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Collection of Scientific Papers of the Polish-Hungarian Research Platform

VOLUME II

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Omne Ius Constitutum Sit

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Preface

We take immense pride in presenting the second volume of the Collection of Scientific Papers from the Polish-Hungarian Research Platform. In our rapidly advancing, technology-driven society, the legal landscape continually evolves to meet the demands of modern social and legal dynamics. The Institute of Justice in Warsaw is pleased to offer this compilation of academic papers from the 2023 Polish-Hungarian Research Platform, an international initiative delving into crucial issues in contemporary legal scholarship.

This project unites a network of dedicated researchers committed to exploring and comprehending various critical topics, including the Legal Protection of Farmers, Legal Protection of Children with Disabilities, The Conscience Clause of Entrepreneurs, and Cybercrime.

The multifaceted nature of this endeavour is evident in its overarching objectives. Our aim was to conduct thorough research and engage in activities that advance four primary areas:

I. Legal protection of farmers, where the aim was to propose a relevant legal framework for more effective protection of farmers in the context of the current threats resulting from the functioning of society (criminal law, civil law, administrative law).
II. Legal protection of children with disabilities, where the aim was to propose a relevant legal framework for a more effective protection of children with disabilities in the context of the current

threats resulting from the functioning of society (criminal law, civil law, administrative law).

III. Freedom of conscience in the institutional aspect, where the aim was to propose a relevant legal framework for the application of the freedom of conscience in the institutional aspect for practical use (criminal law, civil law, administrative law, public and private international law).

IV. Cybercrime, where the aim was to propose new or improving current solutions that increase the effectiveness of combatting cybercrimes.

Just as in the previous year, our research transcends academic boundaries; we endeavour to bridge the gap between theory and practice, ultimately influencing legal developments. As a result, the outcomes of this project will not only enrich the theoretical foundations of law but also contribute to practical applications, providing recommendations for legislative improvements to Polish lawmakers.

The Institute of Justice in Warsaw is honored to present this monograph, featuring a collection of scholarly papers authored by our research teams. This compilation underscores the dedication and collaborative efforts of all the researchers involved. We believe that the insights shared within this volume will inspire meaningful discussions and serve as an invaluable resource for academics, policymakers, and legal professionals alike. Our hope is that the proposed legal frameworks presented here will pave the way for a more equitable, technologically advanced, and empathetic legal system.

Marcin Wielec
Paweł Sobczyk
Bartłomiej Oręziak

PART I

LEGAL PROTECTION OF FARMERS

PROF. DR HAB. RAFAŁ ADAMUS
University of Opole | DOI: 10.32041/9788367149716/1

Preventing Bankruptcy in Poland – Financial Restructuring of Farmers Who Are Natural Persons in Insolvency Proceedings *De Lege Ferenda*

I. Introduction

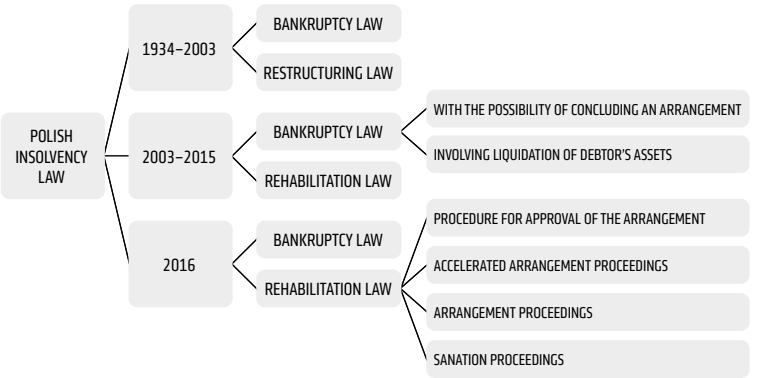
It is a common commercial risk that an agricultural producer (a farmer), acting on the free market (however under some kind of the supervision of the State), may become insolvent. The relatively large size of individual agricultural production in Poland, conducted by one producer, entails proportionately large risks. It is about the appropriate scale: on an individual level, the loss per tonne of crops or animal meat reared is objectively not large. However, if the amount of this loss is multiplied by a significant number of tonnes or livestock populations and by the number of unsuccessful cycles, it may very fast generate deep insolvency.

In the present Polish legal system, the treatment of the insolvent debtor takes place on many legal levels.[1] In general, separate restructuring and bankruptcy procedures should be indicated (in the years 2003–2015 bankruptcy proceedings had two different types: bankruptcy with the possibility of the conclusion of an arrangement and bankruptcy involving the liquidation of the debtor's estate). There are two basic regulations in Poland concerning insolvency: the Act of 28 February 2003 Bankruptcy Law, and the Act of 15 May 2015 Restructuring Law. Restructuring procedures are aimed at

[1] R. Adamus, *Polish Bankruptcy and Restructuring Law for Entrepreneurs and Consumers*, "Studia i Monografie" 2021, No. 604, pp. 1–198.

avoiding bankruptcy[2] and enabling the debtor to continue their activities thanks to the legal instrument for restructuring liabilities, Restructuring in Poland is divided into (1) preventive restructuring ("restrukturyzacja zapobiegawcza") and (2) sanation restructuring ("restrukturyzacja sanacyjna"). Sanation proceedings are excluded from harmonisation with European Union law; however, there are many common institutions for all sorts of proceedings which are directly linked with European directives. Preventive restructuring is a bundle of three separate procedures available in the Polish legal system: (a) procedure for the approval of an arrangement ("postępowanie o zatwierdzenie układu"), (b) accelerated arrangement proceedings ("przyspieszone postępowanie układowe"), (c) arrangement proceedings ("postępowanie układowe"). Sanation ("postępowanie sanacyjne") is a procedure that combines elements characteristic of the arrangement and of the bankruptcy proceedings involving liquidation of the estate. A debtor who is threatened by insolvency could start restructuring proceedings.

Figure 1. The historical development of Polish insolvency law



Source: author's own preparation.

An individual farmer who is a natural person has a restructuring capacity, which means that he can make an arrangement with

[2] R. Adamus, *Liquidation of the bankruptcy estate in Poland*, "Bratislava Law Review" 2020, Vol. 4, No. 1, pp. 115–135.

creditors in any of the available proceedings. In such a way he could obtain a restructuring of liabilities. Bankruptcy is a very far-reaching means of law and deeply affects the legal situation of the debtor who becomes bankrupt. In Poland an individual farmer who is a natural person has bankruptcy capacity only in consumer bankruptcy.

This paper is exclusively about *de lege ferenda* issues. The World is changing rapidly and so does the law.[3] However, changes in the law are still made in the traditional manner.[4] The chosen research area is of key importance in view of the serious risk of insolvency in connection with agricultural production.

Here are the following basic levels of my present research:

1. It is necessary to look at the existing regulation of insolvency law. It should be noticed that insolvency cases are handled by an ICT system – the National Register of Debtors ("Krajowy Rejestr Zadłużonych"). This means that legislative changes require adapting the functionality of the IT tool. Implementing changes in law to an ICT system, in practice, takes a lot of time. On this level will be presented an idea of a quick simplification and facilitation of existing insolvency proceedings. These proposals will be for a short-time implementation.
2. Presented also will be the idea of special debt relief proceedings for estate-less farmers whose agricultural holdings have been sold out in the enforcement proceedings.
3. Further proposals require profound discussion. They are for a long-time, careful implementation.
4. As the next step, the concept of separate insolvency proceedings for farmers will be presented. It would be appropriate to point out the characteristics of proceedings involving farmers in order to assess the legitimacy of this postulate.
5. The influx of new cases (mainly motions for bankruptcy proceedings) to the system of justice in Poland will certainly force

[3] S. Muller, S. Zouridis, M. Frishman, L. Kistemaker (eds.), *The Law of the Future and the Future of Law*: *Volume II*, https://www.legal-tools.org/doc/7f92c6/pdf (accessed on: 05.04.2024).

[4] D. Szostek, *Is the Traditional Method of Regulation (the Legislative Act) Sufficient to Regulate Artificial Intelligence, or Should It Also Be Regulated by an Algorithmic Code?*, "Białostockie Studia Prawnicze" 2021, Vol. 26, No. 3.

a discussion on changing the philosophy of proceedings.[5] Proceedings should be widely automated (thanks to the use of artificial intelligence), and the bankruptcy court should take action only in the event of an objection from the participants of the proceedings: the debtor or any of his creditors.

6. The need for a model of "collective restructuring of farmers" is also deeply considered. In this respect it is not only a matter of the change of the philosophy of proceedings. It is also about fundamental change in the basic foundations of the insolvency.
7. Finally, the idea of protection of farmers personal/private assets serving for family needs will be presented.

With reference to the above presented research plan, the initial research assumptions are as follows:

1. The prospect of implementing changes in insolvency law in order to protect farmers should be considered in the short- and long-term.
2. The following proposals for changes in the insolvency law should be seriously discussed. However, in some points, there is only a recommendation for changes in the budget for a special activity.
3. It should be borne in mind that changes in insolvency law may relate exclusively and directly to agricultural producers or may affect all entities with the ability to participate in the insolvency proceedings.
4. For the proposals of amending the law in the short-term, the following research assumptions can be indicated. As a rule of insolvency proceedings are available to farmers who are natural persons. This applies to all restructuring proceedings and the so-called "consumer bankruptcy" (separate proceedings for natural persons non conducting commercial activity). Restructuring the liabilities of individual farmers: (a) will bring greater benefits to the state economy and the debtors concerned than conducting

[5] R. Adamus, *What are the challenges to the insolvency law in the 21st century?*, "Societas et Iurisprudentia" 2021, Vol. 9, Issue 3, pp. 99–117; A. Gurrea-Martínez, *The future of insolvency law in a post-pandemic world*, "International Insolvency Review" 2022, Vol. 31, Issue 3; A. Gurrea-Martínez, *The future of reorganization of procedures in the era of pre-insolvency law*, "Research Collection School of Law. Ibero-American Institute for Law and Finance Working Paper Series" 2018, No. 6.

enforcement proceedings;[6] (b) enforcement proceedings generate relatively high costs; (c) foreclosure sales are usually carried out below market value; (d) creditors who first file enforcement applications usually having the best chance of satisfying requirements.

Consequently, the widest possible use of the structure of restructuring proceedings is needed. For this purpose, the following circumstances may be helpful:

i. Simplification of formal requirements for farmers who are natural persons.
ii. Informing interested farmers about the benefits of restructuring liabilities through appropriately organised, cyclical advertising campaigns.
iii. Reducing the burden on a farmer who is a natural person to bear the costs of proceedings.
iv. Introduction of potential legal regulations in order to facilitate the restructuring of farmers: 1) strengthening the protection of the debtor at the stage of the implementation of arrangement through the possibility of unilaterally suspending exercising the arrangement; 2) simplification of the change of the arrangement; 3) introduction of "default" arrangement proposals.
v. If the State Treasury policy is aimed at preventing the liquidation of family farms, then in the event of the farmer's bankruptcy, there should be introduced special legal instruments

[6] Effectiveness of bankruptcy proceedings in Poland, from the creditor's point of view is very poor: E. Mączyńska, *Wierzytelności – fundamentalna kwestia ekonomiczna i prawna*, "Biuletyn Polskiego Towarzystwa Ekonomicznego" 2017, No. 2, p. 9; P. Staszkiewicz, S. Morawska, *Ocena poziomu rzeczywistej ochrony praw wierzycieli w Polsce w latach 2004–2012 – koszty transakcyjne dochodzenia praw z umów*, "Biuletyn Polskiego Towarzystwa Ekonomicznego" 2017, No. 2, p. 19; K. Flaga-Gieruszyńska, *Prawo upadłościowe i naprawcze*, Warszawa 2009, p. 18; W. Głodowski, *Pozycja prawna wierzyciela w postępowaniu upadłościowym*, Poznań 2002, p. 15; P. Janda: *Zaspokojenie roszczeń wierzycieli jako cel postępowania upadłościowego*, "Państwo i Prawo" 2005, No. 10, p. 63; J. Kruczalak-Jankowska, *Ogłoszenie upadłości. Skutki dotyczące zobowiązań w krajowym i transgranicznym postępowaniu upadłościowym*, Warszawa 2010, pp. 20–21; M. Pannert, *Cele prawa upadłościowego i naprawczego*, "Radca Prawny" 2008, No. 6, p. 54; F. Zedler, *Prawo upadłościowe i naprawcze w zarysie*, Kraków 2004, p. 44.

to "convert" the status of a farmer-owner into the status of a tenant-farmer.

vi. The use of out-of-court procedures for restructuring liabilities.

5. The idea of debt relief for a natural person running a farm whose entire property has been seized and auctioned off in enforcement proceedings should be considered.
6. Next, the long-term perspective of change should be discussed. An in-depth discussion requires the sense of creating a separate procedure with the participation of natural persons conducting agricultural activity. There should be no doubt that this issue is worthy of proper debate.
7. It should be assumed that an increase in the number of cases before bankruptcy and restructuring courts may slow down the hearing of cases. It is necessary to discuss the change of philosophy of conducting insolvency proceedings. Firstly, it should focus on automating procedures and shifting non-contentious stages of the procedure to their shaping by IT tools. Secondly, judicial intervention must take place in the case of contentious issues, as a result of the "objection" of the debtor or a creditor.
8. In the event of major crises of a structural nature, traditional methods of restructuring may not be sufficient. The research assumption is the possibility of introducing the new formula "many debtors–one or many creditors".

Figure 2. The "roadmap" of the research

STAGE	SHORT-TERM AMENDMENTS	LONG-TERM AMENDMENTS
Preventing	➢ Informing farmers about insolvency tools ➢ Early warning against insolvency ➢ Creating a simplified family foundation ➢ Use of out-of-court proceedings	
Threat of insolvency		
Insolvency		

STAGE	SHORT-TERM AMENDMENTS	LONG-TERM AMENDMENTS
Motion for insolvency	➢ Simplification of formal requirements for farmers	➢ Separate proceedings for farmers ➢ Accelerating insolvency proceedings ➢ The leading rule: insolvency proceedings for many debtors at a time
Proceedings	➢ Reducing the costs of proceedings for farmers ➢ Facilities for farmers in concluding the arrangement ➢ Introducing separate proceeding for farmers ➢ Converting the status of the agricultural producer from the owner to the tenant	
The end of proceedings		
Performing the arrangement	➢ Possibility of suspending performing the arrangement in a definite period of time ➢ Simplification of the procedure for the change of the arrangement	

Source: author's own preparation.

II. Legal protection of agricultural producers against the insolvency of the "buyer" *de lege lata* – the newest Polish legislation

The legislator in Poland provides for a special legal structure allowing for the protection of an agricultural producer against the effects of the insolvency of his contractor. The Act of 9 May 2023 on the Agricultural Protection Fund provides that the Fund's financial resources are to grant and pay compensation to an agricultural producer who has not received payment for agricultural products sold to a purchaser who has become insolvent (Article 10(1) of the Fund Act).

The purchaser who has become insolvent, the receiver or other person managing the assets of this entity, within 2 months from the date of insolvency, shall draw up and submit to the Director General of the National Centre in an electronic version a list of agricultural producers whose claims against this entity for the sale of agricultural products arose before the date of insolvency of this

entity, including the amounts of net receivables for agricultural products sold to this entity, the name and surname of the creditor or his name and other data (Article 11 paragraph 1 of the Act on the Fund). If the claims of agricultural producers for the sale of agricultural products arose after the date of insolvency of the purchaser, this entity, receiver or other person managing the assets of this entity shall draw up and submit to the Director General of the National Centre, within 2 months from the expiry of the period provided for submitting claims pursuant to the provisions of the Act of 28 February 2003 – Bankruptcy Law, an additional list of agricultural producers who have not received payment for the agricultural products disposed of, including the amounts of net claims for the agricultural products sold and the name and surname of the creditor (Article 11(2) of the Fund Act).

The compensation shall be granted at the request of an agricultural producer, by way of an administrative decision, by the director of the local branch of the National Centre competent for the place of residence or registered office of that agricultural producer, by 30 June of the year concerned. The issuance of this decision interrupts the limitation period for claims (Article 12(1) of the Act on the Fund).

On the date of payment of compensation, the agricultural producer's claims are transferred to the National Centre of receivables up to the amount of compensation paid (Article 13 paragraph 1 of the Act on the Fund).

III. Simplification and facilitation of existing rules

III.1. PROPOSALS *DE LEGE FERENDA* OF THE SIMPLIFICATION AND FACILITATION OF EXISTING INSOLVENCY PROCEEDINGS

III.1.1. *Location of adjustment*

It is possible to introduce recommended amendments of the rules on favouring farmers who are natural persons into the legal system a) by direct amendment of the Restructuring Law or Bankruptcy

Law, and b) in a separate act regulating special rights for farmers. In the face of the diversity of proposals, both methods are available for the legislator.

III.1.2. *Early warning against insolvency*

The Restructuring Directive rightly places great emphasis on early warning of debtors' insolvency.[7] According to recital 22 in the preamble to the Directive, which indicates the circumstances which guided the Community legislature in determining the text of the act, "the sooner debtors are able to detect their financial difficulties and react accordingly, the more likely they are to avoid impending insolvency or, in the case of undertakings that have permanently ceased to be viable, the more orderly and effective their liquidation will be". The achievements of science and technology have created many tools (including artificial intelligence) thanks to which it is possible to predict the risk of insolvency in an increasingly effective and accessible way. Meanwhile, the sooner appropriate remedial measures are taken, the greater the chance of avoiding bankruptcy of the debtor.

Recital 22 further states that "in order to encourage early action by debtors who start to experience financial difficulties, clear, timely, concise and user-friendly information on available preventive restructuring procedures and one or more early warning tools should be provided". The Restructuring Directive assumes that a Member State of the European Union should, firstly, assist in the early diagnosis of insolvency risks and, secondly, provide legal remedies to debtors for early restructuring. Thirdly, the State should inform potential interested parties about the restructuring measures available (permanent information campaign). The early

[7] G. Balp, *Early Warning Tools at the Crossroads of Insolvency Law and Company Law*, "Bocconi Legal Studies Research Paper" 2018, No. 3010300, https://ssrn.com/abstract=3010300 (accessed on: 05.04.2024); R. Adamus, *Early warning on insolvency in the European Union Law*, "Sociopolitical Sciences" 2020, Vol. 10, No. 5, pp. 89–94.

warning tools – due to different economic profiles of entrepreneurs – can be diverse.

At the same time, it goes on to state that "the Directive should not impose any liability on Member States for any damage suffered in connection with restructuring procedures initiated by (…) early warning tools." On the other hand, the State is responsible – in general terms – for the consequences of the non-implementation of the Restructuring Directive. Early warning tools should be popularised among farmers.

III.1.3. *Limitation of formal requirements in case of a farmer's motion*

Restructuring proceedings demand a lot of formal requirements. Applications submitted in restructuring and bankruptcy proceedings are among the most complicated in the Polish civil procedures. However, farmers who are natural persons have simplified and reduced bookkeeping. They collect much less financial data than entrepreneurs. The legislator accepted the postulate of simplifying restructuring procedures. There are some crucial examples. The preliminary restructuring plan also includes the debtor's financial statements as of the thirty days prior to the date of submission of the application. If the debtor cannot attach the report, he gives the reasons for not attaching the report (Article 9(2) and (3) of the Restructuring Law). A restructuring plan may be limited if, due to the size or nature of the debtor's enterprise, it is not possible or not necessary to determine all the information listed in the law in order to assess the feasibility of the arrangement. The limitation of a restructuring plan requires justification (Article 10(2) of the Restructuring Law).

A number of procedural simplifications have been included in the draft act amending the Restructuring Law, the main objective of which is to implement Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, on preventive restructuring frameworks, the discharge of debt and disqualifications, and on measures to increase the efficiency of procedures

regarding restructuring, insolvency and discharge of debt, as well as amending the Directive (EU) 2017/1132 (Restructuring and Insolvency Directive). The bill is currently awaiting the closure of the legislative path.

III.1.4. *Facilities for a farmer in concluding an arrangement*

The legislator could make concluding an arrangement with creditors easier for a farmer who is a natural person. Some arrangement proposals could be biding automatically. If the arrangement proposals for a farmer who is a natural person do not stipulate otherwise:

a) all the costs of proceedings, costs of enforcements, including lawyer's fee,
b) all the interests due to not fulfilling the financial obligation in time

could be fully terminated.

Currently, farmers have a certain privilege in the area of restructuring. It is worth noting that currently, Article 161(1)(2) of the Restructuring Law provides that "arrangement proposals may provide for the division of creditors into classes covering particular categories of interests, in particular farmers who are entitled to claims under contracts for the supply of products from their own farms".

III.1.5. *Granting a farmer-natural debtor the right to unilaterally suspend the fulfilment of the arrangement in force*

Very often it happens that after the conclusion of the arrangement by the farmer, a situation occurs that prevents him from performing the arrangement. It is often transient and takes less time than the expected time needed for the arrangement change procedure. *De lege ferenda* farmers who are natural persons could unilaterally suspend the fulfilment of the arrangement with creditors under the basis of law (amended Restructuring law). Such a statement should be made in writing with a definite date. The debtor would be obliged to notify (a) the restructuring court, (b) the supervisor of the

arrangement implementation, if any, and (c) the arrangement creditors who have outstanding arrangement claims. In the declaration, the farmer who is a natural person should indicate the reason for preventing the implementation of the arrangement. The suspension of the implementation of the arrangement should be granted for a specified period of time (three months). It should be unacceptable to repeat it. Failure to implement the agreement during its suspension could not be grounds for repealing the agreement. The time of the suspension of the fulfilment of the arrangement should be automatically extended by the period of its suspension.

III.1.6. *Simplification of the change of the arrangement rules for a farmer*

Notwithstanding the power to unilaterally suspend the implementation of the Arrangement, consideration should be given to the possibility of simplifying the procedure for amending it. In addition, it would be possible to apply lighter criteria for the adoption of the amendment to the arrangement.

The farmer, if the conditions for changing the arrangement are met, could announce the content of the changes to the arrangement. Within a certain period of time, creditors whose claims would not be paid could lodge objections. If the creditors' objections exceeded, for example, 1/3rd of all outstanding claims, then the change would not be effective. Approval of the change in the content of the agreement would take place at the end of a certain period of time, automatically. Court intervention would only be needed if an objection was lodged by the creditor.

In the case of a creditor's application to repeal the arrangement concluded by the farmer, a regulation should be introduced that the restructuring court should examine *ex officio* whether it would not be economically better to change the arrangement.

III.1.7. *Reducing the costs of restructuring proceedings for a farmer*

Another issue is the problem of the costs of restructuring proceedings. In many cases restructuring proceedings are too expensive for farmers who are natural persons. In this respect the need for the introduction of special salary limits for restructuring advisers in matters of farmers who are natural persons should be discussed. In order to encourage farmers to use the restructuring proceedings State Treasury support in financing the costs (all of them or just a part of them) of restructuring farmers could be proposed.

III.1.8. *Acquisition of an agricultural holding from a bankrupt farmer and its subsequent lease*

The following solution can be recommended on the level of bankruptcy proceedings. In the case of the declaration of the consumer bankruptcy of a farmer who is a natural person, or in the case of sanation proceedings of a farmer who is a natural person, the use of the following legal structure should be possible. Within the limits of the annual limit set by the state budget, the State Treasury should be able purchase the debtor's agricultural holding (or a part of it) under the rules of the so-called enforcement sale. The acquisition would be free from any encumbrances on the basis of so-called foreclosure sales. Subsequently, the State Treasury would lease to the farmer the acquired agricultural holding, for a fixed period, for a fixed rent, with the right of the pre-emption of that holding. The sale of a farmer's agricultural holding who is a natural person, in bankruptcy proceedings or in sanation proceedings should be possible only if the State Treasury refused to purchase the farm.

In the case of a former owner's declaration of the acceptance of a lease of the agricultural holding, in addition: (a) a farmer who is a natural person should be exempt from paying rent for six months, (b) a farmer who is a natural person should receive an appropriate amount for sowing from the selling price.

Such a regulation would allow to maintain the existence of an agricultural holding, but with a different ownership structure

III.2. THE ROLE OF THE EDUCATIONAL ACTION TOWARDS FARMERS IN THE FIELD OF ACCESS TO RESTRUCTURING PROCEDURES

The present Polish insolvency law is at a good substantive level. The National Register of Debtors is an IT tool that is intended to affect the speed of intervention processes and increase their transparency. The practical problem may be a large influx of cases to the bankruptcy court – which is primarily due to this statistic of new cases in the field of consumer bankruptcy. In such a situation quick handling of these cases by the justice system will not be possible. However, in many, if not in most cases, restructuring the debtor running a farm is a better solution than enforcement proceedings. Enforcement proceedings impose significant costs on farmers, depriving them of production competences in connection with the enforcement of the means of production. For this reason, the popularisation of the institution of restructuring proceedings, which brings such facilities as a moratorium on the performance of obligations, provides temporary immunity from enforcement proceedings etc.

The information campaign should be carried out by the State agricultural administration ("Krajowy Ośrodek Wsparcia Rolnictwa"), the local governments of agricultural municipalities, foundations acting to protect farmers, and their agricultural organisations. In this case, changes in the law mainly require budgeting specific funds to finance an educational campaign.

III.3. POSSIBILITY OF USING THE OUT-OF-COURT RESTRUCTURING TOOL

In addition to judicial restructuring, out-of-court restructuring is also possible.[8] The farmer could make an agreement with the creditors on the basis of a multilateral settlement between him and his creditors (all or some of them). Organising this type of activity

[8] A.J. Witosz, D. Benduch, *Restrukturyzacja pozasądowa*, "Ruch Prawniczy, Społeczny i Ekonomiczny" 2022, Vol. 84, No. 1, p. 51.

would be possible at the local branches of the state agricultural administration. The agricultural administration could commission persons who are licensed restructuring advisers to help farmers in such cases (part of the remuneration should be conditional on the success of the agreement). A licensed restructuring advisor could (1) prepare a draft settlement, (2) advise on the principles on which the settlement would be concluded, (3) support the farmer in talks with creditors, and (4) prepare an opinion on the possibility of implementing the settlement.

The disadvantage of such a solution is: no moratorium on the performance of obligations; lack of immunity from enforcement proceedings; the consent of all interested partners is needed, not just a majority of them.

Changes in the law would require: budgeting adequate funds for this purpose, and amendment of the tax law. In the latter case, it would have to be established that the write-off of liabilities under the settlement does not constitute taxable income.

IV. Debt relief of farmers in the event of the enforcement sale of the farm

IV.1. PROPOSAL *DE LEGE FERENDA*

The need for a legislative solution should be considered. In a situation where the bailiff carries out enforcement and the debtor's connections from the farm have not yet been satisfied, introducing an additional procedure before the civil court for the cancellation of liabilities remaining after the enforcement sale of the farm should be considered. Because in practice the Bailiff sells less than the farm as a whole, its fragments in court proceedings should be examined:

1. whether there has been an execution sale of the entire farm,
2. whether there are outstanding receivables.

If the above questions are answered positively, the civil court could cancel the uncovered liabilities.

In other words, this is about introducing the institution of debt relief known to bankruptcy law.[9] The new law should apply to cases of enforcement proceedings that were completed before the entry into force of such a law.

Nowadays, the debt relief of a bankrupt who is a natural person can take place using very different mechanisms. A debt relief of an insolvent debtor may take place by a final court decision or by virtue of an arrangement concluded between the bankrupt party and at least an appropriate majority of its creditors, validly approved by the court (Articles 491^{22} and 491^{25} – 491^{38} of the Bankruptcy Act).[10] It should be remembered that the meaning of debt relief is built on the following assumption: the creditor has previously failed to obtain satisfaction from the debtor's assets either voluntarily or using state coercion.

IV.2. THE RIGHT TO PROPERTY AND ITS LIMITATION BY STATE COERCION

The creditor is the owner of his claim: he may realise it (including set-off), may remain idle, may dispose of it or encumber it, may – with the debtor's consent – waive it or renew it (novation). Defining the essence of the right to property and its protection is one of the pillars of civil law. Property is subject to legal-constitutional, international law, legal and European protection as well as statutory protection. Property protection is not absolute. In some situations, the right to

[9] R. Adamus, "*Humanitarian reasons" in the debt relief of natural persons in the contemporary Polish insolvency law in the light of Judeo-Christian tradition and philosophy*, "Iranian Journal of International and Comparative Law" 2022, No. 1; R. Adamus, *Amended consumer bankruptcy in Poland*, "Societas et Iurisprudentia" 2020, Vol. 8, No. 1; R. Adamus, *Debt relief thorough creditors' repayment plan in Poland*, "Economic Problems and Legal Practice" 2019, No. 6, pp. 130–136; R. Adamus, *Modes of debt relief for consumers in Poland*, "Economic Problems and Legal Practice" 2019, No. 6, pp. 137–142; R. Adamus, *Importance of payment morality in the Polish bankruptcy law*, "Journal of Business Law and Ethics" 2019, Vol. 7, No. 1 & 2, pp. 9–15.

[10] R. Adamus, *Consumer arrangement under Bankruptcy Law Act in Poland*, "Sociopolitical Sciences" 2019, No. 6, pp. 76–81.

property may be limited to the realisation of axiologically stronger values than the protection of the individual right of property.

This opens up a legal possibility for the debt relief and restructuring of natural persons, in particular in those cases where the debtor's assets cashed in by the trustee in bankruptcy proceedings were not sufficient to fully cover all the liabilities. In principle, there is a consensus that statutory debt relief (which is a type of state coercion) is a sufficiently justified circumstance justifying interference with the creditor's right to property. It appears to be based on the following arguments: at the time of redemption, the claim against the bankrupt person/entity is in principle economically worthless; the debtor fulfils (at least minimally) the criteria of payment morality; the claim has passed through the stage of compulsory recovery, which proved to be ineffective; debt relief "does not fall from the sky" but requires the debtor's involvement in appropriate proceedings, which performs preventive and educational functions as well as debt collection; debt relief is also carried out in the general public interest; insolvency – in the face of the construction of an economic system based on debt – is a common (mass) phenomenon. *Last but not least*, the principle of humanity speaks for debt relief. Long-term dependence on creditors is a kind of modern economic slavery.

It should be argued that the authority of the right to property is one of the factors against the complete abolition of the census of the debtor's payment morality in order to allow debt relief. In addition, debt relief is preceded by the liquidation of the debtor's assets in bankruptcy proceedings and the implementation of a repayment plan (under certain rules, however, debt relief is possible even if there are no liquidable debtor's assets and without a repayment plan being established).

V. The concept of separate insolvency proceedings for farmers

In the Polish legal system, there are (1) the main proceedings and (2) separate proceedings. *Post mortem* bankruptcy proceedings, separate insolvency proceedings in relation to developers, or bond

issuers, banks, financial institutions, insurance companies, and consumers may all be mentioned here. The question is: whether there should be proposed new separate proceedings in relation to natural persons running a farm?

A characteristic feature of insolvent farmers is the desire to preserve their production base, which is the farm. And at the same time, after unsuccessful production cycles, which are caused in most cases by circumstances beyond the control of farmers, there are periods of prosperity which usually allow to generate profits.

Separate insolvency proceedings for farmers who are not natural persons should in particular:

1. lead to determining whether, after the restructuring of liabilities, they are realistically repayable by the farmer;
2. lead to securing the integrity of the agricultural holding;
3. lead to determining whether it is possible to restructure the ownership of the agricultural land, for example by separating its fragment for sale to the satisfaction of creditors;
4. introduce a simplified instrument of rapid rescheduling of an arrangement in the event of repeated seasonal difficulties;
5. introduce new restructuring instruments, such as the transfer of ownership to secure future farm profits to creditors.

It can be argued that there are reasonable grounds for developing a separate insolvency procedure for farmers who are natural persons.

VI. Strategic changes in the philosophy of conducting insolvency proceedings (general proposal)

VI.1. GENERAL REMARKS

The hereby presented proposal *de lege ferenda* is general. Agricultural producers could be just one of many groups of market participants who could take advantage of it. The rapid progressive influx of consumer bankruptcy cases to bankruptcy courts is a real threat to the efficiency of the justice system and therefore the strategic question arises about the need for a general systemic solution, however concerning insolvent farmers as well. The possible problems of efficiency

in the judiciary system could be easily dissolved in the following manner: a) by using artificial intelligence, b) by re-building the system and introducing new fundamental grounds: the "acceptance and negation rule". In short, the "acceptance and negation rule" can be presented as follows. As long as any of creditors does not object to any action in insolvency proceedings concerning the debtor who is a farmer and a natural person, the proceedings should flexibly go on (of course the scope of application of this rule could be much wider). The proceedings should move forward as automatically as possible and in a simplified, objectified manner. Court intervention should be triggered and the proceedings only after the debtor's or a creditor's objection.

This model would assume:

1. Automatic opening of proceedings: based on the clear statement of the debtor that he is insolvent, submitted under threat of criminal liability, providing false information.
2. Automatic determination of the debtor's obligations.
3. Automatic analysis of the ability to pay against existing obligations.
4. Automatic creating of a plan for the distribution of sums obtained from the liquidation of assets to the bankrupt.
5. Automatic creating of the repayment plan project.
6. Automatic cancellation of unpaid liabilities within the debt relief institution.

VI.2. PROPOSAL OF THE NEW SIMPLIFIED RESTRUCTURING PROCEEDINGS USING THE POTENTIAL OF ARTIFICIAL INTELLIGENCE

An example shape of a new simplified procedure using the potential of artificial intelligence could consist of three stages. The first stage should be a test stage. As part of this stage, any person could check, in a preliminary way, if its restructuring could be carried out. The fact of using the test stage would not be disclosed to any other third parties. There would be no obligation to initiate any procedure if the recommendation of the test stage assumed the need to take further steps. Providing data to the test stage would not be subject to any

liability for providing incorrect data. If this stage were completed without submitting an application, information about the passing of the test stage would be covered by so-called judicial confidentiality. Information about passing the test stage could not be used against the applicant.

Based on the data presented in the test phase, as well as on the capabilities of the system based on artificial intelligence, the debtor could check:

i. what is the state of his financial situation, whether he is at risk of insolvency, whether he is insolvent, or whether there is no threat of insolvency;
ii. what are the proposals for restructuring liabilities;
iii. what are the proposals for a restructuring plan;
iv. what are the proposals for restructuring assets by selling them;
v. whether there is a recommendation to file for bankruptcy;
vi. what are the costs of proceedings;
vii. what are the statistical chances of supporting the contribution from creditors;
viii. what is the timetable of the recommended action.

Based on the data entered by the applicant, such as:

1. the status of overdue liabilities, not yet due, as well as future liabilities if known;
2. revenues for the last 3 years, in the case of farmers it would be possible to provide less processed data, such as e.g. the sown area in the last 3 years, type of sowing, dates of harvest, or number of animals bred, number of breeding cycles, date of insertion of animals for purchase, or other data the system would be able to consider, based on the implemented data on agricultural production costs, in a given area in a given unit of time, for specific agricultural commodities, taking into account weather conditions;
3. information on the debtor's immovable property and other assets;
4. the debtor could obtain comprehensive information with a recommendation for further action.

The test stage would not be mandatory, but fully optional. This means that an application for the opening of the appropriate

proceedings could be submitted immediately. With the initiation of the test phase, it would no longer have any privileges: no suspension of payments, no immunity from execution.

The second stage would be an exploratory procedure. This stage could be preceded by a test stage. If the debtor submits the application at the exploratory stage within the time limit suggested in the test stages, then the date of submission of the application would be counted from the date of the initiation of the test proceedings.

Once the form has been completed in the electronic system, it could decide on the completeness of the application and the grounds for opening it. One can adopt a model of non-interference of a human judge in the opening of proceedings. The judge would examine the legitimacy of the opening proceedings only by virtue of an objection lodged by the creditor within 7 days. The judge could then decide to suspend the effects of the opening of the proceedings.

The effects mentioned above could be:

i. a moratorium on the performance of obligations,
ii. immunity from enforcement proceedings.

After the expiry of the time limits for a possible challenge to the opening of proceedings or after the dismissal of the objection lodged by the creditor(s), the system would present the debtor with what it considered to be an optimal restructuring proposal and optimal arrangement proposals for the creditors. At this stage, the debtor within 7 days, or longer in the case of more complex cases, can lodge an objection to all or part of the restructuring proposal. In this case, the debtor could submit his own proposals.

Further proceedings would require creditors to speak. It would be possible to collect votes in writing, and organise a meeting of creditors remotely or held in a real place. If the system was adopted, an arrangement already based on artificial intelligence would determine whether the arrangement has been adopted or not.

Any creditor could challenge the composition within 14 days of its conclusion. In the absence of any objection from the creditors, the composition would be subject to automatic entry into force.

The third final stage is an executive stage. The debtor would have to fund a special settlement account with adequate funds for the implementation of the arrangement. This settlement account

could be linked to the debtor's bank account. If they included them into the settlement account, they would pass on information about their own bank accounts. The execution of the layout would be automatic. The system would itself determine the final execution of the arrangement.

VII. Auxiliary procedure for mass restructuring of liabilities and debt relief for groups of farmers *de lege ferenda*

VII.1. THE POTENTIAL RISK OF A STRUCTURAL CRISIS AFFECTING AGRICULTURAL ACTIVITY

The following proposals for future legislation concern not only agricultural producers but all sorts of debtors. A significant accumulation of many factors that indicate the possibility of serious financial crises worldwide can be observed.[11] These include: (1) a huge increase in the debt of states, entrepreneurs, and households, which is accompanied by a serious increase in money printing; (2) progressive social stratification and a massive impoverishment of societies,

[11] J. Black, *Managing the Financial Crisis – The Constitutional Dimension LSE Law*, "Society and Economy Working Papers" 2010, No. 12; S. Claessens, L. Kodres, *The Regulatory Responses to the Global Financial Crisis: Some Uncomfortable Questions*, "IMF Working Paper. Research Department and Institute for Capacity Development" 2014, No. 46; P. Conti-Brown, M. Ohlrogge, *Financial Crises and Legislation*, "Journal of Financial Crisis" 2022, Vol. 4, Issue 3; A. Grigorian, D. Hainová, B. Barbova, *The Past, Present and Future of the Rescue and Restructuring Guidelines for Undertakings in Difficulty*, https://www.maastrichtuniversity.nl/sites/default/files/2023-03/the_past_present_and_future_of_the_rescue_and_restructuring_guidelines_for_undertakings_in_difficulty.pdf; (accessed on: 05.04.2024); E.G. Fox, M.B. Fox, R.J. Gilson, *Economic Crisis and the Integration of Law and Finance: The Impact of Volatility Spikes*, "Columbia Law Review" 2016, Vol. 116; A. Gelpern, *Financial Crisis Containment*, "Connecticut Law Review" 2009, Vol. 41, No. 4; T. Laryea, *Approaches to Corporate Debt Restructuring in the Wake of Financial Crises*, International Monetary Fund Staff Position Note, International Monetary Legal Department, 26 January 2010; T.J. Zywicki, *The Rule of Law During Times of Economics Crisis*, "George Mason University Legal Studies Research Paper", Series LS 15-02 and 15-27.

and, as a result, widespread indebtedness; (3) geopolitical unrest and supply chain disruptions; (4) the threat of delaborization, and the disappearance of certain professions due to the use of artificial intelligence; (5) unfavourable demographic structures for the economy; (6) numerous banks' bankruptcy cases.[12]

However, in the case of agricultural activity, serious problems can arise at a local level. Due to natural and weather disasters, there may be various crises independent of the dysfunction of financial civilisation. Therefore, with regard to the problem of agriculture, it is necessary to take into account not only the danger of a general financial crisis (which may affect fertilizer suppliers, buyers of agricultural products in a wholesale way, manufacturers of agricultural machinery, wholesalers, etc.).

Insolvency law is generally designed for dealing with ordinary day to day business, not with extraordinary crises.[13] It should be pointed out that during a serious financial crisis there is a re-evaluation of general assumptions regarding bankruptcy (e.g., the obligation to file for bankruptcy is suspended, faster and simpler restructuring procedures are needed[14]). In view of the anticipated, potential cyclic or over-cyclic financial (economic) crises, there is a very strong need for prior preparation of legal concepts to counteract the effects of such crises in a systemic and orderly manner. In the event of a structural crisis, the legal and economic situation of many debtors is very similar. However, in the case of agricultural activity, the economic problems of farmers may be not only the cause of speculative groups, but also of non-civilisational, irregular,

[12] E.A. Prosner, *What Legal Authority Does the Fed Need During a Financial Crisis?*, University of Chicago Law School Chicago Unbound, "Journal Articles" 2017.

[13] P. Manavald, *Economic Crisis and the Effectiveness of Insolvency Regulation*, "Juridica International" 2010, No. 17.

[14] Impact of COVID-19 on Insolvency Laws: How Countries Are Revamping Their Insolvency and Restructuring Laws to Combat COVID-19, 25 August 2021; Overview of Insolvency and Debt Restructuring Reforms in Response to the COVID-19 Pandemic and Past Financial Crises: Lessons for Emerging Markets, 8 March 2021; COVID-19 Notes developed by the World Bank Group's Equitable Growth, Finance and Institutions (EFI), https://documents1.worldbank.org/curated/en/182341615352260595/pdf/Overview-of-Insolvency-and-Debt-Restructuring-Reforms-in-Response-to-the-COVID-19 (accessed on: 05.04.2024).

unpredictable phenomena such as natural disasters, weather disturbances, or plant and animal diseases.

In such situations, conducting thousands of individual debt relief proceedings are ineffective, time-consuming and expensive. Mass debt relief (restructuring) can be extremely important for small groups of debtors. Collective debt relief (restructuring) will inherently be more effective than individual debtor proceedings.[15]

VII.2. COLLECTIVE (CUMULATIVE) DEBT RELIEF AND RESTRUCTURING – CHANGING OR AMENDING THE FUNDAMENTAL RULE

The current model of insolvency proceedings is based on the scheme: **one debtor and many creditors**. In special situations, the legislator allows for a model of conduct: one debtor, one creditor (cases of consumer's bankruptcy). Proposals reaching beyond the framework of the "extended" personal composition of debtors in the event that the debtors are spouses, partners in a civil law partnership, companies that are a part of a group of companies, etc. should be discussed. Existing solutions are very time-consuming and costly for the justice system. However, the need to introduce a debt relief/restructuring of the principle of **many debtors and one creditor or many creditors** should be discussed.

[15] R. Adamus, *Simplified restructuring proceedings in Poland as an example of anti-crisis regulation due to the COVID-19 pandemic*, "International and Comparative Law Review" 2020, Vol. 20, No. 1, pp. 293–303; R. Adamus, *The need for a special restructuring procedure for insolvent entrepreneurs due to SARS-CoV-2*, "Sociopolitical Sciences" 2020, No. 2, pp. 128–131.

Table 1. The current model of insolvency proceedings and proposals

STATUS OF RULES		DESCRIPTION	LEGAL NATURE OF CLAIMS	PARTICIPANTS OF THE PROCEEDINGS	
Existing rules	1	General legal rules	Civil claims under civil law rules	One debtor	One creditor
			Claims under tax rules		
	2	Typical insolvency rules	All sorts of claims under insolvency law	One debtor	Many creditors
	3	Exceptional insolvency rules		One debtor	One creditor
Proposals		New legal, co-existing insolvency rules	All sorts of claims under insolvency law	**Many debtors**	One creditor
				Many debtors	Many creditors

Source: author's own preparation.

So far, when referring to bankruptcy/restructuring as a collective proceeding, there are many creditors in mind. The debtor is, as a rule, one. The proposals presented in this paper refer to the phenomenon of the collective debt relief/restructuring of many debtors. However, they do not intend to replace the fundamental "one debtor–many creditors" principle. The intention is to supplement this principle, adding – or rather defining – a new option. This legal construction could be used for cases of common crises or crises limited to a certain group of debtors. The key issue is dealing with the existing liabilities. Collective debt relief and restructuring of many debtors should be distinguished from any form of social help. However, the problem should be profoundly discussed in the case of "border" issues.

Axiology of collective (cumulative) debt relief and restructuring (both in the general axiology dimension and the axiology dimension of detailed solutions) is of fundamental importance. Any new proposal should be proofed to be advantageous. The functionality and economics of collective debt relief and restructuring should be compared with individual debt relief and restructuring. This

issue concerns the need for conducting many similar individual proceedings.

A very important question arises: What are the premises of collective debt relief? This is a very important issue. Their formulation will allow to distinguish collective proceedings for many debtors from those of social assistance or social security. The premises of individual bankruptcy or restructuring require an individualized examination of the debtor's situation. Meanwhile, in the case of a procedure involving many debtors very objective premises should be introduced. Overly intricate and profound examination of the overall situation of debtors should be excluded. In individual proceedings for a single debtor, "insolvency" and a "threat of insolvency" could be the simple criteria. In collective proceedings the premises could be the "existing of a concrete/specific liability", "specific level of income", etc. The premises should be easy to use.

The next issue is the following: legal aspects of the potential scope of claims for debt relief/restructuring (claims under public, private law). It should be recommended which claims should be excluded from debt relief/restructuring. It is possible to cover by mass debt relief/restructuring only one type of debt. As a rule, individual debt relief/restructuring is complex. It is not the same in the case of mass debt relief/restructuring. The issue of the total or only partial debt relief/restructuring of many debtors should be explained. The question is whether it is possible that such simplification of debt relief/restructuring could avoid examining the individual situation of debtors? It is possible to cancel all delayed unpaid property taxes for flood, earthquake victims regardless of their personal financial situations. It is equally possible to stipulate income limits for debt cancellation.

How to conduct proceedings of mass debt relief/restructuring should be explained. It should be pointed out how to confirm the results of the debt relief/restructuring. There are many theoretical possibilities. Analysis of the collective debt relief/restructuring procedure should include: (1) debt relief/restructuring given automatically by virtue of law, (2) debt relief/restructuring through collective court proceedings, (3) collective administrative proceedings, (4) a "mixed" manner of these. It is a very complicated issue:

a party of court proceedings and administrative proceedings should be always individually identified. Proceedings with many parties are more prone to protracted procedures. Solving this dilemma doesn't have to be complicated. The premise of mass debt relief/restructuring should be formulated very objectively. A special act should specify the conditions for mass debt relief/restructuring, the procedure and the effects. In administrative or court proceedings, the powers of the authority may be limited to confirming that a given person is subject to this regulation. Proceedings could be collective and involve many debtors, and after the filing of an objection by a specific creditor or creditors (representing a specific amount of debt) in a timely manner, it could transform into individual proceedings of the debtor.

Special consideration should be given to respect for the property rights of creditors (the issue of compensation to creditors, e.g. from the State Treasury). Many post-covid cases showed very serious constitutional doubts about the legislator's arbitral influence in private relationships. A creditor is a position of the owner. Depriving a creditor of his rights should be properly justified.

VII.3. REFERENCE TO HISTORICAL PATTERNS

The legal concept of collective restructuring/debt relief is not new. It already existed in antiquity (royal debt relief edicts in Babylonian law, the concept of debt relief under the Sabbath and Jubilee year in the Mosaic law, Solon's reforms), and their elements took place in later times (e.g., the effects of the lack of restructuring of rental obligations of Irish tenants in the context of the so-called Great Famine in Ireland, some legal regulations in the aftermath of the English Revolution, the Great French Revolution, post-war legislation). The historical background is essential for a correct view of the *de lege ferenda* issues.

VII.4. REFERENCE TO CONTEMPORARY PATTERNS

Some kind of collective debt relief/restructuring takes place today, in the form of various legal regulations (i.e. the effects of these regulations have not lost their significance, if only because of the current constitutional doubts – as to what extent, for instance, the state can interfere in the distribution of economic burdens within private relations). In the Polish dimension: there is the example of the construction of statutory "credit holidays" for borrowers in connection with the COVID-19 pandemic; COVID regulation regarding the legal situation of tenants of premises, travel agencies, etc.; statutory attempts to regulate the debt of borrowers who have incurred liabilities in foreign currency. In the non-Polish perspective, there is, for example, the problem of solving educational debt in the USA, or the problem of farmers' debt in India. The collective debt relief/restructuring occurs today, but requires theoretical and legal systematization, and clear ordering of axiological issues. Dealing with contemporary problems is essential for formulating systematized conclusions for the future.

VII.5. EXAMPLE OF COLLECTIVE RESTRUCTURING

In order to create an example of collective restructuring, the legislative assumption is as follows:

1. restructuring is to concern many debtors at one time;
2. restructuring refers to horizontal relations between civil law entities;
3. the legislation is designed for an event of a serious crisis;
4. the reason for the introduction of "anti-crisis" regulation should be justified in the content of the act introducing this instrument;
5. the legal basis for collective restructuring should be at the level of a Parliament Act (restructuring based on a regulation to which the law would delegate should be excluded);
6. the proposed solutions should be proportionate in terms of the duration of the repayment relief;

7. qualification for restructuring should take place on the basis of the provisions of the Act – this applies to both subjective criteria (who is the subject of restructuring?) and objective criteria (what obligation of the debtor is subject to restructuring?);
8. in order to protect the property rights of creditors, the purpose of restructuring is not to write off liabilities but to defer their payment;
9. the deferral mechanism should be based on a mandatory grace period for repayment and then an optional instalment split;
10. for the grace period and extension of payments in instalments, the creditor should have a minimum compensation in the form of interest at a low interest rate.

VII.6. STATUTORY AUTOMATIC POSTPONEMENT

In the event of the structural indebtedness of farmers, the following legal regulation could be introduced massively in the restructuring of liabilities. For individual farmers who are natural persons, there could be proposed the following solution.

The legislator may provide that a natural person who is running a farm, for example within a specified period of at least one year from the date of entry into force of the new regulations, while maintaining its continuation, may be subject to a special statutory regulation.

The statutory automatic postponement of obligations should apply to debtors who:

1. have problems in the performance of obligations related to conducting agricultural activity, arising not earlier than 6 months before the date of entry into force of the Act, not satisfied as at the date of entry into force of the Act, and this arose no later than on the date of commencement of the statutory automatic postponement of the performance of obligations;
2. may recommend the introduction of certain limits; For example, the statutory deferral did not cover liabilities below PLN 1,000.

The statutory automatic postponement of the performance of obligations should not apply to debtors who are on the date of entry into force of the Act in the course of restructuring, bankruptcy

or enforcement proceedings as regards the claims covered by these proceedings. The statutory automatic postponement of the performance of obligations applies for a predetermined period of time.

Liabilities of a natural person, an agricultural producer, for running an agricultural holding:

1. There is subject to automatic postponement in their performance for a period not longer than, for example, 3 months.
2. For the period of deferral, the creditor is entitled to interest only at the rate, e.g. one percent per annum.
3. The large one may not be charged with the recovery costs incurred by the creditor during the period of the statutory deferral of the amount of liabilities.
4. During half the expiry of the period of deferral of liabilities they may be repaid in installments: no more than 3, in an equal amount payable at the end of each calendar month, unless the parties individually agree on repayment terms more favourable to the debtor.

Once the statutory automatic deferral of obligations has begun, no new enforcement proceedings could be initiated until the end of this period. Statutory automatic postponement of obligations should not be grounds for terminating withdrawal from the contract.

VIII. Methods of securing the farmer's consumer property to meet the needs of his family. "Simplified Family Foundation"

The typical and traditional legal structure of agricultural holdings is such that:

i. the farm is run by a natural person who is assisted by family members,
ii. agricultural assets and consumer assets are mixed.

In addition, in practice it is very often the case that the economic buildings are architecturally located in the immediate vicinity of a residential house. It is therefore located on a single property within the meaning of mortgage law. Thus, in the event of financial problems of a farmer of a natural person, all his assets are recovered to

creditors, including assets used to meet the basic life needs of the farmer of his family members. It seems that the legislator should approach this problem with appropriate sensitivity, taking into account the traditional, family structure of the farm. Serious financial problems of farms and the associated emotional upheavals may result in a new generation fleeing from farming.

There are probably many possible ideas and solutions. In this point, the concept of using the institution of a family foundation will be recommended. The family foundation is a new legal instrument. In accordance with the provisions of the Act, it may be used to conduct activities in the broadly understood agriculture and forestry. However, in the context discussed here, if a family foundation were to take over the running of a farm, the assets of the family foundation are seized in the event of financial problems, in favour of creditors, including the assets of the family foundation which serves to meet the basic life needs of the beneficiaries of that foundation. The idea, therefore, is different. The idea is to leave the production activity in the property of natural persons and the farmer, and the property used to meet the needs of the family should be transferred to the family foundation. In other words, there would be 2 entities: a natural person, a farmer who would be the founder of a family foundation, and at the same time could be its beneficiary, a family foundation, a composition of property, which would include the farmer's private consumer property deposited there as a contribution of the family foundation. At the same time, in the case of the so-called one land and mortgage register, i.e. one real estate in the sense of land and mortgage register, a small part of the production property could also enter the family foundation, for example buildings located on the property on which the residential building is located. The boundary condition is that the assets contributed to the family foundation should contribute a minimum of PLN 100,000. The rights and obligations of the founder and the rights and obligations in the foundation, with the exception of the claims of the beneficiary of the foundation, are inalienable and therefore are not subject to attachment, enforcement, and do not enter the restructuring estate of the bankruptcy estate.

Individuals can use the family foundation instrument as a method of "parking" their own property, in order to protect their life achievements from future economic risks. It should be emphasised that this is about securing a fully solvent person at the time of establishing a family foundation seeking protection against future, unknown and completely potential risks.

The regulations introduce a very easy way to dissolve a family foundation established for an indefinite period by a living founder. The founder may dissolve the family foundation, on the basis of the competence granted to him in the statute, without giving a reason. A family foundation may be established for a definite period of time – the expected time of the founder's business or political activity. As a rule, the surviving founder has priority to take over the assets of the liquidated family foundation (unless the statutes provide otherwise). On the other hand, the introduction of a natural person's property to a family foundation prevents its enforcement seizure in proceedings against the founder or the inclusion of this property in the sanation estate or the bankruptcy estate of the founder. The view that the trustee in bankruptcy of the founder cannot make a statement on the dissolution of a family foundation should be defended. In addition, it should be expressed that the enforcement authority cannot submit a statement on the dissolution of the family foundation.

However, it is possible to pursue – within the statutory deadlines (Article 534 of the Civil Code) – the ineffectiveness of the act of contributing assets to the foundation or donations made to it. A family foundation can be used as a pension fund for the same reasons. Importantly, the founder does not have to give the power of the family foundation "into foreign hands". He can become a member of the board himself. The statutes of a family foundation must indicate at least one beneficiary entitled to participate in the meeting of beneficiaries. The beneficiary may be the founder himself. The view that the founder may at any time amend the statute, in the manner reserved by him, in terms of indicating beneficiaries, changing the rules for receiving benefits from family foundations, changing the scope of benefits to which they are entitled or the title to receive property after the liquidation of the family foundation,

should be defended. A family foundation can be an instrument constructed in a specific case for the needs of the founder himself.

The structural elements of a family foundation in favour of the possibility of using this institution for the so-called "parking of assets" of a solvent person can be summarised as follows:

1. Pursuant to Article 11(1) of the U.fund.rodz. The founder of a family foundation can only be a natural person with full legal capacity. A family foundation can have only one founder.
2. In accordance with Article 4(1) of the U.fund.rodz. A family foundation acquires legal personality upon entry in the register of family foundations. The family foundation has separate assets from the founder.
3. Pursuant to Article 13(1) of the U.fund.rodz. The rights and obligations of the founder are inalienable. The rights of the founder in a family foundation are not subject to attachment and do not enter the bankruptcy estate of the founder.
4. Pursuant to Article 30(2) of the U.fund.rodz. The beneficiary may be the founder. The founder himself can use the property contributed to the family foundation. There can be only one beneficiary. The founder may even be the only one entitled to use the family foundation. In accordance with Article 2(3) of the U.fund.rodz. In the case of a beneficiary who is a natural person, a family foundation may, in particular, cover the costs of his maintenance or education.
5. Pursuant to Article 39(1) of the U.fund.rodz. The rights and obligations of the beneficiary are not transferable. This does not apply to claims of the beneficiary. Pursuant to Article 34(1) of the U.fund.rodz. A benefit from a family foundation may be granted subject to or subject to a deadline. It is possible to shape the rules for the performance of benefits in such a way that they will not be attached to the beneficiary's creditors.
6. You can combine the function of a beneficiary, founder, board member, participant in the beneficiary meeting. Pursuant to Article 26(2)(11) of the U.fund.rodz. The statutes specify at least one beneficiary entitled to participate in the shareholders' meeting A family foundation may be the legal *alter ego* of even one natural person.

7. Pursuant to Article 26(1) of the U.fund.rodz. The founder establishes the statute. In accordance with Article 2(1)(2) of the U.fund.rodz. The founder defines in the statute the detailed purpose of the family foundation.
8. The founder has a lot of freedom in defining the purpose of the family foundation and the principles of its functioning. Pursuant to Article 87(1) of the U.fund.rodz. The Family Foundation shall be dissolved if the circumstances indicated in the statute have occurred. The founder has a lot of freedom in determining the premises for the dissolution of the family foundation.
9. Pursuant to Article 103(1) of the U.fund.rodz. If a family foundation is dissolved during the founder's lifetime, the founder is only entitled to receive property remaining in connection with the dissolution of the family foundation, unless the statute provides otherwise; in particular it specifies the beneficiaries entitled to property in connection with the dissolution of the family foundation. The founder can recover all the assets "stored" in the family foundation. Pursuant to Article 8(1) of the U.fund.rodz. The Family Foundation is jointly and severally liable with the Founder for his obligations arising before its establishment.
10. Due to the guarantee liability of the family foundation for the previous obligations of the founder, the very concept of using the family foundation for "parking assets" is not an abuse of this institution.
11. A family foundation may be established only for a limited period of time (Article 26(2)(7) of the U.fund.rodz). The founder may establish a foundation for the duration of his anticipated agricultural activity.

The practical problem, however, is that even in the case of the adaptation of the family foundation of a safe port for farmers, the formal requirements that are associated with the functioning of family foundations in practice speak against the mass use of this idea. Therefore, there is an idea to create a simplified family foundation for the needs of farmers, covering only residential real estate, and possibly other economic equipment located on the property constituting one whole of perpetual accounting. Simplified family foundations would not have to acquire legal personality, and it

would be enough to become a separate property buffer with a special legal regime. Information on the creation of such a simplified family foundation, the form of a separate property, its satisfaction of the housing needs of the farmer and his legal successors, should be entered in the land and mortgage register. In the Polish legal system, in the context of, for example, bankruptcy, restructuring, and the merger of companies, the concept of a separated property with a special mode of management of this estate is known.

IX. Conclusion

The possibilities of changes in the insolvency law are very large. Nevertheless, the current state of legislation in Poland is at a good level. First of all, the idea of restructuring farmers' liabilities should be disseminated. Restructuring is more advantageous than enforcement proceedings or bankruptcy. Permanent educational campaigns in this area are needed. Cheapness, simplification and efficiency are serious attributes of restructuring. This is the direction in which the legislator should go. Significant support should take place at the implementation stage of an arrangement. The repeal of the arrangement in fact opens the way to bankruptcy. Appropriate changes may also take place in the bankruptcy law.

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Competition Law, Sustainability, and Agriculture: Uneasy Complexity

1. Introduction

Sustainability has become a buzzword in both politics[1] and academia, and competition law has been unable to avoid inclusion in sustainability-related discourses. Legal scholars are divided on the question of whether competition law should play a role in achieving sustainability objectives, and, if it should, the extent to which it should and the way it should do so.[2]

[1] For a brief but comprehensive overview, see: H. Heinrichs, F. Biermann, *Sustainability: Politics and Governance*, [in:] H. Heinrichs, P. Martens, G. Michelsen, A. Wiek (eds.), *Sustainability Science: An Introduction*, Springer, Dordrecht 2016, pp. 129–137.

