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JAKUB HANÁK* – JAN LEICHMANN**

Acquisition of Agricultural Land in the Czech Republic

ABSTRACT: *The article focuses on the acquisition of agricultural land in the Czech Republic. It aims to describe the topic in the context of both historical and property law. The article introduces historical context of property ownership relations and their composition. Agricultural land was nationalized by the State in the past. Therefore, after the Velvet Revolution, it was necessary to restate a significant part of state-owned property back to its original owners.*

Privatization and related matters form a significant part of the present analysis because it still affects the transfer of agricultural land from the State to private individuals. Historically, transfers of agricultural land have also been restricted on the basis of nationality. However, after the accession of the Czech Republic to the European Union, this restriction has gradually been lifted.

Pre-emption also remains an important issue. At present, however, there is no pre-emption right in general. It affects only certain types of agricultural land, where the pre-emption right is established in favor of the State.

The next part of the article deals with actual transfers of agricultural land. This part introduces the basic requirements and elements of transfers, with an emphasis on transfers of state-owned agricultural land. On behalf of the Czech Republic, agricultural land is administered by the State Land Office, which is responsible for the disposal and alienation of land. First, the article focuses on privileged transfers the land in question is transferred only to a certain circle of subjects. In the succeeding section, methods of land transfers to non-privileged entities are described.

KEYWORDS: Czech Land Law, acquisition of land, agricultural land, restitution, pre-emptive right

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1. Introduction

In the Czech Republic, it is mandatory to register land ownership in a public register, the Cadastre of Real Estate. For registration purposes, land is divided into two types: agricultural and non-agricultural. Pursuant to Section 3(2) of Act No. 256/2013 Coll., the Cadastral Act, as amended, agricultural land includes arable land, hop-field, vineyards, gardens, orchards, and grassland (formerly meadows and pastures).

A special act for the protection of agricultural land was adopted in 1959. It was replaced by acts of the same name in 1966 and 1992 (after the Velvet Revolution). The last of these acts, Act No. 334/1992 Coll., remains in force. These regulations ensure the protection of agricultural land from erosion, pollution, and non-agricultural use. Non-agricultural land that is necessary for agricultural production (e.g., farm tracks, irrigation reservoirs, or drainage ditches) and ponds for fish farming are protected by these acts as well.

The following information on agricultural land is available in the Cadastre of Real Estate: type of land, type of land use (e.g., tree plantation, border, photovoltaic plant), type of land protection (i.e., national park or water protection area), and the Evaluated Soil Ecological Units (known as BPEJ), which reflect the quality of the soil.

Unfortunately, registration in the Cadastre of Real Estate often does not correspond to reality because of historical inaccuracies or because landowners do not usually report changes. Any doubts regarding the nature of the land were resolved by the municipal authorities. The nature of the land had to be examined retrospectively in the process of restitution (most often as of June 24, 1991, when Act No. 229/1991 Coll. The Land Act became effective). For these transfers, it was necessary to interpret the definition of agricultural land as broadly as possible.[1]

Farmers in the Czech Republic still conduct farming mainly on rented land, although the share of rented land has decreased from 92% to less than 73% over the last 20 years.[2] However, land-use relations are voluntarily registered in the Cadastre of Real Estate. In practice, this does not occur for financial reasons. Fortunately, information on agricultural land users can be obtained from the Public Land Register (LPIS),[3] which was created primarily to provide European subsidies.

1 Judgment of the Supreme Court of November 18, 2009, Ref. No. 28 Cdo 2969/2009.
2 Czech Statistical Office. Integrated Agricultural Survey (2020) [Online]. Available at: https://www.czso.cz/csu/czso/integrated-farm-survey-2020 (Accessed: 6 December 2021).
3 Information [Online]. Available at: https://eagri.cz/public/app/lpisext/lpis/verejny2/plpis/ (Accessed: 6 December 2021).

In 1993, 4,283,010 hectares of agricultural land was registered in the Cadastre of Real Estate. The latest figure for 2020 is only 4,200,204 hectares.[4] Thus, almost 8.5 hectares of fields, meadows, or gardens have disappeared each day since the Czech Republic was founded, mostly having been converted into construction properties, though parts have been reforested. On the other hand, the price of agricultural land has been rising steadily. Since 2004, when the oldest data were available from the Czech Statistical Office, until 2020, it has increased almost five times, from CZK 4.98/m^2 to CZK 24.2/m^2.[5]

2. Historical context

The current land ownership structure and land size are the result of a complex historical development. Between 1948 and 1989, the communist regime tried to nationalize land. Owners were often illegally deprived of agricultural land or left with bare ownership (the land was used by agricultural cooperatives). After the Velvet Revolution (as early as 1990 and 1991, still in Czechoslovakia), legislation regulating land restitution was adopted. Its aim was to mitigate property injustices and wrongs committed by communist regimes. Former owners obtained their confiscated agricultural land or substitute land if the original land could no longer be given back (e.g., due to construction of urban development). However, restitution was also considered a form of privatization.[6] By privatizing businesses and land, the state sought to establish a market economy.

Restitution and privatization are therefore intertwined. This connection was also reinforced by the possibility of former owners (restituents) selling their claims for substitute land. However, this applied until 2005, when only the original restituents and their heirs were entitled to acquire land (this decision is the so-called first restitution dot).[7] Neither the constitutional order nor the international obligations of the Czech Republic imply an obligation to remedy historical injustices (there is no constitutional right to restitution): It was therefore a benefit provided by the state.[8]

In the 1990s, buildings, technological equipment, livestock, and movable assets were privatized. Transfers of agricultural land during this period were rare. Until 1998, transfers of state-owned land were performed by the Land Fund of the Czech Republic at its discretion based on the demands of former owners, in

4 Information [Online]. Available at: https://cuzk.cz/Periodika-a-publikace/Statisticke-udaje/Souhrne-prehledy-pudniho-fondu.aspx (Accessed: 6 December 2021).

5 Czech Statistical Office. Table 7.1 The average agricultural land prices [Online]. Available at: https://www.czso.cz/csu/czso/ipc_ts (Accessed: 6 December 2021).

6 Judgment of the Constitutional Court of June 4, 1997, Ref. No. Pl. ÚS 33/96.

7 Judgment of the Constitutional Court of December 13, 2005, Ref. No. Pl. ÚS 6/05.

8 For example, Judgment of the Constitutional Court of November 19, 1999, Ref. No. IV ÚS 432/98.

a process that was very non-transparent.[9] The laws regulating the mechanism of privatization in other areas also did not target the de-nationalization of agricultural property.[10] Privatization and restitution of agricultural land therefore began only after the adoption of Act No. 95/1999 Coll. on the conditions for the transfer of agricultural and forestry land from state ownership to other persons. This came into force in May 1999. This Act was replaced on January 1, 2013, by Act No. 503/2012 Coll., which took over its main principles (see below).

Privatization started to speed up after the adoption of Act No. 95/1999 Coll. The state initially intended to privatize 500 thousand hectares of land, subsequently increasing the scope to 600 thousand hectares (i.e., about 14% of the total area of agricultural land). Approximately 276 thousand hectares were transferred in 2005, 452 thousand hectares three years later, and 547 thousand hectares in 2011. Thus, in 10 years, the restitution process was almost complete. The latest figures (as of December 31, 2019) show that only a few particularly complex cases remain to be resolved, and 99.79% of the restitution applications have been decided.[11]

The Land Fund announced public offers for the sale of land under Act No. 95/1999 Coll. Unfortunately, the Land Fund often preferred the applications of farmers to former owners. This was considered a violation of the law. The Supreme Audit Office also criticized such practices.[12] After several years of great struggle and search for a just solution, [13] the legislation finally established the following order of applicants: 1. Former owner (restituent), 2. Tenant who has been using the offered land for at least 36 months, 3. Farmers who have been using at least 10 hectares of the offered land for 36 months, or owners using at least 10 hectares of agricultural land at the location of the offered land who have been farming in the Czech Republic for 36 months.

If no one expressed their interest, the land was offered to any natural person (a citizen of an EU country, a European Economic Area country, and Switzerland) in a commercial tender. Thus, priority was given to former owners and farmers who actually farmed the land. Price was also more favorable: The land was sold at prices below market value. This approach was intended to support private farmers. The income from the sale was not decisive for the state.[14] An advantage of the privatization process was the possibility for beneficiaries to acquire substitute land outside their place of residence and outside the place where the

9 Zeman, 2013, pp. 242, 252.

10 Adamová et al., 2020, p. 766.

11 Green report on agriculture, 2019, p. 123 [Online]. Available at: https://eagri.cz/public/web/mze/zemedelstvi/publikace-a-dokumenty/zelene-zpravy/zelena-zprava-2019.html (Accessed: 15 December 2022).

12 Sale of state-owned real estate managed by the Land Fund of the Czech Republic (2008). Audit conclusions [Online]. Available at: https://www.nku.cz/informace/informace-08-12.pdf (Accessed: 15 December 2021).

13 Hálová and Doležal, 2012, p. 892.

14 Explanatory memorandum to Act No. 95/1999 Coll.

unjustly confiscated property was originally located.[15] However, the possibility of using agricultural land was often precluded by the fact that the land was located within larger blocks or that there was no access to it. This obstacle is still being remedied through land consolidation. However, former owners competed for the land offered to them, effectively reducing the value of their restitution claims. Although they could use the restitution claim to pay the price, they had to offer a higher price than others.

The church property restitution, which also included about 33,000 hectares of agricultural land, has also been almost completed.[16]This lasted for a much longer period. In fact, they were only launched with the adoption of Act No. 428/2012 Coll., on Property Settlement with Churches, and Religious Societies. This Act also led to the separation of the church and the state.

Sales of land owned by the state have had a significant impact on the land market. Privatization, as mentioned above, effectively started in 2001 and continued until around 2012. By that time, 99% of the allocated land had been transferred. In contrast, in the 1990s, transfers of agricultural land were very limited, as farming was not profitable. It was more profitable for farmers to lease land than buy it. Agricultural land was mainly sold, where it could be converted into construction land (mostly around larger towns).[17]

3. Restrictions on the acquisition of agricultural land

■ *3.1. Foreigners*

The rules for the acquisition of agricultural and other land by foreigners were originally regulated by Foreign Exchange Acts Nos. 528/1990 Coll. and 219/1995 Coll. Before the Czech Republic joined the EU (i.e., until April 30, 2004), foreigners could acquire agricultural land in principle only by inheriting it. It should be noted that a foreign national was not considered a foreigner for these purposes if they had permanent residence in the Czech Republic. The same applies to legal persons with a registered office in the Czech Republic. The Czech Republic (like Slovakia, Lithuania, or Hungary) negotiated a seven-year transitional period restricting the acquisition of agricultural and forest land.[18] The main reason for the transitional period was concerns that Czech citizens and farmers would not be able to compete with offers from foreign bidders for agricultural land. This could lead to higher

15 Zeman, 2013, p. 251.

16 Explanatory Memorandum to Act No. 428/2012 Coll.

17 Soil: situation and outlook report. December 1999, p. 17 [Online]. Available at: https://eagri.cz/public/web/mze/puda/dokumenty/situacni-a-vyhledove-zpravy/ (Accessed: 15 December 2021).

18 Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia (2003).

prices, land speculation, and, consequently, threaten the competitiveness of the agricultural sector. Foreign entities could not even participate in the privatization of agricultural land under Act No. 95/1999 Coll.

However, lawyers believed that seriously interested parties could acquire agricultural and forest land relatively easily by establishing a business corporation or purchasing it.[19] In fact, Czech legal entities owned by foreign capital could acquire agricultural land in the Czech Republic without restrictions.

'There have been no significant investments by foreigners in Czech land,'[20] although farmland prices in the Czech Republic in 2011 were significantly lower than in Western Europe, and have remained so until date. For this reason, the Czech Republic did not request an extension of the transitional period by three years. On the contrary, Slovakia, Hungary, and Lithuania decided to extend the transitional period.[21] Since then, no relevant proposals to restrict the acquisition of agricultural land by foreigners have been introduced in the Czech Parliament. Neither the Czech Statistical Office[22] nor the cadastral authorities record the share of agricultural land owned by foreigners or Czech companies owned by foreigners. Therefore, a more detailed analysis is very difficult.

■ *3.2. Pre-emption right*

In the Czech Republic, there is no legislation establishing a pre-emption right to agricultural land for any entity other than the State. The most significant such right is the State's pre-emption right to open land (i.e., including agricultural land) located outside developed areas of municipalities in national parks, national nature reserves, and national natural monuments. Pursuant to Section 61 of Act No. 114/1992 Coll., on Nature Protection, the owners of these lands are obliged to offer them for purchase first to the nature protection authority. According to the Constitutional Court, the state has a positive obligation under the Constitution (Article 7) to protect the environment, which it can fulfill, *inter alia*, by centralizing ownership of land in the national park. Only one of the components of the ownership triad (*ius disponendi*) is limited by pre-emption rights. Therefore, the Constitutional Court did not find this pre-emption right to be unconstitutional.[23]

For a relatively long time, the state had a pre-emptive right to land that it privatized under Act No. 95/1999 Coll. (unless transferred to former owners).

19 Fráňa, 2007, p. 840; Gala, 2010.

20 Soil: situation and outlook report. December 2012, p. 47 [Online]. Available at: https://eagri.cz/public/web/mze/puda/dokumenty/situacni-a-vyhledove-zpravy/ (Accessed: 15 December 2021).

21 Commission decision of April 14, 2011, extending the transitional period concerning the acquisition of agricultural land in Slovakia.

22 Czech Statistical Office. Integrated Agricultural Survey (2020) [Online]. Available at: https://www.czso.cz/csu/czso/integrated-farm-survey-2020 (Accessed: 6 December 2021).

23 Judgment of the Constitutional Court of September 25, 2018, Ref. No. Pl. 18/17.

However, since 2013, the existence of this right has been limited to a period until the full payment of the purchase price for the land or to a period of five years after the date of registration of the ownership right in the Cadastre of Real Estate.[24] The purpose of this limitation was to support the agricultural land market and improve the position of farmers.[25] The gradual repayment of the purchase price (approximately half of the land was privatized with the possibility of payment by installment) led to the termination of this pre-emption right. However, the state rarely uses the pre-emption right (only 84 cases in 2013–2020),[26] even though it has a shortage of agricultural land.

In particular, right-wing politicians and landowners consider legal pre-emption rights an undesirable restriction on property rights. There have been repeated proposals to abolish pre-emption rights for land in national parks (most recently, in spring 2021).[27] The Association of Private Agriculture of the Czech Republic and the Union of Landowners argue that statutory pre-emption rights would result in lower land prices and worsen access to land for new farmers. At the same time, neither the quality of the land nor its protection from non-agricultural use would be improved.

In view of this public opinion, it is not surprising that rare attempts to adopt pre-emption have not been successful. The first proposal was made in 2016 by three Communist Party deputies[28] who proposed that the owner of agricultural land[29] be obliged to offer the land to the state and to a tenant who has been using agricultural land in the municipality for at least three years and has resided in the Czech Republic for at least ten years (registered office in the case of legal entities). The farmer would have two months to accept the offer. The right of pre-emption was to apply also to state land. At the same time, the state would have the pre-emptive right if the farmer did not want to purchase the land. However, the government did not approve the proposal because of the lack of a guarantee of achieving the main objective of the proposal, i.e., the preservation of the existing scope of agricultural land. It also pointed out that the 10-year residency requirement was in breach of EU law.[30] Ultimately, the Chamber of Deputies did not discuss the proposal before the end of the parliamentary term. This demonstrates the low interest of politicians

24 Section 15 of Act No. 503/2012 Coll.

25 Fialová, 2012.

26 Final accounts of the organizational unit of the State for 2020 [Online]. Available at: https://www.spucr.cz/statni-pozemkovy-urad/povinne-zverejnovane-informace/ekonomika/rozpocet (Accessed: 8 December 2021).

27 Parliamentary Document No. 731/5 [Online]. Available at: https://www.psp.cz/sqw/historie.sqw?o=8&t=731 (Accessed: 4 December 2021).

28 Parliamentary Document No. 1046/0. [Online] Available at: https://public.psp.cz/en/sqw/sntisk.sqw?o=7 (Accessed: 4 December 2021).

29 However, gardens, land in developed areas, and land intended for non-agricultural purposes were not considered agricultural land.

30 Parliamentary file No. 1046/0 [Online]. Available at: https://public.psp.cz/en/sqw/sntisk.sqw?o=7 (Accessed: 4 December 2021).

in dealing with this controversial issue. Lawyers have also paid minimal attention to it.[31]

Subsequently, in 2017, Minister of Agriculture, Marian Jurečka, proposed a softer version of the pre-emptive right. However, he did not officially submit a proposal to change the law, but an unofficial proposal[32] requiring the owner of agricultural land to inform the tenant of the intention to sell the land. The conclusion of the contract could take place 30 days after receipt of the notification. However, the tenant would not be able to prevent the sale of theland. The second government of Prime Minister Andrej Babiš (in office since 2018) wanted to introduce an information obligation for landowners. The government pledged to 'enforce the notification obligation for the sale of agricultural land to those who farm on it.'[33] However, no such proposal was submitted by the government by the end of its term in the autumn of 2021.

4. Acquisition of agricultural land by legal persons

As a result of the transformation of State-owned enterprises and agricultural cooperatives, land in the Czech Republic is mainly managed by legal persons. In 1997, they farmed 74.9% of the land; in 2005, 70.7%; in 2011 and 2020, 70.1%.[34]

By means of Act No. 95/1999 Coll., the legislator excluded the possibility of legal persons acquiring agricultural land sold by the state because of concerns that legal persons might buy larger amounts of land for speculation. This measure resulted in an increase in the amount of land farmed by natural persons by more than 100,000 hectares between 2000 and 2005. During this period, the state transferred 276,000 hectares of agricultural land to natural persons through the Land Fund.[35]

Legal persons do not have to meet any special conditions when purchasing agricultural land, unlike natural persons. Therefore, full reference can be made to the interpretation in the following chapter.

31 Metelka, 2016.

32 Další pokus o omezení práv vlastníků půdy – informační povinnost a povinný bobřík mlčení [Online]. Available at: http://www.investicedopudy.cz/clanky/prilohy/201809_N%C3%A1vrh%20novely%20z%C3%A1kona%20o%20zem%C4%9Bd%C4%9Blstv%C3%AD%20-%20informa%C4%8Dn%C3%AD%20povinnost.pdf (Accessed: 4 December 2021).

33 Policy Statement of the Government of the Czech Republic [Online]. Available at: https://www.vlada.cz/en/jednani-vlady/policy-statement-of-the-government-of-the-czech-republic-168237/ (Accessed: 6 December 2021).

34 Czech Statistical Office. Integrated Agricultural Survey (2020) [Online]. Available at: https://www.czso.cz/csu/czso/integrated-farm-survey-2020 (Accessed: 6 December 2021).

35 Soil: situation and outlook report. December 2006, pp. 26, 34 [Online]. Available at: https://eagri.cz/public/web/mze/puda/dokumenty/situacni-a-vyhledove-zpravy/ (Accessed: 15 December 2021).

5. The process of transferring ownership of land

The transfer of ownership of immovable property is regulated by Section 1105 of Act No. 89/2012 Coll., the Civil Code. If the immovable property is registered in a public register, the transfer of ownership occurs only through constitutive registration in the register. Therefore, a transfer contract alone, which, in the case of immovable property, must be in writing, as follows from Sections 560, 2057, and 2128 of the Civil Code, is not sufficient.

In the Czech Republic, the public register in which ownership rights to all land is entered is the Cadastre of Real Estate. It comprises a set of data on immovable property (as defined in Act No. 256/2013 Coll., the Cadastral Act), including its inventory, description, geometric and positional determination, and the registration of rights to these properties.[36]

The subject of registration in the Cadastre of Real Estate is also land in the form of parcels, as described in Section 3 of the Cadastre Act.

Ownership rights to land are entered into the Cadastre of Real Estate through an application while other rights to the land may be registered by entry or notes. An entry is used to record rights derived from ownership rights, while a note is used to record significant information related to the registered immovable property.[37]

An entry into the Cadastre of Real Estate has retroactive effects on the date of filing the application for entry; therefore, the transfer of ownership occurs at the time of filing of the application.

The entry is made based on the final decision by the Cadastre of Real Estate Office. The application for entry must be submitted on approved forms and contain all the required information.[38] As a minimum requirement, a deed of deposit on the basis of which the right is to be entered must also be attached to the application. This is often a contract of sale or donation in which the parties express their will to transfer ownership of the land.[39]

The transfer must meet certain requirements. In particular, it must be in writing and have signatures of the parties on a single document. Another requirement is that the property to be transferred must be sufficiently defined. In the case of a plot of land, this will primarily involve specifying the municipality, parcel number, and Cadastre of Real Estate area in which it is located. When deciding whether to allow registration, the Cadastre of Real Estate Office assesses the requirements of the deed of transfer, i.e., the contract on the transfer of

36 Section 1 zákona of the Act No. 256/2013 Coll., the Cadastral Act.
37 Barešová, 2019, p. 89.
38 Section 14 of the Cadastral Act.
39 Adamová et al., 2020, p. 138.

ownership, but this review does not preclude any judicial review of the contract by the general courts.[40]

If all the conditions for authorizing the entry are met, the entry is authorized, but not earlier than 20 days after the indication that the legal situation is affected by the change. The reason for implementing the protection period was to limit unwanted, and especially illegal, changes to immovable property. No appeal, review proceedings, retrial, or action under the provisions of the Code of Civil Procedure on proceedings in matters decided by another authority is admissible against the decision authorizing the registration.[41]

The information contained in the Cadastre of Real Estate is burdened with material publicity and the presumption of the correctness of the entry. This enables persons consulting this public register to rely on the accuracy of the information entered and derive legal consequences from this information.[42]

6. Transfer of agricultural land

As mentioned above, immovable property, including agricultural land, is transferred based on a written contract. However, acquisition of ownership rights is only affected by registration in the public register (Cadastre of Real Estate), backdated to the date of the application for registration.

The contract that provides for the transfer of agricultural land need not only be for consideration (e.g., a purchase contract) but may also be gratuitous (e.g., a donation or exchange contract). The requirements for the content of the contract have already been described in the section on the process of transferring the ownership of land.

It is also worth mentioning the proposal related to issues with the transfer of ownership of agricultural land.[43] This law was intended to introduce a pre-emption right to agricultural land for the rightful user (an agricultural entrepreneur who meets the condition of permanent residence in the Czech Republic and of farming on agricultural land in the municipality where the land is located). According to the proposal, the right to pre-emption was also granted to the State. The law was also intended to restrict the acquisition of agricultural land by those persons and states whose legal systems do not allow Czech citizens to acquire agricultural land. This condition was not to apply to citizens of the European Union, the European Economic Area, Switzerland, or

40 Barešová, 2019, pp. 224–268; Pavelec, 2021, p. 194–264.
41 Pavelec, 2021, pp. 279–291.
42 Adamová et al., 2020, p. 141.
43 Parliamentary file No. 1046/0, o převodu vlastnického práva k zemědělským pozemkům [Online]. Available at: https://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=1046&CT1=0 (Accessed: 4 December 2021).

states where laws contradictory to an international treaty to which the Czech Republic is bound are followed.

6.1. Transfer of state-owned land

Agricultural land owned by the Czech Republic is managed mainly by the State Land Office (hereinafter also referred to as the 'Office'), which was established by Act No. 503/2012 Coll., on the State Land Office, with effect from January 1, 2013. The establishment of the Office represented the completion of the process of transformation of the Land Fund. It is subordinate to the Ministry of Agriculture but has the status of an administrative office with national competence.

The Office acts on behalf of the Czech Republic in transfers of state-owned agricultural land, whether a transfer to natural or legal persons for consideration or without consideration. It also exercises the state's pre-emption right. It administers restitution claims and exercises the State's property rights under the Act on Property Settlement with Churches and Religious Societies.[44]

The Office's remit includes, among other things, the administration of the State Land Reserve. The Reserve serves mainly to perform the duties of the State Land Office and to implement development programs approved by the Government. The Office is not only obliged to maintain and dispose the State Land Reserve, but also to create it. The law requires that the reserve designated for the exercise of the Office's powers not fall below 50,000 ha.[45]

The State Land Office Act not only regulates the activities of the Office but also sets out the conditions for the disposition of agricultural land by the State, including its transfer. The Act also specifies the real estate that cannot be transferred from the State's ownership to other persons.

In order to discuss the transfer of State agricultural land, it is necessary to first identify the land within State property that cannot be disposed of, as a rule specified in Section 6 of the State Land Office Act. It defines land that cannot be transferred from State ownership as those lands that are intended for a use that, in practice, would not be possible at all or only with considerable difficulty because of a possible transfer of ownership. With the exception of land for public utility buildings, they cannot be transferred to local government units.

In addition to the restrictions on land that cannot be transferred from State ownership, there are also restrictions regarding the persons to whom State agricultural land can be transferred. Section 9 of the State Land Office Act contains an exhaustive list of persons to whom land can be transferred:

44 About the State Land Office [Online]. Available at: https://www.spucr.cz/# (Accessed: 4 December 2021).

45 Section 3 of the Act No. 503/2012 Coll., on the State Land Office.

(a) A natural person who is a citizen of: 1. The Czech Republic; 2. Another Member State of the European Union; 3. A state that is party to the Agreement on the European Economic Area; or 4. The Swiss Confederation,

(b) A legal person who is an agricultural entrepreneur in the Czech Republic,

(c) A legal person who is an agricultural entrepreneur or has a similar status: 1. in another Member State of the European Union, 2. In a state that is a contracting party to the Agreement on the European Economic Area, or 3. In the Swiss Confederation.

The term 'agricultural entrepreneur' is specified in Section 2e of Act No. 252/1997 Coll., on Agriculture as a natural or legal person who intends to carry out agricultural production as a continuous and independent activity on his own behalf, under his own responsibility for profit, under the conditions laid down in this Act.

In addition, agricultural land of the State may be transferred free of charge to individual municipalities or regions under the conditions set out in Section 7 of the State Land Office Act. In the event that the conditions change and the transfer does not meet the requirements of Section 7, the municipality or district is required to transfer the agricultural land back to the Office under the same terms and conditions under which it acquired the land.

The State Land Office Act provides for certain specific situations in which transfers of agricultural land take precedence over sales by public offers.

■ *6.2. Priority claims for the transfer of agricultural land*

The first preferential method includes transfers for consideration to municipalities, regions, and the owner of a building located on the land (Section 10 of the State Land Office Act). It is always a transfer on request and is subject to certain conditions. In the case of a municipality, the land must be located in a developable part of the municipality and designated by a final decision to be developed with a building for the benefit of the municipality (the municipality must also be the developer). In the case of a district, land must be designated for government-approved industrial development projects. In both cases, agricultural land must be located within the Cadastre of Real Estate area of the municipality or district. A specific approach is also applied to the owners or co-owners of a building located on agricultural land owned by the State. This set has been included in the priority group to unify the property regime of the building and the land on which it is situated.[46]

A specific approach in the form of pre-emption rights is applied to those establishing permanent vegetation on agricultural land under the jurisdiction of the Office.[47] The condition stipulated for this is that the permanent vegetation be

46 Hanák, 2020, p. 69.

47 Section 10a of the State Land Office Act.

established with the permission of the Office and that the person uses the land on the basis of a lease agreement for a period exceeding five years. The pre-emption right to such land lasts only for the duration of the lease. Permanent vegetation includes forests, fruit trees, and vineyards. The price at which such land is transferred is the price determined in accordance with the price code, but excluding any accessories that the lessee has set up at his own expense.

Priority for the transfer of agricultural land may also be given to authorized users of land located in gardens or cottage settlements established on the basis of a planning permission or already in existence before October 1, 1976. [48] However, this was possible only for users until the end of 2018.

In the case of simultaneous 'priority' applications for the transfer of agricultural land, the highest priority is given to the application for the transfer of land in a garden or cottage settlement, followed by the owner or co-owner of an immovable building on agricultural land, the founder of permanent vegetation, the municipality, and the region.[49] The timing of the application does not affect the order, but the reason for the application does.[50]

■ *6.3. Public offer*

In addition to the above 'preferential' methods of transfer, the Office may transfer agricultural land on the basis of a public offer.[51] By means of a public offer, the Office addresses an unspecified number of addressees with a proposal to conclude a purchase contract for agricultural land over which it has the competence to manage. The inclusion of land in the public offer does not exclude the right to apply for the transfer of land to a person benefiting from the preference pursuant to Section 10 of the State Land Office Act.[52]

The land can be proposed for transfer by public offer only after it has been included in the public offer to satisfy restitution claims under Act No. 229/1991 Coll., on the adjustment of property relations to land and other agricultural property, three times in vain.

The price for the land is determined according to the Evaluated Soil Ecological Units (BPEJ codes, based on the climatic region, the main soil unit, the slope and exposure, and other properties of the land). If the land is not assigned a BPEJ code, the price is set at the average price for agricultural land, which is determined for each Cadastre of Real Estate area by a decree. The determined price will usually be lower than the normal market price, since the aim of the transfers of agricultural land is to support farming on agricultural land.[53]

48 Section 10b of the Act No. 503/2012 Coll., on the State Land Office.
49 Section 10c of the Act No. 503/2012 Coll., on the State Land Office.
50 Judgment of the Supreme court ref. No. 22 Cdo 3876/2012.
51 Section 12 of the State Land Office Act.
52 Hanák, 2020, p. 82.
53 Ibid.

A precondition for the transfer of agricultural land based on a public offer is that the potential purchaser must be an agricultural entrepreneur. Simultaneously, this person must meet the other conditions required for a public offer.

The Office publishes the notice of the launch of the public offer on its official notice board. A tenant or lessee whose right to the offered land has been in existence for at least 36 months will have the right of first refusal to conclude a purchase contract pursuant to the notice.[54]

It should be noted, however, that the transfer of land by public offer practically never occurs, primarily because of ongoing restitution claims and secondarily because of the obligation to ensure a sufficient reserve of State land.

■ *6.4. Public tender for the highest bid*

Another way to transfer agricultural land is to announce a public tender for the best offer.[55] Only agricultural land without built-up areas, buildings, or groups of buildings if they are separate immovable property and related property, or agricultural land with built-up areas and related property can be sold by public tender.

Agricultural land without built-up areas may be sold by the Office by public tender only if it has been unsuccessfully offered by public tender to satisfy restitution claims under Act No. 229/1991 Coll. Buildings or groups of buildings and related property situated on land belonging to another owner may be sold by the Office by public tender unless the owner of the land exercises his right of pre-emption over the property. The Office may offer agricultural land with built-up areas and related property for sale directly by public tender without first having to announce it.[56]

The Office shall first announce the tender on its official notice board. The notice must contain information on the properties to be offered and the purchase price. The purchase price will be the normal price.[57] The Office then selects the most suitable tender offering the highest purchase price. A deposit of 5% of the published price is paid as a condition for submitting a bid.

7. Conclusion

The article focused on the acquisition of agricultural land in the Czech Republic in the context of both historical and property law. First, the article introduced the historical context and development of property ownership relations through the 20th century.

Between 1948 and 1989, the communist regime tried to nationalize the land. Owners were often illegally deprived of agricultural land or left with bare

54 Section 12 of the Act No. 503/2012 Coll., on the State Land Office.
55 Section 13 of the State Land Office Act.
56 Hanák, 2020, p. 90.
57 Section 14 of the Act No. 503/2012 Coll., on the State Land Office.

ownership. After the Velvet Revolution, legislation regulating the restitution of land was adopted. The restitution was closely intertwined with the privatization of State property. However, the privatization and restitution of agricultural land and forestry began properly after the adoption of Act No. 95/1999 Coll. on the condition of the transfer of agricultural and forestry land from State ownership to other persons. It came into force in May 1999. As of December 31, 2019, 99.79% of restitution applications have been decided. The restitution did not proceed without problems, after great struggle and a search for a just solution, the legislation finally established the following order of applicants: 1. Former owner (restituent), 2. Tenants who have used the offered land for at least 36 months, 3. Farmers who have been using at least 10 hectares of the offered land for 36 months, or owners using at least 10 hectares of agricultural land at the location of the offered land who have been farming in the Czech Republic for 36 months. Priority was given to former owners and farmers who actually farmed the land.

The next part of the article deals with the actual transfers of agricultural land. The article focused on the general requirements for transferring ownership of the land. As agricultural property is typically registered in a public register, the transfer of ownership takes place only by constitutive registration in the register. In the Czech Republic, the public register in which ownership rights to all land are entered is the Cadastre of Real Estate. Therefore, the information contained in it is burdened with material publicity and the presumption of the correctness of the entry. This enables persons consulting this public register to rely on the accuracy of the information entered and derive legal consequences from this information.

The main focus of this article is on the transfer of state-owned land. The State Land Office primarily manages the Agricultural land owned by the Czech Republic. Part of the state-owned property cannot be disposed of (as specified in Section 6 of the State Land Office Act). Among other provisions, there are also restrictions regarding the persons to whom State agricultural land can be transferred.[58]

In Czech law, there exists a category of priority claims for the transfer of agricultural land. First, priority is given to transferring the land to municipalities and the owners of a building located on the land (to unify the property regime of the building and the land). Another prioritized group is people who established permanent vegetation on agricultural land. If there is no 'preferential' method of transfer, the Office may transfer agricultural land on the basis of a public offer addressed to an unspecified number of addressees. The price for the land is determined according to the Evaluated Soil Ecological Units (BPEJ codes; based on the climatic region, the main soil unit, the slope and exposure, and other properties of the land). If the land is not assigned a BPEJ code, the price is set to the average

58 Section 9 of the State Land Office Act.

price for agricultural land. A precondition for the transfer of agricultural land based on a public offer is that the potential purchaser must be an agricultural entrepreneur.

Another way to transfer agricultural land is to announce a public tender for the best offer. Only agricultural land without built-up areas; buildings or groups of buildings if they are separate immovable property and related property; or agricultural land with built-up areas and related property can be sold by public tenders.

Overall, the legislation and processes set out by the State Land Office Act have proved effective and operational without any major issues. The main concern is that the State is no longer transferring land. As for the future development of criteria or priority claims for the transfer of agricultural land, the legislator should focus on ecological development and sustainability of the transferred land. For example, one of the criteria should be that the potential owner uses the land for organic farming or other environmentally sustainable practices.

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TATJANA JOSIPOVIĆ*

Role of Private Law for Europe's Digital Future

ABSTRACT: *The digital transformation of the EU single market actualizes numerous issues regarding the regulation of private law relations in the digital market. The key issue is whether the digital transformation requires a complex reform of the existing rules brought by the European legislator to provide for individual rights in various private law relations in the offline market (e.g., consumer contracts, labor contracts, and contracts on the provision of services in individual economic sectors), and if that is the case, how this reform must be implemented. An answer to this question mostly depends on whether, by the existing legal instruments in the digital market, namely efficient protection and enforcement of fundamental rights, EU market freedoms and individual rights can be ensured in the same way they are protected in the offline market. This paper deals with the changes in the regulation of EU private law relations caused by the establishment of the Digital Single Market. The main aim is to consider the perspectives of the EU private law in the digital transition, and whether a different approach to the regulation of private law relations in the digital market is necessary.*

KEYWORDS: digital law, Digital Single Market, private law, digital transformation, digital rights, information duty, directives, regulations, harmonization

1. Introduction

In this decade, the full functioning of the Digital Single Market based on European values has been the most important strategic goal of the European Union. The digital transformation of society and economy is thus in the limelight of all European strategies. The aim is to establish a connected, strong, open, and competitive Digital Single Market where

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> the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under the conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.[1]

For this reason, the EU's digital strategy for 2030 is based on four cardinal points: digitally skilled population and highly skilled digital professionals, secure and sustainable digital infrastructures, digital transformation of businesses, and digitalization of public services.[2] It is of the outmost importance that digital transformation remains human-centered and founded on democratic values and the protection of fundamental rights and that it contributes to a sustainable, climate-neutral, and resource-efficient economy and sustainable society as a whole.[3] Human-centered digital transformation calls for the recognition and protection of the rights and freedoms of individuals as guaranteed by the law of the Union–particularly fundamental rights, which, due to the development of digital technology, are exposed to new risks and serious infringements and abuses (protection of personal data, protection of privacy, freedom of expression and information, freedom to conduct a business, non-discrimination, fair and just working conditions, and so on). Digital transformation must guarantee highly specific digital rights, and it must be based on specific principles defined by the European Commission as '*the principles for the Digital Decade*,' such as putting people at the center of digital transformation; solidarity and inclusion; freedom of choice; participation in the digital public space; safety, security, and empowerment; and sustainability.[4]

The processes of digital transformation—and in particular the digital transformation of businesses—have had a significant impact on the private law relations established in the digital market between various participants. The digital market is largely shaped and developed by consumers, traders, the employed or self-employed, private internet platforms, and service providers by the realization of a variety of private law relations governing the online market exchange of goods and services. The legal framework for the digital market is mostly based on private law

1 Taken from the European Commission Communication: A Digital Single Market Strategy for Europe, Brussels, 6/5/2015, COM(2015) 192 final.

2 See the European Commission Communication: 2030 Digital Compass: the European Way for the Digital Decade, Brussels, 9/3/2021, COM(2021) 118 final, pp. 4–12.

3 See the European Commission Communication: Shaping Europe's Digital Future, Brussels, 19/2/2020, COM(2020) 67 final.
See the European Commission Communication: 2030 Digital Compass: the European Way for the Digital Decade, Brussels, 9/3/2021, COM(2021) 118 final.
See the European Commission Communication: Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, Brussels, 26/1/2022, COM(2022) 27 final.

4 See the European Declaration on Digital Rights and Principles for the Digital Decade, Brussels, 26/1/2022, COM(2022) 28 final.

rules providing for the rights and obligations of the parties in horizontal private law relations; therefore, the market's digital transformation actualizes numerous issues regarding the regulation of private law relations in the digital market. The key issue is whether the digital transformation requires a complex reform of the existing rules enacted by the European legislator to provide for individual rights in various private law relations in the offline market (e.g., consumer contracts, labor contracts, and contracts on the provision of services in specific economic sectors), and if that is the case, how this reform must be implemented. An answer to this question mostly depends on whether, by the existing legal instruments in the digital market, namely efficient protection and enforcement of fundamental rights, EU market freedoms and individual rights can be ensured in the same way they are protected in the offline market. On the one hand, undoubtedly, both in the digital market and in the offline market, the same or similar problems frequently occur when exercising or protecting individual rights in private law relations resulting from the infringements of contractual obligations or caused by the existing imbalance between the parties because of their weaker negotiating position or inferior level of information. In such cases, by extending the area of application of the already existing private law rules (adopted to protect the parties to the contract in the offline market), to the private law rules emerging in the online market, a satisfactory level of protection of individual rights can be achieved. On the other hand, within the framework of private law relations established in the online market, specific risks are created for individuals, as well as specific infringements of their rights. When dealing with private law relations in the digital market, specific risks in terms of the violation of fundamental rights and market freedoms may not appear to be possible in the offline market. Indeed, new private law relations are created in connection with new products (e.g., digital content), new services (e.g., digital services), new assets (e.g., crypto assets), and new contracts are concluded (e.g., supply of digital content). In private law relations in the digital market, personal data are becoming more and more commercialized, and an economic value is attached to them. Thus, they become a specific form of counter-performance in contract relations in the digital market (e.g., in contracts for the supply of digital content). Specific multisided legal relations (e.g., buyer↔online platform↔seller) where online platforms have an increasingly more dominant position even when it comes to the users of their services also exist. In the digital market, the asymmetry of information between the parties becomes increasingly obvious even when dealing with B2B contractual relations. The sharing economy, which is based on digital transactions and internet platforms, emphasizes the protection of individual rights in the so-called peer-to-peer (P2P) contractual relations. Business processes become more automatized through artificial intelligence, blockchain technology, smart contracts, and the Internet of Things. On a daily basis, such automatization of business transactions raises new questions on the liability for the damage suffered by the users of new

technologies and third persons, particularly in connection with the protection of fundamental rights. This all leads to specific disputes involving private law relations, to new conflicts and tensions between the parties in the digital market. However, it is disputable whether, in such cases, a corresponding application of the existing EU private law rules created for the offline market or an appropriate interpretation of general private law principles (e.g., freedom to contract, private autonomy, and prohibition of the abuse of law) can always achieve satisfactory standards in the protection of individual rights in the digital market. It is highly probable that within the framework of the traditional private law rules designed for the protection of individual rights in the offline market, it will not always be possible to find an effective legal remedy for the protection of these rights, particularly in the cases of cross-border transactions in the digital market. A Digital Single Market poses many new and specific challenges to EU private law.

This paper deals with the changes in the regulation of EU private law relations caused by the establishment of the Digital Single Market. The European concept of the private law adjustment of new trends in the regulation of legal transactions in the digital market is analyzed, as well as the effects of the digitalization on the private law of the European Union and of the Members States. The role that EU private law should have in the future in the digitalization of the single market is also analyzed, particularly with regard to the digital rights and principles in the human-centered digital transition of the single market. The main aim is to consider the perspectives of EU private law in the digital transition and whether a different approach to the regulation of private law relations in the digital market is necessary.

2. Recent developments in EU private law caused by digital transformation

■ *2.1. General*

The development of EU private law has always been determined by the objectives of the European integration processes and sector policies, especially those that are significant for the development and functioning of the single market. In the European Union, private law has always primarily been oriented toward the establishment of a competitive social market economy; an internal market based on free movement of goods, workers, services and capital; and the creation of an area of freedom, security, and justice without any internal frontiers and for all citizens of the Union.[5,6] The main objective of EU private law has been to remove the obstacles

5 Art. 3/2 of TEU; Arts. 26 et al. of TFEU.

6 See Basedow, 2021, pp. 35, 36.

to market freedoms and to establish and upgrade the functioning of the internal market by observing private autonomy and freedom of contract. Therefore, the development and concept of EU private law are both primarily determined by the Union's competences to adopt legally binding acts for the functioning of the internal market in accordance with the principles of subsidiarity and proportionality.

Because of the limited competences of the Union in the adoption of legally binding acts on the approximation of laws, the regulation of private law relations in the offline market has been characterized by a few crucial circumstances. Private law relations used to be regulated fragmentarily and by sectors. Only some aspects of private law relations were regulated in a substantial manner—in particular, those of significance for the removal of obstacles to cross-border transactions in the internal market[7] as well as some specific private subjective rights[8] and legal persons of the Union,[9] also important for the functioning of the internal market. The lack of an integral regulation of private law relations was bypassed by legally binding acts adopted within the framework of judicial cooperation in civil matters.[10,11] When substantive private law was regulated at the EU level, an approach prevailed whereby private law rules, in accordance with the principles of subsidiarity and proportionality,[12] were provided by directives.[13] Directives first achieved minimal harmonization and subsequently targeted the maximal harmonization[14] of individual private law rules of Member States that were barriers to cross-border transactions, the protection of fundamental rights, and market freedoms. It was mostly the harmonization of private law rules of the Member States restricting EU market freedoms whose application in practice could not be eliminated by negative harmonization—in other words, by the application of the principle of primacy of EU law.[15] Individual (private

7 For example, certain types of contracts (or only some aspects of contracts) tort liablity for specific cases, such as product liability or damage caused by infringement of the competition law, etc.
The legal bases for legal acts have mostly been Arts. 114, 153, 46, 50, 53, 59, 62, 64 of TFEU.

8 For example, the European Union Trade Mark, Community Design, et al.

9 For example, European Company/SE, European Cooperative Society/SCE, European Economic Interest Grouping/EEIG.

10 Art. 81 of TFEU.

11 Lack of any substantial private law regulation at the level of the Union is solved by legal acts on mutual recognition and enforcement of judgments, common rules concerning conflict of laws and of jurisdiction, optional procedural instruments for cross-border cases (e.g., European Small Claims Procedure, European Order for Payment Procedure, European Account Preservation Order Procedure, etc.).

12 Arts. 5/3, 4 of UEU.

13 Art. 288/3 of TFEU.

14 For more, see Basedow, 2021, pp. 102–116.

15 It was mostly the application of the judgments of the Court of Justice where the Court interpreted that the EU law precludes the application of some national law provisions of Member States as incompatible with EU law. See Basedow, 2021, pp. 75–79; Josipović, 2020, pp. 624–630.

law) rights were, in directives, mostly regulated by their mandatory rules, whose application could not be neglected by the parties. Most frequently, their objective was to ensure cross-border private autonomy and the weaker parties' freedom of entering into contracts for the transactions in the internal market (consumers, workers). However, such approximation of laws could not always contribute to a consistent private law regulation in EU law and to an efficient and standardized protection of individual rights in private law relations in the internal market. The harmonization was usually concerned with only some aspects of private law relations governed by national private law, so that the need for a subsidiary application of numerous national law provisions (not aligned with EU law) to private law relations in the internal market continued to exist. In the end, this approach resulted in significant differences in the legal position of individuals in the internal market as well as different standards of protection of their rights in cross-border transactions. In addition, the provisions of directives, when they have not been transposed or have been improperly transposed to national private law, can never have horizontal direct effects and direct applicability to the legal relations between individuals. It is only possible (depending on the methods of legal interpretation of national law) that the untransposed provisions of directives have indirect effects (individual→state→individual) in private law relations coming into play by the consistent interpretation of domestic private law in conformity with directives. This is why the level of protection of individual rights in private law relations under partially transposed directives largely and precisely depended on national private law and on the standards and level of protection of individual rights in the law applicable to a specific private law relation.

The traditional concept of the regulation of private law relations in the internal market by directives has turned out to be inappropriate for the accomplishment of specific requirements for the protection of individuals in the Digital Single Market. Human-centered digital transformation calls for a different approach to the protection of individual rights in the Digital Single Market. Private law rules, like those in an analogous market, must continue contributing to the removal of obstacles to the functioning of the market. In the context of digital markets, this means that private law must contribute to the development of cross-border e-commerce as well as better access to the digital market and its responsible functioning. However, private law must also increasingly contribute to a fair and competitive economy for the digital market based on a fair online environment. More transparency and fairness in private law relations, a more efficient protection of fundamental rights and EU market freedoms in horizontal legal relations between individuals, a more efficient protection of consumers, and more efficient legal remedies for the protection of individual rights are needed. These new requirements have impacted the concept of the private law regulation of the EU Digital Single Market in various ways. Many changes have occurred in the nomotechnical approach to the regulation of private law relations in the

digital market, in the substantive regulation of some individual rights, in the legal remedies for the protection of individual rights in private law relations, and in the role of public law for the protection of individual rights.

■ *2.2. A turn from directives to regulations*

The development of the EU digital market has changed the European legislator's nomotechnical approach to the regulation of private law relations of significance for the Digital Single Market. Some kind of 'Copernican revolution' took place in the methodology of regulating private law relations. Instead of by directives, private law relations for the digital market are now mostly governed by regulations,[16,17] which, for the first time, provide for specific segments of the digital market and also for private law relations (e.g., prohibition of geo-blocking, portability of online content, transparency for online platforms, and crowdfunding). However, there is also a trend of substituting the existing directives by regulations which, although with significant changes, provide for the same aspects of the digital market and of individual rights.[18] The same legislative choice is also present in all

16 Art. 288/2 of TFEU.
Previously, regulations were exceptionally drafted to govern private law relations within specific sectoral policies (e.g., contracts on transport services within common transport policies, Arts. 91, 100 of TFEU) and within the scope of judicial cooperation in civil matters (e.g., mutual recognition and enforcement of judgments, conflicts of law, and the like Art. 81 of TFEU), and the so-called optional instruments were listed pursuant to Art. 352 of TFEU (subsidiary legislative powers of the Union).

17 See, for example, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation/GDPR); Regulation (EU) 2017/1128 on the cross-border portability of online content services in the internal market (Portability Regulation); Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market; Regulation (EU) 2018/1807 on a framework for the free flow of non-personal data in the European Union; Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market; Regulation (EU) 2018/644 on cross-border parcel delivery services; Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services; Regulation (EU) 2020/1503 on European crowdfunding service providers for business; Regulation (EU) No 531/2012 on roaming on public mobile communications networks; Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market.

18 For example, the General Data Protection Regulation repealed Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market repealed Directive 1999/93/EC on the Community framework for the electronic signature.
Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market repealed Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading.

the Proposals of the European Commission for the regulation of the new areas of importance for the Digital Single Market, such as artificial intelligence, crypto-assets, digital services, and digital identity.[19] At the same time, the legal basis for the adoption of regulations has not changed, and it continues to be Art. 114 of TFEU, which is also otherwise considered as the main legal basis for the approximation of laws for the functioning of the internal market. Apart from Art. 114 of TFEU, sometimes the TFEU provisions on freedom of establishment and free movement of capital[20] or that on the protection of personal data[21] are cited. Very few directives on the digital market have recently been passed, and it seems that the regulation of private law relations by way of directives—of importance for the Digital Single Market—is gradually becoming an exception. It only applies when the TFEU expressly establishes that in a specific field, harmonization must be made by directives,[22] when only some aspects of a private law concept are harmonized, when the harmonization by a regulation requires more detailed and more comprehensive rules,[23] or when it is necessary to leave a margin of manoeuvering for the Member States, considering the aim to be achieved by a directive.[24]

The main reason for the organization of legal relations in the digital market by regulations is their direct applicability in all Member States—in other words, throughout the whole Digital Single Market. The direct applicability of regulations

19 Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), Brussels, 21/4/2021, COM(2021) 206 final; Proposal for a Regulation markets in Crypto-Assets, Brussels, 24/9/2020, COM(2020) 593 final; Proposal for a Regulation on a single market for digital services (Digital Services Act), Brussels, 15/12/2020, COM(2020) 825 final; Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), Brussels, 15/12/2020, COM(2020) 842 final; Proposal for a Regulation amending Regulation (EU) No 910/2014 as regards establishing a framework for the European Digital Identity, Brussels, 3/6/2021, COM(2021) 281 final; Proposal for a Regulation on European data governance (Data Governance Act), Brussels, 25/11/2020, COM(2020) 767 final; Proposal for a Regulation on roaming on public mobile communications networks within the Union, Brussels, 24/2/2021, COM(2021) 85 final.

20 Arts. 53, 62 of TFEU.

21 Art. 16 of TFEU.

22 For example, it proposes to regulate, by a new directive, the working conditions in platform work. The legal basis for the new measure is Art. 153/2/b of TFEU, where it is expressly established that harmonization is conducted by directives. See the Proposal for a directive on improving working conditions in platform work, Brussels, 9/12/2021 COM(2021) 762 final 2021/0414 (COD).

23 For example, by directives based on targeted maximal harmonization, some aspects of consumer sales contracts and contracts for the supply of digital content and digital services are provided for. See, for example, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods; Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.
For an explanation of the choice of instruments see, for example, the Proposal for certain aspects concerning contracts for the supply of digital content, Brussels, 9/12/2015, COM(2015) 634 final – 2015/0287(COD), point 2, Explanatory Memorandum.

24 See, for example, the Proposal for a directive on copyright in the Digital Single Market, Brussels, 14/9/2016, COM(2016) 593 final, 2016/0280(COD), point 2, Explanatory Memorandum.

avoids any implementation period and eliminates the need, within their field of application, for the participants in the market to become subjects to specific national rules. By regulations, a single coherent regulatory framework and a single set of rules for all market participants are established. The direct applicability of regulations makes a coherent, effective, and uniform application of their provisions, as well as their simultaneous entry into force throughout the single market, possible. It is repeatedly emphasized that EU regulations reduce legal fragmentation and prevent divergences hampering the functioning of the digital market. They ensure necessary clarity, uniformity, and legal certainty to enable all market participants to fully benefit from their rules. Therefore, the regulations ensure an efficient protection of individual rights, fundamental rights, and EU market freedoms. A uniform protection of rights and obligations, and the same level of legally enforceable rights, obligations, and responsibilities for market participants is thus established. With regard to the protection of fundamental rights, a consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons is provided. In addition, a uniform and effective protection of EU market freedoms is maintained in the cases of direct and indirect discrimination based on customers' nationality, place of residence, or place of establishment. The regulations also ensure consistent monitoring, equivalent sanctions in all Member States, and effective cooperation between the supervisory authorities of different Member States. Moreover, their provisions are not overly prescriptive, and they leave room for different levels of a Member State's action for the elements that do not undermine the objectives of the regulations.[25]

The regulations providing for individual rights in private law relations, in a special way, connect private law and public law stipulation of a particular segment of the digital market. Private law provisions establish the market participants' rights and obligations in particular business transactions in the digital market; these are mostly mandatory rules from which the parties may neither withdraw

25 See Regulation (EU) No 531/2012 on roaming on public mobile communications networks (point 20 of Recital); Regulation (EU) No 910/2014 on electronic identification (points 2,12, Recital); General Data Protection Regulation (points 10, 1 of Recital); Portability Regulation (point 12 of Recital); Regulation (EU) 2018/1807 on a framework for the free flow of non-personal data in the European Union (point 7 of Recital); Regulation (EU) 2018/302 on addressing unjustified geo-blocking (point 41 of Recital); Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (point 7 of Recital); Regulation (EU) 2020/1503 on European crowdfunding service providers (point 7 of Recital).
See Explanatory Memorandum (point 2 of Choice of the Instrument) in the Proposal for a regulation on artificial intelligence; Proposal for a regulation on markets in crypto assets; Proposal for a regulation on a single market for digital services; Proposal for a regulation as regards establishing a framework for European digital identity; Proposal for a regulation on European data governance; Proposal for a regulation on roaming on public mobile communications networks.

nor rule out their application.[26] On the other hand, various public law rules lay down the conditions for the establishment or service provision in a particular economic sector in the digital market, or its supervision, sanctions, or the like.

