness as well as enhanced reproductive autonomy in a socioeconomic context by extending the reproductive period or, in other words, postponing childbearing by medical means and preventive techniques.[14] Some advanced methods, such as preimplantation genetic

10 Technique of preservation of human gametes by freezing.
11 Community of Protestant Churches in Europe (EPEK-GEKE/CPCE), 2017, pp. 86–88.
12 Genesis 1:28.
13 Rabbi Mordechai Halperin, M.D., 1996, pp. 3–6.
14 Seiz, Eremenko, and Salazar, 2023, pp. 11-14.

testing, have roots in the emergence of ARTs. Although they do not directly connect to infertility treatment, they help couples with detecting hereditary conditions in the foetus, thus screening and identifying genetic abnormalities. Moreover, the research and observation conducted on the in vitro embryo contribute to the discovery of new medical techniques in assisted reproduction, as well as opportunities in stem cell therapy to treat some neurogenetic disorders.[15]

A more problematic concept is linked to heterologous AI, which introduces additional circumstances for debate. This type of ART requires, besides the couple, a third person, the donor, who provides the sperm used during AI. Given the nature of the procedure, early legal classifications of sperm donation were treated as an act of adultery. In the US Supreme Court, in the Gursky v. Gursky case, heterologous AI was rendered as adultery on the side of the wife and highlighted the problem of the illegitimacy of the child born via donor insemination. On that matter, it is necessary to address the other ethical question, which is mainly related to the data protection of a donor. Exactly what kind of, and how detailed, information about the donor shall be stored, and shall these data be accessible to the child? The right of the donor to data protection and anonymity is placed on one scale, along with the right of the child to know his or her ethnic and genetic origin.[16] Originally, there was the concern of a child being 'reduced' to be born out of wedlock, which pushed AI to be viewed as immoral and condemned to the husband's bloodline.[17] Not surprisingly, Germany was also negative towards this technique, as expressed in the reform bill of the Criminal Code in 1962, proposing to ban and impose punishment for undergoing the procedure.[18] A similar approach was characteristic to the US at the beginning; however, later on, the case law overruled the adultery consequence of heterologous

15 Rahman, M.M. and others, 2022, p. 147.

16 Regarding anonymous gamete donations the ECtHR has a wide range of case law in this matter, although The right to identity falls in the scope of Art. 8 of the Convention, the right to respect for private and family life. Although the Court has never directly addressed this right specifically as the right of donor-conceived persons. The Court has examined this issue in three dimensions, in connection with paternity, anonymous birth and anonymous donations in assisted reproduction. The case of S.H. and Others v. Austria (Application no. 57813/00, 2011) is a significant judgement in the context of gamete donation for the purpose of medically assisted reproduction. The case was significant for the notion of how the state justified the ban on anonymous sperm and egg donation for the use of some ART, as it would compromise the child's right to identity to get to know its biological origins, which is their legitimate interest. The Court in its ruling highlighted the importance of identity as follows: *„its formative implications for his or her personality'* and which *'includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents''* (§83).
Most importantly, the Court established that this right is not absolute, and found that Austria had found an appropriate and fair balance between the competing interests with its restrictive legislation on anonymous sperm and egg donation for ART.

17 Ben-Asher, 2009, p. 1889.

18 Navratyil, 2012, p. 39.

AI.[19] All these concerns were not prevalent in the UK, where not only medics but also social scientists from several spheres were more receptive to this form of ART.[20]

Evidently, even though medical science was evolving, homologous AI was reachable and regarded as a potential treatment for male infertility. It started to break certain taboos and traditions in procreation, which came to the surface. However, this technique presented a relatively cheap and effective way of assisted reproduction, which opened up the demand for 'sperm markets' and resulted in the establishment of sperm banks. For example, since the Sorensen decision, and due to the vague legislation on this matter, in the US, sperm banks have seemed to flourish. Gradually, the fertility landscape expanded as more and more sperm banks were established outside of the US in the 1960s.[21] Although there was a clear demand and need for gamete preservation, it brought in several new ethical aspects to elaborate on, such as donor anonymity, post-mortem fertilisation, who and how the gametes should be disposed of (mainly possession issues), and the possibilities of incestuous relationships. These concepts will be further discussed in later chapters.

To conclude, AI, as an ART form, was the first technique to undergo thorough ethical deliberation. First, it was deemed intolerable but gradually became viewed through a medical lens instead of a social context. Moreover, since the 1960s, with the emergence of sperm banks, the law has accepted it as a permissible form of medical ART option, although the circumstances of accessibility to this service differ from country to country.

2.2. Gamete Donation

The previously discussed ART method can be linked to the practice of gamete donation[22]. As ARTs are paramount to individuals who are infertile and have a high probability of transmitting genetic diseases or are homosexuals, donor gametes are

19 An important, shifting decision was made in California, where in the People v. Sorensen case from 1968 the court ruled, that in order to come to adultery, the two free-willed individuals' active engagement to the activity is relevant. On one hand, the physicist cannot be held accountable (as it can be a woman, too), neither the donor, as he is not physically present at the moment of procreation, thus determining adultery seems absurd.

20 It is evident from the report of the Feversham Committee from 1960, and later the Report of the Committee of Inquiry into Human Fertilisation and Embryology from 1984, that UK from the start intended to recognise and regulate the issue, rather than completely restricting it.

21 Ben-Asher, 2009, p. 1896.

22 We have to make a distinction between gamete donation for reproductive purposes and for research. In terms of assisted reproduction, more ethical questions arise, as they further complicate the family ties, and the social relation between donors and recipients. The issue of objectification of the human body and its parts, besides commercialization of the gametes, arise in both reproductive and research context.

necessary for them to attempt procreation. If we examine the issue from a purely utilitarian perspective and if there is interest, the system ought to enable access at maximum capacity. This practice certainly raises several ethical questions. Basically, who and why would anyone be interested in donating gametes? How are potential donors motivated? Should it work voluntarily or for remuneration? These are only surface-level problems that gamete donation touches upon.

More complexity[23] arises when we examine the conflicts of interest between acting subjects, donors, recipients, and even the child. Likewise, similar considerations are considered when we elaborate upon embryo donations, while not neglecting the need to discuss and establish the legal status of the embryo itself. Regardless, both gamete and embryo donation regulations involve similar problems, as the child born from these donations faces the same controversies arising from the perspectives of human rights and family law. In the following, we will analyse the ethics of payment for donation, anonymity, and post-mortem fertilisation to keep the proportionality in discussing the ethics of most ART.

First, we have to make a clear distinction between oocyte and sperm donations, as they fundamentally diverge in the applied scientific practice used during extraction, preservation and usage. Sperm donation is followed by direct insertion into the recipient woman's reproductive system, after egg donation procreation takes place outside the recipient's body, basically merging the sperm and donor oocyte in a laboratory dish (IVF), whereafter the embryo is transferred into the womb. Certainly, both sperm and oocyte donation take place in a medical setting with physician supervision; however, oocyte donation requires additional medical treatment and preparations beforehand. It is essential to undergo clinical hormonal treatment on both the donor's and recipient's sides, during which the menstrual cycles of the two women are synchronized and the uterus is prepared for the embryo transfer. Moreover, there are some differences in cryopreservation and the success rate of fertilisation. The most recent preliminary data on the utility and successful fertility rate factors between planned and medical oocyte cryopreservation suggest that both groups result in the preservation of fertility and subsequent live births in patients who return to fertilise their frozen eggs. Those who undergo cryopreservation at a younger age ought to have higher oocyte yield and birth rates.[24]

23 We mean the social, psychological and ethical consequences of the donation, such as anonymity issues, genetic screening, selection process, post-mortem fertilisation, donor-selection process, consanguinity, informed consent and risk disclosure and avoidance of incestuous relationships.

24 Walker, Lanes, and Ginsburg, 2022, pp. 1-5.

2.2.1. Compensation or Payment Issues

We will first examine the aspect of compensation for the 'donation', which is closely linked to bodily autonomy and the commercialisation of the human body and its parts. Generally, it is morally unacceptable to treat negligible human body parts as a commodity, especially according to continental jurisprudence, which is supported by the argument of the specific normative status of the human being supported by values of human dignity and integrity. However, other philosophical grounds such as libertarianism and utilitarianism theoretically enable the 'selling' of gametes, referring to contractual freedom and the right to privacy.[25] Regardless, the term donation has the connotation of an altruistic act; one can argue that certain levels of compensation shall be introduced to motivate or induce donors to engage in the process in the first place. Moreover, mainly in the case of oocyte donation, the efforts, inconvenience, and risks involved by the donor should be compensated to some extent. Some feminist critics argue that offering 'payment' in exchange for a woman's reproductive capacity opens up a pathway for potential abuse, oppression, and exploitation[26], while others see it as an embodiment of their self-expression and empowerment.[27] Before everything else, the fulfilment of ideal ethical purposes could be achieved by improving informed consent, better preparation, counselling, sufficient access to information, and involvement of independent egg-donor advocates, who overwatch the process and promote the donor's needs, which would certainly contribute to making gamete donation non-exploitative and consensual.

2.2.2. Anonymity Concerns

Additionally, an even more controversial aspect of gamete donation is seemingly donor anonymity. As previously mentioned, anonymous or non-anonymous donations intend to balance the donor's right to privacy and data protection and the child's right to identity to get to know his or her genetic origins. It can certainly affect the child negatively psychologically, morally, and socially, especially if it is revealed that he/she was born through gamete donation and is unable to trace his/her genetic

25 Soniewicka, 2019, p. 77.

26 There is a higher probability that if monetary compensation is involved, it would rather attract underclass women with disadvantageous economic backgrounds to engage in this activity. Moreover, the exploitative nature can be further enhanced, if payments are high so they may affect the quality of consent from the donor's side. If the financial compensation is of high value, individuals may engage in activities they otherwise would not do, which are risky, and harmful, thus their actions and decisions may be autonomous and voluntary.

27 Purdy, 1996, p. 38

origins.[28] Furthermore, this creates an obstacle for the child to access its genetic and medical inclinations. However, one can argue that treating the matter with non-anonymity would discourage the tendency to donate. Depending on which value, the legislator prefers to grant 'more' protection. Nevertheless, the question is delicate, because it can detrimentally affect the family life of both the donor and child if they try to get in touch with each other later, thus further fragmenting traditional family relations.[29] The distinctive treatment of oocyte or sperm donation in this aspect is relevant, as owing to the nature of oocyte donation (the required hormonal treatment and syncing of the menstrual cycle of the donor and recipient), anonymity cannot be accomplished in practice.

Based on the abovementioned consequences, a certain approach can create a substantively different legal landscape that can be preserved in Europe. In recent years, some states have started to break the tradition of anonymity and introduced contrary or found unique solutions to this matter. One of the advocates in favour of non-anonymity is Germany. Although only sperm donation is allowed, it is permissive towards the disclosure of donor identity. The legal reasoning behind this can be derived from the decision of the Constitutional Court in 1989, highlighting the right to know someone's genetic origins, derived from human dignity, to which everyone is due.[30] The privilege of the child to know its genetic origin is expressed by the Sperm Donor Registry Act[31], pursuant to which sperm banks and clinics are obliged to store the data about the donor and the mother in a central register for a minimum of 110 years and to forward information about the donor to the German Federal Institute for Drugs and Medical Devices after a child has been conceived. Additionally, the recipient is obligated to inform the attending doctors about the birth. The recipient, child, and donor data are stored under the highest data protection regulations for 100 years. Concretely, the child's right to identity can be exercised at the age of 16 or older and can seek information about its genetic data at the central registry; however, pursuant to §1600 (5) of the German Civil Code, the sperm donor is excluded from contesting paternity, meaning he cannot become a legal father. Germany has established a fairly progressive approach to the anonymity question in sperm donation, ensuring the child's right to identity while unequivocally settling familial relationships.

An example of the relative anonymity approach might be Spain, meaning that certain information about the donors and the child could be disclosed, but paying attention to confidentiality, not sharing the identity of either of them, unless there is an extraordinary situation (serious health risk to the child) in which data about the identity of the donor could be released. This non-absolute rule of anonymity is linked

28 Freeman, 2015, pp. 45–63.
29 Frankó, 2014, p. 54.
30 BVerFGE 79, 256 (1989) d
31 SaRegG – Samenspenderregistergesetz

to Law 14/2006 on human-ARTs which establishes the obligation of clinics, registries, and other facilities to maintain the confidentiality of identifiable donor data. However, pursuant to Law 41/2002 on patient autonomy, an individual is entitled to access all available data on one's own health; therefore, in cases of a child born from gamete donation, obtaining information on its genetic origin shall be reachable. Spanish regulation intended to balance the right to privacy and confidentiality of the donors, the patients undergoing ART treatment, and the child's right to identity by making it theoretically possible for the child to receive facts about its genetic origins, but only if its release is necessary to prevent harm to the health of the parties, which are rare and extraordinary circumstances. Basically, as long as the health of the parties can be preserved without disclosing the identity of the donor, it shall remain anonymous.[32]

2.2.3. Post-mortem Fertilisation

Concerns about post-mortem fertilisation have emerged, as ART practices help overcome not only medical infertility but also the so-called 'secondary' infertility. This condition is linked to current socioeconomic circumstances and trends. Although medical infertility is not age-related, there is a close correlation between ageing and infertility. In other words, the time of childbearing is extending, and so is the age of becoming a parent, as women tend to pursue their studies and careers first and establish a family afterwards.[33] Cryopreservation offers a solution for planned parenthood if certain obstacles (severe medical diagnosis, sterilisation, and other treatments which can compromise gamete production or childrearing) arise in the future. As the technique can be used as prevention if something 'irreversible' occurs, what about the cases of death of the individual whose gametes are stored in the clinic? From a biological perspective, frozen gametes and embryos enable the birth of a posthumous child, raising questions about its legal status in the family, in succession, social security entitlements, as well as the subsequent parental status of the deceased, whose gametes were preserved and used.[34] The complicated consequences of post-mortem fertilisation are mostly connected to the legal status of the parties in civil and family law contexts, as well as the intentions and will of the deceased: How shall the interests of the surviving partner, other family members, and potential offspring collide with those of the deceased?

Post-mortem fertilisation can practically arise in two forms: first, using the deceased man's sperm, which he got stored in the sperm bank during his life, and

32 Riaño-Galán, González, and Gallego, 2021, p. 337.
33 Cousineau and Domar, 2007, pp. 293–308.
34 Navratyil, 2012, p. 106.

the widow insisting on having a child from her deceased partner. The second way is to retrieve sperm from an already deceased partner, as he had not stored it beforehand.[35] However, the latter practice is not common, and most legislations forbid it. We will discuss the circumstances of the former case.

The controversial French case of Parplaix v. CECOS (1984) was the first to raise the post-mortem use of sperm for reproductive purposes. The widow insisted on access to the sperm of her spouse, Mr Parpalaix, who died 2 days after they wed. He had previously had his sperm preserved at the Centre for the Study and Conservation of Sperm upon his diagnosis of testicular cancer, as the treatment could have compromised his sperm production. The sperm bank declined the request to entrust the sperm to Mrs Parpalaix, who intended to carry out AI with it, referring to the lack of a specific declaration of intent by the deceased regarding what to do with them in the event of his death. The court ruled in favour of Mrs Parpalaix based on the absence of legislation on this matter and the testimonies from the deceased's family and his widow, which could determine the former will of the deceased to have a common child with his wife. Moreover, it could not categorise the sperm as either an object of a contract or a donated organ under French law, regardless of whether it was a unique substance carrying the destiny to create a human being. Basically, the court recognised the possibility of the existence of the living will or surviving interests of a deceased person. Even though some claim that one cannot be harmed or benefited anymore, nor would they be affected by decisions made after death, the fact that last wills are expressed makes the interests of deceased individuals ethically considerable to carry out.[36] However, some argue that post-mortem reproduction can only be justified if it serves the same values and interests as traditional reproduction. Though there is a clear distinction, as a dead person is not involved in the experience of having an offspring (no participation in gestation, rearing, nor parenting), thus this interest is '*... so attenuated that it is not an important reproductive experience at all, and should not receive the high respect ordinarily granted core reproductive experiences when they collide with the interests of others*'[37]. Notwithstanding, it is also essential to determine whether the surviving partner wishes to follow the intentions of the deceased partner's post-mortem use of gametes.

National legislation enabling post-mortem fertilisation places utmost focus on the existence of a prior expressed consent of the deceased about the use of gametes for the event of death, which is in line with reproductive freedom in general. The

35 Ibid.

36 Posthumous retrieval and use of gametes or embryos: an Ethics Committee opinion Ethics Committee of the American Society for Reproductive Medicine Birmingham, Alabama – Posthumous retrieval and use of gametes or embryos: an Ethics Committee opinion – Fertility and Sterility (fertstert.org)

37 Robertson, 1994: 1027–65.

'declaration of intent' model is followed in the UK, where pursuant to Sections 39 and 40 of the Human Fertilisation and Embryology Act of 2008,[38] post-mortem fertilisation can be carried out under the condition that the man has consented to it in writing. Moreover, the Human Fertilisation and Embryology (Deceased Fathers) Act of 2003[39] enables the registration of the man as the father on the birth certificate, who prior to his death started[40] ART with his partner, and presented written consent to use his gametes after his death for reproduction purposes.

Another legislative approach that completely prohibits any form of post-mortem fertilisation practice is followed in Germany. Pursuant to § 4 sec. 1 no. 3 of the Embryo Protection Act 1990 (Embryonenschutzgesetz), it is not allowed to knowingly fertilise[41] an egg cell with a man's sperm after his death, and perpetrators of such can be criminally prosecuted to up to 3 years imprisonment or fined. The famous OLG Rostock decision of 2010 is noteworthy, as it was a cornerstone in placing modern reproductive medicine in a legal context. The factual background of the case includes a married couple who engaged in ART. Notably, the woman's fertilised eggs were cryopreserved immediately; thus, complete fusion of the gametes was not achieved yet. After the husband passed away, the widow initiated continuation of the ART; however, the clinic declined this application, referring to the Embryo Protection Act and the prohibition of post-mortem fertilisation. The case was brought before the court, which decided in favour of the widow, arguing that the Embryo Protection Act in this case was inadmissible, as the gametes of the husband were used for ART while he was still alive, and the Act specifies the prohibition of usage after death, when fertilisation happens after the man passes away. Overall, the court based its decision strictly arguing on the biological aspects of embryo development, and highlighting several times that the 'utilisation' of the sperm of the deceased had not happened after his death.

Apparently, there is no clear-cut argumentation only in favour of or against post-mortem fertilisation or sperm retrieval. It may seem adequate to perform this ART, especially for individuals who turn to it as a preventive measure (e.g., those with high-risk jobs and illnesses that reduce fertility). However, is it really in favour of the child to be born into a fatherless family, where its legal familial ties are not clear? Shall the will to create an offspring extend death? If so, who and on what grounds can evaluate

38 Available online: Human Fertilisation and Embryology Act 2008 (legislation.gov.uk)
39 Available online: Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (legislation.gov.uk)
40 Also in cases the pair resorted to donor sperm, the deceased man will be listed as father.
41 However, the Embryo Protection Act, is neglecting a clear interpretation of this term. As the development of an embryo goes through several stages (fertilisation cascade) has relevance in legal context of how we interpret fertilisation. The legislation is not clear on the categorization of a cryopreserved impregnated egg cell, whether its implantation is against the Act. For more see: The prohibition of post-mortem-fertilization, legal situation in Germany and European Convention on human rights | Cairn.info

the intent of the deceased? Is it ethical for an external institution or court to deny a family member's request to continue their lineage on certain grounds? England clearly prefers informed consent and the expression of the will of the individual for post-mortem fertilisation, while the German example was originally prohibitive; however, it can be overridden. Regardless, several ethical concerns play a role in drafting legislation on this phenomenon; however, the circumstances of a given case strongly matter. In connection with informed consent and individual will about the usage or disposal of one's gametes, the ECtHR expressed in Evans v. United Kingdom (Application no. 6339/05) that Article 8 of the Convention incorporated the right to respect for both the decisions to become and not to become a parent. From the factual background of the case, Ms Evans and her partner underwent the extraction and fertilisation of her eggs because she was diagnosed with serious pre-cancerous tumours in both ovaries, which had to be removed. The embryos were stored for future IVF, as the pair signed a form consenting to the IVF, which allowed space for withdrawing this consent at any time before the implantation of the embryos. Although the relationship broke down, Ms Evans insisted on preserving the embryos, while the ex-partner wanted to initiate their destruction. The Court acknowledged the moral sensitivity of the case and established that there was no European consensus on the circumstances of IVF treatment where the consent of the gamete providers could become irreversible, and a wide margin of appreciation was granted to the states. The right not to become a parent and the right to a genetic offspring cannot outweigh each other. Moreover, as the legislation on the possibility of withdrawal of consent to IVF treatment was clear, the UK struck a fair balance between the competing interests, which did not constitute a violation of Article 8 of the Convention.

2.3. In Vitro Fertilization and Surrogacy

The modern IVF technique dates back to the 1970s and can be linked to the phenomenal gynaecologists of the time, namely, Patrick Steptoe and Robert Edwards. Primarily, they conducted research on the treatment of female infertility caused by flawed fallopian tubes. The practice involves, as indicated by the name 'in vitro'[42], a female and male gamete to be fertilised outside the woman's body in a petri dish[43]. These two scientists laid down a cornerstone in embryology; however, several unsuccessful attempts and research have been carried out since the 19th century. Of note, Samuel Leopold Schenk, Gregory Pincus, and Ernst Vinzenz Enzmann attempted IVF on mammals beforehand.

42 Meaning 'in glass' in Latin

43 A transparent lidded dish, similar to a test tube, serves for holding and developing cells of different kinds.

The first 'test-tube' baby, Louise Brown, was born on 25 July 1978. Steptoe and Brown supervised the parents and transferred the IVF-fertilized egg. This was the moment that triggered the ethical debate over IVF fertilization, and later on surrogacy procedures.[44]

Surrogacy involves the practice of a woman getting pregnant on behalf of another woman who is unable to do so for medical or other reasons. The procedure eventuates in giving the child to the intended parents after birth. There are different types of surrogacies based on the type of genetic material used and how the surrogate is compensated.[45] The most ideal type is undoubtedly gestational surrogacy, where the aforementioned IVF is used with the intended parents' gametes; thus, the child is genetically unrelated to the surrogate.