[2] See, for example: C. Veljanovski, *The case against green antitrust*, "European Competition Journal" 2022, No. 18(3). However, many argue for the need to include sustainability-related assessment in the application of competition law. See, for example: S. Kingston, *Competition Law in an Environmental Crisis*, "Journal of European Competition Law & Practice" 2019, No. 10(9), p. 517; S. Holmes, *Climate change, sustainability, and competition law*, "Journal of Antitrust Enforcement" 2020, No. 8(2), p. 354. There is a growing number of publications that deal with the possible ways to align competition law and sustainability. See: J. Nowag, *Environmental Integration in Competition and Free-Movement Laws*, Oxford University Press, Oxford 2017; E. Loozen, *Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability*, "Common Market Law Review" 2019, No. 56(5), p. 1265; G. Monti, *Four Options for a Greener Competition Law*, "Journal of European Competition Law & Practice" 2020, No. 11(3–4), p. 124; C. Volpin, *Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)*,

The relationship between competition law and agriculture is also controversial, in particular if one aims to justify the exemption of the sector from the prohibition of anti-competitive agreements and/or producers' additional protection against buyers beyond competition law with the prohibition of unfair trading practices.[3] The latter – based on fairness and not efficiency considerations – reaches those practices that are beyond the scope of the abuse of dominance,[4] causing condemnation among competition lawyers through its approach, that may run counter to improving economic efficiency.[5]

Multiplying the questions to be answered, the revision of the Common Agricultural Policy for the post-2020 period brought new provisions effective as of 7 December 2021 that are exempt from Article 101(1) TFEU agreements, decisions and concerted practices of producers of agricultural products aiming to apply a sustainability standard higher than mandated by EU or national law.[6] With this

"CPI Antitrust Chronicle" 2020, No. 1(2); E. van der Zee, *Quantifying Benefits of Sustainability Agreements Under Article 101 TFEU*, "World Competition" 2020, No. 43(2), p. 189; D. Wouters, *Which Sustainability Agreements Are Not Caught by Article 101 (1) TFEU?*, "Journal of European Competition Law & Practice" 2021, Vol. 12(3), p. 257; C. Volpin, *Competition enforcement and sustainability: the odd couple*, [in:] I. Kokkoris, C. Lemus (eds.), *Research Handbook on the Law and Economics of Competition Enforcement*, Edward Elgar Publishing, Cheltenham 2022, pp. 448–471; J. Malinauskaite, *Competition Law and Sustainability: EU and National Perspectives*, "Journal of European Competition Law & Practice" 2022, No. 13(5), p. 336; L.P. Feld, C. Fuest, J. Haucap, H. Schweitzer, V. Wieland, B.U. Wigger, *Green Deal auf Kosten des Wettberbs?*, Stiftung Marktwirschaft, Berlin 2022.

[3] P. Carstensen, *Economic Analysis of Antitrust Exemptions*, [in:] R.D. Blair, D.D. Sokol (eds.), *The Oxford Handbook of Antitrust Economics – Vol. 1*, Oxford University Press, Oxford 2015, pp. 33–62.

[4] V. Daskalova, *The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks?*, "Journal of European Competition Law & Practice" 2019, No. 10(5), p. 281.

[5] See: a critique saying that "the principle of competition and the freedom of contract have been sacrificed on the altar of interest-driven politics": P. Pichler, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, "Neue Zeitschrift für Kartellrecht" 2021, p. 537.

[6] Article 210a of Regulation (EU) No. 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC)

step, two difficult-to-reconcile areas have been linked hand in glove to competition law, despite the fact that they – even separately – have unsettled and ambiguous relationship with antitrust.

This article aims to critically assess the new provisions and the related Draft Guidelines[7] published in early 2023 within the current competition law and policy framework. In order to do so, first, it is reasonable to briefly explore the relationship between agriculture and sustainability, because not only their respective connection to competition law is full of unanswered questions but also there are complicated interrelations between agriculture and sustainability. Examining the convoluted liaison between them is important in order that the way of their co-existence could be identified in relation to competition law. Second, it is rational to find the place of the new derogation in the agricultural exemption system that has existed since the beginning of the European integration, to find the differences and similarities compared to these earlier derogations and to determine the problems that may arise in connection with the new derogation based on our earlier experiences. Third, the provisions in force are put under scrutiny from a normative point of view, by also using the Draft Guidelines. Fourth, the article aims to briefly delve into the analysis of earlier sustainability initiatives and examine whether they could have had a different outcome in light of the new derogation. Lastly, I will offer my conclusions.

2. Agriculture and sustainability in the EU context

Agricultural production and sustainability do not always go hand in hand with one another in all cases. Simply put, there are agricultural practices that are detrimental to the environment; however, certain production methods and techniques do contribute to

No. 922/72, (EEC) No. 234/79, (EC) No. 1037/2001 and (EC) No. 1234/2007 [2013] OJ EU L 347/671 (hereinafter referred to as Regulation 1308/2013).

[7] Draft Guidelines on the application of the derogation from Article 101 TFEU for sustainability agreements of agricultural producers pursuant to Article 210(a) of Regulation 1308/2013 [2023].

the preservation of our landscape, the conservation of biodiversity, and the better management of renewable natural resources. While the latter are often identified with the model of multifunctional agriculture,[8] the former are connected to industrial farming that is led by the pursuit of purely efficiency-based considerations, "contribut[ing] to the loss of natural diversity and heterogeneity within the landscapes".[9]

Based on the clustering of *Lang and Heasman*, one may associate the multifunctional agricultural model with the ecologically integrated paradigm, and industrial agriculture with the integrated paradigms of the productionist and the life sciences, the latter denoting a mode of agriculture that builds upon, among others, genetically modified crops.[10] By taking the approach of the ecologically integrated paradigm, we may find ourselves in the field of agroecology, the academic discipline that can be defined as "the application of ecological concepts and principles to the design and management of sustainable agroecosystems".[11] The role of agroecology in sustainable agriculture has been intensively embraced by food sovereignty advocates[12] who, at the same time, have launched an attack against neoliberal food policies serving the interests of agribusiness.[13] Many scholars pose neoliberal food policy with the notion of food security at its centre and the food sovereignty movement as a global conflict,[14]

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[8] H. Renting *et al.*, *Exploring multifunctional agriculture. A review of conceptual approaches and prospects for an integrative transitional framework*, "Journal of Environmental Management" 2009, No. 90(2), p. 112.

[9] L.H. Logan *et al.*, *Freshwater Wetlands: Balancing Food and Water Security with Resilience of Ecological and Social Systems*, [in:] D. Niyogi (ed.), *Vulnerability of Food Resources to Climate – vol. 2*, Elsevier, 2013.

[10] T. Lang, M. Heasman, *Food Wars: The Global Battle for Mouths, Minds and Markets*, Earthscan, London 2004.

[11] S.R. Gliessman, *Agroecology: Ecological Processes in Sustainable Agriculture*, Ann Arbor Press, Chelsea 1998.

[12] See, for example: *The activity of La Via Campesina: The Role of Agroecology in the Flight for Food Sovereignty*, https://viacampesina.org/en/the-role-of-agroecology-in-the-fight-for-food-sovereignty/ (accessed on: 13.09.2023).

[13] V. Shiva, *Who Really Feeds the World? The Failures of Agribusiness and the Promise of Agroecology*, North Atlantic Books, Berkeley, CA, 2016.

[14] W.D. Schanbacher, *The Politics of Food: The Global Conflict Between Food Security and Food Sovereignty*, Praeger Security International, 2010;

which is, however, not characteristic of the European Union if one examines the (limited number of) EU documents that mention relevant topics.[15]

M.E. Martínez-Torres, P.M. Rosset, *Diálogo de saberes in La Vía Campesina: food sovereignty and agroecology*, "The Journal of Peasant Studies" 2014, No. 41(6), p. 979; P. McMichael, *Historicizing food sovereignty*, "The Journal of Peasant Studies" 2014, No. 41(6), p. 933; J.J. Wills, *Contesting World Order? Socioeconomic Rights and Global Justice Movements*, Cambridge University Press, Cambridge 2018.

[15] See, for example: European Economic and Social Committee (2009) Opinion on "Trade and Food Security" (exploratory opinion) (2010/C 255/01); European Economic and Social Committee (2011) Opinion on the "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The CAP towards 2020 — Meeting the food, natural resources and territorial challenges of the future" (2011/C 132/11); European Economic and Social Committee (2012) Opinion on "Cooperatives and agri-food development" (own-initiative opinion) (2012/C 299/09); European Economic and Social Committee (2016) Opinion on "The main underlying factors that influence the Common Agricultural Policy post-2020" (own-initiative opinion) (2017/C 075/04); European Economic and Social Committee (2017) Opinion on "A possible reshaping of the Common Agricultural Policy" (exploratory opinion) (2017/C 288/02); European Economic and Social Committee (2018) Opinion on the "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The Future of Food and Farming" (2018/C 283/10); European Economic and Social Committee (2019) Opinion on the "Promoting short and alternative food supply chains in the EU: the role of agroecology" (own-initiative opinion) (2019/C 353/11); European Economic and Social Committee (2020a) Opinion on the "Introduction of safeguard measures for agricultural products in trade agreements" (own-initiative opinion) (2020/C 364/07); European Economic and Social Committee (2020b) Opinion on the "Compatibility of EU trade policy with the European Green Deal" (own-initiative opinion) (2020/C 429/10); Committee of the Regions (2011) Opinion on "Local food systems" (outlook opinion) (2011/C 104/01); Committee of the Regions (2011) Opinion on "The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future" (2011/C 192/05); European Parliament (2008) Resolution of 22 May 2008 on rising food prices in the EU and the developing countries (2009/C 279 E/14); European Parliament (2009a) Resolution of 13 January 2009 on the Common Agricultural Policy and Global Food Security (2010/C 46 E/02); European Parliament (2009b) Resolution of 26 November 2009 on the FAO Summit and food security (2010/C 285 E/11); European Parliament (2016) Resolution of 5 October 2016 on the next steps towards attaining global goals and EU commitments on nutrition and food security in the world (2018/C 215/02); European Parliament (2017) Resolution

The notion of food sovereignty, as it appears in EU documents, is many times connected to that of food security, and the former is perceived as an important pillar of achieving the latter, despite the fact that the EU is an open proponent of multifunctional agriculture.[16] The dual approach of the EU towards agriculture and its agricultural policy – more market orientation but multifunctionality – is also perfectly reflected in the regulation of the European agri-food markets and the competition therein. While the EU is reluctant to adopt binding provisions to regulate sustainability agreements in a general and sector-neutral competition law context, it is induced to experiment on the competitive process of its agri-food markets with a sustainability-related exemption. That is to say, it does not rule out policy choices that mix the neoliberal efficiency-based approach aiming to integrate European agri-food actors in globalised markets (more market orientation) with sustainable production techniques and methods contributing to biodiversity and other environmental and social aims (multifunctionality). With this, the EU aims to serve both the market players of industrial agriculture, which typically lobby for free markets, and small and medium-sized (family) farms that rather fit in with the multifunctional model.

Food systems accounted for 30 percent of the EUs overall greenhouse gas emissions in 2015, which is 4 percent higher than in 1990.[17] While freshwater resources might decrease by 30–50 percent in certain European areas,[18] the agricultural sector is responsible for 70 percent of the EU's total water use.[19] Comparing the year 2020 with 2010, the amount of both nitrogen and phosphorus

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of 27 April 2017 on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers (2018/C 298/15), point V.

[16] M. Cardwell, *The European Model of Agriculture*, Oxford University Press, Oxford 2004.

[17] M. Crippa *et al.*, *Food systems are responsible for a third of global anthropogenic GHG emissions*, "Nature Food" 2021, No. 2(3), p. 204.

[18] M. Milano *et al.*, *Current state of Mediterranean water resources and future trends under climatic and anthropogenic changes*, "Hydrological Sciences Journal" 2013, No. 58(3), p. 498.

[19] M. Gerveni, A.F. Tomon Avelino, S. Dall'erba, *Drivers of Water Use in the Agricultural Sector of the European Union 27*, "Environmental Science & Technology" 2020, No. 54(15), p. 9191.

fertilisers used in the European Union increased, by 6.9 percent and 21.9 percent respectively.[20] Almost half of the nitrogen fertilisers "lost into the environment via emission of gases or by polluting water bodies".[21] Excess phosphorus not taken up by plants enters surface waters, and ends up in coastal seas "with profound effects upon the quality of receiving waters through the eutrophication of lakes, rivers, and coastal waters".[22]

Pesticides do not only have a direct impact on humans but may also pollute surface and ground waters, soil, turf and other vegetation.[23] While industrial agriculture embedded in the productionist paradigm, which wants to achieve higher and higher yields, uses fertilisers and pesticides heavily, thereby contributing to environmental degradation, sustainable production methods and techniques aim to find a balance between, on one hand, producing food of adequate quantity and quality, and on the other hand, the preservation of the environment.

It seems beneficial that the obstacles to competition law have been removed for undertakings to cooperate in sustainability-related projects; nevertheless, it is rather dubious when one looks at the full picture that shows quite unambitious goals in the field of direct payments and rural development, heavily criticised by green organisations.[24] Though communicated by the EU itself as

[20] Eurostat, Agri-environmental indicator – mineral fertiliser consumption.

[21] J. Martínez-Dalmau, J. Berbel, R. Ordóñez-Fernández, *Nitrogen Fertilization. A Review of the Risks Associated with the Inefficiency of Its Use and Policy Responses*, "Sustainability" 2021, No. 13(10), p. 5625.

[22] M.M. Mekonnen, A.Y. Hoekstra, *Global Anthropogenic Phosphorus Loads to Freshwater and Associated Grey Water Footprints and Water Pollution Levels: A High-Resolution Global Study*, "Water Resources Research" 2018, No. 54(1), p. 345.

[23] M.W. Aktar, D. Sengupta, A. Chowdhury, *Impact of pesticides use in agriculture: their benefits and hazards*, "Interdisciplinary Toxicology" 2009, No. 2(1), p. 1.

[24] See, for example: European Environmental Bureau, *New EU farm policy will worsen environmental crises for years*, 25 June 2021, https://eeb.org/major-new-eu-farm-policy-will-worsen-environmental-crises/ (accessed on: 13.09.2023); Y. Pantzer, *The New CAP is a Failure for Citizens, Farmers and Nature*, 26 November 2021, https://www.slowfood.com/the-new-cap-is-a-failure-for-citizens-farmers-and-nature/ (accessed on: 13.09.2023).

greener, fairer and more competitive,[25] the whole CAP reform was labelled as greenwashing by the policy director of Greenpeace EU.[26] It is controversial that the primary means, i.e. agricultural spendings in different forms of state aids and project funds, to direct the agricultural sector towards a greener path, do not seem sufficient in the new CAP system, while, on the contrary, one of the many complementary tools[27] to contribute to environmental protection, such as exempting sustainability agreements between agri-food market players under EU competition law, was adopted *prima facie* in such a forward-looking way.

A better use of primary means might have brought more advantages for sustainability objectives than the amendment of a complementary legal instrument that may open the door for greenwashing by private actors under binding legal acts. This suggests an inappropriate balancing between public policies and the emphases put on them to achieve a mutual goal.

In sum, sustainability and agriculture have a diverse relationship. Private actors in the food supply chain must be cautious to treat all of their agriculture-related agreements as automatically sustainable under, and thereby exempted from, EU competition law pursuant to the new provision inserted into Regulation 1308/2013. If the voluntary assessment of sustainability agreements is not thorough and undertakings try to misuse the new exemption possibility, not only might the two pillars of the Common Agricultural Policy – direct payments to farmers and rural development programmes – be

[25] European Commission, *The new common agricultural policy: 2023–2027*, https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/new-cap-2023-27_en (accessed on: 13.09.2023).

[26] Euronews, *EU reforms to common agricultural policy branded 'greenwashing'*, 30 June 2021, https://www.euronews.com/my-europe/2021/06/30/eu-reforms-to-common-agricultural-policy-branded-green-washing (accessed on: 13.09.2023).

[27] As formulated by Margrethe Vestager during Renew Webinar on 22 September 2020: "So competition policy is not going to take the place of environmental laws or green investment. The question is rather if we can do more, to apply our rules in ways that better support 'the Green Deal'"; https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en (accessed on: 13.09.2023).

labelled as greenwashing, but also the CAP reform's new competition law-related provision will contribute to concealing anti-competitive agreements under the disguised aegis of sustainability, both resulting in adverse effects on environmental protection and running counter to the ambitious Green Deal objective of a climate-neutral Union by 2050. In this case, the so called "shield" role of competition law must be transformed into its "word" role to tackle the greenwashing practices of such undertakings.[28]

3. The new exemption in the system of derogations

Competition law exemptions for the agricultural sector are not a recent development. Its origins date back to the 1910s and 1920s in the United States. Starting with Section 6 of the Clayton Act in 1914,[29] the exemption provided for agricultural organisations became complete with the adoption of the Capper-Volstead Act in 1922.[30] It is called the Magna Carta of farmers.[31] The European Union has followed the path laid out by the United States, and since the beginning of European integration, privileged rules have applied to the agricultural sector.[32] As Blockx and Vandenberghe put it, "[d]espite successive Treaty reforms, this agricultural exemption has never been profoundly touched upon and has remained in substance unaltered since 1957".[33]

[28] See about these two roles: J. Malinauskaite, *Competition Law and Sustainability: EU and National Perspectives*, "Journal of European Competition Law & Practice" 2022, No. 13(5), p. 336.

[29] 15 U.S. Code § 17.

[30] 7 U.S. Code §§ 291–292.

[31] E.P. Roy, *Cooperatives: Today and Tomorrow*, 2nd Edition, Interstate Printers & Publishers, Danville 1969, p. 215.

[32] See: Council Regulation No. 26 applying certain rules of competition to production of and trade in agricultural products [1962], OJ EU L 30/993.

[33] J. Blockx, J. Vandenberghe, *Rebalancing Commercial Relations Along the Food Supply Chain: The Agricultural Exemption from EU Competition Law After Regulation 1308/2013*, "European Competition Journal" 2014, No. 10(2), p. 390.

The new sustainability-related agricultural exemptions join the framework that is built upon Chapter I of Part IV[34] in the Regulation 1308/2013. This consists of, on one hand, a horizontal derogation for producers and their associations, irrespective of whether they are recognised under national law or not,[35] and, on the other hand, a vertical derogation for recognised interbranch organisations.[36] The new provision, however, mixes the elements of horizontal and vertical elements, and regulates them under one and same article, causing incoherence with its wording to a significant extent.[37]

The impetus behind the incongruity of the article's wording came from the legislative procedure itself as one debate/step within an EU institution follows another one. Originally, the Commission's proposal on the framework of the 2021–2027 Common Agricultural Policy did not include any new provisions on matters related to antitrust law.[38] In a later phase, thanks to its Committee on Agriculture and Rural Development,[39] the European Parliament proposed a new amendment that only included the exemption of vertical agreements,

[34] Articles 206–210a.

[35] Article 209 of Regulation 1308/2013.

[36] Article 210 of Regulation 1308/2013.

[37] Article 210a of Regulation 1308/2013.

[38] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No. 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No. 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No. 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products, (EU) No. 228/2013 laying down specific measures for agriculture in the outermost regions of the Union and (EU) No. 229/2013 laying down specific measures for agriculture in favour of the smaller Aegean islands, COM (2018) 394 final.

[39] Report of the Committee on Agriculture and Rural Development on the proposal for a regulation of the European Parliament and of the Council amending Regulations (EU) No. 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No. 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No. 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products, (EU) No. 228/2013 laying down specific measures for agriculture in the outermost regions of the Union and (EU) No. 229/2013 laying down specific measures for agriculture in favour of the smaller Aegean islands, A8-0198/2019, Amendment 144.

decisions and concerted practices and did not mention horizontal ones.[40] In this version, the sustainability-related exemption regime was similar to that of early-Article 210, according to which, then, the concerned interbranch organisation had to notify its agreement to the Commission to obtain the Commission's approval with a declaration of compatibility. On the contrary and in parallel with these proposals, the original notification system in Article 210 was also proposed to be modified in a way that notification was not needed any more to receive the exemption.[41]

In an even later phase, the European Parliament proposed that horizontal agreements also be included in the scope of the sustainability-related exemption system, and that both vertical and horizontal agreements enjoy the exemption without any obligation for market players to notify it to the Commission.[42] This became the final version: neither horizontal nor vertical sustainability-related agreements are prohibited, with no prior decision to that effect being required.[43]

This continuous extension and simplification of rules resulted that the wording, ultimately, has become quite ambiguous. While

[40] Amendments adopted by the European Parliament on 23 October 2020 on the proposal for a regulation of the European Parliament and of the Council amending Regulations (EU) No. 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No. 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No. 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products, (EU) No. 228/2013 laying down specific measures for agriculture in the outermost regions of the Union and (EU) No. 229/2013 laying down specific measures for agriculture in favour of the smaller Aegean islands, P9_TA (2020)0289, Amendment 144.

[41] Ibid, Amendment 143.

[42] Position of the European Parliament adopted at first reading on 23 November 2021 with a view to the adoption of Regulation (EU) 2021/23 of the European Parliament and of the Council amending Regulations (EU) No. 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No. 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No. 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No. 228/2013 laying down specific measures for agriculture in the outermost regions of the Union (EP-PE_TC1-COD (2018)0218).

[43] Regulation 1308/2013, Article 210a(4).

Paragraph (1) refers to horizontal agreements, Paragraph (2) refers to vertical ones. The latter applies to the agreements, decisions and concerted practices *of producers* of agricultural products to which several producers are party or *to which* one or more producers and *one or more operators at different levels of the production, processing, and trade in the food supply chain, including distribution, are party*. How can an agreement be of producers to which non-producer operators are also party? This incoherence should be corrected, because thanks to the 'referral back' method of Paragraph (2) to Paragraph (1), it seems that regarding the vertical sustainability initiatives only those parties are exempted from Article 101 TFEU who are agricultural producers, and to those parties who are operators at a different level the prohibition still applies. It goes without saying that this solution would not be too reasonable. The better explanation can be, and this is strengthened by the Draft Guidelines,[44] that a vertical initiative shall have at least one party who is a producer and another one who is not. Nevertheless, the wording could be formulated in clearer terms.

With the new exemption, the current agriculture-related derogation regime has grown into a three-pillar system. While Pillar I in Article 209 and Pillar II in Article 210 are general in nature, that is to say, they apply to any agriculture-related agreements, the new Pillar III is a *lex specialis* that only applies to the sustainability-related agreements of agricultural market players. One cannot forget the relatively new – but older than Article 210a – Article 152(1a) that helps recognised producer organisations and recognised associations of producer organisations with letting them plan production, optimise the production costs, place on the market and negotiate contracts for the supply of agricultural products, on behalf of its members for all or part of their total production, without being threatened by the prohibition of anti-competitive agreements.[45] This derogation – which I would list as a Pillar I exemption because

[44] Draft Guidelines, Recital (27).
[45] Article 152(1a)–(1b) of Regulation 1308/2013.

of its application to horizontal agreements – is limited to legally recognised entities,[46] contrary to that of Article 209.

Theoretically, if, for example, a horizontal agreement does not fulfil the requirements formulated in Article 210a, it may still have a chance to get exempted pursuant to Article 209.[47] Now, each and every pillar of the derogation regime is based on voluntary assessment, which may push the related agreements into latency, hindering, on one hand, undertakings from being sure in the legal assessment of their initiatives and, on the other hand, enforcement authorities from exploring greenwashing practices. However, a system established on comfort letters could increase the visibility of initiatives.[48] Obviously, it would require more institutional resources from agencies because of the additional work burden, but it would be worthwhile in the pursuit of the noble cause.

A significant difference between the new exemption and the earlier ones can be found concerning the scope of *rationae personae*. The novel sustainability-related provisions do not mention any specific organisational form;[49] it only refers to "producers of agricultural products" as regards horizontal initiatives, and this is supplemented with the general term "operators" in connection with vertical initiatives. By contrast, the first two pillars of the agricultural exemption system function differently. It is clear that a prerequisite of the application of Article 152(1a) and Article 210 is the legal recognition of producer organisation and of interbranch organisation, respectively. The situation is more complex regarding Article 209. Although legislation seems not to necessarily require the recognised form of producer organisation, the case law in *Endives* suggests otherwise.[50] The regulation names not only producer organisa-

[46] Autoriteit Consument & Market, *Guidelines regarding collaborations between farmers*, 22 September 2023, p. 7.

[47] Draft Guidelines, Recital (17).

[48] See: S. Ünekbaş, *The Resurrection of the Comfort Letter*, "Yearbook of Antitrust and Regulatory Studies" 2022, No. 15(25), https://doi.org/10.7172/1689-9024.YARS.2022.15.25.2 (accessed on: 13.09.2023).

[49] Draft Guidelines, Recital (11).

[50] Although the judgment in *Endives* is concerned with Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the

tions and associations of producer organisations but also farmers, farmers' associations and associations of such associations. These last two forms are informal cooperations between farmers which are not recognised based on Article 154 of Regulation 1308/2013. On the contrary, in *Endives* the Court of Justice of the European Union deemed the derogation inapplicable in those cases when non-recognised persons are also party to the agreement.[51] This shows that the personal scope of the new exemption is broader than that of the earlier derogations, leaving more room for flexible legal interpretation and, thus, for misuses.

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production of and trade in certain agricultural products, this legal act – similarly to Article 209 of Regulation 1308/2013 – is formulated as also applying to non-recognised entities. The Court, however, ruled that anti-competitive practices could only be exempted if they were applied within a recognised producer organisation. Because of the similarity between Article 2 of Council Regulation 1184/2006 and Article 209 of Regulation 1308/2013, this finding of the Court can, in my opinion, be applied to Article 209 based on analogy. (I do not deal with Council Regulation 1184/2006 in the article because of the relationship between it and Regulation 1308/2013. Pursuant to Article 1 of Council Regulation 1184/2006, it lays down rules concerning the applicability of Articles 101 to 106 and of Article 108(1) and (3) of the Treaty on the functioning of the European Union (TFEU) in relation to production of, or trade in, the products listed in Annex I to the TFEU with the exception of the products covered by Council Regulation (EC) No. 1234/2007. Pursuant to Article 230(2) of Regulation 1308/2013, references to Council Regulation (EC) No. 1234/2007 shall be construed as references to Regulation 1308/2013. That is to say, Council Regulation 1184/2006 does not apply to products in Annex I TFEU which are covered by Regulation 1308/2013. Pursuant to Article 1 of Regulation 1308/2013, it establishes a common organisation of the markets for agricultural products, which means all the products listed in Annex I to the Treaties. Thus, one can conclude that Council Regulation 1184/2006 has no function at all, because it covers only those Annex I products that are not covered by Regulation 1308/2013. However, all Annex I products are covered by Regulation 1308/2013).

[51] See: C-671/15 *Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) et al.*, EU:C:2017:860. See a brief analysis: J. Blockx, *The ECJ Preliminary Ruling in French Endives: Two (Too?) Simple Rules to Attune Article 101 TFEU to the Common Agricultural Policy*, "Kluwer Competition Law Blog" 2017, http://competitionlawblog.kluwercompetitionlaw.com/2017/11/15/ecj-preliminary-ruling-french-endives-two-simple-rules-attune-article-101-tfeu-common-agricultural-policy/ (accessed on: 13.09.2023).

All in all, the sustainability-related derogation from Article 101 TFEU fits into the regime of the agricultural exemption system concerning the voluntary assessment method, but its personal scope steps beyond the toolbox already used in the Regulation 1308/2013, and it does not require any legally recognised form of organisation (producer organisation and interbranch organisation), which may open the door for more cases with arbitrary and an unbounded legal interpretation.

4. Normative analysis

4.1. PERSONAL SCOPE

As explained by the Draft Guidelines, an agreement can also be exempted in the case where it has only one party who is an agricultural producer.[52] This is not too high a requirement for a provision that has been adopted within the framework of the CAP, which aims, among others, to increase the individual earnings of persons engaged in agriculture. Of course, the new exemption is primarily not about the fair standard of living of agricultural producers but the encouragement of sustainability agreements to contribute better to the objectives of the EU Green Deal. Nevertheless, the chosen means and legal basis, i.e. Article 42 TFEU, seems strange. Theoretically, it is possible that only one agricultural producer and several food processors and/or retailers are party to the agreement, because the product covered by the agreement can be found in Annex I TFEU.

Albeit Article 42 TFEU also mentions the trade in agricultural products as an activity with the possibility of a limited application of competition rules if determined so by the European Parliament and the Council, the *raison d'être* and inherent feature of the Common Agricultural Policy is the protection of producers. This is strengthened by Article 40(1) TFEU that the particular nature of agricultural activity, which results from the social structure of agriculture, shall be taken into account when working out the CAP.

[52] Draft Guidelines, Recital (27).

This is to say, it seems that with the means aiming to help agricultural producers, other industrial and trading actors are provided with a helping hand. Unfortunately, it is not the first time that the CAP with its legal basis has been used for the protection of market players who do not farm. The main objective of Directive 2019/633[53] is to tackle unfair trading practices ("UTPs") against agricultural producers; however, the definition of the term "supplier", who enjoys protection, also includes any natural or legal person who sells agricultural and food products, not only agricultural producers. I am of the opinion that EU legislation should be cautious with the use of the CAP for helping market players other than agricultural producers. This trend is in stark contrast with the function of the agricultural policy.

Another issue is worth mentioning. Article 210a uses the term "operator". That food processors, wholesalers and retailers can get exempted does not only seem evident but also is strengthened by the Draft Guidelines; however, undertakings in the hotel, restaurant and catering sector ("HoReCa") were left out. Are not they part of the food supply chain too? The reduction of food waste is explicitly mentioned among the sustainability objectives,[54] and it is a known fact that the HoReCa sector is the third most significant contributor in this regard,[55] amounting to 12 percent of all food waste in the European Union, following households (53 percent) and the processing industry (19 percent).[56]

4.2. SUSTAINABILITY STANDARD

The new exemption's core element is the definition of the sustainability standard. The standard undertaken by private actors within the cooperation shall be higher than that mandated by EU or national

[53] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019], OJ EU L 111/59.

[54] See: Article 210a(3)(a) of Regulation 1308/2013.

[55] A. Buczacki, B. Gładysz, E. Palmer, *HoReCa Food Waste and Sustainable Development Goals – A Systemic View*, "Sustainability" 2021, No. 13(10), p. 5510.

[56] Å. Stenmarck *et al.*, *Estimates of European food waste levels*, Stockholm 2016.

law. In my opinion, this presumably means that it is not sufficient for undertakings aiming to make use of the exemption to agree on terms that should be respected anyway as a consequence of legally binding rules. For example, if a certain kind of pesticide shall not be used in the territory of the European Union, and market players agree not to purchase those agricultural products that were sprayed with that pesticide, they do not fulfil the requirements of the derogation. Rather, this would raise the possibility of greenwashing, from the viewpoint of both the consumer protection and antitrust law. As regards the latter, it is possible that the parties aim to cover up anti-competitive collusion with their agreement under the guise of sustainability.

My standpoint seems to be contrary to that of the Dutch Competition Authority. In one case, garden centers in the Netherlands have agreed to curtail the use of illegal pesticides by not marketing those plants that had been sprayed by these substances.[57] However, in my opinion, this commitment does not exceed the sustainability standard mandated obligatorily by law. To decide whether a standard is higher than mandated by EU and/or national law, the benchmark should be interpreted in a limited way. The Draft Guidelines also stipulate that the exception rule ceases to apply to the agreement "from the moment that equivalent […] standards enter into force".[58] Of course, the regulation on the illegal use of certain pesticides imposes obligations on those persons who (would) market or use the substances, and not those who market the products sprayed with them, but this does not change the fact that the law establishes a sustainability standard that should be respected at each and every level of the vertical chain.

It is worth recalling here the judgment of the Court of Justice from February 2013, in which it was ruled that "the fact that an undertaking that is adversely affected by an agreement whose object is the restriction of competition was allegedly operating illegally on

[57] See: *ACM agrees to arrangements of garden centers to curtail use of illegal pesticides*, https://www.acm.nl/en/publications/acm-agrees-arrangements-garden-centers-curtail-use-illegal-pesticides (accessed on: 13.09.2023).

[58] Draft Guidelines, Recital (59).

the relevant market at the time when the agreement was concluded is of no relevance to the question whether the agreement constitutes an infringement of that provision".[59] In the context of the Dutch case, that the agreement of the garden centres applies restrictions relating to suppliers operating unlawfully in certain aspects of their economic activity (the use of prohibited pesticides) does not mean that the garden centres could take the lead to enforce the laws with their anti-competitive agreement. The unlawful nature of the suppliers' activity does not change the fact that the buyers' agreement is anti-competitive. Moreover, it is not even a higher sustainability standard than mandated by law.

By definition, sustainability standards can be related to a high number of phenomena, be it climate change mitigation, sustainable water use, food waste reduction, reduced use of pesticides or animal welfare.[60] This is as forward-looking as it is dangerous. Obviously, market players can cooperate on a wide variety of issues to contribute to sustainability, and this is positive. Nevertheless, on one hand, the Committee of Professional Agricultural Organisations and the General Confederation of Agricultural Cooperatives[61] and, on the other hand, the Association of Dutch Flower Auctions[62] miss plant health in the list of areas covered, given that this would be in accordance with the protection of the landscape, biodiversity and ecosystem, as well as the reduction in pesticide use.[63] Neither is plant health mentioned in the Draft Guidelines; however, it would be reasonable to clarify whether it can be handled as part of any of the objectives listed in Article 210(3)(a).

Concerning the list of sustainability objectives, a further remark can be made. In a separate point, animal health and animal welfare

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[59] Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.*, EU:C:2013:71, (37).

[60] Regulation 1308/2013, Article 210a(3).

[61] They are commonly known as COPA-COGECA.

[62] Association of Dutch Flower Auctions, *Consultation on sustainability agreements in agriculture – guidelines on the antitrust derogation*, p. 2.

[63] COPA-COGECA, *Copa and Cogeca contribution to the Commission public consultation on Sustainability agreements in agriculture guidelines on antitrust derogation*, p. 3.

are mentioned,[64] relating to which sustainability agreements can be exempted. I am aware that animal welfare has started to infiltrate into scholarly[65], [66] and policy[67] debates as a factor that can contribute to sustainability. However, the real breakthrough to reveal its tangible positive effects on sustainability has not come yet. There are a plenty of high-sounding messages to involve animal welfare in sustainable initiatives, but the direct causal link, in my opinion, is still missing. I am not saying that animal welfare does not matter, because it does, but aim to suggest its immaturity in relation to sustainability. We should not exert ourselves to see the important contribution soil and water protection, reduced pesticides use or biodiversity make

[64] Regulation 1308/2013, Article 210a(3)(c).

[65] See, for example: M. Baumgartner *et al.*, *Improving Horse Welfare and Environmental Sustainability in Horse Husbandry: Linkage between Turnout and Nitrogen Surplus*, "Sustainability" 2021, No. 13(16), https://doi.org/10.3390/su13168991 (accessed on: 13.09.2023); G. Olmos Antillón *et al.*, *Animal Welfare and the United Nations' Sustainable Development Goals – Broadening Students' Perspectives*, "Sustainability" 2021, No. 13(6), https://doi.org/10.3390/su13063328 (accessed on: 13.09.2023); Y. Sun *et al.*, *Determinants of Animal Welfare Disclosure Practices: Evidence from China*, "Sustainability" 2021, No. 13(4), https://doi.org/10.3390/su13042200 (accessed on: 13.09.2023); O. Torpman, H. Röcklinsberg, *Reinterpreting the SDGs: Taking Animals into Direct Consideration*, "Sustainability" 2021, No. 13(2), https://doi.org/10.3390/su13020843 (accessed on: 13.09.2023); L. Friedrich *et al.*, *Iceberg Indicators for Sow and Piglet Welfare*, "Sustainability" 2021, No. 12(21), https://doi.org/10.3390/su12218967 (accessed on: 13.09.2023); L. Keeling *et al.*, *Animal Welfare and the United Nations Sustainable Development Goals*, "Frontiers in Veterinary Science" 2019, Article 336; H. Buller *et al.*, *Towards Farm Animal Welfare and Sustainability*, "Animals" 2018, No. 8(6), https://doi.org/10.3390/ani8060081 (accessed on: 13.09.2023).

[66] See also: Independent Group of Scientists appointed by the Secretary-General, *Global Sustainable Development Report 2019: The Future is Now – Science for Achieving Sustainable Development*, United Nations, New York 2019, p. 117.

[67] C. Verkuijl *et al.*, *Mainstreaming animal welfare in sustainable development: A policy agenda (2022)*, https://euagenda.eu/upload/publications/animal-welfare-stockholm50backgroundpaper.pdf (accessed on: 13.09.2023); S. Weimer, *Being sustainable doesn't equate to a free pass on animal welfare*, 2020, https://www.thepoultrysite.com/articles/being-sustainable-doesnt-equate-to-a-free-pass-on-animal-welfare (accessed on: 01.09.2023); United Nations Environment Programme, *Why is animal welfare important for sustainable consumption and production?*, 2019; World Society for the Protection of Animals, *Animals: helping us achieve the future we want*, 2013.

to sustainability, but the same does not seem to apply as regards animal welfare. Competition policy should express this difference.

Concerning the exception rule in Article 101(3) TFEU, it is undisputed that the causal link between the restrictive agreement and the claimed efficiencies must be direct, and "[c]laims based on indirect effects are as a general rule too uncertain and too remote to be taken into account".[68] The higher level of sustainability is the "efficiency" to which the sustainability agreement should contribute. The claimed efficiencies should be verified, and the real contribution of animal welfare (for example, larger cages) to sustainability remains to be seen. I emphasise once again: I am not against animal welfare, but against competition law exemptions being used for the sake of an objective (sustainability) that cannot be achieved even with allowed competition restrictions due to the missing direct causal link between the means and the efficiencies to be realised. This empties out the essence of the exemption: allowing something that has been restricted to achieve efficiencies. The Pandora's box of competition law should open only when the reason for the derogation is substantiated.

Furthermore, it cannot be forgotten that sustainable practices can conflict with other aspects of sustainability. For example, "if intensively farmed animals were all kept extensively, there would be a large increase in demand for currently unfarmed land". With this, animal welfare would increase, but it can lead to habitat degradation and soil loss.[69] These cases require thorough balancing as to whether the agreement in question contributes overall to sustainability. Legal certainty, in particular in the aspect of creating a proper and well-functioning definition of the sustainability standard, is crucial inorder that the undertakings in the food supply chain could identify those agreements that can be exempted.[70]

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[68] Guidelines on the application of Article 81(3) of the Treaty [2004], OJ EU C 101/97, Recital (54).

[69] D.M. Broom, *Animal welfare complementing or conflicting with other sustainability issues*, "Applied Animal Behaviour Science" 2019, https://doi.org/10.1016/j.applanim.2019.06.010 (accessed on: 13.09.2023).

[70] BEUC – The European Consumer Organisation, *European Commission's consultation on Sustainability Agreements in Agriculture: BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO*, 23 May 2022.

4.3. THE INDISPENSABILITY TEST

As to the condition of indispensability, there are many concerns raised by stakeholders. Of course, many would welcome the clarification of the criterion[71] and see that it is key to achieving a balance between benefits and harms.[72] ClientEarth is of the opinion that it should not be interpreted too strictly and should give room for producers to become more profitable and prevent financial distress.[73] There are also opinions that higher sustainability standards necessarily come with higher prices.[74]

The indispensability standard is articulated in the Commission's guidelines on Article 101(3) TFEU,[75] and – giving attention to the considerations mentioned there – it means that the sustainability agreement must not impose restrictions which are not indispensable to the attainment of the efficiencies created by the agreement in question. In my interpretation, this means that the efficiencies understood as a higher level of sustainability (for example, less food waste, less pesticides, better animal welfare) necessarily require cooperation between market players. Indeed, its assessment method on consumers' willingness-to-pay has been debated heavily,[76] for example the Dutch Competition Authority concluded that the measures taken by the participants within the framework of the widely

[71] LTO Nederland, *Response to call for evidence: Sustainability agreements in agriculture – guidelines on antitrust derogation*, p. 4; EuroCommerce, *Guidelines on antitrust derogations for sustainability agreements in agriculture: call for evidence*, p. 3.

[72] BEUC – The European Consumer Organisation, *European Commission's consultation on Sustainability Agreements in Agriculture: BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO*, 23 May 2022.

[73] ClientEarth, *Sustainability agreements in agriculture – guidelines on antitrust derogation*, p. 4.

[74] COPA-COGECA, *Copa and Cogeca contribution to the Commission public consultation on Sustainability agreements in agriculture guidelines on antitrust derogation*; Association of Dutch Flower Auctions, *Consultation on sustainability agreements in agriculture – guidelines on the antitrust derogation*.

[75] Guidelines on the application of Article 81(3) of the Treaty [2004], OJ EU C 101/97, para. 73–82.

[76] S. Holmes, *Climate change, sustainability, and competition law*, "Journal of Antitrust Enforcement" 2020, No. 8(2), pp. 379–380.

known initiative "Chicken of Tomorrow" are not indispensable to reach a higher level of animal welfare.[77] In this case, the desired efficiencies could have been achieved with means softer than collusion, with which I agree. Of the two protective pillars concerning Article 210a, the indispensability of the concerned agreement in achieving the objectives is at least as important as the requirement of a higher sustainability standard than that mandated by law. The two-factor test concerning indispensability is of significant importance to decide whether a sustainability-related agreement can actually realise the expected outcomes. In my opinion, the realisation of both standards – no efficiencies without the agreement and no efficiencies without competition restriction[78] – should be assessed strictly to exempt an agreement under Article 210a.

In my opinion, the assessment of indispensability should be identical to that carried out as regards Article 101(3) TFEU. Contrary to this, the Draft Guidelines stipulate that the Guidelines on the application of Article 101(3) TFEU is only "a useful starting point" for the assessment of indispensability within the framework of sustainability agreements, but due to certain key differences of the articles, the indispensability standard is also necessarily different between the two.[79] Among other things, they are different because sustainability agreements in the agricultural sector are not limited to providing a fair share of benefits to consumers.[80]

I would approach the question in another way. The indispensability test is not different in the two cases. What is different is the objective to be achieved by a certain agreement. A higher level of sustainability may require, at least *prima facie*, a more tolerant approach towards restrictions. However, it does not mean that the pivot of the indispensability test would change. The factual

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[77] See: *ACM's analysis of the sustainability arrangements concerning the "Chicken of Tomorrow"*, 2015, https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf (accessed on: 13.09.2023).

[78] Guidelines on the application of Article 81(3) of the Treaty [2004], OJ EU C 101/97, para. 73.

[79] Draft Guidelines, Recital (81).

[80] Draft Guidelines, Recital (83).

circumstances to which we apply the indispensability test are the ones that are dissimilar, but one must make the same steps concerning the test itself: first, there is the indispensability of the agreement, and, second, of the competition restrictions. What the Draft Guidelines point out here, the fair share of benefits to consumers is a distinct assessment criterion, and should not play a role in the assessment of the indispensability. An agreement can be indispensable to achieve certain efficiencies but may fall short of providing a fair share of benefits to consumers. These two should not be mixed. I am of the opinion that the Draft Guidelines should not give the impression that there are different indispensability tests as regards different types of restrictive agreements.

Of course, sustainable products are more expensive, or in other words, "sustainability does not come at zero cost".[81] In my view, the indispensability criterion can be aligned with higher prices, if the chance remains for consumers to choose the non-sustainable and cheaper product. This is to say, the initiative (agreement) that aims to achieve a higher sustainability standard does not cover the whole product market (as in the Dutch case of *"Chicken of Tomorrow"*), but leaves "the right of decision" in the hands of consumers. This also takes into consideration those consumers who cannot afford the more expensive product that arises as a consequence of including the costs of sustainability in the price. Nevertheless, higher prices can be indispensable not because the test itself is changed, but because the objective to be achieved with the help of the agreement may require solutions that seem more restrictive than our general assumptions about what is permissible.

[81] *Collective initiatives and sustainability agreements in an organic farming association: The case of Bioland e.V. (July 2022)*, p. 4, https://enrd.ec.europa.eu/sites/default/files/enrd_publications/case_study_bioland.pdf (accessed on: 13.09.2023).

4.4. FURTHER ISSUES

As mentioned, an agreement can only be exempted if it aims to achieve a sustainability standard higher than that mandated by EU or national law. The Draft Guidelines stipulate that "[i]f a mandatory national standard is more stringent or ambitious than the corresponding EU standard, producers and operators active in that Member State must respect that higher national standard".[82] The exemption derives from an EU regulation which is directly applicable. The guidelines interpret this provision, however, in a way that does not apply uniform standards to the whole territory of the EU. A sustainability standard can be appropriate in one Member State but insufficient in another one because of its stricter national legislation. On one hand, it is not in accordance with the global (and cross-border) nature of environmental problems and the emerging number of global food value chains, and, on the other hand, due to the voluntary assessment method of the agreements and the opinion to be issued, upon request, by the Commission, it may result *de facto* in a violation of equal treatment. Why should an agreement be exempted in one Member State but excluded from the exemption in another Member State, if the provisions come from an EU legal act and the Commission itself can opine on its compatibility with EU law? The benchmarks against a sustainability standard applied in an agreement should be those that have been mandated by EU law, because otherwise market players of different Member States are not treated equally at the EU level.

Some thoughts on procedural issues are also worthwhile. The Draft Guidelines formulate within the framework of *ex post* intervention that the competent competition authority may decide that the agreement shall be modified, discontinued or prevented from being implemented, if, among others, the objectives of the CAP are jeopardised. I find it unlikely that a competition authority would be in the position to decide whether a sustainability agreement runs counter, for example, to the aim of enhancing the living standard of agricultural producers. Perhaps the other four objectives are

[82] Draft Guidelines, Recital (56).

closer to the mandate of competition agencies, but they still require a viewpoint unique in relation to the conventional approach. For example, the CAP aims to ensure that supplies reach the consumer at reasonable prices, which – according to the Draft Guidelines – obviously, cannot simply be equated with the lowest prices possible.[83]

Although the Draft Guidelines point out that the threshold of jeopardising CAP objectives is high,[84] these challenges are to be overcome when enforcing the new provisions. I assume that the competition authorities will have a hard time to solve these problems without the help of agriculture-specific regulatory agencies and/or other institutions having information about agri-food markets and the environment. This is where it becomes most apparent how difficult it can be to reconcile different public policy interests in a given case. This is not what any competition authorities are for.

A further difference between the new provisions and general competition law can be found in the sharing of competences between the Commission and national competition authorities. The dividing line has not been determined according to the effect on trade between Member States, but in a more simplified way: decisions on agreements covering a single Member State belong to the respective national competition authority; if more than one Member State is involved, the Commission is responsible.[85] This approach is unjustified and contrary to the case law of the EU competition law. To mention one example: an agreement covering a single Member State wholly has, by its very nature, inter-state trade effects, which should result in the Commission's involvement.[86]

[83] Draft Guidelines, Recital (168).
[84] Draft Guidelines, Recital (167).
[85] Draft Guidelines, Recital (180).
[86] See, for example: Case 8-72: Vereeniging van Cementhandelaren v. Commission of the European Communities, EU:C:1972:84.

5. Earlier cases assessed under the new Article 210a

In this section, I aim to examine a few sustainability initiatives in light of whether the new Article 210a would have resulted in adverse outcomes.

The "Chicken of Tomorrow" case is well known in antitrust circles. The parties to the initiative and the agreement itself were not only suppliers of chicken but also retailers who buy the chicken. The arrangement included numerous criteria to improve the welfare of chicken: slower growing, more space, more dark hours and several environmental requirements. "A key feature of this agreement was that the parties agreed to completely replace all regular chicken in the participating supermarkets with the new, more expensive product".[87]

It is not hard to imagine that, even *prima facie*, an industry-wide agreement that is obligatory and comes with the total elimination of cheaper chicken meat for consumers is not proportionate to the increasing of animal welfare. Even if the consumers' willingness-to-pay for more sustainable chicken meat would have materialised and the sustainability standard adopted by the initiative would have been higher than mandated by law, the indispensability criterion could not be met. From the viewpoint of competition, the animal welfare of chicken can be increased with less restrictive means. That is to say, both the traditional individual exemption and the sustainability-related exemption exclusively applying to the agricultural sector would lead to the same outcome, the prohibition of the initiative. This is because the two-factor test related to the indispensability requirement is also part of Article 210a of the Regulation 1308/2013.

The case of Dutch garden centres is a different example. The parties aimed to curtail the use of illegal pesticides. The garden centres, who are party to the initiative, agreed that they would not buy plants from suppliers who use illegal pesticides on those products. The Dutch Competition Authority assessed the agreement based

[87] J.P. van der Veer, *Valuing Sustainability? The ACM's analysis of "Chicken for Tomorrow" under Art. 101(3)* (18 February 2015), http://competitionlawblog.kluwercompetitionlaw.com/2015/02/18/valuing-sustainability-the-acms-analysis-of-chicken-for-tomorrow-under-art-1013/ (accessed on: 13.09.2023).

on "the competition rules and its draft Guidelines on Sustainability Agreements, and has no objections against it".[88] As mentioned earlier, in my opinion, the agreement would not be exempted under Article 210a of the Regulation 1308/2013, because it does not meet the requirement of a sustainability standard higher than that mandated by law. If a legal provision prohibits the use of certain pesticides, the sustainability standard is embedded in that provision in a way that the legislator has aimed to establish an obligation regarding that type of pesticide. A pesticide is typically forbidden because it is harmful to human health and/or the environment. The standard is given, and I do not see any contribution here to a higher level of sustainability.

The standard could be higher, for example, if the agreement refers to a pesticide that is lawful, but the parties to the agreement recognise and establish its harmful nature, and both plant growers and garden centres agree to avoid using that pesticide and decline to market products treated with that pesticide. It would mean a higher sustainability standard than that mandated by law.

My opinion implies that the newly introduced Article 210a may limit the room for manoeuvre for competition authorities, if they apply the exemption with a narrow interpretation.

Within the framework of the European Network for Rural Development, a Thematic Group on Sustainability Agreements was established to discuss the topic. The 2nd meeting may shed light on certain misinterpretations arising from Article 210a. The presentation of the representative of a large cooperative group included that their "sustainable" production model is pursued with the help of the centralised purchase of inputs, since "[t]he reduction of the cost of inputs for small farmers may be seen as a sustainability action as it improves profit margins and thus economic sustainability".[89] Article 210a, however, is not about this. One cannot justify a collusion

[88] See: *ACM agrees to arrangements of garden centers to curtail use of illegal pesticides*, https://www.acm.nl/en/publications/acm-agrees-arrangements-garden-centers-curtail-use-illegal-pesticides (accessed on: 13.09.2023).

[89] Collective initiatives and sustainability agreements in a non-recognised Producer Organisation: The case of DCOOP (July 2022), p. 2, https://enrd.ec.europa.eu/sites/default/files/enrd_publications/enrd_case_study_dcoop_0.pdf (accessed on: 13.09.2023).

like this with the new derogation. Of course, sustainability has three pillars: environmental, economic, and social. Nevertheless, Article 210a aims to handle only those initiatives that are concerned with environmental improvements. I am not saying that increasing social and economic sustainability in agri-food markets does not appear in EU competition law; quite the contrary.

Although these are not declared *expressis verbis*, Article 209 of Regulation 1308/2013 exempts agreements necessary for the attainment of the Common Agricultural Policy objectives provided that it does not entail an obligation to charge an identical price or by which competition is excluded.[90] The Common Agricultural Policy objectives, such as the goal of ensuring a fair standard of living for the agricultural community, are social in nature,[91] so – in my opinion – Article 209 can be perceived as a provision aiming to increase the social sustainability of agricultural producers, despite the lack of its explicit formulation to do so. Besides, Article 209 leaves room also for joint economic activities (production and sale, as well as joint facilities for storage, treatment, and processing of products) to boost the economic sustainability of producers, with the same implicit approach and not mentioning the expression unequivocally. Article 152(1) contains a similar alleviation for recognised entities, which may help them raise their economic sustainability. These should not, however, be confused with the new Article 210a that has environmental sustainability at its core.

Returning to the above-mentioned initiative, the collusion drawn up by the large and non-recognised[92] cooperative group can be exempted under neither Article 210a (no sustainability standard) nor Article 152(1) (no recognition). It can, nevertheless, have a chance

[90] Regulation 1308/2013, Article 209(1).

[91] A. Heinemann, *Social Considerations in EU Competition Law: The Protection of Competition as a Cornerstone of the Social Market Economy*, [in:] D. Ferri, F. Cortese (eds.), *The EU Social Market Economy and the Law: Theoretical Perspectives and Practical Challenges for the EU*, Routledge, 2019, p. 124.

[92] Collective initiatives and sustainability agreements in a non-recognised Producer Organisation: The case of DCOOP (July 2022), p. 2, https://enrd.ec.europa.eu/sites/default/files/enrd_publications/enrd_case_study_dcoop_0.pdf (accessed on: 13.09.2023).

to enjoy the derogation provided by Article 209, if the case law in *Endives* is overruled (the text of the provision makes it possible).

All in all, the new derogation requires caution, because it also has two criteria to be fulfilled by agreements. It cannot be said that all sustainability initiatives that have not been exempted under "old" derogations will automatically be exempted pursuant to Article 210a. The picture is more nuanced, in particular in light of the requirement of a sustainability standard higher than that mandated by law.

6. Conclusions and *de lege ferenda* proposals

Beyond the above-mentioned suggestions in connection with both substantial and procedural issues, I would bring to the fore here only some general insights.

Although a new sustainability-related exemption has been introduced in the agricultural sector, in my opinion it will not bring significant changes. If a competition authority would have liked to assess the sustainability agreement within the framework of the individual exemption, it could do so even in the lack of an *expressis verbis* provision. The indispensability criterion is also part of the assessment of the individual exemption, and the requirement of the higher sustainability standard than that mandated by law could be included in the analysis of whether the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress.[93]

Of course, the alleviation comes from not requiring that a fair share of benefits shall be returned to consumers. Albeit the new exemption seems less stringent because of this,[94] the requirement of the higher sustainability standard than that mandated by law may bring some surprises. The question may arise that in case the

[93] See, for example: J.P. van der Veer, *Valuing Sustainability?…*, *op. cit*., pp. 5–6, https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf (accessed on: 13.09.2023).

[94] I. Lianos, *Agriculture & competition law: An overview of EU and national case law*, "Concurrences" 2022, No. 16 November 2022.

agreement does not meet this criterion, can the general exemption be applied to the particular case and can the agreement be exempted under the general rules? My answer would be "no", in contrast to what is declared in the Draft Guidelines.[95] There is an inherent contradiction in that the Draft Guidelines also refer to those agreements that do not fulfil the conditions of Article 210a as sustainability agreements, which, anyways, can only be exempted under other exception rules.

The new exemption aims to signal that there are some limitations to have a sustainability-related agreement of agricultural market players exempted from the general prohibition of anti-competitive agreements. Since it paves the way for the exemption of these agreements, its function would vanish by returning back to the analysis in light of the derogations adopted earlier. It may, then, be actually considered greenwashing if later it is referred to as a sustainability agreement.

With the above-mentioned clarifications and modifications, the new antitrust exemption that aims to serve the realisation of a more sustainable agri-food sector could be attained more easily and could come with a framework that protects agricultural producers at a higher rate. I am of the opinion that the operationalisation of the exemption would require intensive cooperation between the agricultural regulatory agencies and the competition authorities in order that both the interests of producers and the requirement of undistorted competition be realised. While the former objective comes from agricultural policy, the latter from competition policy. Although the exemption is codified only at EU level, it is directly applicable in all the EU Member States. Nevertheless, I propose that each member state should adopt its own regulation in this area to establish a tailored regulatory system to the respective country's own needs and agricultural market characteristics. Of course, this possibility may arise only when the agreement has no effect on trade between Member States. In this case, national legislation should identify the domestic features of the agricultural sector and establish an "internal" regulatory framework that opens the door for local

[95] Draft Guidelines, Recital (17).

market participants to be more engaged in sustainable agriculture without being threatened by the enforcement of the competition law.

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Generational Change in Agriculture in Hungary

1. Introductory thoughts

In Hungary, the act specifically designed to promote generational change in agriculture entered into force on 1 January 2023. But before I explore the details of this new regulation, I would like to bring together the legislative aims that appear in the preambles of some of the background legislation of this area, as well as scrutinise the strategic documents that mention at some level the need to support generational change. With this, I would also strengthen my hypothesis that facilitating the change of generations by changing the legal environment is not a new goal, and that this type of regulation is necessary in order to give the ageing farming community a realistic opportunity to hand over the economy to the next generation during their lifetime. This was very difficult to achieve in the previous legal environment, and for this reason, typically, in a large percentage of cases, the farms changed hands on the basis of succession, which in Hungary was not a fortunate situation due to the lack of special and complex agricultural succession regulation.