The most important effects of the changes in the nomotechnic regulation of private law relations in the digital market are reflected in a better protection of subjective private rights of individuals in business transactions. The provisions of the regulations providing for the parties' rights and obligations in private law relations are directly applicable and have a horizontal direct effect (individual↔individual) as well as priority in application over the national law of Member States. The provisions of the regulations are thus a direct legal basis for the acquisition of subjective private rights, for their enforcement and protection. The regulations directly recognize the rights and obligations in horizontal relations between individuals on the entire Digital Single Market. Subjective private rights are acquired directly based on EU law, without the necessity of adopting any normative acts at the level of a Member State. It is an approach that has ensured uniformity and legal certainty in the regulation of private law relations in the digital market. In private law relations, established in a regulation, all participants in the market are recognized the same content-related individual rights for which the same standards of protection must be guaranteed in the entire digital market. Finally, this has all led to a situation where the process of unification of EU private law, little by little, supersedes the traditional approach in the regulation of EU private law based on the harmonization/approximation of the national private law bodies of Member States.

Moreover, the regulations providing for private relations in the digital market have also increased the protection of EU market freedoms and fundamental rights. Sometimes, in addition to private law relations in the digital market, the regulations also lay down the rules on enforcement and the protection of EU market freedoms and fundamental rights and freedoms in the digital market. Such linkage between subjective private individual rights and EU market freedoms and the protection of fundamental rights has significantly changed the private law concept for the digital market, particularly because the provisions of regulations have horizontal direct effects. The regulation of private law relations is determined not only by a requirement for an efficient protection of private rights of individuals in their mutual relations but also by the requirement that an appropriate implementation of the public order of the Union regarding EU market freedoms and protection of fundamental rights is ensured in the digital market. A turn from directives to regulations has resulted in a situation where the realization and protection of market freedoms and fundamental rights based on directly applicable provisions of regulations have become crucial components

26 For example, it is expressly prescribed that any contractual provisions that are contrary to the regulation shall be unenforceable. See Art. 7/1 of Portablity Regulation.

for the regulation of private law relations on the digital market and important correctives for the regulation of the parties' rights and obligations.

■ *2.3. Horizontal direct effects of EU market freedoms*

The TFEU provisions on market freedoms[27] have vertical direct effects in the relations between individuals and Member States (individual→state), based on which individuals are recognized their subjective rights to a non-discriminatory treatment while exercising their market freedoms. In relation to Member States, by vertical direct effects, market participants are protected against discrimination based on nationality and unjustified restrictions of market freedoms arising from various government measures or treatment by state authorities. The impact of vertical direct effects has been significantly extended by a very broad interpretation of the concept 'Member State.'[28] It arises from the case law of the European Court of Justice (ECJ)—albeit exceptionally—that EU market freedoms also have horizontal direct effects in the legal relations between individuals (individual↔individual). As a rule, these are the cases where private law subjects act in relation to other private law subjects by discriminatorily taking some collective measures (strikes, boycotts) or by applying collective regulatory measures (strikes, boycotts, collective agreements, statues of professional associations and the like) contrary to the rules on EU market freedoms.[29]

In private law for the digital market, a different trend is visible. Increasingly noticeable is the recognition of the horizontal direct effects of EU market freedoms. In some specific private law relations, horizontal direct effects between individuals are expressly recognized by EU regulations. The proper functioning of the Digital Single Market implies that direct effects of EU market freedoms are extended to also include legal relations between individuals. This is essential for an efficient elimination of obstacles to online cross-border transactions; for example, the regulation addressing unjustified geo-blocking expressly prohibits that a trader, through the use of technological measures or otherwise, blocks or limits a customer's access to the trader's online interface for the reasons related to the customer's nationality, place of residence, or place of establishment.[30] In addition, a trader must not apply different general conditions of access to goods or services for reasons related to a

27 Arts. 26, 28–66 of TFEU.

28 In the context of vertical direct effects of EU market freedoms, the concept of 'Member State' comprises all the organs of its administration, including decentralized authorities; organizations or bodies that are subject to the authority or control of the state; and organizations, even governed by private law, to which a Member State has delegated the performance of a task in the public interest. See the judgment of October 10, 2017, Farrell, C-413/15, ECLI: EU:C:2017:745, points 33–35.

29 See Josipović, 2020, pp. 160–201.
See, for example, the judgment of December 18, 2007, Laval, C-341/05, ECLI:EU:C:2007:809; the judgment of December 11, 2007, Viking, C-438/05, ECLI:EU:C:2007:772.

30 Art. 3/1.

customer's nationality, place of residence, or place of establishment.[31] The application of different conditions for a transaction against payment for the reasons related to a customer's nationality, place of residence, or place of establishment; the location of the payment account; the place of establishment of the payment service provider' or the place of issuance of the payment instrument within the Union are also prohibited.[32] In brief, traders are obliged to ensure non-discriminatory access to online interfaces on the digital market for their customers as well as non-discriminatory access to goods or services and non-discriminatory treatment related to payments. These are obligations established in the directly applicable rules of the regulations having horizontal direct effects. By these provisions, horizontal direct effects are achieved by prohibiting discrimination based on nationality in the context of exercising EU market freedoms (free movement of goods, persons, services, and capital).

Due to the existence of horizontal direct effects of EU market freedoms on the digital market, based on the law of the Union, individuals directly acquire their subjective rights to request, from the other contractual party in a particular segment of the digital market, non-discriminatory treatment based on citizenship. Indeed, individuals are granted their right to seek court protection before the national courts of their subjective right to non-discriminatory treatment or to seek measures to avoid the violation of non-discriminatory rules. The horizontal direct effects of market freedoms bind all market participants to act in a non-discriminatory manner toward other individuals in the digital market and not to block their access to the market because of nationality, place of residence, or place of establishment. By extending the direct effects of market freedoms on private law relations, a higher level of legal security is ensured, as well as a clear regulation of private law relations and better protection of individuals and their increased presence in the digital market. Individuals are thus brought into a position to contribute to the proper functioning of the digital market by way of the so-called private enforcement of EU law before their national courts, at the same time protecting their subjective right to non-discriminatory treatment. However, the implementation of measures for adequate and effective enforcement and remedies, in case of violation of the obligations ensuing from the horizontal direct effects of EU market freedoms, is left to the Member States. They decide freely, and in accordance with their national law, whether they will stipulate public or private remedies against infringements. It is only important that the measures are effective, proportionate, and dissuasive.[33]

■ *2.4. Horizontal direct effects of fundamental rights*

This trend of regulating private law relations in the digital market has led to a specific constitutionalization of EU private law. A different approach to the protection

31 Art. 4/1.
32 Art. 5/1.
33 See, for example, Art. 8 of Geoblocking-Regulation.

of fundamental rights is evident. The obligations of specific market participants are prescribed, and their purpose is, among other things, the protection of fundamental rights in legal relations between individuals. There is a danger, however, that some fundamental rights become particularly jeopardized by the use of digital technology. The same risks also exist in private law relations, where various digital technologies are used to conclude and execute contracts to automatize business processes. Therefore, some provisions are focused on the explicit regulation of the protection and exercise of fundamental rights and freedoms on the digital market (e.g., the right to the protection of personal data, freedom of expression and information, the right to engage in work, freedom to conduct a business, and non-discrimination). Some provisions mainly aim at ensuring a uniform and effective protection of fundamental rights in the digital environment regardless of whether the actions of public bodies or individuals are at issue within the framework of specific private law relations. For example, the General Data Protection Regulation (GDPR) provides a series of rules that also apply in horizontal private law relations regarding the processing of personal data between natural persons (data subjects) and the processors, controllers, recipients, and others.[34]

To the extent to which such provisions also apply to private law relations, fundamental rights and freedoms have horizontal direct effects between individuals. The provisions of the regulations then directly bind market participants to respect the fundamental rights and freedoms of other participants in the market and with whom they enter into business transactions. This obligation arises from directly applicable provisions of the regulations providing for the exercise and protection of fundamental rights in the digital market or those by which the users of digital technologies are bound to respect and protect fundamental rights. Such horizontal direct effects of fundamental rights specified in the regulations are also valid when it comes to private law relations for the digital market regulated by other legal acts of the Union (e.g., directives).[35] Based on the primacy of EU law,

34 See, for example, the Proposal for a regulation establishing harmonized rules on artificial intelligence where it is proposed to draw up harmonized rules for placing on the market, into service, and in use artificial intelligence systems ('AI systems') in the Union, among other things, for the protection of fundamental rights and the elimination of risks to the fundamental rights throughout the 'AI systems' lifecycle. It is emphasized that 'AI systems' will have to comply with a set of horizontal mandatory requirements for trustworthy AI and follow the conformity assessment procedures before those systems can be placed on the Union market. See Explanatory Memorandum, 1 Context of the Proposal, 1.1. Reasons for the Objectives of the Proposal, pp. 1–3.

35 Although it already arises from the regulations, some other legally binding acts expressly provide for the obligation to observe fundamental freedoms in private law relations. Thus, for example, Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, in Art. 3/8 expressly refers to the application of the GDPR. Indeed, it is expressly laid down that 'in the event of conflict between the provisions of this Directive and Union law on the protection of personal data, the latter prevails.' This trend of expressing a regulation of the protection of fundamental rights in private law relations is also visible in some new proposals for directives aimed at new regulation of

the horizontal direct effects of fundamental rights established in the regulations are also valid when dealing with any other private law relations regulated by the national laws, if these relations fall under the scope of application of EU law.

■ *2.5. New rights and obligations of the participants in the digital market*

The development of new products and services in the digital market (e.g., digital content, online content services, online intermediation services, electronically supplied services, and so on) called for a specific substantive regulation of the new rights and obligations emerging in the participants' contractual relations. The aim was to ensure the protection of all market players (business users, consumers) in their access to the digital market, to increase their trust in the digital market, and to develop some new business models. Numerous new contractual rights and obligations were introduced, which, because of the nature and content of private law relations in the analogous market, could not exist before. For example, some new and highly specific obligations were prescribed for online content service providers in relation to the cross-border portability of online content services,[36] for traders/suppliers of digital content regarding the supply and requirements for conformity of the digital content or digital services,[37] and for the providers of online intermediation services offered to business users.[38]

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some contractual relations adapted to digital technologies. Thus, for example, the European Commission, in the Proposal for a directive on consumer credits of June 30, 2021, proposes a separate provision on non-discrimination (Art. 6) encompassing the prohibition of discrimination based on nationality or place of residence or on any ground as referred to in Art. 21 of the Charter of Fundamental Rights of the European Union. In addition, a special protection of consumers is proposed in the cases where the creditworthiness assessment involves the use of profiling or other automated processing of personal data (Art. 18/6). See the Proposal for a directive on consumer credits, Brussels, 30/6/2021, COM(2021) 347 final, 2021/0171(COD).

36 For example, the provider of an online content service against payment is obliged to enable a subscriber, who is temporarily present in a Member State, to access and use the online content service in the same manner as in the Member State of residence. The provider must enable access to the same content, on the same range and number of devices, for the same number of users, and with the same range of functionalities. For such access, the provider must not charge the subscriber for any additional amount. See Art. 3 of Portability Regulation, which establishes specific obligations for online content service providers.

37 For example, when a continuous supply of digital content or digital services over a period of time is stipulated, the trader is responsible for the lack of conformity throughout this period and is also obliged to supply the most recent version of digital content available at the time of the conclusion of the contract, unless the parties have agreed otherwise. In respect of the consumer's personal data, the trader is obliged to comply with the obligations under EU law on the protection of personal data, etc. See Arts. 8/4, 6, 11/3, 16/2, 3 of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. On the other hand, the trader is recognized special rights under the contracts for the supply of digital content and digital services, such as the modification of the digital content or digital service. See Art. 19 of Directive (EU) 2019/770.

38 See, for example, Arts. 4, 8,11,12 et al. of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services on the obligations of the providers of online intermediation services in case of restriction, suspension, and

When regulating private law relations on the digital market, it is necessary to consider various duties to inform (information duties). For informed decisions and for the effective protection of rights and fundamental freedoms in the digital market, it is decisive to provide the necessary level of information on specific aspects of contractual relations between individuals, on the parameters for data processing by digital technology, on the results of automatic data processing, and so on. It is crucial for individuals to be adequately informed about their legal and economic position in the digital market in order for them to be able to act responsibly. In conformity with the European digital principle of a safe and reliable internet environment, access to various, reliable, and transparent information is considered a fundamental digital right of citizens.[39] Objective, transparent, and reliable information is a prerequisite for a fair online environment and for informed decisions on the choice of online services in the digital environment.[40]

However, the concept of the protection of individuals in the digital market based on the duty to inform did not start developing only with the development of the digital market. It is a concept that had already existed in EU private law long ago. Its development had already begun when private law relations in the offline market were regulated—particularly those related to consumer contracts and mostly in connection with the rules on the traders' pre-contractual duties.[41] The aim of expressly prescribing the traders' information duties in consumer contracts was to ensure freedom of contracting for consumers.[42] By informing the consumers, the asymmetry of the level of information with the consumers and traders was intended to be removed, and the consumers were to be brought in the position to be able to reach informed decisions when entering into contracts. These processes finally contributed to the development of the internal market and to market competition. The extensive regulation of the duties in the digital market to provide information has also been used as an instrument to remove the asymmetry of the amount of information received by different market players. In that sense, information duties are important not only for consumer contracts in the digital market but also for other private law relations in which only business market participants take part. In the digital market, there are much greater risks than those of asymmetry in the level of information; they can jeopardize legal certainty, fair market access,

termination of the provision of services; changes to the terms and conditions for the provision of services (prohibition of retroactive changes); establishment of an internal system for the complaints of business users; obligation to identify mediators; and the like.

39 See the European Commission Communication: 2030 Digital Compass: the European Way for the Digital Decade, Brussels, 9/3/2021 COM(2021) 118 final, pp. 12–14.

40 See the European Declaration on Digital Rights and Principles for the Digital Decade, Brussels, 26/1/2022 COM(2022) 28 final, Chapter III: Freedom of Choice.

41 For example, within the rules on the trader's obligation to precontractual provision of information for consumers before entering into subtypes of consumer contracts.

42 See Heiderhoff, 2016, p. 114; Riesenhuber, 2013, p. 86; Ebers, 2021, p. 210; Reich and Micklitz, 2014, pp. 45, 46.

business transparency, freedom of contracting, and the protection of individual rights and fundamental freedoms. Such risks are particularly obvious in the transactions involving various online platforms, which often have a dominant position in the digital market.[43] This has resulted in a situation where information duties are given an even more important role in EU private law for the digital market than the one they used to have in private law relations in the offline market. On the one hand, the traders' information duties in consumer contracts have become more serious, while on the other hand, new information duties in business transactions have been introduced where business users take different roles.

In consumer contracts made in the digital market, the scope of application of the rules on information duties has become larger. The list of obligatory information that the traders are obliged to provide to consumers when entering into contracts on the supply of new products and services in the digital market is now more extensive.[44] At the same time, special information duties for providers of an online marketplaces have been introduced in consumer contracts. The providers' duty is to inform the consumer—before they are bound by a contract—on the main parameters determining the ranking; whether or not the third party offering goods, services, or digital contents is a trader or not; and so on. Indeed, the provider of an online marketplace has the duty to inform the consumer even when they provide only an intermediatory service for the use of software, website, or an application, allowing the consumers to conclude distance contracts with third persons (traders or consumers)—in other words, even the provider is not a party to a consumer contract.[45,46]

New information duties are expressly provided in many other legally binding acts establishing particular private law relations in the digital market

43 See De Franceschi and Schulze, 2019, pp. 5–9; Staudenmayer, 2020, pp. 78–81.

44 See, for example, Directive (EU) 2019/2161 as regards the better enforcement and modernization of the Union's consumer protection rules (Enforcement and Modernisation Directive/Omnibus Directive).
In Omnibus Directive, among other things, the provisions of Directive 2011/83/EU on consumer rights *on* information requirements for contracts other than distance or off-premises contracts have been amended (Art. 5) and information requirements for distance and off-premises contracts (Art. 6) with regard to specific information on digital content and digital services. See Arts. 4/3, 4 of Omnibus Directive.
See, for example, Art. 7 of Regulation (EU) 2018/644 on cross-border parcel delivery services by which, for contracts falling within the scope of Directive 2011/83/EU for all traders concluding sales contracts with consumers that include the sending of cross-border parcels, special information duty is prescribed regarding cross-border delivery options and charges payable by consumers for cross-border parcel delivery.

45 For example, Art. 4/5 of Omnibus Directive inserted in Directive 2011/83/EU on consumer rights, a new Art. 6a on additional specific information requirements for contracts concluded on online marketplaces. See Cauffmann, 2019, p. 476.

46 The concept of the extension of remedies by which freedom of contracting is ensured in the analogous market is also present when some other legal institutions are involved, such as the withdrawal of rights. Criptoassets, Art. 12.

not belonging to the area of consumer contract law. By the regulation of special duties to provide information, various business users of particular services in the digital market are protected, such as, for example, the business users of online intermediation services,[47] or clients (actual investors or project owners) as users of crowdfunding services.[48] At the same time, these duties to provide information also play a very important role in the protection of other values in the digital market, including the protection of fundamental rights during automatic data processing.[49] The trend of introducing new information duties to protect individuals in the digital market is also visible in the proposals for the regulation of individual segments of the digital market and the use of digital technology.[50]

The development of particular rules on the duty to provide information in the digital market is based on the same principles also valid for the analogous market. According to the first principle, the provided pieces of information must be transparent; they must be drafted in a plain and intelligible language and in a clear and comprehensible manner.[51] The second principle is that the rules on information duties do not bind the traders to include particular content in their

47 See, for example, Arts. 3–11 of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, which provide for various obligations of the providers of online intermediation services to business users, regarding the provision of information on their terms and conditions, restrictions, suspensions, and termination of services; parameters determining ranking; and the like.

48 See, for example, Arts. 19, 23, 24 of Regulation (EU) 2020/1503 on European crowdfunding service providers for business regarding the duty of crowdfunding service providers to provide information to clients about the costs, financial risks, and charges related to crowdfunding services or investments; about the crowdfunding project selection criteria; and about the nature of—and risks associated with—their crowdfunding services, about key investment information; and the like.

49 See, for example, Arts. 12, 13, 14 et al. of the General Data Protection Regulation on the controllers' obligation to take appropriate measures to provide the data subjects with any information when personal data are collected from them.

50 See, for example, Arts. 13, 52 et al.; Proposal for a regulation establishing harmonized rules on artificial intelligence on the duty to provide information to user of high-risk artificial intelligence systems, the duty to inform natural persons about certain AI systems intended to interact with natural persons, etc. See Busch, 2019, pp. 62–68.
See, for example, Arts. 5, 17, 46, et al.; Proposal for a regulation on markets in crypto assets, on the content and form of the crypto-asset white paper binding the issuer of crypto assets, on offers of crypto assets to provide specific information on their type, the issuer, the rights and obligations attached to crypto assets, etc.
See, for example Arts 3–5, 20, 24, 29, 20; Proposal for a regulation on contestable and fair markets in the digital sector.

51 See Art. 6a/1 of Directive 2011/83/EU on consumer rights inserted by Art. 4/5 of Omnibus Directive; Art. 12 of General Data Protection Regulation; Art. 3 of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services; Arts. 23/7, 24/3 of Regulation (EU) 2020/1503 on European crowdfunding service providers for business.
See Art. 5/2 of Proposal for a regulation markets in crypto assets; Arts. 13, 52 of Proposal for a regulation establishing harmonized rules on artificial intelligence; Art. 24, Proposal for a regulation on contestable and fair markets in the digital sector.

terms and conditions for the supply of goods or services in the digital market. Separate provisions on information duties only define the content of catalogs, lists, and types of information that must be provided and the way in which they are provided, as well as when this must be done. These rules only ensure some kind of 'procedural fairness'[52] of the legal relations in the digital market based on an orderly and timely execution of information duties in accordance with EU law. In other words, the European legislator, by the rules on the duty to provide information, does not substantially regulate private law relations in the digital market. Traders are only bound to provide a certain type of information for the other party to the contract, and they autonomously decide on the content of such information. The aim of information duties is not to restrict private autonomy of participants in the market when regulating their business and when deciding on the conditions under which they will offer their goods and services. Their main aim is to eliminate any imbalance regarding the information received by those who participate in the digital market and to protect individual rights and fundamental freedoms of those who are considered to be in a weaker position. The participants in the digital market must be brought into a position to be acquainted with the existing conditions and business operations of traders and service providers, the reasons for their actions, and the ranking criteria to be able to compare the participants' offers and make informed decisions on the selection of their co-contractor. At the end of the day, it all contributes to the fulfillment of public interest of the Union in terms of the establishment and proper functioning of the fair and transparent Digital Single Market. The last and the third principle is a determination that the measures taken to enforce and sanction the violation of the duty to inform are within the competence of EU Member States. The legally binding acts of the EU, establishing the duty to provide information, only prescribe that the relevant national measures must be effective, proportionate, and dissuasive.[53,54] Only exceptionally does EU law expressly establish that the terms and conditions not complying with the requirements for transparency are null and void.[55]

■ *2.6. Personal data as a 'counter-performance' in the digital market*

The development of the digital market is connected with the establishment of the European single market for data as well as the European data space founded

52 See Busch, 2020, p. 134.

53 See, for example, Art. 15 of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

54 EU law provides for special remedies for the collective protection of business users in the cases of the violation of the obligation to transparent provision of information by service providers. See, for example, Art. 14 of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, on judicial proceedings by representative organizations or associations and by public bodies.

55 See, for example, Art. 3/3 of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

on the European rules and values. Various types of data (personal, impersonal, public, and industrial) are at the center of digital transformation.[56] Personal data are now usually considered as 'oil for the internet and a new kind of currency in a digital market.'[57] Therefore, in the European digital transformation, special attention is paid to the protection of the consumers' personal data in digital market transactions.[58] This trend is particularly obvious in directives providing for the protection of consumers in contracts on the supply of a digital content or digital services. Among other things, these directives also provide for consumer protection in cases where the consumer does not pay—or does not undertake to pay—a price to the trader for the supplied digital content or digital services but rather provides—or undertakes to provide—personal data to the trader.[59] The main rule is that the consumer, who has not paid any price for a digital content or digital services but has provided their personal data to the trader enjoys the same protection of their contractual right as the consumer who has paid for digital content or a digital service. The protection of the consumers' contractual rights has thus been provided in a normative way despite the increasingly more frequent practice in the digital market where the trader only seemingly supplies digital content or a digital service while actually processing the consumer's personal data to make money. Legally, the position of the consumer who has paid for digital content or a digital service is the same as that of the consumer who has not paid anything but has provided their personal data and agreed to their processing by the trader. The consumer has the same rights in the cases of non-conformity of digital content or a digital service, failure to supply, or withdrawal from the contract.[60]

Although it is not expressly provided in the directives on the consumers' contractual rights that the provision of personal data is considered a counter-performance for the supply of digital content or digital services, it is indisputable that in practice, personal data are then held to be specific assets and that, under EU law, the possibility of commercial use of personal data is recognized in the

56 See, for example, the European Commission: European Strategy for Data, Brussels, 19/2/2020, COM(2020) 66 final, Intr. DR 2–4.

57 This quotation is taken from Meglena Kuneva, European Consumer Commissioner, Keynote Speech – Roundtable on Online Data Collection, Targeting and Profiling, Brussels, 31 March 2009.

58 See, for example, the European Commission Communication: New Consumer Agenda – strengthening consumer resilience for sustainable recovery, Brussels, 13/11/2020, COM (2020) 696 final (3.2. Digital Transformation).

59 See Art. 3/1 of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services; Art. 4/2 of Omnibus Directive to which a new Art. 1a has been added, Directive 2011/83/EU on consumer rights (the scope of application of Directive 2011/83/EU has been extended to contracts on the supply of digital content or digital services when the consumer provides personal data to the trader). See Cauffmann, 2019, p. 475.

60 See Arts. 13, 14 of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, Arts. 13, 14 *et al*. of Directive 2011/83/EU on consumer rights, added Art. 4 of Omnibus Directive.

digital market. However, undoubtedly, no economic value can be specified when it comes to personal data, and their protection is proclaimed to be one of the EU fundamental rights.[61] This is why the contractual relations of the consumer who has provided their personal data and the trader in a contract for the supply of digital content or a digital service are much more complex. To some extent, their design and content depart from the traditional rules on which the concept of the trader's liability for the lack of conformity of goods/services has up to now been based in EU private law. The trader's liability for the lack of conformity has traditionally been based on the violation of the principle of equal value of mutual performances in synallagmatic contracts because the lack of conformity results in the unequal validity of performance and consideration in a contract against payment. An extension of the rule on the protection of consumers in the case of the lack of conformity to the case where the consumer has not paid a price for a digital content or digital service but has provided their personal data, whose economic value cannot be specified, requires a different explanation of the trader's obligation in case of non-conformity of digital contents or digital services. Consumer protection, when the lack of conformity of digital content or of a digital service is involved, is then primarily based on the requests that special consumer protection is ensured in contractual relations because the consumer is the weaker contractual party. At the same time, it must be considered that the consumer has provided their personal data to the trader, which is why it is necessary to establish the specific rights and obligations of consumers and traders in case of a lack of conformity and if the consumer provided their personal data for digital content or a digital service. Neither the traditional rules on the proportionate reduction of the price, nor the same rules on the rights and obligations of the parties can then be applied in the cases of termination of contract due to lack of conformity, withdrawal from the contract, and an obligation to pay back what has been received under the contract. Providing personal data, as a specific form of counter-performance, also requires the regulation of special obligations of traders regarding the processing of consumers' personal data after the termination of a contract or withdrawal from it.[62]

The provision of personal data requires that in consumer contracts, the provisions of EU law are parallelly and simultaneously applied, providing for contractual rights and obligations as well as directly applicable EU rules on the protection of personal data as a fundamental right. In fact, between the consumer

61 See Art. 8 of Charter of Fundamental Rights of the European Union.

62 See Arts. 14/4, 16/2 of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services; Arts. 13/4, 14 of Directive 2011/83/EU, amended Arts. 4/10, 11 of Omnibus Directive.
Pursuant to GDPR, the trader, in such cases, is considered a 'controller' or 'processor,' and all the obligations from GDPR continue to be effective for them regarding the processing of personal data. See Twigg-Flesner, 2020, pp. 285–287.

and the trader, two parallel and mutually connected legal relations arise: the first is a contractual relation (contract for the supply of a digital content or a digital service) to which the national law provisions apply, harmonized with the Directive on the supply of digital contents or digital services. The second legal relation is the one created by the provision of personal data or by giving the consent to the trader for the processing of a consumer's personal data for one or more specific purposes.[63] The trader, to be brought in the position to lawfully process the consumer's personal data, must possess a valid legal basis for such processing.[64] Therefore, during the entire period of the validity of a contract—and even upon its termination—the obligations exist for the trader to lawfully process personal data as established in the General Data Protection Regulation. However, all other obligations and rights of contractual parties under the contract for the supply of digital content or a digital service must be interpreted in the context of the right to the protection of personal data as the basic right, also considering that the provisions of the GDPR directly apply and have primacy in the application. As a result, a parallel and coordinated application of various provisions of the EU law is essential. A legal remedy because of a lack of conformity, or a failure to deliver digital content or a digital service (e.g., termination of a contract) will sometimes impact the consumers' rights to the protection of personal data provided for in the Data Protection Regulation.[65] Vice versa, to exercise the right to the protection of personal data as a fundamental right (e.g., withdrawal of consent) will sometimes impact contractual relations.[66] However, the Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services does not contain any detailed and express provisions on the coordinated protection and exercise of contractual rights and on the protection of personal data. It only generally establishes that 'the Union law on the protection of personal data shall

63 Art. 6/1/a of GDPR.

64 In practice, this legal basis will be the consent given based on Art. 6/1/a of GDPR. See Staudenmayer, 2020, p. 72.

65 A question arises of how the termination of a contract or withdrawal from a contract impacts consent for the processing of personal data. The key to this is whether the contract and the consent are dependent or independent acts, or whether a causal link exists between the contract and the consent so that the validity of the consent depends on the validity of the contract. Schmidt, 2019, pp. 81, 82.
A viewpoint in literature argues that the termination of a contract for non-alignment or non-delivery has the effect of a withdrawal of consent to the processing of personal data. See Twigg-Flesner, 2020b, p. 287; Mischau, 2020, p. 350.

66 The question arises of how withdrawing consent for the processing of personal data (Art. 7/3 of GDPR) impacts the contract for the supply of digital content or a digital service; namely, after withdrawing consent, the trader no longer has a valid legal basis for the processing of personal data. Another question is whether this withdrawal would automatically result in the contract's cancellation. The literature contains different opinions on this issue. See Metzger, 2020, p. 35; Zoll, 2017, p. 184; Landhanke and Schmidt-Kessel, 2015, p. 222; Twigg-Flesner, 2020a, p. 277.

apply to any personal data processed in connection with contracts."[67] Therefore, in the largest number of cases, the regulation of the relations between the protection of contractual rights and the fundamental right to the protection of personal data depends on the interpretation of the provisions of EU law (primarily the GDPR provisions) and on the subsidiary application of national law. It is left to the Member States to regulate in more detail—in their national bodies of law and in conformity with the objectives of EU Directive and EU rules on the protection of personal data—the rights and obligations of the contractual parties for which there is no obligation for harmonization at the level of the Union.[68]

3. Conclusion

The development of EU private law for the digital market has so far been focused primarily on the establishment of the same level of protection for market participants that they enjoy in the offline market. The main goal has been to maintain the same standards of protection of individual rights in both offline and online markets[69]; therefore, in principle, the same remedies by which individual rights are protected in the offline market are used to protect individual rights of the participants in the online market.[70] In addition, the same remedies have been extended to include consumer protection in the new contractual relations where the trader delivers the contents and services specific only to the digital market.[71] The remedies and methods for the protection of consumers introduced earlier for an offline market have only been modernized and adjusted, in more detail, to an online environment. There is also a visible trend that extends the traditional instruments for the protection of individual rights in consumer contracts (e.g., duties to provide transparent information, withdrawal rights, protection of collective interests, and prohibition of waiving the rights) to the new private law relations emerging in the digital market between business market participants

67 Art. 3/8 of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

68 See Staudenmayer, 2020, pp. 72, 73.

69 See the European Commission Communication: New Consumer Agenda – Strengthening Consumner Resilience for Sustainable Recovery, Brussels, 13/11/2020, COM (2020) 696 final (3.2. Digital Transformation); European Commission Communication: Shaping Europe's Digital Future, Brussels, 19/02/2020) (Fair and Competitive Economy).

70 For example, in consumer contracts of sale, the same remedies apply to the protection of consumers in case of the lack of conformity of goods for all sales channels—in other words, for all businesses selling goods to consumers (domestic, cross-border, online, offline, distance or off-premises sales, and so on).

71 For example, the concept of consumer protection due to lack of conformity of digital content or a digital service is, in principle, based on the same rules on which consumer protection for the lack of conformity of goods in the consumer contracts of sale is based.

(e.g., between internet platforms and business users, P2B).[72] The application of traditional remedies is also recommended when the law of the Union provides for the new private law relations in the digital market involving new digital assets[73] and digital services[74] or when dealing with the legal relations where automated decision-making systems are used.[75] In principle, private law regulation for the digital market contains no new remedies and very few new substantial private law rules. The European legislator's approach to the regulation of private law relations for the digital market has been quite restrained, and the measures that have been taken are mostly directed to the *ex post* removal of the already existing risks for the functioning of the digital market and for the protection of fundamental rights. The most significant changes in the substantial regulation of private law relations in the digital market seem to be evident in the recognition of the specific status of personal data as a 'consideration' in specific consumer contracts. Although it is only the harmonization of individual aspects of a contract where the consumer provides their personal data to the trader, this has been the first step to a reform of the Union's contract law for data economy. Another important change has been the new nomotechnical approach to the regulation of private law relations, which is a contribution to the unification of private law rules by directly applicable regulations. By the regulations—most frequently by the application of traditional remedies—a uniform enforcement and protection of individual rights in private law relations in the digital market is ensured. In addition, the regulations also provide for a better protection of fundamental rights in private law relations. This is particularly important in the context of data processing for the supplied digital content or digital service.

A traditional approach to the regulation of private law relations in the digital market is a logical consequence of the fact that private law for a digital market is developing within the same policies of the Union and on the same legal bases on which private law for the offline market has so far been developing. The functional approach has been kept to solve specific problems in private law relations, which, in specific market sectors, become an obstacle to the development of the digital market. Private law for a digital market, just like private law for an offline market, is fragmentary and sectorial. Only some aspects of private law relations that must be harmonized at the level of the Union have been regulated to ensure the

72 For example, see Regulation (EU) 2019/1150 on promoting fairnes and transparency for business users of online intermediation services.

73 For example, in the Proposal for a regulation of markets in crypto assets, it is proposed to provide for the right of withdrawal for consumers who buy crypto assets. See Art. 12.

74 For example, in the Proposal for a directive on consumer credits, the same rules and the same remedies are, in principle, recommended for the protection of consumers in credit agreements and crowdfunding credit services.

75 For example, in the Proposal for a regulation establishing harmonized rules on artificial intelligence, separate rules are proposed on the transparency and provision of information to users of an AI system. See Arts. 13, 52.

cross-border private autonomy and freedom of contracts in the digital market. The challenges of digitization have not given impetus to the development of EU private law in terms of increasing the standards of the protection of individual rights in the offline market. For all these reasons, the role of private law in the development of the digital market and digital transformation is relatively limited. The application of traditional remedies that cannot always fully provide for the efficient protection of individuals in the offline market cannot achieve it in the digital market, either. Indeed, because of the specificity of digital services, digital contents, and digital assets, whether it is even possible to ensure the efficient protection of individual rights in the digital market by the application of remedies applied in the offline market raises significant doubts.[76] The past development of digital technologies, and their effects on business, shows that a digital revolution may have serious disruptive effects on private law relations, whose elimination requires different reactions by the European legislator.[77] Problems may arise not only in connection with the protection of fundamental rights in private law relations but also in the realization of private autonomy and freedom of contracts in online environment because of an increasingly dominant position of internet platforms. Therefore, it would be useful to consider the possibilities of taking measures to prevent the risks and unfavorable effects of digitalization on private law relations or to think of a different approach to the approximation of private relations in the law of the Union based on systematic and substantial regulation to achieve higher standards of protection of individual rights in private law relations in both digital and offline markets. The circumstance by which many aspects of private law relations for a digital market are still not regulated—neither in the law of the Union nor in the Member States—may be a justified reason to begin a systematic regulation of private law relations that are important for a digital market. In such a way,

76 For example, numerous problems are connected with the efficient protection of individuals based on the duty to provide transparent information. An extensive application of the rules on information duties and constant extension of the catalogue of information has already challenged this legal concept in the offline market. It is doubtful whether participants in the offline market have already been able (because of the quantity and complexity of information) to determine everything that is important for their legal and economic position. These risks are even greater in the online market. Therefore, a question justifiably arises of whether it is necessary to also regulate some other instruments for the digital market to ensure informed decisions by market participants. See Metzger, 2020, pp. 43, 44.

77 On the possible approaches to the regulation of disruptive effects of the digital revolution on law, see Twigg-Flesner, 2016, pp. 25, 28, 47, 48.
A viewpoint in literature argues that before the adoption of new measures, it is necessary to determine whether it is possible, by the existing rules, to eliminate the negative consequences of the digital revolution. See Twigg-Flesner, 2016, pp. 25–28, 47, 48; Staudenmayer, 2020, pp. 83–86.
Some authors propose that in some areas (e.g., consumer protection law), in the cases of disruptive effects in the market caused by digital revolution, traditional consumer rules or general principles should perhaps continue to be applied because they are sufficiently flexible to be adapted to any novelties. See Howells, 2020, pp. 146–149, 171.

and on the basis of the existing legal bases for harmonization, the possible negative effects of the technological development on the functioning of the digital market could be prevented (the so-called preventive harmonization).[78] In such regulatory interventions, the European legislator may come across numerous new challenges, such as the choice of legal instruments, the legal basis for different measures, the level of generality and flexibility of private law rules with regard to a fast technological development, the field of application of the new private law rules, and the like. One of the biggest challenges (it always emerges when a substantial regulation of private law in the body of law of the Union is involved) will then be the establishment of an optimal balance between private autonomy and freedom of contract on the one hand and the requirements for efficient protections of private law individual rights and fundamental rights in the digital market on the other. Precisely the approach to this problem will determine the role of private law for Europe's digital future, namely whether private law will continue to have only a very specific role in *ex post* minimalization of risks posed by the use of digital technologies, or whether it will become one of key factors for digital transformation.

78 For example, the non-existence of digital content rules at the level of the Union and at the national level is indicated as one of the reasons for the harmonization of the rules on digital contents in Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital contents and services. See point 9 of the Recital.
This Directive was adopted based on Art. 114 of TFEU as the legal basis for the approximation of laws for the establishment and functioning of the internal market.

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BERND KANNOWSKI* – CECILIA NGAIZA**

Environment or (Collective) Human Rights: What Is More Important? A Critical Perspective on the Implementation of the Joint UNESCO/ICOMOS/IUCN Recommendation on the Voluntary Relocation of Maasai Residents from the Ngorongoro Conservation Area in Tanzania***

SUMMARY: *This article reflects on the 'Yellowstone model' of environmental conservation while considering the United Nations Educational, Scientific and Cultural Organization (UNESCO)/ International Council of Monuments and Sites /International Union for Conservation of Nature's recommendation on the voluntary relocation of Maasai residents from the Ngorongoro Conservation Area (NCA) in Tanzania. While advocating for an inclusive conservation approach, it synthesizes the extent to which the relocation has affected the collective socioeconomic and cultural rights of the Maasai in the property. It discusses the concept of Yellowstone conservation model, and subsequently traces the legal background to the existence of the Maasai in the NCA. The NCA's statuses as a UNESCO heritage site of outstanding universal value, international biosphere reserve, and a global geo-park are also canvassed in the light of multiple-land use model. It further critically discusses the practical impacts of controlling the growing Maasai population at the site through induced voluntary relocation. The authors have drawn lessons from the Inter-American human rights system on the same area of conservation. Ultimately, the article concludes with practical recommendations and proposed issues for further research on this controversial topic.*

KEYWORDS: Collective Human Rights, Environment, Maasai, Ngorongoro Conservation Area, Tanzania, UNESCO/ICOMOS/IUCN Recommendation

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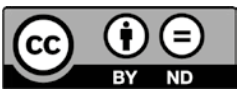

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1. Introduction

The article deals with a problem that typically arises where the traditional way of human life is closely linked to a particular natural landscape. Under these circumstances, legal positions that do not seem to be contradictory at first glance can indeed collide. On the one hand, there is public interest in the existence and preservation of an endangered ecosystem with its unique flora and fauna untouched by humankind. On the other hand, there is the legally protected interest of an indigenous population in preserving the traditional way of life as a collective. This phenomenon is alien from a European perspective. There is no such thing as collective human rights in the European Convention on Human Rights of 1950 and the European Court of Human Rights is reluctant to recognize such rights.[1] The situation is different in Africa. The African Charter on Human and Peoples' Rights of 1981 (Banjul Charter) explicitly grants such collective rights, which comprise the existence of a people and the right to a satisfactory environment for development. A conflict between these two legal positions can arise if such a group living in a nature reserve grows to such an extent that it jeopardizes the existence of the nature reserve, at least in the form prescribed by law. This is the reality in the Ngorongoro Conservation Area (herein referred to as 'the NCA', 'the site', 'the Area' or 'the property') wherein the Maasai people are faced with the pressure to abandon their ancestral lands for the sake of conserving the NCA, which is one of the mixed world heritage sites designated by the United Nations Educational, Scientific and Cultural Organization (UNESCO). The Maasai ethnicity, some of whom live in the NCA, identifies itself as an 'indigenous community' in the sense of associating itself with the global indigenous peoples' movement. The African Commission on Human and Peoples' Rights (ACHPR) has interpreted the concept 'peoples' under the Banjul Charter to include indigenous peoples[2] who

1 Kriesel, 2020, pp. 113–184.

2 Application of the term 'indigenous peoples' in an African context attracts a great deal of debate as to whether there is an African who is not indigenous to the continent. However, the African Commission on Human and Peoples' Rights has come up with a more liberal way of approaching the term 'indigenous peoples' from an African perspective. It emphases that in defining the term 'indigenous peoples,' 'We should put much less emphasis on the early definitions focusing on aboriginality, as indeed it is difficult and not very constructive (except in certain very clear cut cases like the San of Southern Africa and the pygmies of Central Africa) to debate this in the African context. The focus should be on the more recent approaches focusing on self-definition as indigenous and distinctly different from other groups within a state; on a special attachment to and use of their traditional land whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of subjugation, marginalization, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.' See African Commission on Human and Peoples' Right (ACHPR) and International Work Group on Indigenous Affairs (IWGIA), 2005, pp. 91–95, especially pp. 92–93.

have the potential to invoke particular rights in their collectivity.[3] The Maasai socio-cultural and economic collective interests in the NCA hang in balance with nature conservation in the property. The Tanzanian government's efforts to relocate them from the property have recently become more pronounced than ever. Many Maasai residents have been moved outside the property by July 2022. This model of nature conservation, which is considered redundant, is famously known as the 'Yellowstone model or syndrome'.[4] It is viewed as redundant for its unrealistic attempt to confine wildlife and humans within certain designated artificial boundaries in protected areas.[5] It is also said to distort the real concept of the world's heritage, as humans are part of nature too. It is alleged to have eroded indigenous peoples' cultural identity, development, and livelihoods by relocating them from their ancestral lands. These parameters are values that are respected under international law. At the same time, the Yellowstone model is defended by another school of thought, which propounds that, if nature conservation is not regulated and supervised, indigenous peoples have the potential to take advantage of natural resources at the expense of their sustainability.[6] Human beings are thus considered to hunt for prey just as it is the case with other terrestrial predators like lions, wolves, and jackals.[7] In addition, human activities, such as burning of natural forests or certain kinds of plants, are said to affect the natural occurrence and association of the flora kingdom.[8] Therefore, preservation, rather than exploitation, has always been the philosophy behind the Yellowstone model of nature conservation.[9]

It is definitely not advisable, presumably even impossible, to discuss the question of environmental conservation in isolation from human or (collective) peoples' rights, or assert that one of them is more important than the other. The two concepts are intertwined[10] without a simple solution being at hand. In this

3 See the case before the African Commission on Human and Peoples' Rights: Center for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication No. 276/03, paras. 147–155. Also, see ACHPR and IWGIA, 2005, p. 13.

4 The name 'Yellowstone' comes from one of the world's oldest national parks, the first to be founded in the United States of America in 1872. The establishment and management of this national park became a model for many others that were subsequently inaugurated all over the world including the Serengeti National Park. One of its in(famous) *modi operandi* was detaching indigenous peoples from particular 'strict areas of conservation' and confining them into designated areas within or outside the protected areas. This model is condemned for devaluing indigenous peoples' role in nature conservation, hence their marginalization. See Poirier and Ostergren, 2002, pp. 333–334.

5 Poirier and Ostergren, 2002, p. 351.

6 Ibid.

7 Wuerthner, 2015, p. 5.

8 Ibid, p. 4.

9 Ibid, p.2.

10 Mramba argues, 'The efforts to conserve the environment are an appreciation of the relationship between human and the natural system that supports life.' See Mramba, 2020, p. 5.

article, we describe the conflict situation about the presence of the Maasai within the NCA along with its historical and political background. We indicate possible solutions, for which we also take a comparative legal look at Latin America, where similar conflict situations have arisen.

2. Background

The Maasai form part of the 120 plus ethnicities in Tanzania.[11] Over the centuries, they have led a traditional life of pastoralism that solely depends on the natural environment for survival. Being a semi-nomadic (transhumance) pastoral community, they habitually shift their livestock in various parts of the country in pursuit of natural rangelands, water resources, and other mineral sources such as saltlicks, which are crucial for the survival of their livestock. Despite the fact that the Maasai are not one of the minority groups in the country,[12] they are one of the vulnerable categories of people in Tanzania due to the rapid increase of threats to the existence of their pastoral livelihood.[13] In some geographical locations, they have faced limitations to sustain their livelihood because of demarcation of their land for infrastructural development, mega-investment projects, large-scale crop cultivation, and establishment of protected areas such as national parks, game reserves and game controlled areas.[14] Given this background, the Maasai have been playing an active role in the 'indigenous peoples' movement' in Africa from the very beginning of such initiative in the continent, including being at the forefront in self-identifying themselves as indigenous peoples.[15] They are one of the five ethnic communities in Tanzania who resonate with this cause, which is of global importance.[16] Despite the aforementioned reasons for dispossession of the Maasai's rights, which are rather collective as they go down to the root of their collective existence, this article focuses on one specific question of environmental

11 Maasai are not defined by a formal border between Kenya and Tanzania, but their shared origin, history, culture, traditions, beliefs, interests, and values. Nevertheless, this article refers to the Maasai within the geographical borders of Tanzania.

12 This can be explained by the fact that Maa, which is a language spoken by the Maasai, is one of the top 10 languages spoken in Tanzania. See Ministry of Information, Culture, Arts and Sports, 2015.

13 Dersso elaborates that, despite the fact that indigenous peoples can pursue peoples' rights as a collective under the African regional human rights system, the ACHPR has not expressly pointed out that these peoples are necessarily the minorities in a particular country. See Dersso, 2006, p. 372.

14 Note that for many years, the Maasai community has lived in areas of abundant wildlife resources. Such locations are primary targets for tourist attractions as well as domestic and international environmental conservation efforts.

15 Ndahinda, 2011, p. 257.

16 Indigenous peoples' movement seeks to advocate for, promote and protect the rights of indigenous peoples globally.

conservation as a basic ground for relocation of the Maasai from a specific area of conservation in Tanzania, i.e. the NCA.

3. Legal history of the existence of the Maasai in NCA

Some of the Maasai peoples were confined to the NCA following the legal establishment of the Serengeti National Park (SNP) as a standalone national park in 1959, upon enactment of the National Parks Ordinance, 1959, and the Ngorongoro Conservation Area Act, 1959. The SNP, which is now the oldest national park in Tanzania, was first established in 1940 to respond to the International Convention Relative to the Preservation of Fauna and Flora in their Natural State, 1933 (also known as the London Convention).[17] The London Convention was signed by colonial powers before the outbreak of WWII. This convention was one of the earliest international conservation agreements involving protection of flora and fauna in the African continent.[18] It introduced the notion of national parks and 'strict game reserve.'[19] Section 3(1) of the convention obliged all contracting colonial governments to immediately explore areas with the potential of being established as national parks and strict nature reserves. The convention played a role in the limitation of human residents and activities in 'protected areas' (specifically in 'strict game reserves') except with the written permission of competent authorities.[20]

Just like Article 6 of the League of Nations' Mandate Agreement of 1922, the British were obliged under Article 8 of the United Nations Trusteeship Agreement for the Territory of Tanganyika of 1946 to respect and safeguard the rights and interests of the present and future native populations, as well as to take into consideration their laws and customs while legislating laws affecting their land and

17 Shivji and Kapinga, 1998, p. 7.

18 The London Convention of 1933 was however preceded by the Convention for the Preservation of Wild Animals, Birds and Fish in Africa (the London Convention of 1900). Despite the fact that, the convention never entered into force, it was a pioneering agreement ever signed by the colonial powers with intentions of conserving nature in Africa.

19 Nevertheless, the Germans had remotely begun the practice of Game administration in Tanzania as far back as 1908 through the German Game Ordinance of 1908. Specific to NCA, in 1914 the current northern highland forest reserve of the NCA was accorded a conservation status to protect the watershed. The British colonial government, which took over this German colony as a mandate territory, continued the conservation practice through the Game Preservation Proclamation No. 4 of 1920. For instance, the Ngorongoro Crater which is within the current NCA was gazetted by the British colonial administration as a closed game reserve in 1928 whereby, unlicensed hunting and crop cultivation was prohibited therein, but human settlement according to customary law was allowed. However, these conservation schemes had no connection with international commitment to wildlife conservation. See Mchome, 2001, p. 120. Also, see Ministry of Natural Resources and Tourism, 2019, p. 1.

20 S. 2(1) and (2) of the London Convention, 1933.

other natural resources. Hence, it was not by accident that the relocation of the Maasai from SNP to the NCA was legally formalized. This was done after a series of consultations with the Maasai residents in the then SNP through a designated committee of inquiry known as the Nihill Committee to decide the demarcation of SNP and fate of the Maasai residents. When the proposed artificial boundaries of the SNP contained in British Government Seasonal Paper No. 1 of 1956 were initially communicated to the Maasai, the possibility of a revolt became obvious.[21] Generally, the Maasai did not heed the new conservation regime that had been imposed on their homeland, as they considered their interests disregarded. Their resistance involved various disruptions such as vandalism and setting some areas of SNP on fire.[22]

In order to come up with a long-term solution to this, the Nihill Committee Report proposed the division of the park into two; that is, the SNP and NCA, whereby the rights of the Maasai would be reconciled through the scheme of multiple land uses,[23] in compensation for the provision of social services like water for them and their livestock. Additionally, it was recommended that the traditional lifestyle of the Maasai in the NCA should be maintained. This recommendation was implemented in terms of the 'solemn pledge'[24] by the then-British government in exchange of the Maasai's voluntary relinquishment of all of their rights in the now SNP[25] and relocation to the NCA.[26] Thus, it can be argued that, the question of negotiating with native communities before acquiring their customary land rights in lieu of the creation of these protected areas was not completely omitted in this case.[27]However, Lissu argues that the British colonial administration presented

21 The Maasai had already been relocated from their 'ancestral' lands in Kenya by the British colonial government through the 'tacit' agreements of the year 1904 and 1911 (famously known as the Maasai Accords) which had tragic consequences. Hence, it was already in their consciousness to approach such identical case with great caution and self-defense. For an extensive discussion of the 1904 and 1911 Maasai Accords, and their aftermath in courts of justice see Kabourou, 1998, pp. 1–20.

22 Ministry of Natural Resources and Tourism, 2019, p. 1.

23 The Eastern part of the SNP was demarcated as NCA. This area became the earliest protected area in the country and beyond to ever practice multiple land use in terms of mixed wild and human life governed by the rules of conservation.

24 The solemn pledge to specifically preserve and protect the rights of indigenous Maasai inhabitants in the SNP as it was about to face re-definition of boundaries was made by the British government through the governor as he did the opening of the 34th Session of the colonial Legislative Council in 14 October 1958. The governor reiterated this pledge in his speech to the Maasai Federal Council in August 1959, which was the year when the NCA was legally established. See Shivji and Kapinga, 1998, pp. 9–10.

25 National Parks Ordinance, 1959 that re-established the SNP came in with strict restrictions on human activities in national parks. This left no room for the Maasai residence and activities therein anymore.

26 Shivji and Kapinga, ibid. It is never the less argued by Lissu that, Nihill's Committee was subject to and influenced by the international standards of wildlife conservation, not the pre-existing indigenous knowledge that had subsisted in the area for centuries.

27 S. 5 of the Game Ordinance, 1940. See Mchome, 2001, p. 123.

the agreement it had with the Maasai in Serengeti as a 'compromise,' while in reality the same was a compulsion on the Maasai, and the residents who inhabited the western part of Serengeti. He argues that such compulsion was done for the interests of the international conservational image and those of the colonial administration. He presents his empirical findings that the Maasai in Serengeti were faced with only two options in the said 'comprise,' that is, to either sign the agreement to surrender their customary land rights or be forcefully evicted.[28]

4. Ngorongoro Conservation Area Act and Authority

Post-independence, the 1959 NCA Ordinance was revised in 1975 through the Game Parks Laws (Miscellaneous Amendments) Act, Act No. 14 of 1975, and the Ngorongoro Conservation Area Authority (NCAA) was established as an autonomous organization whose management and functions were vested in the Board of Directors.[29] The established authority was bestowed with the responsibilities of conserving and developing natural resources, promoting and providing tourism facilities and protecting the interests of the Maasai community within the NCA.[30] The NCA Act also permitted entry and residence within the NCA to people who owned property or legal land rights in the area. This permit extended to their dependents and family members.[31] However, the NCAA was conferred with powers to limit and control residence in any part of the NCA to any category of residents, while respecting their legal rights.[32] The mandate is still carried out on behalf of the NCAA by the park rangers who conduct periodic patrols in the property. This method of control is associated with the aforementioned Yellowstone model that introduced the 'militarization style of conservation' in the country.[33] Despite this condemnation, the NCA Act is in operation in present times.