Surrogacy procedures, unlike the other ARTs, actively involve a third person whose 'reproductive function' is required. This notion of surrogacy is reflected by the definition of John Robertson as 'collaborative reproduction' defined as *'A third person provides a genetic or gestational factor not present in ordinary paired reproduction which allows some persons who otherwise might remain childless to produce healthy children'*.[46] Thus, the ethical considerations appear particularly in two dimensions: monetary compensation (on a contractual basis) and protection of human dignity. It is worth mentioning that surrogacy procedures of any kind involve ethical and legal challenges in connection with family law, precisely the legal parenthood of the intended parents, the surrogate, and the child, and raise concerns about the child's welfare[47] and its right to know one's genetic origins; however, these will be tangentially discussed in Chapter 4.

2.3.1. Commercialisation alongside Human Dignity?

The issue of commercialisation arises not only in connection to women who wish to become surrogates but also in children and procreation itself.

First, the core question of monetary compensation has already been mentioned in connection with gamete donations, but surrogacy in fact incorporates the offer

44 See more: In Vitro Fertilization | The Embryo Project Encyclopaedia (asu.edu)

45 In cases of traditional surrogacy the surrogate's own eggs are used, in gestational ones the intended mother's gametes. Moreover, there is a possibility to require donor gametes (male, female, or both). From the perspective of compensation we can differentiate commercial (the surrogate receives monetary compensation above the cost of the necessary medical care, examinations) or altruistic surrogacy (only the medical costs are reimbursed, the 'reproductive service' of the surrogate is not compensated).

46 Robertson, 1983, p. 28.

47 It is worth outlining, that there are several psychological studies that found no significant differences in psychological adjustment between different ART children. (See more: Patel A, Kumar P, Sharma PSVN. 'The Miracle Mothers and Marvelous Babies': Psychosocial Aspects of Surrogacy – A Narrative Review. J Hum Reprod Sci. 2020 Apr-Jun;13(2):89-99. doi: 10.4103/jhrs.JHRS_33_20. Epub 2020 Jul 9. PMID: 32792755; PMCID: PMC7394089.)

of the body of the surrogate, where, additionally, the reproductive labour is commercialised. The argument for the justified commercialisation of surrogacy could be compared to prostitution. Although in both cases, it comes to the women selling their bodies, a crucial difference is the length of the period of time the access to the body is given, and the quality or notion of the 'service'.[48] Nevertheless, the risk of harming women in surrogacy procedures is present because, in surrogacy arrangements, all parties voluntarily restrict their right to self-determination to a certain extent. In the case of the surrogate, it is embodied in undertaking several 'obligations', that is, introducing lifestyle changes that are ideal for the foetus, being alert to engaging in sexual intercourse (avoiding getting pregnant), undergoing special required medical examinations according to the wishes of the intended parents, and even getting an abortion initiated by the intended parents if any genetic abnormality of the foetus is unravelled.[49] Besides these invasive physical burdens, we also mention the emotional distress[50] that women may experience while giving away the child after birth.

Moreover, the potential exploitation of economically disadvantaged women could be generated by commercial surrogacy arrangements, as this seems to be an opportunity to earn a substantial amount of money in a relatively short time period. From another perspective, financially well-situated couples could turn to surrogacy services because the procedure is demanding and expensive. The social inequality between the 'requirer' and 'provider' amounts to unfair dependence and exploitation. In this regard, we ought to mention the phenomenon of 'surrogacy tourism', in which a couple from a state where surrogacy is prohibited or not regulated travels to another state where surrogacy is permitted or has an advantageous legal framework, that is, easy access to these services for foreigners.[51]

Based on the abovementioned arguments, surrogacy may endanger women, especially concerning their human dignity. However, would the overall abolishment

48 Soniewicka, 2019, p. 77.

49 Hidegvéginé and Sáriné, 2018, pp. 118-119.

50 The risk of emotional bonding between the child and the surrogate can be presented through the famous 'Baby M. case'. In 1986, a married couple entered into a surrogacy contract, in which the surrogate undertook the obligation to get artificially inseminated with the intended father's sperm, after birth give the child to the intended parents, and give up on her parental rights to the child for the reward of 10.000 USD. However, after handing over the child, the surrogate asked the couple to return the child for a short period of time, as it was emotionally difficult to discard from her. Upon receiving the child, she changed her mind, refused to give it back to the intended parents, fled into another state, and went into hiding. Supreme Court of New Jersey ruled that the surrogacy contract is void, is against public policy, referring to the 'mater semper certa est' principle. In the end, however, parental custody was granted to the intended parents, because it was in the best interest of the child to grow up in a more favourable environment (the intended parents were wealthy, and of high social class). The surrogate received parental rights to the child, as well as the biological father, but was not given parental custody only visiting rights.

51 Ukraine and the US are popular destinations for the intended parents, as commercial surrogacy is allowed and accessible to foreigners.

of surrogacy practices be the ultimate solution to their protection? Some argue that guaranteeing the voidability of surrogacy arrangements would solve the problem of better surrogate protection.[52] Creating a safe environment for a woman to become a surrogate, ensuring that she could change her mind, establishing safety nets, and guaranteeing the equality of the two parties to ensure that her decision regarding the pregnancy was free and was not made out of economic necessity.[53]

Usually, the legal culture and cultural value system of a certain region determine the theoretical and legal qualifications of surrogacy practices, particularly whether they are accessible on a commercial or altruistic basis. For those Western European states, which recognise surrogacy legally, it is usually feasible as long as it constitutes a selfless, moral act of the woman, who voluntarily and out of benignity offers her reproductive capacities to help infertile couples to have a child. The notions of selflessness and morality are embodied in not awaiting any monetary gain from practice because the human body and its functions cannot be considered a commodity.

For example, we could mention the UK, where the first legal introduction of surrogacy was enacted by the Surrogacy Arrangements Act of 1985. Currently, the ART of surrogacy is regulated pursuant to the Human Fertilisation and Embryology Act of 1990 and the Human Fertilisation and Embryology Act of 2008, which simultaneously cover this issue. Surrogacy arrangements are not enforceable by law and do not incorporate additional 'payments' other than the reasonable costs of the procedure. The Surrogacy Arrangements Act of 1985 clearly discourages engaging in surrogacy arrangements on a commercial basis, as an advertisement for a surrogate, or offering oneself as a surrogate. Providing surrogacy arrangements as a third party as a commercial enterprise qualifies as criminal offences.[54] The UK legislation views surrogacy and other ART procedures as technological progress; thus, legislators approach the controversial phenomenon cautiously, while not raising unnecessary legal obstacles in utilising such advancements.

Meanwhile, the US is navigating the issue on a commercial basis, as the market- and profit-oriented approach prevails, and is a great motivator in societal and economic relationships. The first modern surrogacy contract was drafted in Michigan in 1976. Surrogacy is not strictly regulated on a federal level, and state legislation can individually decide whether they permit surrogacy or not and whether altruistic or commercial surrogacy is allowed[55]. The federal legal basis of ARTs is determined by

52 Fabre, 2008, pp. 192

53 Steinbock, 1988, pp. 45–50.

54 Art. 2 – 4 of Surrogacy Arrangements Act 1985 available online: Surrogacy Arrangements Act 1985 (legislation.gov.uk)

55 Virginia, Nevada, New Hampshire, Florida and Washington D.C. states do not permit commercial surrogacy contracts, but surrogates receive big reimbursement for their services.

the Uniform Parentage Act (2000)[56], which deals primarily with the protection and welfare of children born through ART. Pursuant to this Act, states are free to decide how to regulate surrogacy contracts. If they allow surrogacy practices, the contract between the intended parents and the surrogate shall be approved by court, which also determines the legal parents of the child. However, if the state does not allow such contracts, they are considered void and the surrogate remains the legal parent of the child. Commercial surrogacy contracts are allowed pursuant to § 9 of the proposal.[57]

Notably, many different forms of surrogacy contracts are present in the US, and the dynamics of the regulations are shaped by case law, which has high relevance.

The aforementioned 'Baby M' case discussed many controversial sides of surrogacy, one of them being the payment issue for the 'womb-leasing' whether it is against public policy to draft a commercial surrogacy contract, as it involves the risk of child trafficking and undermines adoption laws.[58] Ultimately, the Supreme Court of New Jersey deemed such a contract void and not enforceable; however, this approach is not universal in the US. As an example, we shall mention the case of 'Johnson v. Calvert' (1993), where the Supreme Court of California did not oppose the element of payment and ruled the surrogacy contract valid and enforceable.[59]

Nowadays in the US, 14[60] states expressly permit surrogacy practices; however, they vary in granting additional financial gain to the surrogate.

Overall, the US preserves the standpoint of the constitutional right to procreation, meaning that procreation is a liberty interest[61]. Regardless, there is great diversity among states, as there is no uniform leading approach to navigating surrogacy contracts. The unclear and confusing policy on surrogacy procedures creates a fairly similar situation to Europe in connection to 'surrogacy tourism', as there is no obstacle for intended parents to require the service in another state if their state of domicile prohibits surrogacy contracts.

56 The Universal Parentage Act was revised in 2017, focusing on the parental rights of same-sex couples and individuals.

57 S. Dixon, 2021, pp. 32–34.

58 Wałachowska, 2019, p. 400.

59 19 Cal. Rptr. 2d 494.

60 Alabama, California, Colorado, Delaware, Florida, Illinois, Maine, Nevada, New Hampshire, Texas, Utah, Virginia, Washington.

61 The right to reproductive autonomy is safeguarded under the Fifth Amendment of the US constitution alongside with the Fourteenth Amendment. In relation to ARP, the right to privacy of both the intended parents and the surrogate incorporates that in any individual decision involving one's privacy regardless of being married or single, shall be free from any unwanted governmental intrusion into decisions, which fundamentally affect a person's life such as childrearing (Eisenstadt, 405 US at 453). However, recently the concept of the right to privacy in connection with reproductive autonomy, more precisely the right to abortion has been changed, as the Supreme Court in its ruling of in Dobbs v. Jackson Women's Health Organization (2022), overruled Roe v. Wade, a precedent of established constitutional right to abortion. The effects of this change are yet to be seen in connection to ART cases in the future.

3. Approach of the European Union and the Council of Europe on Assisted Reproductive Techniques

International organisations such as the EU and Council have been initiating discussions, presenting their standpoints on ART, naturally in line with their competencies. These international legal actors certainly have common points in their reasonings, while treating the issue through a 'human rights lens'. As ARTs touch upon many fundamental questions (e.g., determining the legal status of the embryo, the moment of the beginning of life, freedom to procreate, bodily autonomy, human dignity), both the EU and Council intend to provide measures and policies that show their inclination and disposition on the topic.

3.1. The European Union Standpoints

First, besides advocating for reaching its economic goals pursuant to the Maastricht Treaty of 1992, the EU started to navigate and create political cooperation between the member states. The EU unfolds its preferred political and legal policies in connection with the protection of European citizens, specifically their political and economic rights and their free movement. Additionally, based on the Charter of Fundamental Rights, social rights are shaped in relation to family protection, non-discrimination, the principle of human dignity, the protection of marriage, the best interests of the child, and other rights of the child.[62] It is evident that achieving unification in family law matters among the member states is fairly impossible; thus, European law is focusing on strengthening cross-border judicial cooperation and providing guidance on the rule of law in these cases. It is clear from the abovementioned dynamics that the EU overall does not provide a legally binding solution for substantive family matters, nor on the grounds of bioethical questions on ARTs.

First, regarding ARTs, the EU mostly approaches this question from the perspective of the protection of women, human dignity, and embryos.

The initial concerns about ARTs in the EU were embodied in the 'Rothley'[63] and 'Casini Reports'[64] from 1988. These reports clearly reject conducting scientific experiments on embryos, as long as they do not serve their health and healthy development. Moreover, human beings cannot be considered objects and their human dignity must

62 Sokołowski, 2019, p. 592.
63 A.2–327/88 of the European Parliament on genetic engineering.
64 A.2–372/88 on artificial insemination.

be recognised. According to these reports, the protection of the right to life shall be granted from the moment of conception.[65]

However, the problem of ARTs is approached from the perspectives of the protection of women, non-discrimination, and gender equality. As the most controversial of all is surrogacy practices, the EU has been reflecting vividly on this issue in recent years. In 2015, the European Parliament issued a report[66] in which it condemned surrogacy, as it seriously breaches the human dignity of women and contributes to their exploitation, especially of women from less-developed countries.

Presenting how bioethical approaches develop, during the voting of the Annual Report on Human Rights and Democracy in the world and the EU policy on the matter, for the year 2019, the European Parliament took an extreme change in opinion on surrogacy to the previous one. Regarding the condemnation of surrogacy, 429 members of the European Parliament voted against it, 149 voted to acknowledge its condemnation, and only 89 abstained. These ratios reflect how the European Parliament seemingly struggles with determining a clear, unified approach to surrogacy. Even more surprising was that surrogacy as a whole was left out of the Annual Report at the end, reflecting the hesitant position of the EU on such a serious matter as surrogacy, where vague ascertainments and opinions might result in insufficient human rights protection.[67]

3.2. Council of Europe Standpoints

The Council of Europe, as anticipated, has been continuously reacting to new, unprecedented challenges which have appeared alongside biomedical developments. As an initial response, the Special Expert Committee on Bioethics (CAHBI) was set up in 1985 to deliver expert advisory opinions and technical support in the field of ethics in biomedicine. The CAHBI slowly transformed into the Committee on Bioethics (DH-BIO), which functions nowadays. Besides the numerous 'sub-committees'[68] of the Council, the decision-making of the ECtHR should not be neglected in this regard. Undoubtedly, the case law of the ECtHR contributes to navigating the human rights aspect of ARTs, which generally affects the legislation of the member states.

65 Jobbágyi, 2004, pp. 82–83.

66 Annual Report of 30 November 2015 on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)).

67 Garay, 2022, p. 73.

68 Steering Committee for Human Rights (CDDH), Committee of Experts on Family Law (CJ-FA), Committee on Legal Co-operation (CDCJ), Committee on Social Affairs, Health and Sustainable Development

However, as of today, there is no generally binding legal document on the most controversial aspect of ARTs, namely, surrogacy. Although we ought to mention the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention), which oblige the parties to grant legal instruments on a national level to fulfil the aims and measures in human rights protection in the field of biomedicine. The Oviedo Convention aims to safeguard human dignity from the misuse of biomedical scientific advances. The ethical argument presented in the convention seemingly condemns commercial surrogacy, pursuant to Article 21, stating that '*The human body and its parts shall not, as such, give rise to financial gain*'. Moreover, in connection to ARTs, it rejects MAP[69] techniques to be carried out on the human genome as well as in assisted procreation unless the sex selection of the foetus contributes to avoiding hereditary sex-related diseases.[70]

The case law of the ECtHR broadly dealt with the problem of ARTs, mainly concerning Article 8 of the Convention (right to respect for private and family life), sometimes in conjunction with Article 14 (prohibition of discrimination).

The case of S.H. and others v. Austria (Application No. 57813/00) outlined several ethical considerations related to IVF and assisted reproduction in general. The factual background of the case involved two Austrian couples who wanted to start a family and wished to conceive a child through IVF, for which one couple required the use of a sperm donor and the other pair an ova donor; however, under Austrian law at the time, ova and sperm donation for IVF was prohibited. The applicants stated that there had been a breach of Articles 8 and 14 because only some ARTs are legal in Austria, and it is discriminatory that ova donation is disallowed, while sperm donation is allowed. The court ruled that there had been *no violation* of Article 8, as it found the approach of the member state to regulate ARTs sufficient and circumspect on such a controversial issue, which raised complex ethical questions. As there was no clear consensus in European states about gamete donation for IVF, it was in the margin of appreciation of the member state to draw the line of limits, which it did while backing it up with fair arguments (e.g., risk of 'splitting' motherhood, exploitation of ova donors, etc.).[71] Moreover, the state did not take the opportunity away from couples,

69 The co-called technique of mapping and sequencing of the human genome, involves scientific research exploring the human genome at an early stage, which provides key landmarks in the genome (the DNA and chromosome structure). Genome sequencing is the process of determining the order of bases in a length of DNA. Basically, from this practice, serious ethical concerns can arise, that is, misuse of human genetic information, disproportionate usage of DNA data of donors in sequencing, manipulation.

70 Art. 12, 13, 14, 18 of the Oviedo Convention.

71 S.H. and others v. Austria, pp. 114–115.

who wished to participate in certain types of ARTs that were not allowed in Austria, to travel to other member states and access such services.[72]

The Court presented an interesting evaluation of the notion and interpretation of ARTs. Austria, through the ban on gamete donation for IVF, intended to maintain the 'natural characteristics' of childbirth and childrearing, even in medically assisted procreation. Both *in vitro* and *in vivo*[73] fertilisation are ART methods. However, according to Austria's legislation, ova donation is only permissible in cases of *in vivo* fertilisation. The Court observed that Austria only allowed gamete donation in specific cases of ART, as it tried to navigate assisted reproduction in a manner that would not upset long-established societal views on family, parenthood, and so on. In other words, by banning ova donation for IVF, the principle of *mater semper certa est* would be maintained, and there would be no distinction between the genetic mother and the mother who gave birth to the child. The Court recognised that the intention of Austria was not to disturb society with the ethically questionable possible outcomes of medical ARTs.[74] Overall, a cautious approach to regulating sensitive issues as such is within the margin of appreciation of member states.

Moreover, the Court has presented a solid interpretative narrative case concerning ART, which can be presented through cases in which the most controversial type, namely, surrogacy procedures, has been discussed. The Court tends to rely on the best interest of the child principle enshrined in Article 3 of the UN Convention on the Rights of a Child[75] concerning decision-making about the establishment of legal parenthood in cross-border surrogacy cases. First, the Mennesson v. France case[76] has

72 Ibid.

73 A method of fertilisation, where the fusion of male and female gametes happens within the body of a female. The sperm is placed into the female genital tract and the development of the embryo happens inside her body.

74 Ibid, p. 104.

75 Convention on the rights of the child (1989) Treaty no. 27531. United Nations Treaty Series.

76 The case's factual background unfolds with Mr. and Mrs. Menesson, French citizens, entering into an international surrogacy agreement in California. Although the twins born from this arrangement shared a genetic link with one of the intended parents, French authorities declined to issue French birth certificates, thus blocking the twins from obtaining French nationality. The Court's ruling centred on the factors of legal parentage and genetics, as well as the distinction between altruistic and commercial surrogacy. These deliberations underscored the imperative of upholding the child's right to identity through the recognition of parenthood with the genetic parent. In essence, an individual's identity is linked to the establishment of a legal parent-child relationship, thus its failure jeopardizes a fundamental aspect of their identity. Additionally, the Court pointed out how the principle of the child's best interests was disregarded by the French authorities, emphasizing its pivotal role in guiding public decision-making concerning children. By denying the twins French nationality, the French authorities breached their right to privacy, as their integration into French society was compromised due to this refusal. Through a children's rights-oriented approach, the Court elevated the significance of biological connection in surrogacy cases, while also asserting that the child's best interests should outweigh public policy considerations regarding surrogacy.

established that the key factors to consider in international surrogacy cases are the best interest of the child principle and the child's right to identity. This rationale was followed in the most recent K.K. and Others v. Denmark[77] case, which centred around the denial of the applicant's request to adopt twins as their stepmother, born from a commercial surrogacy arrangement concluded in Ukraine, by the Danish authorities. The intended father has been recognised as a legal parent based on the biological connection. Lastly, the Danish Supreme Court held that adoption by the applicant was not in line with the Danish Act on Adoption because the surrogate mother (in other words, the consenting party to adoption) received payment for her services, which contributed to the children becoming a commodity. The Court found by four votes to three that children's rights under Article 8 of the Convention had been violated by the non-recognition of legal parenthood between the intended mother and children, as it could potentially put them in an uncertain legal position, particularly concerning matters such as inheritance.[78]

Currently, the Council presents a similar resolution to that of the most controversial type of ART (surrogacy) as the EU. Pursuant to the 2016 Report on 'Children's Rights Related to Surrogacy' by the Committee on Social Affairs, Health and Sustainable Development, commercial surrogacy was condemned. The Report was prepared by Petra De Sutter, who advocated for raising awareness and sensitivity about the risks, which arise from commercial surrogacy arrangements, and drafting unified guidelines on altruistic surrogacy, on how to protect children's rights. She recommended the following:

'*The Parliamentary Assembly recommends that the Committee of Ministers: 1.1. consider the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to surrogacy arrangements;*

1.2. collaborate with the Hague Conference on Private International Law (HCCH) on private international law issues surrounding the status of children, including problems arising in relation to legal parentage resulting from international surrogacy agreements, with a view to ensuring that the views of the Council of Europe (including those of the Parliamentary Assembly and the European Court of Human Rights) are heard and taken into account in any multilateral instrument that may result from the work of the HCCH'.[79]

The Report was not accepted by the Committee based on the ratio of drafts of 83 to 77 for votes.

The Council's hesitancy prevails still over the issue of surrogacy; however, a promising advisory opinion concerning legal parenthood in cross-border surrogacy

77 K.K. and Others v. Denmark no. 25212/21, 06 March 2023.
78 Ibid, p. 101.
79 Sutter, 2016, p. 1.

was issued under Article 1 of Protocol No. 16 to the ECtHR on 10.04.2019, which offered a follow-up interpretation of the Menesson v. France case (no. 65192/11, 26 June 2014), on the topic of protection of children in cross-border surrogacy cases. The gist of the document provides balanced, child-protection-centred guidelines on this issue. Although the advisory opinion has no legally binding force, it seems to be a positive development in the interpretation and application of the law in surrogacy cases.