Our accession to the European Union has played a major role in the way in which Hungarian agricultural regulation is currently in force. As a result of our accompanying obligations, the Act CXXII of 2013 on the Transfer of Agricultural and Forest Land (hereinafter

referred to as: the Land Transfer Act)[1] regulating the area was first created. Since then, this legislation has been followed by subsequent legislation, of which I would like to highlight the most relevant in relation to generational change. I would like to start the analysis by bringing together the form in which the idea of supporting

[1] For more about the analysis and its history, see: T. Andréka, *Birtokpolitikai távlatok a hazai mezőgazdaság versenyképességének szolgálatában*, [in:] Cs. Csák (ed.), *Az európai földszabályozás aktuális kihívásai*, Novotni Kiadó, Miskolc 2010, pp. 7–19; P. Bobvos, P. Hegyes, *A földforgalom* és *földhasználat alapintézményei*, SZTE ÁJK – JATE Press, Szeged 2015; Cs. Csák, *Die ungarische Regulierung der Eigentums- und Nutzungsverhältnisse des Ackerbodens nach dem Beitritt zur Europäischen Union*, "Journal of Agricultural and Environmental Law" 2010, Vol. 5, No. 9, pp. 20–31; Cs. Csák, J.E. Szilágyi, *Legislative tendencies of land ownership acquisition in Hungary*, [in:] R. Norer, G. Holzer (eds.), *Agrarrecht Jahrbuch – 2013*, Neuer Wissenschaftlicher Verlag, Wien–Graz 2013, pp. 215–233; G. Horváth, *Protection of Land as a Special Subject of Property: New Directions of Land Law*, [in:] P. Smuk (ed.), *The Transformation of the Hungarian Legal System 2010–2013*, Complex Wolters Kluwer–Széchenyi István University, Budapest 2013, pp. 359–366; P. Jani, *A termőföld-szerzés hatósági engedélyezésének szabályozása de lege lata* és *de lege ferenda*, [in:] E.I. Ágoston (ed.), *Komplementer kutatási irányok és eredmények az agrár-, a környezeti- és a szövetkezeti jogban*, SZTE-ÁJK, Szeged 2013, pp. 15–28; I. Kapronczai, *Az* új *földszabályozás hatása az agrárpolitikára*, [in:] Á. Korom (ed.), *Az új magyar földforgalmi szabályozás az uniós jogban,* Nemzeti Közszolgálati Egyetem, Budapest 2013, pp. 79–92; L. Kecskés, L. Szécsényi, *A termőföldről szóló 1994. évi LV. törvény 6. §-a a nemzetközi jog és az EK-jog fényében*, "Magyar Jog" 1997, No. 12, pp. 721–729; M. Kurucz, *Gondolatok a termőföldjog szabályozás kereteiről és feltételeiről*, "Geodézia és Kartográfia" 2008, No. 9, pp. 13–22; Z. Mikó, *A birtokpolitika megvalósulását segítő nemzeti jogi eszközök*, [in:] Á. Korom (ed.), *Az új magyar földforgalmi szabályozás az uniós jogban*, Nemzeti Közszolgálati Egyetem, Budapest 2013, pp. 151–163; Z. Nagy, *A termőfölddel kapcsolatos szabályozás pénzügyi jogi aspektusai*, [in:] Cs. Csák (ed.), *Az európai földszabályozás aktuális kihívásai*, Novotni Kiadó, Miskolc 2010, pp. 187–197; I. Olajos, *A termőföldről szóló törvény változásai a kormányváltozások következtében: gazdasági eredményesség és politikai öncélúság*, "Napi Jogász" 2002, No. 10, pp. 13–17; I. Olajos, J.E. Szilágyi, *The most important changes in the field of agricultural law in Hungary between 2011 and 2013*, "Journal of Agricultural and Environmental Law" 2013, Vol. 8, No. 15, pp. 93–110; T. Prugberger, *Szempontok az új földtörvény vitaanyagának értékeléséhez és a földtörvény újra kodifikációjához*, "Kapu" 2012, Vol. 25, No. 9–10, pp. 62–65; J. Vass, *A földtörvény módosítások margójára,* [in:] J. Vass (ed.), *Tanulmányok Dr. Domé Mária egyetemi tanár 70. születésnapjára*, ELTE-ÁJK, Budapest 2003, pp. 159–170; A. Zsohár, *A termőföldről szóló törvény módosításának problémái,* "Gazdaság és Jog" 2013, No. 4, pp. 23–24.

generational change appears in these acts. In the Preamble of the Land Transfer Act, several of the goals of the act are purported to be strengthening family farms, helping generational change, involving young people in farming and providing the necessary conditions for this. On this basis, the objectives of the act include:

> the renewal of villages with a view to maintaining population levels, to cut the flow of migration to larger cities, hence to improve the age structure of the local population; enhancing further the agricultural community through the organisation of development production groups within rural family partnerships and through the growth of local businesses; facilitating the development of medium-size farms in the agricultural sector, and ensuring the stability and further development of small farms; expanding farming operations building one's own work and direct production and service activities; effectively promoting the operations of newly developed farming bodies through transactions in agricultural and forest land, and through the use of agricultural and forest land as collateral for mortgage loans; the creation of estates sufficient in size for viable and economically feasible agricultural production; eliminating the detrimental consequences of a fragmented estate structure in terms of ownership, hence to permit farmers to ply their trade without unwarranted obstructions.[2]

Act CXXIII of 2020 on Family Farms (hereinafter referred to as: Family Farms Act) states in its Preamble that it "expresses its commitment to strengthening the economic role of families; considers it of the utmost importance that the backbone of agricultural production is defined by the form of production based on family farms; expresses its conviction that production activity carried out in an intergenerational framework can ensure the long-term sustainability

[2] Preamble of the Land Transfer Act.

and prosperity of the countryside". It is clear from the general justification of the Family Farms Act that:

> the generational change in agriculture is a problem in the European Union, including in Hungary. State intervention is also important in this area, as only continuous generational renewal can ensure the viability of the agricultural and food economy. A significant step towards solving the problems of generational change in agriculture could be to make the primary agricultural producer layer more transparent and to improve the legal environment for family farmers.

The main emphasis in the rest of the paper will be on the Act CXLIII of 2021 on the Transfer of Agricultural Holdings (hereinafter referred to as: Farm Transfer Act), as this is the act that introduced the transfer of agricultural holding as a new legal institution in the Hungarian legal system, following the Western European model.[3] The purpose of creating the act is to:

> facilitate the transfer of the farm as a unique set of assets to the next generation, which was created during agricultural and forestry activities with the participation of family members, the joint use of their resources and the result of their work for their common prosperity, in such a way that by preserving the diversity of agriculture and strengthening its adaptability, they ensure the efficiency

[3] For some examples from Western Europe, see: H. Kronaus, *The Austrian legal frame of the agricultural land/holding succession and the acquisition by legal persons*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 33, pp. 75–92, https://doi.org/10.21029/JAEL.2022.33.75 (accessed on: 07.07.2023); F. Prete, *The Italian Legal Framework of Agricultural Land Succession and Acquisition by Legal Persons*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 33, pp. 141–154, https://doi.org/10.21029/JAEL.2022.33.141 (accessed on: 07.07.2023); E. Muñiz Espada, *Particular Rules on the Transfer of the Holding Farm in Spanish Law*, "Journal of Agricultural and Environmental Law" 2020, Vol. 15, No. 29, pp. 171–183, https://doi.org/10.21029/JAEL.2020.29.171 (accessed on: 07.07.2023).

> and operability of the farm and help the farmers who start, operate and develop the farms to have a balanced income.[4]

But before I go into detail about the rules of the Farm Transfer Act, however, I would like to highlight a few provisions from the Land Transfer Act, which also contain the idea of support for generational change. If the agricultural land is acquired under the legal title of sale, then the approval of the sale contract by the agricultural administration body is necessary, and the agricultural administration body is obliged to ask for the opinion of the local land commission before granting or refusing the approval. The regional body of the Hungarian Chamber of Agriculture, Food and Rural Development, operating as a public body based on the mandatory membership of those engaged in agricultural activities and the equal voting rights of the members, acts as the local land commission according to the location of the land affected by the contract. In its opinion, the local land commission states, among other things, whether the sale contract meets the general agricultural and land policy interests of promoting generational change in agriculture.[5] The local land commission shall deliver its opinion within thirty days of the date of receipt of the request of the agricultural administration body. The local land commission shall assess the contract of sale and the statements of acceptance of each holder of pre-emption rights listed based on the best information it has available and which are public knowledge, and shall then formulate its opinion as to whether support it. During this assessment, the local land commission must take into account, among other things, how the sale of the land helps a young farmer's, new agricultural producer's acquisition of ownership related to the transfer of the farm.[6]

As aforementioned, it is not only our acts, but also our strategic documents that set the goal for supporting the generational change. One of these documents which is worthy of mentioning in Hungary is the Common Agricultural Policy (CAP) Strategic Plan, which was

[4] Preamble of the Farm Transfer Act.
[5] Land Transfer Act, Art. 23/A (1) f).
[6] Land Transfer Act, Art. 24(1) and (2) and (3) e).

adopted by the European Commission in November 2022, according to which the agricultural support resources became usable from 1 January 2023. The CAP Strategic Plan summarises direct subsidies (Pillar I), rural development (Pillar II) and sectoral measures in a common planning document. Under the CAP Strategic Plan, the promotion of generational change is to be treated as a priority, and several measures are aimed at curbing the increase in the average age of the farming community. Based on all of this, the Strategic Plan designates farm transfer as an area to be supported, and promises tender opportunities for both the transferor and the transferee, as well as for young farmers, both for their start-up and dedicated investment subsidies, which are also expected for them. The rural development interventions of the CAP Strategic Plan can be divided into three groups, such as: 1) economic development interventions; 2) green interventions; 3) interventions of renewable countryside. Of these, the Economic development interventions are now relevant from the point of view of the topic, eight of which will deal with enterprise development and support for generational renewal. As examples of the planned interventions, the document identifies: a) generational renewal with start-up support for young farmers, b) generational renewal with support for farm transferees, and c) support for investments by young agricultural producers.[7]

2. Generational change in the light of the Farm Transfer Act

On 1 January 2023, the act came into force which is intended to facilitate the generational change, specifically to facilitate the transfer of a farm[8] between living persons, from the older farming generation

[7] *Magyarország elfogadott KAP Stratégiai Tervének főbb elemei*, https://kap.mnvh.eu/sites/default/files/pdf/KAP_strategia_legfobb_elemek.pdf (accessed on: 02.09.2023).

[8] Farm Transfer Act, Art. 2 a) farm: serving the operation of the farm:
aa) agricultural and forest land, including farmstead, owned or used by the transferor of the holding;

to the younger one. This is the previously mentioned Act CXLIII of 2021 on the Transfer of Agricultural Holdings.

At the same time, it should be pointed out that the provisions of this act refer to a very special case and do not cover all transfer situations, the subject of which is an agricultural farm. The basic aim is to facilitate the transfer of ownership of the farm within the family through the regulation. The starting point in drafting the act was that the founders of farms that were established during the regime change have now reached the age when they are thinking about securing the future of their farms and thus the question of handing them over to the next generation. 61 percent of farm managers were over 55 years old when the act was enacted.[9] On behalf of the Hungarian National Chamber of Agriculture, the Hungarian Central Statistical Office carried out a survey in 2020. Based on the data of the annual Agricultural Census survey, in 2020 35 percent of farm managers were 65 years old or older, and only 10 percent were younger than 40. And the general finding was that the managers do not know who to entrust their business to in the future, because in most cases their children have chosen other careers.[10]

The main aim in drafting the Act was to lighten the administrative load, and the basic premise is that the majority of farmers in

ab) other immovable properties owned or used by the transferor of the holding necessary for carrying on agricultural and forestry activities;
ac) movable properties owned or used by the transferor of the holding for carrying on agricultural and forestry activities, in respect of which the transferor has the right to organise production and – with the exception of production of seed for hire, hired breeding, hired fattening and the keeping of exposed animals – the right to use the results of production;
ad) rights in rem in respect of agricultural and forestry activities belonging to the transferor of the holding;
ae) a share in the assets of a business association related to the agricultural and forestry activities carried out on the holding, a share in a cooperative society, a corporate interest in an association of forest holders;
af) rights and obligations relating to the assets set out in points (aa) to (ae).

[9] T. Andréka, Lecture entitled *Üzemi rendszer* at the Asset Management Specialist Lawyer training in Miskolc on 7 October 2022, ppt (Slide 84).

[10] V. Kovács, *Generációváltás kapujában a mezőgazdaság*, 2023, https://www.agrotrend.hu/hireink/generaciovaltas-kapujaban-a-mezogazdasag (accessed on: 15.08.2023).

Hungary were small and medium-sized primary agricultural producers and sole proprietors, who either worked individually or as part of a family farm of primary agricultural producers.[11]

Thus, within the framework of the act, the farm transfer contract was introduced as a new legal institution, of which four types are distinguished by the act, the farm transfer sale contract,[12] the farm transfer gift contract,[13] the farm transfer maintenance contract[14] and the farm transfer life-annuity contract.[15]

Due to the purpose of the legal institution, which is to promote generational change in agriculture, the group of subjects who can participate in this legal transaction is extremely limited, because the farm transferor can be only the following: a primary agricultural producer or an individual entrepreneur engaged in agricultural and forestry activities, who has reached the age-limit for retirement or will reach it within 5 years from the conclusion of the contract: who a) has been engaged in agricultural and forestry activities or secondary activities in his own name and at his own risk for at least 10 years and has verifiably produced revenue by such activities, and b) the land user of more than three quarters of the agricultural and forestry land area specified in the farm transfer contract registered in

[11] T. Andréka, *Üzemi rendszer*…, (Slide 85).

[12] Farm Transfer Act, Art. 3(2) a) Based on the farm transfer contract, the farm transferor is obliged to transfer the ownership of the farm and the rights in rem related to the farm, and the farm transferee is obliged to pay the purchase price and take over the farm.

[13] Farm Transfer Act, Art. 3(2) b) Based on the farm transfer contract, the farm transferor is obliged to transfer the ownership of the farm and the rights in rem related to the farm free of charge, and the farm transferee is obliged to take over the farm.

[14] Farm Transfer Act, Art. 3(2) c) Based on the farm transfer contract, the farm transferee is obliged to provide care and maintenance in accordance with the circumstances and needs of the farm transferor or the person designated by the farm transferor until their death, and the farm transferor is obliged to transfer the ownership of the farm and the rights in rem related to the farm.

[15] Farm Transfer Act, Art. 3(2) d) Based on the farm transfer contract, the farm transferee is obliged to periodically provide a specified sum of money or other replaceable thing until the death of the farm transferor, and the farm transferor is obliged to transfer the ownership of the farm and the rights in rem related to the farm.

the land use register for at least 5 years, the forest manager registered in the forest management register for at least 5 years or the owner of the company registered as such, or c) the legal heir of a primary agricultural producer or individual entrepreneur who meets the conditions specified in subsections a) and b).[16] The farm transferee, in turn, can be a primary agricultural producer or an individual entrepreneur engaged in agricultural and forestry activities who is at least ten years younger than the farm transferor, under the age of 50, who meets the conditions prescribed by law for the operation of the farm to be taken over and must either a) be in the chain of relatives defined in the Family Farms Act with the transferor or b) have been employed by or have been in another employment relationship with the transferor for at least 7 years.[17] Here we need to clarify two things in relation to the transferee: what the Family Farms Act means by chain of relatives, and how the Farm Transfer Act defines other employment relationship. Chain of relatives is the group of natural persons who are close relatives (*close relative shall mean spouses, direct relatives, adopted children, stepchildren, foster children, adoptive parents, stepparents, foster parents, and siblings*)[18] within the meaning of the Civil Code,[19] as well as relatives (*relative shall mean close relatives, domestic partners, spouses of direct relatives, spouse's direct relatives and siblings, and spouses of siblings*)[20] of these persons and direct relatives of these relatives.[21] Other employment relationships are employment as an outworker and business association activities involving personal participation.[22]

In addition to the four types of contracts for the transfer of ownership of the farm, the act also provides an opportunity within the framework of the farm transfer contract for the farm transferor and the farm transferee, in connection with the transfer of use. But here, the act does not provide for the possibility of transfer of use

[16] Farm Transfer Act, Art. 2 b).
[17] Farm Transfer Act, Art. 2 c).
[18] Civil Code, Art. 8:1(1) 1.
[19] Act V of 2013 on the Civil Code.
[20] Civil Code, Art. 8:1(1) 2.
[21] Family Farms Act, Art. 2 b).
[22] Farm Transfer Act, Art. 2 d).

for the farm as a whole, as we have seen in the four types of contracts mentioned, but only for agricultural and forest land or part of it owned and used by the transferor, wherein the act provides for the possibility of transfer of use under lease, gratuitous land use according to the Land Transfer Act or in the case of land classified as forest on the legal title designated by the Act CCXII of 2013 on Certain Provisions and Transition Rules Related to the Act CXXII of 2013 on the Transfer of Agricultural and Forest Land (hereinafter referred to as: the Implementation Land Act).[23] In this case, the transfer of the use of the land also takes place in one of the types of farm transfer contracts defined above. The law also recognises mixed types of these contracts, in which case, the parties must determine the contractual provisions for each element of the farm.[24]

Regarding such formalities, the legislator specifies that the farm transfer contract must be incorporated in an authentic instrument or in a private document countersigned by an attorney.[25] Another essential condition to prevent the creation of undivided common ownership and thus avoid fragmentation of the farm is that one person can be the transferee.[26]

As soon as the parties conclude the farm transfer contract, the transferor may not start any new activity related to the transferred farm to be registered in the food chain information system. And after the transfer of ownership, the transferor a) may not exercise the rights and obligations of forest managers to be recorded in the register of forest managers, except for the exercise of the right of usufruct, and b) must delete the activities to be recorded in the food chain information system.[27] In addition, the farm transferor must be deleted from the register of farmers, agricultural production organisations and agricultural holding centers after the transfer of the ownership of the agricultural land or the transfer of use as specified in the Farm Transfer Act.[28] When acquiring the ownership

[23] Implementation Land Act Chapter IX/A.
[24] Farm Transfer Act, Art. 3(3) and (4).
[25] Farm Transfer Act, Art. 3(5).
[26] Farm Transfer Act, Art. 3(6).
[27] Farm Transfer Act, Art. 4(1).
[28] Farm Transfer Act, Art. 6(3).

of land, the transferee must comply with the land acquisition limit and when acquiring the use of the land, the transferee must comply with the land possession limit rules of the Land Transfer Act. If these categories are exceeded, it causes the nullification of the farm transfer contract.[29] A good solution for maintaining the land acquisition limit in case of farm transfer is that the farm transferor only transfer the use of the land to the farm transferee in case when the transfer of ownership would exceed 300 hectares.[30] Based on all of this, it can be concluded that the acquisition limit has a strong "feel for the land"; however, there is no quantitative limit defined for farms in the Farm Transfer Act, as we have seen, the relevant provisions of the Land Transfer Act must be applied.[31]

A common rule for all types of farm transfer contracts is that they must contain: a) the rights and obligations of the parties; b) a precise definition of the elements of the farm; c) a list of civil law contracts related to individual elements of the farm, and proof that the transferee of the farm has become familiar with the rights and obligations arising from them; d) permits for the continuation of agricultural and forestry activities related to certain elements of the farm – if the exercise of the rights is subject to official registration – together with a list of the obligations for submitting the application, and proof that the recipient of the farm has familiarised themselves with the rights and obligations arising from them; e) the pending procedures, pending subsidies within the scope of Act XVII of 2007 on Certain Issues of Procedure Relating to Agricultural, Agro-Rural Development and Fisheries Subsidies and Other Measures, and the statement by the transferee that he is aware of and accepts to be bound by the rights and obligations arising from them; f) applications for subsidies submitted on the basis of the government decrees on the procedure for the use of subsidies from individual European Union

[29] Farm Transfer Act, Art. 6(6) and (7).

[30] T.L. Csegődi, *Élesedtek a gazdaságátadás előírásai*, "Agrárágazat" 2023, No. 2, https://agraragazat.hu/hir/agrar-gazdasagatadas-generaciovaltas-tulajdon-atruhazas-mezogazdasag/ (accessed on: 02.09.2023).

[31] M. Kurucz, Lecture entitled *A mezőgazdasági termelő saját gazdasága: agrárüzem* at the Conference Gazdaságátadás jogi kérdései in Miskolc on 24 March 2023, ppt (Slide 18).

funds and not yet adjudicated, as well as the founding documents of the established subsidies relationships and the statement of the farm transferee that he has learned and recognises the rights and obligations arising from them as binding on him; g) in cases where the parties manage the farm jointly during the cooperation period before the transfer of the farm, then the provisions necessary to ensure the process of the transfer of the farm, the duration of the cooperation; and h) the provisions that are required by law in the case of the transfer of certain elements of the farm.[32]

It also appears as a common element in the farm transfer sale, gift, maintenance and life-annuity contracts that the value of each element of the farm must be determined.[33] As a special provision, in the case of the contract for the farm transfer sale, we can see that where rights of repurchase, pre-emption rights, rights to purchase or rights to sell cannot be established, the parties cannot agree to purchase upon delivery subject to inspection.[34] The Land Transfer Act mentions as an additional feature that the pre-emption rights shall not apply to the transfer of land by a farm transfer contract,[35] and strict guarantee rules should therefore be established to ensure that the farm transfer contract is not misused by the contracting parties.[36] This abuse is already possible in a relatively narrow circle due to the rule that it is only possible to conclude a farm transfer contract between parties who are in the chain of relatives to each other, or who have been in an employment relationship for at least 7 years. In the case of a farm transfer gift, maintenance or life-annuity contract, it is noted that contracts of this type, if they agree on the transfer of the ownership of agricultural and forest land, can only be concluded by close relatives; so in this case, the employee of the farm transferor cannot be in the position of a farm transferee, if he is also not a close relative of the farm transferor.[37] The Land Transfer Act also defines a special rule in the case of the transfer of land use

[32] Farm Transfer Act, Art. 7.
[33] Farm Transfer Act, Art. 8(1), Art. 9(1).
[34] Farm Transfer Act, Art. 8(2).
[35] Land Transfer Act, Art. 20 c).
[36] T. Andréka, *Üzemi rendszer*…, (Slide 92).
[37] Farm Transfer Act, Art. 9(2).

through a farm transfer contract, namely that the prelease right shall not apply to lease arrangements realised by way of the transfer of the right of use of the land under a farm transfer contract.[38]

A special feature of the farm transfer contract, which also greatly facilitates generational change, is the possibility to include a cooperation period in the legal transaction, during which the transferor and the transferee jointly operate the farm, for a maximum period of 5 years. This period represents the transfer of knowledge, which is also an important condition for the appropriate operation of the farm on the part of the farm transferee. During this period, the transferor will remain the owner of the farm and the transferee will be personally involved in the operation of the farm and, unless otherwise agreed, will be jointly entitled to manage the farm and take management decisions together with the transferor. The last day of the cooperation period will be the date on which the transferor transfers ownership of all the elements of the farm or the right to use of the agricultural and forest land to the transferee. For this period, it will be the task of the farm transferee to initiate, with the application submitted to the real estate authority, the recording of the fact of the ongoing farm transfer on the title deeds of the real estate belonging to the farm and owned by the farm transferor.[39] A further feature of the cooperation period is that during this period the farm transfer contract may be terminated with immediate notice if a) one of the parties culpably violates an essential obligation arising from the contract, or b) the health of the transferee has deteriorated to such an extent or there has been a permanent change in his living conditions that prevents him from fulfilling his obligations under the act.[40]

The transferee replaces the transferor in the civil law contracts relating to certain elements of the farm, as defined in the farm transfer contract, without the need for the consent of the third party remaining in the contract, and the guarantees of the civil law contracts defined in the farm transfer contract are not terminated. The transferee shall, by means of the farm transfer contract, replace

[38] Land Transfer Act, Art. 48(1) b).
[39] Farm Transfer Act, Art. 10(1) and: (2), (4)–(5), (7).
[40] Farm Transfer Act, Art. 11(1).

the transferor as the holder of any prior authorisation required for the pursuit of the economic activity related to the farm, as defined in the farm transfer contract, provided that they comply with the legislation laying down the conditions for pursuing that activity. In addition, the transferee is the general legal successor to the transferor in the support relationships according to the farm transfer contract and, if it fulfils the eligibility and content conditions, replaces the transferor in the support relationships as well.[41]

The farm transfer contract must be approved by the agricultural administration body, but it is not the approval of the agricultural administration body according to the Land Transfer Act. The Land Transfer Act also specifically mentions that approval by the agricultural administration body is not required for the transfer of land by a farm transfer contract, and for land use agreements realised by the transfer of use rights under a farm transfer contract.[42] So, the land, as part of the farm, is excluded by the legislator from the special approval of the authorities, and the approval in relation to the farm is sufficient in the case of such a contract.[43] The land thus forming part of the farm is therefore excluded from the rules of the Land Transfer Act, and the Farm Transfer Act is placed on the market as part of the farm[44] based on this provision, which points towards a holding regulation in the classical sense. In the present case, under the provisions of the Farm Transfer Act the contract must be submitted to the agricultural administration body for approval within sixty days of its conclusion. Here, the act designates the Land Transfer Act and the Implementation Land Act, as well as the General Public Administration Procedures Act[45] as background legislations, in which relation the *lex specialis* is the Land Transfer

[41] Farm Transfer Act, Art. 13(1), Art. 14(1), Art. 15(1) and (2).

[42] Land Transfer Act, Art. 36(1) f), Art. 59(1) d).

[43] I. Olajos, *A gazdaságátadási szerződés, mint a generációváltást megalapozó szerződéstípus*, "Advocat" 2022, No. 2, pp. 35–36.

[44] I. Olajos, *Át kell-e alakítani a mezőgazdasági cégeket? Avagy a családi gazdaságokra vonatkozó jogalkotás hatása a mezőgazdasági termelőszervezetekre*, "Miskolci Jogi Szemle" 2022, Vol. 17, No. 4, p. 74, https://doi.org/10.32980/MJSz.2022.4.2114 (accessed on: 07.07.2023).

[45] Act CL of 2016 on General Public Administration Procedures.

Act and the Implementation Land Act, and the *lex generalis* is the General Public Administration Procedures Act. During the procedure, the agricultural administration body examines whether: a) the farm transferor and the farm transferee meet the conditions prescribed in the Farm Transfer Act; b) whether the transferee is entitled to acquire the ownership or right of use of the agricultural and forest land; c) in the case of a transfer of the use of land, do the provisions regarding the use of agricultural and forest land comply with the Land Transfer Act and the Implementation Land Act; d) whether the parties have included in the contract the statements specified by the Land Transfer Act, required as conditions for the right to acquire ownership, and required as conditions for the right to use the land,[46] and; e) whether the agreement of the parties complies with the conditions prescribed by law, from which the parties may not deviate. The agricultural administration body must take a decision within 60 days from the receipt of the documents.[47] As an agricultural administration body, the Government designates four county government offices for this case, of which the appropriate will act according to the location of the land in question.[48] In this case, the agricultural administration body need not contact the local land commission for the purpose of issuing an opinion.

An interesting question is, what will be the legal title of the transaction in this case? According to one point of view, since the farm transfer contract has been introduced as a new legal institution, the farm transfer has also been introduced as a new legal title, in support of this position; they refer to the fact that this can also be derived from Article 17(1) point 37 of the Real Estate Registration Act,[49] which mentions the farm transfer in progress as a legally significant

[46] This obligation is laid down in Art. 6(1) of the Farm Transfer Act.

[47] Farm Transfer Act, Art. 12(1) and (3).

[48] 383/2016. (2.XII.) Government Decree on the designation of bodies performing official and administrative tasks in agriculture Art. 43/A (1) The four government offices: Békés County Government Office; Hajdú-Bihar County Government Office; Veszprém County Government Office; Baranya County Government Office.

[49] Act CXLI of 1997 on Real Estate Registration.

fact that can be recorded in the real estate register.[50] The other point of view, which I also share, is that the appropriate type of contract will determine the legal title of the transaction, i.e. sale, gift, maintenance or life-annuity will be the legal title. In my opinion, this is supported also by Article 32(1) points d) and e) of the Real Estate Registration Act, which state that the document – in order to be recorded in the real estate register – shall contain: d) the detailed description of the right or fact, e) the legal title of the change, so it names separately the designation of the fact, which can be the transfer of the farm in progress, and separately the legal title of the change, which cannot necessarily be inferred from the designation of the fact. In my opinion, the legislator should clearly indicate in the Farm Transfer Act or in the Real Estate Registration Act whether it intends to designate the farm transfer as the title of acquisition.

3. Support for farm transfer

The proposal of the State Secretary[51] responsible for the area to the persons concerned is to wait until 2024 to conclude contracts for the transfer of farms – except in the case that the farm transferee turns 50 in 2023 – because according to the plans, in 2024 the call for tenders will be published that would support the farm transfer in such a way that both the farm transferor and the farm transferee would receive support with a one-time benefit. Under Hungary's CAP Strategic Plan, generational change will be supported for the farm transferor only in the framework of farm transfer cooperation.[52] The conditions of the support will be as follows: a) the farm

[50] Á.L. Nagy, *Generációváltás a magyar agráriumban: új törvény az agrárgazdaságok átadásáról,* https://jogaszegylet.hu/jogelet/generaciovaltas-a-magyar-agrariumban-uj-torveny-az-agrargazdasagok-atadasarol/ (accessed on: 07.07.2023).

[51] Zsolt Feldman – State Secretary responsible for agriculture and rural development.

[52] K. Gönczi, *Gazdaságátadás: ezek a lehetőségek és hozzá a források,* "MezőHír" 2023, No. 5, https://mezohir.hu/2023/05/02/agrar-gazdasagatadas-lehetosegek-tamogatas-mezogazdasag/ (accessed on: 07.07.2023).

planned to be transferred must be at least 10,000 Standard Production Values in size, i.e. it must have an agricultural revenue of at least € 10,000 per year; b) the farm transfer cooperation is established with a commitment of up to 5 years, at the end of which the farm transferor must reach the retirement age; c) there must be the existence of a valid farm transfer contract; and d) there must be a detailed business plan developed by the farm transferee.[53] The amount of the support is as follows for the farm transferor: 1) between 10,000 and 50,000 Standard Production Values transferred farm size: € 50,000; 2) between 50,000 and 100,000 Standard Production Values transferred farm size: € 60,000; 3) over 100,000 Standard Production Values: € 70,000. In the case of the farm transferee, we can calculate the following subsidy amounts: 1) between 10,000 and 50,000 Standard Production Values transferred farm size: € 40,000; 2) between 50,000 and 100,000 Standard Production Values transferred farm size: € 70,000; 3) over 100,000 Standard Production Values: € 100,000.[54] It is clear from the data that for larger farm sizes, the farm transferor receives a smaller allowance than the farm transferee. The reason for this is that the purpose of the support is different, since in the case of the older generation the goal is to help them move into passivity, while in the case of the younger generation it is to support the active management of the farm.[55]

4. Good practices

The creation and enactment of the special regulation of the farm transfer itself and thereby the facilitating of the generational change can, I feel, be adjudged a good practice.

Simultaneously with the entry into force and application of the Farm Transfer Act, practical problems began to arise, for the

[53] D. Kovács, *KAP 6. rész: Generációs megújulás gazdaságátvevő támogatással*, https://palyaz.hu/generacios-megujulas-gazdasagatvevo-tamogatassal-blog/ (accessed on: 07.07.2023).

[54] *Gazdaságátadási pályázat 2023*, https://annexpalyazat.hu/gazdasagatadasi-palyazat-2023/ (accessed on: 07.07.2023).

[55] K. Gönczi, *Gazdaságátadás: ezek a lehetőségek és hozzá a források*, *op. cit.*

solution of which experts are already trying to come up with proposals in advance, with practical options to avoid controversial situations. Tibor András Cseh, Secretary General of the Association of Hungarian Farmers' Groups and Cooperatives (MAGOSZ), formulated some good practical advice for those who are thinking about transferring their farm. On the one hand, in order to avoid later succession disputes, it is worthwhile to include in the contract in the case of a farm transfer gift contract that the gift was made without the obligation to add its value to the value of the estate. But even in the case of a dissolution of marriage, controversial issues can be prevented if the parties stipulate, for example, in the farm transfer gift contract that the farm will become the separate property of the farm transferee, so that the farm will not be the subject of the distribution of assets in a case of the dissolution of marriage.[56]

In addition to this, the data from the 2007–2013 programme period is thought-provoking, insofar as in the member states of the European Union the emphasis was more on supporting young people, and the withdrawal of older people from active farming was less supported. During this period, start-up support for young farmers was available in 24 of the Member States and farm transfer support was available in 16 Member States.[57] In any case, I consider it a good practice not only to support young people, potential farm transferees, but also to introduce the possibility of support for the older generation, the farm transferors, into the support systems.

5. Conclusions and *de lege ferenda* proposals

I welcome the creation of the Farm Transfer Act, thereby facilitating the generational transition in relation to the farm. I think it might be also worthwhile for other Central European countries to introduce

[56] T.A. Cseh, Lecture entitled *Gyakorlati tudnivalók a gazdaságátadásról* at the Forum Generációk kapcsolata – Generációváltás a mezőgazdaságban in Miskolc on 26 June 2023.

[57] E. Székely, Lecture entitled *A nemzedékváltás kérdései az ÚMVP tükrében* at the Conference Nemzeti Fejlesztéspolitikai Fórum 2011 – A vidék- és területfejlesztés helyzete és jövője in Lajosmizse on 14 June 2011, ppt (Slide 12).

this kind of special settlement, which is already working for several Western European countries. So, my proposal – adapting the special rules to the legal environment of each country – would be aimed at developing a structure in the case of the transfer of the farm to a younger generation, which would facilitate the administration and, if possible, ensure with a farm transfer contract that in the legal relations related to the farm the farm transferee would be the general legal successor to the farm transferor, i.e. also take his or her place in the case of permits and support relationships related to the land's/farm's activities, if he or she meets the relevant legal conditions.

In Hungary, I recommend clarifying the existing regulation regarding the farm transfer, in the case that the legislator wishes to consider the farm transfer as the legal title of the change, then this should be clearly indicated in the Farm Transfer Act or in the Real Estate Registration Act.

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The Legal Position of Young Farmers in Land Transfer

1. Introduction

Within the framework of this research, I am examining how the category of the young farmer appears in the legal regulations for the transfer of agricultural land in Hungary, and what special rules must be applied in their case. Of course, in connection with the topic, I cannot ignore the regulation of the European Union, and the support for the generational change that appears in relation to agricultural holdings also deserves a mention.

2. The emergence of the young farmer category in the land transfer

Let us begin with the definition of the Act CXXII of 2013 on the Transfer of Agricultural and Forest Land (hereinafter referred to as: the Land Transfer Act),[1] according to which the *young farmer shall*

[1] For more about the analysis and its history, see: T. Andréka, *Birtokpolitikai távlatok a hazai mezőgazdaság versenyképességének szolgálatában,* [in:] Cs. Csák (ed.), *Az európai földszabályozás aktuális kihívásai*, Novotni Kiadó, Miskolc 2010, pp. 7–19; P. Bobvos, P. Hegyes, *A földforgalom és földhasználat alapintézményei*, SZTE-ÁJK–JATE Press, Szeged 2015; Cs. Csák, *Die ungarische Regulierung der Eigentums- und Nutzungsverhältnisse des Ackerbodens nach dem Beitritt zur Europäischen Union*, "Journal of Agricultural and Environmental Law" 2010, Vol. 5, No. 9, pp. 20–31; Cs. Csák, J.E. Szilágyi, *Legislative tendencies of land*

mean any farmer between the age of sixteen and forty years at the time of exercising the pre-emption right or the prelease right.[2] So, the basic condition, in addition to age characteristics, is that the given person meets the criteria for becoming a farmer according to the Land Transfer Act.[3] Another interesting category in the Hungarian regulation is the new agricultural producer. According to the act the:

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ownership acquisition in Hungary, [in:] R. Norer, G. Holzer (eds.), *Agrarrecht Jahrbuch – 2013*, Neuer Wissenschaftlicher Verlag, Wien–Graz 2013, pp. 215–233; G. Horváth, *Protection of Land as a Special Subject of Property: New Directions of Land Law*, [in:] P. Smuk (ed.), *The Transformation of the Hungarian Legal System 2010-2013*, Complex Wolters Kluwer–Széchenyi István University, Budapest 2013, pp. 359–366; P. Jani, *A termőföld-szerzés hatósági engedélyezésének szabályozása de lege lata és de lege ferenda*, [in:] E.I. Ágoston (ed.), *Komplementer kutatási irányok és eredmények az agrár-, a környezeti- és a szövetkezeti jogban*, SZTE-ÁJK, Szeged 2013, pp. 15–28; I. Kapronczai, *Az új földszabályozás hatása az agrárpolitikára*, [in:] Á. Korom (ed.), *Az új magyar földforgalmi szabályozás az uniós jogban,* Nemzeti Közszolgálati Egyetem, Budapest 2013, pp. 79–92; L. Kecskés, L. Szécsényi, *A termőföldről szóló 1994. évi LV. törvény 6. §-a a nemzetközi jog és az EK-jog fényében*, "Magyar Jog" 1997, No. 12, pp. 721–729; M. Kurucz, *Gondolatok a termőföldjog szabályozás kereteiről és feltételeiről*, "Geodézia és Kartográfia" 2008, No. 9, pp. 13–22; Z. Mikó, *A birtokpolitika megvalósulását segítő nemzeti jogi eszközök*, [in:] Á. Korom (ed.), *Az új magyar földforgalmi szabályozás az uniós jogban*, Nemzeti Közszolgálati Egyetem, Budapest 2013, pp. 151–163; Z. Nagy, *A termőfölddel kapcsolatos szabályozás pénzügyi jogi aspektusai*, [in:] Cs. Csák (ed.), *Az európai földszabályozás aktuális kihívásai*, Novotni Kiadó, Miskolc 2010, pp. 187–197; I. Olajos, *A termőföldről szóló törvény változásai a kormányváltozások következtében: gazdasági eredményesség és politikai öncélúság*, "Napi Jogász" 2002, No. 10, pp. 13–17; I. Olajos, Sz. Szilágyi, *The most important changes in the field of agricultural law in Hungary between 2011 and 2013*, "Journal of Agricultural and Environmental Law" 2013, Vol. 8, No. 15, pp. 93–110; T. Prugberger, *Szempontok az új földtörvény vitaanyagának értékeléséhez és a földtörvény újra kodifikációjához*, "Kapu" 2012, Vol. 25, No. 9–10, pp. 62–65; J. Vass, *A földtörvény módosítások margójára,* [in:] J. Vass (ed.), *Tanulmányok Dr. Domé Mária egyetemi tanár 70. születésnapjára*, ELTE-ÁJK, Budapest 2003, pp. 159–170; A. Zsohár, *A termőföldről szóló törvény módosításának problémái,* "Gazdaság és Jog" 2013, No. 4, pp. 23–24.

[2] Land Transfer Act, Art. 5, point 6.

[3] Land Transfer Act, Art. 5, point 7: "'farmer' shall mean any domestic natural person or EU national registered in Hungary, who has specific vocational skills or a professional qualification in agricultural or forestry activities as provided for in the decree adopted for the implementation of this Act, or, in the absence thereof, who:

> new agricultural producer shall mean a domestic natural person or EU national over the age of sixteen years: a) who has been habitually residing in Hungary under an address registered as his residence at the time of making the legal statement for the acquisition of ownership of land, b) who does not own any land in any Member State of the European Union, in a Member State that is a party to the Agreement on the European Economic Area, or in any other State enjoying similar treatment under international agreement, c) who has specific vocational skills or professional qualification in agricultural or forestry activities as provided for in the decree adopted for the implementation of this Act, and d) who is registered by the body in charge of agricultural and regional development aid as a new agricultural producer.[4]

As regards the regulation of the acquisition of ownership of agricultural land, there are two special provisions for the former categories. One of them is the pre-emption right,[5] and the other is

a) has been verifiably engaged in the pursuit of agricultural and/or forestry activities, and other secondary activities in his/her own name and at his/her own risk in Hungary continuously for at least three years, and has verifiably produced revenue by such activities, or revenue did not materialise for the – completed – agricultural or forestry investment project which has not yet turned productive, or

b) verifiably holds membership for at least three years in an agricultural producer organisation in which he/she has at least a 25 percent ownership share, and who personally participates in agricultural and forestry operations, or in agricultural and forestry operations and the related secondary activities".

[4] Land Transfer Act, Art. 5, point 22.

[5] The situation was similarly regulated in the case of the prelease right, but I will not deal with the issue of use within the framework of this study. Land Transfer Act, Art. 46(4): "Within the entitlement groups specified under Paragraphs b)–d) of Subsection (1) and in Subsections (2)–(3), the prelease right shall apply in the following order: a) member of a family agricultural company, or member of a family farm of small-scale farmers; b) young farmer; c) new agricultural producer".

related to the obligation to make the statements[6] required for the acquisition of ownership by the Land Transfer Act. First, I would like to deal with the issue of the pre-emption right. The Land Transfer Act lays down a special order of pre-emption right in the case of the acquisition of ownership of agricultural land with a sale contract, according to which the State is ranked first, the State exercising this right through the land fund management body. Second is the case of the sale of an ownership share to a third party of jointly owned land by the co-owner who is a farmer and has owned the land for at least 3 years. Third is the local neighbour farmer using the land, or the local resident farmer using the land, or the farmer using the land who has a place of habitual residence or has his center of agricultural operations for at least three years in a municipality from whose administrative boundaries the land in question is located within a 20-kilometer radius via a public road or publicly accessible private road.[7] Fourth is the farmer who is a local neighbour; I would emphasise here that it is not about the farmer using the land. In fifth place, some specific categories related to certain branches of cultivation are wedged in: a) a locally resident farmer who operates an animal farm in the municipality where the land is located for at least three years before the time of exercising such a pre-emption right, and the purpose of acquisition is to produce fodder for the animals as commensurate and which has the mean density of the animal population specified in the decree adopted for the implementation of the Land Transfer Act; aa) in the case of the sale of land registered as meadow,

[6] The situation was similarly regulated in the case of the land use right, but I will not deal with the issue of use within the framework of this study. Land Transfer Act, Art. 42(4): "In addition to what is contained in Subsections (1)–(3), new agricultural producers shall undertake: a) to take up habitual residence within a period of one year from the date of acquisition of the land use right at the registered address in the municipality where the land is located, or to set up a center of agricultural operations in the municipality where the land is located within one year from the date of acquisition of land use right, and b) to engage in the pursuit of agricultural, forestry activity or secondary activity".

[7] Here, in the case of the land user category, I would add, that the farmer mentioned as a land user shall be construed a farmer who uses the land for at least three years according to the land use register or the register of foresters, including if designated as the regulatory user of the land. Land Transfer Act, Art. 19(2).

permanent pasture (grassland) or woodland with respect to cattle, horses, asses, mules and hinnies, sheep, goats and bees; ab) in the case of the sale of land registered as cropland with respect to animal species not mentioned in Subparagraph aa), including cows, and which qualifies as a feed business operator by way of authorisation or notification; b) in the case of the sale of land registered as cropland, garden, vineyard or orchard a farmer who has a place of habitual residence or has had his center of agricultural operations for at least three years in a municipality from whose administrative boundaries the land in question is located within a 20-kilometer radius via a public road or publicly accessible private road; and plans to acquire the land for the production of products bearing a protected geographical indication or a protected designation of origin, or for the purpose of organic farming; c) in the case of the sale of land registered as garden, vineyard or orchard a locally resident farmer who plans to acquire the land for the purpose of pursuing market gardening activities; d) in the case of the sale of land registered as cropland a locally resident farmer who plans to acquire the land for the purpose of production of propagating materials. Sixth in line is the farmer who is a local resident, emphatically not the user of the land. Seventh is the farmer who has a place of habitual residence or has had his center of agricultural operations for at least three years in a municipality from whose administrative boundaries the land in question is located within a 20-kilometer radius via a public road or publicly accessible private road.[8] In the case of the categories in the 2nd, 4th, 5th, 6th and 7th places of the above order, the legislator has established an internal order of pre-emption right within these points, thus facilitating the identification of the pre-emption right holder in a specific case. Within the mentioned categories, if more than one pre-emption right holder who is entitled to this right in the same place in the order submits a statement of acceptance, they will be entitled to the pre-emption right in the following order: 1) the member of a family agricultural company, or member of a family farm of primary agricultural producers for at least a year;

[8] Land Transfer Act, Art. 18(1)(2) and (3).

2) a young farmer; 3) a new agricultural producer.[9] Thus, within the given categories, the act applies a kind of emphasis in the case of the two examined legal subjects, but neither the young farmer nor the new agricultural producer has a special pre-emption right in the basic pre-emption entitlement order.

The other area where we find a speciality, but not in both categories, but only in relation to the new agricultural producer, is the range of statements to be made by the acquiring party as a condition of the acquisition of ownership. As a general rule, the acquiring party must declare: 1) not to permit third-party use of the land, and to use the land himself; 2) in this context to fulfil the obligation of land utilisation; 3) not to use the land for other purposes for a period of five years from the time of acquisition;[10] 4) if the land which is the subject of the contract on the transfer of ownership is used by a third party, the acquiring party must undertake not to extend the duration of the existing land use contract and must undertake the obligations set out in points 1, 2 and 3 for the period following its termination; 5) furthermore, the acquiring party provides a statement enclosed with the contract on the transfer of ownership, of having no outstanding fee or other debt owed in connection with land use, as established by final ruling relating to any previous land use; 6) moreover, he must have not been found to be involved during the period of five years before the acquisition in any transaction aiming to circumvent restrictions on land acquisitions.[11] The special feature of this is that, in addition to making these statements, the new agricultural producer must also undertake: 1) to take up habitual residence within a period of one year from the date of acquisition of ownership at the registered address in the municipality where the land is located, or to set up a center of agricultural operations in the municipality where the land is located within one year from the date of acquisition of ownership, and 2) to engage in the pursuit of agricultural, forestry activity or secondary activity.[12] Therefore, this provision does not mean an

[9] Land Transfer Act, Art. 18(4).

[10] But land may be used for other purposes in certain cases: Land Transfer Act, Art. 13(3).

[11] Land Transfer Act, Art. 13 and Art. 14.

[12] Land Transfer Act, Art. 15.

advantage for the new agricultural producer, but rather a difficulty during the acquisition of ownership of land, although this provision serves to meet the goals of land policy.

The aforementioned all apply in cases when agricultural land is the object of the ownership acquisition. We have seen that the Hungarian regulation contains only a few special provisions for young farmers and new agricultural producers during the acquisition of the ownership of land. This means that, in other respects, the provisions applicable to farmers also apply to them,[13] so they must comply with the rules prescribed as a condition to acquire the ownership of land. The situation is somewhat different when the object of the transaction is an agricultural holding, where I can highlight a special, new legal institution, the farm transfer contract, which is specifically designed to promote generational change. The Act CXLIII of 2021 on the Transfer of Agricultural Holdings (hereinafter referred to as: the Farm Transfer Act)[14], which entered into force on 1 January 2023, introduced this legal institution, which specifically aims to simplify the transfer of farms from older to younger generations, to make it more attractive for the ageing generation to plan ahead for the future situation of the farm and not to leave it to be settled by succession in the future. Looking at the age distribution of agricultural producers, it is typical that most farmers are middle-aged or elderly, and the proportion of young farmers is relatively low, which poses a challenge for the future of the agricultural sector and generational change. The main problem is the lack of intergenerational knowledge and experience in handing over businesses to their successors. According to a 2015 study by the Family Business Consulting Group, 30 percent of family businesses survive the first generational change,

[13] Land Transfer Act, Art. 3(2).

[14] See about it: Á.L. Nagy, *Generációváltás a magyar agráriumban: új törvény az agrárgazdaságok átadásáról*, https://jogaszegylet.hu/jogelet/generaciovaltas-a-magyar-agrariumban-uj-torveny-az-agrargazdasagok-atadasarol/ (accessed on: 07.07.2023); I. Olajos, *A gazdaságátadási szerződés, mint a generációváltást megalapozó szerződéstípus*, "Advocat" 2022, No. 2, pp. 29–36; I. Olajos, *Át kell-e alakítani a mezőgazdasági cégeket? Avagy a családi gazdaságokra vonatkozó jogalkotás hatása a mezőgazdasági termelőszervezetekre*, "Miskolci Jogi Szemle" 2022, Vol. 17, No. 4, pp. 56–75, https://doi.org/10.32980/MJSz.2022.4.2114 (accessed on: 07.07.2023).

the success rate of the second generational change is around 10 percent, and in the case of the third, even worse results were achieved, with the survival rate being only 5 percent.[15] The Farm Transfer Act also tries to emphasise the transfer of knowledge, by providing the opportunity to include a maximum five-year cooperation period in the farm transfer contract, during which the farm transferor and the farm transferee will jointly manage the farm. Under the act, there will be a "quasi" category of young farmers, which would be the farm transferee, who is a primary agricultural producer or an individual entrepreneur engaged in agricultural and forestry activities who is at least ten years younger than the farm transferor and under the age of 50, who meets the conditions prescribed by law for the operation of the farm to be taken over and must either be in the chain of relatives as defined in the Family Farms Act with the transferor or have been employed or have been in another employment relationship with the transferor for at least 7 years.[16] A further relief in connection with the acquisition of ownership by the farm transferee is that the transferee replaces the transferor in the civil law contracts relating to certain elements of the farm, as defined in the farm transfer contract, without the need for the consent of the third party remaining in the contract. The transferee should also replace the transferor as the holder of any prior authorisation required for the pursuit of the economic activity related to the farm, as defined in the farm transfer contract, provided that he or she comply with the legislation laying down the conditions for pursuing that activity; in addition, the transferee is the general legal successor to the transferor in the support relationships according to the farm transfer contract and, if it fulfils the eligibility and content conditions, replaces the transferor in the support relationships as well.[17]

I found it worthwhile to first review the concepts created by the national regulation and the main land transfer provisions in relation to the young generation of farmers, and now I would like

[15] N. Jakab, G. Mélypataki, Lecture entitled *Az agrárgazdaságok átadása, mint a munkáltató személyében bekövetkező változás speciális esete* at the Conference Gazdaságátadás jogi kérdései in Miskolc on 24 March 2023, ppt (Slide 4).

[16] Farm Transfer Act, Art. 2 c).

[17] Farm Transfer Act, Art. 13–15.

to discuss the categories in relation to the European Union, since there we basically encounter a category created from a support point of view, and in the rest of the study I also would like to deal with this issue. The Regulation (EU) 2021/2115 on CAP Strategic Plans defines the common minimum criteria at the EU level for those who qualify as a young farmer. This definition includes the requirements for all relevant interventions under income support (first pillar) and rural development (second pillar). The starting point in the definition of the European Union is that a young farmer must be a "farmer" as defined in Article 3(1) to Regulation (EU) 2021/2115. In relation to the concept of "young farmer", Article 4(6) to Regulation (EU) 2021/2115 defines the compulsory elements for Member States to establish the category of young farmer. It is a mandatory element that the young farmer must be no more than 35–40 years old, within which range each Member State must establish the exact upper age limit. The young farmer must also be "the head of the agricultural holding", i.e. he or she must exercise actual control over the agricultural holding. Finally, the young farmer must have appropriate training and/or skills, the detailed rules of which must be developed by the individual EU countries.[18]

3. Some thoughts on support for young farmers

The possibility to support young farmers[19] appears in both Pillars of the Common Agricultural Policy (CAP) for the years 2023–2027, Pillar I and Pillar II in parallel, and the possibility of their

[18] European Commission, *Agriculture and rural development: Young farmers*, https://agriculture.ec.europa.eu/common-agricultural-policy/income-support/young-farmers_en (accessed on: 01.09.2023).

[19] See more about the topic: A témáról lásd bővebben: AGRYA – Fiatal Gazdák Magyarországi Szövetsége, *Közös agrárpolitika fiatal gazda szemével*, "Az Európai Unió agrárgazdasága" 2010, No. 4, pp. 8–10; Z. Nagy, *The regulation of financial support in particular for agricultural support*, "Journal of Agricultural and Environmental Law" 2018, Vol. 13, No. 24, pp. 135–148, DOI: 10.21029/JAEL.2018.24.135; M. Somai, *Agrártámogatások az Európai Unióban*, http://real.mtak.hu/17418/1/Somai_Agrártámogatások.pdf (accessed on: 01.09.2023); Á. Pólya, M. Varanka, *Gazdaságátadás, nemzedékváltás – az AGRYA és az Agro*

simultaneous use is not excluded. The area-based support for young agricultural producers eligible under Pillar I is provided for in AM Decree 19/2023 (19.IV.),[20] which states that:

> [A] young agricultural producer means a natural person who, on the day of the first submission of the basic income support within the framework of the unified application, a) has reached the age of 18 but is not older than 40, or b) one or more legal entities under the actual and long-term control of the person referred to in subparagraph a) who, as the head of the agricultural holding, establishes an agricultural holding for the first time, and who started his agricultural activities after the last day of the period open for the submission of a unified application for the previous calendar year.[21]

This support can be applied for electronically each year by submitting a unified application:[22]

> To qualify for the subsidy, the applicant must a) when submitting the application according to this regulation for the first time aa) declare that he is submitting a unified application for the first time or, in the case of a legal entity,

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Stratéga közös kutatása, "Agrofórum: a növényvédők és növénytermesztők havilapja" 2018, No. 7, pp. 190–191; J.E. Szilágyi, *Az Agrár- és vidékfejlesztési támogatások pénzügyi jogi rendszere*, [in:] Cs. Csák (ed.), *Agrárjog – A magyar agrárjog fejlődése az EU keretei között*, Novotni Kiadó, Miskolc 2010, pp. 359–363; J.E. Szilágyi, *A mezőgazdasági és vidékfejlesztési pénzügyek, valamint a mezőgazdasági kockázatkezelés szabályai*, [in:] J.E. Szilágyi (ed.), *Agrárjog*, Miskolci Egyetemi Kiadó, Miskolc 2017, pp. 236–264; I.R. Kőszegi, *Fiatal gazdák induló támogatása alprogram (fig) bemutatása és a főbb eltéréseinek kiemelése a korábbiakban kiírt fiatal gazda pályázatokhoz képest*, "Economica" 2015, No. 2, pp. 168–173; T. Andréka, K. Bányai, I. Olajos, *A magyar agrár-piacpolitika legfontosabb változásai a Közös Agrárpolitika 2013-as reformját követően*, "Journal of Agricultural and Environmental Law" 2015, Vol. 10, No. 19, pp. 6–31.

[20] 19/2023 (19.IV.) Decree of Agricultural Minister on the support of young agricultural producers (hereinafter referred to as: 19/2023 (19.IV.) AM Decree).

[21] 19/2023 (19.IV.) AM Decree, Art. 1.3.

[22] 19/2023 (19.IV.) AM Decree, Art. 2(1).

> that the natural person providing actual and long-term control of the legal entity has not submitted a unified application in any form of management; ab) declare the date of starting the actual agricultural activity carried out at his own risk, which cannot be earlier than the day he becomes at least limitedly capable of acting; ac) have a qualification according to Annex 1 or an equivalent qualification, in the case of a qualification obtained abroad, a professional qualification or qualification – according to Annex 1 – recognised or naturalised according to the Act C of 2001 on the Recognition of Foreign Certificates and Diplomas, or prove at least the existence of an employment, contractual or family farm membership relationship as referred to in paragraph (5), related to the agricultural activity (hereinafter referred to as practical activity); and b) declare in the unified application ba) the form of management in which he carries out his agricultural activity, and bb) in the case of a claim as a legal entity, that the claimant is the manager of the holding, and exercises actual and long-term control during this activity.[23]

The financial framework of the European Agricultural Guarantee Fund determined by the European Commission will be the source of the support.[24] It should be noted that the EU reform of the Common Agricultural Policy for the years 2023–2027 brought several changes to this form of support.[25] Such a support is that the applicant must have appropriate qualifications or 2 years of professional experience; the support can be applied for up to 300 hectares, for a maximum period of 5 years, with the estimated amount of aid valued at € 157 per hectare.[26]

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[23] 19/2023 (19.IV.) AM Decree, Art. 2(4).

[24] 19/2023 (19.IV.) AM Decree, Art. 5(1).

[25] E. Sarok, *Hogyan veheti igénybe a fiatal gazda támogatást az ŐCSG tagja?,* https://www.agroinform.hu/palyazatok/fiatal-gazda-teruletalapu-tamogatas-ocsg-ostermelo-64149-001 (accessed on: 01.09.2023).

[26] Nemzeti Agrárgazdasági Kamara, *Közös Agrárpolitika 2023–2027*, Nemzeti Agrárgazdasági Kamara 2023, pp. 10–11, https://www.nak.hu/kap-2023-2027/kap-kiadvanyok/7003-kozos-agrarpolitika-2023-2027/file (accessed on: 01.09.2023).

Although I will not deal with the issue of the family farm in detail within the framework of this study, I would like to mention that the concept of the regulation in connection with this has changed somewhat since the entry into force of Act CXXIII of 2020 on Family Farms (hereinafter referred to as: Family Farms Act)[27] on 1 January 2021. According to this Act, the family farm of primary agricultural producers is a production community established by at least two primary agricultural producers,[28] who are relatives of each other, having neither legal personality nor assets separate from those of its members, within the framework of which the primary agricultural producers conduct their agricultural activities collectively on their own farms, based on the personal contribution of all members and in a coordinated manner.[29] The young farmer also has the opportunity to become a member of the family farm of primary agricultural producers, although, precisely because of the regulatory concept, to join the family farm is basically not an incentive for young people.[30] However, according to the information published by the Ministry of Agriculture, in the CAP reform 2023–2027, the national implementing legislation for area-based support for young farmers has been developed in such a way that support is also available to young farmers who are registered as being in a family farm of primary agricultural producers.[31]

Under Pillar II of the CAP, start-up support for young agricultural producers will be introduced for the first time in 2024, with the following eligibility criteria. In the case of a natural person, he or she a) must be at least 18 and at most 40 years old; b) have

[27] For the previous regulation on family farms, see: E. Bacskai, *Jogi tudnivalók: A családi gazdaság alapítására és működtetésére vonatkozó alapvető szabályok*, "Agro napló" 2013, No. 3, p. 11.

[28] Family Farms Act, Art. 3(2).

[29] Family Farms Act, Art. 6(1).

[30] A. Schiller-Dobrovitz, *Új kihívások a családi gazdaságokban a családi gazdaságokról szóló törvény tükrében*, [in:] M. Fazekas (ed.), *Jogi Tanulmányok*, ELTE Állam- és Jogtudományi Kar, Budapest 2021, p. 70.

[31] Agrárminisztérium, *Tájékoztató – a fiatal gazdák kiemelt területalapú támogatásának változásairól a Közös Agrárpolitika 2023–2027 közötti időszakában*, https://cdn.kormany.hu//uploads/sheets//f/f8/f84/f8480f32441d7367170b7936a24d06a.pdf (accessed on: 01.09.2023).

state-recognised agricultural expertise; c) run an agricultural farm established no more than 5 years ago; and d) have an agricultural farm the size of at least 10,000 Standard Production Values, but no more than 50,000 Standard Production Values. In the case of a legal entity, it must: a) carry out agricultural activity as the main activity no earlier than 5 years from the date of submission of the application; b) the executive officer and the owner must be at least 18 and at most 40 years old; c) the executive officer and the owner must have state-recognised agricultural expertise; d) the legal entity must have a holding size of at least 10,000 Standard Production Values, and the legal entity and the manager and the owner of the legal entity together must have a holding size of at most 50,000 Standard Production Values. The aid may not exceed € 100,000.[32]

4. Good practices

I would like to mention here some organisations and initiatives among the good practices intended to help the activities of young farmers. One of them is the Young Farmers' Association of Hungary – AGRYA, which was founded in 1996, is a national agricultural and rural development organisation and is in contact with more than 3,000 young farmers. One of its main objectives is to represent the interests of young farmers. In pursuit of this it participates in the professional decision-making processes and consultations. Another main objective of AGRYA is to help young people in rural areas who are not involved in agricultural production to stay in place and strengthen the local community, take part in it, and take responsibility for the life of the settlement. AGRYA's activities are managed by a 3-member Presidency. The Executive Secretary is responsible for the operational management, administration and financing of AGRYA. The main decision-making body of AGRYA

[32] B. Németh, *Felkészülés a fiatal mezőgazdasági termelők induló támogatására (II. pillér – 1. rész),* https://www.nak.hu/tajekoztatasi-szolgaltatas/fiatal-gazdalkodo/106245-felkeszules-a-fiatal-mezogazdasagi-termelok-indulo-tamogatasara-ii-piller-1-resz (accessed on: 20.09.2023).

is the National Assembly, which meets annually. In the National Assembly, 72 delegates elected for 2 years represent the membership. The National Assembly elects the officials for 2 years and accepts the annual report and work plan. The financial resources of their activities come from membership fees, income from their own activities, a small proportion of national and the majority of EU subsidies, and subsidies from individual companies which are active in the agricultural sector. Membership of the Association is open to practicing farmers under the age of 40 who apply for admission and are supported by the Presidency. AGRYA operates several priority programmes, among which there are also programmes for children of elementary school age, but here I would like to talk about a few opportunities specifically advertised for young farmers. One of these, the University Young Farmer Clubs, is a programme aimed at young people studying in agricultural higher education who later want to farm professionally. Practicing farmers give lectures on practical agricultural and farm organisation knowledge. Their other event is the Young Farmer Information Exchange, which is announced as part of a series of events between November and February of the following year. Here, a professional conference is combined with an exhibition. Another event is the Young Farmer Conference, which has been held on the last Friday of February every year since 2001, concluding their series of informational events. The event focuses on current agricultural and support policy issues with direct relevance to farmers. The last event that I would like to highlight is CERYC – the Central-European Rural Youth Centre. Cooperation started in 1998 at the initiative of AGRYA, and from 2007 an intensive partnership was formed between the participants, who are young farmers' organisations from Slovenia, Slovakia, Romania, Croatia, Poland, Czech Republic, Bulgaria and Hungary. This sees the partners implement projects together, meet regularly, exchange information and opinions. A major result of this cooperation was that the professional work carried out within the European Council of Young Farmers – CEJA – was also coordinated, and thus the representation of the region in the leadership of CEJA

was stabilised and these countries have a meaningful impact on the operation of CEJA.[33]

As another good practice, I would like to highlight the Young Farmer Mentor Programme announced by the Agrarian Community, which offers young farmers in Hungary a kind of help in developing the farm and submitting a successful application. The programme basically consists of 5 steps: 1) tender advice, 2) consultation with an expert adviser, 3) accounting advice, 4) legal advice, 5) a completed project plan and financial plan. A mentor accompanies the young person participating in the programme throughout these steps.[34]

5. Conclusions and *de lege ferenda* proposals

In relation to the young farmer, we encounter relatively few facilities in the case of acquiring land ownership in Hungary. Basically, apart from the point 2 in the order of internal pre-emption rights, the legislator did not facilitate their acquisition of ownership. All in all, the young farmer will be in an easier situation if he is also a close relative of the person from whom he wishes to acquire ownership of the land, since the legislator prefers the acquisition of ownership by a close relative, thereby keeping the land within the family; so, the close relative appears as an exception in the case of several land transfer provisions, to whom some of the restrictions on acquisition of ownership do not apply. The situation is similar in Poland, where the young farmer's acquisition of ownership could be helped by easing the eligibility conditions, which, according to the current legal provisions, take place in the case when the young farmer acquires land ownership from a relative.[35]

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[33] *Rövid összefoglaló a Fiatal Gazdák Magyarországi Szövetsége – AGRYA tevékenységéről és működéséről*, https://agrya.hu/content/magunkrol (accessed on: 01.09.2023).