Since its establishment, the NCAA has made efforts to live up to its obligation to safeguard the interests of the Maasai of Tanzania living within the NCA as charged by the NCA Act. The Authority has a specific community development department that works hand in hand with the established Ngorongoro Pastoral Council (NPC). The NPC is composed of both the local government and Maasai community leaders (Ilaigwanak). This council protects the interests of the Maasai

28 See Lissu, 2000.
29 S. 4 of the Ngorongoro Conservation Area Act, 1959 read together with s.9 of the Game Parks Laws (Miscellaneous Amendments) Act, Act No. 14 of 1975.
30 S. 6 of the Ngorongoro Conservation Area Act, 1959.
31 S. 21(1), (2) (b) and (d) of the NCA Act.
32 S. 23 of the NCA Act.
33 The Yellowstone Park was run by the United States Army since 1886. In 1918, the park was handed over to the National Park Services, which had been created in the same year. See Oldest Org., '10 Oldest National Parks in the World.' [Online]. Available at: https://www.oldest.org/geography/national-parks/ (Accessed: 16 December 2022).

community in the property and offers them an inclusive platform in matters related to conservation and development. Through this collaboration, the NCAA has been offering veterinary services to Maasai livestock and has provided them with food supply at affordable prices to supplement their traditional food as cultivation is prohibited within the NCA. The NCAA has also offered education services (from primary to university level) amongst Maasai children living in the NCA, including vocational training programs such as carpentry, tailoring, and tour guiding. In addition, the NCAA offers free health services in the NCA and supports the Maasai community to participate in ecotourism projects, for example, operation of campsites within the Area and display of their culture and daily routines in the designated *bomas*.[34] Finally, the NCAA facilitates income-generation programs such as poultry and beekeeping as well as handicraft training for the Maasai residing in the NCA.[35] Nonetheless, some of these activities that have introduced the Maasai of the NCA to the money economy are not typically in line with their 'traditional' life, which ought to be strictly maintained in the property. In order to buy and sell the proceeds of their economic activities, they need markets in and outside the conservation area, hence introduction to and interaction with the mainstream society. The NCAA's initiatives to support formal education and introduce economic activities to the Maasai have been one of the *bona fide* strategies to convince them to voluntarily relocate from the NCA. Through educational and economic activities, a number of the Maasai have moved out of the conservation area, yet some have maintained their residences therein. The authors observe that this strategy has a possible resultant effect of attracting new residents to the site in the form of dependents and family members acquired outside the site through intermingling.[36]

5. NCA: Mixed world heritage of outstanding universal value

The NCA is located in the northern part of Tanzania, in the Ngorongoro division, Ngorongoro district, and Arusha region. It stands in the eastern part of SNP.[37] The site is essentially part of the mega Serengeti-Mara Ecosystem whereby it covers a total of 8,292 km^2 out of the 25,000 km^2 of the said ecosystem.[38] It is a protected

34 NCAA, 'Community Services.'[Online]. Available at: https://www.ncaa.go.tz/pages/community-service (Accessed: 17 July 2022).

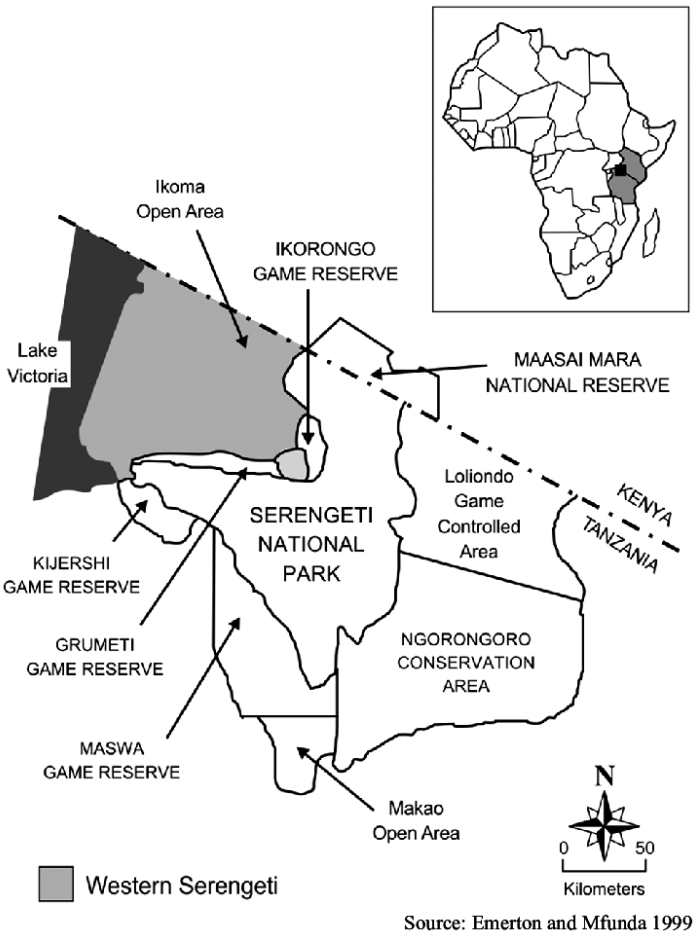
35 NCAA, 'Economic Empowerment.' [Online]. Available at: https://www.ncaa.go.tz/pages/economic-empowerment (Accessed: 19 July 2022).

36 For more discussion on in how Maasai intermingle though marriages see Coast, 2006, pp. 1–34.

37 It lays 180 kms from the Arusha City.

38 Ministry of Natural Resources and Tourism, 2019, p. 7.

area and a mixed heritage site bearing both natural and cultural resources of outstanding universal value.[39]



Map: Serengeti-Mara Ecosystem indicating the exact location of NCA.

The NCA was accorded the status of the world's natural heritage site by the World Heritage Committee in its Third Ordinary Session held in Cairo and Luxor in 1979. It later gained its status as an International Biosphere Reserve in 1981.[40] In 2010,

39 See NCAA, 'NCA History.'[Online]. Available at: https://www.ncaa.go.tz/pages/ncaa-history (Accessed: 29 August 2022).

40 According to UNESCO, biosphere reserves are '…learning places for sustainable development. They are sites for testing interdisciplinary approaches to understanding and managing changes and interactions between social and ecological systems, including conflict prevention and management of biodiversity. They are places that provide local solutions to global challenges.' See UNESCO, 'Biosphere Reserves.' [Online]. Available at: https://en.unesco.org/biosphere (Accessed: 7 August 2022).

the World Heritage Committee in its 34th Session in Brasilia made a decision and inscribed the site as one of the world's cultural heritage sites, making it a mixed world heritage site.[41] The property received another UNESCO recognition on April 17, 2018, as a Global Geopark.[42]

6. UNESCO World Heritage Centre's missions and impacts on the management of the NCA

UNESCO strives to maintain peace through international cooperation in education, sciences, and culture.[43] One of its overall missions regarding world heritage is to encourage the identification, preservation, and protection of the cultural and natural heritage of outstanding universal value, given the fact that heritage sites are considered of relevance to the entire humanity irrespective of their geographical location.[44] Within the UNESCO auspices, the World Heritage Centre (WHC) plays the role of the Secretariat to the World Heritage Committee tasked with the implementation of the World Heritage Convention.[45] It has the function of assisting state parties to the convention to apply for international assistance in matters related to conservation of natural or cultural heritage as well as coordinating the reporting processes.[46] The aforementioned committee is sanctioned by the convention to cooperate with other international and national governmental and non-governmental organizations and individuals that have objectives like those of the convention in the execution of its programs.

Since its establishment, the NCA has experienced a growing human population, part of which is summarized in the graph below.

41 UNESCO WHC, 2019, p. 12.

42 According to UNESCO, global geoparks are '…single, unified geographical areas where sites and landscapes of international geological significance are managed with a holistic concept of protection, education and sustainable development.' For more information about the Ngorongoro-Lengai UNESCO Global Geopark, see NCAA. 'The Ngorongoro-Lengai UNESCO Global Geopark.' [Online]. Available at: https://www.ncaa.go.tz/pages/geopark (Accessed: 7 August 2022).

43 UNESCO, 'UNESCO in Brief.'[Online]. Available at: https://www.unesco.org/en/brief (Accessed: 2 August 2022).

44 UNESCO, WHC. 'World Heritage.'[Online]. Available at: https://whc.unesco.org/en/about (Accessed: 1 August 2022).

45 See Art. 14 of the World Heritage Convention, 1972 read together with Rule 43 of Rules of Procedure of the World Heritage Committee, 2015, para. 27 of the Operational Guidelines for the Implementation of the World Heritage Convention, 2021 and Circular Letter No. 16 of 21 October 2003. [Online]. Available at: https://whc.unesco.org/circs/circ 03-16e.pdf (Accessed: 2 August 2022).

46 UNESCO WHC. 'The Center.'[Online]. Available at https://whc.unesco.org/en/world-heritage-center (Accessed: 1 August 2022).

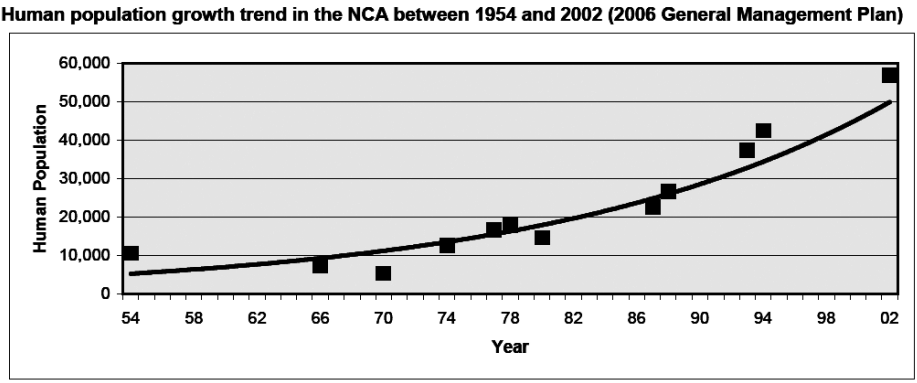


Chart: An extract from the Report of the WHC/IUCN Reactive Monitoring Mission to NCA (United Republic of Tanzania), 1–6 December 2008, p.10.

Therefore, for the last 15 years, several measures have been taken by the Tanzanian national government in collaboration with international organizations, specifically the UNESCO World Heritage Centre (WHC), the International Council of Monuments and Sites (ICOMOS), and the International Union for Conservation of Nature (IUCN), with the aim of assessing the rapid increase in human population and activities in the NCA and offering technical advice on how to contain the situation. Examples of the measures undertaken by the aforementioned international organizations are reactive monitoring missions to the property carried out in the years 2007, 2008, 2011, 2012, 2017 and 2019. One of the repeated recommendations in the reports of these missions has been to depopulate the property by offering attractive incentives outside the NCA to the indigenous Maasai who live therein to encourage their relocation. This strategy has not been successful in halting the drastic increase in the number of people living on the property. There are no exact figures, but estimates put the number of the Maasai living in the NCA at around 100,000 today. If the population continues to grow, it will double to 200,000 by the year 2038.[47]

7. Human/collective rights' perspectives on the selected circumstances of the indigenous Maasai in the NCA

The atmosphere surrounding relocation of the Maasai from the NCA may be analyzed from different points of view. We have selected the following relevant aspects for a focused discussion on the selected theme of this article.

47 Ministry of Natural Resources and Tourism, 2019, p. 93.

■ *7.1. The question of Maasai ancestral lands and cultural rights in the NCA*

As in the case for Lake Bogoria Game Reserve in Kenya (the lake and the surrounding areas) which is considered an 'ancestral land' with rich natural resources for the livestock and historic, religious and cultural value to the Endorois peoples,[48] the Maasai also have areas in Tanzania of the same nature and status. One of them is the Oldoinyo Lengai Mountain.[49] In the language of the Maasai, it means 'The Mountain of God.'[50] It is the youngest active volcanic mountain with a unique global feature of producing carbonatite, silicon-free lava.[51] It is located adjacent to the NCA and has religious and spiritual importance to the Maasai community. They believe that whenever the mountain erupts, their gods are upset. The mountain has been significant as a medium of prayer and a source of fertility, especially among women and healing among the Maasai people. Hence, Maasai women, even those from Kenya, travel long distances to undergo cleansing in the mountain vicinity and pray for fertility. The same is considered a source of guidance for Maasai leaders.[52] Therefore, relocating the Maasai from this spiritual-strategic-geographical location in the name of nature conservation to Msomera village in the Tanga region, which is more than 600 kilometers away from the NCA, contributes to detaching them from their cultural site as a people. Article 22 of the Banjul Charter provides for peoples' rights to cultural development as per their freedom and identity. The same charter provides for an individual's right to participate in his or her own community's culture.[53] The ACHPR in the Endorois case had this to say regarding a particular state's obligation to peoples' right to their own culture:

> ... protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and

48 Para. 6 of the Endorois case. In this case, it was revealed that, the Endorois believe whenever an Endorois is buried, his or her spirit lives in Lake Bogoria.

49 The mountain is the highest point of the Ngorongoro-Lengai UNESCO Global Geopark.

50 Naming of the protected areas using the Maa language by itself speaks volumes of the cultural and historical connection the Maasai have with such areas. It suggests the life lived in particular geographical locations for a reasonably long period. For instance, Serengeti National Park; the name Serengeti is originally from the Maa language 'Siringit,' which describes the vastness of endless savannah plains of such locality. See TANAPA. 'Serengeti National Park.' [Online]. Available at:https://storymaps.arcgis.com/stories/da3c674bdcc44265af0d5e85d8403583 (Accessed: 9 July 2022).

51 See UNESCO, 'UNESCO Geoparks: Ngorongoro-Lengai UNESCO Global Geopark (Tanzania).'[Online] Available at: https://en.unesco.org/global-geoparks/ngorongoro-lengai (Accessed: 9 July 2022).

52 Haulle and Njewele, 2016, p. 26.

53 This right is provided for under Art. 15 (1) (a) of the International Covenant of Economic, Social and Cultural Rights, 1966, acceded by Tanzania in 11 June 1976. The same is also reflected throughout the United Nations Declaration of the Rights of Indigenous Peoples, 2007, particularly Arts. 8(1) (a), 11, 12 and 31. Tanzania was among the 144 countries, which voted in favor of this Declaration on 13 September 2007.

> protection of, their religious and cultural heritage essential to their group identity, including…sites.…Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognized by a community.…thus culture…includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.…cultural identity…encompass a group's religion…and other defining characteristics.[54]

This quote presupposes that culture is an important tool to protect indigenous peoples' interests in their own ancestral lands.[55] Raisz also argues that land is an important factor in preserving the cultural identity of indigenous peoples.[56]

Articles 3 and 4 of the Cultural Charter for Africa (1976) emphasize respect for cultural diversity of each African country. Further, Section 5 of the same charter is not in favor of asserting national identity at the cost of varying communities' cultural orientations.[57] The right to take part in one's cultural life is also provided under Article 15(1) (a) of the International Covenant of Economic, Social and Cultural Rights (ICESCR), 1966 to which Tanzania is a party.[58] It goes hand-in-hand with protecting peoples' collective rights to land.

Despite the existence of the aforementioned legal guarantees to peoples' right to culture and cultural practices, and the reality that the land in Ngorongoro is of cultural importance to the Maasai as one of their ancestral lands,[59] the legal history of the country in Tanzania provides a narrow possibility to enforce the right to ancestral land. Most peoples who have asserted recognition of ancestral land as a collective right *vis-à-vis* the public interest have not been successful. The reason behind this is that Tanzania opted to maintain a substantial part of the colonial legal regime on land administration. The colonial administration declared all land in Tanganyika (now Mainland Tanzania) whether occupied or not as 'public land.' Currently, the Land Act maintains this position and vests all land under the custody of the President to hold it as a trustee for and on behalf

54 Endorois case, para. 241.
55 For an extensive discussion on this topic see Marinkás, 2016, pp. 15–38.
56 See Raisz, 2008, p. 43.
57 Tanzania ratified the Cultural Charter for Africa on 5 May 1978.
58 Tanzania ratified the Covenant in 11 June 1976.
59 In this article, ancestral land connotes the land which generations of a particular community have lived on for a considerable long period of time without interference and has been central to the survival of such community' socio-economic and cultural ways of life.

of all Tanzanians.[60] Tracing the roots of this notion, the concept 'public land' surfaced in the German and subsequently British colonial land administration regimes in Tanzania, that is, through the Imperial Decree of 1895 (Imperial Decree Regarding Creation, Acquisition and Conveyance of Lands, 1895) and the British Tanganyika Order in Council, 1920[61] and later the Land Ordinance of 1923, respectively. Another sustained colonial legacy with respect to land administration in Tanzania is reserved land. Section 6 of the Land Act provides for reserved land as one of the categories of land in Tanzania and lists the land designated under the NCA to be amongst the categories of reserved land. This colonial legacy has played a significant role in dismissing claims of ancestral lands in Tanzania and other African countries. Before the post-colonial societies in Tanzania[62] could comprehend and re-adjust to what had happened to their identities and heritage, they found themselves under a different legal regime that did not revert their right to ancestral lands that had been alienated through colonial legal instruments. Wanitzek and Sippel argue, 'The identities of people are strongly affected by the laws which govern their daily activities.'[63] It is a reality for the Maasai of the NCA that the Land Act that does not recognize the question of ancestral lands countrywide automatically affects subsistence of their cultural identity and practices in relation to their traditional land.

■ *7.2. Right to a general satisfactory environment favorable for development vs. environmental conservation*

The African Commission in the SERAC case[64] stated:

> The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter, or the right to a healthy environment, as it is widely known,...imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent... ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[65]

For the case of Ngorongoro, this obligation backfires to the government of Tanzania as a party to the Banjul Charter as it finds itself positioned in the violation of human rights of the Maasai peoples in the NCA as it strives to maintain the ecology,

60 See s. 4(1) of the Land Act, Cap.113 Revised Edition, 2019.
61 S. 2 and 8 of the Tanganyika Order in Council, 1920.
62 The pre-colonial societies lived in a different setting compared to that of the post-colonial era, for instance, they were in the position of owning their community lands. See, Gastorn, 2008, p. 22.
63 Wanitzek and Sippel, 1998, p. 113.
64 The Social and Economic Rights Action Centre (SERAC) and the Center for Economic and Social Rights v. Nigeria, Communication No.155/96, Judgment of October 2001.
65 SERAC case, para. 2.

promote conservation, and ensure the sustainable use of natural resources.[66] The implementation of peoples' rights to satisfactory environment depends on against whom such right is being enforced for a state to be regarded as fulfilling or not fulfilling this right, that is, the states are tested against omission or commission of such obligation. In the SERAC case, the government was found to have violated the Ogoni peoples' right to a generally satisfactory environment, having omitted to take reasonable steps to ensure that the concession on oil extraction in the Ogoni land considered sustainable ecological preservation and utilization of natural resources. Conversely, Tanzania is doing what the Nigerian government did not do and finds itself on the wrong side of human rights implementation. Although these two cases have different backgrounds, they provide suitable scenarios of how the right to a satisfactory environment for development can be fulfilled.

■ ***7.3. Other aspects of the Maasais' socioeconomic and cultural rights in the NCA***

The Maasai peoples' predicaments in the NCA became aggravated when the area gained international recognition as one of the world's natural and cultural heritage of outstanding universal value and as an important biosphere reserve.[67] The predicaments related to their population increase and human activities in the property. The legal incentives under the Ngorongoro Conservation Area Act in terms of sanctioned resident Maasai's right of entry, property ownership and use of land in the site as well as social services provision such as veterinary and hospital services are some of the causes of population increase in the NCA apart from the primary factor of the relocation of Maasai from the SNP.[68] The aforementioned factors have for many years now granted the Maasai's assurance of their establishment in the site. Another factor is immigration of people to the property. The government aims to prevent immigration by encouraging the relocation of Maasai outside the property as much as possible. A reason that the government gives for this is to prevent fatal accidents caused by wild animals as the rapid growth of population in the NCA aggravates the human-wildlife encounters in the property. It has been recorded that there have been 49 deaths of people caused by human–wildlife encounters between 2015 and 2021, which is an equivalent of seven deaths per year.[69]

66 This duty also falls on the shoulders of the Government under Arts. 7 and 8 of the International Convention on Biological Diversity, 1992. Tanzania signed this Convention on June 12, 1992, ratified it on March 8, 1993 and became a party thereto on 6 June 1996; having deposited the instruments of ratification with the Convention's Depositary.

67 Shivji and Kapinga, 1998, p. 5.

68 Following the establishment of the NCA, about 4,000 people from SNP were relocated to the NCA. This population joined another population of approximately 4,000 Maasai who inhabited the Ngorongoro Highlands since 17th Century. The two groups were guaranteed protection of their interests and livelihood development. See, Bellini, 2008, p. 5.

69 The statistics were shared by the Director of Wildlife whose presentation is available in Swahili language at Mwananchi Digital. 'Serikali Haihamishi Mtu Loliondo' (Unofficial translation: 'The Government is Not Evicting Anyone from Loliondo'). [Online]. Available at: https://www.youtube.com/watch?v=DeXi7H4PBnc (Accessed: 9 August 2022).

The government considers the ban of crop cultivation in the NCA and facilitating it elsewhere outside the property where food and cash crops may be grown as part of fulfilling the Maasais' right to food and economic development. Even before the property was renowned with international conservation status, a legal restriction to cultivate in the property was already in place through section 16 of the Game Parks Laws Act, 1975. Nevertheless, the rise of food insecurity due to climate change grossly affected the Maasai livestock. Consequently, the ban on cultivation in the Area was lifted in 1992 though the ban was reinforced in 2009. The NCAA took actions to ensure that such a ban was heeded to by wiping out whatever farms were standing past the period when the ban was restored.[70] With the ban on cultivation in the Area, food insecurity and malnutrition in children has been on the rise, as the NCAA is allegedly not substituting enough food for the resident Maasai families. It is argued that the authority has been deliberately providing minimum food supplies as a strategy to force them out of the property.[71] This line of argument does not find any other explanation for this shortcoming, taking into account the amount of profit the Area generates out of tourism, that is, USD 100 million or more per annum.[72] The right to food is not directly addressed under the Banjul Charter. Nevertheless, the ACHPR in the SERAC case implied such rights in articles 4, 16, and 22 of the charter, which provide for the right to life, health, economic, social, and cultural development. The same commission asserted that a minimum requirement for state parties to the Banjul Charter is to refrain from hampering peoples' efforts to feed themselves.[73] The scenario of banning cultivation in the NCA speaks volumes on the relationship between the environment and human rights. It implies violation of the right to food and utilization of natural resources. However, the government considers relocation of the Maasai from the NCA to areas where land for crop production is offered to every family without any conditions, as a fulfillment of the human right to food, and an economic right to cultivate cash crops for economic gains.

Article 1(2) of the ICESCR guarantees the right to free disposal of wealth and natural resources and that no person should be deprived of means of subsistence.[74] The same right is provided for under article 24 of the Banjul Charter whereby unlike the ICESCR, the African philosophy is embedded in this right through the wording; '...This right shall be exercised in the exclusive interest of the people.' The charter also provides that if people are disposed of this right, they

70 IWGIA, 2013, p. 76.

71 Laltaika argues: 'For reasons unclear, the government gives the Maasai only nine (9) kgs of maize per family for six months, which is hardly a week's worth of food for an inherently large Maasai family. As a result, many families consume far below the recommended daily caloric intake, and thus are exposed to deaths caused by hunger and malnutrition. 'See, Laltaika, 2015, p. 51.

72 Laltaika, 2015, p. 77.

73 SERAC case, para. 65.

74 Art. 1(2) of the International Convention on Economic, Social and Cultural Rights, 1966.

should be awarded adequate compensation. Nonetheless, this right has several limitations.

First, the exercise of this right should have due regard for the principles of international law. Tanzania is a party to the World Heritage Convention and the Rio Convention on Biological Diversity, 1992, thus it is bound to implement international commitments. For instance, under Article 4 of the World Heritage Convention, Tanzania is obliged to do everything necessary to conserve the natural and cultural heritage of outstanding universal value within its jurisdiction.

Second, Tanzania is a dualist state. Therefore, provisions of international agreements cannot be directly enforced as they are at the domestic level unless and until enabling domestic legislation is enacted. A good example is the Law of the Child Act, 2009, which was enacted to give force to the Convention on Rights of the Child and the African Charter on the Rights and Welfare of the Child, 1990, to which Tanzania is a party. Therefore, if Tanzania was a party to the ILO C 169- Indigenous and Tribal Peoples Convention of 1989, the same would still require another level of domestic legislation. A noteworthy aspect about dualist states is that their enabling legislation may have room for deviation from international obligations through modifications or omissions in relation to the rights sought to be enforced, or they may face undue delays when it comes to enactment. However, although Tanzania has been condemned for lagging behind in domesticating international treaties and conventions,[75] its parliament has enacted legislation reflecting on the right to free disposal of wealth and natural resources, that is, the Natural Wealth and Resources Act, 2017.[76] The law imposes the responsibility to ensure protection of peoples' interests in any agreement entered by the government with respect to the utilization of natural resources.[77] Nevertheless, it is tedious for the Maasai as an indigenous group to enforce the right to free disposal of wealth and natural resources. As is the case with land under the Land Act, per this law all the wealth and natural resources in the country are owned and controlled by the government on behalf of all Tanzanians which is held in trust by the President.[78]

Third, the Tanzanian Constitution only makes it a duty to every person to safeguard natural resources (Article 27). There is no provision on the right to use natural resources. Thus, the Maasai may only invoke Article 24, which grants

75 For a deeper analysis of undue delays in domestication of international legal obligations in Tanzania, see Kamanga K.C. 'Treaty Constipation As a Key Factor in Implementation of Human Rights Treaties in Kenya, Tanzania and Uganda,' pp.1-22. [Online] Available at: https://www.academia.edu/13587731/Treaty_Constipation_As_a_Key_Factor_in_Implementation_of_Human_Rights_Treaties_in_Kenya_Tanzania_and_Uganda. (Accessed: 22 July 2022).

76 Act No. 5 of 2017.

77 Preamble to the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017.

78 Art. 4(2) and 5(2) of the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017.

the general right to own property to every individual citizen when it comes to claiming their right to ancestral lands within the NCA. However, the legal situation regarding this matter remains unclear. When the Maasai were moved there in 1959, the NCA Act did not imply or expressly grant them the right to occupy or use the land under their customary law, as was the case in the previous laws governing the Area as part of SNP, which expressly provided for such right.[79] Thus, the only option left is to assume that the customary law of the Maasai still applies. Consequently, the land belongs to those who were already there before the NCA was established, together with those who were relocated there afterwards. Since the combined resident and 'immigrant' Maasai of the NCA share a similar history, beliefs, language, values, and most importantly livelihood, they can principally assert the collective right to land, a claim that goes into the core of their existence as a people.

If viewed from an African philosophical perspective of human rights, the Maasai right to land as a property and a natural resource can be explained in the form of a pre-colonial sense of communal ownership whose utilization went in line with protecting and ensuring the existence of a particular community as a whole.[80] The post-colonial sense of property ownership in Tanzania has mainly embraced individualism, as reflected in the country's constitution. Nonetheless, a little room for communal land is provided under section 13 of the Village Land Act.[81] The Maasai living in the NCA live in registered villages whose land is not under the category of village land under the Land Act, but under reserved land.[82] This means that their village councils have no power over the land they occupy, as it is the case with other villages outside the property. They only have usufruct rights to land within the NCA. This explains the NCA restrictions on Maasai pastoralists to access some of the crucial grazing lands within the property on the grounds of environmental conservation. For this reason, the Maasai in the area have lost more than 8,292km^{2}of grazing land.[83] Shrinking grazing land affects their way of relating, sense of prestige, identity, beliefs, and most importantly, survival. Madsen argues that 'once people lose their land, it is not long before they lose everything else; their language, their heritage, identity, children, culture and all too frequently their lives.'[84]

79 See S. 6 of the Land Ordinance, 1923. The Game Ordinance of 1940, which was succeeded by the National Parks Ordinance, 1948 and later the Fauna Conservation Ordinance, 1951 also provided for this right.

80 Amin, 2021, p. 38.

81 Chapter 114 of the Laws of Mainland Tanzania. Communal lands in the villages are governed by the village councils on behalf of all villagers and in pastoral communities like the Maasai, this portion of village land can be demarcated for purposes of communal livestock grazing.

82 S. 6 of the Land Act, Chapter 113 of the Laws of Mainland Tanzania.

83 Lissu, 2000.

84 Madsen, 2000, p. 8.

Fourth and to a much smaller extent, litigation of any dispute related to the country's sovereignty over natural resources is limited to domestic courts.[85]

Fifth, and to add weight to the aforementioned limitation, individuals and NGOs' right to access the regional human rights court that is the African Court on Human and Peoples' Rights (herein referred to as the 'African Court') has been inhibited following Tanzania's withdrawal of the declaration under Article 34(6) of the African Court Protocol which accepted the jurisdiction of the Court.[86] Therefore, under the Banjul Charter the ACHPR remains the only forum within the African human rights system at the disposal of the Maasai of NCA through which they can access the African Court to initiate human rights litigation. The aforementioned withdrawal of the declaration is quite a setback toward securing their legal rights because the NGOs that have been at the forefront in advocating and supporting indigenous peoples' rights movement (due to their expertise and financial capabilities compared to the peoples they represent) have fallen victims to such withdrawal.

8. The relocation: the government policy and status quo

Attempts to relocate the Maasai from the NCA are not new. They began in the 2000s whose results manifested in a 30 days' notice to vacate the property dated April 12, 2021. The notice targeted residents who had previously voluntarily vacated and returned to the Area. The eviction notice raised various national and international concerns, which led to the withdrawal of the notice a few days later, with a promise to find a much more suitable solution. On February 17, 2022, a meeting was held at the NCA, attended by the Tanzanian Prime Minister and prominent members of the government as well as Maasai leaders. The Maasai communicated their willingness to cooperate with the government, and the prime minister offered all residents an option for voluntary relocation from the property to an area of their choice. Shortly after the meeting, the government announced that a suitable location for the resettlement of NCA residents had been identified in Msomera village, Sindeni division, Handeni district,Tanga region. The registration and relocation processes for those willing to leave the NCA are ongoing. The fate of the Maasai who are not willing to relocate from the property is yet to be determined. The NCAA believes that the more voluntary the relocation of residents from the Area, the better it is for conservation purposes. The Authority has shared statistical information regarding the level of poverty and illiteracy amongst the NCA Maasai residents from the National Bureau of Statistics (NBS). According to

85 S. 11(1), (2) Natural Wealth and Resources Act.

86 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 1998.

these statistics, the percentage of illiteracy in the Area was 64% by the beginning of the relocation process. One reason for this is that children walk to schools that are situated long distances away from their homes, through threatening wildlife environment.[87] Therefore, voluntary relocation from the property has been highly encouraged by the NCAA.

The government of Tanzania has received both criticism and calls from different stakeholders domestically and internationally to contain the situation in the NCA. Internationally, the reactions were openly made by, among others, the United Nations Permanent Forum on Indigenous Issues,[88] the International Work Group on Indigenous Affairs (IWGIA),[89] the ACHPR,[90] and the UNESCO. Specifically, the UNESCO made it clear that the organization '…has never at any time asked for the displacement of the Maasai people.' It acknowledged the hurdles faced by the Maasai in the NCA and vowed to continue supporting the government of Tanzania to find suitable solutions.[91] Domestically, the Pastoralists Indigenous Non-governmental Organizations Forum issued a statement warning the government about the imposter Maasai leaders who attended the prime minister's meeting, which sowed the seed for acceptance of the government's offer to voluntarily relocate from the Area. The forum stated that such imposters could be compromising the long-term solution to the subsisting problem between the indigenous Maasai and the NCAA. It also advised the government not to conduct the relocation process in haste, but to give enough room for dialogue and grassroots consultations.[92]

87 Okuly Digital (2022). 'Kwa Sababu Hizi ni Muhimu kwa Wakazi wa Ngorongoro Kuhamia Msomera.' (Unofficial translation: 'Reasons for Ngorongoro Residents to Relocate to Msomera'). [Online]. Available at https://www.youtube.com/watch?v=k4UnXIxHAiE (Accessed: 8 August 2022).

88 United Nations Permanent Forum on Indigenous Issues. 'Statement by the Chairperson of the Permanent Forum on the Eviction of Maasai people from the Ngorongoro Conservation Area in Tanzania,' dated June 14, 2022. [Online]. Available at: https://www.un.org/development/desa/indigenouspeoples/news/2022/06/statement-by-the-chairperson-of-the-un-permanent-forum-on-indigenous-issues-with-reference-on-the-eviction-of-maasai-people-from-the-ngorongoro-conservation-area-in-tanzania/ (Accessed: 9 August 2022).

89 IWGIA. 'Urgent Alert: Threats of forced eviction of the Maasai indigenous pastoralists of the Ngorongoro Conservation Area (NCA) and Ngorongoro District in Tanzania,' dated February 23, 2022. [Online]. Available at: https://www.iwgia.org/en/resources/publications/4606-urgent-alert-maasai-ngorongoro-tanzania-forced-eviction.html (Accessed:9 August 2022).

90 ACHPR. 'Urgent Call for Cessation of the Eviction of the Maasai Community in the Ngorongoro District in the United Republic of Tanzania,' dated 13 June 2022. [Online]. Available at: https://www.achpr.org/pressrelease/detail?id=639 (Accessed: 9 August 2022).

91 UNESCO WHC. 'News, Ngorongoro: UNESCO has Never at Any Time Asked for the Displacement of the Maasai People,' dated 21 March 2022. [Online]. Available at: https://whc.unesco.org/en/news/2419. (Accessed: 10 August 2022).

92 PINGOS Forum, 'Tamko toka Mashirika Yasiyoya Kiserikali Kuhusu Mgogorowa Ardhi Wilayaya Ngorongoro' (Unofficial translation: 'Joint Statement of the Non-governmental Organisations regarding land conflict in Ngorongoro District') dated 26 February2022. [Online]. Available at: https://pingosforum.or.tz/tamko-toka-mashirika-yasiyo-ya-kiserikali-kuhusu-mgogoro-wa-ardhi-wilaya-ya-ngorongoro/ (Accessed: 10 August 2022).

Moreover, the Legal and Human Rights Center published a press release on June 30, 2022, touching on both the Loliondo and Ngorongoro cases involving Maasai land rights in conservation areas. The center advised the government to halt the promulgation of reviewing the NCA Act with the view of legally formalizing the relocation of the Maasai from the NCA.[93]

On March 25, 2022, the government convened a meeting with the ambassadors and consular officers present in Tanzania to brief them of the Tanzanian government's plans and strategies to maintain the sustainable use of its natural resources, particularly, the conservation of the NCA. The meeting was an opportunity for the government of Tanzania to inform the world of what was happening on the ground with respect to the implementation of the voluntary relocation of NCA residents. The Tanzanian Minister of Constitutional and Legal Affairs (who previously held the position of the Minister of Natural Resources and Tourism) addressed the issue of Ngorongoro from a human rights perspective. He admitted that the protection of natural resources for sustainability is not an easy task for any country, but Tanzania will not do so at the cost of human rights of its citizens. He reiterated Tanzania's human rights obligation to the international community with regard to preservation of natural resources[94] and insisted that Tanzania has taken into account all human rights and constitutional safeguards in relation to the people who have decided to voluntarily relocate from NCA to Msomera village.

He further stated the position of the government in relation to the recognition and implementation of indigenous peoples and minority rights in Tanzania. He specifically declared the government's position in relation to the notion of ancestral lands. He uttered (as quoted), '…we do not have anyone within Tanzania who has indigenous rights…we do not have any minority groups in Tanzania.' With this position, credits were accorded to the late Julius Nyerere (1922–1999), the first President of Mainland Tanzania who abolished the question of tribalism in the country as well as established '(one of) the most equitable land ownership systems in the world.' In this line of argument, the minister stated that nobody owns land privately in Tanzania. All land is publicly entrusted to the President and leased to the citizens in the form of a right of occupancy that can be issued in a span of 33, 66, or 99 years. Hence, 'there is no Maasai (ancestral) land in Tanzania.' The ancestral land notion was elaborated to be non-existent within the legal framework of

93 LHRC. 'Tamko Kuhusu Hali ya Loliondo na Ngorongoro' (Unofficial translation: 'Press Statement on the Situation of Loliondo and Ngorongoro') dated 30 June2022, p.9. [Online]. Available at: https://humanrights.or.tz/en/news-events/ngorongoro (Accessed: 10 August 2022).

94 This includes the African Convention on the Conservation of Nature and Natural Resources, 2003. Tanzania signed this Convention on September 15, 1968 and ratified the same on September 7, 1974. This is when the Convention was still known as the (Algiers Convention) before its revision in Maputo in 2003. Some scholarship indicates that, lack of functional human rights safeguards positions local communities at a risk of losing their land and other rights associated with it. See Laltaika, 2020, p. 21.

the country, and non-existent in the constitution. Hence, he iterated that human rights implemented in the country were equal for all citizens.[95]

As of 22 July 2022, 757 households (4,344 individuals) had registered to be relocated from NCA to Msomera village.[96]So far, the government has devised all means to provide adequate, equitable, fair, and proportional compensation to people who have volunteered to join the exercise. This includes a minimum of three hectares, a modern house with electricity, and running water per household. In addition to all the incentives, they also receive monetary compensation as startup capital.[97]

9. Why are the Maasai reluctant to leave the NCA?

The traditional way of life the Maasai have led over the centuries has enabled them to persistently survive with wildlife. This life solely depends on the natural environment for subsistence. Many of their generations have lived there before. The British colonial government had hoped that the Maasai who were granted the right of residence in SNP would voluntarily evacuate if provided water services elsewhere outside the park;[98] a relative supposition was possibly made while relocating them to the NCA. It might have been expected that the Maasai would abandon the NCA overtime in search for social services outside the property given the limitations in their supply therein.[99]All of these assumptions were rendered futile for both cases in the SNP and the NCA due to the long established historical peaceful existence of the Maasai in the wild.

The proposition that Maasai co-existence with wildlife is a distortion to nature conservation attracts scrutiny, except for their (including livestock's) overpopulation and practice of non-traditional ways of life in conservation areas. Generally, and specifically the Maasai residing in Ngorongoro do not prey on wild animals. Their main source of food is meat, blood, and milk from the cattle, goats, and sheep that they keep.[100] Exceptions can be made in extreme cases of food shortage for example during long periods of drought as a result of climate change when they would hunt specific types of animals or substitute their meals with grains such as maize.

95 Maelezo Tv. 'The Truth about Loliondo Game Controlled Area and Ngorongoro Conservation Area' date 21 June 2022. Available at: https://www.youtube.com/watch?v=GMGMoQXW16w&t=12s (Accessed: 11 August 2022).

96 Okuly Digital (2022).

97 Maelezo Tv, 2022.

98 Shivji and Kapinga, 1998, p. 9.

99 Notably, the supply of social services like water and electricity and modern day infrastructure is limited in the NCA due to the requirement of nature conservation. Modern markets, hospitals, and schools are available but kept at minimal levels to reduce human activities within the Area, and there is little importation of any building materials therein.

100 Information from the Maasai during field visit to NCA on 24 March2022.

Additionally, given the pre-existing knowledge on the use of medicinal plants for themselves and their livestock, they neither invade and clear forests' vegetation, nor do they cut down trees to make their houses.[101]Their houses are made by women using mud, cow dung, tough sticks picked from fallen tree branches, and savannah grass for roofing. All the aforementioned building materials are environmentally friendly and can decompose and return to soil naturally in the event that they vacate the place.[102] Moreover, the Maasai do possess traditional knowledge on managing grazing lands, for example, demarcation of pasture reserves for drought seasons (*alalili*) as well as reserves for calves and sick livestock. Notably, the elders hold more knowledge and experience of traditional pastoralism and they are the ones who manage the communal grazing lands. Furthermore, the question of preserving water sources is of utmost importance to the Maasai, as it is crucial for their and livestock's survival. Traditionally, any member of the Maasai community who violates rules on the preservation of water sources or grazing land is liable for punishment.[103]

The Maasai in the NCA have further argued that their presence has been beneficial to wildlife in terms of containing animal poaching. They claim to have been the guardians of nature for centuries. The Maasai associate the relationship between their removal from the NCA with the rise in numbers of poached animals, specifically rhinos, who have now been reduced to endangered species.

10. Comparative aspects with other jurisdictions

The question of interests of nature conservation clashing with indigenous peoples' rights is not a novel phenomenon beyond Tanzania. Thus, this segment provides a 'bird's eye view' on the same matter in other jurisdictions with an objective of drawing viable lessons which have the potential to be applied in the NCA's situation to balance the interests at stake. Impliedly, the discussion will tackle a sub-objective of painting a picture of the situation of indigenous peoples elsewhere and their justification for carrying on with the 'global indigenous peoples' movement' to-date.

■ *10.1 A glimpse from African jurisdictions*

Indigenous peoples' rights in Africa remain a delicate matter despite the fact that all African countries except Morocco have ratified the Banjul Charter and

101 During our field visit to Ngorongoro we learnt that when it becomes unavoidable for a Maasai to cut down a tree he or she prays and offers nature an explanation in Maa language about the intention to cut down a tree before he or she does so.

102 Information obtained through observation and authors' interaction with Maasai residents in the NCA, Ngorongoro District and the late Maasai Olaiboni's residence in Monduli District during a field visit to Tanzania in March 2022.

103 Goldman, 2011, p. 73.

they neither acknowledge the concept of indigenous peoples nor recognize their rights.[104] Only the Central African Republic has ratified ILO C 169, which is the basic international legal instrument providing for the rights of indigenous and tribal peoples in post-colonial countries. This is, however, not to degrade the domestic milestones that have been made in some African countries in recognizing indigenous peoples' rights through their country's constitutions and judicial activism by domestic courts. A good example can be drawn from Uganda, whose Constitution categorically recognizes the rights of minorities and right to culture and other similar rights.[105]A similar provision was included in the 2010 Kenyan Constitution under Article 56. Regarding the work of the judiciary, a decision passed by the Constitutional Court of Uganda in 2021is a recent revolutionary move. The Court upheld the rights of the Batwa indigenous peoples in relation to their ancestral lands situated in the present-day Echuya Central Forest Reserve, Bwindi Impenetrable National Park, and Magahinga Gorilla National Park. These parks were designated by the British colonial government as protected areas since the early 1930s and are still recognized as such by the independent Ugandan government.[106] Another decision of this kind surfaced in 2006 when the High Court of Botswana delivered a judgment in favor of the Bushmen (the San), whose eviction from the Central Kalahari Game Reserve to settlement camps was found to have been illegally carried out, hence, their entitlement to return to their traditional land.[107]

■ *10.2 Lessons and experiences from the Inter-American human rights region*

Human rights have formed part of transcontinental adjudication practice. The African regional human rights implementation bodies, that is, the African Commission and Court on Human and Peoples' Rights, have borrowed jurisprudence from the Inter-American Court of Human Rights while developing their own human rights jurisprudence.[108] This was the case when the African Commission and Court on Human and Peoples' Rights specifically cited cases from the Inter-American Court of Human Rights while adjudicating cases touching on indigenous peoples' rights. A clear example can be drawn from the SERAC and Ogieks[109] cases, whereby the cases of Velásquez Rodríguez v. Honduras[110] and Yakye Axa Indigenous

104 ACHPR & IWGIA, 2005, p. 112.
105 Arts. 36 and 37 of the Constitution of the Republic of Uganda, 1995.
106 See the case of United Organisation for Batwa Development in Uganda (UOBDU) & 11 Others v. Attorney General & 2 Others, before the Constitutional Court of Uganda at Kampala, Musoke JCC, Constitutional Petition No.003 of 2013, judgment delivered on 19 August 2021.
107 Survival. 'Bushmen win landmark legal case.' [Online] Available at: https://www.survivalinternational.org/news/2128 (Accessed: 29 August 2022).
108 Kannowski and Steiner (eds.), 2021, p. 11.
109 African Commission on Human and Peoples' Rights v. Republic of Kenya, Application No. 006/12.
110 Merits, Reparations and Costs, Judgment of 19 July 1988.

Community v. Paraguay[111] adjudicated before the Inter-American Court of Human Rights contributed to the decisions of these cases. Despite developments in the field of indigenous peoples' rights in Africa, the situation in the Inter-American human rights region provides more active engagements in relation to the aspect of collective rights of indigenous peoples due to the magnitude of human rights violations in such regions and the zeal of the victims and their supporters to turn to the Inter-American human rights system for recourse.[112] This section therefore analyzes the situation of the indigenous Maasai in the NCA in relation to cases of approximate nature decided by the Inter-American Court of Human Rights, while drawing lessons where applicable. Such cases are Xákmok Kásek Indigenous Community v. Paraguay,[113] (Xákmok case), Mayagna (Sumo) AwasTingni Community v. Nicaragua[114](Mayagna case), Garífuna Triunfo de la Cruz Community and its Members v. Honduras[115] (Garífuna case) and Kaliña and Lokono Peoples v. Suriname (Kaliña and Lokono case).[116]

Xákmok's case involved the Xákmok Kásek indigenous community's claim of their ancestral land, measuring 10,700 hectares in the Chaco region of Paraguay. Between 1885 and 1887, the independent state of Paraguay sold two-thirds of the land in Chaco belonging to this indigenous community at the London Stock Exchange to clear the debt that the state had incurred in the 'War of the Triple Alliance.'[117] This land disposition, carried out between Paraguay and private settlers who established a ranch (Salazar Ranch) on the sold property was done without any consultation with the indigenous community. As the strife continued between the Paraguayan government and the Xákmok Kásek, the property was divided and sold to another private individual. Immediately after this, a part of the claimed territory (4,175 hectares out of 10,700 hectares) was declared a private nature reserve land for a period of five years by presidential decree.[118] This rendered futile the administrative route for claiming collective rights by the Xákmok Kásek indigenous community. Therefore, the matter landed before the Inter-American human rights bodies, starting with the Inter-American Commission on Human Rights and later the Inter-American Court of Human Rights. This regional court eventually found a violation of several articles of the American Convention on Human Rights, 1969, by the government of Paraguay.

The Xákmok case has the following significance in addressing the case in the NCA. First, it addresses the question of 'dispossession by formalization.' Just as the Maasai in the NCA found themselves automatically losing their customary land

111 Merits, Reparations and Costs Judgment of 17 June 2005.
112 Raisz, 2008, at pp. 41 and 45.
113 Merits, Reparations and Costs, Judgment of 24 August 2010.
114 Merits, Reparations, and Costs, Judgment of 31 August 2001.
115 Merits, Reparations and Costs, Judgment of 8 October 2015.
116 Merits, Reparations, and Costs, Judgment of 25 November2015.
117 Xákmok Kásek Indigenous Community v. Paraguay, para. 58.
118 Ibid., para. 80.

rights due to domestic legislation in 1959, the Xákmok Kásek suffered the same fate when part of their ancestral land was declared a private nature reserve by a presidential decree in 2008. According to the law establishing protected wildlife areas in Paraguay,[119] private nature reserves could not be annexed as long as the declaration that gave them such status was valid. The same law put restrictions on human activities and control mechanisms, including the arrest of peoples who trespass and perform any activity thereto, just like the restrictions that came in with the National Parks Ordinance, 1959, and necessitated the relocation of Maasai from SNP to NCA.

Second, the question of poor or lack of indigenous peoples' prior consultation and free consent to disposition of their ancestral land was a fact in this case. At the very beginning, the Xákmok Kásek peoples were not consulted when their land was sold to pay debt that the state had incurred in war. In negotiating back this land, the same peoples were presented with a probable substitute land that did not support their livelihood; this was also done without prior consultation. Further, before part of their ancestral land was declared a private nature reserve, no consultation was made despite the fact that their claim towards such land was still pending. The same shortcoming can be observed in Mayagna's case in which the state of Nicaragua granted a concession to SOLCARSA Corporation for logging and road construction on the ancestral lands of about 62,000 hectares without the Mayagna peoples' prior consent.[120] Similarly, there are suppositions that the Maasai who were moved from the SNP to NCA had not willingly consented to such relocation as it was presented to have been by the British colonial government.[121] Fimbo argues that:

> The predicament of non or poor consultation of villagers in decisions affecting their customary rights of occupancy in land has been long observed in Tanzania. This was also reported to be one of the manifested and persisting problems by the Presidential Commission of Enquiry into Land Matters (Shivji Commission) in the year 1994.[122]

The aforementioned discussion provides a bird's eye view of the exclusion of indigenous peoples in decisions that affect the ownership of ancestral lands, one of which is formalizing such lands as protected areas with insufficient or non-consultation at all.

119 Law No. 352/94 of Paraguay.

120 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 83 (b).[Online]. Available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf (Accessed: 27 January 2023). Also, for a detailed analysis of this aspect in this case see Marinkás, 2013, pp. 922–929.

121 Lissu, 2000.

122 Fimbo, 2004, p. 36.

Third, the Xákmok case is a good example to explain that the presence of national laws recognizing indigenous peoples' rights as well as institutions designed for protecting such rights are not the panacea for the challenges they encounter. It has been indicated earlier that Tanzania lags behind in terms of specific legal and institutional frameworks that accommodate and promote indigenous peoples' rights. However, in the Xákmok case, even with the existence of presidential decrees which granted legal standing to the Zglamo Kacet community recognizing it as part of the Maskoy ethnic group (which is another name for the Xákmok Kásek community),[123] coupled with the presence of state institutions like the Institute of Indigenous Affairs (INDI) and the Rural Welfare Institute in the country, they could not succeed in the claim to their ancestral land before landing into the Inter-American Court of Human Rights.

Fourth, this case sheds light on the debate on indigenous peoples' identity formation and relationship with their ancestral lands. In the case of Ngorongoro the question has always been on the legitimacy to claim the right to ancestral land between the Maasai who were moved from SNP to NCA and those who were already settled there. In the Xákmok case, the Xákmok Kásek community was presented to be multiethnic, comprising 73.7% Sanapanás, 18.0% South Enxet, 5.5% North Enlhet, 2.4% Angaité, and 0.4% Toba-Qom.[124]The Inter-American Court of Human Rights reasoned that neither the court nor the state should decide for a community how they choose to identify themselves. It added that the identity of a community is based on historical and social factors that determine its autonomy and ought to be respected.[125] This explains why it does not matter whether the Maasai were moved from SNP to join other Maasai who were settled at the NCA. As long as they identified themselves as part of the Maasai community within the property, according to their history and other social factors, their identity cannot be denied. This raises the next question as to whether the Maasai outside the NCA may also claim the land in the property to be their ancestral land. The answer to this question can be obtained by drawing inspiration from the Xákmok case through relating the situation of the Xákmok Kásek community vis-à-vis the Paraguay government to that of the Maasai community vis-à-vis the Tanzanian government. In the Xákmok case, the court noted that the state was not denying its duty to reinstate the rights of Xákmok Kásek community that were lost when their land was sold in the stock market. However, it had an issue with the 'ancestral notion' of the specific land that was claimed. It stated that the ancestors of the Xákmok Kásek community inhabited a larger territory than what was being apparently claimed by the victims. According to this, the land covered by the Salazar Ranch was just one of many places in the area that was wandered about by Xákmok

123 Xákmok Kásek Indigenous Community v. Paraguay, para. 44.
124 Ibid., para. 41.
125 Ibid., para. 37.

Kásek ancestors as part of internal migration and that, part of such the community settled there when the sale was executed. Hence, it was proper for the state to allocate them land elsewhere within such vast 'ancestral territory.'[126] The same line of argument has been used by the government of Tanzania in the NCA case. The government has maintained its position that every citizen can live in any part of the country as long as he or she is not breaking the law. This means that the Maasai can live in the NCA, or in Msomera village, just as other ethnic groups that are scattered throughout the country. Some of the Maasai and other pastoralist families belonging to the Ilparakuyo, Datoga, and Sukuma ethnic groups have been living in the Tanga region for a long period. Therefore, the government believes that relocating the Maasai to Msomera village will not affect their semi-nomadic and traditional pastoral livelihood. Contrarily, as in the Xákmok case, where the claimant stated '... the lands being claimed have been identified through the collective memory which is still alive in the community and its members who clearly and systematically link and associate events, places, memories and practices of traditional economy to the geographic spaces referenced', the Maasai in Ngorongoro have the same reasoning. They assert that as far as their collective memory takes them back the land in the NCA has always been their home just as other Maasai in other localities like Simanjiro, Loliondo, or Monduli. It is our view that the Tanzanian government's argument that every citizen can live anywhere in the country is an assertion that will encroach the cultural survival of the Maasai who have led a traditional life in the NCA for centuries. Maasai's traditional livelihood does not thrive in any other geographical location, but only in particular supporting natural environment.