Overall, the responses provided in the advisory opinion undoubtedly hold significance for forthcoming cross-border surrogacy cases aimed at safeguarding the right to respect for private and family life for all parties concerned. Furthermore, landmark cases such as S.H. and others v. Austria and Mennesson v. France, coupled with the advisory opinion, present compelling arguments that establish the foundational principles guiding the ECtHR's decision-making regarding assisted reproduction, with particular regard to cross-border surrogacy cases.

4. Conclusion

The gradual challenges new, medical inventions have brought into traditionally established societal and family structures are undeniable. The concept of reproduction has reached many new horizons, which have opened up new interpretations of bioethics, thus enhancing the dynamics in the jurisprudence of the medical, civil, family, and other branches of law.

Bioethics plays a leading role in connection to ARTs, which legislators rely on when passing laws related to this issue. A bioethical perspective is necessary when balancing individual values and interests to reach an ideal outcome for every subject of law. The assumptions and interpretation of the above-discussed ART methods, namely AI, gamete donation, IVF, and surrogacy, are based on the individual value system of individuals, which is influenced by the other, irrespective of the value systems encompassed thereof. Generally, such values predominate and are manifested, which are preferred by the majority and reflected in the bioethical legal approach at the local level as well.

However, ARTs of a different nature trigger slightly distinctive ethical concerns, most of which can be linked to the protection of the human dignity of the subjects involved. However, the fundamental ethical principles of human dignity are inalienable from oneself. Even if certain decisions of an individual are within the scope of personal autonomy, no one can refrain from the protection of human dignity if it is due.

The conflict between personal, specifically reproductive autonomy, and human dignity can be found in all of the described types of ARTs. Generally, it can be concluded that American legal tendencies show a completely different perspective in

terms of legislation (especially by allowing the commercial nature of these techniques); there is diversity among the states. Furthermore, the European legal culture is quite divided on the legislation of certain ARTs, with the most controversial being surrogacy. This variability has not been bridged by either the EU or the Council as of today, which unfortunately exposes individuals to potential violations of their human rights.

Bibliography

- Barzó, T. (2021) 'Family Protection in Central European Countries' in Barzó, T. and Lenkovics, B. (eds.) *Family protection from a legal perspective,* Budapest: Ferenc Mádl Institute of Comparative Law and Central European Academic Publishing, pp. 287 – 322; DOI: 10.54237/profnet.2021.tbblfl
- Ben-Asher, N. (2009) 'The Curing Law: On the Evolution of Baby-Making Markets', 30 Cardozo L. Rev., Vol. 30:52009, [online]. Available at: http://digitalcommons.pace.edu/lawfaculty/594/ (Accessed: 12 January 2023).
- Brandt, R., Wilkinson, S., Williams, N. (2021) 'The Donation and Sale of Human Eggs and Sperm', in N. Zalta, E. (ed.) The Stanford Encyclopedia of Philosophy, Winter Edition, 2021, [online]. Available at: https://plato.stanford.edu/archives/win2021/entries/gametes-donation-sale/. (Accessed: 12 January 2023).
- Cousineau, T.M. and Domar, A.D. (2007) 'Psychological impact of infertility' Best Practice & Research Clinical Obstetrics & Gynaecology, 21(2),. [online]. Available at: doi:https://doi.org/10.1016/j.bpobgyn.2006.12.003. (Accessed: 23 January 2023)
- De Sutter, P. (2016) Children's rights related to surrogacy [Online]. Available at: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=23015&lang=2 [Accessed: 31 August 2021].
- Dionne, E.J. (1984). WIDOW WINS PARIS CASE FOR HUSBAND'S SPERM. The New York Times. [online]. Available at: https://www.nytimes.com/1984/08/02/us/widow-wins-paris-case-for-husband-s-sperm.html (Accessed: 26 January 2023).
- dr. Hidegvéginé A., L. and Sáriné dr. Simkó, Á. (2018). *Etikai normák és dilemmák az egészségügyben*. Medicina Könyvkiadó Zrt.
- Erdősová, A. "Náhradné materstvo ako bioetický problém z pohľadu ochrany základných práv a slobôd" *Justičná revue* 72, no. 4, (2020): 471 – 480.
- Erdősová, A. *Aktuálne otázky o človeku a jeho právach v bioetike.* 1. vyd. Bratislava : Wolters Kluwer, 2016. ISBN 978-80-8168-420-3.
- Fabre, C. (2008) Whose Body is it Anyway? Justice and the Integrity of the Person, Oxford
- Folentová, Veronika. "Po Joy si prišli rodičia do Užhorodu. K mnohým iným deťom, ktoré porodili na Ukrajine náhradné matky, sa rodičia nedostanú," *Dennik N,* March 28, 2022. https://dennikn.sk/2787323/po-joy-si-prisli-rodicia-do-uzhorodu-k-mnohym-inym-detom-ktore-porodili-na-ukrajine-nahradne-matky-sa-rodicia-nedostanu/.
- Frankó, D. (2014) 'Gondolatok a petesejt adományozásról' in *Credo Evangélikus Folyóirat,* 20(2) [online]. Available at: https://epa.oszk.hu/02300/02357/00044/pdf/EPA02357_credo_2014_2_048-057.pdf (Accessed: 20 January 2023)

- Freeman, T. (2015) 'Gamete donation, information sharing and the best interests of the child: an overview of the psychosocial evidence' Monash Bioeth Rev., 33(1), [online]. Available at: 10.1007/s40592-015-0018-y (Accessed: 20 January 2023)
- Garay, L. (2022) 'Surrogate Motherhood – the European Legal Landscape', Law Identity and Values, vol. 1, 2022, [online]. Available at: https://doi.org/10.55073/2022.1.65-83 (Accessed: 12 January 2023)
- Holland, B. (2018). The 'Father of Modern Gynecology' Performed Shocking Experiments on Slaves. [online]. Available at: https://www.history.com/news/the-father-of-modern-gynecology-performed-shocking-experiments-on-slaves. (Accessed: 12 December 2022)
- Jobbagyi, G. (2004) *Orvosi jog*. Budapest: Szent István Társulat
- Júdová, E. and Píry, M. "Surrogacy motherhood in the Slovak Republic – an illegal immigrant?" in *Fundamental legal problems of surrogate motherhood: Global perspective*, ed. Piotr Mostowik, 753-794, Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019.
- Králíčková, Z. "On the Family and Family Law in the Czech Republic." in *Family Protection From a Legal Perspective*, edited by Tímea Barzó and Barnabás Lenkovics, 77–110. Budapest–Miskolc: Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing, 2021.
- Kramer, E. A. Varenikova, M. "In a Kyiv Basement, 19 Surrogate Babies Are Trapped by War but Kept Alive by Nannies," *The New York Times*, March 12, 2022. https://www.nytimes.com/2022/03/12/world/europe/ukraine-surrogate-mothers-babies.html.
- Krüger, M. (2011) 'The prohibition of post-mortem-fertilization, legal situation in Germany and European Convention on human rights' Revue internationale de droit pénal, 82, . [online] Available at: https://doi.org/10.3917/ridp.821.0041 (Accessed: 26 January 2023).
- Laber, A. "International police cooperation against child trafficking and illegal adoption" in *Fundamental legal problems of surrogate motherhood: Global perspective*, edited by Piotr Mostowik, 955-966, Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019.
- Mostowik, P. ""May you live in interesting times." General remarks" *in Fundamental legal problems of surrogate motherhood: Global perspective*, edited by Piotr Mostowik, 33-42. Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019.
- Navratyil, Z. (2012) *A varázsló eltöri a pálcáját? A jogi szabályozás vonulata az asszisztált reprodukciótól a reproduktív klónozásig*, Budapest: Gondolat Kiadó, ISBN: 978 963 693 406 4
- Navratyil, Z. "Az asszisztált reprodukciós eljárások a jogi szabályozás tükrében – különös tekintettel az in vitro embrió helyzetére," *Debreceni Jogi Műhely, 2 (Különszám),* no. 2 (Summer 2005): 1-66, https://ojs.lib.unideb.hu/DJM/article/view/6580.

- Oleg, M. Reznik, Yakushchenko, M Yuliia. "Legal considerations surrounding surrogacy in Ukraine," *Wiadomości Lekarskie* Aluna Publishing 73, no. 5, (May 2020): 1048-1052, DOI: 10.36740/WLek202005139
- Posthumous retrieval and use of gametes or embryos: an Ethics Committee opinion Ethics Committee of the American Society for Reproductive Medicine Birmingham, Alabama – Posthumous retrieval and use of gametes or embryos: an Ethics Committee opinion – Fertility and Sterility (fertstert.org)
- Purdy, L. 'Reproducing Persons: Issues in Feminist Bioethics' in Cornell University Press, i–iv. Ithaca, NY, 1996. Available at: http://www.jstor.org/stable/10.7591/j.ctv5rdz8p.1.
- Rajan, S. "International surrogacy arrangements and statelessness" in *The World's Stateless Children*, edited by. Laura van Waas and Amal de Chickera, 374-385, Oisterwijk: Wolf Legal Publishers, 2017.
- Riaño-Galán, I., Martínez González, C. and Gallego Riestra, S. (2021). 'Ethical and legal questions of anonymity and confidentiality in gamete donation' Anales de Pediatría (English Edition), 94(5), [online]. Available at: doi:https://doi.org/10.1016/j.anpede.2021.02.004. (Accessed: 23 January 2023)
- Robertson, J. (1983) Surrogate Mothers: Not So Novel After All, "Hastings Center Report" No 13(5).
- Robertson, John A. (1994) 'Posthumous Reproduction' Indiana Law Journal: Vol. 69 : Iss. 4, Article 8. [online]. Available at: https://www.repository.law.indiana.edu/ilj/vol69/iss4/8 (Accessed: 15 January 2023).
- Sharma, R.S., Saxena, R. and Singh, R. (2018) 'Infertility & assisted reproduction: A historical & modern scientific perspective'. The Indian Journal of Medical Research, 148(Suppl 1) [online]. Available at: doi:10.4103/ijmr.IJMR_636_18. (Accessed: 20 January 2023)
- Sokołowski, M. (2019) 'Surrogate motherhood in legal and political activities of the institutions of the European Union' in Mostowik, P. (ed.) *Fundamental legal problems of surrogate motherhood: Global perspective*, Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 589-607.
- Soniewicka, M. " Ethical and philosophical issues arising from surrogate motherhood" in *Fundamental legal problems of surrogate motherhood: Global perspective*, ed. Piotr Mostowik, 969-980, Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019.
- Steinbock, B. (1988) Surrogate Motherhood as Parental Adoption, "Law, Medicine & Heatlth Care" 1988, No. 16 (1–2),
- The Honorable Beth S. Dixon, (2021) 'For the Sake of the Child: Parental Recognition in the Age of Assisted Reproductive Technology', Campbell Law Review, Vol. 43, Iss. 1 [online]. Available at: https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1700&context=clr (Accessed: 05 January 2023).

- Unicef Briefing Note. "Key Considerations: Children's rights & Surrogacy", February 2022.
- Varenikova, M. and Kramer, E. A. "How Ukraine's Surrogate Mothers Have Survived the War." *New York Times*, October 16, 2022. https://www.nytimes.com/2022/10/16/world/europe/ukraine-surrogacy-war.html.
- Wagoner, N. (2017) John Hunter (1728–1793). Embryo Project Encyclopedia. [online] Available at: http://embryo.asu.edu/handle/10776/11421. (Accessed: 12 December 2022)
- Wałachowska, M. (2019) 'Surrogate motherhood under different laws and federal issues – the case of the USA' in Mostowik, P. (ed.) *Fundamental legal problems of surrogate motherhood: Global perspective*, Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 399-420.
- Zając, D. "International criminal law aspects of surrogate motherhood" in *Fundamental legal problems of surrogate motherhood: Global perspective*, ed. Piotr Mostowik, 969-980, Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019.

Petra ŠPREM*

Conceptualising Torture in Domestic Violence Cases: The ECHR's Dynamic Approach

ABSTRACT: *From 2007, when the first judgment strictly related to domestic violence was enacted before the ECHR, domestic violence is considered to be a human rights violation. The possibility for such a conceptualisation was previously rooted in positive obligations doctrine which shifted the postulates of human rights law. From the obligation to merely refrain from the abuse, states now have an obligation to protect an individual from the abuse of another individual. Enabling the horizontal effect of the rights from the Convention, the ECHR broadened up the scope of human rights tackling all sorts of cases which occur between individuals, such as domestic violence. However, certain elements of such constructs remain uncoherent and some immature aspects of this doctrine may cause some challenging issues in its practical implementation. Although the ECHR has established criteria on assessing whether a conduct is torture, degrading or inhuman behaviour, such an assessment lacked in the recent domestic violence judgments. Clearly, the dynamic and evolutive approach of the ECHR did not yet followed a substantial change in before mentioned domestic violence conceptualisation. In this paper, author analyses an early ECHR jurisprudence regarding Art. 3. of the Convention as well as the structure and the content of positive obligations which enabled domestic violence to be perceived as human rights violation. The author provides a brief review of the development of domestic violence concept as violation of torture.*
KEYWORDS: *domestic violence, torture, Art. 3., positive obligations, ECHR jurisprudence, European Convention on Human Rights*

1. Introduction

The United Nations Office on Drugs and Crime estimates that in 2020 alone, approximately 47,000 women and girls were killed by their intimate partners or family

* Senior Assistant at the Chair of Criminal Law, Balkan Crimonology, Violence Research Lab; University of Zagreb. Email: psprem@pravo.unizg.hr; ORCID: 0000-0003-4396-6887.

https://doi.org/10.62733/2023.2.203-224

members worldwide.[1] Sadly, these numbers are merely a 'tip of the iceberg' bearing in mind a big 'dark figure'[2] which accompanies domestic violence along with the fact that victims of domestic violence are men and boys also. Today, there is no more room for doubt: domestic violence is a global phenomenon and represents a violation of human rights which states are obliged to prevent. The invisibility of domestic violence and the fact that it was long considered a private issue,[3] not a social problem, have significantly slowed down the recognition of the phenomenon as a human rights violation.[4] Although many countries had already criminalised domestic violence at that point, it was only in 2007 that the European Court of Human Rights (hereinafter referred to as the ECHR) issued the first judgement strictly related to domestic violence.[5] Since then, the ECHR has repeatedly emphasised the existence of member states' positive obligations in the sphere of domestic violence and determined the minimum standards for the protection of its victims. The latter provided a possibility that domestic violence was conceptualised as a human rights violation. While the European Convention on Human Rights[6] (hereinafter referred to as the Convention) does not explicitly mention the term 'domestic violence', the ECHR has repeatedly referred to the protection of other rights from the Convention in these cases, including the right to life (Art. 2),[7] the prohibition of torture (Art. 3),[8] the right to respect for private and family life (Art. 8),[9] and the prohibition of discrimination (Art. 14),[10] always referring to the 'positive obligations' doctrine. However, the way in which domestic violence cases have been contextualised through the aforementioned rights from the Convention by the ECHR has varied and evolved.[11] Numerous rights contained in the Convention are formulated in the form of negative rights as a reflection of the policy of ‚non-interference', but this formulation has caused many difficulties in the implementation and effectiveness of international human rights law. This is precisely why, in recent years, on countless occasions, the ECHR has imposed positive obligations on states in situations where a fundamental human right

1 Gibbons 2021. Also see: World Health Organisation, 2002.
2 Gracia, 2004, p. 536.
3 Farris and Holman, 2015, p. 1117.
4 Council of Europe, 2022.
5 Kontrová vs. Slovakia, (ECHR Application No. 7510/04), Judgment 31 May 2007.
6 Council of Europe, 1950.
7 E.g. Osman vs. United Kingdom, (ECHR Application No. 87/1997/871/1083), Judgment 28 October 1998.
8 E.g. J.I. vs. Croatia, (ECHR, Application No. 35898/16), Judgment 8 September 2022.
9 E.g. Y.F. vs. Turkey, (ECHR, Application No. 24209/94), Judgment 22 October 2003.
10 E.g. Volodina vs. Russia, (ECHR, Application No. 41261/17), Judgment 4 November 2019.
11 McQuigg, 2021, p. 155. The constant evolution of the ECHR interpretations is also rooted in the fact that the ECHR mainly approaches the interpretation of the convention teleologically in the sense that it interprets the convention rights in the light of the purpose that they serve. Also, it is well known that the ECHR is a living instrument which keeps in track with changes in common values and generally in society. Dzehtsiarou, 2011, p. 1730.

has been violated within an individual vs. individual relationship. After the provisions of the ECHR were transformed from merely negative rights into positive obligations,[12] in the next step, it was necessary to define the meaning, concept, and scope of these binding obligations, as well as their extent, that is, the time point of their activation. Considering that according to the doctrine of positive obligations, the state can be held responsible for the violation of the Convention if it does not adequately protect the rights of individuals, the question arose as to what the practical meaning was, and, perhaps most importantly, at what moment such an obligation was activated. For this purpose, the ECHR has been developing doctrines, tests, standards, and rules (e.g., *due diligence* standard, Osman test, etc.) for its interpretations. However, the constantly expanding jurisprudence on the issue of domestic violence showed its flaws in detecting the state's obligations in these cases as well as the focal point of their activation. In addition, in cases where domestic violence was conceptualised as states' violation of the prohibition of torture, detecting positive obligations turned out to be even more complex, especially as the concept of torture is still blurry. Even though torture (together with inhuman and degrading treatment) is considered one of the most serious international human rights violations (due to its profound violation of an individual's dignity), it is particularly difficult to pinpoint its exact scope and meaning because of the changing nature of the human rights concept. The latter occurs as a clear consequence of adding a new dimension to these rights, especially through the doctrine of positive obligations. The statement, 'The legal system is designed to protect men from the superior power of the State but not to protect women or children from the superior power of men'[13] does not apply anymore and the international human rights system is no exception. By protecting individuals from the state, a horizontal approach within humanitarian law opens up the possibility of a state violation of human rights in cases of domestic violence. Despite the clear trend of stretching the conceptualisation of both (positive obligations and human rights in general), the ECHR remains reluctant to label domestic violence as torture (rather than merely an inhuman or degrading behaviour) despite its longstanding earlier jurisprudence which imbedded concreteness into such an assessment.

In the first part of this paper, the author will provide an early conceptualisation of Art. 3 of the Convention. The second part of this paper will deal with the ECHR's positive obligations implementation and the manner in which its criteria were framed, focusing on the assessment standards in detecting violations of the Convention. The third part of the paper will follow the development of the aforementioned standards within the ECHR's jurisprudence and the transformation of the approach towards domestic violence. The paper ends with a conclusion of thoughts on the future of

12 Although, some authors criticise this dichotomy and suggest that its false (Donnelly, 2003, pp. 30-33) and that 'all rights are positive'. See: Holmes and Sustein, 1999.

13 Lewis Herman, 1992, p. 72.

positive obligations in domestic violence cases and their interpretation as violations of Art. 3 of the Convention.

2. Early Conceptualisation of Art. 3 of the European Convention on Human Rights (Convention)

Art. 3 of the Convention enshrines the most fundamental value of democratic societies bound up with the ultimate respect for human dignity. Despite the absolute and non-derogable character[14] of the prohibition of torture, inhuman or degrading treatment, or punishment,[15] the violation of Art. 3 of the Convention is one of the most frequently violated Convention rights in the case law of the ECHR.[16] Art. 3 is the shortest Convention provision, stating that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[17] At first glance, one might think that this provision, due to the simplicity of its wording, would be easy to apply in practice. However, despite the concise wording and the fact that it applies without exception, the freedom of torture evolved into a highly and conceptually challenging and complex human right. One must bear in mind that '...no law, especially not a human rights law can speak with absolute clarity in all possible situations',[18] so numerous terms from the Convention needed further interpretation and clarification. Before the final design of the Convention, its creators considered amendments that would provide more precision in its provisions, including listing certain procedures that would constitute torture/inhuman/degrading treatment or punishment. At the end of the *travaux preparatoires* of the Convention, it was concluded that briefness was the best way to express the fundamental importance of this principle.[19] The initial idea behind this right is that, without any exception, member states shall not maltreat individuals. The legal *rationale* behind this is that human dignity presents a right that must be guaranteed to all, regardless of who they are or what they have done, and that the potential highest reasons of public interest

14 That is why some suggest that Art. 3. should not be trivialised in the sense that actions which do not represent the most serious forms of abuse should not be subjected to this prohibition. Harris, O'Boyle, and Warbrick, 2009, p. 69.

15 An absoluteness and non-derogability is reflected in a fact that no exception can be accepted, defended, justified, or tolerated in any circumstance whatever. Also, there is no room for a margin of appreciation doctrine.

16 In 2021, regarding subject-matter of the Court's violation judgments in the first place in terms of frequency are violations of the right to a fair trial (Art. 6), which comprise around 20% of all established violations, followed by violations of the right to personal freedom and security (Art. 5) – 18%, and, violations of the prohibition of torture, inhuman treatment and punishment (19%). ECHR, 2021, p. 7.

17 Art. 3 of the Convention.

18 Marochini, 2014, p. 65.

19 See preparatory work on Art. 3: Council of Europe 1956, p. 2.

(e.g., the need to fight terrorism or organised crime) cannot justify state conduct that would otherwise be in breach of Art. 3 of the Convention.[20] In its earlier ruling, the ECHR applied Art. 3 only in cases of states' maltreatment of an individual. The first conceptualisation did not include the infliction of harm between individuals.

There are three types of actions prohibited in Art. 3 of the Convention (torture, inhuman, or degrading treatment or punishment), and in any case, for an ill treatment to fall within the scope of Art. 3, it must attain a minimum level of severity.[21] Even though Art. 3 is supplemented by the *European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter referred to as the Convention against Torture), where the concept of torture is defined more precisely,[22] the demarcation of the three and assigned level of severity remains somewhat blurry at the conceptual level and relative in practice.[23] It depends on all the circumstances of the case. On the question of whether the treatment constituted 'torture' or (merely) an 'inhuman and degrading treatment', the ECHR checks a number of relevant factors, including duration of the treatment, its physical or mental effects, and, in some cases, the sex, age, and state of health of the victim,[24] in addition to the purpose for which the treatment was inflicted together with the intention or motivation behind it.[25] The case of *Ireland vs. United Kingdom*[26] illustrates that torture

20 See Tomasi vs. France,(ECHR, Application No. 12850/87), Judgment 27 August 1992, para 115. "The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals."