[34] Agrárközösség, *Fiatal Gazda Mentorprogram*, https://agrarkozosseg.hu/fiatalgazdamentorprogram/ (accessed on: 01.09.2023).

[35] A. Kubaj, *Legal frame for the succession/transfer of agricultural property between the generations and the acquisition of agricultural property by legal persons – in Poland*, "Journal of Agricultural and Environmental Law" 2020,

On the other hand, the situation is different in the Hungarian regulation in the case of the farm, when the generational change is carried out with a farm transfer contract, when the legislator greatly simplified the administrative burdens and the ownership acquisition process itself, and took care of the transfer of knowledge, creating the possibility of incorporating a cooperation period into the legal transaction, during which the farm transferor and the farm transferee jointly operate the farm. In this case, the subject of the legal transaction may not only be a relative of the farm transferor during the application of these favourable rules, but also the primary agricultural producer or an individual entrepreneur engaged in agricultural and forestry activities who has been employed or has been in another employment relationship with the farm transferor for at least 7 years.

It can also be stated that despite the measures within the CAP reform aimed at young farmers, the new generation has to face many difficulties, especially in terms of access to credit and land.[36] This is supported by the European Parliament's report on land concentration,[37] in which, among other things, the role of the young generation is highlighted, as it states that:

> whereas the future of the agricultural sector depends on the younger generation, and on its willingness to innovate and invest, which is decisive for the future of rural areas as it represents the only way to halt the ageing of the farming population and to secure farm succession, without which the intergenerational contract also loses validity; whereas,

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Vol. 15, No. 29, p. 128, https://doi.org/10.21029/JAEL.2020.29.118 (accessed on: 07.07.2023).

[36] I. Olajos, *A fiatal gazda tematikus AIprogram mint a támogatási rendszer kiemelt eszköze*, "Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica" 2019, Vol. 37, No. 2, p. 404.

[37] European Parliament (EP), *Report on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers*, Committee on Agriculture and Rural Development A8-0119/2017, 30.03.2017. For the analysis of this, see: J.E. Szilágyi, *Az európai jog és a magyar mezőgazdasági földek forgalmának szabályozása*, "Agrár- és Környezetjog" 2017, No. 23, pp. 179–181.

> on the other hand, it is particularly difficult for young farmers and new entrepreneurs to gain access to land and to credit, which is liable to make the sector less attractive.[38]

It would be worthwhile to rethink the regulation from the point of view of how, in addition to complying with the land policy goals, it would be possible to put young farmers and new agricultural producers in a more favourable position during the land transfer, since the main problem is that they have difficulties in accessing land. A solution to this situation could be to provide them with an independent place within the main order of the pre-emption right,[39] or, in the case of a new agricultural producer, to provide a longer period of time – not just 1 year – to live as a permanent registered resident, or to establish a centre of agricultural operations.

My further suggestion would be to lay down the missing or not fully developed sui generis agricultural succession rules, which I have not discussed in detail in this study, but which I explained in my book chapter completed within the framework of the Polish-Hungarian Research Platform 2023. Here I would just like to emphasise again the importance of this, as it is often the younger generation that is affected by the issue of succession, and a complex regulation of this kind, in line with the objectives of land policy, would make it easier for young people to prepare for this situation and would make it clearer who will be the heir of the agricultural land or holding.

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[38] European Parliament's report, Point Z). For further challenges for young farmers, see: P. Hegyes, *Legal Responses to the Challenges Facing the Young Agricultural Generation*, "Journal of Agricultural and Environmental Law" 2022, Vol. 17, No. 33, pp. 51–62, https://doi.org/10.21029/JAEL.2022.33.51 (accessed on: 07.07.2023).

[39] This is also the conclusion of AGRYA – the Young Farmers' Association of Hungary – in its proposal entitled Nemzeti minimum az agrár-nemzedékváltásért. AGRYA – Fiatal Gazdák Magyarországi Szövetsége, *Az ügy, ami összeköt: Nemzeti minimum az agrár-nemzedékváltásért. A Fiatal Gazdák Magyarországi Szövetségének javaslatai a magyar mezőgazdaság generációs megújulásáért,* p. 3, https://dxpvcgy88gl35.cloudfront.net/sites/default/files/downloads/fiatal_gazda_nemzeti_minimum.pdf (accessed on: 01.09.2023).

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The Ritual Slaughter of Animals in Poland

1. Introduction

The Polish regulation concerning slaughter of animals with specific methods required by religious beliefs is not very satisfactory.[1] Firstly, the text of the provisions of the Act of 21 August 1997 (hereinafter: u.o.z.),[2] which deals with the rules of the slaughter of animals, does not reflect the true state of the law, as some of its provisions were partially revoked by the ruling of the Polish Constitutional Court. Secondly, other of its provisions are formally still in force, but their accordance with the Constitution of Poland of 2 April1997 (Constitution RP)[3] can be reckoned as doubtable, because, even though they were not derogated as they were formally not the subject of a Constitutional Court verdict due to procedural issues, the rationale of

[1] Cf. W. Brzozowski, *Dopuszczalność uboju rytualnego w Polsce*, "Państwo i Prawo" 2013, No. 5, p. 50; J. Helios, W. Jedlecka, M. Stępień, *Odkrywanie intencji prawodawcy na rzecz konstytucyjnej ochrony zwierząt*, [in:] J. Helios, W. Jedlecka (eds.), *Prawo zwierząt do ochrony przed cierpieniem: wybrane problemy*, Toruń 2019, p. 86; E. Łętowska, M. Namysłowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Prawo UE o uboju zwierząt i jego polska implementacja: kolizje interesów i ich rozwiązywanie (Cz. 2)*, "Europejski Przegląd Sądowy" 2013, No. 12, p. 4. See also: K. Słomiński, *The status of ritual slaughter in the multicentric legal system*, [in:] E. Kruk, G. Lubeńczyk, H. Spasowska-Czarny (eds.), *Legal protection of animals*, Lublin 2020, p. 80.

[2] Animal Protection Act of 21 August 1997 (Journal of Laws of 2023, item 1580).

[3] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997 No. 78, item 483, as amended). See English translation: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (accessed on: 26.09.2023).

the verdict supports the view of its non-compliance with the Polish fundamental law. In the EU law, the rules on ritual slaughter and their interpretation are still the subject of much debate.[4]

2. General legal grounds for animal rights and animal welfare

The status of an animal as a sentient being and its consequences has been the subject of different views throughout the ages and still is not free from discussion.[5] Some fundaments for the legal protection of animals[6] can be deducted from Article 5 Constitution RP, which states that the Republic of Poland shall ensure the protection of the natural environment pursuant to the principles of sustainable development.[7] It can be argued that also Article 31 para. 3 Constitution RP provides mechanisms for animal protection, which can be treated as a part of the protection of the natural

[4] An example of this is: the verdict of the EU Court (Grand Chamber), 17 December 2020, C 336/19, Centraal Israëlitisch Consistorie van België, ECLI:EU:C:2020:1031, English version: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62019CJ0336#t-ECR_62019CJ0336_EN_01-E0001 (accessed on: 29.09.2023); the verdict of TS of 17 December 2020, C-336/19, Centraal Israëlitisch Consistorie van België, E.A. and Others v. Li and Others, LEX No. 3095387. For the critical analysis of this, see: M.J. Dębowski, *Granice wolności wyznania w prawie Unii Europejskiej w kontekście uboju rytualnego: glosa do wyroku Trybunału Sprawiedliwości z 17.12.2020 r., C-336/19, Centraal Israëlitisch Consistorie van België*, "Europejski Przegląd Sądowy" 2022, No. 1, pp. 36–41.

[5] For the most comprehensive up-to-date information in the field of animal law and its theoretical and philosophical grounds, see: T. Pietrzykowski, *Foundations of animal law: concepts – principles – dilemmas*, translated by K. Warchał, Katowice 2023. About the overview of the approaches to the problem from philosophical and partially legal perspective, see: J. Helios, W. Jedlecka, *Prawo zwierząt do ochrony przed cierpieniem z punktu widzenia filozofii i etyki*, [in:] J. Helios, W. Jedlecka (eds.), *Prawo zwierząt do ochrony przed cierpieniem: wybrane problemy*, Toruń 2019, pp. 11–57.

[6] There is a view that this provision concerns only wild animals and not domesticated animals, see: J. Helios, W. Jedlecka, M. Stępień, *Odkrywanie..., op. cit.*, p. 75.

[7] G. Rejman, *Ochrona prawna zwierząt*, "Studia Iuridica" 2006, No. 46, p. 258. See also: K. Kuszlewicz, *Prawa zwierząt: praktyczny przewodnik*, Warszawa 2019, pp. 42, 47–48.

environment, as it prescribes that constitutional freedoms and rights can be limited when it is necessary in a democratic state for the protection of the natural environment.

Polish law provides protection for animal and animal welfare, just as other EU and international regulations do.[8] The crucial provisions in this field are included in the Law of 21 August 1997 (hereinafter: u.o.z.).[9] The very title of this statute, i.e. law on the "protection of animals", indicates the will of the lawmaker to safeguard other living creatures than human beings and presents the main statute's aim, which should not be overlooked during interpretation of its provisions. The system of values, on which the specific provisions of the u.o.z. are grounded, are explained explicitly in Article 1 para. 1 u.o.z., according to which: "an animal, as a living being, capable of feeling suffering, is not a thing".[10] Man owes it respect, protection and care".[11] Albeit this general rule can consider not only vertebrate animals (i.e., fish or some crustaceans), the scope of the law is generally restricted to vertebrates (Article 2 para. 1).[12]

The European Union (EU) shares the same view of necessary protection for animals and their welfare.[13] In 1997 EU member states

[8] List of the EU and international regulations in the field of animal welfare with short description of the status of animals in the light of those regulations can be found in: I. Lipińska, *Administracyjnoprawna ochrona zwierząt gospodarskich*, [in:] P. Czechowski, P. Będźmirowska, J. Bieluk, A. Zieliński (eds.), *Prawo rolne*, Warszawa 2022, pp. 739–740 (footnote 4); R. Kołacz, *Europejskie regulacje prawne dotyczące dobrostanu zwierząt gospodarskich*, [in:] R. Kołacz (ed.), *Standardy higieniczne, dobrostan zwierząt oraz ochrona środowiska w produkcji zwierzęcej w świetle przepisów UE*, Wrocław 2000, pp. 5–7.

[9] Animal Protection Act of 21 August 1997 (i.e., Journal of Laws of 2023, item 1580).

[10] In this context "thing" is a synonym of *res*, i.e. physical object, which may be the subject of rights.

[11] However, due to practical necessity, if the law does not provide otherwise, provisions concerning *res*, apply to animals, but only accordingly (Article 1 para. 2 u.o.z.).

[12] Wording of the Article 2 para. 1 u.o.z. resulted in different opinions about the scope of the statute's provisions. See: K. Kuszlewicz, *Ustawa o ochronie zwierząt: komentarz*, Warszawa 2021, pp. 84–89.

[13] For further information on the rule of animal welfare in EU law and practice, see: E. Jachnik, *Zasada dobrostanu zwierząt we Wspólnej Polityce Rolnej Unii Europejskiej*, "Studia Iuridica Lublinensia" 2017, No. 1(26), pp. 287–298; M.E. Szymańska, *Livestock welfare – legal aspects*, [in:] E. Kruk, G. Lubeńczyk,

adopted a protocol[14] which resulted in introducing into treaties new regulation guaranteeing animal welfare. This value became a part of the fundamental regulation within the EU, i.e. the Treaty on the Functioning of the European Union (TFEU).[15] Article 13 TFEU states that in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals. Among the many regulations, which aim at providing safety from unnecessary pain or fear, the provisions dealing with the killing of animals are among the most important ones. The rules of EU law concerning the killing of animals for different purposes, including food production (Article 1 para. 1), were introduced in Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of their killing (CR 1099/2009).[16] Even though the scope of the regulation is narrower than that of the u.o.z.[17] and thus the protection of animals provided by it is lesser, the main rules are very similar to the Polish ones. The main rule is that animals shall be spared any avoidable pain, distress or suffering during their killing and related operations (Article 3 para. 1 CR 1099/2009).

H. Spasowska-Czarny (eds.), *Legal protection of animals*, Lublin 2020, pp. 177–187. See also: I. Lipińska, *Administracyjnoprawna…*, *op. cit*., pp. 741–742.

[14] Protocol (No. 33) on protection and welfare of animals (1997), OJ EU C 321, 29.12.2006, p. 314.

[15] Consolidated Version of the Treaty on the Functioning of the European Union, OJ EU C 202, 07.06.2026, p. 47. Consolidated version available on-line: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016E%2FTXT-20200301 (accessed on: 26.09.2023).

[16] Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of their killing, OJ EU L 303, 18.11.2009, p. 1, as amended.

[17] According to the legal definition included in Article 2 letter c) CR 1099/2009, an animal is a vertebrate excluding reptiles and amphibians.

3. Right to manifest religion

The right to meat prepared according to the specific methods required by religious beliefs can be deducted from the right to freedom of conscience and religion, as it can be treated as a way of manifesting one's religious beliefs and fulfilling the obligations and duties of one's religion.[18]

The right to freedom of conscience and religion is one of the most important human rights and exercising religion is a crucial element of this freedom, guaranteed in the documents of the United Nations (UN) and international law. Both the freedom of religion and the right to exercise religion, are mentioned in the UN's Universal Declaration of Human Rights (UDHR),[19] which states that everyone has the right to freedom of conscience and religion, and this right includes freedom to manifest one's religion or belief in practice, worship and observance (Article 18 UDHR). Very similar provisions were also adopted in another UN declaration from 1981 (Declaration'1981).[20] The International Covenant on Civil and

[18] Cf. A. Skóra, *Religious slaughter of animals in light of the EU and in the Polish law*, "Studia Prawnoustrojowe" 2019, Vol. 43, pp. 286–287. To some extent the right to religious slaughter can be deducted from the right to food. About the so-called right to food, see: P. Popardowski, *Prawo człowieka do żywności ("right to food") i jego oddziaływanie w obszarze prawa rolnego*, [in:] A. Niewiadomski, K. Marciniuk, P. Litwiniuk (eds.), *Z zagadnień systemu prawa. Księga jubileuszowa Profesora Pawła Czechowskiego*, Warszawa 2021, pp. 693–704.

[19] Universal Declaration of Human Rights (10 December 1948), U.N.G.A. Res. 217 A (III) (1948), [in:] Resolutions adopted by the General Assembly during its 3rd session, Volume I, 21 September–12 December 1948, A/810, 1948, pp. 71–77, available on-line (in English): https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NO.0/043/88/PDF/NO.004388.pdf?OpenElement (accessed on: 26.09.2023); in Polish: *Powszechna Deklaracja Praw Człowieka (rezolucja nr 271A (III) Zgromadzenia Ogólnego Organizacji Narodów Zjednoczonych z dnia 10 grudnia 1948 r.*, [in:] W. Uruszczak, Z. Zarzycki (eds.), *Prawo wyznaniowe: Zbiór przepisów*, Kraków 2003, pp. 69–72, http://libr.sejm.gov.pl/teko1/txt/onz/1948.html (accessed on: 26.09.2023).

[20] See: Article 1 para. 1 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, [in:] Resolutions and decisions adopted by the General Assembly during its 36th session, 15 September–18 December 1981, 16–29 March, 28 April and 20 September 1982, A/36/51, 1982, pp. 171–172, available on-line (in English): https://

Political Rights (ICCPR)[21] also guarantees to everyone the right to conscience and religion, including freedom to manifest their religion or belief in worship, observance and practice (Article 18 para. 1 ICCPR). In Europe this fundamental freedom is also guaranteed by the Article 9 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[22] In the system of laws of the EU, freedom of conscience and religion is prescribed in the Charter of Fundamental Rights of the European Union (CFREU),[23] which reiterates the previously mentioned documents and states that everyone has the right to freedom of conscience and religion, which includes manifesting religion or belief, in worship, practice and observance (Article 10 CFREU).

It is important to note that, like in the case of the majority of human rights, the right to freedom of conscience and religion with its component of manifesting one's religious beliefs, is subjected to

documents-dds-ny.un.org/doc/RESOLUTION/GEN/NO.0/406/81/PDF/NO.040681.pdf?OpenElement (accessed on: 26.09.2023); in Polish: *Deklaracja Zgromadzenia Ogólnego Organizacji Narodów Zjednoczonych z dnia 25 listopada 1981 r. w sprawie eliminacji wszelkich form nietolerancji i dyskryminacji opartych na religii lub przekonaniach*, [in:] W. Uruszczak, Z. Zarzycki (eds.), *Prawo wyznaniowe: Zbiór przepisów*, Kraków 2003, pp. 73–76, http://libr.sejm.gov.pl/teko1/txt/onz/1981.html (accessed on: 26.09.2023).

[21] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, Vol. 999, pp. 171–186, available on-line (in English): https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf (accessed on: 27.09.2023); in Polish: International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966 (Journal of Laws of 1977 No. 38, item 167).

[22] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, United Nations Treaty Series, Volume 213, pp. 222–270, available on-line (in English): https://www.echr.coe.int/documents/d/echr/convention_ENG (accessed on: 27.09.2023); in Polish: Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993 No. 61, item 284, as amended).

[23] Charter of Fundamental Rights of the European Union, OJ EU C 303, 26.10.2012, pp. 1–16, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2007.303.01.0001.01.ENG&toc=OJ%3AC%3A2007%3A303%3ATOC (accessed on: 27.09.2023).

limitations. The enumerative catalogue of values that justifies limitation of the right to manifest religion, are also included in some of the international and EU laws. Declaration' 1981 (Article 1 para. 3) provides that the freedom to manifest one's religion or belief may be subject only to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. The same grounds for lawful limitation of exercising religious beliefs are included in the ICCPR (Article 18 para. 3), while the ECHR (Article 9 para. 2) introduces very similar regulation, which is incorporated into EU law by the reference made by Article 52 CFREU.

Summarising, there are no explicit references to animal welfare among the legal premises for restricting the manifestation of religion or belief. Thus, grounds for the limitation of exercising one's religious beliefs (including eating meat prepared with respect to the specific methods of slaughtering animals demanded by religion) must be sought among the values of public safety, order, health or morals or the fundamental rights and freedoms of other people (as others in this context does not mean animals). This conflict between animal welfare and the right to manifest one's religion has not been overlooked in EU law, as the respect for the exercising of religious beliefs was provided also in the EU regulations on animal welfare. Even Article 13 TFEU, which introduced the protecting of animal welfare into EU treaties, states that taking into consideration animal welfare during formulating and implementing EU law, cannot be done without regard to the provisions and customs of the member states relating in particular to religious rites, cultural traditions and regional heritage.[24]

Constitution RP (Article 53 para. 2) reflects the rules of the ICCPR and ECHR, guaranteeing anyone the right to the freedom to manifest one's religion or belief.[25] The premises for a legal limitation

[24] This regulation was also included in previously mentioned Protocol (No. 33) on the protection and welfare of animals.

[25] Ritual slaughter is not mentioned directly by it is guaranteed as a part of manifesting religion. However, in the statute regulating the legal status of Jewish communities in Poland (Act of 20 February 1997 on the Relationship of the State to Jewish Religious Communities in the Republic of Poland, Journal of Laws of 2014, item 1798), ritual slaughter is explicitly mentioned. According to its Article 9

of this freedom also omits protection of the natural environment and animal welfare (Article 53 para. 5 Constitution RP). Additionally, the main statute dealing with religious freedom in Poland (Act of 17 May 1989 on guarantees of freedom of conscience and religion),[26] states that in carrying out religious functions, churches and other religious communities may in particular produce and acquire objects and articles needed for worship and religious practices and use them (Article 19 para. 2 point 9). Meats prepared according to a specific method required by a religious rite can be treated as an example of articles needed for worship and religious practices; however, the relation of this provision with the provisions of the u.o.z. can be dubious.[27]

para. 2, in order to fulfil the right to perform ritual rites and activities related to religious worship, Jewish communities take care of the supply of kosher food, ritual canteens and baths and ritual slaughter. It should be interpreted as a right for Jewish communities to perform ritual slaughter according to their beliefs. The same opinion is shared in: W. Brzozowski, *Dopuszczalność…*, *op. cit.*, pp. 48–49; E. Łętowska, M. Namysłowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Prawo UE… (Cz. 2)*, *op. cit.*, p. 6. For the contrary view, see: K. Lipińska, *Czy w Polsce jest dozwolony ubój zwierząt?*, "Przegląd Prawa Ochrony Środowiska" 2011, No. 1, p. 25. See also: H. Kaczmarczyk, *Zakaz uboju rytualnego w prawie polskim naruszeniem konstytucyjnego prawa do wolności religijnej?*, "Przegląd Prawa Publicznego" 2014, No. 12, pp. 58–60; M. Winiarczyk-Kossakowska, *Sytuacja prawna gmin wyznaniowych żydowskich w Polsce*, "Przegląd Prawa Publicznego" 2010, No. 7/8, pp. 49–50.

[26] Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion (Journal of Laws of 2023, item 265).

[27] Cf. W. Brzozowski, *Dopuszczalność…*, *op. cit.*, pp. 49–50.

4. EU particular laws on ritual slaughter

EU regulation on ritual slaughter dates back to 1993, when directive 74/577/EWG was issued.[28] Its provisions[29] stated that solipeds, ruminants, pigs, rabbits and poultry brought into slaughterhouses for slaughter must be stunned before slaughter or killed instantaneously in a prescribed way by its provisions and bled in accordance with its provisions (Article 5 para. 1 letters c–d). However, in the case of animals that are subject to particular methods of slaughter required by certain religious rites, the requirements of stunning did not apply.[30]

Later the EU's Council Regulation on protection of animals at the time of killing, provides for rules about slaughtering animals in connection with religion beliefs.[31] Important implications in the field of

[28] Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing, OJ UE L 340, 31.12.1993, p. 21, as amended, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0119 (accessed on: 28.09.2023). On technical issues concerning slaughter of animals while the directive was in force, see: J. Szymborski, *Zasady ochrony zwierząt przed i w czasie uboju*, [in:] R. Kołacz, B. Króliczewska, A. Rudnicka (eds.), *Etyczne i prawne aspekty ochrony dobrostanu zwierząt: konferencja naukowa, Wrocław, Polska, 4–5 października 2001: materiały konferencyjne*, Wrocław 2001, pp. 46–69.

[29] In the motives for its issuance, the document provides that it took into account the particular requirements of certain religious rites. In Article 2, which regulates definitions, the document states that, in the Member States, the religious authority on whose behalf slaughter is carried out shall be competent for the application and monitoring of the special provisions which apply to slaughter according to certain religious rites.

[30] Due to the scope of this directive it did not forbid ritual slaughter conducted in other places than a slaughterhouse. See: E. Łętowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Wiąże, ale nie przekonuje: wyrok Trybunału Konstytucyjnego w sprawie K 52/13 o uboju rytualnym*, "Państwo i Prawo" 2015, No. 6, p. 58.

[31] Shortly about the ritual slaughter, see: A. Czohara, T. Zieliński, *Ustawa o stosunku państwa do gmin wyznaniowych żydowskich w Polsce: komentarz*, Warszawa 2012, p. 78; J. Drath, *Ubój rytualny w polskim systemie prawnym*, "Colloquium" 2015, No. 3, pp. 72–73; J. Helios, W. Jedlecka, M. Stępień, *Odkrywanie…*, *op. cit.*, pp. 85–86, 91–94; K. Lipińska, *Czy w Polsce…*, *op. cit.*, pp. 13–14; M. Rudy, A. Rudy, *Normy religijne*, [in:] M. Rudy, P. Mazur, A. Rudy, *Ubój rytualny w prawie administracyjnym*, Warszawa 2013, pp. 17–21; C. Vinci, M. Pasikowska-Schnass,

religious slaughter result from the definitions included in this law. According to Article 2 letter g) CR 1099/2009, "religious rite" means a series of acts related to the slaughter of animals and prescribed by a religion.[32] The document does not mention specific religions, nor limits the scope of "religious rite" to the religious communities of specific legal status granted in the member states.[33] Thus no matter the formal legal status the religious community obtains in the member state's legal system (e.g., association, foundation, denominational private-law legal entity, public-law corporation), its religion's rules about preparing food are within the scope of this definition.

The main rules are that the animals shall only be killed after stunning in accordance with the methods and specific requirements related to the application of those methods (which are set out in Annex I of the CR 1099/2009), and the loss of consciousness and sensibility shall be maintained until the death of the animal (Article 4 para. 1 CR 1099/2009). However, the same article states that, in the case of animals subjected to particular methods of slaughter prescribed by religious rites, the requirements of paragraph 1 shall not apply, provided that the slaughter takes place in a slaughterhouse (Article 4 para. 4 CR 1099/2009).[34] Some authors add that

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B. Rojek, *Religious slaughter: reconciling animal welfare with freedom of religion or belief*, Brussels 2023, pp. 2–9. See also: T. Kaleta, *Zwierzęta we współczesnych religiach światowych: wybrane zagadnienia*, "Życie Weterynaryjne. Czasopismo Społeczno-Zawodowe i Naukowe Krajowej Izby Lekarsko-Weterynaryjnej" 2011, No. 9, pp. 703–707.

[32] In this context it is important whether "prescribed" means an activity that is a necessary obligation in the light of religious beliefs or an activity that is only recommended (even strongly) by the religion's beliefs. In the Polish-language version of the document, this latter meaning was adopted. For a former view on the grounds of the Constitution RP, see: J. Helios, W. Jedlecka, M. Stępień, *Odkrywanie…*, *op. cit*., pp. 94–95.

[33] This is compliant with the EU fundamental rule that the EU respects and does not prejudice the status under national law of Churches and religious associations or communities in the Member States (Article 17 para. 1 TFEU).

[34] There is a view that this provision does not forbid religious slaughter in other places than a slaughterhouse, because it should be interpreted differently, i.e. in the way that Article 4 para. 4 CR 1099/2009 allows in a slaughterhouse other methods of slaughter, when it is required by religious rite. This is because of the scope of the regulation which concerns only killing animals for meat. See:

this exemption requires the slaughter not only to be performed according to the rules prescribed by religious rites, but also it must be conducted for the purposes of religious ceremonies only.[35]

The general rule of CR 1099/2009 guarantees the minimal standard for the animals' protection, thus each of the member state can introduce in its internal law higher standards and more restrictive provisions. If not, the exception from Article 4 para. 4 CR 1099/2009 applies.[36] The other issue is whether this EU regulation guarantees the right to ritual slaughter in the law of the member states. In the C-336/19 case, the EU Court stated that EU legislation does not

E. Łętowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Wiąże, ale nie przekonuje…*, *op. cit*., p. 58; E. Łętowska, M. Namysłowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Prawo UE o uboju zwierząt i jego polska implementacja: kolizje interesów i ich rozwiązywanie (Cz. 1)*, "Europejski Przegląd Sądowy" 2013, No. 11, p. 16. For a different opinion, see: K. Słomiński, *The status…*, *op. cit*., p. 75. Additionally, it can be argued that otherwise the condition for the exemption for religious slaughter is non-proportional, as there are no reasonable arguments that require ritual slaughter to be conducted in a slaughterhouse. *Criterium divisionis* for making the exemption for religious slaughter is the method of killing an animal, which differs from other kinds of slaughtering animals prescribed by CR 1099/2009. The requirement of performing a ritual slaughter in a slaughterhouse in no way affects the procedure itself to be less stressful for an animal. Simultaneously, exercising religious beliefs does not require ritual slaughter to be performed in the slaughterhouse. On the contrary, religious beliefs may demand particular methods of slaughtering animals not in the slaughterhouse (e.g., on the altar built in mountains). In these circumstances religious beliefs are treated differently upon a condition that seems unjustified. Another argument is that the regulation allows domestic slaughter (Article 10 para. 1 CR 1099/2009), so it could be argued that there are no grounds for the prohibition of ritual slaughter outside of a slaughterhouse, as killing an animal in a slaughterhouse is not an absolute obligation. For a contrary opinion, see: Opinion of Advocate General Wahl delivered on 30 November 2017, Case C426/16 Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v. Vlaams Gewest, ECLI:EU:C:2017:926, available on-line (English version): https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CC0426#c-ECR_62016CC0426_EN_01-E0001 (accessed on: 28.09.2023).

[35] See: J. Helios, W. Jedlecka, M. Stępień, *Odkrywanie…*, *op. cit*., p. 87; E. Łętowska, M. Namysłowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Prawo UE… (Cz. 1)*, *op. cit*., p. 16.

[36] E. Łętowska, M. Namysłowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Prawo UE… (Cz. 1)*, *op. cit*., p. 15.

forbid the complete prohibition of ritual slaughter in member states's laws.[37] On the contrary, some authors states that the exception for religious slaughter provided by Article 4 para. 4 CR 1099/2009 cannot be fully omitted by introducing higher standards of animal protection in countries' law.[38]

5. Polish particular laws on ritual slaughter

Nowadays[39] the main Polish regulation concerning the slaughter of animals for food purposes is included in Article 34 para. 1 and 3 u.o.z. According to the provisions it provides, a vertebrate animal in an abattoir may be killed only after being rendered unconscious by qualified persons, and in domestic slaughter, ungulates may be slaughtered only after they have been rendered unconscious by a trained slaughterer. Thus, the law differentiates two situations – slaughter in a slaughterhouse (which requires a separate room for

[37] The different view was presented by the Opinion of Advocate General Hogan delivered on 10 September 2020, Case C-336/19, Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering and Others, ECLI:EU:C:2020:695, available on-line (English version): https://curia.europa.eu/juris/document/document.jsf?text=&docid=230874&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2396591 (accessed on: 29.09.2023). Cf. E. Łętowska, M. Namysłowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Prawo UE… (Cz. 1)*, *op. cit*., p. 16.

[38] See: M.J. Dębowski, *Granice…*, *op. cit*., p. 40. Cf. M. Rudy, P. Mazur, *Obecny stan prawny*, [in:] M. Rudy, P. Mazur, A. Rudy (eds.), *Ubój rytualny w prawie administracyjnym*, Warszawa 2013, pp. 47 and 53. In this regard it should be mentioned that Luxembourg allowed previously banned ritual slaughter due to the transposition of CR 1099/2009, see: C. Vinci, M. Pasikowska-Schnass, B. Rojek, *Religious slaughter…*, *op. cit*., p. 29.

[39] About the history of ritual slaughter in Poland, see: A. Czohara, T. Zieliński, *Ustawa….*, *op. cit*., pp. 79–80; M. Różański, P. Szymaniec, *Debaty wokół zakazu uboju rytualnego w II Rzeczypospolitej Polskiej*, "Przegląd Sejmowy" 2020, No. 1, DOI: 10.31268/PS.2020.06, pp. 121–146; M. Rudy, A. Rudy, *Geneza regulacji poświęconych ubojowi rytualnemu w prawie polskim*, [in:] M. Rudy, P. Mazur, A. Rudy, *Ubój rytualny w prawie administracyjnym*, Warszawa 2013, pp. 23–28; M. Rudy, A. Rudy, *Ustawa z 17 kwietnia 1936 r. o uboju zwierząt gospodarskich w rzeźniach*, [in:] M. Rudy, P. Mazur, A. Rudy, *Ubój rytualny w prawie administracyjnym*, Warszawa 2013, pp. 19–36.

holding animals and a room for stunning and bleeding the animals, Article 34 para. 2 u.o.z.), and domestic slaughter.[40] These two situations differ in terms of the species of animals that can be legally killed (vertebrate animal in the previous, ungulates in the latter), as well as the person entitled to kill the animal (a qualified person in the previous, a trained slaughterer in the latter). Since 2002 in the text of u.o.z. there are no exceptions for religious slaughter.[41]

Some provisions in the Polish legal system are the effect of the other than EU international obligations. On the 3rd of March 2008 Poland had ratified a multilateral convention dealing with the slaughter of animals,[42] which requires animals to be stunned before slaughter (Article 12). It also regulates the case of the ritual slaughter – animals of the bovine species should be restrained before slaughter by mechanical means designed to spare them all avoidable pain, suffering, agitation, injury or contusions (Article 13). It also

[40] In both cases the law forbids the killing of animals before the scheduled date of delivery (in the last 10 percent of time of pregnancy for a given species) and 48 hours after delivery (Article 34 para. 4 point 1 u.o.z.). This prohibition does not apply (Article 34 para. 4 point 1 letter a)) to the killing of animals for scientific and educational purposes (as specified in Act of 15 January 2015 on the Protection of Animals Used for Scientific or Educational Purposes, Journal of Laws of 2023, item 465). Other exceptions (Article 34 para. 4 point 1 letters b) and c)) concern killing the animal in the case of a necessity of immediate killing and killing of an animal due to the decision issued by the district veterinarian ordering the killing or slaughtering of animals (on the grounds of Article 44 para. 1 point 4; Article 48b para. 1 and 3, or Article 57e para. 4 of the Act of 11 March 2004 on the Protection of Animal Health and Combating Infectious Diseases of Animals, Journal of Laws of 2023, item 1075). Slaughtering or killing vertebrate animals with the participation or in the presence of children, as well as evisceration, scalding, skinning, smoking and separation of parts of warm-blooded animals, before the cessation of respiratory and muscular reflexes, are also forbidden (Article 34 para. 4 points 2 and 3 u.o.z.).

[41] Till the amendment that took effect on the 28th of September 2002 and abrogated Article 34 para. 5 u.o.z., the law stated that the requirements set out in paragraphs 1 and 3 shall not apply when animals are subjected to particular methods of slaughter prescribed by religious rites.

[42] European Convention for the Protection of Animals for Slaughter, European Treaty Series 2008, No. 102, available on-line (English version): https://rm.coe.int/1680077d98 (accessed on: 28.09.2023); in Polish: The European Convention for the Protection of Animals for Slaughter, done at Strasbourg on 10 May 1979 (Journal of Laws of 2008 No. 126, item 810).

forbids in the case of ritual slaughter any means of restraint causing avoidable suffering, tying animals' hind legs or suspending them before the end of bleeding (Article 14).

The main rule derived from Article 34 para. 1 and 3 u.o.z. provides that a vertebrate animal cannot be killed without first being rendered unconscious. Even though the text of the above-mentioned paragraphs did not change due to any amendment, their effectiveness is limited due to the judgement of the Polish Constitutional Tribunal issued on the 10th of December 2014.[43] According to point 1 of this verdict, Article 34 para. 1 u.o.z. was declared incompatible with Article 53 para. 1, 2 and 5 of the Constitution RP in conjunction with Article 9 of the ECHR[44] in so far as it does not permit animals to be slaughtered in a slaughterhouse in accordance with specific methods required by religious rites.[45] As a result, according to Article 190 para. 1 Constitution RP, which states that judgments of the Constitutional Court have general binding force, provisions of Article 34 para. 1 u.o.z. expired insofar as they concern killing a vertebrate in a way demanded by religious beliefs. In the verdict's justification the right to the freedom to manifest religion outweighs the animal welfare,[46] as according to Article 53 para. 5 Constitution RP protection of natural environment cannot legitimise a limitation of the right to manifest one's religion; and simultaneously public morality in Poland at the time of the verdict's issuance does not develop a rule in the light of which the prohibition of ritual slaughter would be justified (though the Constitutional Court stated that it may develop it in the future).[47] What is also important, this verdict allowed not only religious communities to perform ritual slaughter

[43] Judgment of the Constitutional Tribunal of 10 December 2014, file No. K 52/13, OTK-A 2014, No. 11, item 118.

[44] About some views concerning ritual slaughter on the grounds of Article 9 ECHR, see: M. Rynkowski, *Status prawny Kościołów i związków wyznaniowych w Unii Europejskiej*, Warszawa 2004, pp. 112–114.

[45] For a different opinion, see (among others): H. Kaczmarczyk, *Zakaz…*, *op. cit.*, pp. 61–62.

[46] Cf. J. Helios, W. Jedlecka, M. Stępień, *Odkrywanie…*, *op. cit.*, pp. 95–96.

[47] Cf. T. Pietrzykowski, *Foundations…*, *op. cit.*, pp. 75–76; A. Skóra, *Religious slaughter…*, *op. cit.*, p. 291. Very similar views were presented in Austria, see: R. Potz, *Państwo i Kościół w Austrii*, [in:] G. Robbers (ed.), *Państwo i Kościół*

for their internal needs, but also made it possible to meat manufacturers to produce meat with the methods of ritual slaughter for sale.[48]

The verdict of the Polish Constitutional Tribunal from 10th of December 2014 was not the first one connected with the issue of ritual slaughter. Previously, question whether it is legal to perform ritual slaughter was raised due to the provisions of an ordinance which regulated details of methods of slaughtering and killing animals, as mentioned in Article 34 para. 6 u.o.z. Historically, the first ordinance issued on the grounds of Article 34 para. 6 u.o.z. was issued on 26th of April 1999.[49] Its main rule was that animals of species of animals for slaughter (within the meaning of the regulations on the control of infectious animal diseases, the examination of animals for slaughter and meat and the Veterinary Inspection) shall be killed by bleeding (§ 2 para. 1). However, the bleeding should start (immediately) after the animal has been stunned by one of the methods listed in the ordinance (§ 2 para. 2 point 1). This regulation did not include any special regulations concerning slaughter for religious purposes. It was replaced by the ordinance from 2nd of April 2004.[50] Generally its provisions were similar to the previous regulation. The soliped animals, ruminants, pigs, rabbits and poultry delivered directly to the slaughterhouse for slaughter should be immobilised, stunned or killed and bled (§ 5 para. 1). According to its § 9 para. 1, the bleeding of animals must start within the time described in the ordinance (e.g., within 60 seconds in the case of

w krajach Unii Europejskiej, translated by J. Łopatowska-Rynkowska, M. Rynkowski, Wrocław 2007, p. 17.

[48] Cf. M. Pisz, P. Ochmann, *Prawne aspekty uboju rytualnego w Polsce: uwagi do wyroku TK w sprawie K 52/13*, "Państwo i Prawo" 2018, No. 1, pp. 111–112.

[49] Regulation of the Minister of Agriculture and Food Economy of 26 April 1999 on the qualifications of persons authorised to carry out professional slaughter, permissible methods of killing animals according to the species and bodies authorised to control the activities of persons who professionally engage in the slaughter of animals or carry out slaughter as part of breeding or economic activity (Journal of Laws of 1999 No. 47, item 469, as amended).

[50] Regulation of the Minister of Agriculture and Rural Development of 2 April 2004 on the qualifications of persons authorized to carry out professional slaughter and permissible methods of slaughter and killing of animals (Journal of Laws of 2004 No. 70, item 643).

bovine animals and solipeds). Both ordinances were not the subject of the constitutionality control by the Polish Constitutional Court, but the following one was.

Ordinance from the 9h of September 2004[51] introduced a general exemption for killing animals due to the special requirements demanded by religious beliefs. The general provisions of this ordinance stated that soliped animals, ruminants,[52] pigs, rabbits and poultry, delivered directly to the slaughterhouse for slaughter, should be immediately stunned before slaughter by one of the listed methods (§ 8 in conjunction with § 6). However, according to the first version of this ordinance,[53] this rule did not apply to animals slaughtered in accordance with the religious rites of registered religious associations (§ 8 para. 2).[54] This exception was the subject of the Constitutional Court ruling from 27th of November 2012,[55] which mainly dealt with the issue of the accordance of exceptions for religious slaughter with the rule of the u.o.z., that requires the stunning of an animal before its killing, as well as exceeding the matters transferred to the minister to be regulated in the ordinance. According to the ruling, § 8 para. 2 of the ordinance was issued with the violation of the Article 34 para. 2 u.o.z. and rules about issuing ordinances, and thus abrogated. In the justification of its decision, even though it underlined that the constitutional possibility of ritual slaughter is beyond the scope of jurisdiction in the case, the Polish Constitutional Court stated that it was necessary for the competent state authorities to decide on the permissibility of ritual slaughter in Poland due to the fact that EU regulations (CR 1099/2009) would

[51] Regulation of the Minister of Agriculture and Rural Development of 9 September 2004 on the qualifications of persons authorized to carry out professional slaughter and the conditions and methods of slaughter and killing of animals (Journal of Laws of 2021, item 1033).

[52] For some terminology remarks, see: K. Lipińska, *Czy w Polsce…*, *op. cit.*, p. 27 (footnotes 51–52).

[53] Journal of Laws of 2004 No. 205, item 2102.

[54] Some authors state that this provision allowed back ritual slaughter in Poland – see: J. Drath, *Ubój rytualny w polskim systemie prawnym*, *op. cit.*, p. 74; M. Rudy, P. Mazur, *Obecny stan…*, *op. cit.*, p. 38.

[55] Judgment of the Constitutional Tribunal of 27 November 2012, file No. U 4/12, OTK-A 2012, No. 10, item 124.

come into force starting from the 1st of January 2013[56] (and sparked a debate whether ritual slaughter is allowed or not).[57]

Summarising, the legal rules in Poland for killing animals must be decoded by the text of the provisions of the u.o.z. in conjunction with the judgment of the Constitutional Tribunal from 2014.[58]

[56] There were no changes introduced to Article 34 u.o.z., which further forbade the slaughtering of vertebrates without rendering them unconscious. This led to the complaint which resulted in the previously described verdict of the Polish Constitutional Court from 2014.

[57] About the public debate on this issue, see: J. Drath, *Ubój rytualny w polskim systemie prawnym*, *op. cit.*, pp. 76–77 and 80–83.

[58] In the Sejm (lower chamber of Polish parliament) of the 9th parliamentary term, there were two separate drafts proposed by two groups of members of parliament. The first one, dated 12 December 2019 (Sejm Paper No. 378 of the Sejm of the ninth term: Deputies' bill amending the Animal Protection Act, https://orka.sejm.gov.pl/Druki9ka.nsf/0/B8FA328649981D0BC125856E0047D791/%24File/378.pdf (accessed on: 19.09.2023)), did not include any provisions about ritual slaughter. The second draft, dated 11 September 2020 (Sejm Paper No. 597 of the Sejm of the ninth term: Deputies' bill amending the Animal Protection Act and certain other acts, https://orka.sejm.gov.pl/Druki9ka.nsf/0/153EF164944D1C75C12585E300498DA9/%24File/597.pdf (accessed on: 19.09.2023)), included important regulation in the field of killing animals for religious purposes. According to the draft, two new paragraphs were to be introduced. If the bill had been passed, Article 34 para. 3a u.o.z. would have stated that the requirements set out in paragraphs 1 and 3 shall not apply when animals are subjected to particular slaughter methods provided for by the religious rites of religious communities of regulated legal status operating in the territory of the Republic of Poland for the exclusive use of their members. Accordingly, new para. 3b of Article 34 u.o.z. would have prohibited in the case of ritual slaughter the use of systems restraining cattle by placing them in an inverted position or in any other unnatural position. Furthermore, the draft intended to oblige the minister responsible for agriculture to issue ordinance regulating details of the ritual slaughter. The issues planned to be regulated concerned: the qualifications of persons authorized to carry out the ritual slaughter, the conditions for unloading, movement, detention, immobilization for the purpose of ritual slaughter, the conditions and methods of slaughtering according to species, as well as the conditions for the supervision and determination of the maximum needs of members of religious associations with a regulated legal situation operating on the territory of the Republic of Poland. The bill required the minister to be guided by considerations of ensuring humane treatment of animals during the process of slaughter and meeting the personal needs only of members of religious communities of regulated status operating on the territory of the Republic of Poland. Both drafts were proceeded within a joint legislative procedure and the described-above provisions were included in the bill passed by the Sejm and

It means that killing a vertebrate animal in a slaughterhouse without rendering it unconscious is allowed, if it is done in accordance with specific methods required by religious beliefs. As far as domestic slaughter is concerned, ungulates may be slaughtered only after they have been rendered unconscious, even if the killing of an animal is for religious purposes; and rendering it unconscious is against the rules of the religion's rite. However, this last rule derived from Article 34 para. 3 u.o.z. is disputable, as the views of the Constitutional Court expressed in the justification of the above-mentioned verdict can be applied also to the domestic slaughter.[59]

6. Comparative background overview

Previously (i.e., in late 2000s) almost all EU Member States allowed ritual slaughter in some way.[60] In 2014, EU Member States Denmark and Sweden,[61] as well as European Economic Area (EEA)

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subsequently submitted to the Senate (higher chamber of Polish parliament). See: Senate paper 209 of the Senate of the tenth term: Act of 18 September 2020 amending the Animal Protection Act and certain other acts, https://www.senat.gov.pl/download/gfx/senat/pl/senatdruki/11003/druk/209.pdf (accessed on: 19.09.2023). It is worth mentioning that the bill also included provisions about the compensation for individuals and entities conducting business activity involving slaughtering animals carried out in the particular manner provided for by the religious rites of religious communities (Article 13). Cf. J. Helios, W. Jedlecka, M. Stępień, *Odkrywanie…*, *op. cit*., pp. 89–90.

[59] This discrepancy between slaughter in the slaughterhouse and domestic slaughter is the result of the scope of the Constitutional Court's verdict from 2014 and not the different assessment of the domestic slaughter. The Court decided that, due to the lack of proper justification of the allegation of violation in the case of Article 34 para. 3 u.o.z. made by the applicant in the motion, the proceedings must be discontinued in this respect pursuant to Article 39 para. 1 point 1 of the law regulating the procedure before the Constitutional Court (Act of 1 August 1997 on the Constitutional Tribunal, Journal of Laws of 1997 No. 102, item 643, as amended). See also: E. Łętowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Wiąże, ale nie przekonuje…*, *op. cit*., pp. 55 and 60.

[60] Cf. R. Potz, *Państwo…*, *op. cit*., p. 17.

[61] See also: L. Friedner, *Państwo i Kościół w Szwecji*, [in:] G. Robbers (ed.), *Państwo i Kościół w krajach Unii Europejskiej*, translated by J. Łopatowska-Rynkowska, M. Rynkowski, Wrocław 2007, p. 365.

countries[62]: Switzerland[63] and Norway, forbade ritual slaughter.[64] Later, also Slovenia made slaughter without stunning illegal[65] and there were also plans to prohibit it in the Flemish and Wallonian Regions starting 2019[66] which finally were implemented and became the subject of the EU Court ruling C-336/19. In some countries a middle-of-the-range approach was introduced, which allowed ritual slaughter, but with immediate stunning after cutting of the animal's throat.[67]

In many countries, ritual slaughter is the subject of debate and controversies. For example, in Germany, ritual slaughter was prohibited in the 30s of the XX century. In 2002, the Federal Constitutional Tribunal stated that ritual slaughter is allowed only when it is conducted by a person who is a member of the religious community, which requires meat prepared according to the religion's specific rules, and only to fulfil the needs of this religious community to which the person belongs. In 2006, the Federal Administrative Court decided that the right to obtain an individual administrative decision allowing for ritual slaughter is in conformity with the German Constitution, but only for the needs of the religious community.[68]

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[62] For other than the European perspective (about ritual slaughter in United States of America), see: E. Tuora-Schwierskott, *Rytualny ubój zwierząt w świetle wolności sumienia i wyznania oraz zasady proporcjonalności w ustawodawstwie i orzecznictwie Niemiec, Szwajcarii i USA*, "Państwo i Prawo" 2016, No. 4, pp. 66–68.

[63] Switzerland forbade any kind of ritual slaughter due to the national referendum in 1893. In 2008, conformity with the Swiss constitution was confirmed by the Swiss Federal Tribunal. Meat produced due to ritual slaughter can be imported, but only for the purpose of the members of religious communities, whose beliefs require it. Sale of the kosher and halal meat is strictly controlled by the state institutions. See: E. Tuora-Schwierskott, *Rytualny ubój zwierząt w świetle wolności sumienia i wyznania…*, *op. cit.*, pp. 65–66.

[64] H. Kaczmarczyk, *Zakaz…*, *op. cit.*, p. 61.

[65] Cf. below.

[66] See: EU advocate's general opinion mentioned in footnote 34 above.

[67] T. Pietrzykowski, *Foundations…*, *op. cit.*, p. 210.

[68] E. Tuora-Schwierskott, *Rytualny ubój…*, *op. cit.*, pp. 69–70. See also: A. Dziadzio, *Zakaz uboju rytualnego jako naruszenie konstytucyjnej zasady wolności religijnej: kontekst współczesny i historyczny*, "Forum Prawnicze" 2014, No. 1, pp. 9–10; E. Łętowska, M. Namysłowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Prawo UE… (Cz. 1)*, *op. cit.*, p. 17.

Today also in the majority of EU member states ritual slaughter without prior stunning is allowed; however, there is development towards restricting it in some way (the opposite direction can be seen in the case of Latvia, which allowed slaughter without stunning for religious purposes in 2009, and Lithuania, which made it legal from the beginning of 2015). In Belgium, the regions of Flanders and Wallonia (there is no prohibition in the Brussels capital region), in Denmark and Sweden, as well as in Norway and Switzerland (in the latter with the exception of poultry) ritual slaughter without stunning is forbidden, though in the Flanders region the rule is so-called post-cut stunning. In some countries ritual slaughter is allowed without high level of restrictions. This includes Bulgaria, Ireland, Croatia, Latvia, Hungary, Netherlands (with an obligation of post-cut stunning), Romania, Slovakia (with an obligation of post-cut stunning) and Finland (with an obligation of simultaneous stunning at the start of bleeding). Like in the previously described situation in Germany, prior administrative permissions must be issued in the Czech Republic, Estonia (with the requirement of immediate post-cut stunning), France, Luxembourg, Austria (with the requirement of immediate post-cut stunning), Portugal and Slovenia (in the latter only as an extraordinary case). There are also some further restrictions introduced in some of the EU member states, e.g. prohibition of any restraint of ruminants by inversion, prohibition of other abnormal positions, requirements concerning the knife in Greece. Some common restriction concerns the allowance of religious slaughter in selected slaughterhouses and/or by certificated persons (Spain, Italy, Cyprus, and – to some extent – Malta).[69]

[69] For the most up-to-date short information about allowance of ritual slaughter in EU member states, see: C. Vinci, M. Pasikowska-Schnass, B. Rojek, *Religious slaughter…*, *op. cit.*, pp. 27–30. Cf. A. Skóra, *Religious slaughter…*, *op. cit.*, pp. 287–288. For overview about some other countries including Norway, Switzerland and United Kingdom, see: C. Vinci, M. Pasikowska-Schnass, B. Rojek, *Religious slaughter…*, *op. cit.*, pp. 30–31.

7. Summary

The text of regulations on the slaughter of animals included in the u.o.z. should be changed. From the point of view of farmers, it is important that the new text of the law precisely regulates the issue and does not expose the farmers to the risk of committing a crime due to the uncertainty of the provisions of the law and its interpretation. So primarily, amendment of Article 34 u.o.z. should reflect the Constitutional Tribunal verdict issued on the 10 December 2014, as the rule of law requires that the addressee of the legal provisions should be able to determine on the basis of the text of law their rights and obligations. This could be achieved by adding a new paragraph (No. 7) to Article 34 u.o.z., which – in general – could reiterate the disposition part of the above-mentioned Constitutional Tribunal's decision. Another possibility is to introduce changes that the wording will not be based on the text of the verdict. Such an amendment can be more far-reaching than the verdict is (e.g., it may theoretically allow ritual slaughter in any case and without any limitations), but the core of the judgment should not be affected. So, the amendment must at least permit to slaughter animals in a slaughterhouse in accordance with the specific methods required by religious rites.

To avoid possible future cases concerning inconformity of the prohibition of religious slaughter conducted not in a slaughterhouse, the amendment should simultaneously allow the ritual slaughter in other places; especially as there are no provisions in the EU law, which limit ritual slaughter to a slaughter performed in a slaughterhouse.[70]

[70] See: footnote 34 above. The admissibility of the public event of the so-called *corrida* in some EU countries (see: T. Pietrzykowski, *Foundations…*, *op. cit.*, p. 210; K. Wlaźlak, *Spór o zakaz* "*corrida de toros*", "Prokuratura i Prawo" 2019, No. 6, pp. 90, 103–109) can be used by some as an argument even for a public religious slaughter, which is present in some religions (the same can be applied to allowance of hunting – cf. A. Skóra, *Religious slaughter…*, *op. cit.*, p. 291). If a lawmaker will decide to allow public religious slaughter, there are grounds for some restrictions. Article 53 para. 5 of the Constitution RP allows for restricting the manifestation of a religion's beliefs on the premises of the protection of public safety, order, health or morals or the fundamental rights and freedoms of others. Thus, it can be maintained that involvement or attendance of minors

In the light of this work, there are no grounds to assume that the exception introduced by Article 4 para. 4 CR 1099/2009 requires for religious slaughter to be conducted only for the purposes of religious ceremonies only. In other words, there are no bases to insist that this provision prohibits ritual slaughter which leads to the production of meat for sale purposes. It is contrary to the rule of Article 26 para. 4 CR 1099/2009, which prohibits member states to forbid to place on the market in its territory products of animal origin derived from animals which have been killed in another member state on the grounds that the animals in question were not killed in accordance with its national rules aimed at ensuring more extensive protection of animals at the time of killing. This provision would have had no effect and would have lose its *raison d'être*, if Article 4 para. 4 CR 1099/2009 had prohibited conducting ritual slaughter for export, because there would have been no country that had been able to export such meat, and thus there would have been no reason to assure that one country could have not forbidden the import of such meat. If Article 4 para. 4 CR 1099/2009 would have been interpreted in such a way, all the arguments presented in favour of the ritual slaughter ban – that it would be possible for people who because of their religion's beliefs required meat prepared with the methods of ritual slaughter to buy it due to the meat import from other EU countries – would have had no reason.

The decision whether to raise the standard of the protection of animals by limiting the ritual slaughter exemption only for the purposes of internal religious needs is political, i.e. on the grounds of Article 4 para. 4 CR 1099/2009 countries' lawmakers can decide whether to introduce it or not. From the point of view of farmers, regulation which allows religious slaughter for sale purposes better protects their interests.[71]

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of a certain age at that kind of event can be inappropriate and contrary to the public's morals, which entitles parliament to prohibit it (like in the case of *corrida* in some regions of Spain – see: K. Wlaźlak, *Spór…*, *op. cit.*, pp. 105 and 111). It is possible to introduce such restrictions in a new provision or rely on Article 34 para. 4 point 2 u.o.z. In the former case, the new provision should be coherent to Article 34 para. 4 point 2 u.o.z.

[71] Cf. A. Skóra, *Religious slaughter…*, *op. cit.*, p. 293.

If the contrary regulation is to be included in amendment of the Article 34 u.o.z., the rules of the Polish denominational must be respected. It is especially important that allowing meat prepared with the ritual slaughter methods must be available for all religious communities due to the rule of equal rights of Churches and other religious organizations (Article 25 para. 1 Constitution RP). The new provision cannot state that an exception is made only for the personal needs of members of religious communities of regulated status operating on the territory of the Republic of Poland (as one of the bills provided). It must concern all religious communities and not only registered ones or religious communities whose status is regulated by a particular statute, nor their legal entities.[72]

Finally, it should be mentioned that any changes in the u.o.z. affecting the scope of the protection of animal welfare will require notification to the EU Commission, because previously it was notified that Poland will introduce higher standards for protecting animal welfare than required by the EU regulations (Article 26 para. 2 letter c) in conjunction with Article 4 para. 4 CR 1099/2009).[73]

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[72] For the list of those religious communities, see: M. Strzała, *Oświadczenie woli wyznaniowej osoby prawnej*, Kraków 2019, pp. 229 and following.

[73] Cf. W. Brzozowski, *Dopuszczalność…*, *op. cit.*, pp. 51–52; E. Łętowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Wiąże, ale nie przekonuje…*, *op. cit.*, pp. 56–57.

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The Current Legal Challenges in Agricultural Irrigation in the Framework of the Modernisation of the Hungarian Agricultural Water Law

Introduction

The development of a new system of agricultural irrigation, including the relevant legal regulatory environment, has been a priority for the Hungarian government for more than ten years. Some of the measures taken in recent years may be informative and relevant for an international academic audience, and possibly even for legislators. With this in mind, those measures and developments are outlined in the sections below. In Section 1, we discuss the economic and environmental importance of the topic. In Section 2, agricultural water law is then presented as the most appropriate scientific framework for the legal aspects of agricultural irrigation. In Section 3, the concept of landscape-based water management is discussed in more detail, an ideal policy concept envisioned by Hungarian academics. It would be reasonable to approximate the legal environment of agricultural irrigation to that concept. In Section 4, a significant part of our study is devoted to a discussion of the Hungarian legal and regulatory environment, which has been continuously shaped and developed over the last decade. Finally, Section 5 highlights various elements and measures of Hungarian legislation that are recommended for consideration as good practice, while some issues are also outlined that may provide opportunities for further improvement.

1. Significance of the topic, the strategic objectives of an optimal irrigation structure and the EU framework

As far as water is concerned, it must be emphasized that while the Earth has an essentially constant water supply, which at current technology levels is sufficient to support approximately 20 billion people, it is already a source of various difficulties, as water is present on Earth in variable forms over time and space.[1] In addition to its assets of large agricultural land, Hungary also has substantial freshwater resources. The fact that Hungary is rich in water resources[2] should be understood in the global context referred to above. However, it should be clarified that while Hungary is a water-rich country, this does not mean that it is free from water management issues: for example, drought, floods, and inland water may occur in the same place within a single year, and the fact that a significant part of Hungary's aquifers stretch through the national border is a particular difficulty. Water is the gold of the 21st century; however, how can this treasure be used in a sustainable way? Looking at the purposes people currently use water for, it is seen that 70 percent of all water consumed is used for agricultural purposes (that figure will obviously vary considerably from region to region).[3] In other words, it seems a good idea *to convert* part of our water resources into *agricultural products* (for example, by developing agricultural irrigation). However, this requires a move towards a *more adaptive water management*, where an important objective should be to "retain water generated within the borders", i.e. to be able to use a greater part of our water resources within the country, rather than simply letting it flow through the country into neighbouring countries, as

[1] P. Szűcs, F. Sallai, B. Zákányi, T. Madarász (eds.), *Vízkészletvédelem: A vízminőség-védelem aktuális kérdései*, Bíbor Kiadó, Miskolc 2009, p. 21.