The fifth is the question of detachment from ancestral land and its effects on a community's cultural identity. The Xákmok case exemplifies how relocating indigenous communities from their traditional land may affect their livelihood. For communities that hunt, farm, and fish like the Xákmok Kásek, the proceeds of these activities are part of their cultural activities like weddings, payment of bride price, reconciliation, and sacrificial offerings. The same applies to the Maasai community. Apart from pastoralism being the backbone of their survival as a community, livestock is used in initiation processes, offering sacrifices for rain or casting away diseases and payment of bride price. It is also a source of prestige and security for Maasai men. Furthermore, a cow or goat's skin is used for making beds, and cow dung is crucial for building traditional Maasai houses. Hence, relocating the Maasai from NCA to Masomera village, where ready-made modern houses and alternative lands for food production and economic activities are offered as incentives, exposes them to a different kind of environment that threatens their cultural survival as a community. In the Xákmok case, it was noted by the court that the connection which indigenous peoples have with their

126 Ibid., paras. 90-91.

traditional lands, natural resources and other intangible elements form part and parcel of their culture hence, deserves to be safeguarded by article 21 of the American Convention.[127]

In addition, the court elaborated that unlike the classical sense of property ownership of property among indigenous communities is based on their collectivity. Thus, it deserves equal protection like private property under law. It added that the failure to recognize this dichotomy would imply that there is only one way of owning properties which will in turn make the legal guarantees of the right to property meaningless for millions of people across the world.[128]

While making this remark, the court revisited one of its landmark judgments in the Mayagna case where it asserted:

> There exists a communitarian tradition of a communal manner regarding collective property of land, in the sense that ownership does not pertain to an individual, but rather to the group and the community. Indigenous peoples, as a matter of survival, have the right to live freely on their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy to preserve their cultural legacy and transmit it to future generations.[129]

The question of collective ownership of land under the umbrella of 'ancestral lands' has nevertheless remained a subject of controversy. For instance, in the Garífuna case, the GarífunaTriunfo de la Cruz Community of indigenous peoples made of mixed races of descendants from Central Africa, West Africa, the Caribbean, Europe, and the Arawak who were living on the Caribbean coast of Honduras, claimed title to the land they had occupied historically. This raised the question as to whether history should be the factor for determining the ancestral nature of the land, and, if so, whether this community would hold the right to claim title to the lands where their ancestors originated from, i.e. from West and Central Africa, South Americaas well as Europe. The same debate has arisen around the question of Maasai claiming ancestral land in the NCA. If history is to be traced, the Hadzabe occupied the land earlier than the rest of the communities living within the NCA territory. Nevertheless, priority in time with respect to the occupation

127 Xákmok Kásek Indigenous Community v. Paraguay, para. 85.
128 Ibid., para. 87.
129 Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations, and Costs. Judgment of August 31, 2001. Series C No. 79, para. 149.

and use of a particular territory has been paramount in determining the right to ancestral lands by indigenous peoples, as indicated in paragraph 107 of the Ogieks case. This has also been reflected in the Garífuna case since the Agrarian Reform Law allowed indigenous communities to make applications for full ownership of land that they have used and occupied for not less than three years.[130]

In the Kaliña and Lokono case, which involved alienation of land of two indigenous communities, that is, the Kaliña and Lokono of Lower Marowijne River in East Suriname for purposes of nature conservation, the question of lack of consent and non-recognition of indigenous peoples' collective right to ancestral land was one of the central issues. Nevertheless, two other issues worthy of noting and relevant to the Ngorongoro case have been extensively covered by the Inter-American Court of Human Rights. One addresses indigenous peoples' right to participate in government, and the other addresses balancing the state and indigenous peoples' interests in a multiple land-use setting.

Starting with the issue of participation in the governance of natural resources, the court noted that the state made no efforts to consult the Kaliña and Lokono peoples prior to establishing 45% of their claimed ancestral land as nature reserves. This formed 59,800 hectares of the 133,945 hectares claimed by indigenous peoples. The rest of the 55% of the land claimed included the area where private persons had been granted titles and leases to conduct activities like building a hotel, vacation homes, shopping malls, gas stations, mining, and logging businesses.[131] Consent was not sought in granting titles and leases to non-indigenous persons in the ancestral lands. In addition, inclusion of indigenous peoples in the governance of their ancestral land like preparation of the Draft Bill on Traditional Authorities whose tasks would include administration of traditional land did not take the indigenous peoples on board.[132] In this situation, the court held that despite the fact that parties did not refer to the right to participate in the government under article 23 of the American Convention on Human Rights, such right had to be applied nonetheless under the *iuranovit curia* principle as long as the parties presented the facts that point to such violation.[133] In the end, the state of Suriname was found to have violated the Kaliña and Lokono peoples' right to participate in government, specifically the governance of their own traditional land, by excluding them from decisions that affected their interests in land. Viewing the case of Ngorongoro, there have been allegations that the Maasai peoples have not been granted sufficient opportunity to participate in the governance of the NCA. It is claimed that most decisions concerning the management of the property have been unilaterally carried out by the Board of Directors of the NCAA. This has led to the suggestion that the NCAA needs to be disbanded or reconfigured to

130 Garífuna Triunfo de la Cruz Community and its Members v. Honduras, para. 108.
131 Kaliña and Lokono case, paras.137–140.
132 Ibid., paras. 55–56.
133 Kaliña and Lokono case, para. 126.

accommodate equal representation of the government and local communities in the Board.[134]On this aspect, Goldman offers his views as follows:

> I am suggesting that a participation gap is bad for conservation and for local communities; it represents human rights abuses and poses ecological threats to conservation. Participation by local people in conservation may provide new insights and strategies for conservation, which do not separate people from nature in the strict dichotomous way…The exclusion of local people, on the other hand, can result in deliberate (if illegal) misuse of resources or passive neglect of an area, once it is no longer seen as belonging to the community.[135]

Another important feature in this case is the balancing of interests when it comes to the question of public interest vis-à-vis indigenous peoples' rights. It has been highlighted earlier that in the Kaliña and Lokono case, multiple activities had taken place on indigenous peoples' ancestral lands, some of these being building of a hotel and formation of nature reserves therein. The NCA presents the same circumstances, that is, apart from nature conservation in the Area, there are luxury hotels for tourists within the property.[136] The Maasai are of the view that if the aim of relocating them from the NCA is to reduce the impacts of human activities on the property for nature conservation, the hotels constructed in the property should also be relocated outside the Area.[137] Notably, the NCA was established as a multiple land use property whereby the interests of tourism, wildlife conservation, and human activities were meant to be balanced. In the Kaliña and Lokono case, the court elaborated that, in a situation where the interests of indigenous peoples are against the interests of nature reserve, the state should balance the collective rights of the indigenous peoples vis-à-vis environmental conservation, which is also part of the state's responsibility to defend the public interest.[138] In this case, the state had granted mining concessions on indigenous peoples' ancestral lands while denying hunting and fishing rights to the indigenous peoples. Fimbo argues '…land has always been an arena of struggles between contending forces.'[139] With this in mind, a way forward of taking on board both sides' interests has been provided by the Inter-American Court of Human Rights in case of conflict of interests between indigenous peoples and other forces, being the state or non-state actors, while implementing any 'public interest activity' at the indigenous

134 Lissu, 2000.
135 Goldman, 2011, p.68.
136 The Maasai opinion obtained from a field visit to NCA, Tanzania, on 24 March 2022.
137 Ibid.
138 Kaliña and Lokono case, para. 168.
139 Fimbo, 2004, p. 2.

peoples' vicinities. Also, the court insisted that such situations should be treated on a case-by-case basis to bring about relevancy in handling indigenous peoples' interests in varying contexts.[140]

By summing up this section, it is worth noting that the experiences of indigenous peoples in Latin America with regard to struggles to defend their rights in areas of nature conservation and other economic activities sanctioned by the state, such as tourism, are similar to issues faced by the Maasai in Tanzania. This explains why the Maasai in Tanzania self-identify with the global indigenous peoples' movement. The positive aspect of this discussion is that the Inter-American Court of Human Rights has been revolutionary in terms of safeguarding indigenous peoples' rights, mostly ancestral lands, something that also implies protecting the survival of their culture and livelihood. The bar has been set high for the African Court on Human and Peoples' Rights that operates under the realm of the Banjul Charter, which protects the (collective) rights of the indigenous peoples in Africa.

11. Conclusion

This article addresses the question of human and collective rights of the Maasai of the NCA *vis-à-vis* natural and cultural heritage conservation in the NCA. It has been revealed that the Maasai's traditional and cultural way of life is threatened by environmental conservation. This situation is typical for the Yellowstone model of nature conservation. The article has attempted to balance the two notions of peoples' rights and nature conservation while explaining the role played by the colonial administration, post-colonial legal regime, international law and practice in detaching the indigenous Maasai from the NCA. The role played by UNESCO's technical assistance in facilitating voluntary relocation of the Maasai from the NCA to maintain the property's status as a world heritage site has also been highlighted. It has been discovered that the presence of legal guarantees by itself does not suffice to protect peoples' rights in protected areas. Problems such as impeded enjoyment of the collective right to culture, threatened livelihood in terms of food insecurity and restrained economic subsistence; inadequate consultation and inclusion of the Maasai in natural resources governance of the NCA have been uncovered despite guarantees of these rights in several international instruments to which Tanzania is a party. The fact that the Tanzanian government considers the NCA's Multiple Land Use Model[141] a failure and uses such allegation as a justification for relocation of

140 Kaliña and Lokono case, para. 155.

141 The NCA Multiple Land Use Model was established as a very first trial model of mixed wild and human life in Tanzania.

the Maasai from the NCA continues to play a role as the root cause to unending conflict between the Maasai residents in the property and the government. The Maasai maintain that their coexistence with wildlife has been their way of life ever since before multiple land use model was established in such geographical area, i.e. before when the NCA and SNP were demarcated as two protected areas of different statuses.

12. Recommendations

Given the fact that Tanzania as an internationally recognized state may not function in isolation from the international community with regard to abiding by the body of laws on environmental conservation it has committed to, a balance between modern and traditional nature conservation techniques may be an option in containing the situation in the NCA. This will contribute to reconfiguring conservation approaches to bring about sustainable preservation and utilization of natural resources that do not offend the human rights principles or collective interests of the Maasai peoples. Nevertheless, the biggest question here is, are the Maasai, the government of the United Republic of Tanzania, and the international community willing to take this route?

Another suggestion is increased transparency, unfailing grassroots consultations, the practice of prior and informed consent, and inclusive feedback sessions. This may gradually improve the participatory governance of the property. Moreover, periodic community awareness programs on the national and global initiatives on environmental conservation and its accepted standards as well as its importance ought to be keenly implemented to avoid misinformation, confusion and chaos in controlling the growing number of population and livestock in the NCA. Collective rights to information and participation in form of a group are of crucial importance in such cases.

As for the residents who opt to remain in the property, voluntary relocation from the area should remain open at their disposal. Sufficient time, resources, and close monitoring of this process should be dedicated to the program to determine its challenges and possible solutions. This will ensure the perpetual fulfillment of human rights to both the relocated and residents of the property.

Most importantly, the human rights approach should be at the heart of identifying, proposing, vetting, approval and management of all UNESCO world heritage sites. It will be illogical to preserve these sites for the benefit of all humanity at the expense of humanity itself.

13. Opportunity for future research

Since the process of relocating Maasai people from the NCA to Msomera village is ongoing and such an experiment costs this community to abandon the only place they have ever known to be home, there might be a window for future assessment of the socio-cultural and economic impacts of this exercise on the relocated Maasai. Another research route might be taken by looking into what lies ahead of the resident Maasai, who have resolved to remain in the NCA. This assessment might be made in relation to the future conservation of the property.

Moreover, thorough research may be conducted on the effect of the Yellowstone model of nature conservation on the collective interests of indigenous peoples in Tanzania. Contemporary data will provide timely and effective solutions to this persistent problem. The Maasai have suffered repercussions from actions taken to conserve natural environment in the NCA and other protected areas in Tanzania such as Loliondo Game Controlled Area, Mkomazi Game Reserve, Mkungunero Game Reserve, and Tarangire National Park, to mention but a few. Establishment, redefinition, and management of these protected areas have remained a threat to the Maasai and other indigenous peoples' livelihoods. Finally, lessons from other jurisdictions may shed light on how to move forward from the current situation. Comprehensive research is needed to come up with suitable lessons for each case. Research on the jurisprudence of other jurisdictions like the Inter-American Court of Human Rights on the protection of indigenous peoples' livelihoods may also play a great role in influencing judicial attitude towards protecting indigenous peoples' rights in Tanzania and Africa in general, hence a potential area for legal research.

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ANDRÁS KOLTAY*

Photographing People in Public and the Protection of Privacy: The Jurisprudence of the European Court of Human Rights and Some Comparisons with England

ABSTRACT: *This study examines certain aspects of privacy protection, addressing the questions of whether it is possible to consider a person's image (most often a photograph) as part of their private life and whether the protection of privacy can be claimed in public spaces. A thorough examination of the European Court of Human Rights (ECtHR) and English case law reveals that these questions can be answered affirmatively. Certain general principles emerge from this case law, which take into account the freedom to discuss public affairs, namely, the protection of freedom of speech and freedom of the press. Based on an examination of these, it seems that a connection with a matter that qualifies as a public affair justifies the protection of the freedom of the press, meaning that purely tabloid content does not enjoy such protection. This creates widespread protection for freedom of expression and freedom of the press and may also result in numerous frustrated privacy plaintiffs.*

KEYWORDS: privacy, right to one's image, freedom of speech, freedom of the press.

1. Introduction

This study examines the aspect of privacy protection that is unique in several respects: Is it possible or necessary to consider a person's image (most often a photograph) as part of their private life? It is also possible to examine whether the

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protection of privacy can be claimed in public spaces or in places open to the public in general. Privacy in public spaces may seem like a conceptual contradiction. The study is based on an analysis of case law, examining and analyzing the case law of the European Court of Human Rights (ECtHR) and the English courts.

2. The European Court of Human Rights and Article 8 of the European Convention

The European Convention on Human Rights (ECHR), which was announced for ratification in 1950 in Rome and finally entered into force in 1953, created an international court designed to protect human rights and fundamental freedoms and watch over the respect for human rights entailed by the Convention. If a court decision or other resolution of any authority is adopted in one of the Member States by which a fundamental right set out in the Convention is breached, and there are no further ways of reviewing that decision or for a resolution in said Member State (either because the decision was adopted by a court of highest instance or because the right of appeal was limited in the first place), the applicant may turn to the ECtHR. If the ECtHR finds the claim admissible, it will decide on the matter, and if it finds that the Convention has been violated, it may rule that the applicant should receive just satisfaction or compensation depending on the situation. The Court has no jurisdiction to overrule the decisions adopted by the authorities of the party states or their legislations, or to initiate the amendment of any provision of law, but an unfavorable decision is rarely without consequences in the country concerned.

Article 8 of the ECHR prescribes respect for private and family life, in particular the protection of one's home and correspondence. Paragraph 2 details the possible limitations of that right, which are as follows: national security, public safety, the economic well-being of the country, the prevention of disorder and crime, the protection of health and morals, and the protection of the rights and freedoms of others. These limitations may only apply if they conform to the prerequisites usually applicable to other fundamental rights under the Convention, and as such they must be: (a) prescribed by law, (b) in the interest of achieving a legitimate aim, and (c) necessary in a democratic society.

> Article 8 – Right to respect for private and family life
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for

> the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The bases of these limitations are expressed in rather broad terms, but it should be remembered that the wording was drafted in 1950 in an entirely different European political and human rights environment. Limitations such as the economic well-being of a country or the protection of morals no longer have practical implications today. The scope of Article 8 was uncertain for a long time, as generic wording on the protection of private and family life did not necessarily enable the provision to be easily applied in practice. In recent decades, Article 8 has begun to function as a sort of catchall, which provides grounds for the ECtHR to accord protection to an applicant for violations of rights that do not fall under any other protected fundamental right.

Matters that do not fall under the scope of the Article include the right to marry, the right to found a family, equality of spouses, cases related to guardianship, visitation rights and alimony, adoption, inheritance, immigration, the right to integrity (more specifically school disciplinary actions and certain issues related to medical treatments), violations relating to homosexuality and transsexuality, rights of detainees, the right to housing, environmental rights, data protection rights, rights relating to public data, and of course the protection of private life versus freedom of the press and of speech.[1] In other words, the ECtHR enjoys a broader range of freedom than usual in interpreting Article 8, although Paragraph 2 states that the right may only be limited to protecting certain defined interests. In recent years, the Court has ensured broader protection of private life vis-à-vis the press and freedom of speech. Applicants who deem that their rights were not properly protected against the media by the law of their state (these rights primarily being the right to honor, reputation, one's own image, and private life) may turn to the ECtHR. Therefore, oddly, the violation of reputation, which tends to play a role in the external judgement of the individual by society, is subject to Article 8 and thereby falls within the scope of 'private life.'[2]

3. English law

English law does not recognize the general protection of privacy; there is no specific general tort related to privacy. However, this does not mean that interest in respecting privacy remains unprotected. There are separate torts for each of the most frequently occurring types of cases, and as the law has evolved, new,

1 Ovey and White, 2006, pp. 241-299.
2 Barendt, 2009.

independent responses to specific problems have emerged, rather than regulations with general applications.

The torts of trespass and nuisance provide protection against harassment; the name, voice, and image of a person are protected by the tort of appropriation of personality, while the tort of breach of confidence offers protection against the publication of confidential information. This casuistic approach, which does not take a general approach, is supplemented here and there by laws that offer protection against certain special forms of violation of privacy (the Data Protection Act of 1998, the Post Office Act of 1969 protecting private correspondence, and the Interception of Communications Act of 1985 providing protection against illegal wiretapping). However, until recently, the tort of breach of confidence – suitable for protecting privacy – had not provided adequate protection in several manifestly unfair journalistic proceedings. Courts have consistently rejected the general introduction of privacy into the English legal order, although this has been gradually counterbalanced by widening the scope of possible applications for breach of confidence.

Misuse of private information is a fairly new common law tort that the English Courts recognized in *Campbell v MGN Ltd*.[3] This decision made it clear that the tort of 'misuse of private information' was to be distinguished in scope from that relating to 'breach of confidence,' as the former does not require an initial confidential relationship.

4. Case law of the European Court of Human Rights

In the case of *Friedl v Austria,*[4] the European Commission of Human Rights[5] had to decide whether to accept an application alleging that the police had violated the applicant's rights under Article 8 of the ECHR by taking photographs of applicants participating in a public demonstration. The Commission found that taking and storing photographs did not infringe on Article 8 of the European Convention on Human Rights. In its decision, the Commission stressed that the photographs were not taken on private property and that they were related to a public event.

One of the most frequently referenced ECtHR decisions is *Von Hannover v Germany* from 2004,[6] which is certainly the key case of the 'being private in public'

3 *Campbell v MGN* [2004] 2 AC 457, HL.

4 *Friedl v Austria*, no. 15225/89, judgment of 31 January 1995.

5 The European Commission of Human Rights was a special body of the Council of Europe. Before 1998, individuals did not have direct access to the European Court of Human Rights; they had to apply to the commission, which, if it found the case to be well-founded, would launch a case in the Court on the individual's behalf. In 1998, the Commission was abolished and, since then, individuals are allowed to take cases directly to the Court.

6 *Von Hannover v Germany,* no. 59320/00, judgment of 24 June 2004.

doctrine,[7] one which 'radically altered the extent to which the media can lawfully intrude into the private lives of the rich and famous.'[8] The applicant in this case was Caroline, the Princess of Monaco, who was a favorite target of German tabloids. Before she lodged the claim, two tabloid papers published photographs of the princess taken by the paparazzi, showing her in various situations. Some of the images were taken on public streets and others in a restaurant, showing the princess having lunch with her new companion, while others were of Princess Caroline on the beach. Some of these pictures also include her children. The Princess turned to the courts complaining of a violation of her privacy. The German High Court only partially ruled in the Princess's favor and stated the legality of disclosing images that were taken in public places and not in places restricted to the general public. The Federal Constitutional Court went on to say that the images showing the applicant's underage child qualify as unlawful, as they violate the right to undisturbed family life, despite the fact that these images were taken in a public place.[9]

Furthermore, the ECtHR ruled that the disclosure of pictures taken under circumstances where the Princess would have had a reasonable expectation of privacy, for example, in the restaurant having lunch or on the beach, regardless of the fact that these qualify as public places, is a violation of Article 8 of the Convention. The statement of reasons for the decision is worthy of attention. The ECtHR states that although public figures are less able to protect their private life, their privacy is nonetheless acknowledged and protected by law. While freedom of expression extends to the disclosure of photographs, in this case, the rights of others, as well as the interest in the protection of their reputation, must also be taken into consideration. In addition, those affected by photographs published in the tabloids consider such disclosure to be a strong interference with their privacy, or even outright stalking or persecution.[10]

> The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart [ing] information and ideas on matters of public interest' . . . it does not do so in the latter case.[11] . . . As in other similar cases it

7 Krotoszynski, 2015, p. 1300.
8 Barnes, 2006, p. 614.
9 1 BvR 653/96, judgment of 15 December 1999.
10 *Von Hannover,* [59].
11 *Von Hannover,* [63].

> has examined, the Court considers that the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society, despite the applicant being known to the public.[12]

The public is obviously very interested in Princess Caroline's private life, but this in itself does not constitute an interest that trumps her rights. [13] The right to inform the public may, in some cases, extend to publishing details about the private life of certain public figures, especially politicians, in this case that does not apply. The sole aim of publishing the articles and photographs was to satisfy the curiosity of the audience by exposing the private life of the applicant, which cannot be considered necessary for a public debate.[14]

> The Court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection – as stated above – extends beyond the private family circle and also includes a social dimension. The Court considers that anyone, even if they are known to the general public, must be able to enjoy a 'legitimate expectation' of protection of and respect for their private life. . . .[15]
> Furthermore, increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data. . . . This also applies to the systematic taking of specific photos and their dissemination to a broad section of the public.[16]

Only ensuring weak protection of privacy for people like the applicant is not justified, as the interest in such people exhibited by the media and the general public lies merely in the fact that they are celebrities (in this case, a member of a royal family), and they do not exercise any important public functions.[17] The domestic courts did not adequately weigh these circumstances.

> The Court . . . considers that the criteria on which the domestic courts based their decisions were not sufficient to protect the

12 *Von Hannover,* [65].
13 Moosavian, 2014, pp. 242–243.
14 *Von Hannover,* [63]-[65].
15 *Von Hannover,* [69].
16 *Von Hannover,* [70].
17 *Von Hannover,* [72].

> applicant's private life effectively. As a figure of contemporary society 'par excellence' she cannot – in the name of freedom of the press and the public interest – rely on protection of her private life unless she is in a secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life.[18]

Without a doubt, the Princess is a public figure, but she does not hold public powers and is not a politician. Furthermore, as a woman, under the laws of Monaco, she cannot inherit the throne either. As she is 'just' a celebrity, the unveiling of certain aspects of her private life to the public does not contribute to a democratic debate, and so the protection of her private life is more important than it would be for a public figure who is a politician. The freedom of the press and the monetary interests of the media are not sufficient to justify the limitations of the protection of privacy. 'Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.'[19]

Therefore, there was a breach of Article 8 of the Convention in this case. According to this decision, respect for celebrities' right to privacy is not limited to secluded places but can be extended to public places, with some restrictions in the case of public figures. The images do not have to portray the public figure in a humiliating or indecent manner in order to qualify as infringement, just as the pictures of Princess Caroline showed her in everyday situations and did not uncover any new, intimate information; in this instance, it is the interference in her privacy per se which qualifies as unlawful.[20] As a result, the manner in which the press obtained the photographs and whether they effectively stalked the affected individual, and hence whether these were *paparazzi* pictures, is a secondary question.[21] As Moreham puts it:

> The scope of von Hannover is therefore far-reaching: It makes it clear people are not automatically free to publish images of others simply because they were in a public place at the time that the images were

18 *Von Hannover*, [74].
19 *Von Hannover*, [77].
20 Cheung, 2009.
21 Hughes, 2009.

> obtained, and that freedom of expression and public interests will be weak when information or images are published solely to satisfy readers' curiosity.[22]

In the second case,[23] initiated at the request of the Princess of Hannover, the ECtHR held that the publication of a single photograph attached to a newspaper article containing information of genuine public interest, showing her walking during a winter holiday with her third husband, did not infringe her right to privacy. This is because the article was about the health of the Princess's father, the Prince of Monaco, and the support that his family members gave him during his serious illness. The discussion of this topic was considered to be of public interest, and there was no allegation that the photograph had been taken by the reporter by harassment or surreptitiously (stealthily).

The third *Von Hannover* case[24] was based on an article published in the newspaper *7 Tage* in 2002, which included a picture of Princess Caroline and her husband on holiday along with several photos of their holiday home in Kenya. The pictures were illustrations from a newspaper article about how it has become common for the rich to rent out their holiday homes to paying guests. Caroline von Hannover filed a lawsuit against the publisher of the newspaper in question and requested a ban on further publication of her picture. The court of the first instance upheld her claim, but the court of the second instance dismissed it. The German Federal Court of Justice (BGH) agreed with the court of first instance and, referring to previous ECtHR rulings, held that the photograph and the article did not relate to a matter of public interest but to the central core of Caroline von Hannover's private life. The German Constitutional Court (BVerfG) found the reasoning of the BGH unacceptable and ordered a new procedure. In the new procedure, the Court gave priority to freedom of expression and explained why the article could contribute to a debate that is of public interest, and therefore dismissed the plaintiff's claim. The appeal against the new judgment of the Federal Court of Justice was unsuccessful, so Caroline von Hannover appealed a third time to the ECtHR. The ECtHR found that Germany did not violate Article 8 of the ECHR. According to the Court, the decision of the German courts that the article in question contributes to a debate on an issue of public interest cannot be considered unreasonable. The German courts carefully weighed the conflicting considerations in light of ECtHR case law and also took into account that the ECtHR considered the plaintiff to be a public figure, who was not entitled to the same degree of protection of her private life as a private individual.

22 Moreham, 2006.

23 *Von Hannover v Germany (No. 2)*, nos 40660/08 and 60641/08, judgment of 7 February 2012.

24 *Von Hannover v Germany (No. 3)*, no. 8772/10, judgment of 19 September 2013.

In *Axel Springer v Germany,*[25] the ECtHR also ruled in favor of the freedom of the media outlet when it decided in favor of the complainant publisher. The background of the case was that the German courts had banned the publication of photographs depicting the arrest of a well-known actor on suspicion of drug abuse at the Oktoberfest in Munich. According to the ECtHR, the person was a public figure whose unlawful conduct was information of public interest; the circumstances of the arrest were such that the information could not conceivably remain secret; the publisher had received the information from law enforcement authorities; and there was no reason to suspect that the anonymity of the person concerned should have been guaranteed.

In *Peck v the United Kingdom,*[26] a decision had to be made about the scope of the right to private life in connection with photographs taken in a public place, this time depicting a private person. The applicant, Mr. Peck, had attempted suicide on the streets by cutting his wrists. However, his loss of blood was not fatal, so he continued, in a deranged state of mind, to roam the streets with the knife in his hands. Closed-circuit television (CCTV) cameras, installed on the streets of Brentwood not long before, recorded images of Peck. The applicant was recognizable in the recordings; although the suicide attempt itself was not visible, only a confused man could be seen walking the streets with a kitchen knife in his hands. The local government intended to release the recordings to prove the legitimacy of introducing the CCTV-cameras. Peck's objection and his request for an injunction were unsuccessful. After the images were broadcast on television, he did not sue, as it was obvious that he could not obtain any satisfaction on the grounds of the tort of breach of confidence, as the recordings were made in a public place, so he turned directly to the Strasbourg Court.

The ECtHR established a breach of the applicant's right to private life. Even though he was in a public space, he did not consequently become a public figure, and the disclosure of his image and the recordings represented a violation of his privacy that exceeded what would normally be acceptable in such a situation, especially as he was walking in the streets in a state of confusion.

> The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life. On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations.[27]

25 *Axel Springer v Germany,* no. 39954/08, judgment of 7 February 2012.
26 *Peck v the United Kingdom*, no. 44647/98, judgment of 28 April 2003.
27 *Peck*, [59].

The Court's standpoint that the observation of individuals in public places without recording any data does not raise any concerns with respect to the right to privacy is questionable. In the specific case, however, the images were recorded, and the Court accepted that the right to private life can apply even in public places.

> [T]he Court notes that the present applicant did not complain that the collection of data through the CCTV-camera monitoring of his movements and the creation of a permanent record of itself amounted to an interference with his private life. Indeed, he admitted that that function of the CCTV system, together with the consequent involvement of the police, may have saved his life. Rather, he argued that it was the disclosure of that record of his movements to the public in a manner in which he could never have foreseen, which gave rise to such an interference.[28]

Therefore, the infringement was not the making of the recording per se, but its disclosure. The applicant did not have a public role, and his being on the street could not be categorized as a public appearance.

> The present applicant was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. It was late at night, he was deeply perturbed and in a state of distress. While he was walking in public wielding a knife, he was not later charged with any offence. The actual suicide attempt was neither recorded nor therefore disclosed. However, footage of the immediate aftermath was recorded and disclosed by the Council directly to the public in its CCTV News publication. In addition, the footage was disclosed to the media for further broadcasting and publication purposes. . . . The applicant's identity was not adequately, or in some cases not at all, masked in the photographs and footage so published and broadcast. He was recognised by certain members of his family and by his friends, neighbours and colleagues.[29]

Accordingly, the Court considered that the disclosure by the local council of the relevant footage constituted serious interference with the applicant's right to respect of his private life.

28 *Peck*, [60].
29 *Peck*, [62].

> [T]he Court notes that the Council had other options available to it to allow it to achieve [its] objectives. In the first place, it could have identified the applicant through enquiries with the police and thereby obtained his consent prior to disclosure. Alternatively, the Council could have masked the relevant images itself. A further alternative would have been to take the utmost care in ensuring that the media, to which the disclosure was made, masked those images.[30]
>
> In sum, the Court does not find that, in the circumstances of this case, there were relevant or sufficient reasons which would justify the direct disclosure by the Council to the public of stills from the footage in its own CCTV News article without the Council obtaining the applicant's consent or masking his identity, or which would justify its disclosures to the media without the Council taking steps to ensure so far as possible that such masking would be effected by the media. The crime-prevention objective and context of the disclosures demanded particular scrutiny and care in these respects in the present case.[31]

In the aftermath of *Peck*, the question of the limits of the right to private life on public streets still remained. Does this right extend to everyday situations?[32] Peck was most certainly in an extreme situation; hence, the question. Whatever the case may be, in the years following the decision, the ECtHR referred in a generic manner to the 'right to be left alone' in public places and to a reasonable expectation of respect for private life.[33]

5. English case law

A landmark case in English privacy law is *Campbell v MGN*. The applicant was supermodel Naomi Campbell, whose case went all the way to the House of Lords. It so happened that Campbell became a serious drug addict, a situation that she carefully concealed from the public and even denied. However, the *Daily Mirror* investigated the matter and exposed this side of the model's life in several articles. The paper reported that she was undergoing treatment at the Narcotics Anonymous rehabilitation facility, provided details of the treatment, and published photographs of Campbell as she was leaving the facility. Campbell

30 *Peck*, [80].
31 *Peck*, [85].
32 Morgan, 2003, p. 448.
33 Hatzis, 2005, p. 145.

then filed a lawsuit against the publisher of the newspaper for the invasion of privacy.

The judges held that privacy does not require a prior confidential relationship or any relationship between the parties. The newspaper also invoked freedom of the press and the public-interest nature of the information in the lawsuit. These were taken into account by the judges, who ruled that reporting on addiction and treatment was allowed, but that publishing the details and photographs was illegal. As Campbell had previously misled the public, her hypocritical behavior justified the public being made aware of the bare facts, but there was no public interest in readers being privy to the details (as the court said, these details are 'interesting' to them but not in their interest), which could even jeopardize the results of the treatment. The Court (by a narrow majority of 3 to 2) found a violation of privacy. *Campbell v MGN Ltd* established that the tort of misuse of private information' is distinguishable from that of breach of confidence, as it does not require an initial confidential relationship.

Even after this case, it was unclear whether English law generally accepted the private nature of photographs. This issue was first examined in *Murray v Express*.[34] The plaintiff was the minor son of author J. K. Rowling, and the case was brought to court following the publication of photographs of a child in a pram on a family outing on a street in Edinburgh. The photograph was taken surreptitiously with a telephoto lens, and neither the plaintiff nor his parents consented to the photograph being taken or its subsequent publication. The proceedings were brought to court on behalf of the baby based on the tort of misuse of private information. At first, the claim was dismissed on the grounds that the plaintiff had no reasonable prospect of success in legal action. However, the plaintiff successfully appealed: The Court of Appeal found that 'the fact that [the plaintiff] is a child is, in our view, of greater significance than the judge thought.'[35]

Although the Court of Appeal held that the fact that there had been a misuse of private information was arguable, the issue was not decided because the parties reached an out-of-court settlement. Thus, while the misuse of private information' may extend to taking and subsequently publishing certain photographs in public places, the framework for this has not been established, nor has the question of when the law protects photographs. However, the court set out criteria for determining whether a child has a reasonable expectation of the protection of their privacy. These are (1) the characteristics of the plaintiff, (2) the nature of the activity in which the plaintiff participated, (3) the place where the photographs were taken, (4) the nature and purpose of the invasion of privacy, (5) the absence of consent, (6) whether the effect on the plaintiff was known or could be inferred,

34 *Murray v Express Newspapers* [2007] EWHC 1908, [2007] EMLR 583.
35 *Murray,* [45].

and (7) the circumstances and purposes under which the photograph was obtained by the publisher.[36]

Weller v Associated Newspapers Ltd[37] was initiated after the publication of photographs of three children of the well-known musician Paul Weller. The photos were taken in Los Angeles but published in a British tabloid. Weller was in a public space with his 16-year-old daughter, Dylan, and his 10-month-old twin children, and the children's faces were also recognizable in the pictures. Weller did not initially notice the photographer, but when he realized that his family was being photographed, he asked him to stop. The photographer promised to do so, but later returned and took more photographs. Legal proceedings were brought on behalf of the children in the United Kingdom under the Misuse of Private Information Act and the Data Protection Act. Since the data protection procedure overlapped with the procedure for the misuse of private information, the judge only dealt with the latter. In his analysis, the judge examined whether the right to privacy was a reasonable expectation and considered how to determine the balance between privacy and freedom of expression. The judge held that the children had a reasonable expectation of protection of their privacy and that the balance between Articles 8 and 10 of the European Convention on Human Rights in this case must tip in favor of privacy. Therefore, the publication of the photographs constituted an invasion of privacy, and hence, the judge awarded damages to Dylan and the twins. Therefore, the crucial issue in the Weller case was that the photographs identified the plaintiffs and that although the photographs were taken in a public space, it was nevertheless a private event.

The question remains whether reasonable expectations of privacy are limited to children. Unlike the Court of Appeal proceedings in *Murray*, the judge in *Weller* made no reference to this, so it is unclear whether his decision would have been different if the plaintiffs had not been children. As such, it is possible that the reasoning in *Weller* could also be applied to public figures in relation to photographs taken in public spaces.[38]

6. Important factors when determining the breach of privacy

The decisions examined above can be used to identify the criteria against which the question analyzed in this study can be judged. On the one hand, it has become clear that the image is to be interpreted within the private sphere and that the misuse of the image is a violation of the right to privacy. On deeper reflection,

36 *Murray* [36].
37 *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB).
38 Hughes, 2014, p. 188.

this is not self-evident in the case of people spending time in public spaces or places open to the public, whose faces are 'public,' meaning that they are visible to others. It is also clear from the cases presented that under certain circumstances, people also have the right to privacy in public spaces and places open to the public.

The notion of 'privacy in a public place' may, at first sight, appear to be a paradox; however, it is in fact very well justified, as 'privacy' is not linked to a specific physical place or space, but is primarily the nature of the activity carried out by the right holder that determines whether the right holder is entitled to protection at a given time. The physical space can, of course, be relevant: there is a stronger presumption that activities carried out in the home are protected, but not those carried out in a public space, on the street. At the same time, it is possible to carry out activities in a private home that cannot be considered part of private life (e.g., having an important discussion relating to public affairs at the kitchen table).

Another important aspect is the 'reasonable expectation of privacy' that emerges from the cases presented. On the street, in a public place, the privacy claim may not be as strong as if the right holder were in their home or in another private place. In public places, full protection of privacy cannot be guaranteed. However, knowing this, and knowing the nature of public places, the privacy that is normally afforded to those who are spending time there is easily identifiable (e.g., people sitting at the next table in a restaurant can see each other eating, and may overhear snippets of their conversation, but that is different from taking a photograph of the table with a telephoto lens or placing an audio recorder near it).

The face of a person venturing into a public place can therefore be both fully public and at the same time protected if someone disturbs him or her in an unusual or unexpected way and attempts to capture their image. The clash between privacy, which is also protected in public spaces, and the face being visible to others as a solid European 'tradition' can be observed in cases involving Muslim headscarves. (Although these cases were not started on the grounds of taking pictures without consent, they are, even so, an interesting addition to the question of the permitted use of public spaces.)

To date, two ECtHR decisions relate to wearing head scarves in public spaces, and the outcome of each case differs. The Court ruled against the applicant in *SAS v France*.[39] The applicant, in this case, was a practicing Muslim and a French citizen who objected to not being allowed to wear a veil covering her entire face as a result of the entry into force of legislation banning the covering up of the entire face in public places. The applicant emphasized that religious clothing is worn of an individual's free will without pressure from others. It was also underlined that

39 *SAS v France*, no. 43855/11, judgment of 26 June 2014.

she had worn the veil in the past, even if not all the time, and that she wished to wear it freely in the future, at any time she pleased. Finally, she pointed out that her intent was not to bother anyone but to express her religious, personal, and cultural beliefs and to find 'inner peace.'[40] In other words, she based her reasoning mainly on the protection of freedom of speech and her right to privacy, in addition to the freedom of religion. The Court acknowledged that Article 8 of the Convention, on the right to private life, is strongly affected by the case; the freedom to choose one's clothing and to be able to be in the street without disturbance are both questions falling under the scope of private life.

According to the ECtHR, for reasons of security, any state may prohibit wearing clothes that hinder the identification of a person, but such a blanket ban with such an effect is acceptable only if the risk to public order can generally be identified.[41] The French Government could not demonstrate such a risk. Another possible rationale for limitation is the 'protection of the rights and freedoms of others.' In this respect, the French Government pointed out that concealing one's face makes living together impossible for the affected members of society and is against the minimum norms of civility that are necessary for social interactions.[42] The ECtHR accepted the above as legitimate arguments, simultaneously expressing that allowing full-face veils to be worn in public places is a choice to be made by society.

In *Dakir v Belgium*, the ECtHR found that the preservation of the conditions of 'living together' is an element of the 'protection of the rights and freedoms of others.' It, therefore, held that the contested restriction could be regarded as 'necessary' 'in a democratic society,' and that the question of whether it should be permitted to wear the full-face veil in public places in Belgium constituted a choice of society.[43]

Another case concerns the use of public spaces. The applicant in *Gough v the United Kingdom*[44] held a belief that the human body is inoffensive, so being naked in public must be allowed. His belief in 'social nudity' was expressed by naked walks. In 2003, he decided to walk naked across the whole length of the country, from Land's End in England to John O'Groats in Scotland, earning the nickname 'the naked rambler.' Following these performances, he was arrested, prosecuted, convicted, and imprisoned many times over the course of a decade for public nudity. In his application, he argued that his right to free expression (Article 10) had been breached by the state authorities, and his right to private life (Article 8) had also been violated.

40 *SAS,* [12].
41 *SAS,* [139].
42 *SAS*, [25] and [141].
43 *Dakir v Belgium,* App no 4619/12, judgment of 11 July 2017.
44 *Gough v the United Kingdom*, no. 49327/11, judgment of 28 October 2014.

The ECtHR declared – explicitly referring to the Article 10 complaint, but possibly with a more general scope – that a margin of appreciation for the state applies in cases involving public morals. The use of public spaces can therefore be restricted for reasons of public interest, and privacy in public places cannot be enjoyed without restrictions. There are, then, limits to the law on both sides: on the one hand, the general, common norms accepted in society and, on the other hand, the public's interest in being informed of public affairs, or the speaker's or reporter's freedom of speech or freedom of the press. The cases presented highlight the limited recognition of the rights of public figures and those involved in public affairs in relation to the photographs taken of them. If the freedom of the press and the purpose of the information justify it, the protection of the image may be overshadowed. This is confirmed by all three *Von Hannover* judgments, the *Axel Springer* case, and all the English cases, in particular the *Campbell* judgment. Freedom of the press also extends to tabloid media, as long as their materials are not produced solely for entertainment purposes, but are genuinely concerned with matters of public interest. Moreover, the scope of these matters of public interest is broad, as the cases presented here illustrate.

The way pictures are taken is also an important factor. If the photographer has harassed the person concerned, the balance may tip in favor of providing protection (see the first *Von Hannover* and *Weller* cases).[45] It is also worth recalling another decision of the Strasbourg Court, which, although it did not concern photographs taken in public places, set out criteria relevant to the issues discussed in this study.

In *Reklos*,[46] the Court had to consider whether Greece had failed to protect the rights of a child when it dismissed a case against a photographer who had taken a photograph of the child without the child's consent or the consent of the child's parents. In *Reklos*, the plaintiffs were parents of a newborn baby. Immediately after birth, the baby was placed in a sterile ward and only doctors and nurses from the clinic were allowed to enter. A professional photographer working at the hospital took photographs of the baby in the sterile ward and offered them to the plaintiffs. The plaintiffs complained that the photographs had been taken without their consent and demanded that the photographer hand over the negatives to them. The photographer refused to do so, and the parents took legal action on the grounds that the photographer had violated their child's personal rights. This claim was considered 'too vague' by the Greek Supreme Court, which led the parents to refer the case to the ECtHR. The applicants claimed that the Supreme Court, by dismissing their statement of claim, had violated Article 6 of the European Convention on Human Rights, the right to a fair trial. The Court

45 Hughes, 2009, pp. 162–168.

46 *Reklos and Davourlis v Greece,* no. 1234/05, judgment of 15 Jan 2009.

agreed with them and accepted that it had to be considered whether there had been an interference with the boy's right to privacy, even if the photographs had not been published.

Deciding on cases involving photographs of people in special situations requires special judgement and individual consideration. In these cases, the interests in the right to information and in freedom of the press do not clearly prevail over the protection of privacy, even when the facts are linked to public affairs. Examples include the *Peck* decision and a Norwegian case, *Egeland and Hanseid v Norway.*[47] In this case, two Norwegian newspapers published photographs of an individual who had been convicted of triple murder just before the pictures were taken. In the published pictures, he is seen after the decision, emotionally broken, and sitting in a police car. According to the ECtHR, the sanction imposed by the Norwegian court for the publication of these pictures did not violate Article 10: Even though the seriousness of the crime and the circumstances of the conviction may have been of public interest, the life situations depicted in the pictures qualify as events that fall within the protected privacy of an individual, even of a criminal. Hence, the important considerations in judging a case are what the person was doing in the public place in question, how their conduct or the account of it can be linked to a public affair, and exactly where he or she was (the 'type' of public space it was.[48]

The last aspect worth highlighting is the priority given to protecting children's rights. Both the first *Von Hannover* decision and the *Weller* case were largely (the latter entirely) about child protection. It is clear that photographs of children are much less likely to be associated with public affairs and, because of their vulnerability, may inherently require stronger protection. In *Weller,* the extent to which a parent takes their child out in public and the fact that Paul Weller had previously explicitly protected his children from publicity were also considered. This raises the question of whether children whose parents regularly and knowingly display them in public, exploiting the public's interest in children to promote themselves, and seeking the favor of photographers are less likely to bring a case seeking redress for their grievances arising from (this time unwanted) photographs taken of them. Kirsty Hughes argues – convincingly – that it would be wrong to diminish children's rights because of their parents' conduct, and parents' conduct in this regard (even if they sought wide publicity by means of their minor child) cannot be considered a waiver.[49]

47 *Egeland and Hanseid v Norway,* no. 34438/04, judgment of 16 April 2009.
48 Hughes, 2014, p. 189.
49 Hughes, 2014, pp. 190–191.

7. Conclusions

The questions posed in the introduction to this study have been adequately answered by case law over the last two decades. One's image needs to be interpreted as an aspect of privacy and that the protection of privacy can also be claimed in public spaces and places open to the public. In this respect, the European approach differs significantly from that of the US, where people in public spaces can essentially be photographed freely.[50] Certain general principles also emerge from European case law, which take into account the freedom to discuss public affairs, namely the protection of freedom of speech and freedom of the press. Based on the decisions examined, it seems that even a remote, indirect connection with a matter that qualifies as a public affair based on a broad interpretation of the concept is sufficient to justify the protection of freedom of the press, meaning that only purely tabloid content is excluded from protection. This creates an enhanced level of protection for this freedom and may also result in numerous frustrated privacy plaintiffs.

50 See more in Gajda, 2022.

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GDPR and Religious Freedoms (With Insight Into Ronald Dworkin and Competing Rights)

ABSTRACT: *In this article, the author explains that important privacy laws are not by any means absolute and unconditional. Like other rights in contemporary democratic society, they often clash with other rights (and duties), which are usually resolved by balancing. The GDPR and its direct application influence various situations (not originally and initially planned) in which requests on the basis of the right 'to be forgotten' cause or can cause problems for religious institutions (religious communities) when they are pressed by some citizens to implement erasure from church books and records. The author explains why this cannot be done and that religious communities cannot be treated in the same manner as business entities. Moreover, such requests can cause harm to religious freedoms and also jeopardize proper functioning of the state bodies, since in many countries, church books are not only historical but also public documents. On a theoretical level, the author examines Dworkin's teachings on conflicting rights and values and, by using his methodology, concludes that the religious rights of citizens belong to the group of rights that require specific and more persistent protection.*

KEYWORDS: GDPR, privacy law, legal theory, religious freedoms, Ronald Dworkin

1. Introduction

One of the most important manifestations of privacy law in contemporary European privacy law is the General Data Protection Regulation (GDPR), which was initially intended for business entities. The regulatory bodies of the European Union intended to regulate the use of private data by big companies that have been

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expanding their networks and profits through the use of private and sensitive material.

This is an important historical aspect in the development of the document, which is today considered a major tool for halting the corporate sector from penetrating into the protected world of private area and family life. All this was created as a safeguard and a guarantee that private and sensitive features of everyday life of commons will be in the hands of those who are the principal bearers of data – physical (natural) persons, or simply said, citizens themselves. As mentioned, the GDPR[1] was connected with the protection of citizens from corporations that had the power to use the private data of their customers and distribute the same through their channels to various entities that did not have direct access to their original data. Certainly, in that respect, the GDPR was necessary, but as is the case with many big changes, it was not possible to foresee all possible consequences of such intensive legislation.

This paper will examine and explain how the GDPR potentially jeopardizes the freedom of religion enjoyed by churches and other religious communities and/or organizations for many years. This is connected with the right of the religious community to organize its practices and beliefs according to its own traditions and needs. This is the obvious setup of the European Convention on Human Rights, which in its Article 9, protects freedom of religion, and the same is true for Article 10 of the Charter of the Fundamental Rights of the European Union. This article will elucidate that extensive use of the GDPR could harm religious freedoms that have two major components: the first one is connected with the individual rights for religious freedoms; and the second one is the collective right of religious freedoms that is embedded into the institutional rights of religious entities to operate freely. In that sense, the concept of religious freedoms cannot be fully understood in the absence of either of these two components: individual freedom of religion and collective or institutional freedom of religion. It is not possible to be religiously free if the institution or organization in which someone is a member does not have prerequisites to operate freely according to the practices and creeds of that particular group. In that sense, a citizen belongs to a religious organization where they execute their religious rights and operate within the system of religious norms, which again legally exist in the state according to domestic laws on religious organizations.[2]

1 Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) is published in the Official Journal of the European Union under the code L 119, Volume 59, dated May 4, 2016. This Regulation has been also published in the Official Journal of the European Union in parallel in all European Union languages on the official EUR-Lex website [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1530652545116&uri=CELEX:32016R0679 (Accessed: 3 July 2019).

2 The principal document which covers religious freedoms of citizens' is usually the constitution, which is the key document for human rights in general. Although constitutions grant

There are multiple issues connected with the right to privacy, as it was established and, to some extent, reassured by the GDPR on one side and the freedom of religion on another. In this article, there is a reference to Donald Dworkin's theory of clash of conflicting rights—in fact, this problem, which will be elaborated upon in subsequent passages, can be observed as a confrontation of different rights. On the one hand, there is the right to privacy, which is guaranteed by many international treaties and conventions,[3] and on the other hand, is the right to worship freely—a right that is also recognized internationally. In this scenario, we have to find a way of proportionality and balance those rights. Another approach in search of the protection of religious freedoms (and this might be more appropriate), would be to confront the right to privacy with public order and public security. This will ensure that documents of various religious communities, if declared a public good, have to be protected for the benefit of society (e.g., matrimonial books are public books). Documents that, for some, may fall under the scope of the GDPR, have the concrete ability to be declared as, a) historical documents, and b) public documents—documents of great importance, which are then exempt from application of the GDPR. Also, as it will be explained, specific rights, according to Dworkin's view, have a basis in human dignity and liberty, which prevail over other competing rights.

2. The GDPR

"GDPR' is an acronym for 'General Data Protection Regulation,' the full title of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016, on the protection of individuals concerning the processing of personal data and the free movement of such data and repealing Directive 95/46/EC'. Title itself gives us five important information: 'who' passed it the European

principal and efficient protection to religious liberties, most democratic countries have this important area of law regulated by law on religious organizations or law on religious communities or similar laws. Also, various countries have treaties signed with the Holy See, which is an international subject of law (State), and such documents are part of the national system of law immediately under the constitution and above the laws.

3 Universal Declaration on Human Rights [Online]. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (Accessed: 10 July 2022); International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966, entry into force March 23, 1976, in accordance with Article 49 [Online]. Available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (Accessed: 10 July 2022); Punta del Este Declaration on Human Dignity for Everyone Everywhere [Online]. Available at: https://www.dignityforeveryone.org/introduction/ (Accessed: 10 July 2022); Charter of Fundamental Rights of the European Union [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT (Accessed: 10 July 2022); European Convention on Human Rights (ECHR), Article 8 [Online]. Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 10 July 2022).

Parliament and the Council; 'when' have they passed it—on April 27, 2016; under which 'number' is it marked as Regulation of the European Union—2016/679; 'what' it deals with, i.e. 'what' is its content—the protection of individuals in connection with the processing of personal data and the free movement of such data; and 'which' legal text does it replace or repeal—Directive 95/46/EC. The next important feature is the structure of the GDPR text. Namely, the GDPR, viewed as a whole, consists of two large parts: an extensive introductory part divided into 173 recitals and the legal text itself, which consists of 99 Articles divided into 11 chapters, of which Chapters III, IV, VI, and VII are further divided into sections. Furthermore, the introductory part and the legal text itself are interconnected in such a way that each article of the legal text supports one or more of the above recitals that explain it by giving it a breadth and describe what it aims to achieve and in what way'.[4]

As mentioned in the introduction, the GDPR was initially set up to protect citizens from big corporations that were controlling the economic life of citizens, but later, it shifted from its original intention to other disciplines and social activities that are not necessarily connected with commerce. Privacy became an important value for the European Union, not only in the GDPR, but also in other documents such as the Charter of Fundamental Rights of the European Union and its Article 8(1).[5]

What does it mean when we state that the GDPR was 'invented' for corporate bodies? This means that citizens have to have control over their own data, which are deliberately collected for economic (profit) purposes.

The GDPR is made up of 11 chapters and is the most comprehensive and wide privacy law instrument of the European Union. The major principles of the GDPR can be found in Article 6, which show that privacy control has limits, and this will be an important feature of this article. This is because of conflicting rights, which would otherwise be balanced if not supported by the construction of the reality of public order (public morals and necessity). Conflicting rights and interests will later be commented in the light of Dworkin's tools of (specific) political rights. Privacy rules (norms) are shaped through the chapter 'Lawfulness of processing' and are confronted by other (EU) rights, with public rules

4 Same technical text up to this footnote with minor corrections in numbering has been equally written for the Savić and Škvorc, 2020.

5 Charter of Fundamental Rights of the European Union
'Article 8 Protection of personal data 1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.' [Online]. Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf (Accessed: 10 July 2022).

and public morals, thus balancing between privacy and other rights and values is inevitable.[6]

For all these reasons, the GDPR principles are not easy to implement. Churches and religious institutions (religious organizations) could face enormous problems with the simplified and direct implementation of the GDPR. Indeed, the GDPR can be used as a malicious tool to attack religious freedoms and religious institutions. If applied without looking into complete systems of laws and without using interpretation, the GDPR rules may become a serious obstacle for religious activities and the proper organization of religious life. The GDPR is a harsh and demanding legislation for its ability to pressurize entities that receive, collect, and store data over a long period of time. Those who have their data collected, in general, have the right to opt out throughout the entire process of processing data; to enter and to withdraw are both equal parts of the GDPR legislation.[7]

Articles 15 and 17 represent the core of the GDPR structure. The concept that the GDPR shaped fundamentally consisted of: a) individual right to access the data, b) individual right to acquire the knowledge of processing of data and c) individual right to receive the copy of the data, and to receive an d) explanation of how the data was used, and for example, for which purposes, and also to e) explain if the data was delivered or transferred, and why. Equally important is to receive information on f) how the body (data processor) acquired the data, if applicable.[8]

6 Article 6 of GDPR: 'Processing shall be lawful only if and to the extent that at least one of the following applies: 1. the data subject has given consent to the processing of his or her personal data for one or more specific purposes; 2. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
3. processing is necessary for compliance with a legal obligation to which the controller is subject;
4. processing is necessary in order to protect the vital interests of the data subject or of another natural person;
5. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
6. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.'
GDPR [Online]. Available at: https://gdpr-text.com/hr/read/article-6/ (Accessed: 1 April 2022).

7 'The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.' Article 7 of GDPR [Online]. Available at: https://gdpr-text.com/hr/read/article-7/ (Accessed: 11 July 2022).