21 Compare: Muršić vs. Croatia, (ECHR, Application No. 7334/13), Judgment 20 October 2016, § 97 & Savran vs. Denmark, (ECHR, Application No. 57467/15), Judgement 7 December 2021, § 122.

22 In the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) the term 'torture' is defined as "... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." (Art. 1 of Convention against torture).

23 The first expansion of the conceptual content of the torture happened in the famous Gäfgen vs. Germany case where it was concluded by the ECHR that a threat of torture can also amount to torture because torture should also cover cases of mental torture (of course, the intensity of mental suffering is a crucial element of such an assessment (Gäfgen vs. Germany, (ECHR, Application No. 22978/05), Judgment 1 July 2010, § 108).

24 Ireland vs. the United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978, §162; Jalloh vs. Germany, (ECHR, Application No. 54810/00), Judgment 11 July 2006, §67.

25 Aksoy vs. Turkey, (ECHR, Application No. 21987/93), Judgment 18 December 1996, §64; Egmez vs. Cyprus, (ECHR, Application No. 30873/96), Judgment 21 December 2000, §78 and Krastanov vs. Bulgaria, (ECHR, Application No. 50222/99), Judgment 30 September 2004, §53.

26 Ireland vs. United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978.

is usually connected to severe physical abuse, while inhuman treatment is connected to the following factors: long duration, intense physical and mental suffering, and acute psychiatric distress. When discussing a degrading treatment, the ECHR implies feelings of fear, anguish and inferiority, humiliating behaviour, and breaking moral resistance.[27] Although their essence overlaps, torture and inhuman treatment are more focused on physical pain, while emotional or dignitary injury is emphasised when detecting a degrading conduct.

It is important to note two aspects which relativise[28] the conceptualisation of the aforementioned concepts. First, the practical scope of this demarcation is narrowed because no exception can be made regardless of whether the action constitutes torture, inhumanity, or degrading behaviour. This fact might only be relevant in terms of the awardable compensation under Art. 41 of the Convention or in terms of illegal evidence.[29] The latter refers to the fact that according to Art. 15 of the Convention against Torture, statements obtained by torture must not be given as evidence in criminal proceedings, whereas the same result does not necessarily follow if the treatment is 'merely' inhuman and degrading.[30] Second, the Court established that the categorisation of ill treatment might change over time, so that acts which were once classified as 'inhuman and degrading' as opposed to 'torture' could be classified differently in the future.[31] In some cases, the Court simply finds the breach of Art. 3 as a whole,[32] and in some cases, it makes that kind of distinction.[33] In its landmark case *Ireland vs. United Kingdom,*[34] the ECHR defined torture as 'deliberate inhuman treatment causing very serious and cruel suffering'.[35] Basic logic dictates that the level of suffering required for an inhuman treatment as opposed to the level of suffering

27 Janis, Kay and Bradley, 2008, p. 181.
28 Even though in its early decisions the ECHR stated that the Court had wished to reserve the epithet 'torture' for the most serious cases. Ireland vs. United Kingdom, §97.
29 First decision by which the ECHR introduced the exclusionary rule, i.e. said that obtaining evidence via torture must always lead to an unfair procedure, was passed in the case of Jalloh vs. Germany. However, unlike in cases of torture, the ECHR did not introduce a general evidentiary prohibition for lower degrees of violation of Article 3. See Jalloh vs. Germany, (ECHR, Application No. 54810/00), Judgment 11 July 2006.
30 Art. 15 of the Convention against Torture: "Each State Party shall ensure that any Statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the Statement was made".
31 Selmouni vs. France, (ECHR, Application No. 25803/94), Judgment 28 July 1999, §101.
32 Usually when referring to procedural limb of Art. 3 e.g. in X & others vs. Bulgaria (ECHR, Application No. 22457/16), Judgment 2 February 2021.
33 E.g., Fenech vs. Malta, ,(ECHR, Application No. 19090/20),1 June 2022; Ireland vs. United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978, Selmouni vs. France , (ECHR, Application No. 25803/94), Judgment 28 July 1999.
34 Ireland vs. United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978.
35 Ireland vs. United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978, §101.

within the concept of torture is less intensive. Moreover, in contrast with torture, inhuman or degrading treatment does not have to be intended to cause suffering.[36]

The third element of Art. 3 refers to an inhuman or degrading treatment/punishment. There is no unambiguous distinction between the two in terms of ECHR jurisprudence.[37] Sentencing imposed on a convicted person is rarely reviewed under Art. 3 of the Convention. However, death penalty methods (which include a higher level of suffering), life imprisonment (without the possibility of release), or indeterminate sentencing might be considered inhuman (not merely degrading) punishment.[38] Treatment is degrading if it 'is such as to arouse in the victim's feelings of fear, anguish, and inferiority capable of humiliating and debasing them'.[39] Similar to an inhuman treatment, it is not essential that the intention to humiliate someone is found.[40] Such a violation was found in the case of *Svinarenko & Slyadnev v. Russia,*[41] where the applicants were held in metal cages during their trial hearings, which the ECHR found the treatment to be degrading, whereas in the case of *Kupinskyy v. Ukraine*, the ECHR reiterates that an irreducible life sentence is not compatible with the requirements of Art. 3.[42]

To get a deeper clue on the essence of the cases where the violation of torture is found and follows an earlier conceptualisation of Art. 3, a few examples should be shown:

- *Aksoy vs. Turkey*[43,44]: the applicant was stripped naked, with his arms tied together behind his back and suspended by his arms ('Palestinian hanging') by state agents while in police custody in to extract a confession [torture];
- *Maslova and Nalbandov vs. Russia*[45]: the applicant was repeatedly raped and subjected to a number of acts of physical violence during interrogation [torture];

36 Premeditation is considered when deciding whether treatment is inhuman, but it is not required. Harris, O'Boyle and Warbrick 2009, p. 75, footnote 70.
37 Harris, O'Boyle and Warbrick, 2009, p. 91.
38 E.g. in case Yabari vs. Turkey, (ECHR, Application No. 40035/98), Judgment 11 October 2000 – stoning to death for adultery; Kafkaris vs. Cyprus, (ECHR, Application No. 21906/04), Judgment 12 February 2008 – mandatory life sentence with no prospect of release for good behaviour.
39 Kudla vs. Poland, (ECHR, Application No. 30210/96), Judgment 26 October 2000, §92.
40 Price vs. United Kingdom, (ECHR, Application No. 33394/96), Judgment 10 October 2001."The Court found no evidence of any positive intention to humiliate or debase the applicant. However, it considered that to detain a severely disabled person in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to go to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment contrary to Article 3."
41 Svinarenko & Slyadnev vs. Russia, (ECHR, Application No. 32541/08 & 43441/08), Judgment 17 July 2014.
42 Kupinskyy vs. Ukraine, (ECHR, Application No. 5084/18), Judgment 10 November 2022.
43 Aksoy vs. Turkey, (ECHR, Application No. 21987/93), Judgment 18 December 1996.
44 Which was also the first case where the Court concluded that an individual had been tortured. Overmeyer, 2021, p. 11.
45 Maslova and Nalbandov vs. Russia, (ECHR, Application No. 839/02), Judgment 7 July 2008.

- *Zontul vs. Greece*[46]: illegal immigrant was raped by a coastal guard responsible for supervising him [torture];
- *Batı & others vs. Turkey*[47]: the applicants were deprived of sleep, subjected to 'Palestinian hanging' and 'falaka', sprayed with water, beaten for several days while in custody in order to extract a confession [torture];
- *Nevmerzhitsky vs. Ukraine*[48]: the applicant, a detainee who was on hunger strike, was force-fed [torture];
- *Satybalova & others vs. Russia*[49]: severe beatings by police officers on different occasions resulting in the death of the applicants' relative [torture];
- *Selçuk & Asker vs. Turkey*[50]: the applicants' homes and property were intentionally destroyed by security forces [inhuman treatment];
- *Simeonovi vs. Bulgaria*[51]: the applicant was serving his life sentence for a long time in poor conditions and under a very restrictive regime [inhuman treatment];
- *Yankov vs. Bulgaria*[52]: the applicant's hair was forcefully shaved by the prison administration without any justification or legal basis [degrading treatment];
- *Iwańczuk vs. Poland*[53]: the applicant was subjected to a strip search in an inappropriate manner, such as the making of humiliating remarks [degrading treatment];
- *Kalashnikov vs. Russia*[54]: the applicant was detained for a lengthy time in a severely overcrowded and unsanitary environment in prison [degrading treatment].

Although the previous practice of the ECHR provided a relatively detailed understanding of Art. 3 of the Convention, Convention interpreters continued to challenge its content.[55] The initial conceptualisation of Art. 3 of the Convention in older ECHR jurisprudence clearly evolved over time and substantially changed its scope. Therefore, at one point, from negative right (simplified: state shall not torture anyone nor behave in an inhuman or degrading manner towards an individual – refrain from

46 Zontul vs. Greece, (ECHR, Application No. 12294/07), Judgment 17 February 2012.
47 Batı and Others vs. Turkey, (ECHR, Application No. 33097/96 et 57834/00), Judgment 3 September 2004.
48 Nevmerzhitsky vs. Ukraine, (ECHR, Application No. 54825/00), Judgment 12 October 2005.
49 Satybalova & others vs. Russia, (ECHR, Application No. 79947/12), Judgment 30 June 2020.
50 Selçuk & Asker vs. Turkey, (ECHR, Application No. 2/1997/796/998-999), Judgment 24 April 1998.
51 Simeonovi vs. Bulgaria, (ECHR, Application No. 21980/04), Judgment 12 May 2017.
52 Yankov vs. Bulgaria, (ECHR, Application No. 39084/97), Judgment 11 March 2004.
53 Iwańczuk vs. Poland, (ECHR, Application No. 25196/94), Judgment 12 February 2002.
54 Kalashnikov vs. Russia, (ECHR, Application No. 47095/99), Judgment 15 October 2002.
55 Webster, 2016, p. 372.

abuse[56]) to positive obligation (simplified: state shall prevent and efficiently protect individuals from such a behaviour inflicted by another individual – protect from abuse of another individual). In the first rulings of the ECHR, it was impossible to apply a violation of Art. 3 to domestic violence cases because such cases occurred between individuals. However, transforming negative rights from the Convention into the 'positive obligations' doctrine provided a possibility of domestic violence to be treated, in some occasions, as a violation of Art. 3 In the next chapter, I deal with the features of the 'positive obligations' structure within Art. 3, which substantially change the concept of its violation.

3. The Scope of Positive Obligations within Art. 3 of the Convention: Framing the Criteria

Over the last couple of decades, the 'positive obligations' standard has been playing an important role in sculpting the European human rights system within the jurisprudence of the ECHR.[57] A common justification for the judicial transformation of the rights imposed in the Convention has been to ensure that the rights are 'practical and effective',[58] especially considering the fact that proper human rights protection is much more challenging to provide today than it was years ago.[59]

From the states' authority's ill treatment of citizens, the violation of Art. 3 was later found in cases where there was no active behaviour of the state, but rather a lack of it. In later ECHR jurisprudence, Art. 3 served as a framework for the state's omission in cases where one's rights were violated by another individual. In its earlier rulings, the ECHR exclusively adhered to the original vision of the authors,[60] but today, although the ECHR still deals with state authorities' wrongdoing towards individuals,[61] it also

56 Preparatory work on Art. 3 of the Convention reveals that the original idea of the scope of this article was prohibition procedures like physical mutilation, sterilisation, medical, scientific experimentation, use of psychological interrogation techniques, forced drug infliction, imprisonment with darkness as to cause mental suffering etc. Council of Europe, 1956, p. 2 and p. 15.

57 Sarıkaya Güler, 2017, p. 359.

58 Mowbray, 2004, p. 221; Fredman, 2006, p.1.

59 Harris and Warbrick, 2009, p. 71.

60 E.g. Ireland vs. United Kingdom, (ECHR, Application No. 5310/71), Judgment 18 January 1978; Aksoy vs. Turkey, (ECHR, Application No. 21987/93), Judgment 18 December 1996; Aydin vs. Turkey, (ECHR, Application No. 23178/94), Judgment 25 September 1997; Nevmerzhitsky vs. Ukraine, (ECHR, Application No. 54825/00), Judgment 12 October 2005; Ilascu et al. vs. Moldova and Russia, (ECHR, Application No. 48787/99), Judgment 8 July 2004, etc.

61 E.g. Wenner vs. Germany, (ECHR, Application No. 62303/13), Judgment 1 September 2016 – long-term heroin addict that had been denied drug substitution therapy in prison; Hellig vs. Germany, (ECHR, Application No. 20999/05), Judgment 7 July 2011 – applicant places naked in a security cell in prison for seven days; Shmorgunov and others vs. Ukraine, (ECHR, Application No. 15367/14), Judgment 21 January 2021 & Lutsenko and Verbytskyy vs. Ukraine (ECHR,

deals with different cases of states' passive attitudes towards prevention, effective investigation, and criminalisation of certain behaviours between individuals.[62] By imposing such hardcore obligations on the member states, followed by the 'horizontal effect' (i.e., extending the scope of the Convention to private relationships between individuals[63]),[64] as *Dickens* mentions, it seems like the ECHR has aimed on transforming itself from being 'a factory churning out thousands of judgements each year' to 'an institution that can make a real difference to the lives of people throughout the continent'.[65] When examining such a transformation and the problems that may arise from it, democratic accountability comes to question.[66] Courts telling states what they must do as opposed to what they must not do increases the cargo on the state's autonomy as well. Without getting into a matter of the state's autonomy, legal reasoning, and plausibility behind positive obligations, the question is, what is the core content and scope of such obligations? As will be seen later on, certain elements of the double obligation doctrine remain unclear, lacking coherence and structure, which is why the urge for its clarification is well recognised.[67]

There are several systematisation schemes of the 'positive obligations' doctrine which can be found in the ECHR's rulings. Obligations can be divided into those which relate to the legal and administrative frameworks and those that encompass more *ad hoc* practical measures which states need to take.[68] Another typology of positive obligations divides them based on vertical (those that protect the individual from the state) and horizontal (those that protect individuals against other individuals) obligations.[69] However, the most fundamental typology of positive obligations probably refers to the

Application No. 12482), Judgment 19 January 2021 – police brutality; Korneykova and Korneykov vs. Ukraine, (ECHR, Application No. 56660/12), Judgment 24 March 2016 – mother and a newborn baby held in a pre-trial detention centre, without adequate medical care; Muršić vs. Croatia, (ECHR, Application No. 7334/13), Judgment 20 October 2016 – applicant held in a cell with insufficient personal space.

62 A.E.J. vs. Romania, (ECHR, Application No. 33463/18), Judgmetn 30 August 2022 (The applicant complained that the authorities had not investigated her allegations of sexual abuse effectively and had thus breached their positive obligation to protect her from inhuman and degrading treatment); Oganezova vs. Armenia, (ECHR, Application No. 71367/12 and 72961/12), Judgmetn 17 August 2022 (State's alleged failure to protect the applicant from harassment, homophobic attacks and threats because of her sexual orientation and to conduct an effective investigation into her complaints).

63 Akandji-Kombe, 2007, p. 14.

64 Despite the ECHR's earlier statement that 'The Court does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals inter se'. Verein Gegen Tierfabriken vs. Switzerland, (ECHR, Application No. 24699/94), Judgment 30 June 2009, §46.

65 Dickson, 2010, p. 205.

66 Dickson, 2010, p. 205.

67 Akandji-Kombe, 2007, p. 6.

68 Lavrysen, 2016, p. 112.

69 Beijer, 2016.

dichotomy of procedural (e.g., the obligation to conduct effective official investigations into violations of fundamental rights) and substantive (e.g., obligations to adopt legislative measures) positive obligations.[70] On a conceptual level, detecting a substantial violation of the mentioned positive obligation seems to be more problematic, for example, failure to prevent abuse between individuals. What constitutes the positive obligations behind Art. 3 of the Convention at a substantial level? If the state fails to prevent abuse in individual vs. individual cases, it may be responsible before the ECHR for the violation of human rights. At what point is such an obligation activated, that is, what conditions must be met for the ECHR to establish an omission to prevent?

The most fundamental issue that is intrinsically connected to the problem of the structure of failure to prevent is connected with the *due diligence* standard established by the ECHR to make the doctrine of positive obligations more concrete. Basically, the *due diligence* standard provides the framework for linking harm to the state by making the claim that the state ought to have adopted certain conduct to prevent the harm.[71] The harm in such cases refers to an illegal act which violates human rights, which is initially not directly imputable to a state (because the torture was perpetrated by an individual, and not by a state representative) but can lead to international responsibility[72] of the state, not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the Convention. The most challenging part is detecting criteria for the assessment of whether the state has fulfilled its positive obligations in a *due diligence* manner within a certain case. The ECHR provided certain guidance in its rulings; however, the complexity, generality, and abstractness of the aforementioned can hardly be more concrete, especially considering that the circumstances of each case must be respected.[73]

Guideline criteria vis-à-vis 'positive obligations' assessment can be generally systematised as (1) the obligation to criminalise harmful conduct, (2) the procedural obligation to investigate allegations of criminal conduct, (3) the obligation to take protective operational measures, (4) the obligation to adopt effective regulatory frameworks for general prevention, and (5) the obligation to offer remedies.[74]

70 E.g., in Öneryıldız vs. Turkey, (ECHR, Application No. 48939/99), Judgment 30 November 2004. ECHR 2022, p. 6. In the literature, similar systematization may be found: (1) the obligation to criminalise harmful conduct, (2) the procedural obligation to investigate allegations of criminal conduct, (3) the obligation to take protective operational measures, (4) the obligation to adopt effective regulatory frameworks for general prevention and (5) the obligation to offer remedies. See Stoyanova, 2017, p. 329.

71 Stoyanova, 2020, p. 4.

72 Same standard can be found also in American Convention on human rights. See Centre for Human Rights & Humanitarian Law, 2018, p. 7.

73 ICJ 2007, para 430: "the notion of 'due diligence' [...] calls for an assessment in concreto."

74 Stoyanova, 2017, p. 329 and Stoyanova, 2020, p. 8.

3.1. Obligation to Criminalise Harmful Conduct

Regarding the criminalisation of a certain conduct, at first glance, it seems rather simple to detect whether a state has criminalised some kind of misconduct or failed to do so. However, some cases show that the assessment is not always easy and that criminalisation is a fluid term. The leading judgments in this respect are *X. & Y. vs. the Netherlands*[75] and *M.C. vs. Bulgaria*.[76] In both cases, the states concerned were held responsible for violating the obligation, either to pass criminal legislation or to interpret criminal law in accordance with the Convention standards. In *X. & Y. vs. Netherlands*, the ECHR states that with regard to less serious acts between individuals, which may lead to a violation of bodily integrity, the obligation of the state does not always require the adoption of some effective criminal law provisions that include a certain misconduct, and that the legal framework can also consist of civil law remedies providing sufficient protection.[77] The same was confirmed in *M.C. vs. Bulgaria* where, in his concurring opinion, Judge Tulkens states thus:

> *'Admittedly, recourse to the criminal law may be understandable where offences of this kind [rape, a.n.] are concerned. However, it is also important to emphasise on a more general level, as, indeed, the Court did in X and Y v. the Netherlands itself, that "[r]ecourse to the criminal law is not necessarily the only answer" (p. 12, § 24 in fine). I consider that criminal proceedings should remain, both in theory and in practice, a last resort or subsidiary remedy and that their use, even in the context of positive obligations, calls for a certain degree of "restraint".'*[78]

3.2. Investigate Allegations

Here, the situation is slightly more complicated. In relation to the domestic violence case in *Tomašić vs. Croatia*,[79] the Court used the following framing: *'...there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by state officials or private individuals. Whatever mode is employed, the authorities must act of their own motion once the matter has come to*

75 X & Y vs. the Netherlands, (ECHR, Application No.8978/80), Judgment 26 March 1985.
76 M.C. vs. Bulgaria, (ECHR, Application No.39272/98), Judgment 4 March 2004.
77 X & Y vs. the Netherlands, (ECHR, Application No.8978/80), Judgment 26 March 1985, §24 & §25.
78 M.C. vs. Bulgaria, (ECHR, Application No.39272/98), Judgment 4 March 2004, dissenting opinion of Judge Tulkens, §2.
79 Branko Tomašić & others vs. Croatia, (ECHR, Application No. 46598/06), Judgment 15 January 2009.

their attention'.[80] More simply put, the state is under a concrete obligation to initiate an investigation once allegations are made in a manner that raises reasonable suspicion. At this point, the positive obligation to investigate is activated. However, the state must be aware of such allegation. It can investigate only if it possesses the knowledge of the abuse that has taken place, which is why, according to the *due diligence* standard, the ECHR will first detect the existence of the state's actual or putative knowledge.[81] While the state's actual knowledge might be easy to detect (e.g., the victim reported the abuse to the police), putative knowledge means that even if the state in fact had no knowledge of the risk of harm (e.g., the victim never called the police), the ECHR will examine whether the state should have known or should have foreseen the harm based on the information it already has.[82] Establishing putative knowledge is mostly not self-evident, and it requires a delicate analytical assessment of all the circumstances *ex post facto.* Putative knowledge indicators could be, for example, if the family has a track record of previous violence settings or is already put under a social system surveillance. However, the determination of these criteria is very uncertain, especially in domestic violence cases which usually occur in private settings and, in a great proportion, remain hidden.[83]

Another problem related to the determination of this criterion entails the burden of proof: Does the victim have to prove that the state should have known/knew about the existence of violence, or is the burden of proof on the state? The disparity of weapons may suggest that it is more realistic to ask the state to prove that it has not been negligent than to ask the victim to prove negligence in how the state has managed the situation.[84]

80 Ibid. §62.

81 Stoyanova, 2020, p. 606.

82 In D.P. & J.C. vs. The United Kingdom, (ECHR, Application No. 38719/97), Judgment 10 January 2002. In this case, although local authorities did not know about the sexual abuse, the ECHR analysed whether there were some signs or risk factors which might present a red flag to the authorities. In the mention case, no violation of the Art. 3 was found, with an explanation that: *'The Court was not persuaded that there were any particular aspects of the turbulent and volatile family situation which should have led the social services to suspect a deeper, more insidious problem in a family which was experiencing financial hardship, occasional criminal proceedings and with a mother observed to be "less caring" than she should be'.*

83 An interesting interpretation could be found in United Kingdom case law where in determining whether the available information is sufficient to give rise to a reasonable suspicion, the test to be applied is that laid down by the House of Lords in Hussein vs. Chang Fook Kam 1970, Appeal Cases at p. 942: *'Suspicion in its ordinary meaning is a state of conjuncture or surmise where proof is lacking: "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is at the end'.*
F. Osman vs. the United Kingdom, (ECHR, Application No.87/1997/871/1083), Judgment 18 October 1998, §78.