[2] For a detailed discussion of the topic, see: J.E. Szilágyi, *Vízjog*, Miskolci Egyetem, Miskolc 2013, pp. 44–56.

[3] B. Aylward, B. Kiersch, N. Petralli, J. Vapnek, *Water resources and their management*, [in:] B. Aylward, J. Bartram, C. Popp, J. Vapnek (eds.), *Law for water management: A guide to concepts and effective approaches*, "FAO Legislative Study" 2009, No. 101, Róma, p. 40.

is currently the case. Such retention of water, the development of agricultural irrigation and drawing up a new basis and development concept for agricultural irrigation are justified not only by economic considerations, but also by climate change and the need to increase adaptation to it, i.e. to improve resilience. As the proportion of irrigated agricultural land in Hungary is still very low in comparison to the rest of Europe (approximately 2–3 percent), the development of this area is a priority for Hungary and should be based on a balanced achievement of the following two objectives. On the one hand, it should guarantee the competitiveness of Hungarian agriculture by ensuring that sufficient water is delivered to the land and farms at a reasonable price. On the other hand, a so-called resilient management (irrigation) structure should be established to keep abreast of climate change. It is unthinkable to achieve these two objectives in a balanced way by serving short-term interests alone. Importantly, it should be ensured that long-term national economic, social and environmental interests are also given due weight.

At the same time, the Member States of the European Union must also take into account the legislative framework of the European Union when developing a water management strategy for agriculture. Thus, for example, in the development of agricultural irrigation, the European Union's (a) human rights standards (in particular the right to property), (b) environmental standards (in particular the polluter pays principle), (c) the provisions of the Water Framework Directive (in particular the full cost recovery principle), or (d) state aid rules, among others, provide a very important framework for Member States to develop their national legislation on agricultural irrigation.

2. Basics of agricultural water law

Given Hungary's hydrographical characteristics, water management in the country has a number of specific features that impact Hungarian agriculture to a great extent: in a single year, drought, flood and (a Hungarian specificity) inland water can occur at the same place along the basin of the Tisza, Hungary's second largest river; the length of our flood protection facilities is among the

longest in Europe. In view of the above, it is no wonder that water governance has long been a priority topic in Hungary, and that in Hungary, traditionally thought of as an agricultural country, there are many points where the two topics (water and agriculture) are interlinked. The author of this paper has therefore considered it appropriate to include within the discipline and educational structure of agricultural law an area dealing with the interconnection of the two subjects, referred to by the author as "agricultural water law".

In this view, *agricultural water law*, as a scientific and educational discipline, deals with the legal relevance of the relationship between agriculture and the water cycle, with a special focus on irrigation. In addition to irrigation, however, as agriculture is linked to the water cycle at various points,[4] agricultural water law also has various fields. There are various possible approaches to these areas. One should start with the concept of "water management". According to the definition of *water management* under Act LVII of 1995 on Water Management (WMAct),[5] *water management* includes the utilisation of water (this is both a quantitative and qualitative aspect), the preservation of the potential for water use (also a quantitative and qualitative aspect), and the protection and control of water against damage (protection against water damage). Looking at the relationship between agriculture and the water cycle in terms of water quality, water quantity and water damage, it can be concluded that agriculture has a major impact on (a) water *quality* and, at the same time, globally, (b) of all consumptive uses of water, agricultural use has the largest impact on water resources, accounting for 70 percent of total water use.[6] Moreover, agriculture is (c) highly

[4] J.E. Szilágyi, *Vízjog*, *op. cit.*, pp. 33–40, pp. 159–161.

[5] Section 22 of Annex 1 to Act LVII of 1995 on Water Management (hereinafter: WMAct).

[6] B. Aylward, B. Kiersch, N. Petralli, J. Vapnek, *Water resources…*, *op. cit.*, p. 40. While food production is probably the sector consuming the largest quantity of water, its future water demand is very difficult to predict. That difficulty is due to various reasons: (a) the difficulty of determining future food consumption patterns; (b) the impact of biofuels on the food sector, a rival sector in terms of land and water use; (c) the impact of future technological developments on water use in food production; (d) the impact of climate change – i.e., where, when and how much water will be available in the future – are extremely difficult to predict;

exposed to *damage* caused by water. A modern *agricultural water law* should therefore include all these areas – quality, quantity, and water damage – and, in particular, the closely related issues of (d) ownership and use. It is important to note, however, that the concept of "agricultural water management", as defined by the WMAct, is much narrower than the general concept of water management (and not only because of it being narrowed down to the agricultural sector). According to the WMAct, the *agricultural water management* concept is limited to two of the aspects mentioned above, namely: the utilisation of water for agricultural purposes (in our interpretation, this is treated primarily as a quantity issue) and protection against water damage.[7] In relation to the *utilsation of water* there is the sub-area of agricultural water management, where the Hungarian legislator created the concept of *agricultural water services* largely based on the concept of *water service*[8] within the EU Water Framework Directive (Directive 2000/60/EC, WFD)[9] and the related case law of the Court of Justice of the European Union,[10] as well as the third Hungarian river basin management plan (RBMP3)[11]

World Water Assessment Programme, *Managing Water under Uncertainty and Risk* (Volume I), *Knowledge Base* (Volume II) and *Facing the Challenges* (Volume III), The United Nations World Water Development Report 4, UNESCO, Paris 2012, p. 25.

[7] Section 13 of Annex 1 to the WMAct.

[8] For an analysis, see in particular: J.E. Szilágyi, *Az uniós Víz-keretirányelv költségmegtérülésének elve az Európai Bíróság esetjogának tükrében*, [in:] J. Szalma (ed.), *A Magyar Tudomány Napja a Délvidéken 2014*, Novi Sad 2015.

[9] Articles 2(38) and (39) WFD. The WFD is discussed in more detail in: Gy. Bándi, *Környezetjog*, Szent István Társulat, Budapest 2011, pp. 449–453; Cs. Csák, *Környezetjog*, Novotni, Miskolc 2008, pp. 100–103; L. Fodor, *Környezetjog*, Debreceni Egyetemi Kiadó, Debrecen 2014, pp. 210–212; L. Miklós, *A vízvédelem szabályozása*, [in:] L. Miklós (ed.), *A környezetjog alapjai*, Szeged 2011, pp. 75–77.

[10] Judgment in case C-525/12, European Commission versus Germany, 11 September 2014.

[11] According to the *Summary of the River Basin Management Plan of Hungary*, 3rd, water services in Hungary include: (a) *public water supply*; (b) *municipal wastewater services*; (c) *agricultural water supply* (irrigation, fish farming, fishing, etc.); (d) *private water withdrawal* for industrial, agricultural and residential purposes; (e) *dams and storage for hydropower generation*. As far as the latter is concerned, it must be noted that while the WFD also makes mention of other types of damming, these (for navigation or flood protection purposes)

implementing the WFD, which concept includes (a) the irrigation of agricultural and forestry land, (b) activities to supply water to fish ponds and other agricultural water uses (e.g., rice paddies), and (c) activities to meet water needs for other purposes related to the agricultural water services system.[12] The second Hungarian river basin management plan (RBMP2),[13] *thermal water abstraction for agricultural purposes* is not included in agricultural water services, but it is worth mentioning, especially in view of its use in horticulture (i.e., as a source of thermal energy for heating greenhouses, among others).[14]

3. Landscape-based water management

"Landscape-based water management"[15] is a water management approach to address the accumulating damage in the central area of the Hungarian lowlands (Alföld) and to improve ecosystem services, based on rethinking land use, partial restoration of near-natural water flows and the continuation of a landscape-based management approach close to nature:

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are not considered as their significance is negligible in Hungary. *Summary of the River Basin Management Plan of Hungary*, 3rd, pp. 56–57 and 59; c.f. VGT2, pp. 246–247; J.E. Szilágyi, *A mezőgazdasági vízjog*, [in:] J.E. Szilágyi (ed.), *Agrárjog*, Miskolci Egyetemi Kiadó, Miskolc 2017, p. 126.

[12] Section 41 of Annex 1 to the WMAct.

[13] *The Second Hungarian River Basin Management Plan*, pp. 246–247.

[14] In spring 2013, the legislator abolished the general obligation to recycle *thermal water extracted for energy recovery*, in support of the horticulture sector. As the background to that issue, see President of the Republic, National Assembly Paper No. T/9194/8, 2009. As the background to the current legislation, see: WMAct, Sections 15(3), 15/C(8), Annex 1, point 16; Government Decree No. 147/2010, Sections 10(3), 11, 28/A and 77/A; KvVM Decree No. 101/2007, Sections 2(e), 5/A, 10 and 11. For an analysis of the above, see: E. Farkas Csamangó, *The utilisation of geothermic energies from a legal aspect*, "Journal of Agricultural and Environmental Law" 2007, Vol. 2, No. 3, pp. 3–10.

[15] J.E. Szilágyi, E. Dobos, P. Szűcs, *Az öntözéses gazdálkodásról szóló törvény a tájszemléletű vízgazdálkodás tükrében*, "Pro Futuro" 2020, Vol. 10, No. 1, pp. 50–53.

> The concept of landscape-based water management, which has numerous precedents, is discussed as such in the scientific strategy of the Hungarian Academy of Sciences, entitled Challenges and Tasks in the National Water Research Programme (hereinafter: 'MTA 2019')[16] as a possible solution to the [...] challenges raised by [...] the Kvassay Jenő Plan (National Water Strategy; hereinafter: 'KJT 2017').[17] Landscape-based water management is a specific Hungarian extension of the concept of adaptive water management embedded in integrated water management (Szilágyi 2018),[18] a response to a specific Hungarian system of issues, which may, with appropriate adjustments, also be applied to water management challenges in other countries and regions.[19]

The policy and literature background to landscape-based water management was discussed in more detail in a previous article.[20] Based on the summary conclusions set out in that article, I would like to emphasize the following points in order to better explain the essence of the irrigation solution I consider to be ideal:

(a) The implementation of the concept of landscape-based water management must also be shaped by the needs and concerns of a number of other policies. In other words, the concept of landscape-based water management can only be successfully implemented in a broader context, understood

[16] A. Engloner, M. Vargha, A. Báldi, J. Józsa (eds.), *A Nemzeti Víztudományi Kutatási Program kihívásai és feladatai*, MTA Ökológiai Kutatóközpont, Tihany 2019 (hereinafter: MTA 2019).

[17] *Jenő Kvassay Plan* or *National Water Strategy*, based on Government Decision No. 1110/2017 (III.7.) on the adoption of the *National Water Strategy and the Action Plan* for its implementation, the KJT was published on the Government website by the Ministry of Interior in April 2017.

[18] J.E. Szilágyi, *Vízszemléletű kormányzás – vízpolitika – vízjog*, Miskolci Egyetemi Kiadó, Miskolc 2018, p. 34.

[19] J.E. Szilágyi, E. Dobos, P. Szűcs, *A tájszemléletű vízgazdálkodás hidrogeológiai, talajtani és jogi aspektusai*, "Hidrológiai Közlöny" 2020, Vol. 100, No. 1, p. 41.

[20] J.E. Szilágyi, E. Dobos, P. Szűcs, *A tájszemléletű vízgazdálkodás...*, *op. cit.*, pp. 42–43.

in terms of the three dimensions of sustainable development (environmental, social and economic). That, however, is not possible in the absence of well-functioning *water governance*,[21] which means that the concept of the study must be addressed within a broader system, which goes beyond water policy and water management. In this respect, there appears to be a particularly wide gap again between environmental nature conservation interests and economic policy interests based on the concept of necessary growth.

(b) It is a Hungarian peculiarity that there is a significant overlap between the areas affected by the three types of major water damage events (floods, inland water and drought). While the problem is not limited to the Tisza catchment area, it is the largest area affected.[22]

(c) In Hungarian water management, it is precisely in the light of the above-mentioned system of problems that an opinion[23] has been formed, which regards the accumulation of water-related damage as an unintended consequence of the regulation of the Tisza in the 19th century. It is clear that a complex system of problems can only be tackled by a complex approach. Referring to that complexity, the KJT 2017 explains that *water policy and water management are inseparable from land use and landscape use… demands on water conditions are largely manifested in terms of land use.*[24]

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[21] In that context, see: World Water Assessment Programme, *Water for People: Water for Life*, The United Nations World Water Development Report, UNESCO–Berghahn Books, 2003; MTA 2019; J.E. Szilágyi, *Vízszemléletű kormányzás…*, *op. cit.*

[22] In this context, it is also important to note that there is a very strong correlation between climate change and the extent of freshwater-related risks (e.g., floods) (see: *Climate Change 2014: Contribution of Working Group II to the Fifth Assessment Report of the IPCC*, Cambridge University Press, Cambridge–New York 2014), largely based on the assumption that climate change is accelerating the hydrological cycle (World Water Assessment Programme, *Water in a Changing World*, The United Nations World Water Development Report 3, UNESCO-Earthscan, Paris–London 2009).

[23] For example: L. Somlyódy (ed.), *Magyarország vízgazdálkodása*, Köztestületi Stratégiai Program, MTA, Budapest 2011, pp. 26–27.

[24] *Kvassay Jenő Plan*, pp. 22, 62 (hereinafter: KJT 2017).

(d) In response to the system of problems, and recognizing the potential of green infrastructures and institutions without infrastructure for water management (the latter including legal instruments[25]), instead of an unlimited development of dams, it is worth considering a partial restoration of near-natural water flows in certain places and the continuation of a (landscape) management close to nature.[26] By doing so, we should essentially achieve that any surplus water arriving in Hungary, for example in the form of floods, should be retained within the national borders for subsequent periods of water scarcity due to climatic reasons. In the context of water retention, the concept of landscape-based water management aims to rely on a variety of tools, i.e. water retention is not based solely on the use of dams and artificial reservoirs.[27] For example, in relation to drought management, it is important to highlight that irrigation is not the only tool considered by the papers discussing the topic. Instead, a change in land use is typically mentioned as an important option,[28] while these papers also call for further improvements in current irrigation practices.[29] Moreover, if landscape-based water management is optimally implemented, it may be fairly claimed that irrigation is not the primary method of meeting agricultural water needs under this concept; in other words, water balance is hopefully achieved at the landscape level.

(e) It should be stressed that landscape-based water management goes beyond the area of the floodplain and the flood basin

[25] See: MTA 2019; J.E. Szilágyi, *Vízszemléletű kormányzás…*, *op. cit*., pp. 123–128.

[26] See: KJT 2017, p. 92.

[27] See, for example: P. Balogh, *Árvízvédelem és gazdálkodás*, [in:] A. Tóth (ed.), *Tiszavölgyi tájváltozások*, Kisújszállás 2003, pp. 127–142; L. Somlyódy, *Magyarország vízgazdálkodása*, *op. cit.*; G. Ungvári, A. Kis, J. Rákosi, *Gazdaságszabályozási koncepció: Intézkedési javaslatok az ex ante feltételek teljesítésére és az intézkedési program követelményei szerint rendszerezve*, the Hungarian part of the Danube river basin, River Basin Management Plan, 2015, Annex 8-5, 2015; MTA 2019.

[28] KJT 2017, p. 92.

[29] See, for example: L. Somlyódy, *Magyarország vízgazdálkodása*, *op. cit.*; J. Tamás, *Az aszály*, "Magyar Tudomány" 2017, No. 10, pp. 1228–1237.

of a river, covering a larger area;[30] for the Tisza, for example, a significant part of the Alföld is affected (the exact territorial delimitation is, however, still open to question).

(f) Identifying the measures, tools and associated costs to achieve landscape-based water management is an important element of its feasibility,[31] as is the issue of financing. It is also a good idea to understand the costs of implementation by understanding the costs of the failure to implement landscape-based water management. Staggering the costs over time, i.e. applying the principle of gradience in practice, can go a long way towards making them more acceptable to society.[32]

In view of the above, the most interesting issues from the perspective of landscape-based water management are the irrigation development plans and the environmental district plans, which will be presented in more detail below in the context of the Hungarian Irrigation Act of 2019.

4. Legal requirements for agricultural irrigation

The timeliness and importance of the legal regulation of the area are illustrated by the fact that there have been huge changes in the area in Hungary in recent years. By way of introduction, it is important to point out that the legal regulation of agricultural irrigation is an extremely diverse discipline, which means that provisions regarding

[30] See, for example: *An Integrated Concept for Spatial Development, Rural Development and Environmental Management in the Tisza Region*. The concept was drawn up under the professional guidance of the Hungarian Office for Area and Regional Development and the Ministry of Agriculture and Rural Development under a contract with the National Directorate General for Environment, Nature Conservation and Water Management. The concept was prepared by VÁTI Kht., MTA RKK ATI and VIZITERV Consult Kft. Budapest, closed: May 2004. See also: KJT 2017.

[31] G. Ungvári, A. Kis, J. Rákosi, *Gazdaságszabályozási koncepció…*, *op. cit.*; MTA 2019.

[32] M. Honti, J.E. Szilágyi, G. Ungvári, *Víztudományi program 6. fejezet – Társadalomtudományi kihívások: A vízszemléletű kormányzás – water governance*, manuscript, MTA Water Science Coordination Group, 31 March 2017.

agricultural irrigation have been laid down in numerous pieces of legislation. In view of this, a presentation (subsection 4.1) of *the legal framework* for irrigation is followed by (subsection 4.2) various *basic concepts* and institutions related to irrigation; after that, (subsection 4.3) we address the *ownership and use issues of* irrigation, while the subsection 4.4 reviews the planned operation of agricultural irrigation; subsection 4.5 evaluates *the financing rules* for agricultural irrigation and, finally, subsection 4.6 summarizes the *types of aquifers* available for agricultural irrigation.

4.1. SYSTEM OF LEGISLATION ON AGRICULTURAL IRRIGATION

The most important rules at the level of Acts and Decrees are listed below. It should be stressed, however, that the following is not an exhaustive list, and serves only as a reference point.

First of all, one should mention the Hungarian Constitution, the Fundamental Law. Many of its provisions also concern agricultural irrigation, of which the following are highlighted below, without claiming to be exhaustive. Under Article P) of the Fundamental Law, natural resources, including water resources, are the common heritage of the nation, the protection, maintenance and preservation of which for future generations are the duty of the State and of all.[33] Under Article 38 of the Fundamental Law, the property of the State and local governments constitutes national assets. The management and protection of national assets shall aim at serving the public interest, meeting common needs and preserving natural resources,

[33] J.E. Szilágyi, *The Protection of the Interests of Future Generations in the 10-Year-Old Hungarian Constitution, With Special Reference to the Right to a Healthy Environment and Other Environmental Issues*, "Journal of Agricultural and Environmental Law" 2021, Vol. 16, No. 31, pp. 130–144; E. Krajnyák, *Hungary: A Progressive Approach to the Protection of the Environment and Future Generations in a Traditional Constitution*, [in:] J.E. Szilágyi (ed.), *Constitutional Protection of the Environment and Future Generations: Legislation and Practice in Certain Central European Countries*, Central European Academic Publishing, Miskolc–Budapest 2022, pp. 203–248; A. Raisz, *A Constitution's Environment, Environment in the Constitution: Process and Background of the New Hungarian Constitution*, "Est Europa" 2011, special edition, pp. 37–70; etc.

as well as at taking into account the needs of future generations. The requirements for preserving and protecting national assets and for the responsible management of national assets shall be laid down in a cardinal Act (the special feature of a cardinal Act is that, instead of a simple majority, it requires the support of two thirds of MPs present). In accordance with that provision, the National Assets Act, which also sets out important rules on water, was adopted and is described below.

The *National Assets Act* (NAAct)[34] is of paramount importance for both the State and local governments in relation to water ownership. In many respects, the regulation of the ownership of water, water facilities and other related matters is a new phenomenon. Formerly, provisions on this subject were also set out in the *former Civil Code*[35] and the *Water Management Act* (WMAct)[36] (the latter of which still contains provisions concerning *water and water facilities owned by the property owner*).[37] One of the most important changes in this respect is that the most important set of waters owned by the State and local governments is now protected by a cardinal Act. The NAAct, which also refers back to the waters and public water facilities transferred into the ownership of local governments, which were defined in the Assets Transfer Act (ATAct)[38] adopted after the change of regime, defines *which* surface and subsurface aquifers, canals, reservoirs and water facilities (a) constitute the *exclusive property of* the state or local governments;[39] however, (b) the WMAct also introduced the category of *marketable State-owned waters and water facilities*).[40] The Act also specifies (c) the *exclusive economic activities of* the State and local governments. These include, *in the*

[34] See: Act CXCVI of 2011 on National Assets (hereinafter: NAAct).

[35] Act IV of 1959.

[36] See: Act LVII of 1995 on Water Management.

[37] Section 6(4) of the WMAct The Water Associations Act (hereinafter: WAAct) also recognizes the category of *works owned by the water association*; Section 1(33) of the WAAct.

[38] Notably, Act XXXIII of 1991 on the transfer of certain State-owned assets to local governments.

[39] Sections 4(1)(d) and (e) and 5(3)(d) of the NAAct.

[40] See: Section 6(6) of the WMAct.

case of the State, the creation and operation of canals and, in the case of *local governments*, the operation of water bodies and public water facilities exclusively owned by local governments, which were transferred to them under the ATAct.[41] Several other Acts,[42] including the Water Management Act, which is presented below, apply according to the principles set out in the NAAct.

Hungary's *Environmental Protection Act* (EPAct)[43] plays a major role in enforcing the integrative approach required by modern environmental protection and environmental law. It sets out rules to enforce the principle of integration (notably a systemic approach), a framework for water protection, a framework for financial instruments relevant to the principle of cost recovery, requirements for environmental impact assessment, etc.

According to the *Water Management Act* (WMAct), which has been repeatedly amended in recent years, (a) the State's water management-specific tasks include (but are not limited to) putting into place financing, cost management and pricing policies for water management, as well as the operation of publicly owned water facilities.[44] The WMAct (b) also specifies the tasks of local governments in the field of water management; for example, it sets out that local governments carry out official duties in this area.[45] While a significant part of the provisions on the ownership of waters have been transferred to the NAAct, the WMAct (c) still contains rules applying to the *waters and water facilities owned by the owner of a property*.[46] Of particular importance for agricultural irrigation is the matter of (d) *water supply easement* regulated by the WMAct (e.g., for the purpose of installing and operating a water facility on the property) and *water use easement* (for the purpose of connecting to a water facility).[47] (e) In addition to the above, the WMAct also provides for a number of other issues (*water resource*

[41] See: Section 12(1)(d) and (2)(d) and (f) of the NAAct.
[42] See: Acts detailed in Section 16(1)(a), (c)–(d) and (o) of the NAAct.
[43] Act LIII of 1995 on the General Rules for the Protection of the Environment.
[44] Section 2(1)(a), (b) and (e) to (i) of the WMAct.
[45] Section 4(1)(d) of the WMAct.
[46] Section 6(4) of the WMAct.
[47] Sections 20 and 27 of the WMAct.

tax, agricultural water service charges, operation and maintenance of irrigation watercourses and canals,[48] etc.) related to agricultural irrigation, which will be dealt with in more detail later in this study. The WMAct also sets out important rules on (f) the rank of agricultural irrigation in *the order of satisfying water demands*[49] and *in the order of water use restrictions* in relation to other uses of water. In this section, however, we consider it important (g) to make a few comments on the regulation of *water management associations*.[50] First of all, it is important to note that the name essentially refers to two distinct legal entities; notably, water utility cooperatives and *water associations*, which is regulated in detail in another Act. For agricultural irrigation, in particular the latter is important.

According to the new *Water Associations Act* (WAAct),[51] which was re-enacted after 2013, water associations, (a) as economic organizations that can be classified as public benefit organizations, (b) carry out important tasks in agricultural irrigation, on works owned by the *water association* or by local governments or private entities, where applicable on the *basis of a management contract* entered into with the owner.[52] It is important to note, however, that water associations are just one possible way of fulfilling the public tasks of territorial water management.[53] One of the innovations

[48] See, for example: Section 22/A of the WMAct.

[49] The order in which water needs are met is: (a) subsistence drinking and public health, disaster relief; (b) production and service activities for medical purposes and directly serving the population; (c) animal husbandry and fish production; (d) nature conservation; (e) *irrigation* (in the case of agriculture, see also Section 9 of KHVM Decree No. 2/1997); see also: Section 6(5) of KHVM Decree No. 2/1997, which provides for the water use season for irrigation, notably, that it runs, as a general rule, from 1 March to 31 October; (f) economic water use; (g) other water uses (e.g., sports, recreation, leisure, bathing, tourism). The order of water use restrictions is the inverse of the order of the satisfying of needs. Section 15(4) and (5) of the WMAct.

[50] Sections 34 and 44/A of the WMAct. For a relevant analysis, see: J.E. Szilágyi, *Vízjog*, *op. cit*., pp. 220–224.

[51] Act CXLIV of 2009 on Water Associations See also: Government Decree No. 160/1995 (XII.26.) on water management associations, in particular Sections 24 and 25.

[52] Sections 1(32) and (33), 3(2), 4(1)(d), 41 and 45 of the WAAct.

[53] Section 3(1) of the WAAct, Section 24 of Government Decree No. 160/1995.

of the Act on Irrigation Farming (IFAct), adopted in late 2019, is precisely in this area, as it enabled the establishment of so-called *sustainable water management communities* (this is a new name, in force at the time of writing this study; the name has been modified at the request of the European Union).[54] *Sustainable water management communities*, established by the Irrigation Farming Act (originally called "irrigation communities") on the model of Austrian irrigation cooperatives, are the new bottom-up co-ordination communities for the implementation of irrigation farming.[55] A company or cooperative can be recognized as a sustainable water management community[56] if at least 75 per cent of its members are farmers with the right to use a parcel of land within the irrigation district. Natural or legal persons providing agricultural water services in the irrigation district may become members of the sustainable water management community. The sustainable water management community shall ensure, within the irrigation district, the possibility of irrigating: (a) at least 100 hectares for arable crops and industrial vegetables, of which up to 10 percent may be permanent grassland (grazed, mown), (b) at least 10 hectares for horticultural vegetables and plantations (fruit, vines), aromatic, medicinal and herbaceous plants. A company or cooperative which meets these territorial quantitative criteria and which is made up exclusively of farmers may also be recognized as a sustainable water management community if the right to use the land in the irrigation district is held by the company or cooperative in addition to its members. The right of use of a company or cooperative may cover up to 25 percent of the area of land parcels within the irrigation district. Producer groups that meet the above territorial quantitative criteria should be recognized as sustainable water management communities.[57] Applications for

[54] Sections 7 to 9 of Act CXIII of 2019 on Irrigation Farming (hereinafter: IFAct).

[55] National Assembly Paper No. T/7845, submitted: 29.10.2019, detailed explanatory memorandum, Sections 9 to 11, p. 13.

[56] The detailed rules for recognition are provided for by the legislator in a Government Decree on the basis of the authorisation under Section 15(2)(b) of the IFAct: Government Decree No. 302/2020 (VI.29.) implementing the Act on Irrigation Farming.

[57] Section 7(1) to (3) of the IFAct.

the recognition of sustainable water management communities are submitted to the irrigation authority, which submits them to the Minister in charge of agricultural policy, together with its professional opinion. Sustainable water management communities are then recognized by the Minister.[58] In order to encourage the establishment of sustainable water management communities, the Rural Development Programme has a new call for proposals to support sustainable water management communities, with an intensity of 90 percent, to support the preparation of water management plans and documentation required for licensing.[59]

As regards water management, it is important to give particular emphasis to the 2013 Act amending several water management laws (including the WMAct and the WAAct, as mentioned above).[60] The 2013 amendment[61] (a) changed the previous asset manager-operator structure by transferring the asset management of marketable public facilities from water associations to water management directorates, and (b) enabled that, by a specific date, (b1) watercourses and canals in municipal ownership should be offered to the water management directorate for operation, or (b2) the water management directorate also had the opportunity, on the basis of an investigation, to initiate with the water management authority that it should be designated as the operator of a canal or watercourse. According to a 2020 amendment to the WMAct,[62] if the water management body determines on the basis of an investigation that a section of a watercourse or canal that obstructs the conveyance of irrigation water or drainage (a) is not in public ownership, (b) cannot be replaced by drainage via another route, (c) its use is in the public interest for agricultural water services or drought or water damage relief, and (d) its intended use requires public water management development, it will initiate the acquisition of ownership of the area for the benefit of the

[58] Section 8(1) and (2) of the IFAct.

[59] Nemzeti Agrárgazdasági Kamara, *Öntözést támogató hazai és uniós ösztönzők – A fenntartható vízgazdálkodási közösség tükrében*, 19.07.2023.

[60] Act No CCXLIX of 2013 amending certain Acts on water management.

[61] See: former Sections 45/D to G of the WMAct.

[62] See: Act XXXI of 2020 amending certain Acts to strengthen the security of citizens.

State.[63] In the absence of such acquisition of ownership, the water management body shall initiate with the water management authority that it should be designated as the operator or maintainer of the non-publicly-owned watercourse or canal section which obstructs the conveyance of irrigation water or obstructs drainage. The water management authority designates the water management body as the operator and maintainer if (a) it determines that the use of the non-publicly-owned watercourse or canal is in the public interest for the purpose of agricultural water services or drought or water damage relief, and (b) the neglected condition of the watercourse or canal impedes the drainage or irrigation water supply necessary for agricultural water services or drought or water damage relief.[64]

The provision of the IFAct, which provides that local governments may transfer to the State the *exercise of rights of ownership of tertiary works*[65] owned by the local government continued to improve the efficiency of water transfers between properties.[66] The irrigation administration authority acts on behalf of the State, which may itself operate these works, or may transfer them for use to others or place them in trust.[67]

In addition to the transfer of the exercise of owners' rights over tertiary works, the Irrigation Management Act (IFAct)[68] has also redefined *irrigation easement*[69] and the rules for *connection to tertiary works*[70] in order to improve the efficiency of water transfers.

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[63] New Section 22/A (2) of the WMAct. The section of watercourse or canal thus transferred into public property is considered a water facility for public use; new Section 22/A (3) of the WMAct.

[64] New Section 22/A (4) of the WMAct.

[65] *Tertiary works*: means a water facility for irrigation or dual use, providing operating-level agricultural water supply and draining excess water from the irrigation district, located between a water facility managed and operated by water management bodies and the place where agricultural irrigation needs actually arise; Section 1(1) of the IFAct.

[66] Section 12(1) to (3) of the IFAct.

[67] Section 12(5) of the IFAct.

[68] Sections 2 to 6 of the IFAct.

[69] Sections 2 and 3 of the IFAct It was formerly provided for under Section 26 of Act CCXII of 2013 on certain provisions and transitional rules related to the Land Transactions Act (hereinafter: LTAct).

[70] Section 4 of the IFAct.

Moreover, and primarily in order to reduce the administrative burden for farmers wishing to irrigate, the IFAct allows for the creation of *irrigation development areas*[71] based on *irrigation development plans*,[72] and *irrigation districts*[73] based on *environmental district plans*[74] and adapted to the operational area of each sustainable water management community. The primary aim of the legislator is to facilitate the willingness of individual farmers to irrigate by avoiding the need to individually obtain numerous permits, and instead to provide a much simpler way of establishing and operating irrigation management, in accordance with the plans of irrigation development areas or irrigation districts. All of the above is discussed in more detail below.

While the provisions of the *Land Transactions Act* (LTAct)[75] and the *Farmland Protection Act* (FPAct)[76] may seem of minor importance, it is important to draw attention to them, precisely because of the combined role of land and water in agriculture. These laws provide for rules mainly in view of the economic importance of agricultural irrigation, i.e. environmental aspects are not primarily enforced in Hungarian law through the provisions of these laws.[77] Under the LTAct, one of the conditions for the right to acquire ownership of agricultural land is an undertaking by the acquiring party not to use the land for any other purpose. However, the LTAct *permits the use of land for other purposes, provided that such purpose* is the construction of *irrigation* facilities, irrigation canals and

[71] *Irrigation development area*: means a medium-level planning unit, which may include several irrigation districts, designated *ex officio* by the irrigation administration body; Section 1(4) of the IFAct.

[72] Section 5 of the IFAct.

[73] *Irrigation district*: means the area defined in the decision on the recognition of a sustainable water management community, which includes land parcels in unincorporated areas used for the operation of the sustainable water management community and intended to be irrigated by the members of the sustainable water management community; Sections 1(5) and 9 of the IFAct.

[74] Section 10 of the IFAct.

[75] Act CXXII of 2013 on transactions in farmland and forestry land.

[76] Act CXXIX of 2007 on the Protection of Farmland.

[77] See, however: Section 38 of the FPAct (on the quality of irrigation water) and Section 50(2)(e) and (f) (on the Soil Protection Plan).

inland water canals, or the construction of water supply canals and reservoirs for landscape management.[78] The FPAct, on the other hand, provides for the possibility[79] that, where irrigation canals or reservoirs for irrigation purposes are established, *no land protection levy is payable* for such other use of farmland.

Agricultural irrigation issues are dealt with, directly or indirectly, in numerous lower-level pieces of legislation, lower than Acts, in the hierarchy of legal sources. These include, but are not limited to the following: (a) from the point of view *of the operation of water facilities*, KHVM Decree No. 2/1997 (II.18.) on the operation of agricultural water services works (hereinafter referred to as: "Decree No. 2/1997") is of major significance; (b) from the point of view of the *use of water and water facilities for irrigation, among other purposes*, the following pieces of legislation are of particular importance:[80] Gov. Decree No. 314/2005 (XII.25.) on the environmental impact assessment and the uniform environmental use permit procedure ("Decree No. 314/2005"), Gov. Decree No. 72/1996 (V.22.) on exercising the powers of the water management authority ("Decree No. 72/1996"), Gov. Decree No. 147/2010 (IV.29.) laying down general rules for activities and facilities for the utilisation, protection and remediation of damage to water ("Decree No. 147/2010"), and KvVM Decree No. 101/2007 (XII.23.) on the professional requirements for intervention in subsurface water resources and water well drilling ("Decree No. 101/2007");[81] (c) from the point of view of the *financing background of agricultural irrigation*, the following pieces of legislation are of particular importance: Gov. Decree No. 115/2014 (IV.3.) on the pricing of agricultural water services ("Decree No. 115/2014") and KHVM

[78] Section 13(1) and (3)(b) to (d) of the LTAct.

[79] Section 21(3)(b) of the FPAct. In fact, the amount of the land protection levy is increased by 50 percent if agricultural land prepared for irrigation is used for other purposes; Section 23(2) of the FPAct.

[80] See also, for example: Gov. Decree No. 219/2004 on the protection of subsurface water and Gov. Decree No. 220/2004 on the rules for the protection of surface water quality.

[81] See also Decree No. 41/2017 (XII.29.) of the Minister of Interior on the content of the documentation required for the water permit procedure.

Decree No. 43/1999 (XII.26.) on the calculation of the water resource tax ("Decree No. 43/1999"); (d) from the point of view of *the organisational definition of irrigation*, of particular importance is Gov. Decree No. 158/2019 (VI.28.) on the tasks of the National Land Center ("Decree No. 158/2019"), which assigns the coordination tasks of irrigation, including the operation of tertiary works, to the National Land Center;[82] (e) Gov. Decree No. 302/2020 (VI.29.) ("Decree No. 302/2020") was adopted to implement Act CXIII of 2019 on Irrigation Farming, which lays down, among others, rules on the establishment of irrigation easements and the related compensation issues, as well as the procedure for the recognition of "irrigation communities" (currently referred to as "sustainable water management communities").

4.2. CONCEPTUAL BASIS OF AGRICULTURAL IRRIGATION

In the context of agricultural irrigation, it is important to briefly discuss the legal meaning of irrigation, the water facilities used for agricultural irrigation and, finally, the different levels of irrigation.

I. *(Agricultural) irrigation* is defined by the law as the use of water to *artificially replenish* natural *precipitation* on agricultural or forestry land authorised by the water management authority or to maintain grassland that is irrigable under the legislation.[83] As for the legal concept, we wish to put forth the following comments. (a) The grassland element of the concept has agri-environmental implications beyond classical agricultural production. (b) Two subtypes of irrigation are of particular relevance in the legislation. They are *simplified irrigation water use*,[84] and *micro-irrigation*,[85] both of which are exempted from numerous irrigation-related requirements,

[82] Section 3 of Decree No. 158/2019.
[83] Section 2(24) of Decree No. 147/2010.
[84] Sections 2(10a) and 60(1a) and (1b) of Decree No. 147/2010, Section 5(12) and (13) of Decree No. 72/1996.
[85] Section 2(22) of Decree No. 147/2010

the former due to economic interests and the latter because of its environmental benefits that are more favourable than and different from those of general irrigation practices. (c) In the case of wells, the type of demand for water may be relevant, since, provided that various other conditions are met, the establishment and operation of a well by a private individual to meet *domestic drinking water and other household needs* only requires a permit from the local notary, rather than a more complex *water permit* from the regional water management authority.[86] (d) Finally, with regard to the concept of irrigation, it is important to note that agricultural irrigation is not the same as *watering*.[87] Watering can be of several types, for example, in the context of a park, it can be considered *as a welfare use of water* and, as such, may be subject to different rates of *water resource taxes*.

II. Among the *water facilities* for agricultural irrigation,[88] *wells*, which are important for access to subsurface water resources, and *agricultural water supply works*,[89] which help to use surface water, deserve special mention. Of these two types, the latter is considered to have a more important role under the relevant water management and environmental regulations (as the use of surface water for irrigation is a priority). Among water facilities, as opposed to the category of so-called *private purpose water facilities*,[90] there is a separate category of so-called *public purpose water facilities*, which essentially serve the water management tasks of the state or local government as defined by law.[91]

[86] Sections 1(1) and (2), 24(1)(a) and (6) Decree No. 72/1996.

[87] In relation to the *use of drinking water for watering*, see also: the repealed KöViM Decree No. 8/2000 (X.18.) on the preferential watering charge in connection with the use of publicly owned water utilities, and KHVM Decree No. 47/1999 (XII.28.) on the fees payable for drinking water supplied from state-owned water utilities and for the use of state-owned sewerage.

[88] For the definition of water facility, see point 26 of Annex 1 to the WMAct.

[89] Section 1(4) of Decree No. 115/2014.

[90] Point 26(b) of Annex 1 to the WMAct.

[91] Point 26(a) of Annex 1 to the WMAct; c.f. *agricultural water management works for public purposes*; Section 1(13) of the WAAct.

III. From the point of view of irrigation development, the literature distinguishes between so-called on-parcel irrigation (i.e., irrigation within the property or land parcel) and off-parcel irrigation.[92] The responsibility for *on-parcel irrigation development* lies with the *landowner (user)*, while the decision-maker will also allocate *EU funding*.[93] In contrast, in the case of *off-parcel irrigation development*, the new Hungarian irrigation development concept provides for a *stronger involvement by the State* than before.[94]

4.3. OWNERSHIP AND USE ISSUES

The following sections deal with the ownership of aquifers and water facilities relevant to agricultural irrigation, followed by operation and maintenance issues and, finally, certain easement issues related to agricultural irrigation.[95]

4.3.1. *Property issues in agricultural irrigation*

The ownership of aquifers and water facilities important for agricultural irrigation is provided for as follows.

I. The *owner of the property* owns (a) *watercourses* that originate and flow into a drain within the boundaries of the property, (b) the natural *still water bodies* (lakes, backwaters) within the boundaries

[92] *National Water Strategy on water management, irrigation and drought management*, prepared by Deputy State Secretariat for Water Affairs, State Secretariat for the Environment, Ministry of Rural Development, November 2013, p. 22.

[93] *National Water Strategy on water management, irrigation and drought management*, p. 22, p. 46.

[94] Ibidem, p. 19.

[95] In this section, only the current legislation is described; on previous legislation, the following excellent works must be mentioned: I. Olajos, *Speciális tulajdonszerzések az erdő- és vízgazdálkodás, valamint a szőlőtermesztés területén*, [in:] Cs. Csák (ed.), *Agrárjog*, Novotni Alapítvány, Miskolc 2008, pp. 116–123; I. Olajos I., *A szerzés tárgya szerint speciális tulajdonszerzési szabályok*, [in:] Cs. Csák (ed.), *Agrárjog*, Novotni Alapítvány, Miskolc 2010, pp. 120–126.

of the property that are not in direct connection with water bodies on any other property, (c) *rainwater* falling onto and remaining within the property, and (d) the *water facilities* within the boundaries of the property and serving private purposes, unless otherwise provided by law.[96] All of the above waters and water facilities can be important for agricultural irrigation.

II. As far as local governments are concerned, the category relevant in terms of agricultural irrigation is *national assets in the exclusive ownership of the local government*. This category includes waters and public-purpose water facilities owned by the local government,[97] which have been transferred to it under a separate Act.[98, 99] In the event of a possible sale of *publicly owned marketable waters and water facilities* described below, the local government or association of local governments concerned has *a right of first refusal*, in proportion to the degree to which they are concerned where more than one municipality is concerned.[100]

III. A significant number of waters and water facilities are *owned by the State.* The following types of public assets are particularly relevant for agricultural irrigation.

III.1. The *exclusive property of the State* shall include: (a) *subsurface water*, *natural aquifers* of subsurface water, (b) *abandoned beds of* running water and natural lakes, (c) *newly created islands* in running water and natural lakes, and (d) *running*

[96] Section 6(4) of the WMAct.

[97] This does not include water utilities which constitute *primary assets of a local government with limited marketability*, similarly to the stake of the local government in a company providing a public service in which the local government has a majority holding. These assets are considered to be of limited marketability in the sense that they may only be alienated to the State, another municipality or a municipal association; see: Sections 5(5)(a) and (c) and 5(7)(a) of the NAAct.

[98] See: Act LXV of 1990 and Act XXXIII of 1991.

[99] See: Section 5(3)(d) of the NAAct.

[100] The local government concerned by the right of first refusal is the local government in whose administrative territory or on whose border the water or water facility is located; Section 6(6) of the WMAct.

waters, stagnant waters, backwaters and natural lakes as defined in Annex 1 to the NAAct and their beds, and (e) canals, reservoirs, flood protection main protection lines and other *water facilities* as defined in Annex 1 to the NAAct.[101]

III.2. The *State's marketable property* includes all waters and water facilities that are *outside* the scope of ownership detailed above in points I, II and III.1 and are not considered to be unmarketable State-owned waters located in a nature reserve. In the event of their disposal, as mentioned above, the *competent local government* (association of local governments) has *the right of first refusal*.[102]

4.3.2. *Use and operation of waters and water facilities for irrigation*

The use and operation of aquifers or water facilities concerned by irrigation vary depending on their owner.[103]

I. The asset management of exclusive and marketable *public* property has now been unified; notably, all such aquifers and water facilities are now held in trust by the *relevant water management directorate*, which is also responsible for their operation, maintenance and development.[104]

II. It was or is possible to transfer the maintenance and operation of a *municipally-owned* aquifer and water facility to the following entities under a management contract or designation decision.

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[101] Section 4(1) of the NAAct.

[102] Section 6(4) to (6) of the WMAct.

[103] See the relevant provisions of the WMAct, the WAAct and KHVM Decree No. 2/1997.

[104] Section 3(2) and (3) of the WMAct. A certain exception to Section 3(2) of the WMAct is made in Section 3(2a) of the WMAct, which provides that the Minister responsible for public investments acts instead of the water management directorates in certain matters. However, as it is apparent, the relevant tasks are kept within the organisation of the State despite such exceptions.

II.1. In 2014, the water management directorate could take over the maintenance of the canal or watercourse free of charge, under a *management contract* on the basis of an *offer by* the *municipal government*.[105]

II.2. In 2014, and later, on the basis of an amendment of legislation, the *water management directorate* had the opportunity to initiate, *on the basis of its own investigation, that it should be designated by the water management authority* as the operator and maintainer. Instead of a designation, the parties may enter into a *management contract*.[106]

II.3. Municipal aquifers and water facilities may also be maintained and operated by the *water association* under a *management contract*.[107]

II.4. As mentioned above, the local government *may transfer to the State the exercise of the owner's rights over a tertiary work* owned by the local government.[108] The State is represented by the irrigation management body (in this case the National Land Center[109]). The irrigation management body concludes a *gratuitous contract* with the owner of the tertiary works on *taking over the management and maintenance of the tertiary works*. The irrigation management body is not entitled to transfer the ownership of the tertiary works as part of its exercise of the owner's rights.[110] As part of the exercise of the owner's rights, the irrigation administration body (a) *may itself operate* the tertiary works, or (b), if the irrigation of the areas supplied by the tertiary works can otherwise be ensured more efficiently and financially more advantageously, it *may transfer the* tertiary

[105] Section 45/D–E of the WMAct.
[106] Formerly: Sections 45/D and F of the WMAct. More recently: Sections 22/A to C of the WMAct.
[107] Sections 1(32) and (33), 3 and 45 of the WAAct.
[108] Section 12(1) to (3) of the IFAct.
[109] Section 3(g) of Decree No. 158/2019.
[110] Section 12(5) of the IFAct.

works *for use on the basis of a lease, usufructuary lease or service agreement or may put them into trust*.[111] With regard to the latter cases (b), it is the intention of the drafters of the Irrigation Act that *sustainable water management communities* (as they are currently called) "[should] also become eligible to operate tertiary works within the irrigation district".[112]

III. In the case of assets[113] owned by a water association, the water association (a) may itself use its water facilities suitable for agricultural irrigation; at the same time, it (b) may also request with the water management authority to designate it as an operator or maintainer, based on *its own investigation*.[114]

IV. In the case of a *private* owner other than the above-mentioned owners, the options are: (a) private use, (b) the water management directorate requesting that the water authority designate the directorate as operator,[115] (c) operation by the water association under a management contract,[116] and (d) *by the setting up of a sustainable water management community, in cooperation with such sustainable water management community*.

4.3.3. *Easements to enable agricultural irrigation and connection to tertiary works*

Watercourses and canals for agricultural irrigation may transport water for agricultural purposes across several parcels of land. At the same time, it often occurs that the property of a user of a land parcel does not have direct access to an appropriate irrigation system. In view of this, in order to ensure the proper functioning of

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[111] Section 12(5) of the IFAct.
[112] National Assembly Paper No. T/7845, submitted: 29.10.2019, detailed explanatory memorandum, Sections 9 to 11, p. 13.
[113] Section 1(33) of the WAAct.
[114] Sections 1(4), (32) and (33), 3 and 45 of the WAAct.
[115] Sections 22/A to C of the WMAct.
[116] Sections 1(32) and (33), 3 and 45 of the WAAct.

inter-parcel irrigation systems, the legislator created various types of easements, listed below.

I. *Water supply easement*: Owners (users) of the property must allow the public water facility to be installed and operated on their property and to carry out the necessary water works on the basis of a decision of the water authority, provided that it does not preclude normal use of the property.[117] The water supply easement must be registered in the land register.[118]

II. *Water use easement*: On request, the water authority authorizes a connection to an existing water facility operating under a water permit, provided that the water facility is fit for or can be made fit for its original purpose and the purpose of the connection.[119] The water use easement must be registered in the land register.[120]

III. *Irrigation easement*: An important consequence of this institution is that "while irrigation cannot be considered as a compulsory task to be carried out by the State or the local government, irrigation farming is a matter of public interest".[121] In order to engage in irrigation farming, the holder of a water right for a water facility is entitled to an irrigation easement[122] if the intended use of the servient property is not precluded. The irrigation easement is granted to the holder of the water right permit for as long as he continues to operate under that permit. The irrigation easement is established by the water authority in the water establishment or operation permit, which is sent to the land authority for registration in the land

[117] Section 20(1) of the WMAct.
[118] Section 27 of the WMAct.
[119] Section 20(2) of the WMAct.
[120] Section 27 of the WMAct.
[121] National Assembly Paper No. T/7845, date of submission: 29.10.2019, detailed justification Sections 2 and 3, p. 10.
[122] On the basis of such easement, the owner or user of the servient property is obliged to tolerate that the farmer engaging in irrigation farming on his real estate establishes and operates a linear water facility for irrigation necessary for the continuation of his agricultural activity, carries out the necessary water works and leads through the irrigation equipment; Section 2(1) of the IFAct.

register.[123] The owner of the property is entitled to compensation corresponding to the extent of the restriction; in its decision, the water authority decides on the compensation to be paid to the owner of the property, which is then paid to the owner of the property by the water right holder.[124] The detailed rules for the above are laid down in a separate government decree, Decree No. 302/2020, mentioned above.

IV. The *connection* to an existing *tertiary plant*, which is operating under a water permit, is also intended to facilitate water transfers. This is possible for any farmer if the operating licence holder agrees; the operation is carried out on the basis of a water permit and the connecting farmer agrees to pay the necessary value and cost compensation in proportion to his interest in the use of the water.[125]

4.4. PLANNED MANAGEMENT OF AGRICULTURAL IRRIGATION: COORDINATING BODY, TERRITORIAL UNITS AND DOCUMENTS FOR IRRIGATION PLANNING

In 2019, the State opted for a much more coordinated and better planned irrigation management, given that the supply of adequate irrigation water to individual properties can often only be economically achieved across other properties, and also in view of farmers' demand for a reduction in the number of individual permits issued by the legislator. The recently established National Land Center as the irrigation body was designated as the main operational body for irrigation coordination,[126] while for the implementation of the plan, irrigation development areas and irrigation districts were set up, and it was ordered that a type of plan should be drawn up for each of them as follows.

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123 Section 2 of the IFAct.
124 Section 3 of the IFAct.
125 Section 4 of the IFAct.
126 Section 3(g) of Decree No. 158/2019.

The two types of plans consist of the irrigation development plan and, in its absence or to provide for a derogation, the environmental district plan;[127] the two plan types concern territorial units of different sizes: the former concerns "irrigation development areas",[128] while the latter is for "irrigation districts".[129] *Irrigation development areas* are designated *ex officio* by the irrigation administration body, taking into account the irrigation clusters associated with active surface water bodies, the sub-units of river basin management planning, soil and hydrology, topography and hydrography conditions and the economics of irrigation, according to the coverage of the surface water irrigation water facility; a parcel of land may only be part of one irrigation development area.[130] The *irrigation district* itself is essentially established when the sustainable water management community concerned is set up, by a decision of the Minister recognising the sustainable water management community, taking into account the hydrological, hydrogeological and topographical conditions within the boundaries of the irrigation development area concerned.[131] The irrigation district must be defined in such a way that it should cover as few parcels of land as possible, while ensuring the objectives of a sustainable water management community. The area of an irrigation district must not overlap with the area of another irrigation district.[132]

Irrigation development plans are prepared by the irrigation management body for the irrigation development area and become valid

[127] Detailed rules for the above are laid down by the legislator in a Government Decree on the basis of the authorization under Section 15(2)(a) of the IFAct; see Decree No. 302/2020.

[128] *Irrigation development area*: means a medium-level planning unit, which may include several irrigation districts, designated *ex officio* by the irrigation administration body; Section 1(4) of the IFAct.

[129] *Irrigation district*: means the area defined in the decision on the recognition of a sustainable water management community, which includes land parcels in unincorporated areas used for the operation of the sustainable water management community and intended to be irrigated by the members of the sustainable water management community; Section 1(5) of the IFAct.

[130] Section 5 of the IFAct.

[131] Section 9(1) of the IFAct.

[132] Section 9(2) of the IFAct.

upon official approval. The irrigation development plan includes the natural conditions related to irrigation, topography, hydrography, hydrology and soil conditions in the irrigation development area; taking these into account, the decision approving the irrigation development plan determines the conservation of nature, environmental protection, and soil protection conditions under which irrigation farming can be carried out in the designated area. Irrigation investment in accordance with a valid irrigation development plan and irrigation farming according to the conditions set out in the decision approving the irrigation development plan do not require any environmental, nature conservation, soil protection permit or authorization procedure. The valid irrigation development plan is considered as an official permit or a resolution of the authorities with regard to the nature conservation, environmental protection and soil protection requirements specified therein. The irrigation development plan remains valid for 20 years from the date of its issue. The designation of irrigation development areas and the irrigation development plans must be published on the government's website. Irrigation development areas and irrigation development plans must be reviewed every 5 years and must be amended if there has been any change to the designation criteria or the nature conservation, water management, environmental, or soil protection conditions.[133]

Environmental district plans for irrigation districts may be prepared in two cases: first, where there is no irrigation development plan in force for the land parcels concerned and, second, where an irrigation development plan is available but it is intended to derogate from the conditions set out in the irrigation development plan in force for the land parcels concerned.[134] An environmental district plan drawn up by the irrigation management body[135] provides farmers with a similar exemption as the irrigation development plan: the environmental, nature conservation and soil protection requirements for irrigation investments are set out in the decision

[133] Section 6 of the IFAct.
[134] Section 10(1) of the IFAct.
[135] Section 10(1) of the IFAct.

of the authority approving the environmental district plan, such authority being specified in the decree implementing the IFAct; the environmental district plan enters into force upon approval. The valid environmental district plan is considered as an official permit or a resolution of the authorities with regard to the nature conservation, environmental protection and soil protection requirements specified in it. An irrigation investment in accordance with a valid environmental district plan and irrigation farming according to the conditions set out in the environmental district plan do not require environmental, nature conservation and soil protection authorization or authorization by the competent authorities. The environmental district plan remains valid for 20 years from the date of its issue. Environmental district plans must be reviewed regularly and must be amended if there is any change to the environmental, nature conservation and soil protection conditions. The entry into force of the irrigation development plans does not affect the scope of the environmental district plan.[136]

The administrative burden for farmers can also be reduced by the provisions of the IFAct,[137] which provide that the irrigation management body may, in the water permit procedure, represent the sustainable water management community or the farmer who initiates an irrigation investment in accordance with the Irrigation Act if the investment complies with the irrigation development plan. A similar relief is that a sustainable water management community can arrange for its members to obtain the necessary permits for irrigation, on the basis of a mandate.

[136] Section 10(2) to (4) of the IFAct.
[137] Section 11 of the IFAct.

4.5. RULES FOR THE BEARING OF COSTS RELATED TO AGRICULTURAL

I. Agricultural irrigation, as a type of water service, is also subject to the *cost recovery principle*[138] mentioned in Article 9 of the WFD.[139] According to a Hungarian version of such legislation, which also applies to agricultural irrigation and specifically to the agricultural water service charge:[140] the pricing policy must be based on the principle of the recovery of costs for water services, depending on the purpose for which the water is used (distinguishing, as a minimum, between domestic, industrial and agricultural needs), taking into account the costs related to the protection of the environment and water resources and the polluter pays principle; the pricing policy should take into account the social, environmental and economic impacts of recovery.[141] Based on the cost recovery principle, the so-called *total economic cost is composed of three cost elements*: the financial cost and two external costs,[142] i.e., environmental and inventory costs. While the cost recovery principle, based on the polluter pays principle,[143] primarily identifies the polluter (or, in the present context, the *user*) as the addressee of the costs, it also allows for *exceptions*. Following an amendment in 2016, the cost

[138] See: *Summary of the River Basin Management Plan of Hungary*, 3rd, pp. 57–59.

[139] For more details, see: A. Csibi, J.E. Szilágyi, *A költségmegtérülés elvének érvényesülése a vízszolgáltatások körében*, "Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica" 2014, No. 32, pp. 371–396.

[140] Section 15/F(4)(d) of the WMAct.

[141] Section 15(7) of the WMAct.

[142] C.f. Z. Nagy, *The instruments of the environmental policy's economic regulation with a particular regard to the Hungarian system*, "Lex et Scientia" 2014, Vol. 21, No. 1, pp. 77–88.

[143] About this principle, see in particular: Gy. Bándi, *A "szennyező fizet" elv és a környezetre veszélyes tevékenységgel okozott károkra vonatkozó felelősségi szabályok európai trendjei*, [in:] É. Margitán *et al.* (eds.), *Nyugat-európai hatások a magyar jogrendszer fejlődésében*, Budapest 1994, pp. 136–162; Cs. Csák, *Gondolatok a "szennyező fizet" elvének alkalmazási problémáiról*, "Miskolci Jogi Szemle" 2011, Vol. 6, special edition, pp. 31–45.

recovery principle is now more emphatically reflected in the Hungarian pricing policy for agricultural irrigation.[144]

II. In the context of *cost sharing*, Hungarian legislation determined the party to bear the costs of operating and maintaining the aquifer or water facility concerned on the basis of the *degree of public interest*. On that basis, the costs of operation and maintenance of water and water facilities owned, operated and maintained by the State must be financed from the *central budget* to *the extent of the public interest.*[145] The legislation also specifically provides for the provision of water services to agriculture.[146] *Additional costs* of activities *over and above the degree of public interest* (water works, construction of a water facility) must be reimbursed by *the applicants* as follows.[147] The costs of regional public-purpose water facilities and public-purpose water works are borne by *the members* in accordance with a special Act[148] in the *case of a water association*, or by the *parties concerned in proportion to their interest in the* absence of a water association (interest-based public-purpose contribution). The amount of the interest-based public-purpose contribution payable per hectare is set annually by decree of the Minister responsible for water management and, (in the absence of a water association) it is levied on the parties concerned by the district office of the county government office.

III. These general rules for cost allocation are also reflected *in the tariffs for agricultural water services*. Under the relevant rules, as a general rule, anyone who uses agricultural water services is obliged to pay an agricultural water service charge to the service provider. The State may, however, assume the liability for the water service charges for irrigation, rice production and fish farming, as defined

[144] For the former legislation, see: J.E. Szilágyi, *A mezőgazdasági öntözéssel összefüggő egyes jogi problémákról*, "Miskolci Jogi Szemle" 2015, Vol. 10, No. 1, pp. 49–50.
[145] Section 7(1) of the WMAct.
[146] Section 7(2)(h) of the WMAct.
[147] Section 8(1) to (3) of the WMAct.
[148] Sections 41 and 19(1) of the WAAct.

in a Government Decree.[149] This "take-over rule" is defined in a Government Decree, which provides that the agricultural water user pays the agricultural water supplier directly supplying such users the water service charge corresponding to the total amount of water supplied to the user, *less half of the basic water service charge* covered by the central budget.[150] In order to understand the take-over rule, it is necessary to point out that the agricultural water service charge consists of two parts: the fixed costs are covered by the so-called "basic charge", which ensures availability, while the variable costs are covered by a charge proportional to the quantity of water used, the so-called "variable charge". Under the take-over rule mentioned above, half of the basic charge is payable from public funds. When drafting the take-over rule, the legislator had to take into account important EU legal requirements,[151] i.e., the cost recovery principle under Article 9 of the Water Framework Directive, mentioned above (and in particular its components relating to the polluter pays principle). However, it seems that the charge paid by Hungarian producers is still very high by international standards, despite the efforts to date.[152] Further action may be needed in this

[149] Section 15/F (1) of the WMAct.

[150] Section 6(1) of Gov. Decree No. 115/2014. See also: Sections 6, 6/A, 8/A and 8/B of Gov. Decree No. 115/2014. The transitional rules for the bearing of costs in relation to the assumption of a certain part of the basic fee by the central budget were previously provided for in Section 8 of Gov. Decree No. 115/2014, whereas at the time of writing this study, they are provided for under Sections 8/C and 8/D of Gov. Decree No. 115/2014 for the year 2023; after the expiry of such a transitional period, Section 6(1) applies.