8 '1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information: (a) the purposes of the processing; (b) the categories of personal data concerned (c) the recipients or categories

Nevertheless, it is clear that the 'right to be forgotten' from Article 17 leans on Article 15, Paragraph 1 Subparagraph e), which guarantees that the data subject has the right to request the erasure of his/hers personal data. This is the most comprehensive and complete right of citizens regarding their private data. This is so even if the legitimate interest for the collection data exists, because legitimate interests are subordinate to fundamental rights and freedoms of the individual (citizen) in case. This can be observed through the lens of balancing the right to privacy and the right to worship freely. As explained in this article, the right to worship, in connection with specific public goods that must be protected (which could be described as political rights), should then be a priority right. For that reason, there are solutions for arranging privacy law issues—from approval and giving consent on one side to the right to erasure on the other. There are various options, variations, and gradations that allow the data subjects to be in control of their personal data. As said, erasure is an important feature of privacy law protection, but at the same time serious limitations of privacy rights also do exist.

Paragraph 3 of Article 17:

> Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:
> (a) for exercising the right of freedom of expression and information;
> (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

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of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organizations; (d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period; (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing; (f) the right to lodge a complaint with a supervisory authority; (g) where the personal data are not collected from the data subject, any available information as to their source; (h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject. 2. Where personal data are transferred to a third country or to an international organization, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer. 3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form. 4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.' Article 12 of GDPR [Online]. Available at: https://gdpr-text.com/hr/read/article-12/ (Accessed: 11 July 2022).

> (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3).
> (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or
> (e) for the establishment, exercise or defence of legal claims. [9]

This means that public health or public morals and interests will prevail over the interests of citizens requiring privacy law actions. It is specifically mentioned in Article 20 that the right to control portability will not be enforced in cases of public interests or against the rights that the controller has through official (public) rights and duties.

This Article explains that the GDPR, although intended for just purposes, created serious problems for non-corporate entities, such as religious organizations. This is especially problematic in countries where there is an international treaty or more of them signed with the Holy See as an entity of International Law. As understood, international treaties that are signed and ratified will find their place under the respective constitutions but are above the law of the countries. It can then jeopardize religious freedom(s), as set up in Article 9 of the European Convention of Human Rights,[10] which protects both private and institutional freedom of religion.[11] As stated before, one cannot exist without the other. Problems with the GDPR started when the citizens began to request the removal of data from church books and registers, which the church or other religious officials did not agree to. Although this was not the original intention of the GDPR, the wording of the document seems to give enough potential for interested parties to act on using this tool, but this is only if the GDPR has not been observed in its totality. Application of the GDPR toward religious communities and organizations without understanding totality of relations and legal mechanisms that protect historical and public books that exist for the 'greater good' of public morals and are

9 Ibid.

10 Article 9 Freedom of thought, conscience and religion '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. [Online]. Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 13 April 2022).

11 On the issues of Church Sate Relations in Croatia and Europe see more in: Savić, 2018, p. 239–240.

necessary for the mere existence of the state leads to unwanted pressure toward religious entities.[12] This is so because church registries are not only documents where the church (or other religious communities) archives the names of their believers (e.g., baptized people), but also historical and public documents that are necessary for public security, as will be explained in connection with (prevailing) political rights, which have to be put higher on the scale of rights.

> Thus, it is clear that the European Union and its regulations accept the specificity of church/religious entities and the special way of collecting data that they perform and that are located. This does not mean at this point that they will not be affected by the GDPR, but in any case, the preconditions are created for a specific atmosphere in which churches and religious organizations will be treated.[13]

When we discuss the GDPR and religious communities, it is important to stress that Article 3, which clearly states that this regulation applies to processing personal data in the context of establishing a controller or processor in the Union, regardless of whether the processing takes place in the Union or not.[14] This will specifically be important when discussing the special position of the Holy See as an international entity.[15] There are also other regulations that put special attention to churches and religious organizations such as Article 91 of the IX Chapter,[16] which prescribes that collecting the data from church organizations must be considered 'specific,' and allows options for churches and their entities (e.g. institutes,

12 See more in: Savić and Škvorc, 2020, footnote 5.

13 Ibid., p. 8.

14 '1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.
2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:
(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.
3. This Regulation applies to the processing of personal data by a controller not.' Article 3 of GDPR.

15 See more in Savić and Škvorc, 2020, footnote 14.

16 Existing data protection rules of churches and religious associations
'1. Where in a Member State, churches and religious associations or communities apply, at the time of entry into force of this Regulation, comprehensive rules relating to the protection of natural persons with regard to processing are applied. Such rules may continue to apply, provided that they are brought into line with this Regulation.
2. Churches and religious associations that apply comprehensive rules in accordance with paragraph 1 of this Article shall be subject to the supervision of an independent supervisory authority, which may be specific, provided that it fulfils the conditions laid down in Chapter VI of this Regulation.' Article 91 of GDPR.

parishes, dioceses according to Cannon Law of the Catholic Church) to collect and maintain data through their own mechanisms. However, this still does not resolve issues when there are demands for erasing the data. However, Recital 165 clearly states: 'This Regulation respects and does not prejudice the status under existing constitutional law of churches and religious associations or communities in the Member States, as recognized in Article 17 TFEU.'[17]

This opens the door toward a value-, moral-, and public-oriented constitutional framework that protects religious freedoms, both individual and collective. The key task of the document is to give control of the personal data to those who are holding and producing them: citizens. The core question is about balancing between individual and collective (public) rights.

In summary, the GDPR will obviously impact religious communities, regardless of the fact that it was created for business entities in the first place. The relatively recent July 10, 2018 Judgment C-25/17 (Jehovan todistajat) on Jehovah Witnesses shows that the Luxembourg court considers religious communities as subjects to the GDPR. Certainly, religious communities should also be treated as subjects of the GDPR, but what must be taken into account is the specific nature of religious communities and their work, conventional and constitutional protections of religious freedoms and Treaties between Catholic Church and state, and contracts signed with particular religious communities. The 2018 case was concerned with 'collecting or processing personal data in the course of their door-to-door preaching.'[18]

3. Religious organizations and religious freedoms

We now look at religious organizations and religious freedoms in the European context. It is important to understand that religious organizations play specific and important roles in society. One does not have to be religious to understand that religiosity is an important social phenomenon.[19] It is so for the reasons that it resolves questions of ultimate reality, which is so characteristic and necessary to humans as *homo sapiens,* who seek the metaphysical meaning of existence. The quest has been important to humans that many of them consider religion an integral part of their identity. Religion gives a sense of right and wrong and sets moral standards. It is intrinsically connected with the existence of the human race. Historically, there were numerous examples where attacking religion meant attacking the very core of people and what they are. Pogroms of various religious groups have

17 GDPR [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=HR (Accessed: 10 October 2022).

18 See [Online]. Available at: https://www.dpcuria.eu/case?reference=C-25/17 (Accessed: 10 October 2022).

19 Savić, 2015, pp. 145–159.

filled the history of human existence. Catholics, Jews, Protestants, Latter-Day Saints (Mormons), and Muslims are just a few groups who had been persecuted in some period of time around the world. In fact, all have suffered somewhere. Most recently, Rohingya Muslims in Myanmar attacked by Military Regime (Burma), or Christians in Finland through persecution of the former politician Päivi Räsänen and Bishop Juhana Pohjola for quoting the Bible in the context of sexual behavior. Attacks on religion are attacks on the heart of the personality of every human being. For this reason, contemporary legal systems, especially in the so-called Western world (still), protect religion through constitutional frameworks. There are practically no examples of a modern constitution that does not contain norm(s) that describe some sort of protection regarding religious life.

According to the theory excellently described by Norman Doe,[20] professor of Law and Religion at Cardiff, today there are three groups of arrangements between the church and state in the European continent. The first arrangement is the complete separation between the church and state, which is present, for instance, in France, which developed *laïcité* principle as a principle of 'living together,' in which religion is a private affair. The second arrangement belongs to the group of countries that have state churches, such as the United Kingdom or Denmark. There is a third group of countries that have some sort of cooperative model between the church and state, such as Italy, Croatia, Spain, Lithuania, Poland, and others. The vast majority of European countries have some modality of cooperative arrangement. Doe states: 'European Constitutions generally deal with the fundamentals of relations between the State and religion, and, occasionally, the rule of law and religion.'[21] There are numerous situations and protections covered by various European constitutions, from religious freedom and freedom of belief and freedom of worship to defining religious discrimination, equality, and religious organizations, which include churches, funding, education, and the recently much publicized issues of conscientious objection.[22]

The major problem with the GDPR and religious communities (organizations) is that the attitude toward religiosity changes, and being religious started (again) to be, but in some other form, somehow unwanted behavior or characteristic that should be hidden from the public sphere. Aggressive secularists demand erasure of religious life from public spaces and want to push religious people, when they are religious, into their private spaces – apartments, houses, organizations, churches, and so on. When they start to 'behave like normal and ordinary' people, they can come to the street again. By being a little bit sarcastic, I want to stress that there is no such thing as being ordinary or normal; all is equally human and/or political. Liberalism and requests to respect diversity should also

20 Doe, 2011.
21 Ibid., p. 15.
22 Ibid.

include the ability to accept others, who think differently than liberals, and also conservatives. Only people who really realize that deep pluralism means that one should accept that in the public sphere there are others who think differently and as such have the right to think so are truly democratic. However, as I have written and discussed several times,[23] there are serious tendencies to remove religion from public spaces, labeling religion as non-neutral and harmful.

> Secular constitutions are therefore very practical and do not diminish or do not want to diminish or jeopardise the position or role of religion; they do not presume religiousness of the state. However, secularised constitutions, which lean toward keeping society secularised, tend to have negative attitudes toward religion in order to justify equality; on the contrary, though, they produce circumstances which provide less convincing techniques for the exercise of human rights and freedom of religion.[24]

All this means that it will be much harder to defend churches and other religious organizations as having specific positions within society; that they are not sports clubs, but rather important social institutions that have historical and public roles, which then have to be protected by the constitution and through political rights with moral and societal value. Religious freedom is not only about the individual right to worship but also living in and through an organized form, which has a special social role. States count on religious activities for social cohesion, humanitarian work, and organization of free time for their members. For example, if children sing in the choir, they will not be on the street and potentially exposed to different forms of violence and harmful behaviors. Therefore, religious communities as organizations have both a historical role and, in many cases and states, a public dimension.

In many European countries, there are various arrangements between states and religious organizations, which vary from having a state church that has a privileged position within society to various agreements that have been stipulated between the religious community and state. The most obvious example is when states enter into a contract with the Holy See, which represents the interests of Catholics in that particular country. The Judeo-Christian tradition and Catholicism are intertwined with the history of Europe through concordats and international treaties. The Catholic Church had a specific role in many countries of the Mediterranean, Central, and Southeastern Europe, which continues to exist today at different levels. In that respect, the position of the Catholic Church is different from that of any other religious organization since it has an international

23 Savić, 2019.
24 Savić, 2020, p. 267.

entity– the sovereign state of Vatican City,[25] which represents Catholics in that jurisdiction. In reality, Catholic churches in EU member states have agreements that are above laws and under the Constitution, since those treaties are treaties between two sovereign states.

The Catholic Church, through its own lenses, is a moral entity, but in real life, it is a legal entity with its own structure organized through Canon Law. All this creates a complicated mixture of norms and rules that have to be followed both in religious and secular (civil) legal systems.[26] The Catholic Church is not only an organization *sui generis*, but also *sui iuris*[27].[28]

For countries that signed agreements with the Catholic Church, if these agreements existed before the country's entry into the European Union, they usually form integral pieces of the respective state's constitutional system, especially if the constitutions themselves contain regulations about the specific position of their state church.[29] Taking all this into account, a careful examiner will conclude that privacy issues—when we discuss religious organizations—are sensitive: first, for the special place that religion (still) has among the vast majority of citizens of Europe; second, for the sake of protection of rights that are guaranteed to religious life (people who practice religion); and third, for the fact that church records are of public or archival value. One should understand that there is no personal religious freedom if collective or organizational religious freedom does not exist.

25 There are differences between Holy See and Vatican City State (Città del Vaticano). Regarding territorial issues and memberships in international organization that has more connections with temporal goods and organizational issues, Vatican City State is the entity in charge. However, regarding the position of the Catholic Church in the World, political international relations and diplomacy that is directly connected with sovereign position of the Pope who is supreme ruler of the State, proper usage is The Holy See. For more information, check out: Bajs and Savić, 1998.

26 See; Savić and Škvorc, 2020, pp. 11–12.

27 Ibid.

28 In a general sense, every religion is a legal system. Not all societal norms are norms of (state) legal system or legal norms in the narrow sense of meaning. There are some norms, for e.g., norms of good behavior, non-spitting, etc. that are not punishable by law (somewhere they are) or religious norms (there should be many overlapping), which from secular or private point of view, are rather norms of the specific groups or requests of customary law. However, religious beliefs, commands, and requests are in their essence legal norms of religious groups. Therefore, religion produces norms and people make them an integral part of their existence. There are some views in classical European Kelsenian jurisprudence that express that sanction is necessary part of the legal norm. Even if we consider that religious norm has to have a sanction in order to be a legal norm, we can still find it within the religious framework. The command of love in Christian religions is a norm, sanction exists and at least can be established, but it is not necessary that that happens in this world. For many religious people, life is eternal and sanctions are equally possible after the moment of death as we understand it.

29 E.g. Denmark, Greece, or in specific way Malta. See: Savić, 2018.

4. Hypothetical Case

This short case would, in my view, be the perfect explanation of what could have and has happened in several jurisdictions of Europe, and includes elements of what has been explained in the previous paragraphs of the text.

Ivan, a 21–year old young man born in Zagreb, Croatia, was baptized, as was the usual practice, as a six-month-old infant in the local church of St. Joseph. His parents were devout Catholics and regular attendees of the Holy Mass on Sundays and Holidays. When he was 16, he started to fight with his parents about the reasons why he had to go to church, and about, in his view, the inappropriate behavior of some clergy regarding political activism and activities. Concurrently, the Church was facing serious problems regarding pedophilic scandals, and he decided to stop attending Church services. In subsequent years, he separated himself from the Church and its teachings. When he moved from his parents' house, he decided to visit his local parish priest, a wonderful man who followed him during many days of his youth and he requested his erasure from the Church books as he decided that 'he does not want to be baptized anymore.' His fiend Marko, who is a law student graduate told him that that there is the GDPR and that he has the right 'to be forgotten.' His priest, father Mathew told him that he cannot be erased from the church books because Canon Law of the Catholic Church does not accept erasure of sacraments (there are some exceptions in Matrimonial Law), and that the only action he may take is to put annotation on the specific place in the Church registry (book) that baptized person has 'left the Church.' He explained to him that for the Catholic Church *'unum baptisatum, semper baptisatum'*[30] cannot be changed. His anger was so strong that he decided to press on various fronts, to have his name erased.

What Ivan and Fr. Mathew did not know that the Church books and Church registries are not only books that belong to the normative order of the Canon Law of the Catholic Church but also that they are public documents containing data for marriage. Therefore, baptism records are important part of that process, same is with confirmations. Church books are not only public books but also part of the mechanism of how the Church works and operates. They are necessary for citizens who are believers, to access verified documents that can then be used to perform religious ceremonies. Religion is not only about spirituality and theology; its work and scope of activities include much paperwork and documentation as a preparation for actual spiritual acts. Therefore, those documents are important for religious life and pressure on them is a pressure on religious freedom. In this case, Croatia has agreements signed with the Holy See. These agreements are a part of the Croatian legal system, which was in place even before Croatia decided

30 Once baptized, always baptized, lat.

to join the European Union[31]. In addition, church documents have historical value, and church history, in all European countries, is part of the history of the nation, regardless of the numbers or percentages of believers.

5. Few words on Dworkin and conflicting rights and values

Just recently, during the IVR Congress in Bucharest[32] I realized that the discussion around privacy law, especially the GDPR in regard to religious freedoms, falls perfectly into the discussion of competing rights and values and Ronald Dworkin's Legal Theory. In the age of proportionality, as Kai Möller, Associate Professor of Law, Department of Law, London School of Economics and Political Science clearly points out, it is the notion that competing rights have to be balanced against each other and that Dworkin uses the conceptualization of rights as they are 'trumps' against competing interests.[33] The great value of the research elaborated in Möller's paper is a desire to reconcile balancing as a norm in today's comparative contemporary jurisprudence and having 'trumps' or better 'higher values,' which then, in particular cases, outweigh particular rights.

> As will be shown, the strength of Dworkin's theory lies in the substantive moral foundation that it offers – in particular its conceptions of human dignity, freedom, and equality –, but its weakness is the structural account of rights as 'trumps', as evidenced by the fact that despite its fame this idea has never really resonated in legal practice. With regard to proportionality, the opposite picture presents itself: the doctrine does not give any indication as to its moral foundation – which is illustrated by the fact that its most famous theoretical account, namely Robert Alexy's theory of rights as principles and

31 Ugovor o pravnim pitanjima (Treaty on Legal Issues) od 18. 12. 1996. This Agreement was the basis for registration of the legal entities of the Catholic Church into Register which had its place in the Ministry of Administration [Online]. Available at: https://hbk.hr/ugovor-o-pravnim-pitanjima/ (Accessed: 15 July 2022); Ugovor između Svete Stolice i Republike Hrvatske o suradnji na području odgoja i kulture (Education and Culture Treaty) od 18.12.1996 [Online]. Available at: https://hbk.hr/ugovor-o-suradnji-na-podrucju-odgoja-i-kulture/ (Accessed: 15 July 2022); Ugovor o dušobrižništvu katoličkih vjernika pripadnika oružanih snaga i redarstvenih službi Republike Hrvatske (Military and Police Treaty) od 18.12.1998 [Online]. Available at: https://hbk.hr/ugovor-o-dusobriznistvu-katolickih-vjernika-pripadnika-oruzanih-snaga-i-redarstvenih-sluzbi-republike-hrvatske/ (Accessed: 15 July 2022); Ugovor o gospodarskim pitanjima (Treaty on Economic Issues) od 9.10.1998 [Online]. Available at: https://hbk.hr/ugovor-o-gospodarskim-pitanjima/ (Accessed: 15 July 2022).

32 The World Congress of the Philosophy of Law and Social Philosophy, Bucharest, Romania July 3–8, 2022 [Online] for more see: https://www.ivr2022.org/ (Accessed: 16 July 2022).

33 Möller, 2017.

> optimisation requirements, is a formal theory – while offering a structure that has proven to be so useful that it has become the globally dominant tool of rights adjudication.[34]

Without going deep into the explanation of Dworkin's theory of rights, it is useful to understand the basic concept of proportionality, which is enriched by his theories, as Möller suggests.[35] To the general reader of law, who is not familiar with legal theory or philosophy, this chapter offers a synergic solution that would explain the balancing between rights on the one hand and values (political rights) on the other. Dworkin makes a distinction between constitutional and political rights, and political rights are those connected with morals—we may call them moral rights. Political rights have also been protected by the constitution and that might cause confusion—it seems now that we might have two 'constitutional' rights. In addition, many legal theorists call political rights constitutional rights, which may cause even more confusion.[36] To avoid all this, I suggest that we stick to political rights as those rights that belong to the morals and have to be a part of the constitution as they deserve the highest form of protection. Certainly, the existence of states and their functions would also be a prerequisite, which is defined through constitutions themselves—states have the right to exist according to the principles set up in the Constitution.[37] Since privacy and religious freedoms may both belong to a group of political rights,[38] it means that they both contain more 'power' as 'trumps:' this situation may cause even more confusion. In this case, obviously, the proportionality concept in the 'age of proportionality'[39] cannot be solely used, and we need something higher in the hierarchy of norms.

> Someone who claims a political right makes a very strong claim: that government cannot properly do what might be in the community's overall best interests. He must show why the individual interests he cites are so important that they justify that strong claim. If we accept the two principles of human dignity that I described in the last chapter, we can look to those principles for that justification. We can insist that people have political rights to whatever protection is necessary to respect the equal importance of their lives and their sovereign responsibility to identify and create value in their own lives.[40]

34 Ibid., p. 2.
35 Ibid., p. 3.
36 Ibid., p. 4.
37 See. Guastini, 2016, pp. 149 et seq.
38 For Dworkin, otherwise constitutional rights defended by constitutions.
39 This is Möller's reference to the title of Alexander Aleinikoff's influential article 'Constitutional Law in the Age of Balancing', Yale Law Journal, 96(5) pp. 943.
40 Dworkin, 2013, p. 32; Möller, 2017, p. 5.

Dworkin says that there are some rights that overrule or outweigh other rights and rules; some individual rights, he states, are extremely important and intrinsically connected with human existence and dignity that cannot be put aside. Based on this notion is the concept of dignity that 'justifies the extraordinary force of rights'[41] to 'block policies that might further the community's overall best interests.'[42] This means that some rights have to exist even if they are contrary to countries' (or societies') best interests (at the particular moment). In this respect, only those rights are constitutional, not as part of the constitution, but as those that have to be protected by the constitutions. All constitutions.

Now that all the terms are clear, we must find a common wording that will address the major characteristics of political (moral) rights, which must exist. The key word is human dignity, which under Dworkin's perception has two major components: a) the principle of intrinsic value (equality principle) and b) the principle of personal responsibility (liberty principle)[43]. The principle of intrinsic value 'declares the intrinsic and equal importance of every human life' and the principle of personal responsibility 'holds that each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him.'[44] As stated, discrimination and genocide are clear examples of the first principle,[45] and forcing someone into religious practice is an example of the second.[46] Regardless of the fact that Dworkin went too far into underlying individual rights over collective rights (and duties), there is inevitable value in his theory with regards to placing human dignity into the center of political (moral) rights and constitutional rights that 'must be.'

When we encounter privacy rights and the right to worship freely, which includes the right to belong to an organized religion and access religious services and ceremonies, and the rights of religious communities to organize their life freely, then religious rights, in my view, according to Dworkin, must be treated as political rights. As stated before, religion forms an essential part of a human being, so important that people have been ready to face persecution and even death in order to protect their religious beliefs and the existence of their religious life. We have to be aware that history is full of religious persecutions, and this is the reason why religion is protected by constitutions throughout the world. Jeopardizing religious life is always a dangerous affair. Historically, privacy laws came into our codes much later, and perception of privacy, especially of questions concerning the GDPR, also came much later in legal history.[47]

41 Möller, 2017, footnote 34; Ibid.
42 Ibid.
43 Ibid.
44 Ibid. and Dworkin, pp. 37, 10.
45 Ibid. and Dworkin, p. 37.
46 Möller, 2017, footnote 34, p. 5.
47 Diggelmann and Cleis, 2014, pp. 441–458.

At the same time, balancing between privacy law and religious rights would be possible in specific circumstances that do not include the political rights of citizens and communities. For instance, a clash between privacy of religious life and security exists if religious services are used for criminal offenses, but then again surveillance would not be possible in case of confessional secrets, and so on. It is important to determine whether one right has a higher moral value than another right. In this case, we must use a political rights doctrine. If that is not the case, and if the rights are the same, then we must use balancing and proportionality. That is the case if we consider public safety (which is connected with existence of the state itself) as a core constitutional norm which then has to be balanced with religious freedoms.

My major concern with Dworkin's theories is that he does not give enough attention to the collective and political rights of a community. Without community, there could not be a democracy. If the community is endangered, the rights of individuals will also be in a state of distress. In that respect, I will extend the use of political rights to the state as a political body that needs to have its roots and pillars of existence. In that case, not only is public order (also as a proper operation of all three functions) of the state important, but public morals are also necessary to achieve social cohesion, which is necessary for the state to exist.

Therefore, Dworkin's claims that 'while it is acceptable for the state to force people to live with collective decisions of moral principle (for example to refrain murdering), its laws must remain neutral between competing ethical ideas.'[48] In my view, this is incorrect since moral principles arose from ethical ideas and formed the foundational framework of a particular society, and which, even in the most rigid conventional solution, have the rights on the Margin of Appreciation basis. Dworkin rejects 'moralism' and 'deep paternalism' as impermissible[49], but then again sets his own standards and does not allow stratifications in which some moral ethical stands of the state could stay and be beneficial for society. Dworkin also imposes his own set of values when discussing which paternalistic rules are acceptable and which are not. The example of 'impermissible legal paternalism [where the state imposes its own preferred set of ethical values on a person in order to improve that person's life] has to be distinguished from (permissible) superficial paternalism (which aims to help people achieve what they actually want) which is found, for example, in seat-belt laws.'[50] The problem is that he is not able to understand (who is?) what people really want, and this is his other self-creation.

In addition, Möller's claim that, for instance, even laws that are not coercive may violate the second principle (liberty) by hanging the Ten Commandments on the classroom's wall,[51] are false, since his and Dworkin's view does not take into account the collective nature of law, by taking a historical and developmental

48 Möller, 2017, footnote 34.
49 Ibid.
50 Ibid. and Dworkin, 2013, pp. 37–38, 73–74.
51 Ibid.

approach that makes law a synthesis of historical developments and the current needs of society. By using this narrative, Dworkin and his followers[52] do not see that even his views are worldviews and as such are not neutral.[53] I think Dworkin did not pay much attention to the notion that some collective rights are essential for individual rights, on which he has majorly focused.

Despite all those differences, I believe that there is value in Dworkin's work and pointing at specific political rights that have to be within the constitution—religious freedom is one of those political rights (although I am not sure Dworkin would like it to be); contrarily, the state as a political entity has to protect those rights that make the very essence of its structure and form, through public order and public morals. Therefore, rules for the GDPR have to be observed through these lenses in order to protect specific individual freedoms as well as the structure and functioning of the state. In summary, combining the teaching of conflicting rights together with the value-based approach of political rights, we are thriving within the specific field of balancing through which we might find the way to protect both – individual and collective rights, rights which are both essential for the functioning of the modern democratic state.

6. Conclusion

Balancing is the key mechanism of contemporary Western law, through which it is possible to shape a just society in which specific values have their deserved position. Individual liberty today is guaranteed by various legal instruments and mechanisms that prevent penetration into private life more than is absolutely necessary for the reasons of securing public order, morals, and security. This is safeguarded by laws, by-laws, and international instruments such as the GDPR. However, as is the case with all rights, individual rights that arise from privacy also have to be observed through the scope of the legal system as a whole. In that system, which must be coherent with other rights that exist, the application of one right sometimes clashes with the substances of other rights. This is the exact situation with religious rights that are protected on both national (constitutional) and supra-national/international levels. Religious freedoms contain both an individual element that guarantees private worship and belief, and its equally important companion, organizational liberty, which guarantees that religious communities (organizations) have the capacity to organize themselves and operate freely. Religious freedoms are essential rights; therefore, this article

52 Ibid. Although Möller finds this unfortunate for Dworkin for his '…commitments to create an opposition between rights and the community's well-being.' p. 8.

53 See Puppinck, 2011; J. H. H. Weiler's final argument, delivered in front of the European Court of Human Rights in *Lautsi v. Italy* [Online]. Available at: https://www.youtube.com/watch?v=ioyIyxM-gnM (Accessed: 16 July 2022).

uses Dworkin's legal theory to underline that religious freedom rights fall in the group of the most important constitutional and political rights from which nobody can be deprived. Although when formulating this theory, Dworkin himself probably meant other rights as the most important to protect, by using his narrative, one can explain that religious rights for historical and moral reasons constitute the most important body of law that has to be protected. In addition, in clashes with privacy rights, priority must be given to religious freedoms. However, the public order and security of all citizens must be taken into account, and used as corrective tool.

As stated, the collective nature of law, which has historical and developmental elements, requires looking at it as a synthesis of historical developments and the current needs of society, in which common values cannot be overpowered by the will of individuals. Certainly, as Dworkin correctly said, there are rights that have different or 'higher' values and must be protected by all means. The difference might only be with regard to which rights society places more value on.

The article aimed to elucidate that religious rights of individuals and freedom of religion, which also guarantees and include freedom to religious communities and organizations, must be protected in harmony with the GDPR that assures privacy, which is important for the democratic life of contemporary European citizens. Privacy laws and religious freedom can indeed go hand–in-hand and coexist in the same legal system. Using the GDPR to harm religious organizations that someone does not like anymore or dislikes for some reason should not be permitted. Certainly, the GDPR has to be applied whenever religious community organizations enter into private contracts with citizens: then specific provisions of the GDPR work well.

In summary, churches and religious organizations have specific and special positions within European societies for numerous reasons. Religious life is protected by national laws, and freedom to worship freely has been articulated in many constitutional texts. Various international conventions protect religious life, notably Article 9 of the European Convention of Human Rights and Article 10 of the Charter of Fundamental Rights of the European Union. A special position of the Catholic Church exists in many countries where the right of the Catholic Church and its relations with the state are regulated by specific agreements stipulated with the Holy See, an entity of International Law. At the same time, numerous agreements have been made with other religious communities, and in some countries, there are state churches that share specific and sometimes privileged positions within society. This has made religious life a very delicate area of social existence and legal protection. Concurrently, on a more theoretical level (as a result of reflections on Dworkin), this article shows that there are some rights that deserve to be additionally and unconditionally protected, and it has been shown that those rights are the rights of religious communities.

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KATARÍNA ŠMIGOVÁ*

Right to Privacy and Freedom of Expression in the Digital Era in Relation to Elected Public Figures

ABSTRACT: *Within the human rights protection system at both international and national system, there are several rights that might be and usually get into a clash of interaction if applied at the same time. One of the common examples is a clash between the right to privacy and freedom of expression. Both are important in relation to the protection of personal identity and autonomy and both concern development of every human being. Nevertheless, if there is a clash, one has to decide which one is given priority. This study aims to analyse the protection of these two rights in case of such a clash between them occurs. Since there has already been a lot of studies dealing with this clash, this study therefore limits its focus on two issues, namely first, specificities of the digital era and second, elected public figures have been identified as a particular subject of research because of a chosen specific case that has been under judicial scrutiny in Slovakia during the period of analysis of the research topic of the right to privacy in digital age. Striking a balance in which both these fundamental rights are protected is challenging, especially in the digital era. The focus is therefore given to the background and case-law of the European Court of Human Rights and Constitutional Court of the Slovak Republic when necessary to point out some specific features because of the stimulating case-law and the influence that these judicial authorities have in relation to the Slovak Republic. Finally, it is submitted that the online human rights protection should meet the same conditions as the offline one, keeping in mind all the circumstances that are typical for the digital world.*

KEYWORDS: right to privacy, freedom of expression, public figures, digital age

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1. Introduction

The terms 'right' and 'freedom' are used in human rights protection systems at the national and international levels. In this area, they refer to an entitlement inherent to any person simply because they are human beings and possess human dignity. The aim of human rights protection is therefore to meet the basic needs of every person while respecting the human dignity of every individual concerned. Nevertheless, human rights are not absolute.[1] During their exercise, a person can encounter various obstacles, such as the clash of different human rights and fundamental freedoms. This does not mean that their protection is not possible: quite contrary, it must be realized with consideration for all the aspects of protected values and factors that influence their mutual coexistence.

This study aims to analyze the protection of two fundamental rights – the right to privacy and freedom of expression – within specificities of the digital era and in relation to elected public figures. The focus is given to the background and case-law of the European Court of Human Rights (hereinafter, the Court) and Constitutional Court of the Slovak Republic (hereinafter, the Constitutional Court) when necessary to point out some specific features because of the inspiring case-law and the importance of these judicial authorities for the Slovak Republic. Striking a balance in which both of these fundamental rights are protected is challenging, especially in the digital era. Nevertheless, the continuous specification of the limits of both rights if they are protected concurrently within the case-law of selected courts has already provided basic guidance for the gradual limitation of both rights for politicians' online activities.

The first chapter analyzes the right to privacy and its peculiarities in relation to the digital era and the necessity of its protection in the case of public figures with a narrower scope. The second chapter similarly focuses on the freedom of expression and its specificities in the digital era and in relation to elected politicians, with an in-depth analysis of the issue of proportionality. The third chapter reflects the latest case that resonated in the public sphere in Slovakia, which was a lawsuit in case of the right to privacy protection of the president of the Slovak Republic vis-à-vis the freedom of expression of the Member of Parliament who was a member of the political opposition and was very active online. The question raised here is what the hypothetical decision of the Court might be.

Acknowledging that the right to privacy and freedom of expression have been the subject of numerous analyses,[2] this publication focuses first on elected

1 The only absolute right is the right not to be tortured. See Art. 3 of the European Convention on Human Rights and Fundamental Freedoms that does not allow any exception.

2 See Guide on Article 10 of the European Convention on Human Rights. Freedom of Expression. European Court of Human Rights. 31 August 2022. See also Reid, 2008, pp. 342 et seq.; Walker, 2012, pp. 61–68.

public figures and second on the specificities of the digital era. This study's aim is thus to find the balance by analyzing the basis and raison d´être of both examined fundamental freedoms and to specify that crossing the borders of the freedom of expression might be materialized in the institute that is called abuse of rights, although this exceptional tool is now not typically used, as the limitation clause is preferred. Nevertheless, freedom of expression in the digital era, when misused, has a greater negative impact and consequences than originally when it was misused within a limited space, time, and toward a limited amount of people. There is a strange power present in the online world that is stimulated by the crowd effect and anonymity. Online spaces lack the attributes of interaction among people that used to form and influence the substance of human rights protection. However, although without limited space, time, or amount of people, human rights protection in the digital world must guarantee the same level of protection as in the real world.

2. Elected public figures' right to privacy in the digital era

There is no legal definition of the term privacy in the Slovak legal order nor at the international level.[3] However, the very concept of the right to privacy is based on the idea that individuals have personal autonomy and identities that deserve protection by the State from outside interference. Every person has a certain space in which they realize their potential and live, and a personal space about which they can make their own decisions. The point here is that individuals decides what they want to make available to others. Nevertheless, even without a legal definition as such, the Constitution of the Slovak Republic serves as the basic legal framework for Slovakia (hereinafter, the Constitution) at the national level that includes the right to privacy protection. Similarly, several legal norms regulate the protection of the right to privacy, either at the universal or regional levels, such as the Universal Declaration of Human Rights,[4] the International Covenant on Civil and Political Rights,[5] the European Convention on Human Rights and Fundamental Freedoms, or the Charter of Fundamental Rights of the European Union.[6] The selected example, Article 17 of International Covenant on Civil and Political Rights, is a good example stating that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence, nor to unlawful attacks on their honor or reputation. Finally, case-law is also very helpful, including the definition of the Supreme Court of the Slovak Republic

3 There are many definitions of the term privacy, but no legal definition. See Albakjaji and Kasabi, 2021, pp. 1–10.
4 See Art. 12 of Universal Declaration of Human Rights.
5 See Art. 17 of International Covenant on Civil and Political Rights.
6 See Art. 8 of quoted international treaties, respectively.

according to which it is the right of a person to decide independently, at their own discretion, whether and to what extent the facts of their private life should be disclosed to others or made public.[7]

Historically, although international human rights law as such began to be developed after WWII,[8] it was already more than 100 years ago that the Harvard Journal published an article on The Right to Privacy by Samuel D. Warren and Louis D. Brandeis.[9] That article proves that already in 1890, political, economic, and social changes justified the emergence and recognition of new approaches to rights that are tied to persons and their protection. The protection of individuals originally related to the protection of their homes, good name, and honor. However, under the influence of technological developments (such as the camera or newspapers at that time), it was justified that the protection of persons should expand from the physical level (i.e., the right to life) to the level that also includes the intellectual and emotional aspects of their personal lives. The current situation is similar. The digital sphere has multiplied the options that allow interference with individuals' privacy. At the same time, it has multiplied the options through which other human rights, especially freedom of expression, can be exercised.[10]

Consequently, this expansion is also present in the case-law of the European Court of Human Rights and other national judicial bodies that must also address the right to privacy protection in the digital age.[11] This right not only includes typical aspects of the protection of one's physical home and correspondence, but also the protection of data (its collection and storage)[12] and of metadata (data about data).[13] Informational self-determination is now presented and analyzed,[14] namely, the fact that part of the right to privacy protection includes the right to have personal information about oneself safely stored and protected from falling into the hands of others who are not authorized to access it.[15] Moreover, the good

7 Order of the Supreme Court of the Slovak Republic No. 3 Cdo 137/2008 from 18 February 2010, p. 9.

8 Nevertheless, even before WWII minority rights systems had already been introduced. See Čepelka and Šturma, 2008, p. 443.

9 Warren and Brandeis, 1890, pp. 193–220.

10 For more about derived human rights, see Mathiesen, 2014, pp. 2–18.

11 See Guide on Article 8 of the European Convention on Human Rights. Freedom of Expression. European Court of Human Rights, 31 August 2022, paras. 175, 177, 181, 185 et seq.

12 See *Satakunnan Markkinapörssi Oy and Satamedia Oy* v. *Finland*, 27 June 2017, No. 931/13, paras. 133 et seq.

13 See Guide to the Case-Law of the European Court of Human Rights. Data Protection. European Court of Human Rights, 31 August 2022.

14 *Satakunnan Markkinapörssi Oy and Satamedia Oy* v. *Finland*, 27 June 2017, No. 931/13, paras. 136 et seq.

15 For more detailed information see the Regulation itself: EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

name and honor of any individual is threatened very easily by the increased speed and extent of possible online interference.[16]

It must be emphasized that there are differences between the right to privacy in the digital age apart from the issue of the lack of space or time limitations (i.e., the fact that in a digital world, information published online is made public worldwide and can be accessed faster than ever possible in the 'real,' physical world).[17] Another specific aspect must be kept in mind is the anonymity of the digital sphere compared to face-to-face contact in the real world.[18] These factual differences have no consequences in the legal protection requirements of examined rights within the European human rights protection system, as has been confirmed by the Recommendation of the Committee of Ministers according to which the obligation of the Member States to secure for everyone within their jurisdiction the human rights and fundamental freedoms enshrined in the Convention involves the assurance that human rights apply equally offline and online.[19] The main reason for the right to privacy is that everyone, including public figures, has a legitimate expectation that their private life will be protected.[20] However, in the digital world with so many informational inputs, one must consider the issue of seriousness and a reasonable reader concept. The seriousness issue includes several factors that should be considered, particularly the capability of constituting interference with the rights of the claimed victim.[21] Reasonable reader elaborates on the same issue, nevertheless, from the point of view of the person whose freedom of expression is under scrutiny.[22]

Keeping in mind that this study's aim is to focus on the right to privacy in relation to elected public figures, it is exactly these two concepts that are relevant, as has been proven in cases such as that of Egill Einarsson v. Iceland.[23] Similar to the case from Slovakia examined in the third chapter, public figures should not have to tolerate being publicly accused of violent criminal acts when such statements are not supported by facts.[24] As is discussed in the following chapter, elected

16 Compare McGonagle, 2022, p. 26.

17 Compare *Delfi v. Estonia*, 16 June 2015, No. 64569/09, para. 65.

18 Compare Kyberšikanovanie [Online]. Available at: https://www.zodpovedne.sk/index.php/sk/ohrozenia/kybersikanovanie (Accessed 25 August 2022).

19 Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users (adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers' Deputies).

20 *Von Hannover v. Germany* (No.2), 7 February 2012, Nos. 40660/08 and 60641/08, paras. 50 et seq. and paras. 95 et seq.

21 *Tamiz v. UK*, 12 October 2017, No.3877/14, paras. 80–81. See also Arnarson v. Iceland, 13 June 2017, No. 58781/13, para. 37.

22 *Sousa Goucha v. Portugal*, 22 March 2016, No. 70434/12, para. 50.

23 In this case, a known person was offended on a social media platform when he was labelled as a rapist alongside a photograph of his likeness. All the circumstances created an understanding that could have been or was taken seriously by public.

24 *Egill Einarsson v. Iceland*, 7 November 2017, No. 24703/15, para. 52. See also *Jishkariani v. Georgia*, 20 September 2018, No. 18925/09, paras. 59–62.

public figures are open to wider criticism than private individuals. Nevertheless, especially if the freedom of expression is realized by another public figure, his words carry more weight.[25]

Attacks in the digital world with an aim to humiliate can come anytime and anywhere. The only barrier is a lack of mobile or Internet access. Similarly, the dissemination is much quicker and broader in relation to the amount of people that are affected. Moreover, the distribution is uncontrollable.[26] It is much easier to put something online than to take it offline; digital traces always remain somewhere in the digital world despite the right to be forgotten.[27] Finally, on the Internet, it is easier to attack someone one would not have dared to attack in the real world because of the person's authority or position.[28] Thus, it is not only anonymity that differentiates the digital world from the physical world. Unlike the traditional requirements of good behavior, people interacting through social media are usually less aware of the fact that there is another human being on the other side of the screen, or they merely aim to make use of the speed and scope of their online activity and by doing so they at least subconsciously interfere with the dignity of another person in a way that is unacceptable not only from the perspective of human good behavior but also from the perspective of the legally settled limits of the exercise of individual human rights and fundamental freedoms, especially when a conflict exists between them.

3. Elected public figures' freedom of expression in the digital era

In general terms, most conflicts concerning this fundamental freedom arise between the freedom of expression and the right to privacy.[29] Both of these basic rights are of the same importance and weight and are protected equally.[30] It is therefore not acceptable to decide normatively which right should be given priority. Even though there is a list both in the Convention and the Constitution, and one right precedes another in the text, this does not mean that the aforementioned right is given priority in cases in which they conflict. According to the Constitutional Court, such an interpretation is not acceptable, since any solution to a conflict of two rights guaranteed by the Constitution depends on the specific

25 *Mesić v. Croatia*, 5 May 2022, No. 19364/18, paras. 103–110.
26 Pollicino, 2020, p. 6.
27 See Court of Justice of the European Union (Grand Chamber), Case C-131/12, Google Spain SL v Agencia Española de Protección de Datos, 13 May 2014.
28 Anonymity might be considered a tool to promote freedom of expression free of fear, nevertheless, it might also be a tool to disrupt the legal system. See more in Maroni, 2020, p. 271.
29 Drgonec, 2004, p. 178.
30 Compare Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 1993, para. 5.

circumstances of the case.[31] It is up to the courts in each case to determine the need to give priority to one of the protected rights by examining the degree of importance of both in the conflict of existing constitutional values.[32] This means that all fundamental rights and freedoms are protected only to the extent that the exercise of one right or freedom does not unduly restrict or deny another right or freedom.[33]

The right to privacy is intended to protect personal identity and autonomy, and without outside interference to ensure the development of every person in the relations toward other human beings.[34] Freedom of expression is fundamental to the promotion of democracy and personal and social development.[35] Both of these concepts thus concern personal development. Moreover, freedom of expression includes the right to obtain and spread information. This is expressly mentioned in the Constitution, where the article regulating freedom of expression includes the prohibition of censorship. It might be considered as having a certain legacy because of the previous communist regime in which the prohibition of censorship was only formally a part of the legal framework. Nevertheless, especially in relation to the public sphere, the issue of the free sharing of information might be considered to be an essential part of political life. Furthermore, freedom of speech as a tool to promote a democratic culture might be exercised in a digital era more easily since the digital world mainly provides passive consumers with a better chance to interact.[36]

Like the right to privacy, there is no legal definition of freedom of expression: there is no generally accepted definition of the term involving receiving and disseminating information and ideas as used in Article 10 of the Convention.[37] Nevertheless, compared to the right to privacy, freedom of expression is regulated in a unique manner since the notion of duties and obligations is involved expressly within the text of the Convention. The exercise of the freedom of expression is clearly accompanied by duties and responsibilities unique to the Convention, as there is no other such wording connected to other rights protected by the Convention.[38] This is especially a challenge in relation to the fact that the Court has explicitly ruled that Article 10 of the Convention protects all information or ideas, including those that are offending, shocking, or disturbing, since such are the demands of the pluralism, tolerance, and broadmindedness that are so essential

31 Constitutional Court, III. ÚS 673/2017 from 7 November 2017, decision, para. 23.
32 Constitutional Court, III. ÚS 193/2015 from 12 May 2015, decision, p. 11.
33 Ibid.
34 Compare *Von Hannover v. Germany* (no. 2), 7 February 2012, Nos. 40660/08 and 60 641/08, Grand Chamber, para. 95.
35 Compare *Handyside v. UK*, 7 December 1976, No. 5493/72, para. 48.
36 Balkin, 2004, pp. 8–10.
37 Compare *Groppera Radio AG et al. v Switzerland*, 28 March 1990, No. 10890/84, para. 55.
38 A different approach is typical for the African regional system, see African Charter on Human and People´s Rights and Duties, adopted 27 June 1981.

for a democratic society.[39] However, as has been discussed, neither the right to privacy nor freedom of expression is absolute. Both can be limited in the same manner, namely, by applying the five-step methodology of the limitation clause. Finally, it is important to point out that the general principles applicable to offline publications also apply to online publications.[40] Nevertheless, there are certain circumstances that might mitigate the evaluation of the State body's decision, such as the extreme nature of the comments in question and the insufficiency of the measures taken by the online functioning company to remove without delay comments amounting to hate speech and speech inciting violence and to ensure a realistic prospect of the authors of such comments being held liable.[41] However, these specific circumstances are examined within the scrutiny of application of the limitation clause.

The five-step-methodology of the limitation clause is a tool used to understand the aim of the protected rights, particularly in relation to the application of the last part of the five-step test, the test of proportionality *stricto sensu*. It is applied after proving the existence of an applicable scope of the protected rights, the existence of a relevant interference into the realization of the protected rights, the existence of the required legality, and the existence of an applicable legitimate aim the list of which differs from right to right and from the national to international levels.[42]

Proportionality is analyzed individually on a case-to-case basis. The Convention uses the term of necessity in a democratic society that is approved if there is a pressing social need.[43] The contracting parties have a certain level of margin of appreciation for evaluating whether such a need exists. Nevertheless, it is up to the Court to decide whether a limitation of the freedom of expression is compatible with the freedom of expression protection as such.[44] It must be proved that every restriction imposed in this sphere is proportionate to the legitimate aim pursued. The restriction of rights and freedoms is necessary when it can be stated that the goal of the restriction cannot be achieved otherwise.[45]

Apart from the limitation clause present in both Article 8 and Article 10 of the Convention, Article 17 of the Convention concerns the abuse of rights. It *de facto* means that the Convention allows limitation even beyond the scope of

39 Compare *Handyside v. UK*, 7 December 1976, No. 5493/72, para. 49.

40 Guide on Article 10 of the European Convention on Human Rights. Freedom of Expression. European Court of Human Rights. 31 August 2022, para. 651, more specifically the online publication of personal attacks which go beyond a legitimate battle of ideas are not protected by Article 10 para. 2 which has been confirmed in *Tierberfreier v. Germany*, 16 January 2014, No. 45192/09, para. 56.

41 *Delfi v. Estonia*, 16 June 2015, No. 64569/09, para. 162.

42 Kmec et al., 2012, p. 998.

43 *Observer and Guardian v. UK*, 26 November 1991, No. 13585/88, para. 59.

44 Compare *Janowski v. Poland*, Grand Chamber, 21 January 1999, No. 25716/94, para. 30.

45 See Constitutional Court, Pl. ÚS 15/98, finding, p. 40.

any limitation clause enshrined in the second paragraphs of the relevant article. Although it might be applied to any protected right, it is typically applied to the freedom of expression, especially to cases of revisionism, communism, racism, or incitement to violence, since values are not compatible with the Convention as such.[46] Nevertheless, the limitation clause is now used more frequently, even in cases that were previously considered as not admissible according to Article 17 of the Convention.[47]

Hence, the limitation clause and its five-step test are used instead. Considering this study's objective, only one of the legitimate aims enlisted in Article 10 of the Convention or in Article 26 of the Constitution is to be analyzed more deeply since the issue is the balance between the freedom of expression and the right to privacy. Therefore, protection of rights of others is at stake, namely, another value also protected by the Convention and the Constitution.

If the right to privacy, one of the rights of others, is claimed to be violated by realization of the freedom of expression, there are several issues that national and international courts consider in general, such as the form and content of the speech or the public interest involved in case of publicly known persons, especially politicians.[48] At the international level from the perspective of the European Court on Human Right, the usual approach is made not by abstract reasoning but individually, on a case-to-case basis. Nevertheless, when looking for a balance within a proportionality test, although there is no generally declared test, a pattern has been detected involving focusing on three fundamental issues that are frequently described as the factors 'what about who by whom.' More specifically, the five relevant criteria are as follows: contribution to a debate of public interest, degree of notoriety of the person affected, subject of the news report, prior conduct of the person concerned and finally the content, form, and consequences of the publication.[49]

As for 'what' is concerned, one of the most important distinctions that should be made in deciding defamation cases is the distinction between information (facts) and opinions (value judgments). The Court has ruled that the existence of facts can be proved, but the truth of value judgments cannot.[50] However, apart from information that can be verified, opinions and criticism that cannot be subjected to truth inquiries are protected under Article 10 of the Convention. Moreover, value judgments, in particular those expressed in the political field, enjoy special protection because of their need for pluralistic democratic systems.

46 Kmec et al., 2012, p. 1016.
47 Ibid.
48 See Constitutional Court, III. ÚS 385/2012 from 21 January 2014, finding, p. 18.
49 *Von Hannover v. Germany* (no. 2), 7 February 2012, Nos. 40660/08 and 60 641/08, paras. 108 et seq.
50 *Jerusalem v. Austria*, 27 February 2001, No. 26958/95.

The distinction between opinions and information has been decisive in most of the well-known cases dealing with freedom of expression related to politicians. Starting with the Lingens case, the Court pointed out that the facts on which the applicant had founded his value judgments were undisputed.[51] The Court has also emphasized that political fights often spill over into the personal sphere. Nevertheless, it considered this to be a hazard of politics and the free debate of ideas that is undoubtedly necessary for a democratic society.[52]

Furthermore, even value judgments may be subjected to examination whether they are based on true information and whether their public presentation is proportionate, whether or not they are aimed at defamation itself.[53] The Court has expressly upheld that even a value judgment may be excessive if there is no factual basis to support it.[54] This means that even value judgments need at least some factual grounds.[55]

Regarding form, Article 10 of the Convention includes the protection of all forms of expression without any specific limit in relation to the medium through which the speech or expression is realized in relation to its content. Nevertheless, this does not mean that there are no limitations; one is definitely the limitation clause and the concept of abuse of rights.

It was already ruled by the Court that Article 10 of the Convention also protects the freedom of expression realized through the Internet.[56] Moreover, it was pointed out in 2004 that audio-visual media has a more immediate and serious effect than the press media.[57] Consequently, such media are more likely to cause serious harm, especially in defamation cases.[58] Therefore, more restrictive measures may be acceptable in these cases, as will be pointed out while analyzing criteria that the Court considers regarding the impact that the realization of the freedom of expression might have upon the privacy of another individual.

Furthermore, if exercised excessively, freedom of expression may be used to incite violence, spread hatred, endanger public or state security, or to interfere excessively into the private lives of others.[59] It is therefore understandable that all case law aims to strike a proper balance between the conflicting interests of protected rights. This is especially challenging in the case of public figures since

51 *Lingens v. Austria*, 8 July 1986, No. 9815/82, para. 46.
52 *Lopes Gomes da Silva v. Portugal*, 28 September 2000, No. 37698/97, para. 34.
53 Constitutional Court of the Czech Republic, 1. ÚS 453/03.
54 *Feldek v. Slovakia*, 12 July 2001, No. 29032/95, para. 76.
55 *Shabanov and Tren v. Russia*, 14 December 2006, No.5433/02, para. 41.
56 *Times Newspapers Ltd* (No. 1 and 2) *v. UK*, 10 March 2009, No. 3002/03 and 23676/03.
57 *Pedersen and Baadsgaard v. Denmark*, Grand Chamber decision, 17 December 2004, No. 499017/99, para. 79.
58 Compare *Murphy v. Ireland*, 10 July 2003, No. 44179/98, para. 74.
59 Compare *Féret v. Belgium*, 16 July 2009, 15615/07, para. 78, *Willem* v. France, 16 July 2009, No. 10883/05, para. 38 et seq.

> the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.[60]

Legal practice in Slovakia concerning politicians was once completely different and protected politicians more than it did private individuals. It was after a decision of the Court against Slovakia that the Supreme Court of Slovakia had to abandon its approach according to which public figures could be discriminated if information about them was spread for the benefit of public awareness.[61] Moreover, the Court has also expressly declared compatibility with the Convention only in exceptional circumstances: if imprisonment is a sentence for an offense in the area of political speech,[62] any national law protecting politicians by special penalties against insult or defamation would not fulfill the proportionality requirements. Examples of the Court's jurisprudence in this area are interesting for the third subchapter of this article. Therefore, French cases are important to mention since they include the defamation of a head of State. The Court noted that the law tended to confer an extraordinary privilege on heads of State not to be criticized, which was not necessary for obtaining the objective to maintain friendly relations with other States.[63] This interpretation of the limitations of the freedom of expression was upheld in 2013, again against France.[64] However, if compared to the case study presented in the following subchapter, the Slovak president has not asked for special protection not to be criticized at all but to be criticized properly within limits of proportionality, like any other individual.

Similarly, the Court clearly acknowledged that

> ... Article 10 para. 2 enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.[65]

60 *Lingens v. Austria*, 8 July 1986, No. 9815/82, para. 42.
61 *Feldek v. Slovakia*, 12 July 2001, No. 29032/95.
62 *Otegi Mondragon v. Spain*, 15 March 2011, No. 2034/07, para. 59.
63 *Colombani and Others v. France*, 25 June 2002, No. 51279/99, para. 68.
64 *Eon v. France*, 14 March 2013, No. 26118/10. Nevertheless, these cases are to be distinguished from cases dealing with immunities of States and their representatives if access to court is at stake, fair trial protection under Art. 6 of the Convention, see *Al-Adsani v. UK*, 21 November 2001, No. 35763/97.
65 *Lingens v. Austria*, 8 July 1986, No. 9815/82, para. 42.