84 Stoyanova, 2020, p. 612. See Öneryildiz vs. Turkey, (ECHR, Application No.48939), Judgment 30 November 2004.

After establishing putative or real knowledge of the state authorities about the abuse, *due diligence* mandates further steps, —undertaking reasonable measures for prevention.

3.3. Obligation To Take Protective/Preventive Operational Measures

Right away, we encounter another challenge. What measures should the state take which would be qualified as reasonable, preventive, and expected in a certain case? This assessment usually implicates a normative evaluation of the measures provided within the normative framework of a member state. For the sake of brevity, I would not get into the rationale behind this criterion; however, it is worth mentioning that another principle from the ECHR jurisprudence can be put to the test when it comes to the evaluation of provisions in a certain state—the margin of appreciation.[85] The first judgement in which this positive obligation was developed was *Osman vs the United Kingdom,*[86] where the Osman test was introduced.

Since Osman, the obligation of taking protective operational measures has been applied by the Court in different contexts, including domestic violence and violence against women under the prohibition of torture. The Court has observed that *'it must be established to its [the Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of identified individual or individuals from the criminal acts of a third party and they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk'*. The triggering of the obligation requires that the risk be 'real and immediate'. The Court has not offered further clarification regarding the meaning of the terms 'immediate' or 'real'. While 'real' risk might mean that the risk must be objective, considering the circumstances of the case, the requirement for the immediacy of the risk has been found to be problematic in the context of domestic violence. Judge Pinto De Albuqerque in his separate opinion in case *Valiuliene vs Lithuania*[87] has explained the underlying reasons emphasising that 'at the stage of an "immediate risk" to the victim, it is often too late for the state to intervene'. The same judge proposed the use of a present risk instead, which would arguably, imply a lower standard than 'immediate' risk. *'If a state knows or ought to have known that a segment of its population, such as women, is subject to repeated violence and fails*

85 The term 'margin of appreciation' refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention. Council of Europe, 2022b.

86 Osman vs. the United Kingdom, (ECHR, Application No.87/1997/871/1083), Judgment 28 October 1998.

87 Valiulienė vs. Lithuania, (ECHR, Application No.33234/07), Judgment 26 March 2013.

to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the state can be found responsible by omission for the resulting human rights violation'.

In general, the Court has been quite flexible[88]: risks that could have materialised within months or even years have been accepted to be 'immediate', ultimately stretching the notion of 'immediacy', which might be problematic.[89]

Assuming that there was a real and immediate risk and that state authorities knew or ought to have known about such a risk, what measures should be undertaken for a state to fulfil its positive obligation? Generally, the ECHR detects a lack of measures provided instead of determining the quality of the ones which the state applies. However, a few times, the ECHR has enumerated specific measures in this regard. In the case *Kontrova vs. Slovakia,*[90] it mentioned measures such as

> *'accepting and duly registering the applicant's criminal complaint; launching a criminal investigation and commencing criminal proceedings against the applicant's husband immediately; keeping a proper record of the emergency calls and advising the next shift of the situation; and taking action in respect of the allegation that the applicant's husband had a shotgun and had made violent threats with in'.*[91]

3.4. Obligation To Adopt Effective Regulatory Frameworks for General Prevention

Generally, in the domestic violence and violence against women discourse, there has traditionally been a strong focus on the criminal law framework; however, the Court has stated that the effective legal framework extends beyond the realm of criminal law.[92] For these criteria to be met, the state has to obtain the capacity to anticipate infringements to the rights from the Convention through the establishment of a proper legislative and administrative framework aimed at providing effective deterrence from the violation of Convention rights.[93]

88 See Ebert and Sijniensky, 2015.
89 Stoyanova, 2020, p. 18.
90 Kontrova vs. Slovakia, (ECHR, Application No.7510/04), Judgment 24 September 2007.
91 Ibid., §53.
92 Bălşan vs. Romania, (ECHR, Application No.49645/09), Judgment 23 May 2017, §63.
93 See Budayeva & others vs. Russia, (ECHR, Application No.15339/02, 21166/02, 20058/02, 11673/02 & 15343/02), Judgment 29 August 2008.

3.5. Obligation To Provide Remedies

If an effective legal remedy in cases of human rights violations does not exist, the state is obligated to create one. This obligation aims to protect the victim; therefore, basic legal principles imply that such remedies must be accessible to facilitate everyone's access to justice. The ECHR underlines that *'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'*.[94] Remedies on a general level imply 'the process by which arguable claims of human rights violations are heard and decided'.[95] Art. 5 of the Istanbul Convention uses the term 'reparation' in cases where violence is committed by private individuals which, in a much broader sense, can be perceived as a remedy.

Although there are still open questions about conceptualising positive obligations (especially in domestic violence cases), it is undisputable that their framing is the focal point for the possibility that states can be held responsible for the violation of Art. 3 in domestic violence cases. The aforementioned transformation from negative rights into positive obligations, provided that cases where a father abuses its child or is violent towards his wife, come to an appliance of Art. 3. From a simple restraint of torturing its citizens, states must now hold up to numerous standards and duties to avoid condemnation by the ECHR. Although it was effective in human rights protection as an incentive for creating the latter, it seems that the ECHR still has not managed to illuminate clear and unambiguous interpretations of the same. As seen earlier, the structure, content, and scope of such obligations have remained unclear and blurry.

4. Domestic Violence as Torture? Not yet: Case of Tunikova & Others vs. Russia

The second thematic report of the Special Rapporteur on Torture to the UN Human Rights Council has authoritatively categorised domestic violence as a form of torture.[96] There is no doubt that in its essence that domestic violence appears to share similar properties with torture, as both deny human dignity and integrity.[97]

As already highlighted, imposing positive obligations, despite the lack of their coherent conceptualisation, made the jurisprudence of the Court deal with not only

94 Akandji-Kombe, 2007, p. 10.
95 Shelton, 2006, p. 7.
96 UNHRC Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Manfred Novick: Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the right to Development (15 January 2008) UNDOC A/HRC/7/3.
97 Marcus, 2014, p. 20; Başoğlu, Şalcıoğlu and Başoğlu, 2017, p. 107.

cases of states' infliction of maltreatment but also those of domestic violence. The ECHR imposes duties for the effective prevention of domestic violence on a daily basis, aiming to create a united and efficient European legal system which would protect victims of domestic violence across Europe. Cases of violations of Art. 3 are substantially different today than they were initially. Broadening the scope of the rights from the Convention and applying them horizontally opened a door towards the extensiveness of the content of Art. 3; however, this process was gradual and sensible. The conceptualisation of domestic violence as a violation of Art. 3 is an ongoing process that started in 2009.

- *Step 1 (2009): domestic violence is a human rights violation*

In 2007, the case of *Kontrova vs. Slovakia*[98] was brought before the ECHR. It was the first ECHR judgement strictly related to domestic violence, highlighting the approach that domestic violence is indeed a human rights violation[99] and falls under the scope of the Convention. Later jurisprudence showed that violations of Arts. 3 (rarely), 8, 14, and 2 (mostly) are usually found in cases of domestic violence.

- *Step 2 (2013): the centre of gravity lies on Art. 3*

Until 2013, in domestic violence cases, the ECHR would sometimes find a violation of Art. 3 (e.g., *Opuz vs. Turkey*[100]) and sometimes decided that it was not necessary when a violation of other Arts. from the Convention was already found (e.g., *Bevacqua & S. vs. Bulgaria*[101]); therefore, the ECHR's approach was incoherent. However, in 2013, in the case *Valiuliene vs. Lithuania,*[102] a different approach was adopted. In the latter case, despite the state's claim that the ill treatment of the applicant was not severe enough to fall within the scope of Art. 3 but rather acknowledging a breach of Art. 8, the ECHR stated that as the violation of Art. 3 was already established, there was no need to go further and determine whether Art. 8 was also violated. This case clearly marked the starting point for the use of Art. 3 more extensively in domestic violence cases from then on.[103][104] Therefore, from the previous practice in which the ECHR was

98 Kontrova vs. Slovakia, (ECHR, Application No.7510/04), Judgment 24 September 2007.
99 McQuigg, 2016, pp. 1009 and 1010.
100 Opuz vs. Turkey, (ECHR, Application No.33401/02), Judgment 9 June 2009.
101 Bevacqua & S. vs. Bulgaria, (ECHR, Application No.71127/01), Judgment 12 September 2008.
102 Valiuliene vs. Lithuania, (ECHR, Application No.33234/07), Judgment 26 June 2013.
103 Mcquigg, 2021.
104 Also, since its entry into force in 2014, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention, Council of Europe, 2014) has frequently been referred to by the Court. (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210.

almost reluctant to observe a violation of Art. 3 in domestic violence cases, a change of approach in 2013 suggested that from then on, if Art. 3 was to be found in these cases, it might mean that no further examination of another violation was necessary.

• *Step 3 (2019): the requirement for precision is set*

The next step in the ECHR approach occurred in 2019 in the case of *Volodina vs. Russia,*[105] in which a violation of Art. 3 had been established. In a separate opinion issued by Judge *Pinto De Albuquerque*, the question of whether it is sufficient to observe a violation of Art. 3 or further gradation should be addressed in terms of deciding whether the ECHR should assess violations concerning torture, inhuman, or degrading treatment.

• *Step 4 (2021): Case of Tunikova & Others vs. Russia*[106]

In 2021, the ECHR refused to characterise domestic violence as torture. In this case, the ECHR's decision is a valuable addition to its jurisprudence on domestic violence.[107] In this case, Russia has violated its positive obligations by failing to take adequate measures to protect victims of domestic violence and conduct an effective investigation due to the continuing structural problems in that society. The four applicants were victims of domestic violence from their partners or (former) husbands, ranging from an assault on Ms. Tunikova's life (application no. 55974/16) to recurrent violence in the cases of Ms. Petrakova (application no. 53118/17), Ms. Gershman (application no. 27484/18), and Ms. Gracheva (application no. 28011/19), and, eventually, to an extreme form of mutilation in Ms. Gracheva's case, leaving her disabled for life (her hands were chopped off). Three of the four applicants argued that they had been subjected to the most severe forms of domestic abuse which caused them very serious and cruel suffering that amounted to 'torture' rather than merely 'inhuman or degrading treatment'. In their view, recognising severe instances of domestic abuse as constituting 'torture' would emphasise the gravity of the abuse in the eyes of the public and authorities. The ECHR stated thus:

> *'The additional characterisation, although important for the applicants and capable of influencing the public perception of domestic violence, is not necessary in the circumstances of the present case, in which there is no*

105 Volodina vs. Russia, (ECHR, Application No.41261/17), Judgment 9 July 2019.
106 Tunikova & others v. Russia, (ECHR, Application No.55974/16, 53118/17, 27484/18 & 28011/19), Judgment 14 March 2021.
107 Mcquigg, 2021.

> *doubt that the treatment inflicted on the applicants attained the necessary threshold of severity to fall within the scope of Art. 3 of the Convention'.*[108]

Therefore, the ECHR did not consider it necessary to examine whether the impugned treatment could also be characterised as constituting 'torture'.

5. Conclusion

It will be far beyond the scope of the paper in hand to engage with all the relevant issues revolving around the conceptualisation of domestic violence, torture, and positive obligations. However, the previous chapters strived to not only highlight the few challenges of the evolution of Art. 3 within the jurisprudence of the ECHR but also set out a thought-provoking discussion on domestic violence and its connection to torture. The first challenge refers to the problematic and incoherent conceptualisation of the positive obligations imposed through the Convention. Despite the ECHR's attempt to make them more concrete, some of the elements within its content remain unclear. Second, although understanding domestic violence as torture might be challenging from the conventional human rights lens, today's indisputable approach of the ECHR suggests that domestic violence will be even more frequently referred to as a violation of Art. 3. Such a shift in modelling human rights by stretching its scope into a horizontal model has its justification in a more efficient human rights law system; however, the question remains as to whether such an approach is followed by sufficient consistency and clarity to achieve its goal. Finally, an ongoing reluctance of the ECHR to determine whether domestic violence should be recognised as torture, as opposed to an inhuman or degrading treatment (i.e., by explicitly conceptualising it as torture), does not necessarily mean that at one point, the ECHR would not take a further step in this regard. The *Tunikova* and *Volodina* cases both illustrate the constant evolution of the ECHR's jurisprudence on domestic violence, followed by the simultaneous development of positive obligations. Creativity, dynamism, and evolvability as characteristics of ECHR judgments will probably engender a more concrete application of Art. 3 in the future—on the one hand, creating a clearer criterion when it comes to positive obligations, and, on the other hand, establishing a more consistent conceptualisation of domestic violence as torture. Only by crystallising the content of and giving teeth to the norms prohibiting torture and positive obligations will greater victim protection be provided.

108 Tunikova & others vs. Russia, 55974/16, 53118/17, 27484/18 & 28011/19, Judgment 14 March 2021, §77.

Bibliography

- Akandji-Kombe, J.-F. (2007) 'Positive obligations under the European Convention on Human Rights – A guide to the implementation of the European Convention on Human Rights' in *Council of Europe Human rights handbook series*, 7.
- Başoğlu, M., Şalcıoğlu, E. and Başoğlu, M. (2017) 'Domestic Violence and Torture: A Theoretical and Empirical Comparison. In: Torture and Its Definition' in Başoğlu, M. (ed.) *International Law: An Interdisciplinary Approach*. New York, https://doi.org/10.1093/med/9780199374625.003.0005.
- Beijer, M. (2016) 'Positive obligations to protect fundamental rights – any role to be played by the European Court of Justice?', *Strasbourg observers* [Online]. Available at: https://strasbourgobservers.com/2016/10/10/blog-seminar-on-positive-obligations-3-positive-obligations-to-protect-fundamental-rights-any-role-to-be-played-by-the-european-court-of-justice/ [Accessed: 11 November 2022]
- Centre for Human Rights & Humanitarian Law (2018) *The Prohibition Of Torture: An Introductory Guide.* American University, Washington College of Law.
- Council of Europe (1950) *European Convention on human rights.* European Court of Human Rights & Council of Europe.
- Council of Europe (1956) 'Library of the European Court of Human Rights, "Travaux preparatoires" of the Convention, Art. 3', *European Court of Human Rights* [Online]. Available at: http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART3-DH%2856%295-EN1674940.pdf (Accessed: 3 November 2022)
- Council of Europe (2014) 'Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011, 2014)', CETS No 210 (Istanbul Convention)
- Council of Europe (2022a) 'Domestic violence or violence in intimate relationships', *Council of Europe* [Online]. Available at: https://www.coe.int/en/web/gender-matters/domestic-violence-or-violence-in-intimate-relationships (Accessed: 22 October 2022)
- Council of Europe (2022b) 'The margin of appreciation', *Council of Europe* [Online]. Available at: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/ECHR/Paper2_en.asp (Accessed: 7 November 2022)
- Dickson, B. (2010) 'Positive Obligations and The European Court of Human Rights', *Northern Ireland Legal Quarterly,* 61(3), pp. 203 – 208, https://doi.org/10.53386/nilq.v61i3.449.
- Donnelly, J. (2003) *Universal Human Rights in Theory and Practice*, *2nd Edition*. Ithaca: Cornell University Press.
- Dzehtsiarou, K. (2011) 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', *German Law Journal*, 12(10), pp. 1730–1745. https://doi.org/10.1017/S2071832200017533.

- Ebert, F. and Sijniensky, R.I. (2015) 'Preventing Violations of the Right to Life in the European and Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?', *Human Rights Law Review* 2015/15, pp. 343–368, https://doi.org/10.1093/hrlr/ngv001.
- ECHR (2021) 'The European Court Of Human Rights In Facts & Figures', *European Court of Human Rights*, [Online]. Available at: https://www.echr.coe.int/Documents/Facts_Figures_2021_ENG.pdf (Accessed: 28 October 2022)
- ECHR (2022) 'Guide on Art. 3 of the European Convention on Human Right', *European Court of Human Rights* [Online]. Available at: https://www.echr.coe.int/Documents/Guide_Art_3_ENG.pdf (Accessed: 21 November 2022)
- Farris, E. M. and Holman, M. R. (2015) 'Public Officials and a "Private" Matter: Attitudes and Policies in the County Sheriff Office Regarding Violence Against Women', *Social Science Quarterly*, 96(4), pp. 1117–1135.
- Fredman S. (2006) '*Human rights transformed: Positive Duties and Positive Rights'*, Oxford Legal Research, 2006/38.
- Gibbons, J. (ed). (2021) *Killings of women and girls by their intimate partner or other family members.* Research and Trend Analysis Branch, United Nations Office on Drugs and Crime (UNODC).
- Gracia, E. (2004) 'Unreported cases of domestic violence against women: towards an epidemiology of social silence, tolerance, and inhibition', *Journal of Epidemiology & Community Health*, 2004/58, pp. 536-537.
- Harris, D. J. O'Boyle, M. and Warbrick, C. (2009) *Law of the European Convention on Human Rights, second edition.* Oxford University Press.
- Holmes, S. and Sunstein, C. R. (1999) 'The Cost of Rights: Why Liberty Depends on Taxes', *High Commissioner for Human Rights* [Online]. Available at: https://www.ohchr.org/en/special-procedures/sr-torture/domestic-violence-and-prohibition-torture-and-ill-treatment (Accessed: 3 November 2022)
- ICJ (2007) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia).* ICJ.
- Janis, M. W., Kay, R. S. and Bradley, A. W. (2008) *European human rights law.* Oxford University Press.
- Klatt, M. (2011) 'Positive Obligations under the European Convention on Human Rights' *ZaöRV Zeitschrift für ausländisches öffentliches Recht und VölkerrechtHeidelberg Journal of International Law (HJIL),* 2011/71, pp. 691-718.
- Lavrysen, L. (2016) *Human rights in a positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights.* Intersentia, Cambridge.
- Lewis Herman, J. (1992) *Trauma and Recovery: The Aftermath of Violence from Domestic Abuse to Political Terror.* Basic books.

- Marcus, I. (2014) 'Reframing domestic violence as torture or terrorism', *Collected papers of Faculty of Law in Niš*, Niš, 67(LII), pp. 13-24. https://doi.org/10.5937/zrpfni1467013M.
- Marochini, M. (2014) 'The interpretation of the European Convention Human Rights', *Collected papers of Faculty of Law in Split*, 51(1), pp. 63- 84.
- Mcquigg, R. (2021) 'Domestic Abuse as Torture? Recent Jurisprudence of the European Court of Human Rights', *Queen's Policy Engagment* [Online]. Available at: http://qpol.qub.ac.uk/domestic-abuse-as-torture-recent-jurisprudence-of-the-european-court-of-human-rights/ (Accessed: 3 November 2022)
- McQuigg, R. J. (2021) 'The European Court of Human Rights and Domestic Violence: Volodina v. Russia', *International Human Rights Law Review*, 10(1), pp. 155-167. https://doi.org/10.1163/22131035-01001002.
- McQuigg, R.J.A. (2016) 'Domestic Violence as a Human Rights Issue: Rumor v Italy', *European Journal of International Law*, 2016/26.
- Mowbray, A. R. (2004) 'The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights (Vol.2)' Harvey, C. (ed.) *Human Rights Law in Perspective*. Hart Publishing.
- Overmeyer, N. (2021) *Domestic Violence as a Violation of the European Convention on Human Rights The Application of Art. s 3 and 8 by the European Court of Human Rights in Cases Concerning Domestic Violence.* Orebro University Juridicum.
- Sarıkaya Güler, T. (2017) 'Positive Obligations' Doctrine of the European Court of Human Rights: Is it Cogent or Obscure?', *European Journal of Multidisciplinary Studies*, 2(6), pp. 359 – 365.
- Shelton, D. (2006) *Remedies in International Human Rights Law.* Oxford University Press.
- Stoyanova, V. (2017) *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States Positive Obligations in European Law.* Cambridge University Press.
- Stoyanova, V. (2020) 'Due Diligence versus Positive Obligations – Critical reflections on the Council of Europe Convention on Violence against Women'in Niemi, J., Peroni, L. & Stoyanova, V. (eds) *International Law and Violence Against Women: Europe and the Istanbul Convention*. Routledge, pp. 1-35.
- Trykhlib, K. (2020) 'The Principle Of Proportionality In The Jurisprudence Of The European Court Of Human Rights', *EU and Comparative Law Issues and Challenges series (ECLIC),* 2020/4, pp. 128–154, https://doi.org/10.25234/eclic/11899,
- Webster, E. (2016) 'Interpretation of the Prohibition of Torture: Making Sense of 'Dignity' Talk', *Human Rights Review*, 2016/17, pp. 371–390, https://doi.org/10.1007/s12142-016-0405-7.
- World Health Organisation (2002) *World report on violence and health*. Geneva, World Health Organisation.