[151] In agreement with Martin Csirszki, the EU State aid rules are not of particular relevance for the Hungarian take-over rule, as the EU State aid rules would only be applicable if the competition between Member States were affected and distorted. That, however, is not the case, as it is not common for a water service provider established in an EU Member State other than Hungary to provide its services to producers in Hungary. The situation is further complicated by the fact that water conditions in Member States also vary considerably, a characteristic which can also be taken into account when describing EU State aid rules. Based on personal communication from Martin Csirszki, 17.08.2023. However, the EU State aid rules (Article 107 TFEU) may be relevant for other aspects of irrigation development (e.g., the reconstruction of main irrigation systems).

[152] See: European Court of Auditors, *Sustainable water use in agriculture*, special report, 2021/20, Luxembourg 2021, p. 26; and J. Berbel, M.M. Borrego-Marin,

respect. Considering that the operation and expansion of irrigation systems can positively contribute to water retention in a given area, this could justify a more active contribution from the public.

IV. In certain cases, a charge that also affects agricultural irrigation is the *water resource tax*,[153] which is not charged to water users up to a certain amount, i.e. 400,000 m^3 per year for irrigation water use or 4,000 m^3 per water user per irrigated hectare, or 400,000 m^3 per year for fish and rice water use for groundwater users, or 25,000 m^3 per hectare per year for surface water users.[154] However, in some cases, the user is not required to pay the water resource tax even beyond the given amount:[155]

> The analysis of exemptions shows that the new requirements introduced in 2018 have significantly reduced the amount of water subject to the water resource tax. In the case of subsurface water use, the total amount of water used for fish production and 96 percent of the amount used for irrigation were transferred to the exemption below the threshold by 2018. For surface water use, the amount covered by the threshold exemption more than quadrupled from 2017 to 2018. In particular, the amount of irrigation water has increased six times, the amount for fish farming nearly four times, while the amount used for rice production 6.5 times.[156]

A. Exposito, G. Giannoccaro, N.M. Montilla-Lopez, C. Roseta-Palma, *Analysis of irrigation water tariffs and taxes in Europe*, "Water Policy" 2019, Vol. 21, No. 4, p. 817.

[153] Section 15/A (1) of the WMAct.

[154] Section 15/C (1)(l) of the WMAct.

[155] Thus, no water resource tax is payable (a) in periods of permanent water shortage, (b) for the water resources used from the retention and storage of surplus water at the end of winter, such as surface water, flood water and inland water, (c) if the State deviates in favour of the water user for reasons based on social, environmental and economic impacts or geographical and climatic characteristics; Section 15/C (1)(m) and (n), (1a) and (2) of the WMAct. See also: Section 15/E (1) and (1a) of the WMAct, Sections 5(1)(i), 9/A–B and point 1(e) to Annex 1 of KHVM Decree No. 43/1999.

[156] *Summary of the River Basin Management Plan of Hungary*, 3rd, p. 59.

4.6. AQUIFERS AVAILABLE FOR AGRICULTURAL IRRIGATION

The legislation basically sets standards for surface water and subsurface water in relation to aquifers that can be used for irrigation (i.e., rainwater, for example, is not specifically addressed). Based on these: (a) *surface water* is the primary source of irrigation;[157] (b) in relation to irrigation, several pieces of legislation state that *subsurface water* can only be considered in planning for irrigation water supply in the absence of surface water supply;[158] (c) for subsurface water, irrigation water needs must be met *from subsoil water* wherever possible;[159] (d) *stratum water* can be used both for micro-irrigation and (under certain conditions) for irrigation other than micro-irrigation;[160] (e) by contrast, *karst water* can only be used for micro-irrigation.[161]

Water needs can be met primarily from water resources not yet committed for water use (here, the amount of water in the water permit in principle is already taken into account). A new *water permit* can only be issued if the water quantity specified in the permit can be provided to the permit holders.[162] Water use for irrigation purposes may be authorized, except for simplified irrigation water use if there is a verifiable demand for irrigation water for a period of at least five years.[163]

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[157] Section 15(1) of the WMAct, Section 2(2) of Decree No. 115/2014.
[158] Section 60(3) of Decree No. 147/2010, Section 3(5) of Decree No. 101/2007.
[159] Section 60(4) of Decree No. 147/2010.
[160] Sections 60/A and 60/B of Decree No. 147/2010.
[161] Section 60(2) of Decree No. 147/2010.
[162] Sections 15(2) and 29(3) of the WMAct.
[163] Section 60(1)(c) of Decree No. 147/2010. See also: Section 5(12) and (13) of Decree No. 72/1996.

5. Good practices from the Hungarian legislation and further opportunities for improvement (*de lege ferenda*)

For more than a decade, the Hungarian legislator has been trying to improve the system of agricultural irrigation and the relevant legislation in order to encourage competition and be more sustainable. On the positive side, the Hungarian academic community has been its partner to those joint efforts. Among the contributions of science, the National Water Strategy of the Hungarian Academy of Sciences and the concept of landscape-based water management formulated by several scientists during its development are particularly noteworthy. On the positive side, landscape-based water management is no longer a concept known only to the scientific community. From time to time, its essential elements have also been included in official national water governance documents, such as the RBMP3.[164]

In designing the irrigation system and its regulatory environment, the Hungarian legislator correctly identified the country's geographical and hydrological characteristics, as well as the fact that, in view of all these, modern water governance and regulation in the 21st century are inconceivable without the active (and professional) involvement of the nation state. A properly interpreted and implemented strengthening of the role of the State can also help to put into practice the principle of integration, which is important for environmental protection. This active involvement by the State is reflected in several aspects. In the Fundamental Law, water resources were named as part of the category of the "common heritage of the nation". Moreover, the Fundamental Law created and strengthened the category of "national assets", which also included, through the adoption of additional pieces of legislation, certain water facilities important for water and irrigation. The State has clearly established ownership issues concerning the waters and water bodies concerned, has strongly positioned the role of the State and local governments, and has prudently enshrined the most

[164] See: *Summary of the River Basin Management Plan of Hungary*, 3rd, pp. 122–123.

important elements of the system in a cardinal Act. At the same time, where appropriate, a number of important irrigation canals were put under public management in various ways and forms. In order to ensure permeability between properties, which is essential for irrigation, the system of easements and the regulation of connections to the various facilities have been reconsidered. The adoption of the Irrigation Act was another important step for the system: a central coordinating body has been assigned to irrigation, which further strengthened the systemic use of water by preparing and implementing the relevant irrigation plans. The irrigation plans have served both to improve environmental protection and to reduce the administrative burden on farmers. The solution adopted does not violate the principle of "non-regression" established by the Hungarian Constitutional Court also. This is not contradicted by the fact that there is still room for improvement in that respect. The RBMP3 itself states (albeit in less specific terms)[165] that the concept of landscape-based water management needs to be further ensured in the development and implementation of spatial plans for irrigation. In this regard, one should not ignore the need to rethink the form of land use in certain areas concerned.

One of the key issues for agricultural irrigation is its financing, as such costs can have a direct impact on both the price of the agricultural products and the sustainability of environmental services, and thus on the competitiveness of the agricultural sector and its producers. Agriculture without access to water at a reasonable price will be left behind in international competition. Agricultural irrigation that correctly applies the concept of landscape-based water management can provide a basis for the State to be more actively involved in the implementation of landscape-based water management up to the "extent of public interest", and for the boundary between the "extent" of public and private interest to shift towards the public interest. A more active role for the State in this area, and a corresponding extension of the scope of public interest, is also justified for other reasons. Examples include ensuring coherence between the economic, social and environmental pillars of sustainable development,

[165] See: *Summary of the River Basin Management Plan of Hungary*, 3rd, pp. 122–123.

and ensuring a high degree of environmental integration. Properly exploited reservoirs can contribute to increasing water retention, which can also be considered as a serious social and environmental interest, and thus it appears logical to increase the share of public funds in its financing.

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PART II

LEGAL PROTECTION OF CHILDREN WITH DISABILITIES

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The Rights of a Child with Disability: Principles of the United Nations Convention on the Rights of the Child. The Child-Rights Based Approach and Its Reflection in Hungarian Law in Terms of Children with Disability

1. Introduction

There are approximately 240 million children[1] in the world who live with some kind of disability. It means that every 10th human being who is under eighteen[2] is determined to cope with:[3] (i) an impairment in his or her body structure or function, or mental functioning;[4] (ii) activity limitation;[5] and/or (iii) participation restrictions in their normal daily activity.[6] And not only the person themselves is determined to cope with this condition, but the whole

[1] UNICEF Fact Sheet: Children with Disabilities, August 2022, p. 3 (hereinafter: UNICEF Fact Sheet), https://reliefweb.int/report/world/unicef-fact-sheet-children-disabilities-august-2022 (accessed on: 26.07.2023).

[2] Article 1 of the UN Convention on the Rights of the Child (hereinafter: UNCRC): "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

[3] According to the World Health Organisation (WHO) disability has three dimensions.

[4] E.g.: loss of a limb, loss of vision or memory loss.

[5] E.g.: difficulty seeing, hearing, walking or problem solving.

[6] E.g.: working, engaging in social and recreational activities, and obtaining health care and preventive services.

society carries a responsibility – being a burden and an opportunity at the same time – as disability is more a result of a social interaction rather than the actual condition of the disabled person.[7] Unfortunately, the numbers show that the coping mechanism of society needs further improvement. Currently,[8] children with disability are more likely to experience abuse than their healthy peers, are 25 percent less likely to attend early childhood education, are 49 percent more likely to have never attended school, 47 percent more likely to be out of primary school, and 33 percent more likely to be out of lower secondary school. They are more likely to experience multidimensional poverty and face significantly poorer health outcomes. Their institutionalisation instead of decreasing shows continuity.[9] The challenges of the XXIst century such as the possible harms of the digital environment endanger all children, but children with disabilities are affected to a much wider extent.[10] *The childhood of children with disability is more endangered and at risk than the childhood of those who live without disability.*

This chapter aims to underline the importance of approaching the protection and empowerment of children with disabilities first and foremost from the perspective of their childhood with a child-rights based approach. The framework of the rights-based approach has been created and is ongoingly formulated by states in international human rights legislation. Therefore, firstly this framework of international human rights law, available for children with disability, will be presented, with a special focus on the United Nations Convention on the Rights of the Child (hereinafter

[7] According to Preamble e) of the Convention on the Rights of Persons with Disabilities: "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."

[8] UNICEF Fact Sheet, p. 3 (data from 2022).

[9] UNICEF Fact Sheet, p. 4.

[10] Committee on the Rights of the Child General comment No. 25 (2021) on children's rights in relation to the digital environment (CRC/C/GC/25), para. 89–92 (hereinafter: CRC/C/GC/25), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/25&Lang=en (accessed on: 26.07.2023).

referred to as UNCRC) and its guiding principles. The guiding principles of the UNCRC provide the basic standards of a respected, protected and empowered childhood, and that should consistently guide legislators when drafting laws or adopting policies concerning children with disabilities. Indeed, principles are important on an international level, but their enforceability and thus effectiveness and as such availability and accessibility for children with disability may be disputed on many levels. Thus, the core issue of international standards is the national implementation and good understanding which makes the rights-based approach initiated by the adoption of international conventions tangible for children with disabilities. The second part of the chapter, therefore will look at the implementation of the guiding principles of the UNCRC into Hungarian legislation and argue that a comprehensive rights-based approach could improve the childhood of those children with disabilities.

2. The right to be a child in spite of disability – level of the international human rights law[11]

2.1. LEGAL FRAMEWORK

Children and obviously children with disability are human beings and therefore are protected by the general international human rights law.[12]

Nevertheless, children with disability have special needs and need special protection and empowerment from two perspectives. Firstly, they are children and as such are entitled to a childhood that nourishes, prepares and empowers them for their adult life. Secondly, they have some kind of disability, which makes them even more vulnerable. Both of these needs are addressed by the international

[11] The subject of the research is the universal system of human rights, i.e. the legal instruments adopted; it does not analyse the protection.

[12] International Bill of Rights, i.e. United Nations Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

human rights law of the UNCRC and by the United Nations Convention on the Rights of Persons with Disabilities (hereinafter referred to as UNCRPD). It is common in both of these documents that these needs were widely accepted by the international community. It is especially true in terms of the UNCRC, where there is only one country[13] that has not yet ratified the treaty. It is common that both of the instruments *represent a shift between the caring and sometimes in terms of disabled persons medicalised model to a so-called rights-based approach*, which in practise means that both documents put an emphasis on participatory rights.

The CRC recognised the special needs of children, and turned them from being an object of protection to being a subject of rights; and the CRPD was an answer to a systematic breach of the rights of persons with disabilities. In terms of children with disabilities, the CRPD rather strengthened the applicability of children's rights and the principles that should govern law and policy making and then added all the new approaches. Nevertheless, this strengthening was and is very adequate regarding children with disabilities, as Article 23 of the CRC that concerns specifically the rights of children with disabilities puts the overall emphasis[14] on welfare rather than rights and is therefore easy to be used by perspectives which promote segregation over inclusion.[15] It is underlined in the joint-statement[16] issued by the Committee on the Right of the Child (hereinafter referred to as the CRC Committee) and the Committee on the Rights of Persons with Disabilities (hereinafter referred to as CRPD Committee) on 18 March 2022.

[13] The United States of America has not yet ratified the UNCRC.

[14] Article 23(1) recognises the child's right to full inclusion in the community.

[15] M. Jones, L.A. Basser Marks, *Beyond the Convention on the Rights of the Child*, "The International Journal of Children's Rights" 1997, Kluwer Law International, p. 184.

[16] During its 89th session and 26th session respectively, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities adopted a Joint Statement on the Rights of Children with Disabilities, https://www.ohchr.org/en/treaty-bodies/crpd/statements-declarations-and-observations (accessed on: 26.07.2023).

With the CRC and the CRPD being there to strengthen and supplement each other as international human rights legal instruments that can be invoked by children with disabilities, one may well-grounded draw the conclusion that the currently available human rights legal framework sufficiently covers children with disability. The devil here lies in good understanding, on both national and international level and the application, implementation and practise on national and cross-border levels. The starting point of a good understanding is the frame of principles of the CRC that created, and with evolvement constantly formulates the child-rights perspective towards children and children with disability. Ongoingly, this paper analyses the principles of the CRC that are core elements of the child rights perspective. Their comprehensive and good – if necessary tailored – understanding is a step forward to guarantee the children's rights also to those children who are, due to their enhanced vulnerability, rather invisible, such as children with disabilities. The more we look at disabled children from the perspective of their childhood, so with a child rights-based approach and not from the angle of their disability, the closer we get to their effective protection.

2.2. THE CHILD RIGHTS-BASED APPROACH: 4 + 1 CORE PRINCIPLES OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD

The CRC Committee tend to determine four principles of the UNCRC. They are: (i) non-discrimination, (ii) the respect for the child's point of view, (iii) the best interest of the child, and (iv) the right to life, survival and development. While fully accepting the relevance of these principles, I would like to add one that is actually there behind all of the principles, namely the (v) right to live in a loving and caring family environment, which means firstly and foremostly the own family of the child, but also the right to alternative care that provides circumstances just the same as a loving and caring family. Without adding and considering this principle, the child rights perspective will be missing an important element. All

of these principles are also rights. Nevertheless, the recognition of these rights as principles affirms the imperative to take them into account when implementing all other rights.[17]

Before going into the principles, there is one point that needs to be made in connection with the overall aim of the CRC – with accepting the difficulty that it is very hard to formulate all of its aims into one goal. Nevertheless, if this was a must, one could conclude that the goal of the CRC is to *give such a fruitful childhood to every child that helps them in maximizing their potential and thus enter adult life with a real chance for a balanced adult life*. This aim should be achievable for all children, also to those who are disadvantaged in some way, just as children with disabilities. As mentioned earlier, there is one particular provision of the CRC, Article 23, that concerns only disabled children. Nevertheless, as also mentioned earlier, and needs to be emphasised here again, an interpretation that would focus only on this particular provision would cause a misunderstanding of the rights of disabled children because even though the first sentence mentions the participatory rights, it is rather close to the caring model. Therefore, it is necessary also to give enough attention to the confirmatory nature of the CRPD, and to look at the whole legislative framework given by the CRC and CRPD and all the rights throughout the prism of the principles, in order to get close to the real rights-based approach. The confirmatory nature of the CRPD is also there in Article 7, where the CRPD addresses specifically children with disabilities and strengthens the applicability of CRC by repeating its core principles.[18]

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[17] Z. Vaghri, *Article 6: The Rights to Life, Survival, and Development*, [in:] Z. Vaghri, J. Zermatten, G. Lansdown, R. Ruggiero (eds.), *Monitoring State Compliance with the UN Convention on the Rights of the Child. Children's Well-Being: Indicators and Research*, Springer, Cham 2022, p. 35.

[18] Article 7 of the CRPD declares that:

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views

2.2.1. *Non-discrimination*

The principle of non-discrimination is enshrined in Article 2 of the CRC. Non-discrimination from the perspective of the CRC basically means that every child is entitled to the same rights regardless of any characteristics. It is important to stress that the CRC is the first international convention that includes disability as a ground for discrimination. General comment No. 5 on the general measures of implementation of the CRC (hereinafter referred to as General Implementation Measures) requires States to actively identify individual children and groups of children whose enhanced recognition and realisation of their rights may demand special measures.[19] The principle of non-discrimination is declared also in Article 5 of the CRPD, which means equality before the law for all persons, and for persons with disability it means addressing their special needs in order for equality to be achievable and accessible. From the perspective of children with disabilities, it completes an important element in the perspective of the CRC, meaning that in order to achieve an equally fruitful childhood, children with disabilities need special attention, where their special needs are recognised and addressed.[20]

Apart from the General Implementation Measures, the CRC did not issue further general comments on the principle of non-discrimination. Nevertheless, the CRPD Committee provides further guidance in a general comment addressed on equality and non-discrimination by emphasising that children with disabilities are particularly vulnerable when it comes to questions on equality, and therefore their identification and deeper understanding by

being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.

[19] Committee on the Rights of the Child: General comment No. 5 on General Implementation Measures (CRC/GC/2003/5), p. 4 (hereinafter: CRC/GC/2003/5), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FGC%2F2003%2F5&Lang=en (accessed on: 26.07.2023).

[20] As underlined by General comment No. 6 on equality and non-discrimination of the CRPD Committee, the non-discrimination principle also covers the parents of children with disabilities.

disaggregated data collection and involvement and inclusion by targeted actions is necessary to diminish that existing vulnerability.

Research shows[21] that the exclusive application of non-discriminatory measures such as including disability as a ground for discrimination, and effective systems of remedy, and awareness raising campaigns are important elements, but merely in themselves are rather contra-productive and may result in an enhanced discrimination. Unless having measures leading us to the next principle: the point of view and the real participation of the child with disability,[22] non-discriminatory measures will not be effective in themselves.

2.2.2. *The child's point of view*

From a narrow perspective, the child's point of view is represented by Article 12 of the CRC, and completed by Article 7 of the CRPD, but from a broader perspective it is indeed so much more. It is the shift from being the object of protection to being a subject of the rights and take active role in enforcing these rights. The weight of this principle is highlighted by the CRC Committee when underlining the role of the child as an active participant in the promotion, protection and monitoring of his or her rights and emphasising that this principle applies equally to all measures adopted by States to implement the CRC.[23] The CRC also underlined this approach in individual communications procedures.[24]

The CRPD's confirmatory nature – i.e., Article 4(3) also acknowledges the importance of systematically "including children with

[21] UNICEF Fact Sheet, p. 39

[22] General comment No. 6 (2018) on equality and non-discrimination (CRPD/C/GC/6), p. 9 (hereinafter: CRPD/C/GC/6).

[23] CRC/GC/2003/5, para. 4.

[24] For instance, in a case against Belgium the CRC Committee stated: "The fact that the child is very young or in a vulnerable situation (e.g., has a disability, belongs to a minority group, is a migrant) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests."

disabilities" – is strengthened by the confirmatory work[25] of the CRPD Committee. The CRPD Committee puts a great stress on the inclusion of children in the development and implementation of legislation and policies to give effect to the CRPD, and in other decision-making processes, through organisations of children with disabilities or supporting children with disabilities. These organisations are key in facilitating, promoting and securing the individual autonomy and active participation of children with disabilities. States parties should create an enabling environment for the establishment and functioning of representative organisations of children with disabilities as part of their obligation to uphold the right to freedom of association, including appropriate resources for support.[26] States parties should adopt legislation, regulations and develop programmes to ensure that everyone understands and respects the will and preferences of children and considers their personal evolving capacities at all times. The recognition and promotion of the right to individual autonomy is of paramount importance for all persons with disabilities, including children, to be respected as rights holders. Children with disabilities are themselves best placed to express their own requirements and experiences, which are necessary in developing appropriate legislation and programmes in accordance with the UNCRPD.[27] States parties can organise seminars/meetings in which children with disabilities are invited to express their opinions. They could also make open invitations to children with disabilities to submit essays on specific topics, encouraging them to elaborate on their firsthand experiences or life expectations. The essays could be summarised as inputs from the children themselves and directly included in decision-making processes.[28] The topic of

[25] General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention (CRPD/C/GC/7) (hereinafter: CRPD/C/GC/7), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FGC%2F7&Lang=en (accessed on: 26.07.2023).

[26] CRPD/C/GC/7, para. 24.

[27] CRPD/C/GC/7, para. 25.

[28] CRPD/C/GC/7, para. 26.

genuine and real participation is a broad and very complex topic in itself, especially in terms of children with disabilities. Here this complexity is not detailed, but it just merely emphasised that the child's point of view is an indispensable element of the child rights-based approach towards children with disabilities. As underlined by the CRC Committee,[29] without genuinely applying a real participation principle the next element of the child rights-based approach, i.e. the primary consideration of the best interest(s) of the child can never be fully effective.

2.2.3. *The best interests of the child*

The principle of the primary consideration of the best interests of the child is encompassed in Article 3 of the UNCRC, and the particular importance of its application in terms of children with disability is confirmed by Article 7 of the UNCRPD.

Article 3 of the UNCRC refers to actions undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". The principle requires active measures throughout government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.[30] The best interests of the child principle is the most widely cited principle, but at the same time it causes many difficulties to apply it genuinely in practice. In practice, the principle has to be

[29] General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3 para.1) (CRC/C/GC/14) (hereinafter; CRC/C/GC/14): "The fact that the child is very young or in a vulnerable situation (e.g., has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests."

[30] RC/GC/2003/5, para. 4.

applied as a threefold concept – a substantive right, a fundamental, interpretative legal principle, and a rule of procedure.[31]

The determination and assessment of the child's best interests should always have a root in what makes the child unique, and regarding children with disabilities it is the disability that needs special attention.[32] This is underlined[33] by the CRPD Committee when declaring that the concept of the "best interests of the child" contained in Article 3 of the Convention on the Rights of the Child should be applied to children with disabilities with careful consideration of their circumstances. State parties should promote the mainstreaming of disability in general laws and policies on childhood and adolescence. After recognising this uniqueness of the child, there are several elements according to the CRC Committee that are to be assessed in a balanced manner[34] in order to get close to the child's real best interests. These elements are, as mentioned earlier, the child's view, the child's identity, preservation of the family environment and maintaining relations, care, protection and safety of the child, situation of vulnerability, the child's right to health, and the child's right to education.[35]

Article 18 of the UNCRC together with Article 5, which covers the duties and rights of parents, and Article 3, paragraph 2 and Article 27, which covers the obligations of the State, clearly stipulates that the parents have the primary responsibility for ensuring the best interests of the child, and the state must take appropriate steps to support parents in fulfilling their duties. At the same time, the state can only take over the role of the parent in order to ensure the rights and needs of the child if the parent is unable to fulfill this responsibility. In terms of children with disability, the supportive role of the state should be present and tangible for parents of these children. In ordinary terms, the parents, with a support of the state, act in the best interests of the child when they respect his or her

[31] CRC/C/GC/14, para. 6.
[32] CRC/C/GC/14, para. 48.
[33] CRPD/C/GC/6, para. 38.
[34] CRC/C/GC/14, para. 80–84.
[35] CRC/C/GC/14, para. 52–79.

dignity as a human being, and provide a loving and caring, emotionally stable environment where the child can thrive. This brings us to the next principle: the right to life, survival and development, and as a plus one the life, survival and development in a loving and caring environment as being a core element in formulating the child rights-based approach.

2.2.4. *The right to life, survival and development (+ in a caring and loving family environment)*

Just as the previous elements of the child rights-based approach, the right to life, survival and development is a wide and complex issue. The aim here is not to discuss it in its entire complexity, but to give an outline of the aspects that mainly form the child rights-based approach.

The right to life, survival and development is incorporated in Article 6[36] of the UNCRC. It guarantees the inherent right to life, and for the first time in an international human rights treaty, introduces the right to survival and development.[37] Article 6 prohibits any act that is detrimental to the child's inherent dignity and right to life, including the death penalty, corporal punishment, torture or other inhuman treatment or punishment.[38]

In connection with the right to life, i.e. Article 6 paragraph (1), the question of the definition of the child and childhood arise. The UNCRC does not define the beginning of childhood; it only determines the endpoint. The international human rights law layer of the protection directs the determination of this question to a national level. Indeed, the UNCRC's preamble cites the Declaration of the Rights of the Child: "the child, by reason of his physical and mental

[36] Article 6. "States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child."

[37] Z. Vaghri, *The Rights to Life, Survival, and Development*, *op. cit*., p. 32.

[38] M. Nowak, *A commentary on the United Nations Convention on the Rights of the Child, Article 6: The right to life, survival and development*, Brill Nijhoff, 2005, pp. 18–24.

immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", but the question of the right to life before being born alive was consciously left out from the UNCRC. From the perspective of children with disabilities, the question of the beginning of childhood may be even heavier and more carefully considered. Most mortality, morbidity and disability among children could be prevented if there were the political commitment and a sufficient allocation of resources directed towards the application of available knowledge and technologies for such prevention, treatment and care.[39] From conception until the first three or four years of our lives, the cerebral infrastructure is laid down for our health, personality and resilience.[40] Therefore, preventability and early childhood intervention is indeed a very important aspect and needs positive actions. Nevertheless, the right to life should not mean a right to life without disability, which means that preventability does not necessarily mean prevent it by all means, i.e. providing easier access to abortion to those women who are allegedly carrying a disabled child, but to provide equal chances to be born alive and live in dignity.[41]

Article 6 paragraph (2) introduces the obligation to ensure the survival and development of the child to the maximum extent possible. This article is an umbrella provision that there is a positive obligation in implementing all the rights both from the perspective of the right to survival and the right to development. The right to survival collects[42] under its umbrella the right to health and adequate nutrition,[43] the right to an adequate standard of living,

[39] Committee on the Rights of the Child General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24) (CRC/C/GC/15), para. 1 (hereinafter: CRC/C/GC/15), https://www.refworld.org/docid/51ef9e134.html (accessed on: 26.07.2023).

[40] J.C.M. Willems, *Principles and Promises in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities*, "European Yearbook of Disability Law" 2012, No. 3, p. 98.

[41] M. Andrzejewski, *Prawa dzieci niepełnosprawnych*, [in:] *Konwencja o prawach dziecka, Analiza i wykładnia*, T. Smyczyński (ed.), Poznań 1999, p. 334.

[42] Z. Vaghri, *The Rights to Life, Survival, and Development*, *op. cit.*, p. 37.

[43] Article 24 of the UNCRC.

the eradication of poverty and provision of basic material needs,[44] the right to recovery and rehabilitation,[45] the right to preventive measures from harm such as provisions of information to children and parent for optimal development of the child,[46] and protection from exploitation and abuse in general and in times of forced displacement by natural and/or man-made causes.[47] The right to development includes the rights to education,[48] supportive measures for parents, an adequate standard of living for children's physical, mental spiritual, moral and social development, and protection of children against work that is harmful to their health or physical, mental spiritual moral or social development. According to the CRC Committee, the right to survival and right to development of children should precede the states interests in, i.e. deporting families into their country of origin.[49]

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[44] Article 27 of UNCRC.

[45] Articles 19 and 39.

[46] UNCRC, Articles 5, 12, 17, 24

[47] UNCRC, Articles 19, 32–36.

[48] UNCRC, Articles 28–29.

[49] Committee on the Rights of the Child's Views adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 99/2019 (CRC/C/90/D/99/2019); Committee on the Rights of the Child's Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 74/2019 (CRC/C/89/D/74/2019). In a case against Denmark (from India) and also in one against Switzerland (from Russia) where a child was to be returned to a country where an adequate treatment or help with the disability condition was not guaranteed, the CRC Committee recalled its general comment No. 6 (2015), in which it stated that States are not to return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Articles 6 and 37 of the Convention (para. 27); and that such nonrefoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age- and gender-sensitive manner. Such assessment should be carried out following the principle of precaution and, where reasonable doubts exist that the receiving State cannot protect the child against such risks, State parties should refrain from deporting the child.

Preventability is not merely important in the case of the right to life but it is also essential in terms of the right to survival and development.[50] For instance, children in the street situation[51] are more likely to "get infected" by disability, there is also a higher risk for children who live in poverty and have lower access to social and health services.

The right to education as part of the principle of the right to life, survival and development is an outstandingly important element of the child rights-based approach towards children with disabilities in terms of children with disabilities, also confirmed by Article 24 of the CRPD. Inclusive education goes beyond mere integration, as it focuses on creating an environment where all children can actively participate, learn, and thrive together.[52] The benefits of inclusive education for children with disabilities are numerous and profound. Inclusive education ensures that children with disabilities have the same rights as their typically developing peers to access education. It fosters a sense of belonging. By being part of a regular classroom setting, children with disabilities have the opportunity to interact with their peers without disabilities. This fosters a sense of community, empathy, and understanding, leading to more inclusive societies in the long run. Inclusive education recognises that every child learns differently and at their own pace. Teachers are encouraged to adopt diverse teaching strategies to accommodate various learning styles, benefiting all students, including those with disabilities. Inclusive education helps

[50] According to the CRC Committee, children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, foetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility. If not automatically excluded, such children should be individually assessed. Committee on the Rights of the Child General comment No. 24 (2019) on children's rights in the child justice system (CRC/C/GC/24), para. 28, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/275/57/PDF/G1927557.pdf?OpenElement (accessed on: 26.07.2023).

[51] General comment No. 21 (2017) on children in street situations (CRC/C/GC/21), para. 52–53.

[52] S.R. Kirschner, *Inclusive Education*, [in:] W. George Scarlett (ed.), *Sage Encyclopedia of Classroom Management*, Sage, 2015, pp. 1–3, https://www.researchgate.net/publication/293337563_Inclusive_Education (accessed on: 26.07.2023).

children with disabilities develop self-confidence, self-esteem, and a positive self-image. When they feel accepted and supported, they are more likely to take risks, explore their interests, and discover their potential. Having children with disabilities in mainstream classrooms challenges stereotypes and misconceptions.[53] This promotes a culture of acceptance and inclusion. Inclusive education emphasises the provision of individualised support for students with disabilities. Specialized educators, learning materials, and assistive technologies are employed to cater to the specific needs of each child, ensuring that they can fully participate in the learning process. Inclusive education better prepares all children, including those with disabilities, for life beyond the classroom. It equips them with valuable skills, such as problem-solving, teamwork, and adaptability skills, which are essential in the workforce and community. Inclusive education encourages collaboration between parents, teachers, and the community. Parents of children with disabilities become active partners in their child's education, contributing their unique insights and knowledge. While inclusive education offers a multitude of advantages, its implementation requires ongoing commitment, adequate resources, and professional development for teachers. Schools need to be physically accessible and emotionally welcoming, and educators need training to effectively cater to diverse learning needs. Inclusive education is not just about integrating children with disabilities into mainstream classrooms; it is about embracing diversity and providing an enriched educational experience for all students. When children with disabilities are included and supported in regular schools, they have the opportunity to reach their full potential, and society as the all benefits from it.

Nor the principle of right to life, survival and development, nor the core principles detailed above are valid without bearing in mind that *children's rights are realised when the child lives in an*

[53] S.M. Roldán, J. Marauri, A. Aubert, R. Flecha, *How Inclusive Interactive Learning Environments Benefit Students Without Special Needs?*, "Frontiers in Psychology – Section Educational Psychology" 2021, No. 21, https://www.frontiersin.org/research-topics/13573/interactive-learning-environments-fostering-learning-development-and-relationships-for-children-with-special-needs/articles (accessed on: 26.07.2023).

emotionally, physically safe loving and caring family environment. It is there in the preamble[54] of the CRC and confirmed by Article 23 of the CRPD. In principle the outstanding importance of a family environment is confirmed by both – the CRC Committee and the CRPD Committee, when they underlining: children, for the full and harmonious development of their personalities, should grow up in a family in an atmosphere of happiness, love and understanding.[55] This natural right to a family requires positive measures from the state and it is even more so in terms of children with disabilities. Children with disabilities have equal rights with respect to family life, and states have obligations to provide services and support to families to prevent abandonment, concealment and segregation.[56] Children with disabilities must not be separated from parents unless in their best interests and never on the basis of disability. The placement of children in institutions on the basis of their impairment is also a form of discrimination prohibited by Article 23(5) of the UNCRPD. States must ensure that parents with disabilities and parents of children with disabilities have the necessary support in the community to care for their children.[57] States parties should in particular address violence and institutionalisation of children with disabilities, who are denied the right to grow up in their families as a matter of discrimination. States parties should implement deinstitutionalisation strategies that help children to live with their families or in alternative family care in the community in a family setting.[58]

[54] "(Is convinced) that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community", and "that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".

[55] Joint Statement, para. 10.

[56] Save the Children: See Me, here Me: A guide to using the UN Convention on the Rights of Persons with Disabilities to promote the rights of children, p. 27.

[57] CRPD/C/GC/6, para. 62.

[58] CRPD/C/GC/6, para. 38.

2.2.5. *Conclusions on the nature of the child rights-based approach toward children with disabilities*

In brief, the child rights-based approach could be defined as glasses where the colour of the lenses is need to be adjusted in light of the individual situation or individual child, or group of children. Nevertheless, there are elements, detailed above: non-discrimination, child's point of view, best interests of the child and the right to life survival and development in a loving and caring family environment that give a strong basis to this approach and a prism through which all the rights of the CRC and the CRPD should be assessed when determining legislative approaches, adopting policies and strategies that target children with disabilities. Disability is an element that indeed adjusts and should be adjusting these glasses, but in a manner that they still stay the glasses of children's right – and not glasses of disability – where the childhood of children with disabilities is considered carefully and all efforts are made to ensure that their childhood is protected to the same extent (with an assessment of their special needs) as the childhood of children that are not struggling with disability.

It is important to note that the child rights-based approach is not necessarily identical to the approach of the CRC or the CRPD Committee, but an approach that takes into account and monitors the interpretative work of these bodies and applies if it can be integrated and pasted into national measures. The child rights-based approach in order to be effective needs to be formulated and implemented on a national level in line with the international binding obligations, which are the international human rights treaties.[59] For the genuine approach there is a necessity of a deep understanding of the target group, which in this case is that of children with disabilities and a necessity for a tailored strategy in line with the above detailed principles – which apart from legislative measures needs a human resources and financial resources policy and needs to be monitored and evaluated periodically.

[59] In the introduction it was detailed that the state introduced the right-based approach by adopting the UNCRC and the UNCRPD.

3. The right to be a child in spite of disability – remarks on the implementation of the child-rights based approach towards children with disabilities in Hungarian law

Both the UNCRC and the UNCRPD is incorporated into the national law of Hungary. The CRC was ratified in 1991, the UNCRPD in 2007, together with the Optional Protocol that allows individuals to file complaints to the Committee. The Optional Protocol that allows the same rights in terms of the UNCRC is neither signed nor ratified by Hungary. The UNCRC Committee identifies the rights of children with disabilities as an area that raises concerns.[60]

We know very little about the actual situation of children with disabilities in Hungary. According to the data of the Hungarian Statistical Office, in 2022 there were 97 286 children[61] with special educational needs, but it is important to note that it is not the same category as children with disabilities, it is just the number of children who are involved in the educational system. There is no disaggregated data that would give an overall picture from 0–18 years old on children with disabilities.[62]

3.1. NON-DISCRIMINATION

Article XV paragraph (2) of the Fundamental Law of Hungary prohibits discrimination on the grounds of disability. Article XV paragraph (5) adds a positive provision saying that by means of separate measures, Hungary shall protect families, children, women, the elderly and those living with disabilities.

The Act CXXV of 2003 on equal treatment (hereinafter referred to as the Act on Equal Treatment) in 4 § says that the obligation of non-discrimination must be respected by persons and institutions

[60] CRC/C/HUN/CO/6, para. 4.

[61] https://www.ksh.hu/stadat_files/okt/hu/okt0006.html (accessed on: 26.07.2023).

[62] There was a census in 2022.

providing social care, child protection and child welfare services. 8 § prohibits direct discrimination on the basis of disability, and 31 § subparagraph (2) calls for the preparation of action plans that cover persons with disabilities.

The Act on Equal Treatment does not specify the category of a disabled child.

The Act CLIV of on healthcare (hereinafter referred to as the Healthcare Act) appoints the patient's rights representative to act against discrimination on the basis of disability. Article 42 specifies youth healthcare, where specific stress is laid on minors with disabilities.

The determined category of a disabled child does not appear when collecting data or determining the national strategy in the current Hungarian legal approach. There is no comprehensive strategy or action plan on children's rights, so from this perspective children with disabilities are not approached. The National Disability Programme[63] (hereinafter: NDP) 2015–2025 adopted by the parliament in resolution 15/2015 (IV.7.), does mention children with disabilities as a group that is extremely vulnerable but it rather follows a caring approach instead of a rights-based approach.[64]

The CRC Committee identified the lack of data collection,[65] and the lack of a comprehensive policy and strategy[66] as an omission in the implementation of the UNCRC, and underlined that targeted measures are needed in order to mitigate the existing discrimination.[67] The child right-based approach is not achieved while such a comprehensive strategy is not in place with a specific eye on children with disabilities. Such a strategy needs to be based on updated national data research.

[63] https://mkogy.jogtar.hu/jogszabaly?docid=a15h0015.OGY (accessed on: 26.07.2023).

[64] In the strategy there is direct reference to the CRPD but not to the CRC.

[65] CRC/C/HUN/CO/6, para. 11(a).

[66] CRC/C/HUN/CO/6, para. 8.

[67] CRC/C/HUN/CO/16, para. 8.

3.2. THE CHILD'S POINT OF VIEW

Unlike the Polish Constitution[68] if we look at the constitutional basis, in the Fundamental Law of Hungary we find no direct reference to the respect of the child's point of view, or to the child's evolving capacity to form his or her own views.

The participation of children appears in lower sources of the law. However, there is indeed a gap, and an obstacle to the implementation of a real rights-based approach, as – as already mentioned above – research concludes that positive discriminatory measures are effective when there are measures that allow the participation of those whose discrimination is at stake. Thus, strengthening the principle of participation is a path towards a more genuine child rights-based approach.

3.3. THE BEST INTERESTS OF THE CHILD

The act ratifying the UNCRC translated the term "best interests of the child", as above all the interests of the child; this translation might lead into wrong conclusions when assessing this principle.

The Act XXXI of 1997 on child protection (hereinafter referred to as Child Protection Act) in Article 2 uses the same wording as the translation of the UNCRC. The jurisprudence of the Constitutional Court of Hungary reacts to this by using the form that is closer to the best interest term.[69]

The Family Law Book of the Civil Code[70] declares the principle of the protection of the interest of the child which means that the interests and rights of the child shall be granted increased protection

[68] Article 72 para. 4 of the Polish Constitution declares that "In the course of determining the rights of the child, public authorities and persons responsible for the child are obliged to listen to and, as far as possible, take into account the views of the child."

[69] "legjobb érdek", "legfőbb érdek".

[70] Act V of 2013 on the Civil Code, https://njt.hu/jogszabaly/en/2013-5-00-00 (accessed on: 26.07.2023).

in legal relationships concerning the family.[71] The child shall have the right to be brought up in his own family.[72] If the child cannot be brought up in his own family, it shall be ensured that the child grow up in a family environment and keep his own earlier family relationships if possible.[73] The child's right to be brought up in his own family or in a family environment and his right to maintain his earlier family relationships may only be restricted in cases set out by an act, exceptionally, and in the interests of the child.[74]

The Hungarian Constitutional Court puts a strong emphasis on the rights of the parents in the determination of the best interest of the child, while at the same time defining the best interest of the child as a limitation to parental rights.[75]

3.4. THE RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT (+ IN A CARING AND LOVING FAMILY ENVIRONMENT)

Article II of the Fundamental Law of Hungary says that every human being shall have the right to life and human dignity; the life of a foetus shall be protected from the moment of conception.

Legal capacity is guaranteed for all children[76] with disabilities from conception if they are born alive.[77] So under Hungarian law, even though the protection of the life of a foetus is guaranteed, it is not stated in any legal provision – unlike in Poland[78] – that the life of a child starts from the conception.

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[71] Civil Code, Article 4:2(1).
[72] Civil Code, Article 4:2(2).
[73] Civil Code, Article 4:2(3).
[74] Civil Code, Article 4:2(4).
[75] Constitutional Court decision No. 14/2014. (V.13.), para. 17.
[76] Full legal capacity to act is only guaranteed after reaching 18, unless majority is attained earlier (in Hungary, marrying at 16 means attaining majority at the same time.
[77] Civil Code, Article 2:2.
[78] Act of 6 January 2000 on the Ombudsperson for Children's Rights in Article 2 declares that within the meaning of the Act, a child is any human being from conception to adulthood.

The Act on Healthcare in Article 185 provides a possibility to terminate the pregnancy until the 24th week on potential disability grounds. In terms of homicide, the Criminal Code considers it an aggravating circumstance when the homicide is involved against a person with disability.

Article XVI paragraph (1) of the Fundamental Law states that every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. Article XI paragraph (1) declares the right of every Hungarian citizen to education.

The fundamental right guaranteed in paragraph (1), the right of children to protection and care, has a special structure and is multi-polar: the child is entitled, while the family (each parent) is primarily obliged, and secondarily – in a supplementary or, in some cases, substitute manner – the state is obliged to provide that protection and care. In this role, the state must enforce children's right to protection and care with an active, supportive (not merely passive) attitude.[79] This approach is outstandingly important when formulating the child rights-based approach towards children with disabilities or other groups of children where their disadvantaged situation pushes them onto the periphery. The active, supportive role of the state is even stronger regarding the enforcement of the rights of children with disabilities than in the case of children without any disability, as the disability in itself is a greater burden on the parents and it cannot be expected that they stand alone without a significant support of the state. It is important to note that this support should not affect the parents right to the upbringing of the child.

[79] Constitutional Court decision No. 14/2014. (V.13.). According to the Constitutional Court, this approach is in line with the approach of the UNCRC as pursuant to Article 18(1) of the UNCRC "Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern." In their actions, they must be guided above all by the "best interests of the child". Paragraph 2 of Article 18 specifically emphasises the secondary role of the state when it states that it "shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children."

Article 6 paragraph (3) of the Child Protection Act says that a disabled, chronically ill child has the right to special care that helps the child's development and the development of the child's personality.

Act XXVI of 1998 on the rights of disabled persons (hereinafter referred to as Disability Act)[80] and ensuring their equal opportunities in Article 13 specifies that the disabled person has the right to take part in early development and care, preschool education, school education and training, developmental preparation, vocational training, adult education, and higher education, as defined in the relevant legislation, in accordance with their condition and depending on their age. The Disability Act also provides for an integrated education of children with disabilities.

Act CXC of 2011 on national state education[81] lays down the details of the right to education, where there is a stress placed on inclusive education. Nevertheless, the practise shows that there is still an implementation gap for children with disabilities in terms of inclusive education.

In terms of the right to development, the NDP underlines some important aspect, such as the importance of early recognition. It says that the key task is to connect the various sub-areas that make up the early intervention process – especially early detection, special education counselling, early development, education and care, as well as care and services affecting the family of the disabled person. The early recognition of disability has a decisive role in terms of a person's quality of life, since the basic condition for the initiation of personalised developments, services, and benefits available to a disabled person is the professional diagnosis of a disability as early as possible. This is of particular importance in the case of disabled children, for whom effective early intervention requires not only a quick and accurate diagnosis, but also the coordinated activities of the health, social and early childhood education sectors. Therefore, the important objective of the period covered by the NDP is to create the personal and material conditions necessary for establishing an early health diagnosis, to develop related professional protocols,

[80] https://net.jogtar.hu/jogszabaly?docid=99800026.tv (accessed on: 26.07.2023).
[81] https://net.jogtar.hu/jogszabaly?docid=a1100190.tv (accessed on: 26.07.2023).

and to create the – currently missing – connection points of the care system for early detection and early development. One of the main obstacles to establishing an early diagnosis and starting appropriate developments is currently the lack of information and the resulting not always clear patient path. It is therefore a high priority to initiate developments that make the knowledge, information and data related to individual disabilities and available services accessible to both professionals and disabled persons and their family members at all relevant points of the care system. As regards early development, education and training, the NDP highlights that the effectiveness of starting early development decreases drastically with the age of a child with special educational needs. The primary objective is therefore to ensure that children with special educational needs who are recognised in time and have a diagnosis are included in the early development system as early as possible. To this end, a clear demarcation of the health, social, and state education tasks of early intervention, and at the same time creating a connection and harmony between them, especially with regard to the recently transformed professional service system, is a priority task. As mentioned earlier above, the NDP rather takes the attitude of a caring model than concentrating on providing a childhood to these children by strengthening their access to children's rights.

The right of children with disabilities to live in a family recognises that family environments provide essential support, care, and nurturing for the development of a child with disability.

Article L) paragraph (1) of the Fundamental Law stresses that Hungary shall protect the institution of marriage as the union of one man and one woman established by a voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children.

Article 4:2§ of the Civil Code stresses the right of children to be brought up in their own family. This right may be restricted only if the best interests of the child justify it. Even if the separation happens at the end, the child still has the right to maintain contact with the birth parents.

The Child Protection Act and the policies are adopted in the attitude that separating the child from his or her own family is

an *ultima ratio* measure. The Act CCXI of 2011 on family protection (hereinafter referred to as Family Protection Act) provides for a financial support for those families that are upbringing a child with disability.

Nevertheless, the legal measures do not always meet the practise. The CRC Committee in its concluding observations[82] made several comments in terms of the violation of children's rights to living in a caring and loving family environment. It noted that: (i) children with disabilities are being deprived of their families and living in institutions, in children's homes and small group homes, (ii) there are insufficient measures to end the institutionalisation of children with disabilities and to promote accessible health and rehabilitation services, transport, leisure and sports to ensure their inclusion in the community; (iii) there is an inadequate provision of State care services to children with disabilities; (iv) there is a lack of information on the situation of Roma children with disabilities. There is a strategy, action plan, that targets the deinstitutionalization of disabled people;[83] however, it does not target specifically children but has a general scope, and therefore its effectiveness towards children might be questionable.

4. Concluding remark on the child rights-based approach towards children with disabilities

In order to have a good regulatory approach towards children with disabilities, the child rights-based approach and as such the genuine protection of their childhood is essential. Nevertheless, all of the elements of this approach are damaged and it is true from a more generalising perspective as well as from the perspective of the Hungarian law.

[82] CRC/C/HUN/CO/6.

[83] https://www.parlament.hu/documents/10181/1202209/Infojegyzet_2017_3_fogyatekossaggal_elo_gyermekek.pdf/04882905-ee99-4b72-a715-aa7a94a2bf4b (accessed on: 26.07.2023).

From a generalising perspective, discrimination, explicit, or hidden, is affecting children with disabilities worldwide,[84] the best interests of the child principle is not applied comprehensively and the voice of the children is not given due weight when determining their best interests.[85] Even though these children have the same right to life, health, development, education etc. as their healthy counterparts, they have a bigger chance to lose their life before even being born,[86] to be abused or exploited.[87] Inclusive education is far from being reached when two education systems exist in parallel, one of mainstream education and one that is called special education, when in reality it is rather segregated.[88] And the right of children with disabilities to spend their childhood in a caring and loving family environment is harmed by institutionalisation on the basis of disability.[89]

From a Hungarian perspective, the invisibility of children with disabilities is striking as well. However, it is not necessary something that derives from the lack of legislation. Indeed, thought could be given to make some legislative action, as:

1. strengthening the voice of children by including the right to be heard (Article 12 of the UNCRC) on a constitutional level, just as it is done in Polish legislation, or to
2. review the translation of the UNCRC and as such the implementation of the Child Protection Act in order to have a wording that reflects more precisely the actual meaning of the given provision[90];
3. appoint a separate institution[91] that would specifically deal with the protection and promotion of children's rights.

Nevertheless, even the current legislative framework could be sufficient if it was met in practise. The initiation of a rights-based

[84] Joint Statement, para. 2.
[85] Joint Statement, para. 4.
[86] M. Andrzejewski, *Prawa dzieci niepełnosprawnych*, *op. cit*., p. 334.
[87] Joint Statement, para. 7–8.
[88] Joint Statement, para. 9.
[89] Joint Statement, para. 10.
[90] See Article 3 of the UNCRC.
[91] In Hungary there is no national human rights institution or any other authority that would have as an exclusive task to protect and promote children's rights. In my second paper I will argue about the benefits of the establishment of such institution in Hungarian legal system from the perspective of children with disabilities.

strategy, where the child rights-based approach is applied comprehensively – based on research and disaggregated data collection – that allows targeted comprehensive actions on the national level – are needed. The strategy should consider the four plus one principle of the UNCRC and in particular should:

i. support the families of children with disabilities, including through financial assistance;
ii. increase access to community services that are inclusive of children with disabilities, particularly health and rehabilitation services, transport, leisure and sports, in order to promote their inclusion in society, and provide adequate training to child protection workers on the rights and needs of children with disabilities;
iii. conduct awareness-raising campaigns to combat stigmatisation of and prejudice against children with disabilities and promote a positive image of children with disabilities, their recognition as rights holders and respect for their dignity and evolving capacities on an equal basis with other children;[92]
iv. collect data periodically, and update databases regularly;
v. involve children with disabilities and the parents of children with disabilities;
vi. conduct rights-based impact assessments.

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Disabled Children's Right to Social Security

Introduction – The Role of Social Security in the Inclusion and Data

Children with disabilities. Child and disabled. If vulnerability had degrees, we could say that children with disabilities are the most vulnerable in the world.

Families may restrict participation or even hide children from the rest of the community due to stigma or to protect them, reducing the child's access to support, education and other services. Children with disabilities are almost four times more likely to experience violence and up to 17 times more likely to enter institutional care than their peers without disabilities, particularly owing to insufficient support for families, a lack of inclusive education and poverty.[1]

In this study, we address the safety of children with disabilities through the regulation of social rights, including the right to social security. Social rights, social protection and/or social security plays a critical role in reducing vulnerability and supporting the inclusion of persons with disabilities across the life cycle. Social protection includes benefits for children and families, maternity, unemployment, employment injury, sickness, old age, disability, survivors, as

[1] Joint statement Towards inclusive social protection systems supporting the full and effective participation of persons with disabilities, February 2019, A process facilitated by ILO and IDA, p. 3 [hereinafter: Joint statement, 2019], https://www.social-protection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=55473 (accessed on: 03.08.2023).

well as health protection. Social protection systems address all these policy areas by a mix of contributory schemes (social insurance) and non-contributory tax-financed benefits, including social assistance.[2]

We believe that an adequate level of social security ensures a decent life for all members, including children with disabilities. Social protection constitutes an essential condition for social and economic development for all. The well-being of children with disabilities depends to a large extent on the well-being of the family and the social security of the parents.

Their dependence on adults also makes them more vulnerable to violence or other forms of abuse and exploitation such as child's labour, trafficking, child marriage, teenage pregnancy, and other abusive traditional practices such as female genital mutilation. Even as teenagers, they are often voiceless, growing up in traditional legal and cultural institutions that do not place a high priority on children's rights and needs.[3] Much of the support is provided by families, most often women. Consequently, the autonomy and choice of persons with disabilities are often limited and the economic opportunities of family members providing the support are restricted, especially in situations of intensive support. For instance, having a poor parent with a disability increases the likelihood of children aged from seven to 16 years never having been to school by 25 percentage points in the Philippines and 13 percentage points in Uganda.[4]

Ensuring adequate social protection requires allocating sufficient resources for children and families. Yet, at present, the world's countries spend on average only 1.1 percent of GDP on social protection for children (excluding health expenditure), and the amounts vary greatly across countries and regions. While Europe and Central Asia, as well as Oceania, spend more than 2 percent of GDP on child benefits, expenditure ratios remain well below 1 percent of GDP in most other parts of the world. Regional estimates for Africa, the

[2] See also: UN (United Nations), Report of the Special Rapporteur on the rights of persons with disabilities (A/70/297), New York 2015, p. 5.

[3] See more: World Social Protection Report 2017–2019: Universal social protection to achieve the Sustainable Development Goals International Labour Office – ILO, Geneva 2017, p. 12.

[4] Joint statement, 2019, p. 4.

Arab States, and Southern and South-Eastern Asia show expenditure levels of less than 0.7 percent of GDP, although children represent a greater share of their population. Expenditure levels in sub-Saharan Africa seem particularly low considering that 43 percent of its population are children aged 0–14.[5]

Thus, social protection policies are vital elements of the national development strategies to reduce poverty and vulnerability across the life cycle and support inclusive and sustainable growth by raising household incomes, fostering productivity and human development, boosting domestic demand, facilitating structural transformation of the economy and promoting decent work. The Sustainable Development Goals (SDGs) adopted at the United Nations General Assembly in 2015 reflect the joint commitment of countries to "implement nationally appropriate social protection systems for all, including floors" for reducing and preventing poverty (SDG 1.3). This commitment to universalism reaffirms the global agreement on the extension of social security achieved by the Social Protection Floors Recommendation No. 202, adopted in 2012 by the governments and workers' and employers' organizations from all countries.[6]

The commitment to building social security systems, including floors, is reflected in the 2030 Agenda for Sustainable Development. Most prominently, SDG 1.3 calls upon countries to implement nationally appropriate social protection systems for all, including floors, for reducing and preventing poverty. Furthermore, the importance of social protection for sustainable development is reflected in several other goals, including universal health coverage (SDG 3.8), gender equality (SDG 5.4), decent work and economic growth (SDG 8.5) and greater equality (SDG 10.4). Social protection policies not only protect people from various shocks across the life cycle, but also play a key role in boosting domestic demand and

[5] World Social Protection Report 2017–2019…, *op. cit*., p. 18.

[6] Ibid, p. 29; The Joint Statement on Advancing Child-sensitive Social Protection DFID, HelpAge International, Hope & Homes for Children, Institute of Development Studies, International Labour Organization, Overseas Development Institute, Save the Children UK, UNDP, UNICEF and the World Bank, https://resourcecentre.savethechildren.net/pdf/3840.pdf/ (accessed on: 03.08.2023); Joint statement, 2019, pp. 4, 6.

productivity, supporting the structural transformation of national economies, and promoting decent work.[7]

While social protection is at the centre of the 2030 Development Agenda, *the right to social security is not yet a reality for some 71 percent of the world's population that has no or has only partial access to comprehensive social protection systems*. It is clear that countries need to step up measures towards realizing this right.[8] Only 45 percent of the global population are effectively covered by at least one social protection benefit, while the remaining 55 percent – as many as 4 billion people – are left unprotected. ILO estimates also show that only 29 percent of the global population are covered by comprehensive social security systems that include the full range of benefits, from child and family benefits to old-age pensions. Coverage gaps are associated with a significant underinvestment in social protection, particularly in Africa, Asia and the Arab States.[9] *Only 35 percent of children worldwide enjoy effective access to social protection, albeit with significant regional disparities. Almost two-thirds of children globally – 1.3 billion children – are not covered, most of them living in Africa and Asia*.[10]

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[7] World Social Protection Report…, *op. cit*., p. 5; Report of the Special Rapporteur…, *op. cit*., p. 6.

[8] World Social Protection Report…, *op. cit*., p. 5.

[9] Ibid, p. 29.

[10] See: Figure 1. SDG indicator 1.3.1: Effective social protection coverage, global and regional estimates by population group (percentage), [in:] World Social Protection Report…, *op. cit*., p. 30. We would like to highlight that poverty affects persons with disabilities in a disproportionate manner. They are overrepresented among the poorest in the world: "12) experiencing higher rates of poverty and deprivation, and lower levels of income than the general population; 13) a study using comparable data and methods across 15 developing countries in Africa, Asia, and Latin America and the Caribbean found a significant association between disability and multidimensional poverty in at least 11 of the countries studied; 14) persons with disabilities are also at a significantly higher risk of relative income poverty in most countries of the Organization for Economic Cooperation and Development (OECD), with poverty rates for persons with disabilities exceeding 30 percent in some countries; 15) discrimination and stigma, unequal opportunities, and physical and attitudinal barriers are also causes for the social exclusion and poverty of persons with disabilities; 16) lack of education, in particular, has a significant impact on poverty in adulthood of persons with disabilities (as research shows, persons with disabilities with higher

Social rights, social security, dogmatism of social law

Social rights are one of the most controversial areas of human rights, and one of the most variably regulated in different states. According to some legal scholars, social rights are as important a factor in a person's becoming a citizen as are classical fundamental rights.[11] The declaration of social rights, or some form of regulation of social rights, always gives a faithful picture of the values, the vision of man and the role of a particular state, and is generally linked to prevailing political views and, of course, to the more narrowly defined conceptions of constitutional law.

Economic, social and cultural rights as second generation rights are in many ways contrasted with civil and political rights as first generation rights. One contrast is the difference in the state obligation that they entail.[12] According to Gábor Kardos, there is a behavioural obligation in relation to second generation rights. For a significant group of rights, in order to effectively guarantee them, the state must engage in a well-defined conduct in accordance with the rules of the relevant constitution or international treaty.[13]

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educational attainments have considerably higher employment and income rates); (…) 21) nonetheless, children and youth with disabilities are less likely to attend school or to be promoted in school, which affects their opportunities for future employment; 22) furthermore, measures such as the arrest of homeless persons have a disproportionate impact on persons with psychosocial disabilities and may criminalise persons in need of support." Report of the Special Rapporteur…, *op. cit.*, pp. 9–10. See also: OECD, Sickness, disability and work: keeping on track in the economic downturn, 2009, https://www.oecd.org/employment/emp/42699911.pdf (accessed on: 03.08.2023); Joint statement, 2019.

[11] J. Sári, *A szociális jogok és a szociális állam*, "Jogtudományi Közlöny" 1997, No. 52(5), p. 217.

[12] The question of whether the conduct of the State is a positive or negative sign has been raised in two cases: the Marckx v. Belgium, judgment of 13 June 1979, ECHR, Series A, No. 31; McCann and Others v. United Kingdom, judgment of 27 September 1995, ECHR, Series A, No. 324.

[13] G. Kardos, Üres kagylóhéj? *A szociális jogok nemzetközi védelmének egyes kérdései*, Gondolat, Budapest 2003, p. 27. For example, in order to ensure the right to health, a social security system must be in place.