The Court also reaffirmed in its later decisions that although politicians must accept wider criticism, they also must be able to defend themselves when they think that a publication casting doubt on their person is untrue and might mislead the public as to their manner of exercising power.[66] This is especially important in the online arena, where there is a higher risk of harm.[67] Politicians can promote their views and ideas only if they have the trust of the public, and such a connection can threaten this trust. Public opinion is not a professional judge that firmly distinguishing between facts and value judgments, and its formation is not always governed by strict rules of interpretation. After its publication, any information can 'live a life of its own' and, within the framework of public discussion, possibly acquire a different meaning than those who published it attributed to it. The reaction of the public, especially when it comes to political issues in the broadest sense of the word, can often be harsh, exaggerated, or even unfair.[68]

The last aspect that is considered concerns the person whose freedom of expression is at stake. As for elected public figures, opposition members must especially be protected, as ruled in the Castells case. Again, particular parts of the decision are important because of the case study presented in the third part of the article, namely, the importance of the opposition elected by the people and the higher level of criticism acceptable toward other politicians. The Court has pointed out that although the freedom of expression is important for everybody, it is especially so for elected representatives of the people.[69] Moreover, the Court stressed that the Member of Parliament did not express his opinion in the Parliament where he could have been protected, but decided to use printed media where he might have expected refusal or sanction.[70] Finally, it referred to the dominant position of the government and upheld that limits of permissible criticism are wider with regard to the government than for a private citizen or even a politician.[71] However, it is important to emphasize that this case concerns criticism of the government, an abstract entity that cannot be covered by the legitimate aim 'rights of others' that concerns individuals. Moreover, the sanction was very serious since it concerned a criminal sentence despite the appeal of the Court not to apply criminal proceedings,[72] because such sanctions endanger the substance of the freedom of expression. Although the Court already also criticized the deletion of relevant articles published online and proposed a supplement to the

66 See *Sanocki v. Poland*, 17 July 2007, No. 28949/03, para. 61.

67 *Delfi v. Estonia*, 16 June 2015, No. 64569/09, para. 133, *Węgrzynowski and Smolczewski v. Poland*, 16 August 2013, No. 33846/97, para. 98, Editorial Board of Pravoye Delo and Shtekel v. Ukraine, 5 May 2011, No. 33014/05, para. 63.

68 Constitutional Court, IV. ÚS 492/2012-67 from 18 April 2013, finding, p. 21.

69 *Castells v. Spain*, 23 April 1992, No. 11798/85, para. 42.

70 Ibid., para. 43.

71 Ibid., para. 46. Nevertheless, this case concern criminal prosecution and conviction of the MP.

72 Ibid.

article with a reference to the court judgment,[73] even though the Internet can serve as an archival space because of its boundless and spaceless qualities, one has a guaranteed right to be forgotten online.[74]

To summarize this subchapter, politicians' rights to privacy is a special case of balancing privacy and public interests, which is also relevant in the digital world. In general, the more publicly known a person is, more interference into their privacy they must endure. Still, in these cases, one should distinguish between statements of facts and value judgments. The former does not result in a violation of the right to reputation, whereas for the latter, opinions must meet criteria of materiality, specificity, and proportionality.[75] In particular, the issue of proportionality may be at stake, since even opinions within exercise of the freedom of speech may have limits, although people who are active in public life are expected to accept critical comments more readily than ordinary people. In general, there are limits to the freedom of expression regarding attacks that are aimed to influence public persons in the performance of their duties and to damage public confidence in them and in the office they hold.[76] Finally, even their personal security must be considered if freedom of expression is realized in a manner that could threaten it.[77]

4. Slovak case study

The online activities of politicians are generally very welcomed by the public. First, such activities make communication with voters more effective, and second, they can support the engagement of citizens within a democratic system. Nevertheless, even online political activities must meet the requirements of the protection of all relevant human rights. It was not the freedom to hold opinions that is regulated by Article 10 paragraph 1 of the Convention but the freedom to impart information and ideas as regulated by Article 10 paragraph 2 of the Convention that was *de facto* ruled upon by the District Court Bratislava I. (hereinafter, District Court). The present case is an excellent example of the presentation of Facebook (FB) status posts as exercises of freedom of expression. Nevertheless, slanderous and sometimes even vulgar statuses have been considered a part of the political fight, as discussed later. The case has not been decided by merits and the District Court has been asked to adopt an interim measure.[78] Therefore, the District Court

73 Compare *Węgrzynowski and Smolczewski v. Poland*, 16 August 2013, No. 33846/97, para. 45.
74 Court of Justice of the European Union (Grand Chamber), Case C-131/12, *Google Spain SL v Agencia Española de Protección de Datos*, 13 May 2014.
75 Constitutional Court, III. ÚS 193/2015 from 12 May 2015, decision, p. 9.
76 See *Janowski v Poland*, 21 January 1999, No. 25716/94.
77 Compare Constitutional Court, IV. ÚS 107/2010 from 28 October 2010, Decision, p. 23.
78 See Decision of the District Court Bratislava I, file No. 21C/12/2022-478, 22 March 2022.

first explained the basis of an interim measure since it is not a final decision and its purpose is only to temporarily adjust the relations between the parties.[79] This does not mean that it is possible to issue an interim measure only on the basis of a proposal without proving at least the basic facts necessary for the conclusion of the probability of a claim or of the danger of imminent damage that must be immediate and specific.

The lawsuit between the Slovak president and the well-known opposition Member of Parliament (MP) concerns online activity through social media, namely, FB. This MP has approximately 170,000 FB followers. The case involves finding a balance between the protection of freedom of expression and that of the right to privacy. The statuses that were challenged by the president were of a withholding nature, and the Court was asked to decide whether specified statuses should be deleted and whether the MP must refrain from calling the president a traitor, an American agent, or an agent of foreign powers.[80]

To better understand the broader legal conflict, it is important to explain the facts in greater detail. The defendants' relevant online political activity started when a bilateral treaty was negotiated concerning greater cooperation between the Slovak Republic and the USA in the military area. The implications of this political activity may be seen in the selected statuses that were posted on two separate days and were ordered to be removed from the relevant social media. The first day was before the Russian invasion (1 February 2022) and the second was afterwards (26 February 2022).

In this regard, statuses from 1 February 2022 are as follows:

> "Today, through her spokeswoman Zuzana Čaputová, American Ambassador Bridget Brinková announced the view of the United States of America on the situation in Ukraine."
> "The number of hoaxes that Čaputová uttered today is a Slovak record so far. If after today someone still doubts whether Čaputová is an American agent, they live on another planet."
> "Since Šaňo Macha, there has not been such a militaristic expression in Slovak politics as Čaputová gave today. She completely broke free from the chain."
> "There is no longer any doubt – an agent of a foreign power and a warmonger is sitting in the Presidential Palace. She is not our president; she is America's maid."
> "The General Prosecutor's Office should immediately launch an investigation into whether Zuzana Čaputová is committing the crime of treason. There can be no greater proof than today's intercession."

79 See Supreme Court of the Slovak Republic, 6MCdo 5/2012 from 28 November 2012.
80 Decision of the District Court Bratislava I, file No. 21C/12/2022-478, 22 March 2022, para. 1.

The statuses from 26 February 2022 are as follows:

> "And it is confirmed. It all comes from Zuzana Čaputová and her American friends. This whole lynching."
> "There is no more direct line to the Presidential Palace. Kubina is the gray eminence of Čaputová. It was he who advised her to cut the referendum, he whom she trusts without reservation. This is her show."
> "Zuzana Čaputová recently declared that Ľuboš Blaha must be stopped. Today her gangs of primitives are threatening me, calling my cell phone, today they came to ring my doorbell, they are intimidating my family."
> "In any normal country, the president would condemn such crazy attacks on the opposition. If she didn't have a hand in it herself. Kubin's statements today are clear proof – this is Čaputová's work."
> "And here we come to the point. This government is completely controlled by the American embassy. Čaputová was always just a spokesperson for Bridget Brink, who today is an extended arm of Washington in Ukraine."
> "They cut and chop like Šaňo Mach in 1944. They do not recognize the freedom of scientific research. They do not recognize other geopolitical views. They have no respect for democracy, for academic freedom, and certainly not for the opposition. Not even Hitler felt as much hatred for Russia as they did. And it goes directly from the Presidential Palace. Today it confirmed it. They close down alternative media, introduce censorship, and threaten with life imprisonment for different opinions."
> "People are in shock today. Because of the war in Ukraine. And every totalitarian in human history needs to feed on fear to control people more easily. This is exactly what the Čaputová totality is doing today."
> "Dear friends, no, this is no longer Čaputová's hopelessness. This is Čaputová fascism. And I publicly accuse President Zuzana Čaputová of the fact that she and her people are behind this insane attack on democracy and human rights. She is a murderer of democracy. This is how history will remember her."

The District Court did not completely comply with the submission. Nevertheless, it ordered the defendant to delete specified statuses. It did not order the complete deplatforming of the MP, as it had not been asked to do so. The decision was reasoned by the aim that was claimed to be pursued by the MP, namely, that the statuses were not only offensive in nature (since freedom of expression also

protects offensive language), but that they first aimed to evoke and incite strong negative emotions, whereas rational argumentation was largely absent.[81] The District Court pointed out expressly that in this case, two rights protected by the Constitution stand against each other, namely, the right of a natural person to have his personality protected, including civil honor and human dignity, and the political right to freedom of expression.

The decision of the First Instance Court did not include reference to the international judiciary.[82] Nevertheless, procedurally, the District Court followed the usual approach of a limitation clause and balanced respective conflicting rights. By applying the methodological approach of 'who said what against whom,' it concluded that the defendant acted so rudely and at the same time without providing a factual basis or relevant evidence while interfering with the personal rights of the plaintiff that there was an urgent need for judicial intervention. Moreover, regarding 'what,' the statements of the defendant, in which he accuses the plaintiff of particularly serious crimes and other defamatory accusations and in which the defendant's efforts to evoke strong negative emotions in his supporters toward the plaintiff are evident, cannot be defended by freedom of speech, as they lack objective, rational argumentation, or any effort to explain and prove the asserted facts. The District Court considered the urgency of the plaintiff's proposal to be proven in view of the enormous impact of the defendant's statements, the obvious polarization and division of the society characteristic of the current geopolitical situation and the related, directly threatening harm that the defendant's statements to the plaintiff were capable of causing. It was therefore considered that the threatening harm in connection with the defendant's statements was immediate and concrete, whereas the potential harm caused by the order of interim measures was insignificant in relation to the potential harming of the plaintiff.

In relation to 'against whom,' the District Court also considered higher levels of potential tolerance of violations of the personal rights of the plaintiff in connection with the performance of a public function, but as for 'who,' it points out that the demands for the verification of the truth of the statements are higher for the defendant than for ordinary citizens, both because of his social status and his considerable influence on the masses through social networks.[83]

Moreover, the District Court analyzes the 'what' question more when it emphasizes that the defendant does not formulate his contributions on the social network as evaluative judgments, but as facts that enjoy a lesser degree of protection, since their veracity is verifiable.[84] To summarize this part of the

81 Ibid., para. 6 of the Reasoning.

82 Nevertheless, it referred to some decisions of the Constitutional Court of the Czech Republic.

83 Constitutional Court of the Czech Republic, I. ÚS 453/03 as referred to in the Decision.

84 Decision of the District Court Bratislava I, file No. 21C/12/2022-478, 22 March 2022, para. 6 of the Reasoning.

interim measure, the District Court upheld that defamatory speech, formulated mainly as factual statements, many of which are demonstrably not based on the truth, and the aim of which is probably to defame a public figure, cannot enjoy a higher level of protection under the umbrella of freedom of speech than the right to preserve human dignity, personal honor, and good reputation and to protect one's name.[85]

The District Court found the other parts of the decision problematic, considering that it was impossible to order that the defendant refrain from speech in which the defendant compares or associates the plaintiff with the words fascism and totalitarianism because of speech identification problems and especially because of the protected status of the public function the defendant holds.

Finally, in the part of the proposal in which the plaintiff demanded an apology, the District Court stated that in this case, the conditions for ordering the proposed interim measure were not met, since there was no danger of damage and no need for immediate adjustment; in case of the issuance of such an interim measure, the right to a fair trial would have been violated.

The defendant appealed and the lawsuit reached the Regional Court, which confirmed the decision of the District Court with more detailed reasoning that included case-law from the Court presented by both parties to the conflict.[86] The appeal was submitted on the basis of the claim that the First Instant Court incorrectly determined the factual basis and arbitrarily justified its decision. The biggest conflict lay in deciding whether the statuses were value judgments or factual statements. However, even the defendant admitted that value judgments are examined whether they are based on true information presented properly and whether the primary aim of the expression is not defamation or dishonor of a person.[87] According to the plaintiff, this is exactly what happened: it was submitted that the statements were intended to attack the plaintiff *ad hominem*. The relevant statements were not an invitation or part of a discussion. Furthermore, the plaintiff emphasized that the relevant statuses were fact statements, not value judgments, since the defendant used categorical expressions and declarative sentences while presenting his claims as clearly given, proven facts. Although the plaintiff acted in accordance with the national legal framework when signing a treaty approved by the Parliament, the defendant claimed she was a betrayer, even a war criminal. Furthermore, the defendant submitted that his statements were not objectively capable of interfering with the trustworthiness and good reputation of the plaintiff. Nevertheless, the Safety of President Report showed increased threats to the safety of the President as people came to demonstrate in front of her house who were persuaded that she had sold Slovakia to foreign

85 Ibid.
86 Decision of the Regional Court Bratislava, file No. 5Co/95/2022 – 749, 21 July 2022.
87 Constitutional Court of the Czech Republic, 1. ÚS 453/03 as referred to in the Decision.

powers. Moreover, although it was admitted that the status valid at the time of the adoption of the first decision was decisive, the plaintiff pointed out that a meeting in person on the occasion of the 1 May celebration included incitement by the defendant to declare what the District Court had forbidden him to do, namely, to state that 'the President is an American …' (bitch, added by the excited and incited crowd several times).

The defendant has objected to the limitation of his freedom of expression. As it has already been proven, the use of vulgar language as such is not decisive since it may only serve only exaggerating purposes. The style might be considered a part of the expression itself and is therefore protected as well.[88] The Court found that Mr. Haider' speech was itself provocative, and therefore the word 'idiot' used in the media did not seem disproportionate to the indignation knowingly aroused by Mr. Haider.[89] To point out other similar cases, the protection of the freedom of expression depends on the context and the aim of the criticism. In case of important public interests or during political debates, more is tolerated by a judicial authority that must decide. By doing so, the Court has already accepted the exaggeration or provocation.[90]

Nevertheless, the exaggerated vocabulary and provoking expressions were not decisive in the present case. To summarize, systematic, long-term, and focused verbal and hate-inciting attacks are not protected by the freedom of expression. Even though public figures are expected to endure a higher level of criticism because of the importance of public interest, they are not obliged to endure speech that might be considered abuse of rights than an exercise of the freedom of expression.[91]

5. Conclusion

This study aimed to analyze the relationship between the right to privacy and freedom of expression in the digital era in relation to elected public figures. This analysis has focused on the legal framework and case-law within the Slovak and Council of Europe contexts.

The first chapter dealt with the right to privacy, acknowledging that there is no legal definition of the term privacy. Nevertheless, the right to privacy including honor and reputation is a right that is expressly protected by national and international judicial authorities. This right is protected in a more flexible manner for elected public figures, as they are expected to endure criticism. However, politicians must accept that violations of their right to privacy may take place

88 *Uj v. Hungary*, 19 July 2011, No. 223954/10, para. 20.
89 *Oberschlick v. Austria* (No. 2), 1 July 1997, No. 20834/92, para. 33.
90 *Dalban v Romania*, 28 September 1999, No. 28114/95, para. 49.
91 Decision of the Regional Court Bratislava, file No. 5Co/95/2022 – 749, 21 July 2022, para. 6.

more easily online. Online activities usually have a bigger impact in relation to the amount of people affected by them and the speed at which the news, even if it is false, may reach people and influence them since they usually consume information without fact-checking it.

The second chapter examined the freedom of expression. Neither the right to privacy nor freedom of expression are absolute rights. Thus, their exercise could be limited, especially in cases in which they conflict. Relevant restrictions are legally possible if there are requirements of legality, legitimacy, and proportionality fulfilled. Moreover, regarding sanctions, financial measures are preferred since imprisonment for exercise of the freedom of expression might be a signal of violation of principles of a democratic society and its pluralism. Another issue in relation to the online activities might be deplatforming. Overall, whether offline or online, the freedom of expression must be protected in a comparable way.

Although the aim of the freedom of expression is the same worldwide, the status of the freedom of expression is usually reflected in different ways within the legal framework of the United States of America, where it is constitutionally protected almost to an absolute level. Nevertheless, as has been experienced in the case of Donald Trump's deplatforming, this is not always the case. Even the USA has witnessed that there are limits to the freedom of expression. Although it has been suggested that this deplatforming is not a violation of the constitutional freedom of expression because this freedom is protected from restraint by government not by private companies,[92] from the European legal point of view which has developed Drittwirkung theory,[93] the government is responsible for human rights protection within its jurisdiction, not only for action taken by State bodies.[94] Of course, this is within the limits of the reasonable expectations of positive obligations of a State.[95] Finally, in relation to online activities, despite its peculiarities, human rights protection is an obligation of a member State of the European Convention on Human Rights and Fundamental Freedoms even though it was adopted in the pre-Internet era.

Last, the presented case between the Slovak president and the MP in opposition might be a better example of searched proportionality since he was requested by the court that issued an interim measure to remove only the FB statuses in which he interfered with the right of privacy of the political opponent in an excessive manner. In contrast, deplatforming might be considered a tool used to completely take down a politician, thus ignoring the principle of proportionality. Although the Internet is considered a modern form of a public square and access to social media is protected by the First Amendment of the US Constitution,[96] various

92 See Rowen-Delson, 2021.
93 Kmec et al., 2012, p. 997.
94 See Art. 1 of the European Convention on Human Rights and Fundamental Freedoms.
95 Harris, O´Boyle and Warbrick, 2009, p. 446.
96 US Supreme Court, *Packingham v. North Carolina*, 19 June 2017.

interpretations oppose deplatforming as a violation of the First Amendment. Of course, private social media have their own rules and if these are not respected, users may be reported. Nevertheless, set limits is different from complete deplatforming, which finally occurred in the case of the Slovak opponent politician. It was not a judicial authority, though, that deleted the official and later also the personal FB account of the elected public figure, but the private company itself.[97] There is still ongoing discussion about Internet service providers' liability for information published on their servers since there are doubts concerning the effects of removing information before a judicial decision confirming defamation has been made.[98]

Although the Slovak courts have not yet adopted a decision in merits,[99] but only an interim measure, it is considered that they have properly handled the conflict between the right to privacy and freedom of expression. Although the objected statuses have reached the intensity and scope of the abuse of rights institute because of their inciting nature, the decision treated them from the perspective of the limitation clause and focused on distinguishing between information and value judgments and on the principle of proportionality. It systematically reasoned its decision and not only examined not only the basis and aim of the concerned statuses but also against whom and who had published them, considering that both parties to the conflict were elected public figures. Moreover, the impact of the online activities of the MP was also examined since he was one of the most Internet-active politicians in Slovakia. It is therefore considered that the Slovak judicial authorities have examined and used all of the available means to find a balance between the right to privacy and freedom of expression in this very challenging case and that the European Court on Human Rights would not have found a violation of Article 10 of the Convention by the Slovak authorities if the case had reached Strasbourg.

97 See Hodás, 2022.

98 See Rowland, 2005, pp. 55–70.

99 Apart from the aforementioned decisions, the Constitutional Court of the Slovak Republic also adopted a decision related to the lawsuit between the Slovak president and the opposition member of Parliament who finally submitted a constitutional complaint asking the Constitutional Court to declare interference with his freedom of expression. Nevertheless, the Constitutional Court adopted a decision rejecting the submission because all the available remedies had not yet been exhausted. See decision IV. ÚS 534/2022-33 from 25 October 2022, paras. 33 et seq.

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TAMÁS SZABADOS*

Right to Property and Cultural Heritage Protection in the Light of the Practice of the European Court of Human Rights

ABSTRACT: *This article presents the relationship between the protection of property and cultural heritage protection under the ECHR system. Most often, state measures aimed at the protection of cultural heritage appear to interfere with private parties' right to the peaceful enjoyment of possessions. Those dissatisfied with the outcome of domestic court proceedings regarding such interferences often want to reverse unfavorable domestic court decisions by bringing their case before the ECtHR. This article outlines the relevant case law of the ECtHR, distinguishing deprivation of property cases from controls on the use of property, in accordance with the structure of Article 1 of Protocol No. 1. At the same time, it demonstrates the limits of property protection and, thereby, the success of claims by applicants before the ECtHR in cases involving cultural heritage. First, the limited temporal scope of the application of the ECHR and Protocol No. 1 excludes many cultural heritage disputes from the jurisdiction of the ECtHR. Second, the applicant has to prove that (s)he has possessions as interpreted by the ECtHR; the lack of possessions bars in particular restitution claims regarding property expropriated before the ratification of the Convention. Third, cultural heritage protection is considered a legitimate aim by the ECtHR, which can justify a deprivation or restriction of the use of property. States have a wide margin of appreciation in determining whether and how they will ensure the protection of cultural heritage in public interest. In particular, the ECtHR seems to endorse policies underlying both cultural nationalism and internationalism without giving a priori preference to any of them. Finally, the application of the flexible proportionality test by the ECtHR often makes the outcome of the procedure difficult to predict.*

KEYWORDS: cultural heritage; possessions; right to property; expropriation; proportionality; ECHR; ECtHR

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1. Introduction

Legal scholarship has several times underlined the need to create a specialized permanent international court for cultural heritage disputes with mandatory jurisdiction,[1] but such a judicial forum has not yet been created. Parties to such disputes who are dissatisfied with the outcome of domestic court proceedings sometimes bring their claims to an international judicial forum, such as the European Court of Human Rights (ECtHR or the Court). In several recent cases involving claims related to cultural property, after having gone through the various national judicial instances without success, the losing party in the domestic proceedings sought remedy directly before the ECtHR. In proceedings before the courts of European states, the assertion that the party will turn to the ECtHR if it loses the case domestically is an argument of last resort. This happened recently in the Esterházy case, pending before Hungarian courts. Alternatively, the parties rely on the rules of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, also called the European Convention for Human Rights) and its protocols before domestic courts (even outside Europe), as illustrated by the Cassirer case.[2]

In the case of the Esterházy collection, the Austrian Esterhazy Private Foundation (*Esterhazy Privatstiftung*) is claiming its right of ownership over treasures located in Hungary that were once kept in the Fraknó (*Forchtenstein*) castle of the Esterházy family (which has been in Austrian territory since 1921), but were later moved to Budapest, where they were nationalized after the Second World War. After the court of first and second instance in Hungary rejected the claim of the Esterhazy Private Foundation,[3] the latter stated that it would bring the claim to the Kúria, the Supreme Court of Hungary, the Hungarian Constitutional Court, or, if necessary, even to the ECtHR. Currently, the case is pending before the Hungarian courts,[4] so it remains to be seen whether the Esterhazy Private Foundation will later turn to the ECtHR.

In the Cassirer case, the heir of a German Jewish owner of a Pissarro painting, '*Rue Saint-Honoré, après-midi, effet de pluie,*' sought before US courts to reclaim the painting from the Thyssen-Bornemisza Museum in Madrid, asserting that

1 See, for example, Parkhomenko, 2011, pp. 145–160; Granovsky, 2007, pp. 25–40.

2 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), Rome, 4 November 1950.

3 Decision of the court of first instance: Fővárosi Törvényszék (Budapest-Capital Regional Court) 4.P.22.219/2020/5, 23 September 2020; decision of the court of second instance: Fővárosi Ítélőtábla (Budapest-Capital Regional Court of Appeal) 7.Pf.20.731/2020/25, 14 April 2021.

4 The decision of the Hungarian Supreme court, the Kúria, Pfv.II.20.909/2021/9, 19 January 2022 rescinded the decision of the court of second instance and instructed it to conduct a new procedure and to render a new decision.

the painting was sold by its owner in 1939 under pressure from the Nazi authorities. The plaintiff argued, *inter alia*, that the Spanish museum could not acquire ownership of the painting due to adverse possession because the Spanish adverse possession rules are contrary to Article 1 of Protocol No. 1 of the ECHR.[5] Briefly analyzing the case law of the ECtHR, the US Court of Appeals for the Ninth Circuit did not hesitate to establish that the Spanish adverse possession rules did not violate Article 1 of Protocol No. 1.[6]

The extent to which the provisions of the ECHR and its protocols and a procedure before the ECtHR can serve to alter the outcome of domestic proceedings in favor of the applicant is questionable. This article outlines the approach of ECtHR to cases concerning cultural heritage and the limits of recourse to the ECtHR.

This article is limited to the analysis of ECHR provisions and case law concerning cultural heritage from the perspective of the right to property. This aspect is, however, particularly important, since state measures aimed at the protection of cultural heritage often appear as interference with private parties' right to peaceful enjoyment of their possessions. Even though certain individual decisions of the ECtHR relevant for cultural heritage protection have received some attention, the legal literature has not addressed the relevance and peculiarities of the provisions of the ECHR and its protocols, as well as the case law of the ECtHR for cultural heritage in a more comprehensive way. This contribution intends partly to fill this gap by focusing on the protection of property under Article 1 of Protocol No. 1 of the ECHR.

2. Property protection under the ECHR System

■ *2.1. Brief glance at property protection in the context of the international framework of cultural heritage protection*

In cultural heritage protection law, the need for the protection of property rights is often linked to the circulation of works of art, and discussed primarily regarding stolen cultural objects in the relationship between the original owner and the actual possessor of the cultural object. The 1995 UNIDROIT Convention on stolen or illegally exported cultural objects provides for the restitution of the stolen cultural object, giving priority to the right of property of the original owner, even against a good faith purchaser.[7] A good faith possessor, who exercised due

5 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 009), Paris, 20 March 1952.

6 Cassirer v. Thyssen-Bornemisza Collection Foundation, 862 F.3d 951 (9th Cir. 2017); see also Cassirer v. Thyssen-Bornemisza Collection Foundation, 153 F.Supp.3d 1148 (2015). The case is mentioned in the context of the relationship between private international law and human rights by Hirschboeck, 2019, pp. 181–182.

7 UNIDROIT Convention on stolen or illegally exported cultural objects, Rome, 24 June 1995.

diligence when acquiring the object, must be content with fair and reasonable compensation. Thus, the UNIDROIT Convention intends to strike a balance between two competing titles: that of the original owner, and that of the actual possessor. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property prohibits any transfer of ownership of cultural property effected in breach of the Convention.[8]

However, very often, the question is whether a person's ownership right can be limited to protect cultural heritage. Certain international conventions aiming at the protection of various forms of cultural heritage explicitly recognize that the protection of individual property rights must sometimes yield to the general interest in protecting cultural heritage, and as such, property rights can be subject to certain limits. For example, under the Council of Europe Convention for the Protection of the Architectural Heritage of Europe, state legislation has to permit public authorities to require the owner of a protected property to carry out the necessary conservation works or to carry out such works if an owner fails to do so. The state legislation also has to allow the compulsory purchasing of a protected property.[9] In fact, such an approach reflects to a certain extent the solution of Article 1 of Protocol No. 1 of the ECHR that, in addition to guaranteeing the right to property, recognizes the possibility of restricting the same right in the general interest.

■ *2.2. The added value of the property protection under the ECHR system*

There is no special international court for legal disputes that hears claims brought by private parties regarding cultural property. For this reason, Francioni writes of an 'enforcement deficit in international cultural heritage law.'[10] Although the International Court of Justice has addressed a few cases related to cultural heritage, only states may be parties in cases submitted before it.[11] In Europe, however, even private parties can rely on human rights and fundamental freedoms, including the protection of their right to property before the ECtHR, in disputes related to cultural heritage. However, the ECtHR is not a forum specifically created for cultural heritage disputes. The wording of the ECHR and its protocols does not refer to 'cultural property,' 'cultural heritage,' 'cultural objects,' or 'cultural goods.'[12] The protection of cultural heritage is not the objective of the ECHR.[13] It addresses cultural heritage exclusively through the lens of human rights.

8 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970, UNTS 11806, Art. 3.
9 Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121), Granada, 3 October 1985, Art. 4.
10 See Francioni, 2012, pp. 726–729.
11 Statute of the International Court of Justice, Art. 34(1).
12 See Ress, 2005, p. 499.
13 See Michl, 2018, p. 110.

The ECtHR used various provisions of the ECHR to recognize what can be called cultural rights.[14] In this way, the ECtHR provided protection, for example, for the right to artistic expression, access to culture and cultural identity, and the use of one's own language.[15] Nonetheless, in the case brought by an Athenian cultural association for the return of the Elgin marbles, in the context of Article 8 (the right to respect for private and family life) it held that the ECHR does not recognize 'a general right to protection of cultural heritage.'[16] Despite this reticence, state measures aiming to protect cultural heritage are often considered an interference with private parties' right to peaceful enjoyment of their possessions. At the same time, cultural heritage protection is deemed a legitimate aim that can justify restrictions on the right to property. This generates tension between individuals' interest in the protection of their property and the general aim of protecting cultural heritage. This underscores the significance of property protection under the ECHR system if we want to understand the challenges applicants face in disputes concerning cultural heritage brought before it.

The protection of property is enshrined in Article 1 of the First Protocol to the ECHR, which provides the following:[17]

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

Even though the wording of Article 1 refers more broadly to 'possessions,' in most cases related to cultural heritage, the deprivation of or the restriction on ownership constituted the object of the proceedings. In the established practice of the

14 See in particular ECHR Art. 8 (right to respect for private and family life), Art. 9 (freedom of thought, conscience and religion), Art. 10 (freedom of expression), Art. 1 of Protocol No. 1 (protection of property) and Art. 2 of Protocol No. 1 (right to education).

15 For a detailed summary of these cultural rights, see European Court of Human Rights, Research Division, Cultural Rights in the Case Law of the European Court of Human Rights. Council of Europe/European Court of Human Rights 2011.

16 Case *Syllogos ton Athinaion v. United Kingdom*, no. 48259/15, 23 June 2016.

17 For a summary of the case law related to Article 1 of Protocol No. 1, see European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights—Protection of Property (31 August 2022). Council of Europe/European Court of Human Rights 2022. See also Schabas, 2015, p. 958; von Raumer, 2017, 'Artikel 1 Schutz des Eigentums,' paras. 1–65.

ECtHR, there are three distinguished rules in the wording of Article 1 of Protocol No. 1. The first sentence of the first paragraph declares the right to peaceful enjoyment of possessions. A second rule, laid down in the second sentence of the first paragraph, addresses deprivation of property and allows expropriation under certain conditions. The third rule contained in the second paragraph of Article 1, recognizes the right of the contracting states to restrict the use of property in accordance with the general interest. The second and third rules demonstrate that the right to property is not an absolute right; it can be subject to restrictions. Even if deprivation of property and restrictions on the use of property are regulated separately, their conditions specified in the practice of the ECtHR largely overlap.[18] In both cases, the ECtHR examines whether the state measure is provided for by law, whether it pursues a legitimate objective in the public interest, and the proportionality of the measure. In the cases decided by the ECtHR, it was not difficult to establish that the state's interference was based on legislation, and it consistently acknowledged that the protection of cultural heritage is a legitimate aim that can justify expropriation or any other restriction on the right of property. In expropriation cases, the ECtHR additionally examines the existence and appropriateness of compensation provided by the state. In the next chapter, the judicial practice of the ECtHR will be discussed by distinguishing the two types of cases: deprivation of property and restrictions on the use of property.

3. Resolving conflicts between the right to property and the protection of cultural heritage: the case law of the ECtHR

Private parties may have recourse to property protection when the state restricts the peaceful enjoyment of their possessions for protecting cultural heritage. In accordance with the rules contained in Article 1 of Protocol No. 1 of the ECHR, the cases decided so far by the ECtHR can be classified either as deprivation of property—that is, as expropriation—or as controls on the use of property. Following the structure of Article 1 of Protocol No. 1, the judgments of the ECtHR related to the protection of cultural property will be briefly outlined in accordance with this distinction.

■ *3.1. Expropriation and restitution*

In several cases, the ECtHR had to address the deprivation of possessions, meaning expropriation. As former expropriations are sometimes followed by restitution, the ECtHR's approach to restitution in the context of cultural heritage is also elucidated below.

In Bogdel v. Lithuania, a state-owned plot of land at the entrance to the picturesque Trakai castle was first leased and then sold to the applicants, who

18 See Michl, 2015, p. 372.

operated a kiosk and later a café there.[19] Subsequently, the national authorities concluded that the underlying agreements breached the cultural heritage legislation, and so they were declared null and void. The applicants alleged that this constituted property deprivation. The ECtHR noted that interference by the state was based on law, and the conservation of cultural heritage served the public interest. Remarkably, the ECtHR used other sources to support this statement. It pointed out that the site was on the tentative list of the Lithuanian state for UNESCO World Heritage status (it is now a World Heritage Site), and it also referred to the Council of Europe Convention for the Protection of the Architectural Heritage of Europe, which requires state parties to take measures to protect architectural heritage.[20] The ECtHR recalled the principle of good governance, according to which public authorities must act in good time and in an appropriate and consistent manner. However, this principle does not exclude correcting any earlier mistakes by the authorities. Nevertheless, the need for the correction of any former mistake must not disproportionately restrict the right acquired by private persons who were relying in good faith on the legitimacy of the erroneous action of the national authority. Revoking the ownership of a property transferred erroneously by the authorities is possible if this takes place promptly and by providing appropriate compensation to the private persons concerned. In Bogdel, the Court found that such adequate compensation was granted, and thus interference with the right to property was not disproportionate.

In practice, not only can the legitimacy of expropriations be challenged, but also the amount of compensation provided by the state. In Kozacioğlu, the determination of the value of the compensation for an expropriated building was in question after Turkish authorities classified it as a cultural asset.[21] The ECtHR did not doubt that the case constituted a deprivation of property within the meaning of the second sentence of paragraph 1 of Article 1 of Protocol No. 1. The ECtHR stated that deprivation of property without compensation clearly constitutes a disproportionate interference. However, Article 1 of Protocol No. 1 does not always require a complete compensation. Legitimate public-interest objectives can justify compensation below the market value of the expropriated property. Even so, the ECtHR found the Turkish system of compensation unfair because it excluded taking the rarity and architectural and historical value of the building into account when determining the amount of compensation. Undue advantage was given to the state, as the depreciation of the building could be considered in the course of the expropriation, but any benefit resulting from the above features of the property or the maintenance costs incurred by the original owner could not. Consequently, it violated Article 1 of Protocol No. 1.

19 Case Bogdel v. Lithuania, no. 41248/06, 26 November 2013.

20 Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121), Granada, 3 October 1985.

21 Case Kozacioğlu v. Turkey, no. 2334/03, 19 February 2009.

There are cases in which the question arose as to whether the restitution claims of past owners of expropriated assets are substantiated under the ECHR. In the Prince Hans-Adam II of Liechtenstein v. Germany case, the prince, as an applicant, wanted to challenge the confiscation of a painting formerly owned by his father.[22] The painting 'Szene an einem römischen Kalkofen' by Pieter van Laer was stored in a family castle in the territory of the current Czech Republic and was confiscated due to the Beneš decrees after the Second World War because the Czechoslovakian authorities classified the applicant's father as a German citizen. The applicant's father's appeal before the Czechoslovakian courts was rejected. In 1991, the painting was on a temporary loan in Cologne, and the applicant, as an heir, took this occasion to reclaim the painting. He requested the delivery of the painting to him before the German courts, but this was rejected. Even though the painting was given to a bailiff while the domestic proceedings were pending, it was finally returned to the Czech Republic. In the proceedings before the ECtHR, the applicant argued that the procedure of German courts, by finding his restitution claim inadmissible and returning the painting to the Czech Republic, violated, among others, Article 1 of Protocol No. 1. The ECtHR found no violation of his right to property. The hope of recognizing an old property right that could not be exercised due to expropriation did not give rise to a legitimate expectation on the applicant's part and could not be considered as possessions within the meaning of the first sentence of the first paragraph of Article 1.

Sometimes, states or national authorities decide to remedy past expropriations and order restitution to the original owners. In such cases, restitution must comply with the requirements of Article 1 of Protocol No. 1. In the Archidiocèse catholique d'Alba Iulia c. Roumanie case, the Romanian state decided to give back the collection of the Batthyaneum library, the institute of astronomy, and the building containing them, which were nationalized in 1961, to the applicant archdiocese.[23] Despite this decision, restitution was not implemented, even 14 years after the adoption of the regulation ordering it. The ECtHR saw that Romanian law established the state obligation to return those assets that gave rise to a legitimate expectation to settle the proprietary status of those assets swiftly, considering their importance, not only for the applicant but also for the general interest. Therefore, Article 1 of the First Protocol could be applied to the restitution claim. The relevant regulation did not specify the deadline or procedure for restitution and did not provide for any judicial recourse as to the application of the legislative provisions. The Romanian state did not justify this prolonged inaction either. The ECtHR found this delay incomprehensible in light of the cultural and historical significance of the assets in question, which should have called for rapid action in

22 Case Prince Hans-Adam II of Liechtenstein v. Germany, no. 42527/98, 12 July 2001.
23 Case Archidiocèse catholique d'Alba Iulia c. Roumanie, no. 33003/03, 25 September 2012.

view of their preservation and appropriate use in general interest. Considering the above, the ECtHR found a violation of Article 1 of Protocol No. 1.

In Debelianovi, a house was expropriated by the Bulgarian authorities as one of the most significant historical and ethnographical monuments in the municipality of Koprivshtitsa, and it was transformed into a museum.[24] Applicants requested an annulment of the expropriation. Even though the Bulgarian Supreme Court ordered restitution, this was not implemented because the Bulgarian National Assembly set a moratorium for the restitution of assets classified as national monuments of cultural character until the adoption of a new law on cultural monuments. The ECtHR considered the moratorium as an interference with the right to property, but it could have been justified by the aim of preserving the elements of national cultural heritage. Nevertheless, the ECtHR established a violation of Article 1 of Protocol No. 1, since the decision to introduce the moratorium gave rise to uncertainty. After more than a decade, restitution was not effected and the decision did not determine when the moratorium would end. No new legislation was put forward to regulate monuments, and the Bulgarian government did not explain its delay. Furthermore, no compensation was provided to the applicants for the impossibility of using their assets.

■ *3.2. Restrictions on the use of property*

Based on Protocol No. 1 and the related case law of the ECtHR, restrictions on the use of property are permissible for both movable and immovable objects in accordance with the conditions specified in the second paragraph of Article 1. Regarding movable objects, this provision was interpreted by the ECtHR in its seminal Beyeler judgment regarding the pre-emption rights reserved for the state.[25] In 1977, Ernst Beyeler, a Swiss national, acquired the painting 'Portrait of a Young Peasant' by Vincent Van Gogh through an intermediary, an antique dealer from Rome. Italian authorities deemed the painting to be a work of historical and artistic interest. In 1983, when Beyeler wanted to sell the painting to the Peggy Guggenheim Collection in Venice, the Italian state was invited to announce its intention to buy the painting. The authorities did not allow the painting to be transported to Venice; they ordered that it be taken into custody by the Modern and Contemporary Art Gallery in Rome. In 1988, the competent ministry decided to avail itself of the right to pre-emption, taking the 1977 agreement and the price determined there into account, which was significantly less than the market value of the painting by the time the exercise of the pre-emption right was declared. The Italian authorities explained that the delay in exercising the pre-emption right was caused by Beyeler not duly declaring himself as a buyer to the Italian authorities

24 Case Debelianovi c. Bulgare, no. 61951/00, 29 March 2007.

25 Case of Beyeler v. Italy, Application no. 33202/96, 5 January 2000. See Renold, 2000, pp. 73–76; Rudolf, 2000, pp. 736–739; Seidl-Hohenveldern, 2001, pp. 70–78.

at the time of purchasing the painting, which impeded them from exercising their right to pre-emption. It was also disputed whether Beyeler qualified as the owner of the painting under Italian law. The ECtHR, without addressing the issue of title under Italian law, stated that the concept of possessions within the meaning of Article 1 has an autonomous independent meaning and does not correspond to the formal classifications made by national laws. Autonomous meaning is not limited to ownership. Taking into account that Beyeler was treated as the owner of the painting on a number of occasions by the Italian authorities, the ECtHR concluded that the applicant had a proprietary interest in the painting that constituted a 'possession' within the meaning of Article 1 of Protocol No. 1, and the latter provision could be accordingly applied to the case.

The exercise of the right of pre-emption constituted interference with the applicant's right to the peaceful enjoyment of his possessions. As the Court recognized that this interference was based on legislation and aimed at the protection of cultural and artistic heritage, the question was rather whether the restriction was proportionate. The Italian authorities announced the exercise of their right to pre-emption with a significant delay even though it is required that national authorities 'act in good time, in an appropriate manner and with utmost consistency,' where a case concerns general interest. Moreover, the delay enabled them to buy the painting well below the market price and gain unjust enrichment that excluded the existence of a fair balance between the general interest and the applicant's rights protected under Article 1.

In Albert Fürst von Thurn und Taxis v. Germany, the ECtHR found the applicant's claim, by which he intended to challenge the restrictions related to the family library and archives in his ownership, to be inadmissible.[26] The library, dating back to the 15th century, belonged to a family trust fund (*Fideikommiss*). When the institution of *Fideikommiss* was terminated in Germany in 1939 and its assets transferred to private ownership, certain restrictions, including a requirement to obtain authorization for changing, displacing or disposing of the collection and an obligation to maintain it in good condition, were imposed on the owners because the collection included objects of artistic, scientific, historical, and patrimonial value. In 2002, the applicant asked the German courts to lift these restrictions. The measures concerned the use of property with a view to protecting cultural heritage as a legitimate objective. The ECtHR held that the restrictions did not give rise to a disproportionate and excessive burden on the applicant. The applicant was aware of the restrictions imposed when he inherited the collection. Supervision by a state authority can be justified by the aim of the protection of cultural heritage. The requirement of state authorization did not prevent the applicant from using his property; moreover, no such authorization was requested by the applicant.

26 Case Albert Fürst von Thurn und Taxis v. Germany, no. 26367/10, 14 May 2013. The judgment is analysed in detail by Michl, 2015, pp. 370–374.

Even if its considerable costs were acknowledged, the obligation of maintaining the collection in a proper state was justified by the fact that the owner should make such expenditure anyway to preserve the value of his property. Based on these considerations, no violation of Article 1 of Protocol No. 1 was established. It can be remarked that, in the legal literature, the view was expressed that the case should have qualified as a *de facto* deprivation of property instead of a measure of controlling the use of property because of the financial burden of the continuous maintenance costs on the owner, which were not covered by the state.[27] The above mentioned judgments concerning movable cultural property indicate that states can interfere with the art market and the interests of the owners in order to protect cultural heritage as long as the restrictive measures are proportionate.

In other cases, the ECtHR had to address restrictions related to immovable properties. In SCEA Ferme de Fresnoy v. France, the vestiges of a chapel and a capitular hall of the Knights Templars from the 12th and 13th centuries were classified as historical monuments by the French authorities.[28] The farming site, which included monuments surrounded by various agricultural buildings, was intended to be developed by the applicant for undertaking farming. The applicant company argued, *inter alia*, that the restrictions imposed to protect ancient buildings, including the need for authorization before constructing or demolishing buildings, violated its right to property. The ECtHR acknowledged that this constituted interference with the right to respect the possessions of the applicant as a rule on the use of assets. However, the Court found that the protection of cultural heritage was a legitimate aim, and that the restrictions were not disproportionate. It referred to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, also known as the Faro Convention, which establishes in its Article 1(c) that 'the conservation of cultural heritage and its sustainable use have human development and quality of life as their goal.'[29] It was noted that the company applied for various building and demolition permits, and only two were refused.

In the Hellborg v. Sweden case, the applicant argued that Article 1 of Protocol No. 1 was violated by the Swedish state, as he could not build a second house on his property despite the fact that authorities had previously issued a tentative approval that would have enabled him to receive a building permit for the construction project within two years.[30] The building permit was rejected due to a new development plan and in view of the protection of the cultural heritage of the neighborhood in Lund, where the property was located. The Court rejected the applicant's argument that the refusal to issue a building permit amounted

27 Michl, 2015, pp. 372–373.
28 Case SCEA Ferme de Fresnoy v. France, no. 61093/00, 1 December 2005.
29 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (CETS No. 199), Faro, 27 October 2005.
30 Case Hellborg v. Sweden, no. 47473/99, 28 February 2006.

to *de facto* expropriation. Instead, the measure was considered a control of the use of property. Based on the tentative approval, the applicant had a legitimate expectation of receiving the building permit. However, the ECtHR added that the interest in preserving the particular character of the neighborhood could prevail over the individual interest in obtaining a building permit for the construction of a second house in that area.

In the Matas v. Croatia case, an industrial building located in Split and used as a car repair workshop was subject to a measure of preventive protection relating to cultural heritage.[31] The restrictions included a requirement for authorization for any change in the nature of the building, right of pre-emption for the state in the event of the sale of the property, and the possibility of expropriation. Croatian cultural heritage legislation provided that such measures could be adopted for a period of three years. However, after the expiration of the three-year duration of the measure, preventive protection was ordered for the workshop building a second time. The workshop owner challenged the extended measures before the Croatian authorities and courts without success. The ECtHR considered the measure to be a restriction on the use of the property. Even if the measure was provided for by law and pursued the legitimate aim of conserving cultural heritage, the actions of the Croatian authorities failed to be proportionate. Extending the preventive measures was not preceded by examining the value of the applicant's property with regard to cultural heritage to ascertain whether repeated preventive measures were indeed necessary. The Court also referred to the principle of good governance, which requires state authorities to act in good time, in an appropriate and consistent manner. It was found that the Croatian authorities failed to meet these requirements, particularly because they did not act in due time to address the status of the building.

The Court not only requires states to refrain from disproportionate restrictions on the use of property, but it also underlines that Article 1 of Protocol No. 1 imposes a positive obligation on them to protect individuals' rights to property. This was also highlighted in the Potomska and Potomski case, where the applicants bought a plot of land from the state with the intention of building a house and a workshop.[32] The property, which was a Jewish cemetery from the 19th century, was classified as a historic monument. As a result, the applicants were not allowed to develop the property without the permission of the competent authority. The Polish authorities did not offer an appropriate alternate plot to the applicants, and the plot of land could not be expropriated in the absence of financial resources. The listing of the property did not deprive the applicants of their possession but constituted a restriction on its use. The restrictions ranged from the prohibition of fully or partly developing the property to an obligation imposed on the applicants to protect

31 Case Petar Matas v. Croatia, no. 40581/12, 4 October 2016.
32 Case Potomska and Potomski v. Poland, no. 33949/05, 29 March 2011.

and preserve it. The ECtHR found that the most suitable measure would have been expropriation with the payment of compensation or offering an appropriate alternative plot. The Court established that Article 1 of Protocol No. 1 not only imposes a negative obligation on the states, not to interfere with the right to the peaceful enjoyment of possessions, but also confers a positive obligation on states to take measures to protect the right to property. This could have been satisfied by providing an effective procedure for expropriation and resolving potential disputes related to the suitability of an alternative plot. The lack of financial resources did not justify the failure to remedy the applicants' situation. The uncertainty of the legal situation and the impossibility for the applicants to develop their property or have it expropriated resulted in a violation of Article 1.

4. Limits

Property protection before the ECtHR is subject to certain limits. Some limitations, such as the requirement of the exhaustion of all domestic remedies, have a role in all proceedings reaching the ECtHR. Nevertheless, there are limitations that acquire particular significance in legal disputes related to the right to property and cultural heritage. Among these, we can refer to (1) the limited temporal scope of application of the ECHR and Protocol No. 1; (2) the need to establish that the applicant had a possession (that had been violated); (3) the wide margin of appreciation enjoyed by states to determine whether and how to protect cultural heritage; and (4) the uncertainty of the proportionality test. These factors can have a decisive impact on the outcome of legal disputes involving cultural heritage where the applicants invoke their property rights.

■ *4.1. Temporal scope of application of the ECHR and Protocol No. 1*

The first limitation follows from the temporal scope of application of the ECHR. A peculiarity of cultural heritage disputes is that court proceedings often start well after the emergence of the facts underlying legal disputes. Such a delay is usually the result of, for example, the identity of the defendant and/or the location of the cultural object are unknown, and the plaintiff is not in a position to make the claim.

The ECHR and its protocols do not apply to events preceding the date of its ratification. A clear illustration of the limits ensuing from the temporal scope of the ECHR was the rejection of the claim of a Greek association dealing with the protection of Athenian historical monuments, for the return of the Elgin marbles, which were removed from the Parthenon of Athens and transported to England in the 19th century.[33] To bring the case under the jurisdiction of the ECtHR, the

33 Syllogos ton Athinaion v. United Kingdom.

association argued that the UK continues to refuse the return of the marbles on display in the British Museum and the UK was unwilling to take part in a mediation procedure on the fate of the Parthenon marbles. The ECtHR, however, disambiguated that the removal took place some 150 years before the adoption of the ECHR and thus it cannot be applied to the restitution claim. The UK's continued retention did not bring this matter to the jurisdiction of the ECtHR.

In Potomska and Potomski, where the Polish authorities' omissions to offer an alternative plot or to proceed with the expropriation of the plot in issue commenced in 1987, the ECtHR confirmed that its jurisdiction *ratione temporis* extends only to acts and omissions committed following the date of ratification of the ECHR and its protocols by the respondent state.[34] However, state measures can also fall under the jurisdiction of the ECtHR to the extent that they are extensions of a situation already existing before that date. It added that such facts can be taken into consideration, which came into existence prior to the date of ratification, to the extent they contribute to a situation also of relevance after the date of ratification, or if those facts are necessary to understand the facts emerging after that date. Even if the reference to the extension of situations may suggest that, contrary to what was held in the case of the Elgin marbles, measures taken before the ratification of the ECHR and its protocols could fall under the jurisdiction of the ECtHR, in fact, in Potomska and Potomski, the Court did not follow a different approach. It exclusively examined the events that occurred, and the measures taken after the ratification of Protocol No. 1 by Poland.[35]

For this reason, in several cases applicants tried to devise tactics to bring their dispute under the jurisdiction *ratione temporis* of the ECtHR. They challenged decisions that fell under the jurisdiction of the Court, even if the source of the dispute went back for a period before the ratification of the ECHR and Protocol No. 1. In the Prince Hans-Adam II of Liechtenstein v. Germany case, the ECtHR made it clear that it does not have competence *ratione temporis* for the examination of the Czechoslovakian expropriation measure and its continuing effects. This was not imputed to Germany, the respondent state.[36] However, the applicant did not directly contest the expropriation measure of 1946, but the (in)actions of the German courts in refusing to deliver the painting to the princely family several decades later. This is how the case could fall under the temporal scope of application of the ECHR, even if a violation of the ECHR or its Protocol No. 1 was not finally established by the Court. Following a similar strategy, in Thurn und Taxis, the applicant did not challenge the imposition of the restrictions on the library and the archives that dated back to 1943, but the subsequent decisions of the German

34 Potomska and Potomski v. Poland, paras. 40–41.
35 Ibid., para. 41.
36 Prince Hans-Adam II of Liechtenstein v. Germany, para. 85.

courts rendered in the 2000s that refused to lift the restrictions. Therefore, the case could fall within the jurisdiction of the ECtHR.[37]

Expropriation cases, such as the Prince Hans-Adam II of Liechtenstein v. Germany judgment, in addition to the limited temporal scope of application of the ECHR and its protocols, exhibit another problem: the difficulties in establishing the existence of a possession.

■ *4.2. The existence of a 'possession' of the applicant*

In matters brought before the ECtHR, the applicants must prove that the contested national measures affect their 'possessions'.[38] The term 'possessions' is construed autonomously by the ECtHR and is not limited to the ownership of physical goods. 'Possessions' can be either existing possessions, typically a right of ownership, or at least a legitimate expectation based on domestic law to obtain a property right.[39]

In most cases, this does not cause any problem because the claimant is without doubt the owner of the movable or immovable object subject to litigation. As Beyeler demonstrates, the broad interpretation followed by the ECtHR, extending 'possessions' to any proprietary interest without having regard to domestic concepts even facilitates bringing claims to the Court. It is to be examined whether all circumstances of the case let the applicant hold a title to a substantive interest protected by Article 1 of Protocol No. 1.[40]

However, in cases related to the expropriation of cultural objects, the lack of the right to possessions sometimes raised an obstacle to bringing a successful claim under the ECHR and its Protocol No. 1, as well as to restitution. The ECtHR held that, following expropriations that took place before the ratification of the ECHR by the respondent state, the state could decide whether it wanted to return the property and, the conditions for doing so.[41] No obligation to return follows from the ECHR and its Protocol for such property. This is strongly connected to the lack of retroactive force of the ECHR and Protocol No. 1, as set out in chapter 4.1. In the Prince Hans-Adam II of Liechtenstein v. Germany case described above, the applicant failed to demonstrate that he had a property right or legitimate expectation related to the painting he wanted to claim back. The applicant could not effectively exercise the rights of the owner regarding the painting located in the Czech Republic, and the hope of an old property right being recognized by itself could not be considered as 'possessions' within the meaning of Article

37 Fürst von Thurn und Taxis v. Germany, para. 19.
38 Rikon, 2017, p. 335.
39 Case Maria Atanasiu and others v. Romania, nos. 30767/05 and 33800/06, 12 October 2010, para. 134; Case Archidiocèse catholique d'Alba Iulia c. Roumanie, para. 82.
40 Beyeler, para. 23.
41 Case Jantner v. Slovakia, no. 39050/97, 4 March 2003, para. 34; Atanasiu v. Romania, para. 135.