Agata WRÓBEL*

The issue of surrogate motherhood in Poland: a coherent analysis of the branches of Polish law

ABSTRACT: *The article was devoted to the analysis of the surrogacy phenomenon in Polish law. The author evaluates the regulation of the phenomenon from the perspective of various legal branches. The analysis is directed at identifying problems with the regulation of the surrogacy phenomenon. For the Polish legislator has not yet attempted to regulate surrogacy. Thus, following one path of interpretation, it can be assumed that everything that is not forbidden is allowed. However, the situation becomes more complicated at the level of surrogacy contracting. The analysis is intended to polemicize over the interlocking fields that, if regulation is made, will also require amendment.*
KEYWORDS: *surrogate motherhood, surrogate, maternity, surrogacy contracts, child*

1. Introduction

Society is increasingly reaping the benefits of scientific advances. Assisted fertilisation procedures are regularly used these days. The process of procreation can be divided into two independent stages: fertilisation and pregnancy. This makes it possible to distinguish motherhood into genetic and biological. The biological mother of a child is the woman who becomes pregnant and gives birth to that child. The woman's role here is reduced, so to speak, to the function of an 'incubator'. Genetic motherhood is closely related to the very moment of conception. It relies on the identity of the genetic material of the child and the mother. Surrogate motherhood is gaining more popularity due to social and biological considerations. It is important to note the significant impact of international trade on the number of surrogacy contracts. The freedom of movement of people across borders has meant that despite the fact that surrogacy contracts cannot be successfully claimed in Poland, nothing prevents one from entering into such a contract abroad in countries where such a contract is legal,

* Researcher at the University of the Cardinal Stefan Wyszynski University. ORCID: 0000-0003-1809-0334.

https://doi.org/10.62733/2023.2.225-240

such as Russia, India, the United Kingdom, Israel, and Ukraine[1]. In the case of the latter country, it is also worth noting that it is a popular destination for the so-called 'exit surrogacy' phenomenon. As Ukraine and Poland are in close proximity, Ukraine is a destination for 'legitimate' surrogacy arrangements. The phenomenon can be compared to that of the so-called 'abortion tourism' in the Czech Republic. There is a high demand for the use of surrogate mothers due to not only the civilisation's infertility issues but also a change in life priorities. Naturally, these aspects will be addressed and developed later in the article, but it is worth noting at the outset that many complications with the status of the legality of surrogacy in Poland boil down to the lack of sufficient regulations in the law. This lack of regulation leads to the resolution of cases of surrogacy *ad casum*. Albeit there are no official statistics as to the extent of the annual 'demand' for surrogacy services, this does not mean that the phenomenon does not exist in Poland. Surrogacy agreements are concluded even though they are not due. Thus, the problem can also transfer to the field of criminal law; here, as a rule, the most frequently addressed direction of the criminal act is human trafficking. As it is impossible to determine the object of the agreement, and the effect is the transfer of parental rights to another person for a fee, this can be interpreted as a criminal act.

2. Definitional issues

In proceeding to analyse the current legal status of surrogacy in the Polish legal order, first, the meaning of the term '*surrogate*' should be clarified, as the analysis conducted so far allows us to note that the issue of investigating maternity is not only a legal, social, and moral problem but also one that induces doubts of a definitional nature. A '*surrogate*' is a woman who adapts into her uterus an *in vitro* fertilised egg cell of another woman, who, after the child is born, gives it back to the parents. The development of effective methods of transferring human embryos, created either *in vivo* or *in vitro*, into the uterus of a woman from whom the genetic material did not originate, and with whose participation the embryo was created, meant that the Roman paremia *mater semper certa est*, at least on a factual level, no longer had a categorical character. This is because of the a break in the rule that the biological mother of the child (the woman who was pregnant and gave birth to the child) is always at the same time the child's genetic mother (the person from whom the genetic material originated). According to Article 61 of the Family and Guardianship Code[2], maternity is to be understood as a legal relationship linking a woman to a child through the

1 Mikluszka, 2017, pp. 5-9.
2 Family and Guardianship Code Act of February 25, 1964 (Journal of Laws 1964 No. 9 item 59).

birth certificate. This legal relationship arises at the time of the child's birth[3]. The moment of birth should be considered the beginning of the parental relationship, although there are doubts in the science of the subject as to whether this moment is not the moment of conception. The issue has been resolved with the repeal of Article 8 Paragraph 2 of the Civil Code, which states that '*a conceived child also has legal capacity; however, he or she acquires property rights and obligations on the condition that he or she is born alive*'. With the repeal of this article, it has been prejudged that the *nasciturus* does not have full legal capacity; thus, the maternal relationship should be considered to arise from the moment the child is born. This also coincides with European standards. Depending on the intentions, simply 'buying' a child can raise many moral questions. Agencies brokering surrogacy offer procurers the right to choose the sex, race, and hair colour of the child. This phenomenon is therefore discriminatory and violates basic human rights. Sometimes, buyers abandon the purchase after the birth of the child, with the most common reason being the child's illness. In such cases, newborns end up in orphanages. It also happens that mothers do not want to give up the child because of their attachment to it. Purchasers then often seek to take the minor by force, against the will of the mother.

3. Issues of regulation in Polish law

The first Polish normative act of a general, abstract, universally binding nature, touching on the subject of in vitro fertilisation, appeared only on 1.11.2015, when the Law on Infertility Treatment came into force. Until the Infertility Treatment Law came into effect, the issue of human reproduction under conditions of medically assisted procreation remained completely outside the ambit of the law. The first child born from a pregnancy induced by in vitro fertilization in Poland was born in November 1987. The current Law on Infertility Treatment is a piece of legislation that represents an ethical consensus on matters of medically assisted procreation[4]. The situation in which a woman becomes pregnant and gives birth to a child without the will to raise it, becoming a kind of incubator for the life developing inside her, is something unknown and unsolved by Polish law. In the current legal situation, the lack of a genetic connection between the child and the woman giving birth does not prevent the Polish authorities from recognising her as a mother under the law, which definitely raises very serious legal questions. The maternity status of a particular woman is determined by the fact of the child's birth. The Polish government has not yet dealt with the issue of surrogate motherhood; therefore, no position has been

3 See Śledzińska-Simon, 2022, pp. 74-90.
4 Witczak-Bruś, 2021, pp. 38-50.

developed on this issue. Usually, the person or persons initiating the conception of the child is the ordering party of the contract. In general, the practice is contractual in nature between the ordering parties and the woman carrying and delivering the child. There are two main types of surrogacy: full and partial[5]. The former involves the surrogate being both the egg donor and the woman carrying and delivering the child. The second is one whereby the surrogate is only responsible for carrying and giving birth to the child—an embryonic transfer into her uterus is performed, and the embryo is the result of a combination of third-party gametes or the ordering party. Some bioethicists consider the first option morally problematic, while the second option is no longer regarded as such (assuming that carrying and giving birth to a child is similar to any other activity of caring for a young child). However, we can delve further into the divisions and distinguish between the two configurations in the case of natural insemination: the sperm of the future target father and the egg cell of the surrogate, or the sperm of another donor and the egg cell of the surrogate. However, in the case of *in vitro* insemination, these configurations can include an egg cell and sperm from the target parents, an egg cell from the target mother and sperm from another man, or an egg cell from another woman and sperm from the target father[6]. As has already been established, surrogacy involves the conclusion of a contract. The first of the grave ethical problems lies in defining the object of the contract. According to many assumptions, this can be a procreative service, a child, rights to a child, or a parental relationship. First, a child can absolutely not be the subject of a contract because it is not a thing. If the object of surrogacy contracts were a reproductive service, then the contracting party would be obliged to pay for the birth of the child, even if the woman giving birth did not choose to relinquish her rights to the child. For these reasons, it is emphasised that the transfer of rights to the child is the real object of the contract, but then the charge of commodification of the child arises again. However, no one has ownership of the child, not even the mother, so it is impossible to transfer ownership of the child to another person, as no one can transfer more rights than he himself has. Another question is whether the parent–child relationship, which generates rights and obligations, can be subject to choice and trading. In the case of recognising the reproductive service as the subject of the contract, it is necessary to consider the problem of the prohibition of commercialisation of the body commonly accepted in European legal systems[7] and justified by the principle of human dignity, which is the most important element protected by the Polish Constitution. When considering the subject matter of a surrogacy agreement, it should be recognised that the conclusion of a surrogacy agreement does not

5 Fras & Abłażewicz, 2008, p. 35.
6 Holocher, 2019, pp. 163-170.
7 See Wedeł-Domaradzka, 2021, pp. 64-83.

have the child as its object, but the creation of an opportunity for the child to come into the world. It is therefore incorrect to confuse commercial, paid adoption with child trafficking, as these are two separately defined crimes.

4. Surrogacy and criminal law in Poland

Turning to criminal law, it should be noted that at the moment, the only criminal law provision dealing with the broader crime of procreation from the perspective of the aggressive development of the surrogacy underworld seems to be Article 211a of the Criminal Code and, in extreme cases, Article 189a of the Criminal Code[8]. Article 189a criminalises human trafficking. The introduced Article 189a § 2 of the Criminal Code provides for the criminalisation of persons making preparations for the crime of human trafficking, such as preparing a plan of action, obtaining appropriate means/tools, and entering into an agreement with other persons. Persons entering into an agreement to give birth to a child cannot violate the child's dignity because the child's dignity cannot be said to have been compromised prior to conception. This article criminalises preparation for the crime of human trafficking, which is dictated by the high degree of social harmfulness of the crime in question. Prior to the 2010 amendments to the Criminal Code, the article did not criminalise activities related to making preparations to commit the crime of human trafficking. Article 211a, however, deals with illegal adoption. It stipulates that imprisonment is punishable by 'whoever, for the purpose of financial gain, is engaged in arranging the adoption of children in violation of the law'. In the context of surrogacy, § 2 of the same article is particularly noteworthy here, according to which one 'who, being a person with parental authority over a child, consents to the adoption of that child by another person, with the purpose of achieving a pecuniary or personal benefit, concealing this purpose from the court ruling in the adoption proceedings'. Human trafficking can be linked to surrogacy in the context of obtaining financial benefits in exchange for the transfer of parental rights to a newborn child. Embryo donation is possible under the law, but it must meet the conditions set forth in Article 36(1) of the Law on Infertility Treatment[9]. These conditions must be met together, and they exclude

8 Criminal Code Act of June 6, 1997 (Journal of Laws 1997 No. 88 item 553).

9 Infertility Treatment Act of June 25, 2015 (Journal of Laws 2015 item 1087). The Act implemented: Directive 2004/23/EC of the European Parliament and of the Council of March 31, 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells (Official Journal of the EU L 102 of 07.04.2004, p. 48); Commission Directive 2006/17/EC of February 8, 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements technical requirements for the donation, procurement and testing of human tissues and cells (OJ. EU L 38 of 09.02.2006, p. 40); Commission Directive 2006/86/EC of

surrogacy because, for example, the transfer of an embryo must be to an anonymous recipient. This regulation demonstrates the legislature's desire to prevent embryo trafficking, which can be attributed to surrogacy[10]. The very definition of the concept of human trafficking in Polish law was regulated only with the amendment of the Criminal Code by the power of the Act of 20.05.2010. This change was dictated by the need to align the Polish legal order with European standards and Poland's international obligations. This obligation, in particular, resulted from the Act of 18.08.2003 ratified by Poland. The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime of 15.11.2000 (The Palermo Protocol)[11] includes a definition of trafficking in persons in Article 3, while Article 5 requires state parties to criminalise acts in accordance with the stated definition of trafficking. In the Criminal Code, we find a definition of human trafficking in Article 115 § 22. According to it, human trafficking is the recruitment, transportation, delivery, transfer, storage, or reception of a person using: (1) violence or unlawful threat; (2) abduction; (3) deception; (4) misrepresentation or exploitation of a mistake or incapacity to grasp; (5) abuse of a relationship of dependence, exploitation of a critical position or a state of helplessness; (6) giving or accepting a pecuniary or personal benefit or the promise thereof to a person having custody or supervision of another person – for the purpose of exploiting him or her, even with his or her consent, in particular in prostitution, pornography or other forms of sexual exploitation, forced labour or services, begging, slavery or other forms of exploitation degrading human dignity, or for the purpose of obtaining cells, tissues or organs in violation of the law. If the perpetrator's behaviour involves a minor, it constitutes human trafficking, even if the methods or means listed in items 1–6 are not used.

Protection against unwanted actions under the guise of surrogacy or surrogacy conducted for purely commercial purposes can be provided by international law. One such act may be the Convention for the Protection of Human Rights and Dignity of

October 24, 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards requirements for traceability, notification of serious and adverse reactions and events, and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells (Official Journal of the EU L 294, 25.10.2006, p. 32); Commission Directive 2012/39/EU of November 26, 2012 amending Directive 2006/17/EC as regards certain technical requirements for the examination of human tissues and human cells (Official Journal of the EU L 327 of 27.11.2012, p. 24).

10 Ciulkin-Sarnocińska, 2019, pp. 247-259.

11 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on November 15, 2000 (Journal of Laws. 2005 No. 18 item 160) [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons (Accessed: 1 January 2023).

the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine[12]. The Convention attempts to set minimum legal standards in the field of biomedicine. Undoubtedly, the development of biomedicine may contribute to actions that harm human beings and their dignity. Emerging ethical concerns regarding the possible application or testing of new knowledge on an individual have prompted the development of certain standards for the protection of life. Despite this, the Convention has not yet been ratified by all countries that are signatories to it: an example is Poland, which signed the Convention in 1999; however, it has still not been ratified. From the perspective of the issue under analysis, it is worth noting the emphasis in the content of the Convention on the importance of human dignity, which is inherent and inalienable. Dignity is the essence of humanity and determines human subjectivity. The Convention refers to dignity in both the preamble and normative part. It is already clear from Article 1 of the Convention that the parties protect the dignity and identity of the essential human being. According to Article 2, the interests and well-being of the human being prevail over the exclusive interests of society and science. According to some, this may indicate that surrogacy will be considered an illegal practice under these regulations, as the phenomenon can be analysed in relation to a child treated as an object or a surrogate mother who is only a means of production. Article 21 of the Convention, according to which 'The human body and its parts shall not, of themselves, be a source of profit', is difficult to judge unequivocally, as one must keep in mind the purpose of such practices and good faith, as well as surrogacy of a non-material nature. European Union law does not directly address the issue of surrogacy. Nevertheless, the issue has appeared in the case law of the Court of Justice of the European Union. In the judgment of the Grand Chamber of the Court of 18 March 2014 in the case of Z. v. A Government Department, the Board of Management of a Community School, ref. C-363/12, it was stated that Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and in particular, Articles 4 and 14, must be interpreted as meaning that the refusal to grant paid leave equivalent to maternity leave to a worker as a contracting mother whose child was born through a surrogacy arrangement does not constitute discrimination on the basis of sex, and the situation of such a contracting mother with regard to the granting of adoption leave is not covered by the directive. The next act that can be pointed to is the Declaration of the Rights of the Child[13]. This was adopted by the UN

12 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, April 4, 1997, done in Oviedo.

13 Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

General Assembly on 20 November 1959. It is not binding but nevertheless provides an important point of reference for the interpretation of those acts of international law that create binding obligations for states concerning the rights of the child. According to the second sentence of Principle 9 of the Declaration, the child should not be trafficked in any form. Moreover, Principle 6, which prohibits, among other things, the separation of a child from its mother in the first few years of life, except in exceptional situations, indicates the desire to exclude the phenomenon of surrogacy from society. Indeed, due to the medical possibilities of the time, there was no problem at the time related to the implementation of the conceived child (fertilised ovum) to another woman than the 'genetic mother'. Neither is the issue of surrogacy explicitly addressed in the 1989 Convention on the Rights of the Child. Nevertheless, some of the Convention's provisions address various phenomena related to surrogacy (transfer of children outside the country of their birth and violation of adoption laws). Under Article 11 of the Convention, state parties undertake steps to combat the illegal transfer of children and their illegal export abroad. This provision may be of particular relevance in countries where surrogacy is not permitted by law. Article 21(4) of the Convention, however, stipulates that state parties recognising and/or permitting the adoption system shall ensure that the welfare of the child is the supreme objective and shall take all appropriate steps to ensure that, in the event of adoption to another country, those involved do not receive an improper financial benefit from it. This should exclude the permissibility of commercial surrogacy in countries that have ratified the Convention on the Rights of the Child. However, despite the fact that the Convention has been ratified by 196 countries (and therefore, all UN member states except the United States, which are signatories to the Convention but have not ratified it, as well as some countries that are not UN members), this has not resulted in the complete outlawing of surrogacy (even commercial surrogacy). In addition to the provisions of the Convention, when reconstructing the standard of child protection against surrogacy, in light of the system of binding UN documents, it is necessary to consider the content of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography of 2000. According to Article 2(c), for the purposes of the Protocol, child trafficking means any act or transaction by which a child is transferred by any person or group of persons to another person or group for remuneration or any other compensation. Undoubtedly, the cited legal definition of child trafficking also includes commercial (paid) surrogacy and even surrogacy undertaken for altruistic reasons combined with the reimbursement of various expenses incurred by the pregnant woman (generally related to medical care). Similarly, the Committee on the Rights of the Child has explicitly stated that surrogacy can constitute the sale of a child. It should also be noted that pursuant to Article 3(1)(a)(ii) of the Protocol, each state party is required to ensure, at a minimum, that its criminal or criminal laws fully cover solicitation in an improper

manner, as an intermediary, of consent to the adoption of a child, in violation of the relevant international legal instruments on adoption, regardless of whether the crime is committed at home or abroad, by individuals, or in an organised manner. In this context, the Committee on the Rights of the Child, as an advisory body with no authority to make binding recommendations, encourages state parties to take all necessary steps to eliminate the sale of children following surrogacy agreements.

5. Motherhood in the letter of Polish law

Under Polish law, on the one hand, the mother of a child is the woman who becomes pregnant and gives birth to that child[14]. On the other hand, the father of the child according to the law is presumed to be a man if the child was born during the marriage or before 300 days after its cessation or annulment[15]. This presumption does not apply if the child was born more than 300 days after the decree of separation[16]. However, if a child is born before the expiration of 300 days after the cessation or annulment of the marriage but after the mother has entered into a second marriage, the child is presumed to be from the second husband. In the case of the use of assisted reproductive techniques, after obtaining consent from the mother's first husband, the presumption described above does not apply[17]. Legislators, when regulating the issue of determining the origin of the child, undoubtedly had in mind only the natural method of fertilisation; however, with the development of procreative techniques, the catalogue of fertilisation possibilities has expanded and continues to expand. To date, the issue of the origin of the child after the implantation of the embryo into the womb of the surrogate mother (or genetically unrelated recipient) has not been regulated in Polish law, and the child cannot be denied the right to know its genetic origin. It should also be borne in mind that the semen used to perform the procedure described above may also be obtained from a sperm bank, in which case the donor is assured of relative anonymity; however, this issue is not the subject of this paper. Legislators should take appropriate steps to ensure that such important social phenomena as maternity, paternity, parenthood, and the right of everyone to know their genetic ancestry are not left outside the scope of legal regulations. In the light of the Preamble to the Polish Constitution, the Republic of Poland is obliged to guarantee the development of future generations and the possibility of passing on the nation's traditions to them. In this context, it can be considered that motherhood, in conjunction with the family, plays a key role. Indeed, Article 18 of the Constitution

14 Art. 619 of the Family and Guardianship Code.
15 Art. 62 § 1 of the Family and Guardianship Code.
16 See Skorupka, 2021, pp. 174-178.
17 Art. 62 § 2 of the Family and Guardianship Code.

of the Republic of Poland mandates the protection and care of certain subjects when they perform certain 'social roles'. According to it, marriage as a union between a man and a woman, family, maternity, and parenthood are under the protection and guardianship of the Republic of Poland[18]. This article thus protects the four fundamental values (marriage, family, maternity, and parenthood) associated with the functioning of individuals in society. The Polish Constitution does not define the term *motherhood*. It is undoubtedly related to the concept of *mother* and denotes the relationship that exists between a child and its mother from the beginning of pregnancy through the postpartum period until the death of one of them. The concept of motherhood expresses the necessary relationship between mother and child, with this relationship occurring on many levels, including biological, emotional, social, and legal. The function of this relationship is the proper development of a person's life in its early stages, in which it requires special care. Therefore, we have the term of *sociological (social) mother*, which refers to a woman who enters into a contract of maternity with a so-called surrogate mother and plans to form emotional and family ties with the child that will be born. Sometimes as many as three women are involved in the process of bringing a child into existence using the institution of surrogacy: the genetic mother (the oocyte donor), the biological mother (the surrogate mother expected to give birth to the child), and the social mother (the woman expecting the child, who will later raise it). Until recently, a relatively straightforward way for potential 'parents' (even without a genetic bond linking either of them to the child) to introduce a born child into their birth records and acquire full rights to the child was adoption by indication. This form of legal adoption was severely criticised in its previous formulation by adoption centres. This procedure differs from the form of ordinary adoption in that it takes place outside the procedures of the adoption centres and the child is immediately placed with an adoptive family. Based on Article 1191 § 1 of the Family and Guardianship Code, parents (in the classical, biological sense) could consent to the adoption of their child by a couple they had designated. The court examined only whether the prospective adopters were competent and whether the adoption procedure was in line with the broad interests of the adoptee. This is because the court primarily examines whether the adoption is consistent with the welfare of the child, which it must follow. However, by the 2015 Law on Amendments to the Family and Guardianship Code, the Civil Procedure Code Law, and the Law on Family Support and the Foster Care System, 89 Article 1191a of the Family and Guardianship Code was added, limiting parents' ability to name adopters. Currently, parents before the guardianship court can only designate a relative of either of them, as well as their spouse. Until the aforementioned change, the catalogue of persons who could be designated for adoption remained open; the contenders for parents, if they met certain

18 Constitution of the Republic of Poland of April 2 (Journal of Laws 1997 No. 78, item 483).

qualifications in the opinion of the family court, could be strangers who ordered the child from the birth mother. Thus, the number of indicated adoptions carried out by the adoption underworld will remain unknown. Polish legislation does not use the term 'surrogacy'. Article 109 § 2 of the Family Code only provides for a *surrogate family*; however, it does so in a different context, with no connection to the use of similar terminology in the case of assisted procreation surgery. The Constitutional Court has repeatedly interpreted the terms *maternity*, *paternity*, or *parenthood*[19], most often in the course of examining the constitutionality of various laws regulating them; however, it has never addressed the values protected by Article 18 of the Constitution in the context of medically assisted procreation and surrogacy.