The UN body on social rights sets out three types of state obligations: respect, fulfilment and satisfaction.[14]

We would like to point out here that, like Hajdú, we believe that the generational division of human rights can be misleading. Human rights are indivisible, interdependent and interrelated rights. The quality of human existence is determined by second generation rights. Social security is an integral part of a life worth living. There is a difference between the nature of each generation, and one thing can be said with certainty: all human beings have an indivisible right to human rights, and the quality of human life is largely determined by the opportunities offered by these social rights, and the presence of the state is present in all generational rights, differing only in the extent and intensity of their presence.[15]

The difference between the two groups of human rights is the direct nature of the state obligation in the case of civil and political rights, and its gradual nature in the case of social rights. The temporal dimension can thus be contrasted.[16]

From the enforceability point of view, the accountability of economic, social and cultural rights depends on supporting norms, i.e. lower-level legislation. It is possible to sue for substantive elements that are laid down in lower-level legislation. In the case of civil and political rights, the court will repair the violation of the mother law on the merits.[17]

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[14] See: Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), UN doc, E/2000/22.

[15] See on this: J. Hajdú, *A 60 éves Európai Szociális Karta néhány proaktív dilemmája*, "Pro Futuro" 2021, No. 11(2), p. 31; G. Halmai, G.A. Tóth, *Az emberi jogok rendszere*, [in:] G. Halmai, G.A. Tóth (eds.), *Emberi jogok*, Osiris, Budapest 2008. See also: the Ministerial Conference on Human Rights held in Rome on 5 November 1990, which stressed the need to preserve the indivisible nature of all human rights (whether civil, political, economic, social or cultural) and to give new impetus to the Charter. Therefore, at the Ministerial Conference held in Turin on 21–22 October 1991, it was decided to modernize the ECHR and to amend it to take account of the fundamental social changes that had taken place in the 30 years since the text was adopted. See more on this: J. Hajdú, *A 60 éves Európai Szociális Karta…*, *op. cit.*, p. 33.

[16] J. Hajdú, *A 60 éves Európai Szociális Karta…*, *op. cit.*, p. 29.

[17] Ibid, p. 30.

Economic, social and cultural rights, and human rights in general, place the state under pressure to make certain justifications. The state must justify any regulation by its impact on those it regulates. And human rights place the burden of proof on the state. The consequence is that human rights are reduced to the logical premise of the right to subsistence.[18] The right to subsistence must be interpreted broadly, including the need to satisfy all human needs.[19] The need for economic, social and cultural rights can be justified not only by basic human needs, but also by the avoidance of human suffering closely related to them.

There is a great need for an integrated protection of human rights. The exercise of civil and political rights is hardly conceivable without at least a minimum of social empowerment. The former presupposes the latter. The enjoyment of human dignity requires at least a minimum level of social entitlement. The guarantee of this entitlement can also be underpinned by solidarity within a community of citizens, national, ethnic or religious communities. The idea of equality can also be raised as a basis for social entitlements. Raymond Aron states that economic equality does not follow from social or political equality, but requires institutions to ensure that everyone has sufficient income so that they do not feel excluded from the community because of their poverty or ignorance.[20] This also means the right to an adequate standard of living.[21]

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[18] Ibid, p. 32.

[19] These include survival needs, needs arising from social participation, and self-actualization needs. See for more on this: R. Jayakumar Nayar, *Not Another Theory of Human Rights*, [in:] C. Gearty, A. Tonkins (eds.), *Understanding Human Rights*, Pinter, London 1996, pp. 171–194.

[20] G. Kardos, *Üres kagylóhéj?…*, *op. cit.*, pp. 33–34.

[21] The right to an adequate standard of living under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights includes food, clothing and housing. The right to an adequate standard of living can be no more than a mere objective of the State, but if we look at the individual elements of this right, we are already establishing a specific State service. On this basis, social rights can be grouped into: 1. Rights that give concrete form to specific types of state services, 2. Rights that give legal entitlements to meet basic needs and beyond. Examples of such rights are: the rights to property and the rights to work. These provide a basis for participation in social distribution. If these titles do not ensure that human needs are met, then the right to social security can be

Social rights provide distributive entitlements and guarantee services to people who are on the weaker side of a struggle along organized interests. The protection of the weaker is also often raised in political debate, but these are not absolute arguments and economic and social rights do not lose their legitimacy because of it.[22]

The definition of social security is rarely found in international legal sources, while the social security system itself is most often defined in professional literature as – "a set of all measures that should in certain cases (illness, accident at work, old age, death, birth of a child and unemployment) establish a disturbed balance". In the majority of cases, it is assumed that social security represents an umbrella concept, that is, the basic goal of the science of social law, which is achieved through various subsystems, such as social insurance systems and social protection systems. Consequently, social security can be a goal that society strives for in order to ensure decent living conditions and an existential minimum for as many residents as possible, and the aforementioned goal will be achieved by the developed social insurance and social protection system, which will enable individuals to exercise their basic rights and receive appropriate protection in cases of the occurrence of a certain social risk. Therefore, it is the obligation of the state to create a valid normative framework that will regulate the procedure and conditions for exercising social security rights and providing social protection measures. Without developed legal and sub-legal legislation and a clear constitutional framework, as well as appropriate measures of supervision over the implementation of the law, ensuring social security for citizens will be a difficult task for every state.[23]

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invoked. Here too, there is a hierarchy, since services derived from social security must take precedence over social and health assistance. This hierarchy is also clear from Article 13(1) of the European Social Charter. For more on this, see: ibid, pp. 42–44.

[22] Ibid, p. 36.

[23] F. Bojić, *Sustainability of the Social Security System – Demographic Challenges and Answers in Romania*, [in:] N. Jakab (ed.), *Sustainability of the Social Security System – Demographic Challenges and Answers in Central-Europe*, Central European Publishing, Budapest 2023, under publishing.

Ravnić wonders what social security would encompass – individual subjective rights or something broader, while analyzing at the same time German law, according to which social benefits and services include only those recognized by the public authorities responsible for public social benefits and services. Namely, social law regulated by state public law norms establishes a relationship between the individual and the state, in which individuals are granted benefits and services regulated by public authorities. According to Ravnić, social content regulated by a contract, on a voluntary basis, unilaterally by a charitable institution, or even compulsorily determined by public authorities, would be part of the content of social protection law as a gender concept consisting of different forms of insurance and assistance for individuals, and to a lesser extent, for groups. Social protection in this sense is only part of social law and by no means represents its sole task. However, Ravnić clearly emphasizes that the concept of social security has displaced the concept of social protection, and that social security, seen as a system, encompasses social areas based on insured risks, social needs, and other insured cases, overlapping with the concept of social law or the right to social security. In an objective sense, social law is actually a set of norms, regulations, and rules that regulate legal and social relationships, and in a subjective sense, it is a set of powers conferred by law to individuals, and less frequently to groups, to demand certain social benefits (provision or action) in a state of social need, provided that they meet certain conditions.[24]

One of the greatest Croatian labour law theorists, Nikola Tintić, criticized the ambiguity of the attribute "social" and its usage in various meanings of the term. The term "social" can be seen in various ways such as the totality of protective legislation *in favorem* workers; the limitation of the employer's contractual dictate, particularly in relation to vulnerable groups of workers (minor workers and women); as a system of social assistance and protection in the broadest sense – in relation to members of society in a state of social need,

[24] M. Vinković, *Social Law and Social Security in Croatia*, [in:] N. Jakab (ed.), *Sustainability of the Social Security System – Demographic Challenges and Answers in Central-Europe*, Central European Publishing, Budapest 2023, under publishing.

or as provisions elevated in such cases to the level of specific social rights of individuals. Moreover, he clearly stated that social law and social security in different periods of history, social, political, and economic systems are based on different conditions, social relations, interests, possibilities, goals, and concepts. For such reflections on social law by Tintić, social policies, generally speaking, become a very important instrument because, unlike static social law/social security law, they reflect a more dynamic nature and the ability to adapt to different social challenges, needs, and ultimately different programmes of the political elites.[25]

Legal scholarship offers several definitions of social security law. Several from college textbooks can be cited. Koldinsky sees social security law as a set of legal norms that implement the rights formulated primarily in Articles 30 to 32 of the Charter of Fundamental Rights and Freedoms, respond to legally recognized social situations and, as a whole, constitute a system of social protection. Matlák stresses that social security law acts as a separate legal branch, but at the same time it is the subject of both a pedagogical and a scientific approach and constitutes both a scientific and pedagogical discipline. He further states that social security law constitutes a set of legal norms regulating social, collective and individual relations arising in social security as well as in the application or implementation of the social policy and social partnership of individual subjects of the social sphere. Galvas and Gregorova consider social security law to be a set of legal norms that regulate the behaviour of subjects in social relations arising in the provision of material security or other assistance to citizens who, as a result of social events accepted by law, need such benefits or assistance.[26]

Vieriu explains that social security is not only an activity, a concern of states, but it is a set of legal rules governing this activity, the protective measures, their specifics, their beneficiaries. The legal

[25] Ibid.

[26] M. Dolobáč, *Sustainability of the Social Security System – Demographic Challenges and Answers in Slovakia*, [in:] N. Jakab (ed.), *Sustainability of the Social Security System – Demographic Challenges and Answers in Central-Europe*, Central European Publishing, Budapest 2023, under publishing.

rules governing social relations make up the branch of law known as social law. Just as labour law has separated from its parent discipline – civil law – social law has also separated from labour law to become an autonomous discipline and a new branch of law.[27]

As regards the integration of social security law into the legal system, one can agree with the views that by its nature it is primarily a public law branch, with administrative law being the closest (especially in procedural norms); and similarities can also be found with financial law (the nature of insurance premiums in the social insurance system is similar to the tax system). At the same time, however, many private law elements can also be found in social security law (as an example, private law contracts concluded between the provider and the recipient of certain social or health services). We would add to these considerations that social security law has a special relationship with labour law, and we could find several overlaps. There is a particular correlation in the protection of employees caring for children. The basic code of labour law provides these employees (and other groups) with special care and legal protection (interruptions at work, maternity leave, paternity leave, etc.), which is supplemented by the financial security provided by the standards of social security law.[28]

Modern constitutions have overwhelmingly taken the view that there is a need for some level and type of regulation of social rights in general. *The exercise of classical freedoms and social (existential) security are parts of human quality that are mutually dependent. In society, as a kind of moral community, solidarity must be expressed in some form*. The modern state must protect the individual against social impossibility. It is true, of course, that the extent of social rights depends on the capacity of the state to deliver, but this should not mean that constitutions do not enshrine some realistic system of support for the vulnerable. Indeed, where the line is drawn between economic policy decisions and constitutional decisions depends on the constitutionalisation of social rights and the quality of the

[27] E. Vieriu, *Dreptul securității sociale*, Pro Universitaria, București 2016, p. 113.
[28] M. Dolobáč, *Sustainability of the Social Security System…, op. cit.*, under publishing.

regulation. If the provision of the necessary means of subsistence follows directly from the constitution (human dignity), then it is not an economic policy decision whether to provide the necessary means of subsistence to the citizen, but a matter of fundamental rights. [29]

International legal framework

The issue of social security is the subject of several international documents and treaties. Among the most relevant are the ILO Convention No. 102 concerning Minimum Standards of Social Security, 1952, the ILO Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits, 1967, and the International Covenant on Economic, Social and Cultural Rights (UN), 1966. Of the regional international treaties, the most important are the European Social Charter of 1961, the Additional Protocol to the European Social Charter and, finally, the most recent document, the European Social Charter /Revised/ of 1996.

The Universal Declaration on Human Rights recognizes the right of everyone to social security (Article 22) and affirms that everyone has the "right to a standard of living adequate for the health and well-being of himself and of his family" and the "right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (Article 25).

The UN legal framework on human rights contains a number of provisions spelling out various rights of children that form part of their right to social protection. These comprise the right to social security, taking into consideration the resources and the circumstances of the child and persons having responsibility for their maintenance, the right to a standard of living adequate for their health and their wellbeing, and the right to special care and assistance. The UN Convention on the Rights of the Child (CRC) states that

[29] A. Téglási, *The constitutional protection of social rights – with particular reference to the fundamental protection of social security*, Dialóg Campus, Budapest 2019, p. 337.

"The States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law" (Article 26) (see later).

The International Covenant on Economic, Social and Cultural Rights (ICESCR) further requires States to give the widest possible protection and assistance to the family, particularly for the care and education of dependent children. ILO social security standards complement this framework and provide guidance to countries on how to give effect to the various rights that form part of the right of children to social protection.[30]

The ILO Social Security (Minimum Standards) Convention, 1952 (No. 102), Part VII, sets minimum standards for the provision of family (or child) benefits in the form of either a periodic cash benefit or benefits in kind (food, clothing, housing, holidays or domestic help) or a combination of both, allocated for the maintenance of children. The fundamental objective of family benefits should thus be to ensure the welfare of children and the economic stability of their families.[31]

[30] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (accessed on: 03.08.2023). Article 9 provides a short and general reference on the right of social security, thereby leaving to the UN specialised agencies (in particular the ILO) to identify the details of this clause. Article 10(2) accords special protection to mothers during a reasonable period before and after childbirth. To working mothers it offers, during such a period, paid leave or leave with adequate social security benefits.

[31] While Convention No. 102 covers all branches, it requires that only three of these branches be ratified by Member states, which allows for the step-by-step extension of social security coverage by ratifying countries. Among ILO Security Standards we have to mention the following: The Medical Care Recommendation, 1944 (No. 69, which envisages comprehensive social security systems and the extension of coverage to all and laid the foundations for Convention No. 102, 1952); The Medical Care and Sickness Benefits Convention, 1969 (No. 130) and the Medical Care and Sickness Benefits Recommendation, 1969 (No. 134), which makes provision for medical care and sickness benefit; The Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168) and the Employment Promotion and Protection against Unemployment Recommendation, 1988 (No. 176) relates to unemployment benefit; The Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128) and the Invalidity, Old-Age and Survivors' Benefits Recommendation, 1967 (No. 131) covers old-age

As specified by the ILO's Committee of Experts on the Application of Conventions and Recommendations, these standards require that family benefits be granted in respect of each child in the family and to all children, for so long as the child is receiving education or vocational training on a full-time basis and is not in receipt of an adequate income determined by national legislation. They should be set at a level which relates directly to the actual cost of providing for a child and should represent a substantial contribution to this cost. Family allowances at the minimum rate should be granted regardless of means. Benefits above the minimum rate may be subject to a means test. Furthermore, all benefits should be adjusted in order to take into account changes in the cost of providing for children or in the general cost of living.[32]

ILO Recommendation No. 202 further refines and extends the normative framework, aiming at universal protection. Income security for children is one of the basic social security guarantees constituting a national social protection floor, and should ensure "access to nutrition, education, care and any other necessary goods and services" (Paragraph 5(b)). Although the guarantee should be nationally defined, the Recommendation provides clear guidance on its appropriate level: the minimum level of income security should allow for life in dignity and should be sufficient to provide for effective access to a set of necessary goods and services, such as may be

benefit, invalidity benefit and survivor's benefit; The Employment Injury Benefits Convention, 1964 (No. 121) and the Employment Injury Benefits Recommendation, 1964 (No. 121) makes provision for employment injury benefit; The Maternity Protection Convention, 2000, (No. 183) and the Maternity Protection Recommendation, 2000, (No. 191) covers maternity benefit; The Equality of Treatment (Social Security) Convention, 1962 (No. 118), the Maintenance of Social Security Rights Convention, 1982 (No. 157), and the Maintenance of Social Security Rights Recommendation, 1983 (No. 167), provide reinforced protection to migrant workers; The Social Protection Floors Recommendation (No. 202) provides guidance for the establishment and maintenance of social protection floors and their implementation within strategies for the extension of social security aiming at achieving comprehensive social security system.

[32] ILO Social security and the rule of law: General survey concerning social security instruments in the light of the 2008 Declaration on Social Justice for a Fair Globalization, Report III (Part 1B), International Labour Conference, 100th Session, Geneva 2011, Paragraphs 184–186.

set out through national poverty lines and other comparable thresholds (Paragraph 8(b)). Providing for universality of protection, the Recommendation sets out that the basic social security guarantee should apply to at least all residents, and all children, as defined in national laws and regulations and subject to existing international obligations (Paragraph 6), that is, to the respective provisions of the CRC, the ICESCR and other relevant instruments. Representing an approach strongly focused on outcomes, Recommendation No. 202 allows for a broad range of policy instruments to achieve income security for children, including child and family benefits.[33]

The European Social Charter (Revised) (1996), Article 12, guarantees the right to social security and identifies four principles to which the system should comply. Article 12 also refers to the European Code of Social Security of the Council of Europe (1964). This latter is similar to ILO Convention 102, but the minimum requirements of acceptance for ratification are twice as high for the Code.

The American Declaration of the Rights and Duties of Man (1948), Article 16, includes the right to social security in specific areas. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador" (1988), Article 9, refers to provisions related to old age and disability and to social security benefits for employees in the field of healthcare, work-related injuries, diseases and maternity.

[33] R202 – Social Protection Floors Recommendation, 2012 (No. 202). See also: Report of the Special Rapporteur…, *op. cit.*, p. 5. The Recommendation reflects the ILO's two-dimensional extension strategy, which provides clear guidance on the future development of social security in its 187 member States, by: 1) achieving universal protection of the population by ensuring at least basic levels of income security and access to essential health care (national social protection floors: horizontal dimension); and 2) progressively ensuring wider scope and higher levels of protection, guided by ILO social security standards (vertical dimension). See more: World Social Protection Report 2017–2019, *op. cit.*, pp. 6–8, 13, was adopted virtually unanimously (one abstention) by the Governments, as well as workers' and employers' organizations, of the ILO's 187 Member States.

CRPD

The drafting of a new human rights convention on the rights of persons with disabilities had to meet two basic requirements: on the one hand, it had to reflect the paradigm shift from the medical model to the human rights model, thanks to the disability rights movement; on the other hand, it had to set minimum standards that would protect people with disabilities in the most vulnerable situations of their lives.[34]

For more than 20 years, organizations have been calling for a convention to protect nearly 600 million people with disabilities. The first Italian proposal was made in 1987 as part of the Decade of People with Disabilities (1983–1992), followed by a Swedish proposal in 1989, but these remained mere proposals. The time was ripe for a catalogue of rights.[35] This was supported by two exceptional reports that placed disability in the context of international human rights policy for the first time.[36] Previously, within the UN framework, for the first forty years, disability was treated as a medical or social issue. Therefore, during this period, the focus was on prevention, rehabilitation and social security.[37] Then in 1982 the idea of equal opportunities was introduced, but disability was still seen as a medical and social problem. Leandro Despouy drew attention to the human rights violations that led to disability, thus

[34] T. Degener, *Menschenrechtsschutz für behinderte Menschen, Vom Entstehen einer neuen Menschenrechtskonvention der Vereinten Nationen*, "Vereinte Nationen" 2006, No. (3), p. 104; K. Lachwitz, *Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderun*, "Betreuungsrechtliche Praxis (BtPrax)" 2008, No. (4), p. 143.

[35] Ibid; A. Dhanda, *Constructing a new human rights lexicon: Convention on the Rights of Persons with Disabilities*, "Sur – International Journal on Human Rights" 2008, No. (8), p. 44.

[36] E.I. Daes, *Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder*, "United Nations Sales Publications" 1986, No. 85/19, p. 9; L. Despouy, *Human Rights and Disabled Persons*, "United Nations Sales Publications" 1993, No. 92/14, p. 4, https//:www.un.org/esa/socdev/enable/dipaperdes2.htm (accessed on: 24.08.2010).

[37] T. Degener, *Menschenrechtsschutz für behinderte Menschen…*, *op. cit.*, p. 104; K. Lachwitz, *Übereinkommen der Vereinten Nationen…*, *op. cit.*, p. 143.

raising the issue to an international level within the UN. Among these violations, Despouy highlighted the use of inhumane treatment in wartime (e.g., amputations), female mutilation, medical experiments on human beings, forced sterilization in institutions for people with disabilities, the use of psychological violence, and sexual harassment.[38] Finally, within a Decade of People with Disabilities, the United Nations Standard Rules were born. However, it was not binding.[39]

Following a proposal by Mexico on 19 December 2001, on 26 February 2002 the UN General Assembly, by resolution A/RES/56/168, established an Ad Hoc Committee to finalize the Convention.[40] The January draft followed a holistic approach, based on the principle of non-discrimination, and sought to declare existing human rights in a catalogue. This is why the Convention can be considered specific, although the wording itself is unfortunate, as it suggests that it is a declaration of specific rights. Rather, it is specific because some of the articles of the Convention have been drafted through the lenses of autonomy, equal opportunities and the need for participation, and the civil, political, economic, social and cultural rights it contains have been given a disability-specific interpretation. Aichele and Bernstoff stress, however, that the Convention, thanks to the disability rights movement, is new compared to previous human rights conventions and represents the next stage in a process of development in human rights protection, particularly with regard to the definition of disability and the concept of non-discrimination. It is this new perspective and context that sets the Convention apart from other human rights conventions.[41]

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[38] T. Degener, *Menschenrechtsschutz für behinderte Menschen…*, *op. cit.*, p. 104.

[39] T. Degener, *Welche legislativen Herausforderungen bestehen in Bezug auf die nationale Implementierung der UN-Behindertenkonvetion in Bund und Ländern?*, "Behindertenrecht, Fachzeitschrift für Fragen der Rehabilitation" 2009, No. (2), p. 34.

[40] A/RES/56/168 General Assembly Resolution on the Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, 26 February 2002.

[41] K. Lachwitz, *Übereinkommen der Vereinten Nationen…*, *op. cit.*, p. 144; V. Aichele, J. von Bernstorff, *Das Menschenrecht auf gleiche Anerkennung vor dem Recht: zur Auslegung von Art. 12 der UN-Behindertenkonvention*, "Betreuungsrechtliche Praxis (BtPrax)" 2010, No. 19(5), pp. 199–204.

Article 1 of the Convention sets out the purpose of the Convention, which is "(…) to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity". In addition to the social (societal) model of disability, which holds that disability is the responsibility of society, and goes beyond it, the Convention is the most prominent representative of the human rights model of disability.[42] According to the human rights model, people with disabilities are subject to human rights, which the state has a duty to respect, protect and ensure, i.e. they require both active and passive behaviour.

Respect for human dignity is a central concept of the Convention, it is repeatedly mentioned in it, and it has become a tool for shaping consciousness. However, it is necessary to shape the consciousness not only of society but also of the person with a disability. This is the purpose of awareness-raising programmes and training.[43]

The Convention covers eight thematic areas of disability policy, reflecting the achievements of the disability rights movement: a general disability policy, women with disabilities, children with disabilities, protection and safety of persons with disabilities, self-determination, freedom and participation rights/freedom from barriers, solidarity, international cooperation.[44]

The disability policy should take into account the fact that international developments and disability rights movements have made disability a human rights issue as well as a medical and social one. In fact, Article 1 (Purpose of the Convention), Article 3 (General principles), Article 4 (General obligations), Article 5 (Equality and non-discrimination) and Article 8 (Raising awareness) lay down the basis for a state's disability policy.[45]

We considered it important to emphasize all these points because, if the right to social security is to be established, the enjoyment of

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[42] A. Dhanda, *Constructing a new human rights lexicon*…, *op. cit*., pp. 43–61.

[43] H. Bielefeldt, *Zum Innovationspotential der UN-Behindertenrechtskonvention*, "Deutsches Institut für Menschenrechte. Essay" 2009, No. 5, Juni, pp. 4–5.

[44] T. Degener, *Welche legislativen Herausforderungen bestehen in Bezug…*, *op. cit.*, pp. 36–51.

[45] Ibid, p. 36.

rights requires respect for human dignity and personal autonomy, and access in general, without prejudice to equal treatment.[46]

Social protection and children in the Convention

Historically, social protection policies have been constructed from the perspective of the loss of the capacity to earn income and the need for rehabilitation and care. This approach has guided the adoption of ILO Conventions 102, 121 and 128 and national disability contributory income security schemes. While providing essential protection for workers, it has cemented a dichotomy between persons with disabilities deemed able or unable to work and participate in society contributing to schemes fostering "dependence, segregation and institutionalization of persons with disabilities". The human rights-based approach to disability, which contributed to the adoption of disability anti-discrimination legislations in the 1990s and the United Nations CRPD in 2006, challenged this entrenched perspective. It reconceptualized disability as the result of the interaction between persons with impairments and diverse barriers which may restrict their participation. This implies policies across sectors that combine the removal of barriers (awareness raising, non-discrimination, accessibility) with the provision of required support (assistive devices, rehabilitation, support services, social protection).[47]

[46] The Joint report lists the following: non-discrimination and accessibility respect for dignity, personal autonomy, choice, control over one's life and privacy, full and effective participation and inclusion, consultation and involvement of persons with disabilities, attitudes and awareness, adequacy of benefits and support, eligibility criteria and disability assessments, monitoring and evaluation. The importance of disability assessment is also highlighted by Côte: "Disability assessments can produce a better understanding of individual support requirements. Until recently, most countries used medical assessments focused on health conditions and impairments (medical model). While valued for their apparent objectivity, they leave out significant parts of what constitutes disability and provide little information about the actual support required." A. Côte, *Disability inclusion and social protection*, [in:] E. Schüring, M. Loewe (eds.), *Handbook on social protection systems*, Edward Elgar Publishing, Northampton–Cheltenham 2021, p. 358.

[47] A. Côte, *Disability inclusion…*, *op. cit.*, p. 358.

Article 28 refers for the first time in an international instrument to the right to social protection and links it to the right to an adequate standard of living, with reference to adequate food, clothing and housing, and the continuous improvement of living conditions. It also tailors the right to social protection to persons with disabilities, recognizing that they must enjoy this right without discrimination on the basis of disability, and establishes a pathway for their inclusion in all efforts related to the realization of this right.[48]

More specifically, Article 28 creates an obligation for States parties to take appropriate measures to ensure that persons with disabilities receive equal access to mainstream social protection programmes and services – including basic services, poverty reduction programmes, housing programmes, and retirement benefits and programmes – as well as access to specific programmes and services for disability related needs and expenses.[49] These obligations emphasize that social protection should always contribute to the empowerment, participation and inclusion of all persons with disabilities.

Social protection also resonates in other provisions of the Convention, including in relation to the right to live independently and be included in the community (Article 19), respect for the home and the family (Article 23), education (Article 24), health (Article 25), habilitation and rehabilitation (Article 26), and work and employment (Article 27). Importantly, social protection interventions should be measured against the Convention's principles of non-discrimination, participation and inclusion, equal opportunities, accessibility, and equality between men and women (Article 3).[50]

In addition to Article 7 on children with disabilities, age-specific statements are made in points (d) and (r) of the preamble,[51] Article 3(h), Article 4(3) (inclusion of children with disabilities in legislation), Article 8(2)(b) (raising awareness, including for

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[48] Report of the Special Rapporteur…, *op. cit*., p. 8.

[49] Ibid.

[50] Ibid.; Joint statement, 2019, p. 5.

[51] "(…) Recognizing that children with disabilities must be guaranteed the enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling further the obligations of States Parties to the Convention on the Rights of the Child to this end (…)."

children up to the age of majority), Article 16(5) (child-centred legislation), Article 18(2) (children's right to acquire citizenship), Article 23(3), (4) and (5) (family rights), Article 24(2)(a) and (3)(c) (integrated education), Article 25(b) (access to health services) and Article 30(5)(d) (participation in cultural and leisure activities).

Social protection is central to the implementation of the CRPD and to ensuring that persons with disabilities are not left behind in efforts to achieve the SDGs. The report of the Special Rapporteur concludes:

> Securing the right of persons with disabilities to social protection must be a priority for States and the international community. Inclusive social protection systems, including social protection floors, can contribute significantly to supporting the social participation and inclusion of persons with disabilities by ensuring income security and access to social services. They can also play an important role in fostering the realization of the Sustainable Development Goals for persons with disabilities. For that purpose, States must move away from traditional disability-welfare approaches and turn towards rights-based ones, and must develop comprehensive social protection systems that guarantee benefits and access to services for all persons with disabilities across the life cycle. The inclusion of persons with disabilities in social protection systems is not only a human rights issue, but also a crucial investment for development that States cannot afford to miss.[52]

Historically, social protection viewed disability essentially through the lens of a loss of capacity or incapacity to earn income. Consequently, persons with disabilities were considered to be one of the groups which required protection rather than support. This approach reflects a societal perspective on disability as an individual problem which ignores the negative impact of social barriers and attitudes and is based on very low, if any, expectations for

[52] Report of the Special Rapporteur…, *op. cit.*

persons with disabilities to be able to contribute actively to society. As a result, many social protection policies focus solely on providing a basic level of subsistence or maintaining income after a loss of earning capacity in ways that may not promote participation and inclusion. The shift of paradigm initiated by the CRPD implies a change of perspective in the design of social protection policies mostly focusing on three interrelated issues: *moving away from an "incapacity to work" approach.*[53] *From institutionalized care to support for living in the community.*[54] *Beyond one-size-fits-all eligibility thresholds*[55] *and benefit levels.*[56]

Convention on the Rights of the Child

The Preamble of the Convention acknowledges the family as the fundamental group of society and the natural environment and that for the growth and well-being of all its members and particularly children, it should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an

[53] A new enabling approach is needed that recognizes the capacities of all persons with disabilities and addresses the barriers which they face in the labour market. Such an approach should promote an adequate and flexible combination of income security and disability-related support to promote economic empowerment. Joint statement, 2019, p. 6.

[54] In combination with other policies, social protection plays a key role in preventing institutionalization. It can help to tackle poverty and support coverage of disability related costs, as well as facilitate or incentivize the development of community support services which foster the full and effective participation, choice and control of persons with disabilities. Ibid.

[55] In order to make social protection more inclusive for persons with disabilities and more supportive of their social and economic participation, eligibility thresholds should consider disability-related costs, and benefits should adequately cover these costs through appropriate mechanisms in cash or in kind. Where an income threshold for disability-related support is needed, this threshold should be significantly higher than that for accessing basic income support. Ibid, p. 7.

[56] Joint statement, 2019, pp. 5–6.

atmosphere of happiness, love and understanding. The child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Particular care should be extended to the child as has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in Articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialised agencies and international organizations concerned with the welfare of children,

As indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". According to the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, in all countries in the world there are children living in exceptionally difficult conditions, and such children need special consideration,

Article 26 deals with the right of the child to benefit from social security and social insurance. As underlined by the Committee, this right is important in itself and plays a key instrumental role in the realization of other Convention rights.[57] It guarantees financial

[57] UN Committee on the Rights of the Child, General Comment No. 3 (2003) HIV/AIDS and the rights of the child, 17 March 2003, CRC/GC/2003/3, Paragraph 6; UN Committee on the Rights of the Child, General Comment No. 7 (2005) Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev., Paragraphs 10, 26; UN Committee on the Rights of the Child, General Comment No. 9 (2006) The rights of children with disabilities, 13 November

and other support of the child provided by the state in all cases where the adult(s) responsible for the child are not in the position to provide for the child, because they are unemployed or for other reasons, such as illness, disability, childbearing, old age, widowhood, being a single parent and in total absence of both parent (orphanhood) and so on. These are all circumstances that might prevent the adult(s) from securing work and an income.

Contrary to other international legal provisions dealing with the issue of social security, Article 26 does not guarantee the right to social security, but the right to "benefit from" social security. The use of this expression is due to a proposal of the International Labour Organization (ILO) delegation during the drafting of the Convention, which underlined that the recognition of children for the "right to social security" would not mirror the real position of the child in relation to their entitlement to social security benefits. Parents and/or legal guardians hold the rights to receive benefits "by the reason of their responsibility for the maintenance of the child"[58] based on Article 18. Therefore, the position of dependency of the child towards their parents or legal guardians and their entitlement to social security had been more adequately reflected by recognizing the child's right to "benefit from" social security and not the right to social security. Nevertheless, Article 26(2) ensures that applications for benefits can be "made by or on behalf of the child". Furthermore, in the general guidelines for the periodic reports, the Committee asks States Parties to describe in their reports the circumstances and the conditions under which children are authorized to apply themselves directly or through a legal representative for social security benefits.[59]

2007, CRC/C/GC/9, Paragraph 20; W. Vandenhole, *A commentary on the United Nations convention on the rights of the child*, *Article 26: The right to benefit from social security*, Brill Nijhoff, 2007, https://brill.com/display/title/11639 (accessed on: 10.08.2023).

[58] S.L. de Detrick, *A commentary on the United Nations convention on the rights of the child*, Brill Nijhoff, 1999, p. 447, https://brill.com/display/title/10630 (accessed on: 06.11.2020).

[59] R. Ruggiero, *Article 26: The Right to Benefit from Social Security*, [in:] Z. Vaghri *et al.* (eds.), *Monitoring State Compliance with the UN Convention on the Rights of the Child, Children's Well-Being: Indicators and Research 25*, Springer, Cham 2022, p. 218.

With reference to the implementation of Article 26, it is worth underlining that it is subject to the provision of Article 4, which provides that States Parties are obliged to "undertake all appropriate, legislative, administrative, and other measures to the maximum of the available resources and where applicable within the framework of the international cooperation"[60] Therefore, the right of the child to benefit from "social security is not an immediate States Parties' obligation, but one of progressive achievement".[61] So far, the Committee has not provided yet a comprehensive clarification of Article 26 by way of General Comments, nor through the Concluding Observations on the reports of States Parties.[62] Therefore, the specific and technical meaning of "social security" needs to be identified in many universal and regional treaties dedicated to the right to social security. In these treaties, "social security" is composed of the nine traditional branches identified by the ILO Convention 102 on Minimum Standards, namely health, care, sickness, unemployment, employment injury, family, maternity, invalidity and survivor's benefits; and a social security system should comply with the following four principles identified by the (Revised) European Social Charter (1996): The social security system should be set up or maintained. A minimum level should be defined for each social security system. The principle of progressive improvement of the system should apply. Equality of treatment should be ensured for nationals of other contracting states, along with "granting, maintenance and the resumption of social security rights".[63]

[60] R. Hodgkin, P. Newell, UNICEF, *Implementation handbook for the convention on the rights of the child*, 3rd Edition, UNICEF, 2007, p. 385, https://digitallibrary.un.org/record/620060?lnen (accessed on: 06.11.2020).

[61] S.L. de Detrick, *A commentary on the United Nations convention on the rights of the child*, *op. cit.*, p. 447; W. Vandenhole, *A commentary on the United Nations convention*, *op. cit.*, pp. 24–30.

[62] W. Vandenhole, *A commentary on the United Nations convention*, *op. cit.*, pp. 1, 15.

[63] R. Ruggiero, *Article 26: The Right to Benefit from Social Security*, *op. cit.*, p. 219.

Social Protection of (Disabled) Children

Children's rights and needs are addressed across the 2030 Development Agenda through several SDGs, including those on poverty (SDG 1), hunger (SDG 2), health (SDG 3), education (SDG 4), gender equality (SDG 5), decent work (SDG 8), inequality (SDG 10), sustainable cities (SDG 11) and peaceful and inclusive societies (SDG 16).

At this point to present the *related costs of social security* is a key issue. On average, 1.1 percent of the world's countries' GDP is spent on child and family benefits for children aged 0–14, pointing to a significant underinvestment in children, which affects not only the children's overall well-being and long-term development, but also the future economic and social development of the countries they live in. Cash transfers for children have expanded in low and middle-income countries over the past decades, with a number of countries reaching universal social protection coverage of children (e.g., Argentina, Brazil, Chile and Mongolia). However, coverage and benefit levels remain insufficient in many countries. Measures are needed to adequately address the needs of children and families, extending coverage and benefits in accordance with SDG 1.3.[64]

On average, OECD countries spend 1.2 percent of their GDP on disability benefits alone. The level of disability-related social protection expenditures represents on average 2.1 percent of gross domestic product (GDP) in European Union countries.[65] This figure reaches 2 percent when including sickness benefits, and even 4–5 percent in some countries. This is almost 2.5 times as much as what is spent on unemployment benefits and represents an increase over time in a majority of countries over the past 15 years. More than half of OECD countries have seen a substantial growth in disability beneficiary rates in the past decade, with around 6 percent of the OECD-wide working-age population collecting disability benefits in 2007. The probability of returning to work after being granted a disability benefit is below 2 percent annually across the member

[64] World Social Protection Report 2017–2019…, *op. cit.*, p. 30; A. Côte, *Disability inclusion…*, *op. cit.*, pp. 356–357.

[65] A. Côte, *Disability inclusion…*, *op. cit.*, p. 355.

countries. In practice, therefore, disability benefits function like retirement pensions for the vast majority of recipients.[66]

For persons with disabilities to avoid exclusion and access essential services, they must have not only the resources needed by those without disabilities, but additional spending and other forms of support and accommodation to overcome these barriers. In addition to having to spend more to achieve the same standards of living (direct costs), persons with disabilities also tend to earn less income due to barriers in employment and opportunity costs incurred by family members providing support for them. Together, these additional expenses and the forgone income constitute the disability related costs which prevent them from seizing economic opportunities and achieving a similar standard of living and participation (indirect costs). This creates a vicious circle that social protection can help break with a well-designed combination of schemes.[67]

In light of the alert regarding child well-being around the world, social protection policies are powerful tools to achieve immediate relief for poor children and their families. Social protection provisions can trigger virtuous cycles of improved income-generating capacities of the parents, in cases where households are engaging in higher-risk, higher-return activities. By providing a steady, predictable source of income, social protection benefits enable households to avoid harmful coping strategies such as pulling children out of school, cutting spending on food or selling productive assets when facing a shock.[68]

Within social protection systems, a broad range of interventions can benefit children and families. Interventions designed specifically to benefit children include: universal or targeted, conditional or unconditional, contributory or non-contributory/tax-financed child or family cash benefits; school feeding, vaccination or health

[66] Sickness, Disability and Work Keeping on Track in the Economic Downturn, OECD Background Paper, Organisation for Economic Co-operation and Development Directorate for Employment, Labour and Social Affairs, High-Level Forum, Stockholm, 14–15 May 2009, p. 9, https://www.oecd.org/employment/emp/42699911.pdf (accessed on: 03.08.2023).

[67] Joint statement, 2019, p. 4.

[68] Ibid, p. 14.

programmes and other in-kind transfers such as free school uniforms or school books; exemptions of fees for certain services such as health care or childcare; social security benefits provided to mothers, fathers and other caregivers during leave of absence from employment in relation to a dependent child (parental and other childcare leave benefits in the case of a sick child or a child with disabilities); childcare services, early childhood education and education until the minimum age for admission to employment according to national legislation; and tax rebates for families with children.[69]

The availability to both women and men of adequate parental and childcare leave benefits (including in the case of children with illnesses and disabilities), childcare services and early childhood education are essential in guaranteeing the income security and well-being of children. Measures adopted by employers to facilitate sharing work and family responsibilities for parents with children also play a key role. Another important factor for children's and women's well-being is maternity benefits.[70]

More than one-third (69 countries) of the 186 countries for which data were available do not have any child or family benefit anchored in national legislation (although social assistance programmes without legal basis, or other programmes contributing to income security for children, may still exist in these countries). Of the 117 countries with a child/family benefit scheme, 34 have statutory provisions only for those in formal employment. A similar number of countries (37) provide only non-contributory, means-tested benefits. Fourteen countries combine employment-related and means-tested noncontributory schemes, and only 32 countries (most of them in Europe) provide universal non-contributory child or family cash benefits.[71]

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[69] Ibid.

[70] See more: Report of the Special Rapporteur…, *op. cit.*, p. 91.

[71] Ibid, p. 14.

A child-sensitive and life cycle approach to social protection

Children's experiences of poverty and vulnerability are multidimensional and differ from those of adults. Children undergo complex physical, psychological and intellectual development as they grow, and are also often more vulnerable to malnutrition, disease, abuse and exploitation than adults. Their dependency on adults to support and protect them means that loss of family care is a significant risk, particularly in the context of conflict, humanitarian crises, and HIV and AIDS.[72]

The following principles should be considered in the design, implementation and evaluation of child-sensitive social protection programmes: Concretely, child-sensitive social protection should focus on aspects of well-being that include: providing adequate child and maternal nutrition; access to quality basic services for the poorest and most marginalized; supporting families and caregivers in their childcare role, including increasing the time available within the household; addressing gender inequality; preventing discrimination and child abuse in and outside the home; reducing child labour; increasing caregivers' access to employment or income generation; and preparing adolescents for their own livelihoods, taking account of their role as current and future workers and parents.[73]

[72] Joint statement on advancing child-sensitive social protection…, *op. cit*., p. 1.

[73] In other words: avoid adverse impacts on children and reduce or mitigate social and economic risks that directly affect children's lives. Intervene as early as possible where children are at risk, in order to prevent irreversible impairment or harm. Consider the age- and gender-specific risks and vulnerabilities of children throughout the lifecycle. Mitigate the effects of shocks, exclusion and poverty on families, recognizing that families raising children need support to ensure equal opportunity. Make special provision to reach children who are particularly vulnerable and excluded, including children without parental care, and those who are marginalized within their families or communities due to their gender, disability, ethnicity, HIV and AIDS or other factors. Consider the mechanisms and intra-household dynamics that may affect how children are reached, with particular attention paid to the balance of power between men and women within the household and broader community. Include the voices and opinions of children, their caregivers and youth in the understanding and design of social protection systems and programmes. Joint statement, 2019, p. 2.

Child-sensitive social protection systems ensure that institutional capacity and resources are available to efficiently and effectively implement appropriate instruments such as: *social transfers:* regular, predictable transfers (cash or in kind, including fee waivers) from governments and community entities to individuals or households that can reduce child poverty and vulnerability, help ensure children's access to basic social services, and reduce the risk of child exploitation and abuse; *social insurance*: that supports access to health care for children, as well as services to support communities and other risk-pooling mechanisms, preferably with contribution payment exemptions for the poor, that reach all households and individuals, including children; *social services*: family and community services to support families and promote youth and adult employment; alternative care for children outside family environments; additional support to include vulnerable or excluded children in education; and social welfare services including family support, child protection services and assistance in accessing other services and entitlements; *policies, legislation and regulations*: that protect families' access to resources, promote employment and support them in their childcare role, including ensuring access for poor people to basic social services, maternity and paternity leave, inheritance rights and antidiscrimination legislation.[74]

Social protection systems and programmes can only be effective if they address the specific needs of persons with disabilities throughout their life cycle: childhood, adolescence, working age and old age. States should prioritize social protection policies to ensure the well-being of children and adolescents with disabilities and their families; to enable them to realize their full potential through inclusive and adequate services and support measures (especially in the education and health sectors); and to combat poverty. In effect, families with children with disabilities are disproportionately more likely to fall below the poverty line, as disability in childhood is often

[74] Ibid, p. 3.

the catalyst for poverty owing to disability-related extra costs, family break-ups and unemployment following the onset of disability.[75]

Social protection system for persons (children) with disabilities

Social protection should be aimed at achieving universality and, thus, at contributing to the objective of the enjoyment by all persons of an adequate standard of living. Universal social protection involves comprehensive systems that guarantee income security and support services for all persons across the life cycle, paying particular attention to those experiencing poverty, exclusion or marginalization. At the same time, universal social protection should entail inclusiveness, i.e. take into account the particular circumstances of all persons, including those with disabilities.[76]

What is the CRPD telling us about the proper social protection system for disabled people? The CRPD moves beyond traditional disability-welfare considerations towards a complex equality model that highlights the interdependence and indivisibility of all human rights, stressing that persons with disabilities must enjoy these rights on an equal basis with others. Traditional disability-welfare approaches have been instrumental in building and spreading the medical model of disability worldwide, since they were part of a societal structure that considered disability as a medical problem, and persons with disabilities as unable to work, cope independently or participate in society. Unsurprisingly, these approaches triggered further segregation and loss of self-determination. Children with disabilities were sent to special schools and persons with disabilities received medical attention and rehabilitation in segregated settings, along the lines of "fixing" or "curing" them while disregarding their

[75] See more: Council for Disabled Children, "Disabled children and child poverty", briefing paper for the Every Disabled Child Matters campaign, 2007. WHO and UNICEF, Early Childhood Development and Disability: A Discussion Paper (WHO, 2012).

[76] Report of the Special Rapporteur…, *op. cit.*, p. 7.

own will. When persons with disabilities were granted disability benefits, this was often based on the premise that they were not able to work. Therefore, social protection for persons with disabilities needs to move towards intervention systems that promote active citizenship, social inclusion and community participation, while avoiding paternalism, dependence and segregation. The ultimate aim is to achieve the right to live independently and be included in the community, in line with article 19 of the Convention, which creates an obligation for States to ensure that persons with disabilities enjoy: choice on an equal basis with others about life-shaping decisions (e.g., where and with whom they wish to live), and thus control over their own lives; access to necessary support services as a condition for free choice on an equal basis with others (including the provision of personal assistance); and access to all community services available to others, including in the context of the labour market, housing, transportation, health care and education.[77]

The Special Rapporteur made the following recommendations to States with the aim of assisting them in developing and implementing disability inclusive social protection systems:[78]

i. Ensure that the right of persons with disabilities to social protection is recognized in domestic legislation and taken into account in national social protection strategies and plans, including nationally defined social protection floors.
ii. Implement comprehensive and inclusive social protection systems that mainstream disability in all programmes and interventions, and ensure access to specific programmes and services for disability-related needs.
iii. Design disability benefits in a way that promotes the independence and social inclusion of persons with disabilities and does not limit their full and equal enjoyment of other human rights and fundamental freedoms.
iv. Ensure that eligibility criteria and targeting mechanisms do not discriminate directly or indirectly against persons with

[77] Ibid, p. 8.
[78] Ibid, pp. 14–25.

disabilities; disability determination, when established, must respect the rights and dignity of persons with disabilities.

v. Guarantee that benefits and services offered by social protection programmes are relevant for persons with disabilities and consistent with the right to an adequate standard of living;
vi. Refrain from adopting any retrogressive austerity measures that directly or indirectly affect the right of persons with disabilities to social protection.
vii. Develop disability-related indicators, undertake research on social protection and collect data, disaggregated on the basis of disability and gender, to adequately assess the impact of social protection programmes on persons with disabilities.
viii. Establish formal consultative mechanisms to ensure the active involvement and participation of persons with disabilities and their representative organizations in decision-making processes related to social protection, including in relation to budget cuts;
ix. Encourage international cooperation to support inclusive social protection systems, facilitate cooperation to make mainstream social protection programmes inclusive of persons with disabilities, and develop and improve disability-specific programmes and services.

Not accounting for extra costs of disabled people in the social protection policies undermines the effectiveness of social protection policies in diverse ways.

1. Persons with disabilities may be excluded from social protection programmes as standard means-tested benefits understate the extent of poverty among persons with disabilities. As poverty measurements rarely account for disability related direct costs, they underestimate the socio-economic vulnerabilities of persons with disabilities. Consequently, poverty targeted and means tested programmes that do not factor disability related costs into their eligibility thresholds exclude many persons with disabilities and their families who have a standard of living below the set thresholds.
2. Regular benefits from social protection programmes may provide a lower standard of living for persons with disabilities due

to the extra costs they face. Social transfer programmes that provide benefits at an equal level for persons with and without disabilities are not allowing them to maintain equal standards of living. To do so, benefits must be increased or complemented by other benefits to cover disability related costs. In addition, because disability-related costs vary depending on the type and degree of disability, social protection mechanisms need to be adjusted to fit the support costs of a particular disability category.

3. Social protection may fail to support the economic empowerment of persons with disabilities. By not recognizing that the act of seeking and retaining work can raise disability-related expenses, social protection payments can be insufficient to support persons with disabilities obtaining employment. This failure can be magnified if the receipt of social protection benefits is contingent on the perceived inability to work or if disability benefits can be lost if the person starts working or earning above a defined threshold, which is the case in many countries.[79]

While the extra cost of disability varies greatly depending on the availability and financial accessibility of goods and services, researchers have calculated that it can amount to almost 50 percent of an individual's income. A recent study on older persons with disabilities estimates that, on average, disability costs are approximately 65 percent higher than the net weekly pre-disability household income.[80]

The Joint Statement presented a comprehensive and inclusive social protection system which should ensure that persons with disabilities have access to programmes that adequately: ensure

[79] D. Mont, A. Côte, J. Hanass-Hancock, L. Morgon Banks, V. Grigorus, L. Carraro, Z. Morris, M. Pinilla-Roncancio, *Estimating the Extra Costs for Disability for Social Protection Programs. Advanced*, unedited draft (August 2022), file:///D:/T%C3%A1rol%C3%B3%202023_04_17/DOKUMENTUMOK/Lengyel%20projekt/chapter%2010th%20August/57850.pdf (accessed on: 03.08.2023); Report of the Special Rapporteur…, *op. cit.*, p. 10.

[80] Report of the Special Rapporteur…, *op. cit.*, p. 11. See more: J. Cullinan, B. Gannon, S. Lyons, *Estimating the Extra Cost of Living for People with Disabilities*, "Health Economics" 2011, No. 20(5); P. Saunders, *The cost of disability and the incidence of poverty*, "Discussion Paper" 2006, No. 147, Social Policy Research Centre, University of New South Wales; M. Loyalka *et al.*, *The costs of disability in China*, "Demography" 2014, No. 51(1), pp. 97–118.

income security that enables access to necessary goods and services; ensure coverage of disability-related costs and facilitate access to the required support, including services and assistive devices; ensure effective access to health care, including disability-related medical care and rehabilitation, as well as HIV services; improve access to services across the life cycle, such as child care, education, vocational training, support with employment and livelihood generation, including return to work programmes; and take into account the diversity of this population group, both in terms of the type of disability and other factors such as age, gender and ethnicity.[81]

Côte summarizes it as follows: making social protection systems inclusive requires first understanding the diversity of persons with disabilities, the inequalities and barriers they face and the support they require. Second, delivery mechanisms must be fully accessible. Finally, it requires investments in a blend of cash transfers, with in-kind support, including services.

According to Côte inclusive social protection combines a diversity of schemes to provide basic income security, to cover disability-related costs including support services as well as to grant access to health care and other essential services.[82]

1. Countries have adopted different tax-financed cash transfers which can be broadly divided into three categories depending on their purpose: basic income security, coverage of disability-related costs, and hybrids whose purpose depends on the individuals' circumstances.
2. In-kind support and concessions can respond directly to a disability-related need such as health care, assistive devices or support services which are quite costly and cannot be covered by a basic disability allowance. Other concessions such as free public transportation or tax exemption for disability card holders can contribute to offset some disability-related costs. Concessions

[81] Joint statement Towards inclusive social protection systems supporting the full and effective participation of persons with disabilities, *op. cit.*, p. 7, https://www.social-protection.org/gimi/gess/RessourcePDF.action?ressource.ressourceId=55473 (accessed on: 03.08.2023).

[82] See this system in: A. Côte, *Disability inclusion…*, *op. cit.*, pp. 363–364.

that appear to be the most valued are free or heavily subsidized health care, assistive devices, and transport and housing and utility bill subsidies. Income tax exemptions are valued in countries with a wide formal sector as they provide relief to many parents of children with disabilities and increase the benefits of entering the formal economy.

3. Access to health care, including rehabilitation and assistive technology.
4. Support services such as personal assistance, sign language interpreters, circles of support for persons with intellectual disabilities, and respite services are critical for both the survival and basic socio-economic participation of many persons with significant disabilities.
5. Inclusive combinations of schemes.
6. There are some general design choices to be considered that can have a significant impact on effective support for the inclusion of a given scheme.

The individual versus the household as recipient: While cash transfers for children with disabilities are paid to parents, it is critical that benefits for adults are paid to themselves, including caregiver grants or vouchers, to foster control over the benefits. Some countries have adapted their household schemes to reflect disability-related costs with higher eligibility thresholds, as in Moldova, Tunisia and Palestine, or a disability top-up such as in Indonesia. If this approach seems convenient at first, it is unlikely that it would effectively empower persons with disabilities, as they have very low control over benefits received by households even if the individual disability benefits are often too low to foster autonomy and may be used for household consumption

Universal versus poverty targeting: While income security schemes are often means tested or poverty targeted, schemes aimed at the coverage of disability-related costs or hybrid schemes tend to be universal or affluence tested. Georgia, Mauritius and South Africa's well-resourced universal or affluence-tested schemes cover around 3 percent of the working age population, on a par with many OECD countries. Countries with poverty-targeted schemes such as Kenya, India or Indonesia have expectedly much lower coverage, with a high

risk of exclusion errors due to a combination of inherent challenges of poverty targeting with issues in disability determination.

Adequacy: Whether universal or poverty targeted, most existing schemes offer low benefits, insufficient for covering basic expenses let alone disability-related extra costs, though some do provide relatively high coverage and high levels of benefits such as Georgia, Mauritius, South Africa (50 percent of minimum wage) and Brazil (minimum wage).

Compatibility with work: Many schemes have the incapacity to work as an explicit or implicit criterion and are often the only support available. While the overall impact on labour supply might be low in countries with high structural unemployment, this criterion may create undesirable disincentives for persons with disability and their households. Engaging in economic activity means risking losing the main stable source of income. Also, such benefits are often incompatible with programmes such as vocational training or support for small businesses. On top of this, a fair assessment of the inability to work is challenging.

Compatibility with other benefits: To be effective, cash transfers covering disability-related costs should also be compatible with other cash benefits. In Thailand or South Africa, old age pension recipients requiring human assistance are eligible for an additional disability benefit. Unfortunately, in many countries cash transfers are mutually exclusive, which undermines their effectiveness.

However, before summarizing *de lege ferenda* what are the building stones of an effective social protection policy regarding disabled children, it is important to note that employment policy and social protection policy should be regarded in a holistic approach. It is very important to avoid the benefits' trap and to overcome a disability benefit culture, to move from passive compensation of the incapacity to work to support for socio-economic inclusion.[83] It is considered to be a very important policy issue which points towards a reform of occupational rehabilitation.

[83] See more: ibid, pp. 354–367.

Effective social protection system of disabled children – *de lege ferenda*

When analysing and creating the Hungarian and Polish effective social protection system for disabled children, the following must be taken into account as *de lege ferenda* recommendations.

The social protection system is child-sensitive if it includes providing adequate child and maternal nutrition; access to quality basic services for the poorest and most marginalized; supporting families and caregivers in their childcare role, including increasing the time available within the household; addressing gender inequality; preventing discrimination and child abuse in and outside the home; reducing child labour; increasing caregivers' access to employment or income generation; and preparing adolescents for their own livelihoods, taking account of their role as current and future workers and parents.

It should efficiently and effectively implement appropriate instruments such as: social transfers, social insurance, social services, policies, legislation and regulations.

Disability inclusive social protection systems should:

i. ensure that the right of persons with disabilities to social protection is recognized in domestic legislation and taken into account in national social protection strategies and plans, including nationally defined social protection floors;
ii. implement comprehensive and inclusive social protection systems that mainstream disability in all programmes and interventions, and ensure access to specific programmes and services for disability-related needs.
iii. design disability benefits in a way that promotes the independence and social inclusion of persons with disabilities and does not limit their full and equal enjoyment of other human rights and fundamental freedoms;
iv. ensure that eligibility criteria and targeting mechanisms do not discriminate directly or indirectly against persons with disabilities; disability determination, when established, must respect the rights and dignity of persons with disabilities;

v. guarantee that benefits and services offered by social protection programmes are relevant for persons with disabilities and consistent with the right to an adequate standard of living;
vi. refrain from adopting any retrogressive austerity measures that directly or indirectly affect the right of persons with disabilities to social protection;
vii. develop disability-related indicators, undertake research on social protection and collect data, disaggregated on the basis of disability and gender, to adequately assess the impact of social protection programmes on persons with disabilities;
viii. establish formal consultative mechanisms to ensure the active involvement and participation of persons with disabilities and their representative organizations in decision-making processes related to social protection, including in relation to budget cuts;
ix. encourage international cooperation to support inclusive social protection systems, facilitate cooperation to make mainstream social protection programmes inclusive of persons with disabilities, and develop and improve disability-specific programmes and services.

According to the Joint Statement, a comprehensive and inclusive social protection system should ensure that persons with disabilities have access to programmes that adequately: ensure income security that enables access to necessary goods and services; ensure coverage of disability-related costs and facilitate access to the required support, including services and assistive devices; ensure effective access to health care, including disability-related medical care and rehabilitation, as well as HIV services; improve access to services across the life cycle, such as child care, education, vocational training, support with employment and livelihood generation, including return to work programmes; and take into account the diversity of this population group, both in terms of the type of disability and other factors such as age, gender and ethnicity.

According to Côte, inclusive social protection combines a diversity of schemes to provide basic income security, to cover disability-related costs including support services as well as to grant access to health care and other essential services.

It is important to note that employment policy and social protection policy should be regarded in a holistic approach. It is very important to avoid the benefits' trap and to overcome a disability benefit culture, to move from the passive compensation of incapacity to work to support for socio-economic inclusion.

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Access to Health Services for Children with Disabilities

Introduction

Quality of life depends on the state of health. This is true for all people, especially children, because their development and functioning in society depends on their state of health. This dependency is particularly evident in children with disabilities. One form of equalising the life prospects of children with disabilities is access to health services[1] provided in accordance with current medical knowledge and with due diligence; the legislator has obliged public authorities to provide special health care precisely to children and persons with disabilities. This is necessary in the case of persons who meet the above criteria, i.e. children with disabilities. The importance of the issue is underlined by the axiologically motivated principles of the protection of the dignity of the human being in need and of social solidarity, the need for inclusive measures to minimise the degree of marginalisation of these children on the grounds of disability. However, questions arise as to whether the actions of public authorities in this area are adequate and sufficient, whether they respond to the increased health needs of children with disabilities,

[1] Pursuant to Article 2(1) point 10 of the Act of 15 April 2011 on medical activity (Journal of Laws of 2023, item 991), a healthcare service is an activity that serves to preserve, save, restore or improve health, as well as other medical activities resulting from the treatment process or separate provisions regulating the principles of their performance.

and whether they actually grant them privileges over other groups entitled to health services? The purpose of this study is to attempt to identify the axiological and legal basis for access to health services for children with disabilities.

The concept of a child

In view of the fact that children with disabilities are covered by special health care, it is reasonable to define the concept of a child, whether it is every human being from conception or whether it acquires this status only from the moment of birth. In the Constitution of the Republic of Poland,[2] which is the supreme law of the Republic of Poland, there are no references to determine the moment from which the life of a child begins. These doubts are not clarified by the very general provision of article 38 of the Constitution of the Republic of Poland, according to which The Republic of Poland shall "ensure the legal protection of the life of every human being". From the statement that the legal protection of life is ensured to "every human being", it can be inferred that it also includes the conceived child as a human being characterised by a specific human genotype. Undoubtedly, the notion of the conceived child is included also in the broader notion of "everyone", which means that all freedoms and rights guaranteed by the Constitution of the Republic of Poland addressed to "everyone", including the right to life, constituting a condition for obtaining freedoms and rights to which a person is entitled, apply to him or her.

Such an understanding of the concept of a child was adopted by the Constitutional Court, according to which public authorities have a duty to protect human life and health at every stage of its development, including the prenatal stage. The value of the constitutionally protected legal good, which is human life, including life developing in the prenatal stage, cannot be differentiated. Indeed, there are no sufficiently precise and justified criteria allowing such

[2] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997 No. 78, item 483, as amended.

a differentiation depending on the developmental stage of human life. From the moment of creation, human life thus becomes a constitutionally protected value. This also applies to the prenatal phase. The view that every human being from the moment of conception should be considered a human being is therefore justified.[3] The Constitutional Court has consistently upheld the protection of the right to life, considering it to be a primary right with regard to the state, and as such inviolable; consequently, if any problems of interpretation arise, the principle of *in dubio pro vita humana* should be applied and acted upon in such a way as to protect human life. This means that any doubt regarding the determination of the moment from which the attribute of human dignity could be attributed to the conceived child should be interpreted according to the above principle.[4] Human dignity, as an inherent and inalienable value which constitutes a source of freedom and human and civil rights, is inviolable and its respect and protection is the duty of the public authorities (Article 30 of the Constitution of the Republic of Poland).