1 of Protocol No. 1. As the ECtHR put in other cases, a legitimate expectation of restitution must be of a more concrete nature than a mere 'hope' and be based on a legislative act or court decision.[42] A mere hope of restitution does not constitute 'possessions'.

■ *4.3. Wide margin of appreciation of the states in cultural heritage protection*

4.3.1. Cultural heritage protection as a legitimate aim

It is evident from the ECHR text that certain restrictions on the right to property are acceptable. In practice, restrictions have two justifications in the context of cultural heritage protection. First, when the movable or immovable property itself is part of the cultural heritage. Second, when the property does not have a pre-eminent cultural value, but the environment in which the property is located does, and this justifies restrictions regarding the property.

In the judgments outlined above, the ECtHR consistently acknowledged that the protection and conservation of cultural heritage is a legitimate objective that can justify a restriction on the right to peaceful enjoyment of possessions. In Beyeler, the ECtHR stated that restricting the art market to protect cultural and artistic heritage is a legitimate aim in the public interest. This margin of appreciation extends to determine what is in the general interests of the community.[43] In Kozacioğlu, the ECtHR not only established that the protection of the cultural heritage of a country is a legitimate aim that can in principle justify expropriation, but it also stated that the contracting states enjoy a wide margin of appreciation in implementing social and economic policies. The protection of historical or cultural heritage does not differ from these.[44] Accordingly, the ECtHR respects the determination of 'public interest' by the contracting states, except it lacks a reasonable foundation.

The ECtHR's acceptance of the protection of cultural heritage as a legitimate aim is in accordance with the objectives of the Council of Europe's conventions adopted in the field of the protection of cultural heritage. Under the European Cultural Convention, contracting states must take appropriate measures to safeguard objects of European cultural value.[45] The European Convention on the Protection of the Archaeological Heritage requires contracting states to protect

42 Case Gratzinger and Gratzingerova v. Czech Republic, no. 39794/98, 10 July 2002, para. 73; Case Von Maltzan and others v. Germany, nos. 71916/01, 71917/01 and 10260/02, 2 March 2005, para. 112.

43 Beyeler, para. 112; In SCEA Ferme de Fresnoy, the ECtHR, referring to Beyeler, also confirmed that national authorities have a wide discretion to determine what is in the general interest of the community.

44 Kozacioğlu, para. 53.

45 Council of Europe, European Cultural Convention (ETS No. 18), Paris, 19 December 1954, Art. 5.

archaeological sites,[46] while the Convention for the Protection of the Architectural Heritage of Europe imposes an obligation on contracting states to take statutory measures and implement specific supervisory and authorization procedures to protect architectural heritage.[47] It is interesting to note that in SCEA Ferme de Fresnoy c. France, the ECtHR referred to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society to support that the protection of cultural heritage is a legitimate objective, even though France, the respondent state, is not a party to the Faro Convention.

The ECtHR rarely questions assertions by states that a measure aims to protect cultural heritage. As will be presented in Chapter 4.3.2, the Court found it unproblematic in Beyeler that Italy tried to justify the existence and application of its pre-emption right on the grounds of protecting Italian cultural heritage concerning a painting by a Dutch painter living in France. An exception is, however, the case of the Former King of Greece v. Greece, where Greece intended to justify the confiscation of the former king's and other members of the royal family's lands without compensation for the goal of protecting archaeological sites.[48] The ECtHR pointed out that there was no evidence of the need to protect archaeological sites in the case.[49]

It is worth stopping for a moment to see how the two policy approaches pervading the theory of cultural heritage protection—cultural internationalism and cultural nationalism—fit into the wide discretion accorded by the ECtHR to states.

4.3.2. Cultural internationalism and cultural nationalism

Cultural heritage literature, tracing back to John Henry Merryman, distinguishes between cultural nationalism and internationalism.[50] Cultural internationalism treats cultural objects as the expression of universal human culture, and accordingly intends to ensure the broadest possible access to cultural objects by facilitating free trade in works of art as well. It assumes that in the free flow of cultural objects, wealthy purchasers will also make the expenditure necessary to protect their property and investment. On the contrary, cultural nationalism takes as a point of departure that cultural objects are an inherent component of national culture, and thus they belong to their country of origin. This justifies restrictions on art trade and export controls in particular.

46 European Convention on the Protection of the Archaeological Heritage (ETS No. 66), London, 6 May 1969, see in particular Art. 2; European Convention on the Protection of the Archaeological Heritage (Revised) (ETS No. 143), Valetta, 16 January 1992, see in particular Art. 4.

47 Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121), Granada, 3 October 1985, Arts. 3–4.

48 Case Former King of Greece and others v. Greece, no. 25701/94, 23 November 2000.

49 Ibid., para. 88.

50 Merryman, 1986, pp. 831–853; Merryman, 2005, pp. 11–39.

In Beyeler, when the ECtHR analyzed the aim of interference, it pointed out that the 1970 UNESCO Convention gives preference in principle to the ties between cultural goods and their country of origin.[51] However, it immediately added that the Beyeler case did not concern the return of a cultural object to its country of origin. At the same time, it also stated that a state can take measures concerning 'works of art that are lawfully on its territory and belong to the cultural heritage of all nations' to ensure a wide public access to those cultural objects 'in the general interest of universal culture.'[52]

Without mentioning them explicitly, the reference to the 1970 UNESCO Convention and the country of origin, on the one hand, and to universal cultural values and the broadest access to them on the other hand, exposes cultural nationalism and internationalism as matters of fact. Merryman deemed the 1970 UNESCO Convention to be a clear illustration of cultural nationalism because it enables countries of origin to impede the exportation of cultural objects using wide export restrictions that can lead to the retention of cultural property.[53] On the contrary, facilitating the flow of works of art, granting access to them for the broadest public, and the universalism of culture are the cornerstones of cultural internationalism. In this way, the ECtHR endorses policies underlying both cultural nationalism and internationalism from the perspective of the human rights protection regime.

In Beyeler, the question emerged of whether the portrait painted by Van Gogh, a Dutch painter in France, could reasonably be classified as a national cultural heritage by Italy, which was not the country of origin of the painting. Italy justified the protection and accompanying restrictions by the scarcity of Van Gogh works in Italy. The ECtHR had to answer whether the extended cultural nationalism represented by Italy could justify restrictions on the free salability of the painting. The lack of a strong cultural connection between the painting and the country imposing the restrictions could have called into question the legitimacy of the measure.[54] The ECtHR was content with a distant and somewhat economic (rather than cultural) connection in this case. It simply acknowledged the wide margin of appreciation of states in determining public interest regarding cultural heritage protection without substantively objecting to the qualification of the painting under Italian law.[55]

It cannot be ignored that the contraposition of cultural nationalism and internationalism has been subject to various criticisms, and several alternatives

51 Beyeler, para. 113. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Paris, 14 November 1970, UNTS 11806.
52 Beyeler, para. 113.
53 Merryman, 1986, pp. 842–852; Merryman, 2005, p. 22.
54 Michl, 2018, p. 121.
55 Ibid., p. 122.

have been proposed in the literature to overcome the differences between the two theories. Hence, an opinion has been formulated that finds market regulation necessary while satisfying commercial demands to a certain extent.[56] Others have highlighted that the binarity of cultural nationalism and internationalism disregards those communities that live together with a cultural heritage and should receive a role in regulating cultural heritage that transcends state- and institution-centered approaches.[57] Finally, a view can be also found according to which cultural property disputes are characterized by indeterminacy and uncertainty, and they cannot simply be channeled into the extremes of cultural nationalism and internationalism.[58] Instead, the settlement of disputes related to cultural property should be based on multiple methods.

As these two doctrines represent two extremes, it has always been difficult to apply them in practice. It is not a coincidence that international, regional, and national cultural heritage legislation has never followed either of these theories in a pure form. Merryman acknowledged that certain restrictions can be admitted in international art trade.[59] In other words, only unnecessary restrictions are not acceptable. However, this raises the question of which restrictions can be considered necessary and which cannot.

The ECtHR has a practical answer to resolve conflicts between the proprietor's interest in ensuring the free movement and use of his property and the general interest in protecting cultural heritage. To determine whether an obstacle raised by a state in view of the protection of cultural heritage is necessary in its relation to the right to property, the ECtHR applies the proportionality test that is known and used in relation to other rights and freedoms in the ECHR system. Thus, the conflict between cultural internationalism and cultural nationalism is also addressed through the prism of the proportionality test. Interestingly, however, the ECtHR did not refer to the two policy approaches either explicitly or by implication in its subsequent judgments related to cultural heritage. The proportionality review remained the key tool to decide cases of interference with the right to property. Nevertheless, as the next section demonstrates, the application of the proportionality test is not without uncertainty.

■ 4.4. Proportionality test

As the formal criteria, that the restrictive state measure must be provided for by law and must serve a legitimate objective, were hardly contestable in the cases discussed above, almost all of which turned on the application of the proportionality test. The proportionality test enables the ECtHR to provide a structured answer based on legal reasoning in the cases before it. In applying the proportionality

56 Bauer, 2007, pp. 690–724.
57 Lixinski, 2019, pp. 563–612.
58 Soirila, 2022, pp. 1–16.
59 Merryman, 2005, p. 12.

test, the ECtHR evidently enjoys considerable room to maneuver. Therefore, it is often difficult to predict its outcome.[60]

When applying the proportionality test, it is to be examined whether a fair balance has been struck between the demands of the general interest of the community and the protection of the right to property under Article 1 of Protocol No. 1, and whether the means employed by the state and the aim pursued by the legislation are in a reasonable relationship of proportionality. In this respect, as noted in SCEA Fresnoy, the Court accords a wide margin of appreciation to the states. For instance, in the framework of the proportionality review, the ECtHR established that not all listings of private property as cultural heritage should be considered a violation of Article 1 of Protocol No. 1, and that the owners of a property subject to listing or another restriction on the use of property are not always entitled to some form of compensation.[61] A violation of Article 1 can be established when, due to the action or inaction of the state, the applicant must bear a disproportionate and excessive burden.

In Potomska and Potomski, the ECtHR enumerated certain factors that should be considered in the course of the proportionality review. The applicant's knowledge at the time of the acquisition of actual or possible future restrictions on the property, the existence of legitimate expectations regarding the use of property, the scope of the restrictions, and the availability of remedies concerning the restrictive measures can influence the outcome of the proportionality review.[62]

Even if some guidelines were given in Potomska and Potomski regarding the factors to be considered, the proportionality test in practice can give rise to uncertainty. In Potomska and Potomski, the Court did not mention the existence of concrete negative effects of the restrictions among the factors to be considered. Michl highlights the uncertainty around the extent to which concrete negative effects must be examined by comparing the Fürst von Thurn und Taxis with the Matas judgments.[63] In Fürst von Thurn und Taxis, the ECtHR examined the concrete effects of the restrictions imposed on the treatment of the library and archives to protect cultural heritage and found no concrete negative bearing on the applicant. Even the requirement that the owner maintain the collection in an orderly state, which presupposed considerable expenditure, was not considered a negative effect. As in Fürst von Thurn und Taxis, in Matas the applicant had not sought authorization for any particular transaction related to his property and did not even have to incur additional costs because of the cultural value of the property. However, the argument that potential buyers may be discouraged from investing in the property was enough for the Court to accept the existence of negative implications for the owner. Such potential of investments being held back

60 See Trykhlib, 2020, p. 138.
61 Potomska and Potomski, para. 67; Fürst von Thurn und Taxis v. Germany, para. 23.
62 Potomska and Potomski, para. 67.
63 Michl, 2018, pp. 123–124.

was equally present concerning the Thurn und Taxis library due to the various restrictions.[64]

In summary, taking the wide margin of appreciation of the ECtHR and the uncertainty of the factors used in the course of the proportionality test into account, it seems that it can be difficult from the perspective of a potential applicant to anticipate the outcome of the proportionality review and, thus, that of a procedure before the Court.

5. Conclusions

Private parties often challenge state interference in their right to property before the ECtHR, when they fail to obtain a remedy in domestic court proceedings against states seeking to protect cultural heritage. The chances of applicants in such disputes concerning cultural heritage are limited by certain factors. First, cultural property law disputes often date back to a time prior to the adoption and ratification of the ECHR and Protocol No. 1 by the respondent state (e.g., in the case of expropriations following the Second World War) and as such do not fall under the jurisdiction of the ECtHR. Even so, applicants often try to devise tactics to bring claims under the jurisdiction *ratione temporis* of the ECtHR, for example, by challenging decisions rendered at a time when the ECHR and Protocol No. 1 were already applicable. Second, the applicant has to demonstrate that (s)he has possessions violated by state measures that, in addition to the limited temporal scope of application of the ECHR and Protocol No. 1, can in particular bar restitution claims regarding cultural objects expropriated before their ratification. Third, the ECtHR recognizes the restriction of the right to property in favor of protecting cultural heritage as a legitimate aim. It does not take its turn *a priori* in favor of cultural heritage nationalism or cultural heritage internationalism. States enjoy a wide margin of appreciation regarding whether and how to protect cultural heritage in their domestic law. Finally, another factor that can raise an obstacle to claims based on the right to property is proportionality review. The proportionality test is quite flexible, and the outcome of its use may sometimes seem uncertain. In particular, the extent to which the Court requires that state measures have concrete negative effects on the applicant is questionable. Even though the case law of the ECtHR can be considered largely coherent, the wide margin of appreciation accorded to states in determining when and how to interfere to protect cultural heritage, as well as the flexibility of the proportionality review, leaves states with considerable room to maneuver in restricting the right to property. These factors bring an element of uncertainty in the procedure that often renders successful challenges to state measures difficult before the ECtHR.

64 Michl, 2015, p. 372.

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VOJTĚCH VOMÁČKA* – JOSEF BÁRTŮ**

Damage Caused by Game and its Compensation in Central European Countries: A Comparative Perspective

ABSTRACT: *This article provides a general comparison of the rules on compensation for damage caused by game in Germany, Austria, Poland, the Czech Republic, Slovakia, and Hungary. It focuses on both the scope and assessment of liability and the existence of a complementary compensation scheme for damage caused by protected species. The authors conclude that the national systems share common features but also differ in many areas. Most notably, Polish law divides the responsibility between the hunting ground user and the State, while taking into account how game numbers can be regulated (according to the hunting season). Hungarian law addresses the specific liability directly by the Civil Code, and Slovak legislation, which seems optimal, establishes the breach of a legal obligation as a prerequisite for the establishment of a compensation claim.*

KEYWORDS: agriculture, hunting, game regulation, liability, compensation for damage

1. Introduction

This article focuses on the legal regulation of compensation for damage caused by game in Central European countries: Germany, Austria, Poland, the Czech Republic, Slovakia, and Hungary. It provides a general comparison, which could be helpful for agricultural entrepreneurs and, in particular, persons affected by damage caused by game. In addition, the issues of damages are of interest in terms

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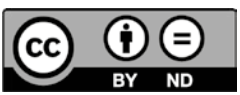

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of the development and reflection of the private law traditions and considerations on liability (*Haftung*) that some states share, and thus may serve as an interpretive tool. Unfortunately, comparative literature on the subject is scarce, aged,[1] or limited in scope.[2] Perhaps the most comprehensive work on the topic was published after this article was submitted: A 2022 book in Hungarian by J. Barta[3] et al. focuses on a wider context of the relationship between game damage, damage caused by huntable animals, and game management from an international perspective. Besides the Austrian, German, and Hungarian regulations covered by this article, it also provides valuable insight into the regulation of hunting in Romania, the United Kingdom, and Finland.

In all the countries compared in this article, game has no master except in rare cases (in Hungary, game is the property of the State). Therefore, as a rule, there is no responsible owner to pay for damage caused by game, and the specific rules apply.

The specific rules on liability are applicable as *lex specialis* to the general framework of civil liability. A notable exception is the Hungarian Civil Code, which expressly addresses liability for damage caused by a huntable animal (see below). Instead of a direct reference, the applicability of specific legislation has usually been confirmed and elaborated upon by case law.[4] For clarity, this article avoids some specific sub-issues covered by different legal acts outside hunting law, usually the civil code. One such example is the rules on the precise determination of damages.

At the same time, the definition of game in national law is usually not restricted to the species allowed for hunting. The liability regime in hunting law is thus applicable to a relatively large number of species that continue to be classified as game but are protected, most of them for many years.

It must be emphasized that the specific rules on compensation for damage caused by game are not restricted to hunting law. Instead, they are often multilevel and, in addition to hunting, cover agriculture and the protection of protected (endangered) species. The State generally provides compensation in these areas for damage caused by selected species, some of which are also game within the meaning of hunting laws. Such compensation does not always stem from liability *strictu senso* since the damage is not attributable (in its entirety) to the State. In principle, it meets the criteria for state aid and is subject to specific requirements in terms of Article 107(3)(c) of the Treaty on the Functioning of the European Union,

1 See De Klemm, 1999.

2 The parts of this article focusing on German, Austrian and Czech law build on elements from Bartů, 2021.

3 Barta, 2022.

4 As regards Germany, for example, see Judgement of the Federal Court of Germany (BGH) of 4 November 2010, No. III ZR 45/10 (NJW, 2011, 852), or Metzger, 2021, § 29 Rn. 4; for Austria, see Judgement of the Austrian Constitutional Court of 28 September 1988, No. VfGH 118261/1988; for Czechia see Judgements of the Czech Supreme Court of 24 March 2015, No. 25 Cdo 3335/2013, of 30 May 2017, No. 25 Cdo 3683/2015, or Petr et al 2019 209; for Slovakia, see Resolution of the Slovak Supreme Court of 13 May 2014, No. 5 MCdo 53/2012.

which concern the definition of eligible costs and the condition of a minimum contribution by the beneficiaries in the form of reasonable precautionary measures.[5] Similar rules apply to the compensation of costs of protective measures in protected areas of the Natura 2000 network.[6] Member States can provide state aid to cover up to 100 % of the cost of any investment needed to prevent damage caused by protected animals, such as wolves. The maximum aid to compensate for damages (both direct and indirect) by protected animals has also been increased to 100 %.[7] The state aid scheme is secondary to the authors but deserves to be briefly mentioned to illustrate the functioning of the compensation system as a whole.

2. Purpose of the specific rules on compensation

The specific rules on compensation for damage caused by game in all the countries compared share similarities. Surprisingly, in most countries, not much attention is paid to the purpose of this legislation. It seems that the rules on compensation are considered a way to balance the conflict of interest between two areas of the economy: hunting and agriculture. On the one hand, they are intended to compensate for the legal disadvantage of the landowner or usufructuary due to the loss of the power of disposal over his property. On the other hand, they seek to compensate for the legal disadvantage of the owner due to his lack of defense against game animals.[8]

German literature and decision-making are perhaps the most advanced. It contemplates that the purpose of the specific, strict liability regime in hunting law is not a liability for endangerment (*Gefährungshaftung*) but a claim for compensation (*Ausgleichsanspruch*)[9] because wild animals in the forest do not pose an increased danger.[10] Therefore, liability for damage caused by wild animals is a special case of liability for damage caused by animals.[11] Liability for damages is

5 See in particular Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 193, 1. 7. 2014, pp. 1–75).

6 See Judgement of the CJEU of 27 January 2022, Sātiņi-S (C-238/20, ECLI:EU:C:2022:57).

7 See European Union Guidelines for state aid in the agricultural and forestry sectors and in rural areas 2014 to 2020 (OJ C 204, 1. 7. 2014, pp. 1–97). Furthermore, the rural development programs, under the EU Common Agricultural Policy, can support, if Member States so choose, the costs for effective preventive measures that help eliminate or reduce the risk of damage from large carnivores.

8 See, to this extent, Judgement of the Supreme Court of Poland of 27 November 2007, No. III CZP 67/2007.

9 Metzger, 2021, § 29 Rn. 3.

10 Wagner, 2020, § 835 BGB, Rn. 15.

11 In contrast to Section 833 BGB, it is not damage caused by a domestic, utilitarian, or so-called luxury animal, but by a wild animal.

justified by the reasoning that the owner of the land is not in a position to prevent damage by wild animals and must therefore tolerate it. This has no influence on the numbers of game. On the other hand, a person entitled to hunt can prevent damage by appropriate means such as hunting or feeding. The attribution of liability for damage is similar to the civil law concept of self-sacrifice (*Aufopferungsgedanken*).[12] Wagner concludes that all those who have been prevented from hunting should have the standing to claim damages.[13]

In other countries, there is a similar consensus that liability for damages offsets the public interest in a healthy game population against prohibiting landowners from hunting game. However, the more in-depth explanation and corresponding discussion on the meaning and purpose of the liability regime in hunting law is somewhat limited. This can lead to a simple rejection or constant undermining of the intention of the legislation.[14] In Czechia, for example, the hunters argue it is 'against common sense that someone should pay for damages caused by something they do not own.'[15] Often, it is only a specific aspect of the liability regime that is subject to criticism, particularly its strictness.[16]

3. The German rules are based on absolute strict liability

The German rules on liability for damages caused by game are provided by the Federal Hunting Act (the 'Federal Hunting Act' or 'BJagdG')[17] with effect from April 1, 1953.[18] Under Section 29(1) of the BJagdG, the hunting association is liable for damage caused by the cloven-hoofed game,[19] wild rabbits, or pheasants[20] on land belonging to or allocated to a common hunting ground within the meaning of Section 8 of the BJagdG (*gemeinschaftliche Jagdbezirken*), irrespective of fault.[21] Damage caused on land that is not part of the hunting ground or on land within the meaning of Section 6 of the BJagdG (*befriedete Bezirken*), which is part of the

12 Judgement of the Federal Court of Germany (BGH) of 4 March 2010, No. III ZR 233/09.
13 Wagner 2020 § 835 BGB, Rn. 15.
14 Krejčí 2015 8.
15 Texl 2020 26.
16 For example, in the Ruling of 13 December 2006, No. Pl. ÚS 34/03, the Czech Constitutional Court justified the existence of the specific liability regime by limiting the property rights of the owner of the hunting land. On the other hand, the Court indicated that by establishing absolute strict liability, the legislator went further than was strictly necessary from the point of view of the constitutionality of such legislation
17 Bundesjagdgesetz in der Fassung der Bekanntmachung, September 29, 1976 (BGBl. I S. 2849).
18 Section 46 of BJagdG.
19 Pursuant to Art. 2(3) of the BJagdG, cloven-hoofed game includes bison, elk, red, fallow, sika, roe deer, chamois, rock, mouflon, and wild boar.
20 Pursuant to Section 29(4) of the BJagdG, the Länder may provide that the obligation to compensate for damage also applies to damage caused by other game.
21 Wagner 2020 § 835 BGB, Rn. 9.

hunting ground but may not be used for hunting, shall not be compensated for. The landowner has the right to compensation, and the hunting community has passive standing. In practice, however, the hunting ground's proletarian often takes over in the lease agreement, which also has effects *vis-à-vis* third parties.[22] If liability is only partially assumed, the hunting community must compensate for the remaining damage.

The legal regime for compensation for damage to land within private hunting grounds according to Section 7 of the BJagdG (*Eigenjagdbezirke*) differs depending on whether the damaged land is attached to the hunting ground[23] or belongs to a private hunting ground.[24] In the first case, the owner, the person benefiting from the hunting ground (*Nutznießer*), or the tenant has passive standing in the dispute if he has contractually assumed liability. In the case of a partial takeover, the owner or person benefiting from the hunting ground is liable to the remaining extent. In the latter case, the contractual arrangement between the injured party and the person entitled to hunt shall prevail. If there is no such agreement, the person entitled to hunt shall be liable for the damage caused by insufficient shooting. Liability under Section 29(3) of the BJagdG is based on fault, which is sufficient in the form of negligence.[25]

For a claim for compensation to arise, the legally relevant damage[26] must be caused by game animals specified in Section 2(3) of the BJagdG on land on which hunting is permitted. The natural behavior of game animals must cause damage. For example, damage caused to fields intended to attract game to avoid valuable crops and trees is not covered.[27] Damage to farms that do not fall within the protective scope of the legislation on compensation for damage caused by game (e.g., damage to health) is also not compensated for.[28] Damage caused by a collision between an animal and a means of transport is also not covered.[29] However, this does not preclude liability under Section 823 of the German Civil Code (BGB).

Besides the hunting law legislation, all federal states use state aid programs for compensation of damages caused by various species, either long-term or *ad hoc*.[30] In particular, wolf management plans that provide compensation for damage caused to livestock farmers have been introduced following the return of wolves to the German countryside. Usually, a minimum standard of measures protecting

22 Section 29(1) third sentence of BJagdG; Wagner 2020 § 835 BGB, Rn. 9.
23 Section 29(2) of BJagdG.
24 Section 29(3) of BJagdG.
25 Metzger, 2021, § 29 BJagdG, Rn. 8.
26 Cf. Sections 31 and 32 of the BJagdG.
27 Metzger, 2021, § 29 Rn. 2.
28 Wagner, 2020, § 835 BGB, Rn. 11.
29 Spindler, 2021, § 835 BGB, Rn. 2.
30 See for example the Decision of the European Commission on Lower Saxony: Granting of aid to compensate for harvest losses caused by Nordic visiting birds to arable land. 28. February 2019, C(2019) 1782 final.

animals vulnerable to wolf attacks is required. Furthermore, the private 'Wolf Compensation Fund' enables livestock owners to be compensated in a quick and unbureaucratic way for any damage caused by wolves.

4. The Austrian regulation is classified on the borderline between strict liability and encroachment liability

The main characteristics of the Austrian regulation of damage caused by game lie in the shared competence between the federal government and individual provinces in the field of forestry. The fundamental competence in this field belongs to the federal government,[31] but since the compensation for damage caused by game falls within the area of civil law,[32] the individual states (*Bundesländer*) are expected to enact precise regulations. As a result, several subsystems of Austrian law can be recognized, some of which are more comprehensive than others. To fill the gaps in the specific regulation, the general legal principles of the Austrian Civil Code (ABGB) are used.

All Austrian provincial hunting laws provide for strict liability of persons authorized to hunt (*Jagdausübungsberechtigte,* JAB).[33] In the Austrian doctrine, liability for damage caused by game is classified on the borderline between strict liability and encroachment liability,[34] because the law provides for a no-fault obligation to pay damages of the JAB, although reasons outside of hunting also cause game damage. The Austrian Supreme Court notes that

> only in this way otherwise occurring difficult problems of proof can be avoided since every damage caused by the game gradually is to be regarded as (new) primary damage. In particular, this applies if the lack of the annually occurring natural regeneration of a tree population is claimed as damage caused by game.[35]

This no-fault liability of the JAB does not apply to the injured party if it fails to take protective measures that an ordinary farmer or forester would have taken or has removed these precautions taken by the JAB. This exemption from liability can be

31 Art. 10(1)10 of the Bundes-Verfassungsgesetz (B-VG): 'Bergwesen; Forstwesen einschließlich des Triftwesens; Wasserrecht…'

32 See Judgement of the Austrian Constitutional Court of 16 December 1987, No. VfSlg 11591/1987.

33 See for example Judgement of the Austrian Supreme Administrative Court (VwGH) of 24 March 2015, No. VwSlg 19080 A/2015: 'The liability of the person authorized to hunt for damage caused by hunting and game, as stipulated in the Krnt JagdG 2000, is in principle – with the exception of damage to real estate on which hunting is rested – designed to be strict.'

34 Koziol, 2018, Rz 99 ff.

35 Judgement of the Austrian Supreme Court (OGH) of 6 October 2000, No. 1Ob119/00g.

found in all provincial hunting laws, except for Vienna, Burgenland, and Styria.[36] Specific rules usually allow for amicable settlement of damage. For example, in Upper Austria, if an amicable agreement cannot be reached with the person authorized to hunt, the aggrieved party shall file his claim for damages with the chairman of the Hunting and Game Damage Commission (*Jagd- und Wildschadenskommission*) within two weeks of the expiry of the period stipulated in Section § 73 of the Upper Austrian Hunting Act (No. 32/1964).

The scope of compensation differs among federal states: Damage caused by game is defined in hunting laws as damage caused by game to land, agricultural and forestry crops, and to products not yet harvested. In the hunting laws of Styria, Salzburg, Lower Austria, Vienna, and Burgenland, the liability of JAB is generally excluded for damage that has occurred on land on which hunting is rested. In Upper Austria, Lower Austria, Salzburg, Tyrol, Vienna, Burgenland, Carinthia, and Styria, all damage caused by the animal species specified in the Hunting Act or in various annexes must be compensated. In Vorarlberg, only the damage caused by the cloven-hoofed game to vegetation and the damage caused by hares and badgers to crops are compensated.[37]

There are other differences. For example, compensation for damage to domestic animals is provided entirely only in Carinthia. It is regulated in three other hunting laws (Salzburg, Tyrol, and Vorarlberg), but with clear restrictions. Thus, in Vorarlberg, damage to domestic animals is not compensated in the case of damage caused by game, but only in the case of damage caused by hunting. In Tyrol, the obligation to compensate for damage caused by game to domestic animals—as in Tyrol for damage caused by game in general—only covers damage caused by huntable animals that are not subject to year-round protection. Finally, in Salzburg, the hunting owner is not obliged to pay compensation for damage to domestic animals caused by predators or birds that are protected throughout the year; rather, the province, as the holder of private rights, can pay compensation.[38]

To our knowledge, there is no specific legislation for compensation regarding protected species in Austria outside the above-mentioned hunting law. Bodies involved in such compensation are therefore insurance companies. The liability for damage is assessed according to the general rules. Therefore, it is important for hunting companies to have insurance coverage, presumably liability insurance. The hunters' associations cover the premiums paid to insurance companies that provide compensation for wild animal damage. The main objective of the hunters' insurance is to cover damage resulting from hunting accidents, such as injuries and destruction of property. The compensation for wild animal damage (mainly

36 Secklehner, 2018, p. 15.
37 Secklehner, 2018, p. 12.
38 See Judgement of the Austrian Supreme Administrative Court (VwGH) of 24 March 2015, No. VwSlg 19080 A/2015.

lynx and bear) constitutes only a tiny part of the insurance fund.[39] Furthermore, the World Wildlife Fund (WWF) contributed to compensation payments from 1989 to 1997 in Lower Austria and from 1994 to 1997 in Upper Austria.[40]

5. The Czech concept is based on the German regulation

The conditions for incurring liability for damage under Czech law are similar to those under German law, particularly in the case of joint hunting grounds. This does not mean that the Czech Hunting Act (Act No. 449/2001 Coll.) blindly follows the German one; its foundations go far back into the past.[41] However, it has undoubtedly developed under German influence.

According to Section 52(1)(b) of the Hunting Act, the hunting ground user is obliged to pay for damage caused by game in the hunting ground to hunting land or field crops not yet harvested, vines, fruit crops, or forestry. The law defines the responsible party as the hunting ground user, which, according to Section 2(n) of the Hunting Act, is the hunting ground holder if he uses the hunting ground himself or a person to whom the hunting ground holder has leased the hunting ground. According to Section 2(m) of the Hunting Act, the holder of a hunting ground means a person to whom the hunting ground has been recognized by a decision of the state hunting administration authority. The establishment of passive *in rem* is required by law by the fact that wildlife is considered a thing of destruction.[42] Otherwise, there would be no entity from which the injured party could claim compensation. The owner of the damaged land and the lessee or tenant of the land may be a person with active legal standing.[43]

The user of the hunting ground is not liable for any damages, but only for damages caused by game on listed properties. The Hunting Act defines game in Section 2(b) of the Hunting Act as a renewable natural resource represented by populations of wildlife species listed in Section 2(c) and (d) of the Hunting Act, which lists specific animals. Hunting land is negatively defined by the Hunting Act as land not designated as non-hunting land in Section 2(e) of the Hunting Act. Hunting land may be declared non-hunting land by a decision of

39 European Commission. Compensation for Damage Caused by Bears and Wolves in the European Union. 1999, pp. 22. 92-828-4278-9.

40 Ibid.

41 The legal regulation of compensation for damage caused by game in the Czech legal system can be described as traditional. It was already contained in Act No. 49 of June 1, 1866, Government Decree No. 127/1941 Coll. of the Government of the Protectorate of Bohemia and Moravia on hunting, Act No. 225/1947 Coll. on hunting, Act No. 23/1962 Coll. on hunting. See Petr et al. 2015 XVIII–XIX.

42 Bělovský, 2021, p. 259; Ruling of the Czech Constitutional Court of 13 December 2006, No. Pl. ÚS 34/03.

43 Judgement of the Czech Supreme Court of 26 November 2020, No. 25 Cdo 3967/2019.

the state hunting administration authority in accordance with Section 17(2) of the Hunting Act.

The Hunting Act makes the liability for damage of the hunting ground user conditional only on the occurrence of legally relevant damage (cf. Section 54 of the Hunting Act) caused by game on listed crops. This is a case of absolute objective liability. No fault is required, and the liable party has no possibility of liberation; that is, it cannot exempt itself from the obligation to compensate for damage.[44] The wording of the explanatory memorandum, according to which

> [t]he proposed legislation abandons, in the case of damage caused by game, the hitherto unbearable liability of the user of the hunting ground for the result and adopts, in essence, the general liability for fault, in that the actions or omissions of the user of the hunting ground are found to be the cause of the damage caused,[45] cannot change that.

The failure of the injured party to comply with the duty of prevention[46] is sometimes incorrectly cited as a liberating ground.[47] However, it is the victim's participation in the damage caused.[48] There is no causal link between the legally relevant event (the effect of the game on the listed crops) and damage; therefore, one of the essential prerequisites for the creation of the obligation to compensate for damage is missing.[49] In the event of a liberalization ground, the pest does not incur any obligation to compensate for the damage suffered. Although the victim's participation in the damage may also lead to zero compensation, the victim typically has to pay part of the damage.

Damage caused by the European beaver, river otter, European elk, brown bear, lynx, and wolf is covered by Act No. 115/2000 Coll., on the provision of compensation for damage caused by selected specially protected animals, as amended. Damage to the life or health of a natural person caused by these selected specially protected animals; damage to designated domesticated animals and dogs used to guard them; damage to fish, beehives, and beekeeping equipment; damage to unharvested field crops or permanent crops; and damage to enclosed buildings or movable property therein are covered. In addition, damage caused by cormorants is covered by the same Act, but only temporarily until 2023, and is limited to damage to fish. In all cases, compensation is provided by the State.

44 Judgement of the Czech Supreme Court of 28 August 2014, No. 25 Cdo 972/2012.
45 Explanatory memorandum to Act No. 449/2001 Coll.
46 Section 53 of the Hunting Act.
47 Petr et al., 2015, p. 211 or Ondrýsek, 2017, p. 28.
48 Section 2918 of the Czech Civil Code.
49 See for example Judgement of the Czech Supreme Court of 10 July 2020, No. 25 Cdo 3287/2019.

6. Slovak legislation requires a breach of a legal obligation to give rise to liability

While drafting the rules on liability for damage caused by game in 2009, the Slovak legislator decided to follow Czechoslovak legal heritage and preserve the objective liability of the hunting ground user and its absolute character. In addition, however, it made the incurrence of liability conditional on the breach of a legal obligation, which must be causally connected with the occurrence of relevant damage.[50]

The content of the hunting ground user's obligations, therefore, determines the scope of liability for damage caused by game. Pursuant to Section 69(1) of the Hunting Act, hunting ground users are liable for damage caused by improper use of the hunting ground. Improper use of the hunting ground is considered to be hunting management, which is contrary to Section 26(1)(a), (c), (d), (f), (h), (i), (l), and (m) of the Hunting Act. Section 69(2) of the Hunting Act further stipulates that the hunting ground user is obliged to compensate for damage caused by improper use of the hunting ground on hunting land or on field crops not yet harvested, vines, or forest crops.

According to Section 26(1) of the Hunting Act, hunting ground users are obliged to ensure year-round care and protection of the game and hunting ground. The purpose, *inter alia*, is to manage the hunting area in such a way as to achieve and maintain the standard number of game animals, to construct and remove hunting equipment (high seats), to feed game, and to survey game numbers. The case law suggests that the breach of the hunting ground user's obligations most frequently concerns issues in area management and feeding, which result in an overpopulated or underfed game that subsequently causes agricultural damage, particularly in winter, or nibbles trees.[51]

Furthermore, the hunting ground user often fails to fulfil a specific requirement under Section 21(1)l) to agree in a written contract with the user of the hunting land the manner and form of minimizing the damage caused by and to game. Such an obligation may, at first sight, appear unfair to the user of the hunting ground, and the Slovak courts have held that if the parties do not agree on the content of the contract, they cannot claim compensation for damages resulting from the breach of this obligation.[52] We find this interpretation problematic, to say the least. This could lead to the submission of draft contracts that would be unacceptable. Furthermore, it does not motivate the parties to prevent damage in

50 Cf. Section 69(7) of the Slovak Hunting Act; Act No 274/2009 Coll., on Hunting and on Amendment of Certain Acts.

51 See Resolution of the Regional Court in Banská Bystrica of 16 December 2014, No. 13 Co 1075/2013.

52 Judgment of the District Court in Liptovský Mikuláš of 27 June 2019, No. 6 C 20/2018.

the first place because the proposal to conclude an agreement after the damage has occurred is not legally relevant.[53] The courts should, therefore, first assess the content of the contract submitted for drafting. If it is unreasonable, the situation should be treated as if no proposal had been made. If it were an acceptable proposal, the application of joint liability for the damage[54] would be more appropriate and motivate the parties to conclude an agreement.

Similar to the Czech legislation, in Slovakia, the damage must occur on hunting land or on field crops not yet harvested, vines, or forest crops. However, the interpretation of this condition seems troublesome in practice. Teleological interpretation must lead to the conclusion that the phrase 'on hunting land' means 'there must be damage to the hunting land,' for example, by the area being plowed up. Nevertheless, Slovak courts interpret the phrase as the location where the damage occurs. *In concreto,* they dismissed the claim of applicants who suffered damage caused by a collision between their car and wild animals, given that the damage did not occur on hunting land.[55] Indeed, it would be absurd to consider that if the plaintiffs were driving through a meadow hunting land and hit a pig or deer, they would be entitled to compensation.

Slovak regulation of compensation for damage caused by selected, specially protected species of animals is provided by the Nature and Landscape Protection Act.[56] State aid covers damage caused by water beavers, river otters, great cormorants, mooses, mountain bisons, brown bears, wolves, and lynx.[57] Except for cormorants, all the above animals are game animals.

Damage caused to the health and life of persons, field crops, tree and forest crops, domesticated animals and dogs, beehives and apiaries, and game in selected areas is covered under defined conditions. In particular, compensation may be provided based on an inspection carried out by the nature protection authority, and only if adequate precautions have been taken.[58]

7. Hungarian law interestingly combines specific rules in the Civil Code and other legal acts

In Hungary, liability for damage caused by a huntable animal is regulated by the Civil Code (Act No. V of 2013) and the Hunting Act (Act No. LV of 1996, on the Protection of Wild Game, Game Management and Hunting).

53 Judgment of the District Court in Revúca of 23 October 2015, No. 8 Cd 5/2015.
54 Article 441 of the Slovak Civil Code.
55 Judgment of the Bratislava II District Court of 9 October 2018, No. 11 C 394/2015; Judgment of the Trnava District Court of 19 November 2014, No. 13 C 341/2013.
56 Sections 97–102 of Act No. 543/2002 Coll.
57 See Decree No. 24/2003 Coll., implementing the Act on the Protection of Nature and Landscape.
58 Sections 98(1) and 101(1) of the Nature and Landscape Protection Act.

The somewhat minimalistic regulation provided by Section 563 of the Civil Code (Liability for damage caused by a huntable animal) deviates interestingly from the typical regulation in other countries. It was introduced in 2013 and states that

> (1) The person entitled to hunt is liable for compensation for damage caused by a huntable animal. The owner of the animal on whose hunting ground the damage occurred shall be liable. If the damage is not caused on hunting grounds, the person liable for the damage shall be the hunting right holder from whose hunting ground the game was taken. (2) The hunting right holder shall be exempted from liability if he proves that the damage was caused by an unavoidable cause beyond his control. (3) A claim for compensation shall be barred after three years.

The Civil Code seems to opt for objective liability even though it is subject to debate among legal scholars since the regulation is still relatively new.[59] The regulation does not contain any reference to the extent of the damage, nor is the meaning of control specified. Therefore, we may assume that the scope of the control required by the hunting right holder is determined by his legal duties, combined with what is foreseeable with due care. However, such determination covers a broad scope of responsibility. In particular, the Hunting Act requires the hunting right holder to protect and ensure the long-term maintenance of game and its habitat. Furthermore, hunting rights must be exercised in a professional way. At the same time, and similar to regulations in other countries, game management is limited by legal acts on forest management (in Hungary, Act No. XXXVII of 2009, on Forests, Forest Protection, and Forest Management), protection of nature and welfare (in Hungary, Act No. LIII of 1996, on Protection of Nature, and Act No. XXVIII of 1998, on Animal Protection).

After the introduction of specific liability in the Civil Code, the Hunting Act was amended in 2015 accordingly[60] to limit the liability considerably. Section 75/A of the Hunting Act now states that the holder of the hunting right is liable for damage caused by a huntable animal under the rules of the Civil Code to compensate for damage caused to others outside agriculture and forestry, with the proviso that a cause outside the control of the holder of the right to hunt shall be deemed to be a cause outside the exercise of the right to hunt and the pursuit of the hunting activity. In such cases and liability for an activity involving increased risk, the rules of the Civil Code on dangerous establishments apply.[61]

59 On the nature and scope of civil liability, see Fézer, 2019 or Fuglinszky, 2015.

60 See Döme, 2016.

61 Civil Code. Article 6:539 of the Hungarian Civil Code provides that '(1) If dangerous establishments cause damage to each other, the operators shall compensate the other in

Combined, it seems that the Civil Code applies to a) damages caused by all huntable animals in agriculture and forestry other than the game species listed in Section 75(1) of the Hunting Act (deer, fallow deer, roe deer, wild boar, mouflon, wild hare, and pheasant); b) damages caused by hares and pheasants in agriculture and forestry, except damage to vineyards, orchards, arable land, afforestation, and nurseries; and c) all damages caused by all huntable animals outside agriculture and forestry. This means that it is important to distinguish both the character of the damage and which animal caused it. For example, in the case of a collision between a huntable animal and a motor vehicle, the substantive legal basis for the assessment of liability for damage would be the rules of Section 539 of the Civil Code on dangerous establishments. The courts would consider whether preventive measures were taken, particularly whether road signs were properly installed.[62]

Regarding rules on compensation for damage caused by protected species, Section 74 of the Act on Protection of Nature divides the risk and obligations between the Directorate and the owner or user of the property. They are both obliged to introduce measures for the prevention or reduction of damage. However, the Directorate is required to use its competence when the owner or user is not able to prevent the damage. It is also obliged to pay compensation if damage caused by protected species occurs because of its inaction to comply with a justified request for adoption of preventive measures or because it granted consent to the use of alarming methods or the capture or thinning out of overpopulated species.

8. Polish law divides compensation between the hunters and the State

Polish law recognizes several types of damage caused by wild animals:[63]

1. Hunting damage caused by wild boar, deer, roe deer, fallow deer, and elk (until 2001) paid by lessees and managers of hunting districts.
2. Damage caused by game species with a year-round protection period (since 2001, elk has been such a species) or the above-mentioned game species

proportion to their fault. If the operator is not the actual tortfeasor, the operator shall be liable to pay compensation for the damage in proportion to the fault of the actual tortfeasor. (2) If the damage is not attributable to either party, the person liable to pay compensation for the damage is the person whose activity involving an increased risk resulted in the anomaly which led to the damage. (3) If the damage caused to each other is attributable to an anomaly in the activities of both parties involving an increased risk, or if no such anomaly can be established in the case of either party, each party shall bear its own damage, in the absence of fault on its part. (4) The provisions of this section shall also apply to the relationship between operators where several dangerous establishments jointly cause damage, with the proviso that, in the absence of fault or faultlessness, the damage shall be borne in equal shares.'

62 See Prencsok, 2019.

63 Zalewski, Markuszewski and Wójcik, 2020, p. 9.

outside hunting districts, that is, in areas excluded from hunting districts. The estimation of these damages is carried out by the Marshal Offices, and compensation is paid by the State Treasury.
3. Damage caused by animals under species protection, that is, beavers, bison, bears, wolves, and lynxes, paid by the state treasury.
4. Damage caused by both animals under species protection and game species for which no one pays compensation. These species currently include cranes, wild geese (both game and under-protected), and cormorants.

Polish regulation of hunting damage is included in the Hunting Law Act from 1995 (Ustawa z dnia 13 października 1995 r. Prawo łowieckie) and in the Regulation of the Minister of the Environment on the detailed conditions for assessing damage to crops and agricultural produce from 2019.[64]

According to Section 46 of the Hunting Law Act, the lessee or manager of the hunting district shall be obliged to compensate for damage caused: 1) to crops and crops by wild boars, elk, deer, fallow deer, and roe deer; and 2) while hunting. Estimation of such damage, as well as determination of the amount of compensation, is performed by a team consisting of 1) a representative of the Voivodship Agricultural Advisory Centre (przedstawiciel wojewódzkiego ośrodka doradztwa rolniczego), 2) a representative of the lessee or manager of the hunting district, and 3) the owner or holder of the agricultural land on which the damage occurs. The Hunting Law Act also provides detailed rules on the application for compensation[65] and inspection, which should precisely establish the damage.[66]

The procedure for claiming compensation begins with determining whether the damage caused to crops by game animals occurred in the hunting district. Pursuant to Section 23(1) of the Hunting Law Act, a hunting district is defined as an area of land with a continuous area enclosed by its borders, not smaller than three thousand hectares, in which there are conditions for hunting. In Section 24, the districts are divided into forest hunting grounds (forest land accounts for at least 40 % of the total area) and field-hunting districts (forest land accounts for less than 40 % of the total area). Section 26 specifies areas excluded from hunting districts, such as national parks and nature reserves (except for reserves or their parts, where hunting has not been prohibited); municipalities within the boundaries of residential and farm buildings; buildings; plants and devices; and areas intended for social, religious, industrial, commercial, storage, transport, and other economic purposes as well as historic and special objects within their fences.

64 Rozporządzenie Ministra Środowiska z dnia 16 kwietnia 2019 r. w sprawie szczegółowych warunków szacowania szkód w uprawach i płodach rolnych. (Dz.U. z 2019 r., poz. 776).
65 Section 46(3)–(8) of Hunting Law Act.
66 Section 46a of Hunting Law Act.

The lessee or manager of the hunting district is obliged to compensate for damage to crops caused by wild boars, red deer, fallow deer, and roe deer. According to Article 48 of the Hunting Law, compensation is not due to: 1) persons who have been allocated land owned by the State Treasury as agricultural depots on forest land; 2) the owners of damaged crops or crops who did not remove them within 14 days from the end of harvesting period of this species of plants in a given region, specified by the provincial assembly by way of a resolution; 3) to the owners of damaged crops or crops, who did not agree to the construction of facilities or performance of treatments to prevent damage by the lessee or manager of the hunting district; 4) for damage not exceeding the value of 100 kg of rye per 1 hectare of crop; 5) for damage to crops deposited in heaps, piles, and mounds, in the immediate vicinity of a forest; 6) for damage to crops established with gross violation of agrotechnical principles; 7) for damage referred to in Article 46 paragraph 1 that occurred on properties in relation to which the owner or perpetual usufructuary has made a declaration of prohibition of hunting, referred to in Article 27b paragraph 1—until the day following the day a) on which the declaration of the ban on hunting was withdrawn or b) on which the authority responsible for the lease of the hunting district or the minister responsible for the environment or the lessee or manager of the hunting district became aware of the expiration of the hunting prohibition, or c) notification of the withdrawal of the declaration of the ban on hunting to the authority responsible for the leasing of the hunting district or to the minister responsible for the environment.

Pursuant to Article 50 of the Hunting Law, the State Treasury is liable for damages caused by game animals under year-round protection in the following areas: 1) forest hunting districts—compensation is paid by the State Forests National Forest Holding from the state budget funds; 2) hunting districts in the field and areas that are not included in hunting districts—compensation is paid by the voivodship board from the state budget funds.[67]

Regarding compensation for damage caused by legally protected animals, under Article 126 of the Nature Conservation Act,[68] the State Treasury is liable for damage caused by aurochs, wolves, lynx, bears, and beavers. However, the compensation does not cover lost profit and does not apply to 1) persons to whom land owned by the State Treasury was allocated; 2) injured parties who a) did not build equipment for crops within 14 days from the end of harvesting of this plant species in a given region, and b) did not agree with the directive of the regional director of environmental protection or the director of the national park to build equipment or to carry out damage prevention measures; and 3) damage a) caused to the property of the State Treasury, excluding property given for economical use based on the Polish Civil Code, b) not exceeding the annual value of 100 kg of

67 For more details, see Rakoczy, 2016.

68 Ustawa z dnia 16 kwietnia 2004 r. o ochronie przyrody (Dz.U.2021.1098).

rye per hectare of crops, c) to crops established in breach of commonly applied agrotechnical requirements, d) caused by a wolf, bear, or lynx in livestock left without direct care in the period from sunset to sunrise.

In 2013 and 2014, the Polish Constitutional Tribunal concluded that several provisions of the above-mentioned Nature Conservation Act were inconsistent with the constitutional standard because the liability of the State was limited only to specific categories of damage, namely, damage caused by aurochs to crops, crop or forest farms, and by wolves, lynxes, and bears to livestock, as well as damage caused by bears to apiaries and crops. Such regulations lead to unjustified differentiation among owners. However, the Tribunal added that there is no general right to compensation from the Treasury, equal for everyone, since not every damage caused by a protected species is subject to the automatic compensation liability of the State. By adopting flexible principles of nature protection, the legislator attempts to reconcile various reasons and interests while respecting the principles of sustainable development.[69]

9. Conclusion

A basic comparison of the regulation of liability for damage caused by game shows common features but also differences in the approach to this issue among Central European countries. In all countries, compensatory measures present a traditional arrangement, often supplemented by a compensation scheme for damage caused by protected species. The specific provisions in national hunting laws are usually based on the general provisions of the Civil Code; the Hungarian Civil Code directly regulates the basis of this liability.

The concept of compensation for damages varies according to who pays the damages and to whom, but also in aspects of the scope of liability (what damages are covered, for what species of game) and the assessment of the liability (what role is played by fault). From the point of view of the condition of fault, the Slovak legislation appears to be optimal since it establishes the breach of a legal obligation as a prerequisite for establishing a compensation claim. For this reason, it is probably the most consistent with the meaning and purpose of the obligation to compensate for damage. At the same time, however, it may entail difficulties in proving a breach of obligation. Therefore, we believe that the burden of proof should *de lege ferenda* be borne by the liable party rather than the injured party. Strict liability, on the other hand, appears to be rather harsh towards hunting associations. While it is true that the injured party cannot hunt and influence game numbers, even hunting ground users cannot reduce game numbers indefinitely,

69 See Judgement of the Polish Constitutional Tribunal of 21 July 2014, No. K 36/133, and of 3 July 2013, No. P 49/11 (regarding beavers).

and overfeeding may not prevent all damage. Moreover, there is general interest in protecting nature and preserving its diversity. The damage caused can be many times greater than the budget of the hunting ground user. A sophisticated compromise that divides the responsibility between the hunting ground user and the State, while taking into account how game numbers can be regulated (according to the hunting season), is the Polish regulation.

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AGNIESZKA WEDEŁ-DOMARADZKA*

On the Need To Protect Cemeteries and Memorials in Europe: The Perspective of the Convention on the Protection of the World Cultural and Natural Heritage and Hungarian and Polish Regulations

ABSTRACT: *The issue of the protection of cemeteries and memorials is fundamental from a legal and historical perspective because it often touches on sensitive issues of complex and tragic past events. However, it is imperative that the remembrance of burial sites and memorials is nurtured and protected. This involves two aspects. The first is the personal well-being of relatives who are buried at a particular place or whose memory is cultivated at a particular place. The second concerns the sense of identity of a given people and awareness of their traditions, cultural values, and history. Therefore, it seems necessary to reflect on the extent to which international instruments, such as the Convention on the Protection of the World Cultural and Natural Heritage, support the protection of cemeteries and places of remembrance. It is also necessary to analyze the interactions between international regulations and national law solutions. Finally, it is worth considering whether this twofold nature of protection is compelling or requires the formulation of de lege ferenda conclusions for both or one of the systems.*

KEYWORDS: international law, protection of the world cultural heritage, cemeteries, memorials

1. Introduction

This study addresses the legal regulations of cemeteries and memorials inscribed on the United Nations Educational, Scientific, and Cultural Organization (UNESCO) World Heritage List. The purpose of UNESCO and the list maintained

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under its auspices is to preserve the memory of places of exceptional importance for preserving the cultural heritage of humankind. Such places include cemeteries and memorials. The former reflects the respect that most cultures have for their deaths. The manner of burial may be influenced by the religion followed, circumstances surrounding the death, cultural circle of residence of the deceased, or position held by the deceased in the community.[1] The latter, on the other hand, are evidence of the memory of tragic events associated with death and, the circumstances of that death. Two sites are on the World Heritage List: the cemetery in the present-day town of Pécs, Hungary, and the memorial site of the Auschwitz–Birkenau Camp, Poland. Their conservation status and significance are analyzed below.