6. Surrogacy contracts

Considering the legal permissibility of so-called surrogacy contracts, the starting point should therefore be a reference to the concept of an individual's procreative freedom, which is an emanation of peoples' right to privacy. In the most general terms, in the positive aspect, procreative freedom means primarily the freedom to decide whether or not to have offspring and the ability to decide on one's own reproductive capacity. The negative aspect of this freedom, however, essentially boils down to a prohibition on state and private entities to encroach on the sphere of human procreative freedom. This specifically excludes the introduction of the legal compulsion of procreation and, conversely, its legal prohibition. The Constitution does not set the boundaries of procreative freedom in a definitive manner, as this freedom is not absolute. The constitutional limits of the freedom in question are therefore *prima facie* in nature and can be definitively established at the level of law. As Polish law inadequately regulates these issues, although couples and surrogates usually sign civil law contracts under such circumstances, it is difficult to enforce these arrangements later in reality. A surrogate cannot in any way force her 'contractors' to take the child from her. Under the current law, she is the mother of the child and bears all the consequences associated therewith. The only thing she could do was relinquish her parental rights and hand the child over for adoption under the provisions of the Family and Guardianship Code. Furthermore, the persons 'procuring' the child have no grounds whatsoever for the surrogate's surrender of the child, since, referring again to the definition of mother in the Family and Guardianship Code, the woman who gave birth to the child is its mother and therefore has legal title effective against everyone. The only issue that could possibly be invoked by those ordering a child

19 See judgement of the Constitutional Court of April 28, 2003, ref. K 18/02, OTK ZU No. 4/A/2003, item 32; Judgement of the Constitutional Court of November 26, 2013.

'cheated' by a surrogate is, as indicated in the literature, the provisions on unjust enrichment. In relation to contracts, the principle of free formation of the content of a legal relationship is clearly confirmed from the positive side by Article 353[1] of the Civil Code, according to which the parties entering into a contract may arrange the legal relationship as they see fit, as long as the content or purpose of the relationship does not contradict the properties (nature) of the relationship, law, or principles of social intercourse. The sanction for violating the prohibitions provided in Article 58 of the Civil Code is the absolute invalidity of the legal act. The violation of the limits of freedom of contract marked by Article 353[1] of the Civil Code leads to the same result. Polish civilian lawyers pointed to several possible variants in concluding an agreement that could serve to achieve the effects of surrogacy[20]. First, the agreement could include an obligation on the surrogate mother to consent to the adoption of the child after birth, while simultaneously obliging the sociological parents to apply for the adoption of that child and to provide certain monetary benefits to the surrogate mother. Second, the contract may take the shape of a conditional contract (under a condition precedent), regulating only certain property relations on account of a future and uncertain event, which is, at the time of the conclusion of the contract, the fact of the child's birth and its adoption by the sociological parents, providing, on the one hand, for a promise to provide a benefit to the surrogate mother, if she would consent to the adoption of the child by the sociological parents, and, on the other hand, for a promise to provide a benefit to bear the costs of the child's maintenance and upbringing by the sociological parents, if the adoption of the child would not would come to fruition due to the withdrawal of this intention by the spouses or because of a negative decision of the family court on this matter.

7. De lege ferenda conclusions

It is worth noting that in the context of the axiology of the Polish Constitution, including its Article 18, special attention should be paid to the problem of infertility of a couple trying to have a child. In the case of a woman, infertility can take the form of an inability to carry a pregnancy and give birth to a live child. In such a case, using the service of a so-called *surrogate* may be the only chance for a couple to overcome the problem of infertility and have their own offspring. Surrogacy can have implications at the civil, familial, criminal, and/or private international law levels. The Court's rulings show how it also relates to human rights, the right to respect for family life, and the right to privacy. The unclarified status of this type of agreement raises many problems, and until the national legislature has a say on the preferred

20 Wiśniewski, 2002, p. 435.

shape of this issue, all cases will be decided *ad casum*, depending on specific factual circumstances. New techniques of medically assisted procreation, which include the institution of contractual pregnancy, can help offset the effects of infertility, which is a growing problem in aging societies. However, this goal is achieved at the expense of other important values associated with procreation, such as the stability and explicitness of parental ties, responsibility and concern for life, and the treatment of offspring as gifts. Therefore, new reproductive technologies should receive special attention. Progress in medicine poses a series of growing challenges to global legislation in modern society. The use of the reproductive capacities of the female body for financial gain prejudices the social reprehensibility and criminality of childbirth contracts. The dynamics of medical progress go hand in hand with the problems of human fertility caused by the various environmental changes to which humans are subjected. Although surrogacy is not a technologically new way of reproduction, it is a novel approach of using the natural capabilities of the human body. New ways that differ from the accepted norms are also an important area vis-à-vis legislative consideration.

Surrogacy remains a contentious issue in Polish law, with the current legal framework inadequately addressing the complexities of assisted reproduction techniques. Despite the emergence of legislation surrounding in vitro fertilization in 2015, surrogacy remains largely unregulated, leaving crucial ethical and legal considerations unaddressed. The absence of explicit regulations has resulted in a myriad of legal ambiguities and ethical dilemmas. It is imperative for Poland to embark on a journey towards comprehensive surrogacy legislation, guided by the principles of human dignity, child welfare, and ethical practice. Central to this endeavour is the recognition of surrogacy within the legal framework. Clear definitions of parentage, rights, and responsibilities are essential for all the parties involved—surrogate mothers, intended parents, and donors. This recognition must prioritise the protection of human dignity, ensuring that no individual is exploited or commodified for financial gain. Moreover, Poland must unequivocally prohibit the commercialisation of surrogacy and any form of trafficking in children. Stringent measures are necessary to not only safeguard the well-being of surrogate mothers and children but also prevent their exploitation in surrogacy arrangements. Harmonising domestic legislation with international standards, such as the Convention on Human Rights and Biomedicine, will ensure alignment with global norms and facilitate international cooperation on surrogacy-related issues. Legislative reforms should prioritise the best interests of the child, establishing procedures for determining parentage and safeguarding the child's right to know their genetic ancestry. Additionally, ethical guidelines must be implemented to prohibit unethical practices and ensure the protection of vulnerable individuals. Public debates and consultations with stakeholders, including medical professionals, legal experts, ethicists, and the public, are essential steps in the

legislative process. Robust enforcement mechanisms and ongoing monitoring and evaluation will be necessary to assess the effectiveness of new legislation and address emerging challenges over time. In conclusion, the journey towards ethical and comprehensive surrogacy legislation in Poland requires concerted efforts to address the existing gaps and challenges. By prioritising human dignity, child welfare, and ethical practices, Poland can establish a legal framework that upholds the rights and responsibilities of all parties involved in surrogacy arrangements.

Bibliography

- Ciulkin-Sarnocińska, K. (2019), *Surogacja w ujęciu karnoprawnym i kryminologicznym [Surrogacy in criminal and criminological terms]* (doctoral thesis). Bialystok: Uniwersytet w Białymstoku – Wydział Prawa, pp. 247-259.
- Fras, M. & Abłażewicz D. (2008), 'Reżim prawny macierzyństwa zastępczego na tle *porównawczym [Legal regime of surrogacy against a comparative background]' Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego,* vol. VI A.D. MMVIII, pp. 31-67 [Online]. Available at http://www.europeistyka.uj.edu.pl/documents/3458728/3c4fd20e-64bc-42e9-95c4-baaadc5d3442 (Accessed: 1 January 2023).
- Holocher, J. (2019), 'Surrogate motherhood – terminological considerations. Three perspectives: theory and philosophy of law, legal doctrine, and public debate' in Mostowik P. (ed.), *Fundamental legal problems of surrogate motherhood. Global perspective*. Warsaw: IWS, pp. 163-170.
- Mikluszka, M. (2017), *Zagraniczne procedury tzw. macierzyństwa zastępczego (surrogacy motherhood) w świetle zasady handlu ludźmi – zagadnienia węzłowe [Foreign procedures of so-called surrogacy motherhood in light of the principle of human trafficking – key issues]*.Warsaw: IWS, pp. 5-9.
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted in New York on May 25, 2000 (OJ 2007 No. 76, item 494).
- Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on November 15, 2000 (Journal of Laws. 2005 No. 18 item 160).
- Skorupka, A. (2021), *Dopuszczalność dowodu sprzecznego z prawem w sądowym postępowaniu cywilnym [Admissibility of contradictory evidence in civil court proceedings]*, Warsaw, pp. 174-178, [Online]. Available at: https://https-sip-lex-pl.pulpit.uksw.edu.pl/#/monograph/369483189/58/skorupka-agnieszka-dopuszczalnosc-dowodu-sprzecznego-z-prawem-w-sadowym-postepowaniu-cywilnym?keyword=%22definicja%20matki%22&unitId=passage_12688 (Accessed: 1 January 2023).
- Śledzińska-Simon, A. (2022), 'Kobiety i płeć w Konstytucji [Women and gender in the Constitution]', *Państwo i Prawo*, 10/2022, pp. 74-90 [Online]. Available at: https://assets.contenthub.wolterskluwer.com/api/public/content/1eeec018bc7f4ea58f33db625ac6edf0?v=564679eb (Accessed: 1 January 2023).
- Wedeł-Domaradzka, A. (2021), 'Uznanie w prawie krajowym stosunku prawnego rodzic-dziecko między dzieckiem urodzonym wskutek umowy o surogację za granicą a matką intencyjną (intended mother) [Recognition in domestic law of

the parent-child legal relationship between a child born as a result of a surrogacy agreement abroad and the intended mother]', *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, vol. XVII, A.D. MMXIX, Warsaw, pp. 64-83.

- Wiśniewski, T. (2002), *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania [Commentary to the Civil Code. Book three. Obligations]*, t. 1. Warszawa, p. 435.
- Witczak-Bruś, P. (2021), *Surogacja. Aspekty prawne macierzyństwa zastępczego [Surrogacy. Legal aspects of surrogacy]*. Warsaw.

Leon ŽGANEC-BRAJŠA*

Agreement between Croatia and the European Space Agency

ABSTRACT: *This article aims to present an agreement between Croatia and the European Space Agency that was concluded in 2018. The Agreement is the first act establishing formal cooperation between the European Space Agency and the Republic of Croatia, making it a significant step in the process of Croatia's entry into the framework of European cooperation for space exploration. Therefore, after a brief introduction, this article begins by explaining the nature of the different types of connections between the European Space Agency and states. Thereafter, the position of the Agreement in the wider framework of space law is recalled, mentioning the specificities of Croatia (not) being party to core treaties that form space law. Subsequently, the Agreement is examined, highlighting some of the articles which seem more interesting from the perspective of general international law. Finally, an overall assessment of the Agreement is given, especially when considering what it may mean for Croatia to position itself in the European states' network for the exploration of outer space.*
KEYWORDS: *space law, Croatia, European Space Agency, agreement, cooperation*

1. Introduction

Given the immense resources and costs associated with outer space exploration, smaller states are compelled to join efforts if they want to participate in the ever-broadening field of space research. The European Space Agency, an international organisation founded in its present form in 1975, was, from the very beginning, created with this very aim in mind.[1] The preamble of the Convention for the establishment of

1 The idea of creating a unified European Space Agency was conceived at the ministerial meeting between the states already participating in joint European space exploration programmes held in 1973 in Brussels. Afterwards, it was formalised in the Convention for the Establishment of the European Space Agency, signed in 1975, and entered into force on 30th October 1980. See in

* Doctoral Candidate at University of Zagreb, Faculty of Law, lzganecbrajsa@pravo.hr, ORCID: 0000-0003-1290-8529.

https://doi.org/10.62733/2023.2.241-255

the European Space Agency thus reads that the state parties to the convention have agreed to form a single European Space Agency, '[c]onsidering that the magnitude of the human, technical and financial resources required for activities in the space field is such that these resources lie beyond the means of any single European country'.[2]

From the time of the conclusion of the aforementioned convention and its subsequent entry into force in 1980, political landscape of Europe changed significantly. In Central and Eastern Europe, after the fall of communism during the 1989–1991 revolutions, many states were willing to engage in various ways of European cooperation and integration, one of which was the exploration of outer space. The European Space Agency provided a format for this particular part of the emerging cooperation.

Having already established itself in a wide range of activities during the past decades,[3] joining or, at least, entering into some form of cooperation with the European Space Agency became a topic on the agenda of both scientific communities and foreign policy creators of states that were exiting one era and entering another. Therefore, this paper aims to present the nature of the cooperation between the European Space Agency and the Republic of Croatia. This cooperation is grounded in an Agreement between Croatia and the European Space Agency, a treaty concluded in 2018.[4]

The Agreement and its provisions will be analysed, with an emphasis on those that are more interesting from the perspective of general international law. Moreover, the Agreement will be positioned in the context of a wider framework of space law, while highlighting the inconsistencies in Croatia's participation. Finally, conclusions regarding the significance of the Agreement for instigating space research activities within Croatia will be given. Before that, however, a short overview of the nature of the connection between post-communist states in Central and Eastern Europe and the European Space Agency has to be provided.

detail: Russo, Arturo, The Scientific Programme Between ESRO and ESA: Choosing New Projects (1973-1977), ESA Publications, Noordwijk, 1995, str. 1-3.

2 The full text of the Convention for the Establishment of the European Space Agency available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201297/volume-1297-I-21524-English.pdf (accessed: 16 November 2022) .

3 From its very establishment the European Space Agency built upon already existing programmes of European cooperation in the fields of the exploration of outer space, which developed in the fields of telecommunication satellites owned and operated jointly on behalf of different European states. New programmes were added relatively quickly after the creation of the European Space Agency. See: Russo, 1994, also: Sebesta, 1996, pp. 11-14.

4 Agreement between Croatia and the European Space Agency, official full text available (in Croatian) in: Narodne Novine-Međunarodni Ugovori, no. 5/2018.

2. Nature of the Connection between Individual States and the European Space Agency

Different post-communist states established connections with the European Space Agency in various capacities and timeframes. Hence, their participation in the European Space Agency also differs in type and nature, especially regarding the governing bodies of the European Space Agency.[5] Here, the nature of the possible connections between the European Space Agency and states is briefly explained. In essence, the European Space Agency is an intergovernmental organisation; thus, states form its membership, which entails formally becoming parties to the 1975 Convention for the establishment of the European Space Agency.[6] This is a classic way of connecting a state to an international organisation, and these states have a direct influence on the governance of the European Space Agency through its governing bodies (organs), namely, the Council which is composed of representatives of all member states. Estonia, Hungary, Poland, the Czech Republic, and Romania are among the states that have used this traditional path to become involved in the work of the European Space Agency.[7]

However, in its subsequent practice, the European Space Agency established other ways of connection and alliance with states that were not its full members. These non-full-member states are further divided into groups of associate members and states that have a special cooperation agreement with the European Space

5 According to Articles X and XI of the Convention for the Establishment of the European Space Agency, the supreme governing body of the European Space Agency is the Council, composed of representatives of member states (Article XI, Paragraph 1). It meets either at the ministerial or delegate level, and is headed by a chairman elected by the Council every two years (Article XI, Paragraphs 2 and 3a). Decision making in the Council is by voting in which, as a general rule, each member state receives one vote, there is no voting rights pondered according to the size of financial contributions (Article XI, Paragraph 6a). However, member states are precluded from voting 'on matters concerning exclusively an accepted programme in which it does not take part' (Article XI, Paragraph 6a). Moreover, in Article XI, Paragraph 6b, there is an elaborate mechanism linking (temporary) loss of voting rights with financial contributions of states, as those are crucial for European Space Agency to operate and fund its activities (see, e.g., European Space Agency Annual Report 2021, p. 39, available at: https://esamultimedia.esa.int/docs/corporate/ESA_2021_Annual_Report.pdf (accessed: 16th November 2022)).

6 Accession procedure to the Convention for the Establishment of the European Space Agency is regulated in Article XXII of the Convention. It is fairly simple, requiring that the state wishing to join the Convention must notify the Director General who will then submit the request to the Council of the European Space Agency for a decision, which must be a unanimous one, meaning that all member states vote in favour of admitting new member to the European Space Agency.

7 Timeline of accession of these states to the Convention is as follows: 1) Czech Republic (18th Member State on 12 November 2008); 2) Romania (19th Member State on 22 December 2011); 3) Poland (20th Member State, September 2012); 4) Estonia (21st Member State on 4 February 2015); 5) Hungary (22nd Member State February 2015).

Agency. Some post-communist EU states belong to these two groups. Indeed, associate members are only such states, with the group comprising Latvia, Lithuania, and Slovenia.[8] Among the states that have separate cooperation agreements are Bulgaria, Slovakia, and Croatia, to name only those belonging to Central and Southeastern Europe.[9] There are at least two reasons for this diversity of possibilities for states to formally connect with the European Space Agency. The first is the natural desire of both the European Space Agency and the scientific communities of the respective states to get involved with each other and cooperate. To achieve this and formalise the cooperation framework, the European Space Agency created the so-called Plan for European Cooperating States.[10] It enables states to, after concluding their first framework agreement with the European Space Agency, become involved in a more formalised manner, preparing them for associate and, eventually, full membership.[11] Thus, the agreement serves a practical purpose for a state, which is to start cooperating with the European Space Agency, as it is a prerequisite to benefit more elaborate cooperation[12] under the aforementioned Plan for European Cooperating States, to which concluding an Agreement serves as the first condition to become a part of. The other set of reasons could, arguably, be found in Article 13 of the European Space Agency Convention of 1975. Long and detailed, Article 13 governs the financial

8 Associate membership is described as a 'special cooperative status' for states which are not full members of the European Space Agency but still participate in various European Space Agency 's programmes, designed to prepare associate members for full membership. In general, associate membership is devised by Article XIV Paragraph 3 of the Convention for the establishment of the European Space Agency and terms and conditions under which a state can become an associate member of the European Space Agency are further decided by the council. In brief, see: https://www.esa.int/About_Us/Business_with_ESA/Programme_for_Associate_Member_States (accessed: 16th November 2022).

9 Bulgaria and Slovakia concluded a cooperation agreement with the European Space Agency in 2015, while Cyprus followed suit in 2016, and Croatia in 2018.

10 For basic information on the Plan for European Cooperating States, see: https://www.esa.int/About_Us/Plan_for_European_Cooperating_States/General_overview (accessed 17th November 2022).

11 Under the framework of the Plan for European Cooperating States, a progression of state's involvement with the European Space Agency is devised in five year steps, starting with the conclusion of the cooperation agreement, which is a precondition for entering the Plan's framework as a European cooperating state. Afterwards, a path opens for associate and, finally, full membership. Both the involvement in the European Space Agency's programmes and financial contributions gradually increase for a state which is participating in the Plan.

12 Article 10, Paragraph 2 of the Agreement, in addition to limiting the Agreement to five years, thus prescribes that the Republic of Croatia and the European Space Agency will, during the last year of the validity of the Agreement, conduct consultations on the possible modes for continuation of cooperation. Moreover, the possibility for conclusion of the agreement on associate membership as a possibility for enhancement of cooperation is explicitly mentioned in the last sentence of the Paragraph, thus enhancing a view of the Agreement being a first step to a process of Croatia's joining more elaborate cooperation with the European Space Agency, possibly culminating in full membership.

contributions of member states to the European Space Agency.[13] These contributions can impose a significant burden on smaller states. In combination, these two sets of reasons logically give rise to the European Space Agency's willingness to become involved with states other than its full members. One of such states is, as already mentioned before, Croatia.

The Agreement between the Government of the Republic of Croatia and the European Space Agency on space cooperation for peaceful purposes was concluded on 19 February 2018 and entered into force in July of the same year in accordance with its Article 10 Paragraph 1, after the ratification in the Croatian Parliament was successfully accomplished.[14] The circumstances in which the agreement was concluded were specific and relevant, especially when considering Croatia's position as the newest member of the European Union, to which it acceded on 1 July 2013. By the time of the conclusion of the agreement, Croatia was the only member state left with which the European Space Agency had not formalised its relations in one of the aforementioned ways (full or associate membership or cooperation agreement). These facts are recalled in the preamble to the agreement, which cites the relevant acts of the European Space Agency and EU, especially their Framework Agreement of 2003 (entered into force a year later in 2004).[15] Thus, the agreement, in a way, provides an important element of enhancing cooperation within the wider EU framework and is not only restricted to bilateral cooperation between the European Space Agency and Croatia, although its legal nature is, without doubt, that of a bilateral agreement.

13 Article XIII prescribes that each member states has an obligation to contribute to the European Space Agency for two basic purposes. The first type of contributions are those covering the expenses of the European Space Agency for programmes (those that are, in turn, described in Article V). The second type of contributions are those paid for covering the 'common costs' of the European Space Agency, those being regular cost of everyday running of the European Space Agency. Under Article XIII, there are further rules as to the scale of contributions, time-restricted reduction of contribution, and special payments for new members.

14 Article 10 of the Agreement states in Paragraph 1 that the Agreement enters into force on a day on which European Space Agency receives a notification that Croatia's internal procedure required for the Agreement to enter into force is concluded. Croatian Parliament (Hrvatski Sabor) ratified the Agreement in its plenary session by a vote on 6th September 2018. It was then, in accordance with the Croatian constitution, promulgated by the president of the Republic on the 10th day of the same month.

15 The preamble to the Agreement cites relevant part of the Article 1 of the Framework Agreement between the European Community and the European Space Agency which provides for 'The establishment of a framework providing a common basis and appropriate operational arrangements for an efficient and mutually beneficial cooperation between the Parties with regard to space activities in accordance with their respective tasks and responsibilities and fully respecting their institutional settings and operational frameworks'. Full text of the Framework Agreement between the European Community and the European Space Agency available in Official Journal of the European Union, L/261.