2. Convention concerning the protection of the World Cultural and Natural Heritage and its relevance to the protection of cemeteries and memorials

The Convention concerning the Protection of the World Cultural and Natural Heritage was adopted at the General Conference of UNESCO.[2] The impulse to start work on the text was the establishment of UNESCO *(fr: Organisation des Nations Unies pour l'éducation, la science et la culture)* on 16 November 1945 acting as a successor to the League of Nations' International Committee on Intellectual Cooperation.[3] UNESCO's initial objectives were 'to develop and maintain mutual understanding and appreciation of the life and culture, the arts, the humanities and the sciences of the peoples of the world, as a basis for effective international organization and world peace' and 'to co-operate in extending and in making available to all peoples for the service of common human needs the world's full body of knowledge and culture, and in assuring its contribution to the economic stability, political security, and general well-being of the peoples of the world.'[4] Ultimately, however, it was recognized that the organization should

1 Innes, 1996, p. 61; Tokarczyk, 2000, pp. 361–363.

2 UN Educational, Scientific, and Cultural Organisation (UNESCO), Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972 [Online]. Available at: https://www.refworld.org/docid/4042287a4.html (Accessed: 11 August 2022).

3 UNESCO, 1987. A Chronology of UNESCO, 1945–1987: Facts and events in UNESCO's history with references to documentary sources in the UNESCO Archives and supplementary information in the annexes 1-21, Document code: LAD.85/WS/4 REV [Online]. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000079049 (Accessed: 11 August 2022).

4 Conference for the Establishment of the United Nations Educational, Scientific and Cultural Organisation. Available at: the Institute of Civil Engineers, London, from the 1st to the 16th November, 1945, ECO/CONF/29, p. 1.

> contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.[5]

In pursuit of this objective, UNESCO adopted a resolution in 1966,[6] the content of which included an indication that the director-general should ensure coordination and see to it that the international community adopts appropriate principles and scientific, technical, and legal criteria for the adequate protection of cultural property, monuments, and sites. This resolution was part of the parallel initiatives of the United States of America presented at the Washington Conference to initiate international cooperation on the protection of the world's nature and landscapes, and places of historical significance for the present and future of citizens of the whole world.[7] At the same time, these measures met with a positive response from the international community, given the earlier successful joint action taken to save the monuments of Egypt and Sudan.[8] Similar proposals were presented at the United Nations Conference on the Human Environment in Stockholm. Furthermore, as part of the recommendations of the Action Plan for Human Environment, the need for the UN Secretary-General, the Food and Agriculture Organization, the United Nations Educational and Cultural Organization, and other interested international and regional intergovernmental and non-governmental agencies to continue initiatives and conventions to protect the world's natural resources and cultural heritage were made clear.[9]

Work on the Convention lasted several years and resulted in a welter of alternative proposals,[10] from which it was finally possible to produce a single

5 Constitution of the United Nations Educational, Scientific and Cultural organisation adopted in London on 16 November 1945 and amended by the General Conference at its 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 12th, 15th, 17th, 19th, 20th, 21st, 24th, 25th, 26th, 27th, 28th, 29th, and 31st sessions, Article 1.

6 UNESCO. General Conference, 14th, 1966, 14 C/Resolutions, CFS.67/VII.4/A/F/S/R, point 3.342 [Online]. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000114048.locale=en (Accessed: 11 August 2022).

7 Slatyer, 1983, p. 138.

8 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage [Online]. Available at: https://whc.unesco.org/en/conventiontext/ (Accessed: 11 August 2022).

9 Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972, Recommendation 98, p. 25 [Online]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/300/05/IMG/NL730005.pdf?OpenElement (Accessed: 11 August 2022).

10 These included Convention on Conservation of the World Heritage (IUCN), Convention Concerning the International Protection of Monuments, Groups of Buildings and Sites of Universal Value (UNESCO) and Convention on the Establishment of a World Heritage Trust (American proposition).

document based on the one prepared by UNESCO, albeit incorporating elements of other proposals. As a result, the Convention concerning the Protection of World Cultural and Natural Heritage was adopted on November 16, 1972, at a conference in Paris.

The Convention included provisions on the subject matter to be protected. This was considered an aspect of cultural heritage, which included three elements:

1. Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, that are of outstanding universal value from the point of view of history, art, or science;
2. Groups of buildings: groups of separate or connected buildings which, because of their architecture, homogeneity, or place in the landscape, are of outstanding universal value from the point of view of history, art, or science;
3. Sites: human works or the combined works of nature and humankind, and areas including archaeological sites of outstanding universal value from the historical, aesthetic, ethnological, or anthropological points of view.[11]

The obligation to protect heritage, which has international and national dimensions, was emphasized. The adopted regulation was also in line with the solution proposed in 1968, that the protection of heritage consisted of two systems, international and national, which should interact harmoniously.[12] The convention also included solutions to support its implementation. The first is the creation of the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage site, which administers an inventory of properties that form part of the cultural and natural heritage. The second supportive arrangement is the Fund for the Protection of the World Cultural and Natural Heritage site, whose funds come primarily from compulsory and voluntary contributions made by the states' parties. This fund is administered by the committee, allowing a state to apply for international assistance for cultural and natural heritage assets of outstanding universal value that are located on its territory. The convention also requires states to establish educational programs to promote awareness of the convention and the objects protected by it. They must also submit periodic reviews that contain information on the legislative and administrative provisions they have adopted.

11 UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, Article 1.

12 Cameron and Rössler, 2016, p. 38; Final report of meeting of experts to co-ordinate, with a view to their international adoption, principles and scientific, technical and legal criteria applicable to the protection of cultural property, monuments and sites, UNESCO, Paris, 31 December 1968, SCH/CS/27/8, para. 49, point 15 [Online]. Available at: http://whc.unesco.org/archive/1968/shc-cs-27-8e.pdf (Accessed: 11 August 2022).

The reports must also contain information on the actions they have taken for the application of this convention, together with details of the experience acquired in this field.

It should be recognized that the World Heritage Convention contains legal solutions typical of international agreements. These solutions allow for the protection of cemeteries and memorials. Although they are not explicitly indicated as objects of protection, the definition of 'cultural heritage' is so broad that cemeteries and places of remembrance are included. Therefore, these can be protected as designated elements of the definition, such as monuments; architectural works; works of monumental sculpture and painting; elements or structures of an archaeological nature; inscriptions that are of outstanding universal value from the point of view of history, art, or science; groups of separate or connected buildings that are of outstanding universal value from the point of view of history, art, or science; and works of humankind that are of outstanding universal value from historical, aesthetic, ethnological, or anthropological points of view. Thus, national and international legal systems must provide solutions that, depending on the characteristics of the object, will be subject to protection.

3. List of UNESCO World Heritage sites and the principles of their protection vs. cemeteries and memorials

The Intergovernmental Committee for the Protection of World Cultural and Natural Heritage, which was based on the World Heritage Convention, maintains the World Heritage List, which contains sites considered world heritage. This list has been in operation since 1978.[13] Following the provisions of the convention,[14] states' parties shall prepare and submit to the committee a list of those cultural and natural heritage properties located in their territory that, in the opinion of the state concerned, merit inclusion on the list. As part of the list, the state concerned shall include information on the location of the assets and the significance. This list is referred to as a tentative list. For a property to be included in the World Heritage List, it must first be included in the tentative lists. Entry on the tentative lists is decided by the state, and the entry at this stage is not subject to verification by the international community.[15]

The listing rules are comprehensive and set out in the Operational Guidelines for the Implementation of the World Heritage Convention. The operational guidelines are subject to periodic updating. They emphasize, among other things, that preparing the state list should involve extensive consultation. This should be

13 Piotrowska-Nosek, 2014, Article 11, Article 12.
14 UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, Article 11.
15 Piotrowska-Nosek, 2014, Article 11, Article 12.

done with the participation of the parties and rights-holders, the managers of the sites submitted to the list, the local and regional authorities of the location of the object of submission, local communities, indigenous peoples, non-governmental organizations, and other stakeholders.[16] Based on a list comprised of the proposals submitted by states' parties, the committee shall establish, update, and circulate a list of those it considers to be of exceptional universal value. The lists shall be updated at least every two years. An entry shall be made after verification that the property in question meets the required criteria defined by the committee. A given property must fulfill the following criteria:

1. represent a masterpiece of human creative genius;
2. exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning, or landscape design;
3. bear a unique or at least exceptional testimony to a cultural tradition or to a civilization that is living or that has disappeared;
4. be an outstanding example of a type of building, architectural or technological ensemble, or landscape that illustrates a significant stages in human history;
5. be an outstanding example of a traditional human settlement, land use, or sea use that is representative of a culture (or cultures), or human interaction with the environment, especially when it has become vulnerable under the impact of irreversible change;
6. be directly or tangibly associated with events or living traditions, ideas, or beliefs with artistic and literary works of outstanding universal significance. (The committee considers that this criterion should preferably be used in conjunction with other criteria.)[17]

Concerning cemeteries and places of remembrance, it should be considered that they certainly fulfill the criteria shown in points 2, 3, 5, and 6, of which 6 is particularly relevant. It cannot be ruled out that cemeteries fulfill the conditions shown in point 4, particularly in the context of sepulchral art.

Where, in the opinion of the committee, a suggested property does not fulfill the conditions for inclusion on the list, the committee shall reject the application, but this shall be done without consulting the state party on whose territory the property of cultural heritage in question is located.

16 Operational Guidelines for the Implementation of the World Heritage Convention, WHC.21/01 31 July 2021, point 64 [Online]. Available at: https://whc.unesco.org/en/world-heritage-centre (Accessed: 11 August 2022).

17 Operational Guidelines for the Implementation of the World Heritage Convention, point 77. Four separate ones have been formulated for natural heritage, also Albert and Ringbeck, 2013, pp. 23–26.

Listed assets must also meet the condition of authenticity.[18] According to the criteria formulated at the Nara Conference,[19] authenticity exists when a cultural property is rooted in values. Knowledge of these values must be reliable and genuine. Protection itself must also meet the condition of ensuring that each culture recognizes the specific nature of its heritage values and that they are credible and authentic. Moreover, it is also required that cultural heritage be considered and assessed primarily in the cultural context to which it belongs. Information on the authenticity of goods can come from various sources, including different forms and designs, materials and substances, use and function, traditions and techniques, location and setting, spirit and feeling, and other internal and external factors. Another necessary condition is integrity. Determining whether a particular property meets this condition includes indicating whether the property: a) includes all elements necessary to express its outstanding universal value; b) is of adequate size to ensure the complete representation of the features and processes that convey its' significance; c) suffers from adverse effects of development and/or neglect.

This should be presented in a statement of integrity.[20]

It is also required that the cultural asset in question be preserved in a good condition. The last required condition is to ensure that cultural assets are appropriately managed. This stewardship ensures that the conditions of integrity and authenticity that exist at the time of inscription are maintained or enhanced over time. This is fostered by regular reviews of heritage assets, long-term protection, and appropriate regulation.[21]

It should be emphasized that inscription on the World Heritage List is only possible with the consent of the country concerned. If the territory in which a potential object of protection is located is claimed by more than one state, an inscription in favor of one of the states does not prejudge the settlement of the dispute.

A separate procedure applies to the List of World Heritage Sites in Danger, which was also created by the Intergovernmental Committee for the Protection of World Cultural and Natural Heritage Sites. The list contains assets on the World Heritage List for which significant works are required, and a request for assistance has been made under the provisions of the World Heritage Convention. It contains information on the cost of relief operations and includes assets that are

18 Operational Guidelines for the Implementation of the World Heritage Convention, point 79.

19 The Nara Document on Authenticity, drafted by the 45 participants of the Nara Conference on Authenticity in Relation to the World Heritage Convention, held at Nara, Japan, from 1–6 November 1994. The Nara Conference was organized in cooperation with UNESCO, ICCROM, and ICOMOS. The World Heritage Committee examined the report of the Nara meeting on Authenticity at its 18th session, Phuket, Thailand, 1994, WHC-94/CONF.003/16.

20 Operational Guidelines for the Implementation of the World Heritage Convention, point 88.

21 Operational Guidelines for the Implementation of the World Heritage Convention, points 96 and 97.

> threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves.[22]

A given property can be listed at any time in the event of an emergency or a growing threat.

When analyzing the practice of inscribing to cultural property on the World Heritage List, it should be pointed out that necropolises and memorials are not numerous. Necropolises, tombs, or cemeteries appear only a few times, and in Central and Eastern Europe one can identify the Thracian Tomb of Kazanlak and Thracian Tomb of Sveshtari in Bulgaria and Early Christian Necropolis of Pécs (Sopianae) in Hungary. It should be emphasized that only Bulgaria has reported on the tentative lists of burial sites as potentially protected in the future.[23]

In the case of memorials (fr: *lieu de mémoire*), the situation is even more complicated as the World Heritage List does not use this term. The term *lieu de mémoire* applies to those significant tangible or intangible entities that, through the action of human will or the action of time, have become a symbolic element of the commemorative heritage of any community.[24] This term is familiar to Polish practice and international agreements concluded by Poland with countries on whose territories Polish cemeteries or places of death of Poles are located. Thus, this study strictly identifies places of remembrance with death. The Auschwitz–Birkenau concentration camp, which is now on the heritage list, is one such example. From non-European examples, one can point to the ruins left by the explosion in Hiroshima. These sites are similar in tone, drawing attention to a tremendous collective tragedy and the deaths of thousands or millions of people.

22 UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, Article 11, point 4, Tentative Lists [Online]. Available at: https://whc.unesco.org/en/tentativelists/?action=listtentative&state=bg&order=states (Accessed: 11 August 2022).

23 UNESCO, World Heritage Convention, Tentative Lists [Online]. Available at: https://whc.unesco.org/en/tentativelists/?action=listtentative&state=bg&order=states (Accessed: 11 August 2022).

24 Nora, 1996, p. XVII.

4. National measures to protect UNESCO-listed heritage—Hungary

The early Christian cemetery of the Roman provincial town of Sopianae (now Pécs) was declared and subsequently placed on the UNESCO heritage list from the Hungarian side. This cemetery was built in the fourth century and consists of richly decorated tombs with above-ground chapels. The assemblage represents a rich collection of structural grave monuments that reflect the diversity of cultural sources. The monument was inscribed on the World Heritage List based on the two criteria identified in the guidelines. The first is criterion three, indicating that the tomb chambers and above-ground chapels bore witnesses to the faith of the Christian communities of the late Roman Empire. The second being criterion four, indicating the unique early Christian grave art and architecture of northern and western Roman provinces. The spread of the new religion Christianity determines the uniqueness of the place as a cemetery in Pécs. This religion presupposed rebirth and promised immortality. Consequently, early Christians attached great importance to burial preparation and the burial itself. As a result, burial sites simultaneously became places of worship, which was not typical of the religions of the time.[25] The site combines temple and burial elements, which is also evidence of its uniqueness. It should also be noted that it represents the most significant early Christian necropolis after the Roman necropolis. Given the importance of Christianity in Europe and its continued development as the dominant religion, it was undoubtedly worth commemorating this site on the World Heritage List.

This heritage site also fulfills other indicated requirements. It is integrated as it represents 16 tombs. Their attributes and historic interrelationships were preserved. They were also authentic. They have been preserved at the place where they were found and secured using techniques available at the time of discovery. It should be emphasized that the requirements for protection and conservation management have also been met in relation to the collection of gravestone monuments. This protection includes the qualification of the cemetery as an archaeological site and appropriate legal arrangements at both national and local levels. The ownership structure varies; two grave monuments belong to the Hungarian state, thirteen to the city of Pécs, and one to the district of Baranya.

The primary document related to protecting World Heritage at the national level is Act LXXVII of 2011 on World Heritage.[26] This piece of legislation was enacted with a view toward the effective implementation of the said Convention and to define provisions required for preserving outstanding universal values. The content of this piece of legislation deals with world heritage areas and tentative

25 Szûcs, 2009, p. 56.

26 Act LXXVII of 2011 on World Heritage, 2011. évi LXXVII. törvény [Online]. https://njt.hu/jogszabaly/2011-77-00-00 (Accessed: 11 August 2022).

world heritage areas, activities relating to world heritage and tentative world heritage areas, activities relating to the outstanding universal value of world heritage areas and tentative world heritage areas. The regulation also included provisions for organizations and individuals associated with world heritage and tentative world heritage areas. The conservation of World Heritage is considered a public value and is subject to the protection provided by the cooperation of state and local governmental bodies, churches, non-governmental organizations, and natural persons. It is important to note that under this legislation, World Heritage areas will be presented, used, and developed according to the following principles:

a) the site preserving its original values, uniform landscape, embeddedness in the historical environment, and unique appearance, especially in the case of daytime and night-time sight, spatial relations, and proportions;
b) not threatening the authenticity of the site, its intact preservation, and not damaging world heritage treasures or putting these at risk to damages;
c) worthy alignment to the region's cultural, historical and natural values;
d) not directly or indirectly diminishing universal and national values, causing loss of values;
e) Maintaining an authentic function and character aligned to public interest and worthy of the World Heritage Site;
f) ensuring access to and the opportunity to freely visit world heritage treasures.[27]

The state's activities related to world heritage are mainly the creation and implementation of strategies for its management, monitoring of the implementation of these strategies, as well as the care of legal regulations concerning them, and reports covering the activity of local and national authorities regarding the protective measures taken. The care of world heritage at the national level is subordinated to the minister responsible for the protection of cultural heritage in agreement with ministers.[28] Cooperation between local and central authorities is essential from the perspective of the tasks related to the protection and management of world heritage. To this end, legislation and heritage protection management plans are reviewed at least once every seven years and harmonized. The World Heritage Protection Act also addresses financial issues. It indicates which activities are financed or financially supported by the state from the central budget. In particular, the state is financially involved in preparing heritage management plans and reviewing land use plans for World Heritage locations.

27 Article 3(4) of Act LXXVII of 2011 on World Heritage.

28 In the case of the Pécs cemetery, these are: Minister responsible for construction, Minister responsible for the use of EU funds, Minister responsible for the coordination of public administration, Minister responsible for spatial planning, Minister responsible for municipal development and planning and Minister responsible for tourism.

Consequently, it must be considered that all elements required by UNESCO are included in this act. These include the management strategy, its implementation, reporting, and the provision of resources so that these activities can have the desired effect.

5. National solutions protecting UNESCO-listed heritage—Poland

There is no Polish necropolis on the UNESCO heritage list. However, the Auschwitz–Birkenau German Nazi Concentration Camp memorial site was included. Although it is not a typical cemetery, the International Council on Monuments and Sites submitted an opinion on its inclusion in the list as part of its recommendation, stating that it is the largest cemetery in the world.[29] Considering that, a cemetery is a place for burying corpses, remains, or ashes, one must agree with this statement.

The Auschwitz–Birkenau camp is living proof of the conditions under which the genocide was planned and systematically carried out by Nazi Germany. It is also the main and most famous concentration camp, which was initially built as a labor camp for Poles to become a place for the systematic extermination of Jews, Roma, and Sinti. The camps (Auschwitz I and Auschwitz II–Birkenau) are proof of the cruel and inhumane treatment of the population and as living testimony to the brutal nature of the anti-Semitic and racist policies of the Nazis.

The camp's inclusion was based on only one of the eligibility criteria: criterion six. It recognized the concentration camp as a memorial to the genocide of Jews and representatives of other nationalities and as evidence of some of the greatest crimes committed against humanity. It was considered necessary to commemorate this place as a memorial to the Holocaust and racist policies, as well as a place to be passed on to future generations. Inclusion of the extermination camp on the World Heritage List caused some debate because the places that were inscribed were usually examples of positive activity, positive values, and human greatness. In this case, however, it was concluded that human heritage does not always have a positive dimension but can also have a negative dimension, and that an inscription should be made as a warning to future generations, as it were.

Making an entry also requires that other criteria be met. These criteria include integrity. Its fulfillment is supported by the fact that all the events that testify to the significance of the site for humanity took place in the territory of both camps. The Auschwitz I camp, which was the main camp, housed the camp administration and political and prisoner offices, as well as workshops. Auschwitz II–Birkenau was primarily a place for the execution of murders. Sick prisoners and those selected to be killed were gathered there. It is assumed that most prisoners

29 Conseil International des Monuments et des Sites ICOMOS, World Heritage List No 31, p. 1.

of the Auschwitz–Birkenau complex died in this camp. The camp is also considered to meet the criteria of authenticity. Authenticity stems from the fact that the entire Auschwitz–Birkenau complex has remained unchanged since the day it was liberated in 1945.The buildings, architecture, and spatial layout at Auschwitz have remained, and modifications were made only to adapt them for commemorative purposes while keeping them as unchanged as possible. The personal belongings of prisoners and other camp relics, such as documents, photographs, and survivors' messages are also housed here. In the case of Birkenau, only some of the buildings have been preserved owing to the weakness of the construction materials. However, efforts have been made to preserve and protect these materials from decay.

As part of the state's efforts to preserve the heritage of humanity, that is the Auschwitz–Birkenau camp, several legal acts have been adopted to protect it. The entire site of the camp is protected based on national heritage legislation, spatial planning, legislation dedicated to the camps, and local legislation. A museum area was established for the Auschwitz–Birkenau site. Therefore, it is subject to the Museum Act.[30] This act states that its purpose is

> to collect and permanently protect the natural and cultural heritage of mankind of a tangible and intangible nature, to inform about the values and contents of the collected collections, to disseminate the fundamental values of Polish and world history, science and culture, to shape cognitive and aesthetic sensitivity and to enable the use of the collected collections.

The museum is subordinate to the minister responsible for cultural and national heritage protection. Following the legal solutions adopted in the act, musealia—that is, movable and immovable objects owned by the museum and entered into the inventory of musealia as well as national treasures—are subject to protection.

In addition to the Museum Act, the provisions for the Protection of the Sites of the Former Nazi Death Camps also apply to Auschwitz–Birkenau Camps.[31] The subject of this act is the rules for protecting the sites of former Nazi extermination camps, referred to as 'extermination memorials.'[32] Their protection consists of the creation of protection zones and the introduction of protection zones with special rules relating to the holding of assemblies, conduct of economic activities,

30 Act of 21 November 1996 on museums (consolidated text Journal of Laws of 2022, item 385).

31 Act of 7 May 1999 on the protection of the sites of former Nazi extermination camps (consolidated text Journal of Laws of 2015, item 2120).

32 In addition to the Auschwitz Martyrdom Memorial, the following are also protected: The Martyrdom Memorial at Majdanek, the 'Stutthof' Museum in Sztutowo, the Gross-Rosen Museum in Rogoźnica, the Mausoleum of Struggle and Martyrdom in Treblinka, the Martyrdom Museum—Camp in Chełmnonad Nerem, the Museum of the Former Death Camp in Sobibor, and the former death camp in Belzec.

construction of buildings, temporary buildings, and construction facilities, and expropriation of real estate. According to the act, the protection of extermination memorials is a public objective and a task of the government administration. Under this, a protection zone is also created around the area, which constitutes the camp. The area and boundaries of the protection zones are defined in such a way as to provide the memorial site with the necessary protection. They are defined in such a way as to be as unobtrusive as possible to third parties. A protected zone clearly indicates that the designated strip of land is protected. The protection envisaged includes issues of spatial planning, holding meetings, and conducting economic activities. Regarding spatial planning, local authorities (municipalities) are obliged to adopt a local spatial development plan for this area. This plan must be agreed upon by the minister responsible for culture and national heritage protection. With regard to the organization of assemblies on the grounds of the extermination memorial or in the protection zone, it is stipulated that they may be organized on the condition that they obtain the consent of the voivode (a local ruler or official in various parts of central and eastern Europe), issued by way of a decision. The provincial governor may delegate his/her representative to the assembly, the organization of which he/she has authorized, to control the assembly's correctness. A representative has the right to dissolve an assembly.

Regarding the conduct of business, the legal solutions are similar. It is permitted to conduct only such economic activity in the area of the extermination memorial and its zone that, to the extent necessary, protects the site from destruction or damage, ensures order and cleanliness on its territory, permanent maintenance or marking of its borders or the borders of the protective zone, and necessary service for visitors to the Memorial. The governor shall grant permission to carry out such activities by way of a decision. It should also be noted that the site of the extermination camp, as a monument, is subject to conservation protection, which means that all activities must be consulted with the Provincial Conservator of Monuments. Any administrative proceedings whose consequences could affect the extermination memorial or its protective zone must immediately (at the stage of initiation of the proceedings) be reported to the minister in charge of culture and national heritage protection. There is also an appropriate conservation policy funded by the Auschwitz–Birkenau Foundation, which is supported by states worldwide, businesses, and private individuals as well as the Polish state.

This wide-ranging protection is evidence of a serious approach to ensuring respect due to this place and to the people who suffered martyrdom, and death here. In organizational matters concerning the establishment and management of the Auschwitz–Birkenau site, appropriate legal solutions have been adopted, dividing the tasks between the government and local authorities following UNESCO guidelines. The World Heritage Committee's congratulations on the delivery and implementation of the 'Conservation Strategy for the World Heritage Site of Auschwitz–Birkenau, German Nazi Concentration and Extermination Camp

(1940–1945)' and its assurance that the Polish state will continue to pursue this strategy are confirmation of the effectiveness of the work.[33]

6. Conclusions

Given the importance of death for human beings and that most cultures and societies regard it as a sacred sphere and hold the dead in high esteem, it is surprising that many famous necropolises are absent from the World Heritage List. Some of them, such as Montmarte, Père Lachaise in Paris, Cimitero Monumentale in Madrid, Fontanelle in Naples, Merry Cemetery in Sapanta, Ross Cemetery in Vilnius, Old Powązki in Warsaw, or Szatmarcseke Cemetery, are assets of considerable architectural value and expressions of the cemeteries of a particular period. Moreover, they showed how much the community valued the deceased and tried their best to commemorate them.

Necropolises and memorials are essential for nurturing values and ensuring that mistakes and tragic events in the past are not repeated. However, this does not mean that every cemetery has to be inscribed as a memorial, especially as some of them—such as Auschwitz–Birkenau—have a symbolic value, and the committee itself considered it appropriate to restrict the inscription of other sites of a similar nature.

It should also be emphasized that cemeteries and the activities carried out in them as part of the cult of the dead may also constitute the intangible heritage of humanity. Burial sites, therefore, combine tangible elements (location, structure, appearance of gravestones, inscriptions) and intangible elements (human behavior, ways of worshipping the dead, celebration of festivals dedicated to the dead or a particular influence on culture, tradition, and preservation of memory. Consequently, these intangible elements could also be protected under the Convention for the Safeguarding of Intangible Cultural Heritage.[34] An example is the inclusion of non-European practices related to the Day of the Dead in Mexico (el Día de los Muertos).

Extending the list to include the indicated sites could also remedy the contemporary tendency to ignore or remove death, gravestones, and cemeteries from the public consciousness. Gardens or forests of remembrance often replace them. In many cases, they are merely places for anonymous scattering of ashes. This is probably an expression of modern people's departure from previous cultural and religious practices.

33 Report of the Joint World Heritage Centre/ICOMOS Advisory mission to the World Heritage property 'Auschwitz Birkenau, German Nazi Concentration and Extermination Camp (1940-1945)' Poland, 12-14 October 2021, p. 16.

34 The Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003 [Online]. Available at: https://ich.unesco.org/en/convention (Accessed: 11 August 2022).

An analysis of legal solutions and cooperation models between central and local authorities shows that states can take adequate care of world heritage. For example, they comply with the guidelines of the World Heritage Convention, improve legal solutions, or provide adequate funding with similar models.[35] This indicates that the legal systems—at least of the countries analyzed—are prepared to provide adequate protection for other cemeteries or memorials for which protection could be requested in the future.

35 Wiśniewski, 2021, pp. 22, 30.

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REVIEWS

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Report on International Scientific Conferences: 'The Right to Privacy in the Digital Age – in general terms' and 'Content of the right to parental responsibility in the legal orders of Central and Eastern Europe – Selected Problems'

ABSTRACT: *The report concerns two international scientific conferences organized by the Institute of Justice in Warsaw within the framework of the Central European Professors' Network coordinated by Miskolc University, Central European Academy. The conferences discussed the following topics: 'The Right to Privacy in the Digital Age – in general terms' and 'Content of the right to parental responsibility in the legal orders of Central and Eastern Europe – Selected Problems.' The conferences were attended by prominent legal researchers from Central Europe, whose papers presented contribute to deeper research into the problems of law in the realities of the twenty-first century.*

KEYWORDS: human rights, freedoms, right to privacy, right to parental responsibility, international law, national law, Central Europe

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1. Introduction

In the first week of June 2022 (June 1–2), two scientific conferences organized by the Institute of Justice in Warsaw as part of the Central European Professors' Network coordinated by Miskolc University, Central European Academy took place. The participants included the best legal academics from Central European countries.

2. About the conference 'The Right to Privacy in the Digital Age – in general terms'

On June 1, 2022, the International Scientific Conference 'The Right to Privacy in the Digital Age – in general terms' was organized by the Institute of Justice as part of the Central European Professors' Network in cooperation with a group of experts from seven countries—Czech Republic, Croatia, Poland, Hungary, Serbia, Slovakia, and Slovenia. The aim of this research project and conference is a comprehensive international scientific activity, and its main topics include parental responsibility, environmental protection, protection of national symbols, and the right to privacy.

The event was devoted to the right to privacy in various legal perspectives. This right is of particular value for human life and has been ensured by several regulations, both national and international. The right to privacy has been placed in the most important documents concerning human rights and has also been confirmed by the constitutions of modern states and included in the national legal orders. The constant development of innovative technologies and the progressive digitization of subsequent areas of human life have led to the emergence of the information society. The development of information technology (IT) and information and communication technology (ICT) solutions, as well as the transfer of individuals' lives to the virtual space and its related benefits, has also led to the emergence of new threats to the right to privacy. It is necessary to provide adequate guarantees of this right and legal mechanisms for the legal protection of private life.

The thematic scope of the conference focused on current issues related to the right to privacy and the dissemination of innovative technologies, as well as the development of the information society. During the conference proceedings, attention was paid to the current challenges and problems facing the right to privacy in the era of socioeconomic changes that have occurred in recent decades due to the digital revolution. The conference discussed current issues related to the right to privacy and the development of innovative technologies as well as the emergence of the information society. As part of the conference, universal

standards regarding the right to privacy and the problems faced by legislators and the judiciary of Central European countries were presented. Particular attention has been paid to determining the limits of the right to privacy and ensuring effective mechanisms of legal protection that can be introduced into national legal order.

The conference, with English as the working language, was attended by experts from the most important research centers in Central Europe, including *Professor János Ede Szilágyi*, Head of the Ferenc Madl Institute for Comparative Law, and *Dr Katarzyna Zombory*, Director of the Central European Academy, and it was a great occasion to discuss the most urgent problems related to the right to privacy. *Máté Gergely*, First Secretary and Representative of the Embassy of Hungary, was also present.

■ *2.1. First Panel*

The Director of the Institute of Justice, *Professor Marcin Wielec*, officially opened the event, and guests were welcomed by the Undersecretary of State, Dr Marcin Romanowski, who was attending on behalf of the Polish Ministry of Justice. Wielec claimed that the cooperation of researchers in Central Europe is important and worth exploring, especially because the common legal tradition of Central Europe countries has Christian roots. The cooperation in the Central European Professors' Network allows to discuss urgent topics and directions in which the law should move in Central Europe. The Undersecretary of State highlighted two important elements in such a cooperation—the choice of the area of law that must be urgently discussed and the choice of the group of experts—and believed that, with regard to the Central European Professors' Network, these two aims had been successfully achieved.

After the conference opening and the welcoming speech on behalf of the Polish Ministry of Justice, the conference participants listened to the welcoming speech on behalf of the Central European Academy by *Dr Katarzyna Zombory*, its Director. Dr Zombory thanked the experts for the mutual work on the project. The main goal of the Central European Academy is to create an academic network of legal experts who represent young perspective of research, and the conference is about the right to privacy and the assumptions and challenges of this right in the digital age.

The next speaker of the event was *Professor János Ede Szilágyi*, who thanked the previous speakers and introduced the Central European Junior Programme, which focuses on junior research and has important links to the senior program. This project has four potential links among this centered communities: PhD students/CEA Interns, PhD supervisors, PhD course books, and institutional cooperation. The professor exhaustively described each of the elements of this program, in which students can, for example, actively organize and attend international conferences and other scientific events. It is also an outstanding opportunity for

doctoral students as it provides insights into research and publication processes across various themes of comparative law.

After Professor Szilágyi's presentation of the Central European Junior Programme, *Dr Grzegorz Ocieczek*, who is an advisor to the State Prosecutor, Assistant Professor at the Department of Criminal Proceedings of the Faculty of Law, and Administration of Cardinal Stefan Wyszyński University in Warsaw, made a special guest appearance. In his speech, entitled 'Analysis of the institution of a crown witness in the context of the right to privacy,' he analyzed this institution as a starting point for further discussion on the issues among crown witness and right to privacy. Dr Ocieczek referred to the effect he achieved on the institution of a crown witness thanks to his research, pointing out the distinction between small and large crown witnesses in the Polish legislation. He described the right to privacy in the case of crown witness in light of interviews in criminal proceedings but also in light of the reasons why the defendant decides to become a crown witness, and indicated about six reasons that may influence one's decision. One of them is a family situation, and another one is a polish crown witness protection program. Then, Dr Ocieczek described the cooperation of crown witness in view of the right to privacy. Thanks to his research, Dr Grzegorz Ocieczek published his own scientific publication entitled 'Crown witness. Assessment of credibility,' where he expands on the topic of his lecture.

During the conference, the participants had the opportunity to listen to *Professor Vanja-Ivan Savić* from the University of Zagreb, Croatia, whose presentation was entitled 'Whom do the Privacy Laws Protect? – Concepts and Developments.' Professor Savić devoted the speech to a consideration of the subjective scope of the right to privacy provisions, and in addition, he spoke about the current concepts and the development of this institution. He considered whether it is possible to speak of a corporation's privacy and right to privacy, the latter of which is a current problem because of the popularity of social media, where everyone posts every aspect of their lives. For this reason, it is necessary to think about whom the privacy laws protect and if it is possible to execute this right in the twenty-first century. In his lecture, Savić asked the question of what values in the right to privacy area are currently protected by society; these seem to be security, individual liberty, and privacy. To sum up his speech, Professor Savić referred to the historical process of change in the right to privacy in societies where community was a major value to the individual and their rights.

Professor Koltay András from the University of Public Service and the Pázmány Péter Catholic University was the next speaker at the international scientific conference 'The Right to Privacy in the Digital Age – in general terms.' He presented the protection of the private sphere in Hungary and freedom of expression, giving a view of the provisions that allow to protect the private sphere and freedom of expression in the country. His lecture was coordinated within the privacy of personal data and the protection of private information.

Another speaker at the conference was *Professor Matija Damjan* from the University of Ljubljana in Slovenia, who presented a speech entitled 'The protection of communication privacy of legal entities – Slovenian view.' The participants had the occasion to hear and learn about the communication privacy of legal entities in the Slovenian legal system, which was especially interesting in the light of previous—Hungarian—perspective. Professor Damjan explained how the protection of communication privacy is regulated in the constitutional provisions and how it is possible to use those provisions with legal entities. The issue Damjan was referring to is also divided into two sections: an inner circle and an outer circle of privacy. In the outer circle of privacy, free economic initiative is limited, and the state can establish the conditions for conducting economic activity to protect other constitutional values. On the other hand, the inner circle of privacy deals with the same conditions applied for the search of a natural person's home—an agency's decision does not suffice in the context of right to privacy.

After the Hungarian and Slovenian points of view, *Professor Marta Dragičević Prtenjača* from the University of Zagreb spoke about the right to privacy and its protection in Croatian contemporary criminal law, presenting general data, statistics, and her personal research effects about the right to privacy in criminal law but also about the increasing amount of convicted people. In Croatia, many acts regulate the privacy of a convicted person, and one of them is the Constitution of Croatia. Professor Marta Dragičević Prtenjača told the participants about the right to individual privacy in criminal law, which was a great addition to the previous speaker's presentation about legal entities. Thus, the participants had the opportunity to learn both sides of this right and to have an overview of the situation in two different legal systems. The most frequent criminal offence is the unlawful use of personal data but also the violation of the inviolability of home and business premises. In the end, Professor Dragičević Prtenjača called for caution when it comes to personal data and their protection; this is extremely important from a criminal point of view.

Professor Dušan Popović from the University of Belgrade spoke about privacy and data protection in Serbian law and highlighted the challenges in the digital environment attached to privacy and data protection. Collecting, keeping, and using personal data in Serbia is strictly regulated and protected. One of the issues raised by the presenter was the right to respect privacy and family life and the protection of correspondence. Every aspect of these rights was described based on legislative solutions in Serbia. Undoubtedly, the valuable addition was a concise presentation of the issue of the right to privacy in the context of civil and criminal law. Two areas that necessitate additional legislative and enforcement effort are that mass surveillance is not regulated by specific norms and the need to reinforce children's privacy protection mechanisms in the digital environment.

■ *2.2. Second Panel*

During the conference, the Director of the Institute of Justice, *Professor Marcin Wielec* from Cardinal Stefan Wyszyński University, also gave a speech about the implementation of the right to privacy in Polish criminal proceedings. He considered this topic in the example of the secret of confession and indicated that privacy has some features such as autonomy, self-existence, intimacy, and naturalness. He claimed that, at some point, the right to privacy in criminal law can be eliminated because criminal proceedings are a complicated mechanism in an implementation of *ius puniendi*—the state's law of punishment. Criminal proceedings are full of institutions that can violate the right to privacy. During the speech, Professor Wielec asked a question: 'where is right to privacy in criminal proceedings?' In this area, a specific balance must be found, and an appropriate example in the search for an answer to the question posed earlier is the characteristic of the institution of the secret of confession. The prohibition arising from the secret of confession helps to ensure the right to privacy in criminal proceedings. The speaker explained that the right to privacy relates to emotions, and the secret of confession is the best example of this because of the relationship and trust between confessor and penitent.

The conference was also an occasion to hear a lecture by *Professor David Sehnálek* from the University of Masaryk, whose speech was entitled 'Current Problems of the Right to Privacy in the Czech Republic.' The participants had the opportunity to learn about how the right to privacy is regulated in the Constitution of the Czech Republic. The problematic aspects in the Czech Republic legal system starts with the definition of the term 'privacy,' which was explained by Professor Sehnalek in detail during his lecture. Sehnalek also focused on personal data with regard to the criminal side of the right to privacy by appealing to the Code of Criminal Procedure. The most current aspect of the speech was about the right to privacy during the COVID-19 pandemic and the problems generated by this extraordinary situation.

Professor Katarína Šmigová from the Pan-European University in Bratislava was the next speaker, telling the participants about the challenges of the right to privacy in the digital age in the Slovak Republic. The professor drew attention to the very rapid digitalization of social life and the developments in cyberspace and cybersecurity in a broadcast sense. It clearly generated problems with provisions in Slovak Republic as same as in the other countries. An important aspect emphasized by Professor Smigova was that the problems with the right to privacy can be seen on various grounds—constitutional, civil, and on provisions referring to children and their protection. One of many aspects was unauthorized monitoring, for example, in the Labor Code —possibility of control of employees and means and forms of control. The main thesis of this speech was that the Slovak legislation is too slow and too outdated for this changing area of law.

The last speaker was *M.A. Bartłomiej Oręziak* from Cardinal Stefan Wyszyński University, who is also a Coordinator of the Center for Strategic Analyses of Institute of Justice. His presentation focused on the legal aspects of the right to privacy from perspective of the Republic of Poland. Mr. Oręziak had previously spoken about the cyberspace and its regulation; therefore, it was possible to compare the provisions and the problems generated by them. Participants were able to listen to the right to privacy in light of the Polish constitution. The speaker also stressed the role of the Polish Constitutional Tribunal, which stated that in one provision, two individual rights referred to the right to privacy. Constitutional relations are the most important to guarantee person's rights and freedoms, but the constitutional aspect was not the only aspect highlighted in this speech. The right to privacy may also be enforced and ensured under civil law provisions as it is one of the personal rights of human being. The speaker believed that civil provisions can be successfully applied in cyberspace conditions. He also noted the most urgent problems with applying these provisions, such as the anonymity of cyberspace users as it is hard to determine their personalities. The second significant problem is the difficulty in determining the applicable law related to the third problem: it is hard to determine the jurisdiction of a cyberspace user. After describing the constitutional and civil points of view, the speaker briefly mentioned the criminal law and administrative law aspects of the right to privacy in cyberspace.

■ *2.3. Closing remarks*

After both panels of the conference, the speakers were able to share their insights and ask each other about interesting issues in a wide-ranging discussion. After the first panel, the question arose of whether anyone in Poland can be a crown witness and in what kind of criminal offence someone can become a crown witness. The answer was held by a special guest, Dr. Grzegorz Ocieczek, who explained that the crown witness status can only be granted for offences committed as part of an organized criminal group. He also explained the cause of such a provision. Another question was about artificial intelligence and how robots collecting personal data can be trusted. The answer is that we cannot trust those who have our personal data with certainty, but we rely on the state, which must provide protection and security. When speaking about legal entities and collecting personal data, we do not know who exactly collects and stores those data: is it a manager or employee of the company? This is an important topic to consider in another research year and conference.

The last question was concerned with the court's position on whether DNA can be collected, stored, and used in a trial in the Czech Republic. Professor Sehnalek said that if the police carefully justifies the reasons for collecting it and using it in a proportional way in a restricted measure, DNA can be collected legally.

At the end of the international scientific conference 'The right to Privacy in the Digital Age – in general terms,' Professor Marcin Wielec, Director of the Institute of Justice, thanked all the participants for their participation in the meeting and in discussions.

3. About the Conference 'Content of the right to parental responsibility in the legal orders of Central and Eastern Europe – Selected Problems'

On June 2, 2022, an International Scientific Conference entitled 'Content of the right to parental responsibility in the legal orders of Central and Eastern Europe – Selected Problems' was organized in the Institute of Justice as part of the central European Professors' Network in cooperation of group of experts from seven countries: Czech Republic, Croatia, Poland, Hungary, Serbia, Slovakia, and Slovenia. The aim of this research project and conference (as a part of it) is a comprehensive, international scientific activity. The main research areas are parental responsibility, environmental protection, the protection of national symbols, and the right to privacy.

In the European legal culture, which is shaped based on Greek philosophy, Judeo-Christian religion, and Roman law, the concepts of family, parenthood, motherhood, and fatherhood are among the fundamental values that have been questioned in the last few decades. Therefore, there is a need for scientific reflection on one of the key aspects in this field, namely parental responsibility, in the legal systems of Central and Eastern European countries, based on a similar constitutional axiology. Selected problems were presented during the conference, such as the concept of parental authority and responsibility, constitutional axiology in the field of parental authority, protection of parental authority in the system of sources of law, the concept of a parent, the concept of a child, rights and obligations arising from parental authority, rights and obligations of parents, rights and obligations of a child in relation to parental authority, rules governing parental authority, special features resulting from the content of parental responsibility, parental authority and divorce, the status of a child not subject to parental authority, and *de lege ferenda* conclusions. The number of topics discussed by the speakers proves that the main area of the conference touched upon an extremely prominent issue from the point of view of private life but also from a legal perspective. Those are the most urgent problems that need to be researched and discussed.

The conference, with English as the working language, was attended by experts from the most important research centers in Central Europe, including *Professor Aleksandra Korać Graovac* from the University of Zagreb in Croatia; *Professor Lilla Garayová* from the Pan-European University in Bratislava; *Professor Aleksander Stępkowski*, judge in the Supreme Court of the Republic of Poland; *Professor*

Zdeňka Králíčková from the University of Brno in the Czech Republic; *Professor Marek Andrzejewski* from the Institute of Legal Sciences of the Polish Academy of Sciences in Poland; and many more excellent researchers. The Undersecretary of State Dr. Marcin Romanowski; the Head of the Ferenc Mádl Institute for Comparative Law, *Professor János Ede Szilágyi*; and the Director-General of the University of Miskolc – Central European Academy, *Dr. Katarzyna Zombory*, were also present that day.

■ *3.1. First Panel*

The Vice Director of the Institute of Justice, *Professor Paweł Sobczyk*, officially opened the event, starting his speech with some questions related to parental responsibility: who should be responsible for raising children? The parents, the school, the state, or NGOs? In answering these questions, he referred to the Christian—but not only—roots of Central European culture and to the values of family, motherhood, and fatherhood. This introduction was a good reflection of the topics that were then vividly discussed by the speakers.

After the opening of the conference, the participants had the pleasure of listening to the introduction lecture given by *Professor Aleksander Stępkowski*, judge in the Supreme Court of the Republic of Poland, who started his speech by stating that the very development of man is inherit to family life. The family is the basic structure of common good and a constitutional right. Although it can be said that the family is a fundamental, in modern society, it to be one of the most problematic structures. An important matter of this speech was about the Polish constitution, the provisions of which are designed to provide family protection; they also impose obligations on the state, which is responsible for this protection. This protection includes the issue of parental authority and parental autonomy.

During the conference, research results were also presented by *Professor Aleksandra Korać Graovac* from the University of Zagreb, who spoke about the content of the right to parental responsibility in Croatia. The professor described parental care and parental responsibility in light of the concept of these terms. In a lecture, the speaker touched upon the issue of foster parenthood, giving—among other things—the example of the court's actions *contra legem* in allowing the adoption of a child by homosexual couples. She also explained what the problem is with this matter: such a court judgement is incompatible with a legal act; thus, the Croatian legal system, which is in general a statutory law, has become partly a case law system. This is also a problem because it does not entail a decision made by a constitutional court, which is permissible by Croatian constitution. Beyond that, a significant part of the speech was about the best interest of a child and shared parental responsibility.

The next speaker, *Professor Zdeňka Králíčková* from the University of Brno, dealt with the same issues as previous speakers but focused on the regulation of parental responsibility in the Czech Republic. The professor presented the

historical aspect of terminology in family law and the concept of terms attached to parental authority. She also described and then compared parental responsibility and the institution attached to that based on legal provisions. An important topic of her speech was concerned with minor parents and parents with disorders. The considerations undertaken by the professor were summarized by presenting the jurisprudence of the Czech court.

The first panel of the event was an opportunity to listen to lectures about parental responsibility also from a Hungarian, Slovenian, and Slovakian point of view.

Professor Tímea Heinerné Barzó from the University of Miskolc addressed Hungarian regulations. The presentation covered topics such as a brief constitutional regulation of parental responsibility, the protection of parental authority, and legal assistance. The issue of alternate care was discussed in detail. Through the presentation of court decisions, the audience was able to understand the mechanism of ensuring the child's best interest under Hungarian legislation.

The content of the right to parental responsibility in Slovenia was a concern of *Professor Suzana Kraljić* from the University of Maribor, who spoke about Slovenian family law regulations starting with the historical aspect of Yugoslavia. After the separation from Yugoslavia, Slovenia had to create new law that would regulate social law, including family law. The new Family Code was implemented in 2017. Speaking about the marriage situation in Slovenia, the professor noted that it is possible for same-sex couples to enter into a civil union, which is similar to marriage but with some differences such as adoption or in-vitro procedures. Much of the speech was therefore devoted to the historical development of the legislation and regulations establishing the rights of parents and children, as well as the development of some crucial terms such as 'child' or 'parenthood.'

The final speaker on the first panel of the conference was *Professor Lilla Garayová* from the Pan-European University in Bratislava, whose speech concerned the right to parental responsibility in Slovakia. The main source of family law in Slovakia is the Family Act from 2005, due to which it is possible to say that parental responsibility includes complex group of rights and obligations such as representation of the minor, care, or administration of the child's property. Both parents should exercise parental rights and responsibilities equally. Although constant care is inseparable from parental responsibility, the speaker points out that it is an undefined concept because no provision explains what can be understood by constant care. It is just a one of the issues attached to the right to paternal responsibility, and statutory law must therefore make use of judgments. It was also worth to note that differences exist in the representation of the child by the parents depending on the age of the minor. Until the child can decide for themselves, parental authority will continue to diminish year by year in this regard.

■ *3.2. Second Panel*

The second panel of the conference began with a speech of *Professor Gordana Kovaček Stanić,* whose lecture was entitled 'Exercise of the Parental Rights after Divorce: Best Interests of the Child.' The professor decided to talk about some issues related to parental responsibility but from a comparative point of view. The basis for consideration of the topic of the child's best interest was to characterize the institution of divorce and its impact on the relationship between parents and children. The professor noted that it is obvious for divorce to always cause changes in parents–children relationships and for some problems with parental responsibility and parental rights to arise after divorce. The lecture allowed the audience to compare the approach of the legislator and the jurisprudence to the issue of the child's best interest in divorce proceedings in various countries. In fact, many countries have decided to regulate this issue differently. The speech was complemented by reference to statistical data, which made it possible to see these regulations in practice.

Another topic that the participants and speakers had to deal with was parental authority and parental responsibility. This issue was discussed by *Professor Marek Andrzejewski* from the Institute of Legal Sciences of the Polish Academy of Sciences, who claimed that the debate between 'parental authority' and 'parental responsibility' is not only one about words. According to the professor, the issue of the concept of parental authority and parental responsibility is a particularly prominent one in the perception of parent–child relations in general. The very meaning of 'parental authority' as authority has negative associations and no positive connotations; it determines a relationship of dependence and places the parties to the relationship in an unequal position. The discourse on the renaming of this institution also raises the question of the origins of both names. The speaker thoroughly presented the democratic as well as authoritarian roots of each name.

The other perspective on parental responsibility was held by *Dr. Michał Poniatowski* from Cardinal Stefan Wyszyński University in Warsaw, whose speech was entitled 'Content of the Right to Parental Responsibility in the Case-law of the European Court of Human Rights.' His presentation was not about the legislation of a specific individual country but about the international view in judiciary of European Court of Human Rights. The speaker emphasized the role of the family as a value in society and pointed out that family rights are often linked to other rights and responsibilities. Because parental responsibility is a universal topic considered not only in Central Europe but on the other parts of the globe, it must be viewed from a wider perspective. In presenting the achievements of the European Court of Human Rights in the field in question, Dr. Poniatowski chose to distinguish several aspects, such as the axiological aspect, as subjective or objective. This division allowed for a detailed analysis of the issue, attempting to answer the research needs of this institution through the abovementioned wider

scope. In this way, it will be possible to benefit from the achievements of other countries or, conversely, to promote the achievements of their own country in the international arena. The European Court of Human Rights, when ruling on matters of parental responsibility, should also apply the division mentioned by the speaker, precisely because of the differences in the understanding of these institutions also on axiological ground. At the end of his speech, Dr. Poniatowski invited the audience to read more about this topic in his monograph, which is part of a publication.

The last speaker, Vice Director of Institute of Justice *Professor Paweł Sobczyk*, gave a speech about the constitutional foundations of protection and care for the family and parenting and he also spoke about their importance for parental responsibility. The speaker presented the axiological aspect of the protection of parenthood and maternity as well as marriage in the context of the Polish Constitution. Even though the family is protected under Polish law, and many regulations state this, the most urgent problem is the lack of a definition of the family; therefore, the problem arises of what should really be protected by the state. Beyond protection, the state should also care about parenthood, motherhood, and family. The fact the constitutional legislator made use of two different terms—protection and care—indicating the intention to establish the separation of tasks and to set the sphere of activities apart for different state bodies.. As a constitutional expert, the professor explained what can be understood by protection and care. The purpose of this protection and care is absolutely connected to the aim of the conference itself and the project in general.

■ *3.3. Closing remarks*

After both panels, a lively discussion was initiated, referring to the topics and issues raised by the speakers during the conference. Experts from various scientific centers expressed their support for the legislative changes proposed by speakers. During the discussion, Professor Andrzejewski's speech, which touched on the meaning of parental authority and parental responsibility, was widely commented upon. The experts expressed the opinion that parental authority does have a negative connotation, and proposed the term 'parental care.' This term is being used in Croatia and Slovenia and better describes this institution.

The discourse also moved beyond the European area to the American legal arena, discussing the perception in American law, by which a child committing a crime is considered the parents' failure and criminal responsibility.

At the end of the international scientific conference 'Content of the right to parental responsibility in the legal orders of Central and Eastern Europe – Selected Problems,' Professor Paweł Sobczyk, Vice Director of the Institute of Justice, thanked all conference participants for their participation in the meeting and in discussions. Special thanks were addressed to Dr. Katarzyna Zombory and Professor János Ede Szilágyi for the idea underlying this project and their cooperation

in organizing this event. The Vice Director expressed hope for further work on joint projects.

4. Summary

The two days of conference in Poland were only a prelude to the implementation of scientific research in selected areas of the science of law, which are research hotspots from the perspective of the challenges of a democratic state of law within the framework of the Central European Professors' Network.

The presented papers will serve to derive interesting conclusions, which will be a part of monographs containing ready-made legislative guidelines of selected areas for state governments, allowing to preserve sovereignty and integrity and, at the same time, fulfill the standard of a democratic legal state.

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