3. Position of the Agreement in the Wider Framework of Space Law

Regarding the wider framework, the preamble of the agreement further mentions universal international treaties and agreements on the exploration and exploitation of outer space.[16] Notably, the preamble of the agreement contains references to arguably the most important treaty of the so-called space law treaty complex: the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.[17] Regarding other treaties that govern outer space, they are mentioned within the same part of preamble summarily, as 'other treaties adopted by the members of the European Space Agency and the Agency itself'. At this point, it is interesting to note the official position of Croatia regarding treaties that form the core of the so-called space law. Beginning with the Outer Space Treaty of 1967, it is quite peculiar that Croatia was still not a party to the widely accepted international agreement when the agreement with the European Space Agency was concluded in 2018. In 2022, this changed, as Croatia signed the Outer Space Treaty, with the clear intention of becoming a party as soon as possible.[18]

Eventually, the Croatian Parliament (the Sabor) ratified the Outer Space Treaty on 8 February 2023 and the President of Croatia signed the ratification bill into law

16 Precisely, only the Outer Space Treaty of 1967 is mentioned explicitly in the preamble to the Agreement, while other treaties governing exploration and exploitation of outer space are mentioned only summarily, as: 'other multilateral treaties of which the member states of the Agency are parties and which were accepted by the Agency'.

17 For the text of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, see: United Nations Treaty Series, vol. 206, 1967.

18 According to the Article XIV of the Outer Space Treaty, 'This Treaty shall be open to all States for signature. Any State which does not sign this Treaty before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time'. However, in Paragraph 2 of the same Article it is prescribed that 'This Treaty shall be subject to ratification by signatory states'. For Croatia, the Treaty, having been signed by the representatives of the government, is currently pending ratification in front of the Parliament (the Sabor). See: https://n1info.hr/english/news/croatia-joins-1967-outer-space-treaty-paving-the-way-for-space-exploration/ (accessed 23rd November 2022). In an explanatory note to the submission of the Draft Law on Ratification of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, sent by the Government of Croatia to the Croatian Parliament, it is stated that 'This law ratifies the Treaty which will enable the Republic of Croatia to more closely contribute to the development of space policy. Moreover, it is important to note that the Treaty has 112 state parties, and that, out of the EU member states, only the Republic of Croatia and the Republic of Lithuania are not parties to the Treaty'. (translated by the author, for the document in Croatian see: https://www.sabor.hr/sites/default/files/uploads/sabor/2022-11-10/163602/PZ_412.pdf (accessed 23rd November 2022)).

two days later, thereby concluding the process of Croatia's accession to the primary international law document governing outer space.[19] Here, a short step-back should be made, emphasising this inconsistency. Recalling a treaty in which a state is not a party as relevant in a preamble of another instrument may seem inconsistent. Strictly speaking, this position should be agreed upon, but the nature of the provisions of the 1967 Outer Space Treaty provides some help in resolving the potential difficulties that may arise. At present, it is clear that most, if not all, provisions of the Outer Space Treaty reflect customary international law.[20]

However, if and when differences between the Treaty's provisions and customary law arise, Croatia will, due to the aforementioned provisions, be bound by the relevant parts of the Treaty, at least for interpreting the Agreement. This follows from the basic principle of interpretation, namely, that the lex specialis derogat legi generali. The same can be argued for other treaties forming the space law, although Croatia is a party to at least some of them. Putting aside the aforementioned interpretation, with Croatia joining the Outer Space Treaty, the inconsistency becomes less stringent; however, somewhat of a feeling of resentment remains. A state not being a party to a treaty that forms the cornerstone of space law, while at the same time concluding an Agreement that should serve as a basis for a relatively nuanced cooperation in the field of space exploration and science of outer space is indeed an upside-down position. It should have been logical to first become a party to the cornerstone of the space law, the Outer Space Treaty, as a prerequisite to starting the procedure of negotiations for the Agreement. This would enable the Republic of Croatia to rescind any doubts around the framework under which the Agreement will be applied.

Moreover, it would serve as a strong statement of the commitment of a state to start a new chapter in the development of its space activities. Therefore, Croatia's decision to join the Outer Space Treaty should be viewed positively, although the feeling remains that the process was undergone in a somewhat wrong order during the creation of a legal framework for Croatia's space activities. Regarding other core treaties of space law, Croatia is a party to the Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space (the

19 Paragraph 2 of the Article XIV prescribes that „This Treaty shall be subject to ratification by signatory States." See also the Law on the Ratification of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, text available (in Croatian) in: Narodne novine-Međunarodni ugovori, no. 2/2023.

20 On the views of both states and the international jurisprudence on the customary nature of provisions of the Outer Space Treaty, see: Responses to the set of Questions provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space, Fifty-sixth session of the Legal Subcommittee of the Committee on the Peaceful Use of Outer Space, A/AC.105/C.2/2017/CRP.6, 2017.

so-called Rescue Agreement) of 1968 and the Convention on International Liability for Damage Caused by Space Objects (the so-called Liability Convention) of 1972.

However, it is neither a party to the Convention on Registration of Objects Launched into Outer Space (the so-called Registration Convention) of 1975 nor the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the so-called Moon Agreement) of 1979.[21] We should now turn to the Agreement proper, examining some of the stipulations found in its articles, to get a robust look into the nature and legal framework of Croatian cooperation with the European Space Agency.

4. Agreement Proper: Selected Articles and Their Interpretations

4.1. Purposes, Fields, and Ways of Cooperation: Articles 1 and 2 of the Agreement

Moving away from the preamble of the Agreement and its position in the framework of space law in general, its first few articles regulated the purposes, fields, and ways of cooperation. Article 1 thus generally regulates the purposes of cooperation, stating that the purpose of the agreement is to provide a legal framework for the parties in the fields of exploration and peaceful exploitation of outer space and for projects of mutual interest.[22] Articles 2 and 3 are framed as further elaboration of the general purposes established in Article 1 and are generally technical in nature, providing a legal framework for the mobility of staff of the European Space Agency and research institutions of Croatia, mutual scientific conferences, promotion of knowledge and sciences on the exploration of outer space, and so on.[23] It will be for the space sector in Croatia to take advantage of some of the fields of cooperation mentioned in these articles to the Agreement and use the possibilities they open.

From the legal point of view, more interesting however are Paragraph 2 of Article 2 and Paragraph 1 of Article 3. They provide a tool to further elaborate on legal and other practical issues regarding cooperation between the parties. By stipulating that

21 For the status of various treaties forming the space law, see: https://www.unoosa.org/res/oosadoc/data/documents/2022/aac_105c_22022crp/aac_105c_22022crp_10_0_html/AAC105_C2_2022_CRP10E.pdf (accessed 25th November 2022).

22 Article 1 of the Agreement thus states as follows: 'Purpose of this Agreement is to establish legal framework for cooperation between the parties in the field of exploration and peaceful use of outer space and conditions for development of projects of mutual interest' (unofficial translation).

23 Specifically, fields of cooperation named under Article 2 of the Agreement are space science, astronomy and astrophysics, exploration of Solar system and solar physics, telecommunications, microgravity research, etc.

subsequent agreements could be made, they however introduce a specific type of provisions to the agreement. Not unknown to international practice, on the contrary, very common especially in an era when international agreements become ever more complex in the scope of the issues they regulate, these agreements will, once concluded, present a subsequent practice in matters regarding the agreement.

4.2. Privileges and Immunities of the European Space Agency: Articles 3 and 6 Combined

Article 3 Paragraph 7 opens the question of privileges and immunities, which are granted to the European Space Agency by the agreement. By this article, duties on imports and exports from and to Croatia of goods and raw materials needed for purposes of projects of joint interest to both parties are levied. This, in turn, sheds light on another part of the agreement, namely, Article 6, in which further privileges and immunities provided for the European Space Agency and its staff while operating in Croatia are regulated. In its structure, Article 6 does not stipulate specific privileges and immunities. Rather, it recalls the well-known instrument, the Convention on the Privileges and Immunities of Specialised Agencies of the United Nations, from 1947.[24] Article 6 of the agreement provides that the European Space Agency and its staff will be accorded the same privileges and immunities as those accorded to United Nations specialised agencies under the 1947 Convention. Thus, the European Space Agency and its staff are granted functional immunity[25] while serving in their official capacity within Croatia, and questions of interpretation and scope, which would otherwise (in the case of prescribing specific norms on immunity within the agreement) surely arise sooner or later, are avoided.

Regarding the privileges and immunities of the United Nations and its specialised agencies, a significant body of practice of states and international jurisprudence exists,[26] so its implementation in the case of European Space Agency staff operating within Croatia should also not present a problem. Paragraph 2 of the same Article 6 prescribes that in subsequent agreements, further elaborations on how privileges and immunities will be implemented in cases of projects of mutual interest.

24 Full text of the Convention on the Privileges and Immunities of Specialised Agencies of the United Nations is available in: United Nations Treaty Series, vol. 33, 1949.

25 Functional immunity, in brief, means that protection of persons who enjoy it is confined to their performance of official functions within the state according them such an immunity. On nature of immunities of the international organizations, including the UN Specialised Agencies, see: Lapaš, Davorin, 2008, pp. 95–109. Also: King, 1949.

26 In that regard, as a groundbreaking, well-known example, the so-called Bernadotte case could be mentioned. See: Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports, 1949, pp. 174–220.

In our view, this stipulation should be carefully and narrowly interpreted. Any part of the possible subsequent agreements concerning privileges and immunities should be carefully designed to be strictly of an implementational nature. Otherwise, a situation of legal uncertainty might arise, specifically one in which something written in the subsequent agreement could alter the privileges and immunities as granted to the European Space Agency staff by the agreement. Such a situation should be avoided because it could create a situation inconsistent with the agreement, which is the act from which all subsequent agreements are derived. Indeed, it could be argued that a subsequent agreement that would go beyond or restrict the privileges and immunities as provided by the agreement (and, in turn, the 1947 Convention) would be contrary to the agreement, as it would not present an elaboration but rather a new rule. This conclusion is only further affirmed by the already mentioned wording of Article 6, which mandates subsequent agreements to be restricted to only implementation and not to changes in the nature of the privileges and immunities.

4.3. Status of Croatia in Governing Bodies of the European Space Agency

Other ways of interaction between Croatia and the European Space Agency regulated by the agreement are the observer status of Croatia in the governing bodies of the agency and the exchange of information. It is stipulated that Croatia is allowed to be present at the meetings of the European Space Agency's Council, the Plan for European Cooperating States Committee, and other bodies subordinated to them. Croatia is to receive all the relevant materials needed for meaningful participation in the aforementioned bodies. The representation is to consist of one representative who is able to have an advisor present along with him. Specifically, being present means that Croatia will be accorded observer status, which does not accord it the right to vote (as it is not yet a member of the European Space Agency). However, even this can be considered an important step, as representatives of Croatia can participate at the meetings, insightfully observe the proceedings, and extract valuable information from such participation.

4.4. Dispute Settlement: Article 9

Of particular interest from standpoint of international law is, however, Article 9, which governs the settlement of disputes arising from the agreement. It stipulates that disputes that arise will be first addressed (and hopefully resolved) by means of consultation, an extra-judicial way of the settlement of international disputes. However, if this does not lead to a solution, a special arbitration tribunal is established

by the agreement. The composition of such an arbitration court is one well established in standards of international adjudication and, in many cases,[27] with every party naming one arbitrator and the president being nominated by joint consensus, and if this consensus is absent, by the president of the International Court of Justice.

Basically, it is a classical arbitration clause found in many international agreements. Article 9 also provides that a judgment resulting from such an arbitration would be final and binding for the parties. Furthermore, rules governing such an arbitration are to be laid out in a subsequent agreement that belongs to the same category as those already mentioned regarding the fields of cooperation, privileges, and immunities. In this case, such a subsequent agreement, which lays out the rules of arbitration, is indeed somewhat different from previous agreements of the same type because it actually establishes some rules and is not restricted only to implementation.

5. Current Status of Space Legislation and Policy in Croatia

The issues of the current status of space legislation and policy in Croatia are intrinsically linked to the agreement, which is the main topic of this article. Therefore, they deserve at least a brief overview. Sadly, as will be shown, space legislation and policy in Croatia constitute an underdeveloped to non-existent field of the municipal legal system. Croatia has no national space act nor any other piece of legislation which would substitute it, or at least partially be devoted to the regulation of space activities and the specific obligations of legal persons involved in them. To the best of our knowledge, there has never been even an initiative to begin the procedure of drafting such a piece of legislation, either at the academic or legislative level. Therefore, any initiative in space exploration and exploitation, be it public or private, is left without specific rules and legal provisions that would regulate it. Establishing whether this is good or not is beyond the scope of this article; however, increasing numbers of space activities and projects dealing with scientific and even commercial activities connected to, inter alia, this agreement might, in the future, possibly justify thinking about bringing up the topic of creating a legal framework for space activities in the Croatian national legal system.

Regarding policy, the outlooks are slightly better, at least partially, due to the subsequent developments in connection to this Agreement. The Ministry of Science and Education of the Republic of Croatia, which is a governmental department that conducted negotiations and concluded the agreement on behalf of the Government of

27 On arbitration as a peaceful means of settlement of disputes in general, see: Shaw, 2008, pp. 1048–1056.

Croatia in the first place, set up a programme based on the Decision on Measures for Strengthening National Participation in Programmes of the European Union in the Field of Exploration, Innovations, and Space (hereinafter referred to as the Decision).[28] The Decision allows for government funding to be provided for preparatory stages of scientific research projects connected to, among others, programmes developed and facilitated by the European Space Agency. Therefore, the Decision is a tool for the implementation of the Agreement and presents a recognition of the need for governmental support for the Croatian scientific community wishing to engage with the European Space Agency on various activities for which the Agreement provides a general framework. The Ministry also provides a periodic evaluation of financial contributions provided to various research institutions, which shows that the measure has been indeed found to be useful and is used by the scientific community.[29]

However, although the programme mentioned in the previous paragraph shows that governmental institutions recognise the potential of space exploration as a research activity, Croatia still lacks a comprehensive national space strategy. The initiative to adopt one, however, has been present in the Croatian public space and media for quite a while. The initiative came from a group of scientists and professionals involved in projects concerning outer space, which were organised by a non-governmental organisation called the Adriatic Aerospace Association.[30] The Association has held and is holding various meetings and consistently promotes peaceful scientific space activities in Croatia. Among these activities, advocating for a national space strategy holds a prominent place, as evidenced by the fact that the Association created an (unofficial, of course) draft of the text of the strategy.[31] Although the analysis of this document, which is publicly available and has attracted at least some media coverage in Croatia[32], goes beyond the scope of this article, it should be

28 Text of the Decision (in Croatian) is available at: https://mzo.gov.hr/UserDocsImages//dokumenti/Medunarodna/Obzor2020/Obzor2021-2025//Odluka%20o%20mjerama%20za%20jacanje%20nacionalnog%20sudjelovanja%20u%20programima%20Europske%20unije%20u%20podrucju%20istrazivanja%20inovacija%20i%20svemira.pdf (accessed 31 January 2023).

29 For a list of institutions to which financing was provided in accordance with the Decision, see: https://mzo.gov.hr/vijesti/odluka-o-mjerama-za-jacanje-nacionalnog-sudjelovanja-u-programima-europske-unije-u-podrucju-istrazivanja-inovacija-i-svemira/4379 (accessed 31 January 2023).

30 For more information on work and organizational structure of the Adriatic Aerospace Association, see its website: https://a3space.org/ (accessed 31 January 2023).

31 The text of the draft proposal for a National Space Strategy of Croatia is available, in Croatian, at: https://a3space.org/wp-content/uploads/2020/01/Nacionalna-svemirska-strategija-14-12-18.pdf (accessed 31 January 2023).

32 For example, see an article at: https://www.tportal.hr/tehno/clanak/hrvatskoj-hitno-treba-nacionalna-svemirska-strategija-ako-to-ne-shvatimo-nepovratno-cemo-zaostati-20200129 (accessed 31 January 2023) .

noted that in its various propositions and ideas, the notion of enhancing cooperation with the European Space Agency occupies a prominent place.

6. Conclusions and Final Assessments

Finally, we present an overall assessment of the Agreement. It can hardly be doubted that a formal, regulatory framework for cooperation between the European Space Agency and Croatia and especially its scientific community that was lacking before this agreement was concluded. With it, a new relationship opened, or at least formalised, as cooperation between the European Space Agency and Croatian scientific institutions existed beforehand at the individual level. Arguably, the most important feature of the Agreement is that it enables Croatia to become involved with the European Space Agency and its broad range of activities in space exploration in a formalised manner. Moreover, the Agreement is a first step into the path of Croatia's eventual accession to the European Space Agency and, as such, has a value outreaching its actual contents. From a purely legal viewpoint, the agreement is of a classic structure and shows many features common to treaties of various kinds.

However, it is interesting to note how subsequent agreements operate within the framework of the agreement and the privileges and immunities accorded to the staff of the European Space Agency while operating in Croatia, even though Croatia has not become a member of the agency. In conclusion, the Agreement provides a framework; however, its real impact on the space sector in Croatia[33] will depend on the proactive use of the opportunities it provides for both sides.

33 For an overview of the emerging space sector in Croatia, See Orešković and Grgić, 2021, pp. 77–126.

Bibliography

- Agreement between Croatia and the European Space Agency, official full text available (in Croatian) in: Narodne Novine-Međunarodni Ugovori, no. 5/2018.
- Convention for the Establishment of the European Space Agency [Online] Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201297/volume-1297-I-21524-English.pdf (accessed: 16th November 2022).
- Convention on the privileges and immunities of specialized agencies of the United Nations is available in: United Nations Treaty Series, vol. 33, 1949.
- Croatia joins 1967 Outer Space Treaty, paving the way for space exploration (2022) [Online] https://n1info.hr/english/news/croatia-joins-1967-outer-space-treaty-paving-the-way-for-space-exploration/ (accessed 23rd November 2022).
- European Space Agency Annual Report 2021 (2021) [Online] https://esamultimedia.esa.int/docs/corporate/ESA_2021_Annual_Report.pdf (accessed: 16th November 2022).
- King, J. K. (1949) The Privileges and Immunities of the Personnel of International Organizations: A Study of Their Special Status with Respect to the Jurisdiction of the State Upon Whose Territory They Carry Out Their Functions, Odense: Strandberg Bogtryk.
- Konačni prijedlog zakona o potvrđivanju Ugovora o načelima koja uređuju aktivnosti država u istraživanju i iskorištavanju svemira, uključujući Mjesec i druga nebeska tijela (2022) [Online] https://www.sabor.hr/sites/default/files/uploads/sabor/2022-11-10/163602/PZ_412.pdf (accessed 23rd November 2022).
- Lapaš, D. (2008) Pravo međunarodnih organizacija, Zagreb: Narodne novine.
- Nacionalna svemirska strategija (prijedlog). [Online] Available at: https://a3space.org/wp-content/uploads/2020/01/Nacionalna-svemirska-strategija-14-12-18.pdf (accessed 31st January 2023).
- Odluka o mjerama za jačanje nacionalnog sudjelovanja u programima Europske unije u području istraživanja, inovacija i svemira. [Online] Available at: https://mzo.gov.hr/UserDocsImages//dokumenti/Medunarodna/Obzor2020/Obzor20212025//Odluka%20o%20mjerama%20za%20jacanje%20nacionalnog%20sudjelovanja%20u%20programima%20Europske%20unije%20u%20podrucju%20istrazivanja%20inovacija%20i%20svemira.pdf (accessed 31st January 2023).
- Orešković, L., Grgić, S. (2021) The New EU Space Regulation: One Small Step or One Giant Leap for the EU, *Croatian Yearbook of European Law and Policy*, 17(77), pp. 77-126
- Plan for European Cooperating States [Online] https://www.esa.int/About_Us/Plan_for_European_Cooperating_States/General_overview (accessed 17th November 2022).

- Programme for Associate Member States [Online] https://www.esa.int/About_Us/Business_with_ESA/Programme_for_Associate_Member_States (accessed: 16th November 2022).
- Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports, 1949, pp. 174-220.
- Russo, A. (1994) ESRO's Telecommunications Programme and the OTS Project (1970-1974), ESA Publications: Noordwijk.
- Sebesta, L. (1996) The Availability of American Launchers and Europe's Decision „To Go IT Alone", ESA Publications: Noordwijk.
- Shaw, M. N. (2008) International Law, Cambridge.
- Smrekar, M., Što se kuha na 'Ruđeru'? Hrvatsku ozbiljno spremaju za svemirsku utrku, nude Nacionalni svemirski program, trebaju nam sateliti. [Online] Available at: https://www.tportal.hr/tehno/clanak/hrvatskoj-hitno-treba-nacionalna-svemirska-strategija-ako-to-ne-shvatimo-nepovratno-cemo-zaostati-20200129 (accessed 31st January 2023).
- Status of International Agreements relating to activities in outer space as at 1 January 2022 (2022) [Online] https://www.unoosa.org/res/oosadoc/data/documents/2022/aac_105c_22022crp/aac_105c_22022crp_10_0_html/AAC105_C2_2022_CRP10E.pdf (accessed 25th November 2022).
- Webpage of the Adriatic Aerospace Association, [Online] Available at: https://a3space.org/ (accessed 31st January 2023).
- Webpage of the Ministry of Science and Education of the Republic of Croatia, [Online] Available at: https://mzo.gov.hr/vijesti/odluka-o-mjerama-za-jacanje-nacionalnog-sudjelovanja-u-programima-europske-unije-u-podrucju-istrazivanja-inovacija-i-svemira/4379 (accessed 31st January 2023).
- Zakon o potvrđivanju Ugovora o načelima koja uređuju aktivnosti država u istraživanju i iskorištavanju svemira, uključujući Mjesec i druga nebeska tijela, in: Narodne novine-Međunarodni ugovori, no. 2/2023