The legal definition of the term child is contained in Article 2 of the Act of 6 January 2000 on the Ombudsman for Children,[5] according to which "1. Within the meaning of the Act, a child is every person from the moment of conception until the age of majority. 2. The age of majority is set forth in separate regulations". This Act implements the principle of the protection of the child's welfare expressed in Article 72(1) of the Constitution of the Republic of Poland, according to which "The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense" and Article 72(4) of the Constitution of the Republic of Poland, which stipulates the Ombudsman for Children's Rights as a specialised body for the protection of children's rights.

[3] Judgment of the Constitutional Court of 28 May 1997, K 26/96, LEX No. 29143.

[4] Judgment of the Constitutional Court of 7 January 2004, K 14/03, LEX No. 82910.

[5] Act of 6 January 2000 on the Ombudsman for Children, consolidated text, Journal of Laws of 2023, item 292.

Taking into account the circumstance concerning the legitimacy of this law and the systemic approach to law, it should be considered that this understanding of the concept of the child has legal effects in all areas of law.[6] This means that even before birth, the conceived child should be given access to health services. The provision of adequate health services to the conceived child is the most important link in the health care system for the child. This is all the more important as developmental defects or chronic illnesses undetected in advance will have negative health consequences at a later stage of the child's development. The obligation to provide medical care to the conceived child is confirmed by the Act of 7 January 1993 on family planning, protection of the human foetus and the conditions of admissibility of abortion,[7] which, in Article 2 § 1 point 1, obliged governmental and local self-government bodies, within the scope of competences granted to them specified in specific provisions, to provide medical, social and legal care to pregnant women, in particular through prenatal care of the foetus and medical care of the pregnant woman. Due to the biological dependence of the conceived child on its mother, it is obvious that any health intervention concerning the conceived child must take place through the body of its mother.

Thus, for the purposes of this study, it has been assumed that a child is any human being from conception until the age of majority. The question of coming of age is resolved by the provisions of the Act of 23 April 1964 – Civil Code,[8] which in Article 10 § 1 assumes that one attains the age of majority at the age of 18. The legislator provides for the possibility of the earlier attainment of majority, which occurs as a result of the marriage of a minor (Article 10 § 2 of the Civil Code). This possibility has been specified in the Act of

[6] M. Zdyb, *Ochrona praw dzieci w prawie polskim i międzynarodowym w kontekście ochrony ich zdrowia*, "Studia Prawnicze KUL" 2018, No. 4, p. 157.

[7] Act of 7 January 1993 on family planning, protection of the human foetus and conditions of permissibility of abortion, consolidated text, Journal of Laws of 2022, item 1575.

[8] Act of 23 April 1964 – Civil Code, consolidated text, Journal of Laws of 2022, item 1360, as amended; hereinafter: the Civil Code.

24 February 1964 – Family and Guardianship Code[9] in Article 10 § 1, in accordance with which, for important reasons the guardianship court may permit a man to enter into marriage with a woman who has reached the age of 16 and the circumstances indicate that entering into marriage will be compatible with the good of the established family. The attained majority is permanent, meaning that a woman does not lose it even if the marriage is annulled before she reaches the age of 18. At the age of majority, full legal capacity is acquired (Article 11 of the Civil Code), i.e. the capacity to independently acquire or waive rights and to contract obligations. It is assumed that upon reaching the age of 18, a person acquires maturity in the physical and mental spheres, which makes him or her capable of independent existence in society; he or she ceases to be a child and acquires the status of an adult. Until that moment, as a child, he or she remains under parental authority, which includes in particular the duty and right of parents to exercise custody over the child's person and property and to bring the child up with respect for his or her dignity and rights (Article 95 § 1 of the KRiO). Those exercising parental authority have the right, but also the duty, to act actively in any matter of importance for the child. Such matters undoubtedly include endeavouring to ensure that the child has access to health services that guarantee the child's health and proper development. Protecting a child's health during his or her development from conception to adulthood potentially gives him or her a better chance of a life with dignity.

Constitutional bases of health protection

Of fundamental importance for health protection on the normative level is article 68 of the Constitution of the Republic of Poland, which confirms that everyone has the right to health protection (§ 1), obliges public authorities to provide citizens, regardless of their material situation, with equal access to health care services

[9] Act of 24 February 1964 – Family and Guardianship Code, consolidated text, Journal of Laws of 2020, item 1359, as amended; hereinafter: the KRiO.

financed from public funds (§ 2),[10] and children, pregnant women, persons with disabilities and the elderly with special health care (§ 3). In addition, public authorities are obliged to combat epidemic diseases and prevent the negative health effects of environmental degradation (§ 4), and to promote the development of physical culture, especially among children and young people (§ 5). The duties of public authorities set out in Article 68(2) to (5) of the Constitution of the Republic of Poland have been indicated by way of example, and do not exhaust everything that makes up the concept of the right to health protection. Nevertheless, their implementation is to enable the actual enjoyment of the right to health care. In this sense, it should be assumed that Article 68(1) of the Constitution of the Republic of Poland is the purpose of the obligations provided for in the following paragraphs.[11] The constitutional idea contained herein, oriented towards health protection, constitutes a determinant for public authorities and a basic assumption in terms of state health policy.

The provision of Article 68 of the Constitution of the Republic of Poland is the subject of debates that concern the nature of the right to health guaranteed therein (whether it is a social or personal right), the manner of its interpretation (whether paragraph 1 can be analysed independently in isolation from paragraphs 2–5, or whether they should be considered together), and whether the individual passages express public subjective rights or are merely programmatic norms. Analyses concerning these issues have been omitted as not directly related to the subject of the study. Nevertheless, it should be emphasised that the state is not in a position to guarantee anyone's good health, but it can extend protection to it, the aim of which is to keep health in a state of no deterioration through preventive measures and to improve health in the event of deterioration through curative measures. The content of the right to health

[10] It should be emphasis that this is not about access to healthcare services in general, but only to those that are publicly funded.

[11] W. Lis, *Konstytucyjne gwarancje ochrony zdrowia i dostępu do świadczeń opieki zdrowotnej finansowanej ze środków publicznych*, [in:] J. Pacian (ed.), *Prawne aspekty cywilizacyjnych zagrożeń zdrowia*, Warszawa 2016, p. 9.

is not some abstractly defined "state of health" of individuals, but the possibility of benefiting from a health care system functionally oriented towards the combatting and prevention of illness, injury and disability. It is therefore incumbent on the public authorities to create institutions that make it possible to prevent diseases and, if they do occur, to enable them to be adequately combatted and treated. Of key importance in this connection is:

> the correct definition by the legislator of the organisational sphere related to the precise, unambiguous and functional construction of the health care system. This is closely related to the proper division of competences granted to institutions implementing public tasks in the sphere of health care. This is followed by the correct definition of the principles of their functioning, guaranteeing the necessary transparency of their activities, their effective supervision, as well as clear, legible and unambiguous principles of responsibility incurred.[12]

Violation of the right to health care, in particular leaving a person in need of assistance without the required care, resulting in social exclusion, constitutes a violation of human dignity.[13]

The legislator used three types of terms: "health protection", "health care services", "special health care". On the grounds of the Constitution of the Republic of Poland, no legal definition of any of them has been formulated. It is assumed that, of these terms, the broadest in meaning is health protection, which includes health care, a component of which is the health care services. Health care is identified not only with the implementation of the objectives of treatment and rehabilitation, but also with the endeavour to preserve health and prevent disease by taking diagnostic and preventive

[12] Judgment of the Constitutional Court of 7 January 2004, K 14/03, LEX No. 82910.

[13] S. Sikorski, *Konstytucyjne prawo do ochrony zdrowia oraz prawo do świadczeń opieki zdrowotnej finansowanych ze środków publicznych*, [in:] E. Nojszewska, W. Malinowski, S. Sikorski (eds.), *Komercyjne świadczenia usług publicznych przez szpitale publiczne*, Warszawa 2017, p. 84.

measures.[14] It follows that the primary aims of health care are the preservation of physical and mental health, the prevention of disease and injury, prompt and effective diagnosis, treatment and care, and the prevention and reduction of disability.

The right to health protection is a fundamental right, which the legislator may not only not question, but also may not restrict.[15] However, it should be emphasised that the right to health protection is not identical to the right of access to health care services, including publicly funded health care services. The right to health protection is closely related to human dignity and the right to the protection of life, which, moreover, stems from the idea of a democratic state under the rule of law and the anthropocentric nature of the state, in which the human being is the supreme value. It constitutes one of the basic guarantees for the implementation of the principle of respect for and protection of human dignity. It is difficult to imagine respect for and protection of human dignity without respect for and protection of the goods most precious to man, which undoubtedly include health. It is *a sine qua non* condition for the proper development and normal functioning of a human being and for the exercise of other freedoms and rights. The right to health protection thus encompasses the sum total of tasks resulting from the provisions of Articles 30 and 38 of the Constitution of the Republic of Poland.[16]

In the context of the topic of the study, the most important provisions are those of Article 68(3) of the Constitution of the Republic of Poland, according to which "Public authorities are obliged to provide special health care to children, pregnant women, persons with disabilities and the elderly". A common feature of these subjects is that, on the one hand, they statistically most often have an increased need for health care services and, on the other hand, they are less independent than the average. Hence, the obligation incumbent on public authorities to provide special care to these persons is justified

[14] Judgment of the Constitutional Court of 22 July 2008, K 24/07, LEX No. 402809.

[15] Judgment of the Constitutional Court of 15 November 2000, P 12/99, LEX No. 44572.

[16] W. Lis, *Konstytucyjne gwarancje…*, *op. cit.*, p. 14.

by humanitarian considerations and the concern to "ensure the development of the Nation".[17] The need for the protection of the aforementioned categories of persons is also highlighted by other constitutional provisions, namely Article 72, defining the obligation to protect the rights of the child, Article 69, providing for assistance to persons with disabilities, Article 18, encompassing the protection and care of the State for maternity and parenthood, and Article 71(2), guaranteeing special assistance from the State to the mother before and after the birth of the child. The concept of the elderly is questionable. However, it seems that it can be equated with persons "after retirement age", as referred to in Article 67(1), which grants the right to social security, given the social context of both norms.

The notion of a disabled person is defined in the Act of 27 August 1997 on professional and social rehabilitation and employment of disabled persons,[18] which in Article 1 recognises as disabled persons whose disability has been confirmed by a certificate on their qualification to one of the three degrees of disability (significant, moderate, light), or on their total or partial inability to work under separate regulations (this is the Act of 17 December 1998 on pensions from the Social Insurance Fund) or on disability, issued before the age of 16 (the Act of 28 November 2003 on family benefits applies here). No gradation of disability applies to persons under 16 years of age. The accepted understanding of a disabled person gives it a formalised character. Persons who do not have any of these certificates are not considered disabled, even if they assess their disability as limited. The statutory definition of disability contained in Article 2(10) refers to a permanent or periodical inability to fulfil social roles due to a permanent or long-term impairment of the body's efficiency, in particular resulting in the inability to work. A separate definition of disability is provided for minors under the age of 16, assuming in Article 4a that they are entitled to the status of a disabled person

[17] Judgment of the Constitutional Court of 22 July 2008, K 24/07, LEX No. 402809.

[18] Act of 27 August 1997 on professional and social rehabilitation and employment of persons with disabilities, consolidated text, Journal of Laws of 2023, item 100, as amended.

if they have a physical or mental impairment of an expected duration of more than 12 months, due to a congenital defect, long-term illness or damage to the body, resulting in the necessity of providing them with total care or assistance in satisfying the basic needs of life in a manner exceeding the support needed by a person of a given age. The rules for determining the disability of minors are set out in the Regulation of the Minister of Economy, Labour and Social Policy of 15 July 2003 on disability assessment and the degree of disability.[19] In accordance with the provisions of § 2 and 3 of this regulation, certificates in this respect are issued by district Disability Assessment Boards and voivodeship Disability Assessment Boards. The certificate is issued at the request of an interested person, their statutory representative or – with their consent – the head of a social welfare centre. In addition to determining disability or the degree of disability, the certificate should also include indications concerning the need for permanent or long-term care or assistance of another person in connection with significantly limited ability to lead an independent life and the need for permanent daily participation of the child's guardian in the process of treatment, rehabilitation and education.

The significance of the provisions of Article 68(3) of the Constitution of the Republic of Poland is expressed in the fact that the notion of health care has been provided with the quantifier "special". According to the Constitutional Tribunal, the notion of special health care should be understood, firstly, as going beyond the sphere of ordinary, universal health care, which means that this care should be intensified, more intensive or more specialised, i.e. adapted to the specific needs characteristic for a given group of subjects; secondly, that the purpose of health care is not only treatment and rehabilitation, but also care for the preservation of health and prevention of diseases; thirdly, that this "specialness" may concern (jointly or separately) the conditions, scope, access or financing of these

[19] Regulation of the Minister of Economy, Labour and Social Policy of 15 July 2003 on disability assessment and the degree of disability, consolidated text, Journal of Laws of 2021, item 857.

benefits.[20] The obligation of public authorities to provide special health care means the necessity of granting health care benefits which are not available to other persons entitled to health care benefits on general terms or benefits available to all, but to persons indicated in the content of Article 68(3) of the Constitution of the Republic of Poland granted on preferential terms.[21] Thus, it would seem that Article 68(3) of the Constitution of the Republic of Poland establishes an exception to the principle of equal access of all citizens to health care services financed from public funds. It should be assumed that it should apply only to Polish citizens, although this does not directly follow from its content. However, since basic health care financed from public funds is guaranteed only to Polish citizens (Article 68(2) of the Constitution of the Republic of Poland), a particular form of this care cannot be guaranteed to persons who do not have Polish citizenship. Hence, it should be assumed that only Polish citizens belonging to one of the four categories of persons listed in the content of the provision may be entitled to special healthcare.[22] Nevertheless, one should take into account the obligation of public authorities to provide special health care to persons who, due to their age, sex (determined by the state of pregnancy) or permanent physical or mental limitations, are in a significantly different health situation than other groups of patients. With this in mind, it should be concluded that Article 68(3) of the Polish Constitution does not constitute a derogation from the principle of equal access to health care services financed from public funds, because children, pregnant women, persons with disabilities and the elderly are distinguished from other patients by relevant characteristics which speak in favour of special treatment. Besides, Article 68(3) of the Polish Constitution differentiates the standard of health care according to age, pregnancy status or

[20] Judgment of the Constitutional Court of 22 July 2008, K 24/07, LEX No. 402809.

[21] M. Florczak-Wątor, *Komentarz do art. 68*, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, p. 232.

[22] T. Sroka, *Komentarz do art. 68, Nb. 74*, [in:] A. Barczak-Oplustil, T. Sroka (eds.), *Odpowiedzialność publicznoprawna. System Prawa Medycznego. Volume 6*, Warszawa 2022.

disability, whereas Article 68(2) of the Polish Constitution prohibits only the differentiation of this standard according to the criterion of the material situation. The adoption of such a solution is justified primarily by the increased health needs of children, pregnant women, persons with disabilities and the elderly, which is associated with a higher risk of the occurrence of various types of bodily dysfunctions, including, inter alia, a higher frequency of illnesses and the occurrence of certain diseases typical of these groups, which in turn is associated with the necessity of applying a specific type of treatment. A not insignificant factor may also be the potentially more limited access to health care services for persons falling into the above-mentioned categories of persons, resulting, inter alia, from limited mobility, reduced financial possibilities or limited independence. The solution introduced in Article 68(3) of the Constitution of the Republic of Poland should therefore be regarded as justified and admissible. However, granting special rights cannot lead to an unjustified privileging of the indicated categories of persons in relation to other patients.[23]

The Constitution of the Republic of Poland does not prescribe how public authorities are to provide special health care to children, pregnant women, persons with disabilities and the elderly, leaving the legislator free to choose the means to achieve the objectives indicated in Article 68, especially as it contains a regulation with a very clear reference to the law. However, it directs the legislator, when constructing the legal framework for the operation and financing of the health care system, as well as the conditions and scope of health care services, to ensure that children, pregnant women, persons with disabilities and the elderly are given appropriate preferences with regard to their ability to benefit from health care services. An exemplification of the guidelines contained in Article 68 of the Polish Constitution is the Act of 27 August 2004 on health care

[23] A. Wołoszyn-Cichocka, *Konstytucyjny obowiązek zapewnienia szczególnej opieki zdrowotnej dzieciom, kobietom ciężarnym, osobom niepełnosprawnym i osobom w podeszłym wieku przez władze publiczne*, "Annales Universitatis Curie-Skłodowska. Sectio G" 2017, No. 1, p. 232.

services financed from public funds.[24] It follows from the provisions of the act that within the framework of health care, activities defined as benefits are undertaken, relating to three types of medical activity – health care benefits, health care benefits in kind, and accompanying benefits (Article 5 point 34 of the HCS). These activities are undertaken for statutorily defined purposes, which are the preservation of health, prevention of disease and injury, early detection of disease, treatment, nursing, and the prevention and reduction of disability (Article 15(1) of the HCS). It follows that health care thus consists of an organised and institutionalised activity involving the provision of health services by authorised entities in order to ensure the preservation of health or its restoration in the event of its loss, or, when this is not possible, the reduction of the effects of illness and the alleviation of ailments.[25]

Due to the inextricable link between the right to health and the right to the protection of life, public authorities are obliged to finance from public funds primarily those services which are directly related to saving human life and preventing disability. These activities are related to securing the individual's existence (Article 69 of the Polish Constitution), the basis of which is undoubtedly life and health. Thus, they fulfil the provisions of the Convention on the Rights of Persons with Disabilities, drawn up in New York on 13 December 2006,[26] which, in Article 25, imposed an obligation on state parties to ensure that persons with disabilities have access to health care services, including health rehabilitation. It should be added that the primary objective of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, which include those with long-term physical, mental or intellectual or sensory impairments. The Convention is based on the principles of respect for inherent dignity and autonomy, non-discrimination,

[24] Act of 27 August 2004 on health care services financed from public funds, consolidated text, Journal of Laws of 2022, item 2561, as amended; hereinafter: HCS.

[25] J. Leowski, *Polityka zdrowotna a zdrowie publiczne*, Warszawa 2010, p. 72.

[26] Convention on the Rights of Persons with Disabilities, drawn up in New York on 13 December 2006, Journal of Laws of 2012, item 1169.

full and effective participation and inclusion in society, respect for difference and acceptance of persons with disabilities, equality of opportunity, accessibility, equality between men and women and respect for the developing capacities of children with disabilities, and respect for the right of children with disabilities to preserve their identity.

Non-medical barriers to accessing health services

Access to health care services for persons with disabilities in general, including for children with disabilities, is determined by many different factors. These were highlighted by the Ombudsman when he commissioned relevant research, which was reflected in the final report "Accessibility of health care services for people with disabilities – analysis and recommendations". It should of course be stipulated that the scale and type of problems vary according to the type and degree of disability.

These include architectural barriers that impede access to healthcare facilities and, consequently, the possibility of receiving healthcare services. At the same time, it is not only about access for people with reduced mobility. Examples of architectural barriers for people with disabilities other than those resulting from mobility impairments are lifts that are not soundproof, rooms that are inconsistently and unintuitively laid out, or even toilets that are not adapted to suit the needs of the individual. Fortunately, more and more buildings are being adapted to the needs of people with disabilities, while new buildings are already being designed universally, i.e. as accessible and safe for all, including people with different types of disabilities. Interestingly, ramps or lifts are sometimes installed not at the main but at the side entrance to a building, which is discriminatory as it means that people with disabilities are treated as inferior patients.[27] Related to these are infrastructural barriers, concerning the equipment of the treatment facility,

[27] A. Mikołajczyk, *Dostępność usług opieki zdrowotnej dla osób z niepełnosprawnościami – analiza i zalecenia*, Warszawa 2020, p. 40.

which makes it difficult or even impossible to perform complete and reliable examinations of patients with disabilities, not allowing an accurate diagnosis to be made and appropriate treatment to be implemented; these are mainly unadapted armchairs, couches or specialised equipment used in diagnostic examinations.[28] In other words, overcoming barriers to accessing a treatment facility does not remove the difficulties associated with being able to benefit from the medical services provided there.

Communication barriers relate to the exchange of information between patients with disabilities and the staff of healthcare entities, both in registries and in doctors' offices. There is a lack of communication channels adapted to the needs of patients with disabilities, especially sign language interpreters or the use of electronic devices for the exchange of information. The consequence of this is not only the difficulty of making an appointment, but also the lack of contact with the doctor and, consequently, the fact that medical recommendations are given in a form that is inaccessible or incomprehensible to the individual patient. The way recommendations are communicated should always be tailored to the person with the specific disability. In view of the above difficulties, it is necessary to improve the process of communication with disabled patients and to develop communication channels adapted to the needs of people with disabilities. This requires ensuring that medical staff have access to training on communication and handling of people with disabilities. Related to this, information barriers remain, related to the lack of information in general or the lack of information in a form accessible to patients with different disabilities. These barriers relate to notices posted on information boards, and the way individual surgeries, rooms or toilets are labelled.[29]

The report also identifies mental barriers that relate to the attitudes of both medical staff, other patients, and those assisting patients with disabilities during visits to healthcare providers. These barriers include the lack of subjective treatment, which is particularly evident in the omission of the patient with disabilities

[28] Ibidem, p. 41.
[29] Ibidem, p. 41.

as a partner in the dialogue and addressing only the person accompanying him or her,[30] the failure to fulfil the obligation to provide information prior to the actions taken (medical procedures),[31] and the accompanying person speaking on behalf of the patient with disabilities. Discrimination in this area is also manifested in the presence during the examination of third parties not involved in the treatment process due to their inability to carry out the examination or perform the procedure on a patient with a disability.[32] These barriers are also related to a lack of willingness to seek a way of communicating with the patient or a way of carrying out the examination that takes into account the needs of such a patient during medical intervention.[33]

It should be added that, in the case of a child with a disability, the decision-maker is, as a rule, his or her legal representative or guardian, but the child must at least be informed by the doctor in a way that he or she understands about the actions taken towards him or her and be listened to. This makes it possible to involve patients who are minors in the diagnostic or therapeutic process and to gain their understanding of the treatment being provided to them. This means that the fact of disability is not a premise that exempts the inclusion of a child with a disability in the diagnosis

[30] The disabled patient is treated only as an object of interaction, as a subject for performing successive medical procedures on him/her. It should be added that doctors sometimes do not even attempt to talk to a disabled person if he or she comes to the appointment with a carer.

[31] Pursuant to Article 31(1) of the Act of 5 December 1996 on the professions of physician and dentist (consolidated text, Journal of Laws of 2023, item 1516), "A physician is obliged to provide a patient or his or her legal representative with accessible information on his or her state of health, diagnosis, proposed and possible diagnostic and therapeutic methods, foreseeable consequences of their application or abandonment, the results of treatment and prognosis". The duty to provide information also applies to patients who are minors under 16 years of age. The doctor should provide them with this information to the extent and in the form necessary for the proper conduct of the diagnostic or therapeutic process and should listen to their views.

[32] During the provision of health services, only those persons among the medical staff can be allowed to participate whose presence is necessary due to the nature of the services provided.

[33] A. Mikołajczyk, *Dostępność usług opieki zdrowotnej…*, *op. cit.*, p. 41.

and treatment process. The situation of patients who are minors will differ according to the criterion of their age and mental state. The criterion differentiating the entitlement of minors is the age census – 16 years of age or older. In the case of patients under the age of 16, consent to medical intervention with regard to them is given by the legal representative or legal guardian (substitute consent). Indeed, a minor under the age of 16 is neither entitled to effectively consent nor effectively object to a medical intervention with regard to him or herself. However, even a patient under the age of 16, before giving or refusing consent to be subjected to medical intervention by entities entitled to do so, has the right to present his or her own position regarding the actions concerning him or her within the institution of a hearing provided for in Article 95 § 4 of the KRiO. According to its content, "Before taking decisions on important matters concerning the person or property of the child, parents should listen to the child, if the child's mental development, state of health and degree of maturity so permit, and take into account the child's reasonable wishes as far as possible". Hearing the minor ensures that he or she has the opportunity to influence those who decide to subject him or her to medical intervention, and gives him or her some slight influence over the medical decisions made in relation to him or her.[34]

Related to the above are competence barriers, which include both lack of professional competence (knowledge of a particular type of disability or experience of treating a particular disease) and a lack of soft competence related to the approach to the patient, the way they are treated.[35] It is not uncommon for patients with disabilities to have a more complete knowledge of their medical condition than medical professionals. As a consequence of the lack of appropriate competences, attempts are made to send patients with disabilities away or refuse them admission.[36] In view of this, it seems necessary,

[34] More extensively: W. Lis, *Zezwolenie sądu opiekuńczego na udzielanie małoletniemu świadczenia zdrowotnego*, "Roczniki Nauk Prawnych" 2020, Vol. 30, No. 3, pp. 106–107; see also: *Zgoda pacjenta na czynność medyczną w polskim porządku prawnym*, "Zeszyty Naukowe KUL" 2018, Vol. 61, No. 3, pp. 39–58.

[35] A. Mikołajczyk, *Dostępność usług opieki zdrowotnej…*, *op. cit*., p. 42.

[36] Ibidem, p. 32.

as a first step, to take action to change the mentality of medical staff, resulting in a change in the treatment of people with disabilities. These expectations entail both a need to change the way in which medical personnel are educated and prepared to work with people with disabilities, as well as to conduct social campaigns to raise awareness of disability issues.

Another problem is the long waiting time for appointments with specialists. Admittedly, this problem concerns patients in general, so it does not apply only to patients with disabilities. However, in relation to them, it acquires particular significance due to their specific situation and health needs, limited communication accessibility on the part of healthcare providers, and financial constraints in accessing non-public healthcare.

All of these factors discriminate on the basis of disability and make it difficult, if not impossible, to use healthcare services freely.

Health services dedicated to children

The type and scope of health care services dedicated to children, including those with disabilities, result from statutory provisions. The most important role is played by the Act of 27 August 2004 on health care services financed from public funds, which is the basic normative act regulating the availability of these services. Under the Act, children have the right to, inter alia: 1) the use of health care services financed from public funds both as persons registered and not registered for health insurance; 2) dental treatment services in the dental surgery at school and in the dental surgery run by a medical entity with which the authority running the school has concluded an appropriate agreement, out of turn (not joining a waiting list); 3) additional health services of a dentist and additional dental materials used in the provision of these services; 4) orthodontic treatment of malocclusion with the use of one- and two-jaw removable orthodontic braces (until the age of 12); 5) free inspection and repair of removable orthodontic braces once a year after the completion of treatment (until the age of 13); 6) additional dental materials (until the age of 18); 7) general anaesthesia for

the performance of guaranteed services and light-curing composite materials for fillings – disabled children up to the completion of 16 years of age and children with moderate and severe disabilities from the completion of 16 years of age up to the completion of 18 years of age – if it results from medical indications; 8) exemption from payment for the costs of meals and accommodation in a children's spa hospital, children's spa sanatorium and other spa sanatorium; 9) medical devices up to the limit of public financing, according to medical indications, but without taking into account the periods of use; the amount of monthly supply of medical devices is decided each time by the person entitled to issue an order for this supply; 10) to obtain outpatient specialist services without a referral if as a result of publicly financed screening tests carried out on the children the presence of congenital diseases has been identified.

One of the most important entitlements is for those children with a severe and irreversible handicap or an incurable life-threatening disease that arose in the prenatal period of the child's development or during childbirth, or with a certificate of significant disability or a certificate of disability with indications: concerning the need for permanent or long-term care or assistance of another person in connection with the significantly limited possibility of independent existence and the need for permanent daily participation of the child's guardian in the process of the child's treatment, rehabilitation and education, whereby the child has the right to use health care services and pharmaceutical services in pharmacies out of turn, resulting from there usually being a (long) waiting list. This entitlement obliges the healthcare provider to provide healthcare services on the day of notification or, if this is not possible, on another date as soon as possible. At the same time, outpatient specialised care services must be provided within 7 working days from the date of notification. This obligation applies only to healthcare entities that have signed a contract with the National Health Fund. Reservations may be raised by the fact that persons with disabilities are not covered by privileged (out of turn) access to services such as therapeutic rehabilitation, which are, as it were, *ex definitione* included in the category of those particularly needed by persons with disabilities. This is particularly relevant for children with disabilities; supporting

a child's development at the earliest possible stage of his or her development can contribute to minimising or even overcoming disability.

Pursuant to the Act of 4 November 2016 on Support for Pregnant Women and Families "Za życiem",[37] children with a certificate stating a severe and irreversible handicap or an incurable life-threatening disease that arose during the prenatal period of the child's development or during childbirth are entitled to priority healthcare services. Entitlements in favour of the child include, in particular: prenatal diagnosis; health care services for outpatient specialist care and hospital treatment, including intrauterine procedures; psychological support; therapeutic rehabilitation; the provision of medical devices; palliative and hospice care; additional medical devices.

Under the Act on Vocational and Social Rehabilitation and Employment of Disabled Persons of 27 August 1997, disabled persons may apply to district family support centres for funding for rehabilitation holidays. It is an organised form of active rehabilitation combined with elements of leisure, the aim of which is the general improvement of psycho-physical fitness and the development of social skills of the participants, inter alia, through establishing and developing social contacts, realising and developing interests, as well as through participation in other activities provided for in the programme of the period.

The laws cited, only by way of example, indicate that the legislator recognises the problem of access to health care services by children, including those with disabilities, and has taken steps to realise the constitutional guarantees of providing special health care to children and people with disabilities. It should be emphasised that their practical implementation, however, depends on the financial capacity of the state and on the way in which health care providers implement and approach medical staff with regard to children with disabilities.

[37] Act of 4 November 2016 on support for pregnant women and families "For Life", consolidated text, Journal of Laws of 2020, item 1329, as amended.

Summary

Children need care, including health care, from the moment of conception, because their prenatal health status has an impact on their postnatal health status and, consequently, on their personal development and functioning in the social group. Hence, health care for the child undertaken from the moment of conception should continue through all phases of his or her development until adulthood. This is particularly true for children with disabilities because of their peculiar combination of needs, on the one hand determined by their illness, and on the other justified by their disability, which is unfortunately always limiting. It is in the public interest to provide a child with an appropriate level of health care appropriate to their needs. Children are a common good who should receive special care from the state – especially with regard to matters concerning life and health. The consequences of neglecting these areas will be borne by society as a whole, especially in economic terms, due to the cost of treatment, but also to minimise the effects of the disability, to counteract marginalisation and social exclusion. Aware of this, the legislator has obliged public authorities to provide special health care to, among others, children and persons with disabilities. However, an analysis of the provisions relating to children with disabilities shows that they do not have many entitlements resulting from their disability in the Polish health care system. It cannot, of course, be said that the state does not see the problem and does not take measures to improve the health situation of children with disabilities, but these measures are still insufficient and do not meet the increased health needs of this group of beneficiaries of the health care services.

The provision of special health care to persons with disabilities is compensatory in nature. At the basis of the provision of such care is the consideration of the protection of the dignity of the person in need of assistance and social solidarity. In addition, the protection of the health of persons with disabilities is linked to the provision of their health security, which remains closely linked to the basic need of every human being – that of security. It is the responsibility of public authorities to facilitate and support people with disabilities in virtually all spheres of life, so that the limitations caused by

disability do not mean total social marginalisation and the full social exclusion of such people.

Bearing in mind the constitutional obligation of public authorities to provide special health care to, inter alia, children and persons with disabilities, it would be appropriate to increase the scope of health care services dedicated to them, or to consider the possibility of a separate area of special health care within the health care system covering all, aimed at meeting the health needs of children with disabilities. Indeed, children with disabilities require permanent, comprehensive care that maintains medical and organisational distinctiveness determined by their increased need for health care services. Any restriction of access to health care services by children with disabilities poses a threat to their development and functioning. Moreover, they may lead to an increase in inequalities based on health status. It is the task of the state to counteract such tendencies and to take measures to level the playing field by giving children with disabilities a privileged position over other groups entitled to health care services (positive discrimination). It appears that the state is taking legislative initiatives to improve the accessibility of health care services for children with disabilities, which are not always reflected in the practice of health care providers and medical staff. However, the negative experience of medical appointments contributes to discouraging further visits or postponing them, with consequences for the state of the health of children with disabilities, de facto burdening society as a whole with the cost of their upkeep. A mental change is needed regarding the attitude and treatment of children with disabilities by medical staff, but this cannot be enforced by law.

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The Principle of Accessibility in the Implementation of the Rights of Children with Disabilities

Introduction

For centuries, children with disabilities have been a group of people particularly exposed to abuse, violence and discrimination. Nowadays, there is no doubt that they are holders of human rights on an equal footing with others, including other children.

Understandably, the lack of access to goods and services as well as their possible extent or quality look very different and incomparable in war-torn regions, affected by natural disasters and widespread poverty than in developed countries. However, even in EU countries, the actual status of children with disabilities is far from international standards set for the protection of children's rights. The fundamental rights of children with disabilities are often at risk of deprivation. The existing legal guarantees and legal instruments are not sufficient and effective. These children continue to face discrimination and are unable to fully enjoy their human rights.

The research objectives do not take into account the full context of children's disabilities worldwide but concern international, European and national standards in their range of accessibility.

The study is intended to enable to identify legal barriers and present proposals for changes in the protection of the rights of disabled children focusing on the role of the principle of accessibility in the implementation of children's rights.

For this purpose, the text outlines international, European and national perspectives. It presents the rights of children with

disabilities primarily from the perspective of two UN Conventions: the Convention on the Rights of the Child (CRC 1989), which provides for the obligation to ensure a full and decent life in conditions that ensure dignity, promote self-reliance, and facilitate the child's active participation in the community; and the Convention on the Rights of Persons with Disabilities (CRPD 2006), which complements the rights of children with disabilities and elevates accessibility to the rank of a principle of international law.

Despite the implementation of the CRC, many children still do not have access to inclusive education. Their families do not receive adequate support, and the children have been excluded from society and placed in institutions.

The CRPD strengthens the "visibility" and presence of children with disabilities within international human rights law. It imposes clear obligations on states parties to take measures that remove barriers faced not only by persons with disabilities in general, but specifically by children, based on both their disability and childhood.

At the European level, the protection of children with disabilities is limited. Several conventions have been adopted by the Council of Europe that apply to children in general and can therefore apply to children with disabilities. Moreover, the Council of Europe as an organization monitors the situation of children and this produces studies, reports, and programmes that address a wide range of rights of children with disabilities. Children's rights are also among the recognized priorities for the EU. However, the European Union has no single, comprehensive, binding piece of legislation on the protection of children's rights. It had until recently no specific competence in this area other than the issue of their employment. It was not until the adoption of the EU Charter of Fundamental Rights that the rights of the child and the rights of persons with disabilities were specifically addressed. Activities for children with disabilities were determined primarily by subsequent EU strategies.

The text also presents the constitutional standard for the protection of disabled children in Poland. Polish statutory regulations regarding accessibility are characterized. Although accessibility has been implemented in many areas, the degree of implementation is still unsatisfactory. Therefore, recommendations are indicated,

including *de lege ferenda* demands and postulates for changing public policy towards children with disabilities.

1. Children with disabilities as subjects of international legal protection under the CRC

Children with disabilities are now recognised under international law as rights holders without discrimination, on an equal basis with other children. For these rights to be recognised and acknowledged, there had to be changes in the perception of both people with disabilities and children themselves. The UN Convention on the Rights of the Child of 20 November 1989[1] (CRC) is now, along with the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD), the most widely ratified UN treaty. Both conventions are part of a broader trend in international human rights law, which entails standardising the rights of particular groups of people.

Under the CRC, a child means any human being below the age of eighteen (subject to Article 38), unless they attain majority earlier under the law applicable to the child. Thus, although the CRC adopts the age of 18 as the cut-off age for childhood, it explicitly recognises that there may be differences in the practice of states parties. By contrast, it does not determine the point at which childhood begins. There is, however, a reference to the unborn child in the Preamble, which cites the 1959 Declaration of the Rights of the Child recognising that "the child (…) needs special safeguards and care, including appropriate legal protection, before as well as after birth". In practice, the CRC Committee has focused its work on the rights of the born child.[2]

The CRC shapes the legal position of children with disabilities in four ways: (1) it explicitly guarantees their right to be free from

[1] Adopted on 20 November 1989 by General Assembly resolution 44/25 (UN Treaty Series, Vol. 1577, No. 27531).

[2] For more about age in the context of the individual rights, see: N. Peleg, *International Children's Rights Law: General Principles*, [in:] U. Kilkelly, T. Liefaard (eds.), *International Human Rights of Children*, Springer, 2019, pp. 136–139.

discrimination on the basis of the child's disability or the disability of the child's parent or legal guardian (Article 2(1)); (2) it contains specific provisions on the rights of children with disabilities (Article 23) as well as (3) four fundamental principles central to the enjoyment of the rights of all children, including children with disabilities, and (4) it provides substantive rights for all children.[3] In other words, all the rights included in the CRC apply to children with disabilities.

The right to freedom from discrimination protects against discrimination on the basis of the child's disability or the disability of the child's parent or legal guardian (Article 2(1)). Until the adoption of the CRC, none of the UN core conventions recognised persons with disabilities as a group deserving legal protection from discrimination. Not even anti-discrimination or employment conventions provided them with such protection. Only the general category of "other status" contained therein, in addition to the enumerated grounds for discriminations, could be applied to persons with disabilities. The protection of persons with disabilities related primarily to the provision of social security in the event of illness or disability and the provision of adapted working conditions.

Aimed directly at the protection of children with disabilities, Article 23 provides for the obligation to ensure a full and decent life in conditions that ensure dignity, promote self-reliance, and facilitate the child's active participation in the community (Article 23(1)). It focuses on the "special care" and assistance given to children and their caregivers, yet according to the available resources, the child's conditions, and the situation of the caregivers, including their financial standing (Article 23(2)), in order to ensure that the disabled child has effective access to education, training, health care services, rehabilitation services, preparation for employment, and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including their cultural and spiritual development (Article 23(3)). The reference to international cooperation and exchange of information is

[3] E.M. Chilemba, *International Law on the Rights of Children with Disabilities*, [in:] U. Kilkelly, T. Liefaard (eds.), *International Human Rights of Children*, Springer, 2019, pp. 362–372.

intended to improve the situation and enrich the experience of developing countries in particular (Article 23(4)). Article 23 is one of the few provisions of the CRC to which no reservations or declarations have been made by states parties.[4] This fact is interpreted as a general acceptance of the obligations imposed by this stipulation.[5] However, looking at its implementation in retrospect, one should be more sceptical in assessing the reasons for the lack of reservations to Article 23. The rights of children with disabilities still did not receive due attention, and the provision itself could have been seen as the Convention's "pretty ornament".

The fundamental principles central to the enjoyment of the rights of all children, namely non-discrimination (Article 2), the best interests of the child (Article 6(2)), the survival and development of the child (Article 6), and the participation of children (Article 12) are addressed in relation to children with disabilities in General Comment No. 9 to the Convention. These principles are cornerstones of the human dignity of the child[6] and must be taken into account in the implementation of all the rights contained in the CRC.[7] In turn, the Committee identified the right to inclusion and active participation in the community (Article 23(1)) as a guiding principle regarding the explicit rights of children with disabilities. Accordingly, it decided that the states must take measures to achieve the goal of including children with disabilities in society (Section 11). In its various concluding observations on the reports of states parties to the Convention, the Committee deplored the exclusion of children with disabilities from society, particularly through their placement in institutions, and urged states parties to take appropriate measures

[4] Committee on the Rights of the Child, General Comment No. 9 (2006), The rights of children with disabilities, CRC/C/GC/9, p. 2.

[5] E.M. Chilemba, *International Law on the Rights of Children with Disabilities*, *op. cit.*, pp. 367–368.

[6] J. Karp, *Concepts underlying the implementation of the Convention on the Rights of the Child*, "Loyola Poverty Law Journal" 1998, Vol. 4, pp. 113–140 (p. 125).

[7] U. Kilkelly, *Disability and children: the convention on the rights of the child (CRC)*, [in:] G. Quinn, T. Degener (eds.), *Human rights and disability*, United Nations, Geneva 2002, pp. 191–227 (p. 193).

to ensure the inclusion of children with disabilities in the community.[8] Moreover, Article 23, the CRC's key provision for the rights of children with disabilities, emphasises special care and the provision of assistance according to available resources, which corresponds to a different vision of human rights, including social rights. However, the Committee urged states parties to treat the issue of special care and assistance for children with disabilities as a high priority and to invest in the elimination of discrimination against children with disabilities and their maximum inclusion in society to the maximum extent of available resources. Care and assistance, it stressed, are intended to ensure that children with disabilities have effective access to and benefit from education, training, health care services, convalescent services, preparation for employment, and recreational opportunities. In addressing the various articles of the Convention, the Committee would develop the measures necessary to achieve this objective (Section 14). Legal scholars recognise that the CRC framework has a number of flaws, as well. The approach adopted in the wording of Article 23 raises questions about its potential to ensure the full enjoyment of human rights by children with disabilities. The language of the provision and the General Commentary on disability are firmly rooted in a caring and medicalised approach to disability, with its emphasis on "special care", "treatment", and "rehabilitation", suggesting a tendency to treat children with disabilities as primarily requiring protective measures rather than as active rights holders.[9] While the CRC is an act that dates back to the welfarist understanding of disability, the CRC Committee has repeatedly stated in its concluding observations that the states must adopt not a welfare, but a human rights-based approach to disability.[10] However, the concluding observations do not have the same binding effect on states as the treaty's provisions do.

[8] Examples of concluding observations are cited by E.M. Chilemba, *International Law on the Rights of Children with Disabilities*, *op. cit.*, p. 365.

[9] B. Byrne, *Minding the gap? Children with disabilities and the United Nations convention on the rights of persons with disabilities*, [in:] M. Freeman (ed.), *Law and childhood studies: current legal issues Vol. 14*, Oxford University Press, Oxford 2012, pp. 419–437 (p. 424).

[10] E.M. Chilemba *International Law on the Rights of Children with Disabilities*, *op. cit.*, p. 368.

2. Rights of children with disabilities under the CRPD

An act that complements the protection of the rights of children with disabilities is the 2006 Convention on the Rights of Persons with Disabilities (CRPD), which aims to ensure the effective enjoyment of all human rights by persons (including children) with disabilities on an equal basis with others (Article 1). It explicitly treats children with disabilities as rights-holders. This fact is emphasised in Article 7(1) and Article 6(1) (in relation to girls), which recognise the right of children (including girls) with disabilities to the full enjoyment of all human rights "on an equal basis with other children".

The Convention on the Rights of the Child provides a framework for addressing the barriers faced by children with disabilities in relation to their childhood. However, it does not set out the conditions in which the barriers faced by children with disabilities due to their disability have to be addressed. The approach taken by the CRPD to ensure "the explicit application of the rights under the Convention throughout the lives of children with disabilities" is "a sign of appreciation of the 'intersection' of disability and childhood".[11] Thus, the CRPD (which, Byrne suggested, could be called the "Convention on the Rights of Children and Adults with Disabilities") provides a "remedy" for the "twofold vulnerability" (related to age and disability at the same time). Earlier core human rights treaties could not protect children with disabilities from violations of all human rights, not least because of the lack of reference to disability or a human rights-based model of disability in their provisions.[12] The "rules of the game" were designed by and for the non-disabled and adult majority.[13] The CRPD strengthens the "visibility" and presence of children with disabilities within international human rights law. It imposes clear obligations on states parties to take measures that remove barriers faced not only by persons with disabilities in general, but specifically

[11] B. Byrne, *Minding the gap?…*, *op. cit*., pp. 419–420.

[12] M.A. Stein, J.E. Lord, *Future prospects for the United Nations convention on the rights of persons with disabilities*, [in:] O.M. Arnardóttir, G. Quinn (eds.), *The UN convention on the rights of persons with disabilities: European and Scandinavian perspectives*, Martinus Nijhoff Publishers, Leiden 2009, pp. 17–40 (p. 21).

[13] B. Byrne, *Minding the gap?…*, *op. cit*., pp. 419–437 (pp. 432, 436).

by children based on both their disability and childhood. It adopts a combined approach to the rights of children with disabilities *per se*, with numerous references to the specificity of children's lives.[14]

The Convention on the Rights of Persons with Disabilities (CRPD) stipulates the rights of children with disabilities in several ways: (1) by guaranteeing non-discrimination, (2) by dedicating one of its general principles to children with disabilities, (3) by including a separate provision setting out substantive rights for children with disabilities, and (4) by setting out other general substantive rights that likewise apply to children with disabilities. An explicit reference to children with disabilities is made already in the preamble of the CRPD, where the right of all children with disabilities to enjoy all human rights on an equal basis with other children is recognised. Moreover, it acknowledges the commitments made by states parties to the CRC with regard to the rights of children with disabilities.

Furthermore, the concept of freedom from discrimination has been considerably developed in comparison to the CRC. The definition of discrimination on the grounds of disability is broadened by including the denial of reasonable accommodation as discrimination (Article 2). Non-discrimination is one of the general principles of the CRC (Article 3(b)). In addition, equality and non-discrimination form a specific substantive right (Article 5).

Next, the CRPD addresses one of its general principles exclusively to children with disabilities, recognising respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities (Article 3 (h)). A number of provisions relating to substantive rights specifically require respect for children's rights without discrimination. Separate provisions dedicated to children with disabilities are contained in Article 7. It requires state parties to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children (Section 1) and to be guided in all actions by the best interests of the child as a primary consideration (Section 2). It obliges the states to ensure that children with disabilities have

[14] Ibidem, pp. 429, 436.

the right to express their views freely on all matters affecting them, with their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right (Section 3). Article 7 of the CRPD refers to the principles of the best interest of the child and of participation expressed in the CRC, while stipulating a higher standard of right. It does not limit the exercise of the right to participation to only "a child capable of forming their own views".[15] Furthermore, Article 4(3) of the CRPD obligates states to ensure that children with disabilities are involved through their organisations in the development of policies and legislation to implement the CRPD and in decision-making processes that affect them.

In addition to Article 7 dedicated to children, the CRPD provides for the rights of girls with disabilities. States parties have an obligation to take measures to ensure the full and equal enjoyment of all human rights and fundamental freedoms by girls and women with disabilities (Article 6(1)). Taken together, Articles 6(1) and 7 serve as an interpretive tool to approach the obligations of states parties to promote, protect, and fulfil the rights of children with disabilities from a human rights-based and developmental perspective.

Finally, the CRPD grants under its general provision other specific substantive rights to all children with disabilities, treating them as rights holders.

3. Rights of children with disabilities in other acts of international law, the Council of Europe, and the European Union

The UN's general human rights treaties, in particular the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966), while relevant to the enjoyment of the rights of children with disabilities because they contain rights that should be enjoyed by all

[15] Ibidem, p. 431.

persons, including children do not include a sufficient framework to ensure full enjoyment of human rights by children with disabilities.[16] Their content does not correspond to the emerging new paradigm of disability based on human rights. General Commentaries attempted to meet it. However, they are not in a position to impose binding obligations on states parties, but merely provide "useful guidance on how to interpret" various treaty provisions. As a consequence, disability issues remained in the realm of non-binding soft law instruments, and children with disabilities continued to face serious obstacles to the full enjoyment of their rights.

Moreover, the international standard for the protection of the rights of children with disabilities includes international instruments other than the CRC which affect either directly children with disabilities or children or persons with disabilities in general, in particular the 1949 Geneva Conventions. Noteworthy in the context of accessibility for children with disabilities is the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption of 29 May 1993. It does not explicitly refer to the category of children with disabilities, but has the proviso that the report containing information on the child's identity should include, among other things, the child's and their family's health history as well as information on the child's special needs (Article 16(1a)).[17] UN organisations are actively working for children, especially UNICEF and UNESCO, but also WHO and the ILO. The result of UNESCO's activities is the 1960 Convention on Combatting Discrimination in the Field of Education. The Council of Europe conventions, which refer to children to varying degrees, pay no special attention to children with disabilities.[18] The core acts of the Council of Europe – the 1950 European Convention on Human Rights (ECHR) and the 1961 European Social Charter (ESC) – were adopted when a medical model of disability and a clear division of human rights into civil and social

[16] E.M. Chilemba, *International Law on the Rights of Children with Disabilities*, *op. cit*., pp. 362–372.

[17] For more, see: P. Wójcicka, *Prawo dziecka do wychowania w rodzinie*, [in:] E. Karska (ed.), *Prawa dziecka w prawie międzynarodowym*, Warszawa 2014, pp. 26 *et seq*.

[18] Council of Europe, The Council of Europe's Factsheet on children's rights, https://www.coe.int/en/web/children/legal-standards (accessed on: 20.07.2023).

rights prevailed. At the same time, protection against discrimination was based on a formal model of equality. Consequently, the ECHR does not contain any specific rights to protect people with disabilities. The only provision that at least mentions disability is Article 5(e), which refers to "mentally ill persons" in the context of legitimate deprivation of liberty for medical treatment. The ECHR fails to even mention disability as a characteristic covered by its non-discrimination provision. In contrast, a stipulation referring to persons with disabilities was already included in the original 1961 version of the ESC (Article 15). The Council of Europe regards the ESC as complementary to the European Convention on Human Rights in the field of economic and social rights and, at the same time, as its main treaty that safeguards the rights of the child in general. Article 15 on persons with disabilities, on the other hand, originally set out rights related to employment and vocational and social rehabilitation. The content of the 1996 revised version of the ESC was broadened towards ensuring that persons with disabilities, irrespective of their age or the nature or cause of disability, effectively exercise their right to independence, social inclusion, and participation in community life. In addition to the issues of vocational training and employment, states parties committed themselves to ensuring full integration and full participation in the life of the community, in particular through measures, including through technical assistance, aimed at overcoming obstacles to communication and movement and by enabling them to benefit from means of transport, housing, cultural activities, and entertainment. The revised article has a wider scope of application, including children with disabilities. Article 7 (right of children and adolescents to protection), Article 11 (right to health care), Article 16 (right of the family to social, legal, and economic protection), which protects the rights of children as members of the family, and Article 17 (right of children and adolescents to social, legal, and economic protection)[19] likewise can apply to them. Unfortunately, Poland has not ratified the revised version of the ESC.

[19] Council of Europe, Information Document prepared by the Secretariat of the ESC, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680474a4b (accessed on: 31.07.2023).

Notwithstanding the modest legislation for the protection of children with disabilities, several conventions have been adopted by the Council of Europe that apply to children in general and can therefore apply to children with disabilities.[20] Moreover, the Council of Europe is an organisation that monitors the situation of children and that produces studies, reports, and programmes that address a wide range of rights of children with disabilities, including the rights to inclusive education, the social inclusion of children, de-institutionalisation of children with disabilities in facilities, as well as access to cultural facilities and activities, universal design, and new technologies. Key documents of this kind in relation to children with disabilities are the Council of Europe Disability Strategy 2017–2023 and the Council of Europe Strategy on the Rights of the Child 2022–2027. Although they have no binding legal force, they provide suggestions and recommendations for the states. Furthermore, when ruling in matters of discrimination on grounds of disability under Article 14 and the Additional Protocols and when interpreting the rights of persons with disabilities, the European Court of Human Rights refers to the ESC, to the CRPD, as well as to the UN General Comments.

The protection of children as rights holders under EU law is similarly limited.[21] The European Union has no single, comprehensive piece of legislation on the protection of children's rights, nor any specific competence in this area other than the issue of their employment.[22]

It was not until the adoption of the EU Charter of Fundamental Rights that the rights of the child and the rights of persons with disabilities were specifically addressed. Article 24 of the Charter grants children the right to such protection and care as is necessary

[20] Council of Europe, Legal standards for child protection, https://www.coe.int/en/web/children/legal-standards (accessed on: 31.07.2023).

[21] C. Mik, *Prawa dzieci w UE – aspekty prawno-traktatowe*, [in:] M. Potapowicz, M. Krauzowicz, P. Przybylski (eds.), *Prawa dzieci po przystąpieniu do Unii Europejskiej*, Proceedings of the Ombudsman's conference, Warszawa, 16 June 2004, p. 33.

[22] G. Michałowska, *Międzynarodowa ochrona praw dzieci*, Warszawa 2016, pp. 194–207.

for their well-being as well as the right to express their views and have them taken into consideration in matters affecting them in accordance with their age and maturity. Above all, it stipulates that the best interests of the child be taken into account in all actions concerning children, whether taken by public authorities or by private institutions. Moreover, it provides that every child has the right to maintain a permanent personal relationship and direct contact with both parents, unless this is contrary to the child's interests. In contrast, Article 26, dedicated to persons with disabilities, is no longer so firm and merely indicates that the Union recognises and respects their right to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community. The situation changed when the European Commission adopted and ratified the 2006 Convention on the Rights of Persons with Disabilities.

However, action in favour of persons and children with disabilities has been primarily determined by successive strategies in the EU for decades: the current Strategy 2021–2030 attaches great importance to accessibility, among other things. It even identifies it as a driver of rights, autonomy, and equality. Importantly, it recognises that basic support services must include and be accessible to children with disabilities and the elderly. Thus, children, alongside seniors, have been identified as a group requiring special attention in the programming of activities and measures by states. In contrast, the first EU Strategy on the Rights of the Child (2021) is not the first programming document on children. It builds on previous legal and policy frameworks and the Commission's communications on children's rights: Towards an EU strategy on the rights of the child (2006) and An EU Agenda for the Rights of the Child (2011). Furthermore, the second European Strategy for a Better Internet for Children (BIK+) was adopted in 2022. It aims to provide support to all children and to make the digital environment diverse, inclusive, and free of stereotypes. In addition, the ICT industry should provide an inclusive environment for all, and children with disabilities should have the opportunity to play, learn, and interact online.

4. The concept and legal nature of accessibility

The cradle of the concept of accessibility is considered to be the United States, where the first legal regulation of certain aspects of accessibility emerged as early as the 1970s to protect the rights of children with disabilities, among others. The Americans Disabilities Act of 1990 is cited as the most often imitated model.[23] As a result of the permeation of legal concepts and institutions, it also began to appear in international law. Examples have been cited, for example, by the UN Committee on the Rights of Persons with Disabilities in General Comment No. 2 (2014) on Article 9 – accessibility (Section 14).[24] Some referred explicitly to accessibility requirements for children in various areas of life (e.g., General Comment No. 5 on Persons with Disabilities (1994) to the International Covenant on Economic, Social and Cultural Rights). However, the conceptualisation of accessibility is conventionally linked to the adoption by the UN General Assembly of the Resolution on the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities on 20 December 1993.[25] The Standard Rules were the first to refer to accessibility in all spheres of life – to accessibility not only of the physical environment, but also to the accessibility of information and communication, and brought the various aspects of accessibility into a single principle (Principle 5 Accessibility). They stressed that the process by which every aspect of society's organisation is made accessible is a fundamental goal of socio-economic development.

A comprehensive and, above all, binding character was given to accessibility by the Convention on the Rights of Persons with Disabilities. It gave accessibility the status of a legal principle and thus the status of international law within the framework of human rights (Article 3). The prominence of accessibility as a general principle means that it has to be applied to all rights enshrined in the

[23] M.A. Stein, *Disability Human Rights*, "California Law Review" 2007, Vol. 95, No. 1, p. 90, https://hpod.law.harvard.edu/pdf/disability-hr-stein.pdf (accessed on: 31.07.2023).
[24] CRPD/C/GC/2.
[25] A/RES/48/96.

Convention. The Convention does not provide a definition of accessibility, but develops it in Article 9 by describing the purpose of accessibility and indicating the scope, the means of achieving it, and the addressees of Article 9. The obligation to ensure accessibility is moreover highlighted in several specific provisions of the Convention that clarify the conditions for ensuring accessibility.

It should be remembered that accessibility is also a technical category. In this case, it serves to specify and meet the various measurable parameters and requirements that affect human functioning in the environment; it is a function of compliance with regulations or criteria that define a certain minimum level of solutions necessary to fully benefit persons with disabilities.[26]

Article 9 has been interpreted by the Committee on the Rights of Persons with Disabilities in General Comment No. 2 (2014) on Article 9 – accessibility[27]. Depending on the context,[28] it identified accessibility as a fundamental principle that is a part of the implementation of the other articles (point 1), a basic prerequisite for the full and equal participation of persons with disabilities in society and the effective enjoyment of all human rights and fundamental freedoms, (2) as a principle, (3) as a means, but also as (4) a human right in its own right – the "right to access" (Sections 2, 3, 14).

Emphasising accessibility as a fundamental principle involves recognising its role in the enjoyment of all CRPD rights. The other provisions of the CRPD must be interpreted and implemented in

[26] J.P.S. Salmen, *U.S. Accessibility Codes and Standards: Challenges for Universal Design*, [in:] W.F.E. Preiser, K.H. Smith (eds.), *Universal Design*, Handbook, 2001, para. 6.2, e-book; S. Iwarsson, A. Ståhl, *Accessibility, usability and universal design – positioning and definition of concepts describing person-environment relationships*, "Disability and Rehabilitation" 2003, Vol. 25, No. 2, pp. 57–66 (p. 58).

[27] CRPD/C/GC/2.

[28] General Comment No. 2 (2014) on Article 9 – accessibility, Committee on the Rights of Persons with Disabilities CRPD/C/GC/2, para. 2, 3, 14. See also: Committee on The Rights of Persons with Disabilities, Outline, Day of General Discussion on Accessibility, 7 October 2010, p. 1, https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www2.ohchr.org/SPdocs/CRPD/DGD7102010/Outline.doc&ved=2ahUKEwiX29XRmbyFAxWER_EDHbxxDYEQFnoECA4QAQ&usg=AOvVaw3hv61rHqvpiDeYAlYafwpg (accessed on: 19.02.2021).

accordance with it. In turn, accessibility seen as an essential prerequisite for ensuring equal access to human rights for persons with disabilities points to the interdependence of accessibility standards as well as equality and non-discrimination standards.[29] Accessibility and equal opportunities, respect for the developing capacities of children with disabilities, and respect for their right to preserve their identity appear side by side as general principles in the Convention (Articles 3(e), (f), and (h)), meaning that together they have an overarching role to play in the implementation of the rights and obligations under the Convention. Furthermore, their relationship is specified in Article 9 ("States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to (…)"). The relationship of accessibility and equality in the CRPD is discussed at length by A. Broderick. The standards of equality, non-discrimination, and accessibility are complementary. Measures taken to guarantee accessibility must be consistent with ensuring compliance with equality and non-discrimination standards. In turn, legal guarantees of equality and non-discrimination should be interpreted in a way that facilitates the implementation of accessibility.[30]

Moreover, accessibility is clearly linked to the concepts of participation and inclusion. Article 9 aims to enable persons with disabilities to live independently and participate fully in all aspects of life. The Committee sees it as a necessary prerequisite for not only equal, but also effective and unrestricted enjoyment by persons with disabilities of all rights and of full participation in society; it is a condition for independent living (Sections 4, 14). Caused by numerous barriers (legislative, environmental, technological, etc.), inaccessibility hinders the full and effective participation and inclusion of persons with disabilities in society, and thus their ability to live independently.

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[29] *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities*, Intersentia, Maastricht 2015, p. 139, https://cris.maastrichtuniversity.nl/en/publications/the-long-and-winding-road-to-equality-and-inclusion-for-persons-w (accessed on: 30.06.2023), pp. 240–241.

[30] A. Broderick, *The Long and Winding Road…*, *op. cit.*, p. 272.

Admittedly, nowhere in the CRPD is accessibility directly equated to the "right to access". In the course of the works on the draft Convention, it was maintained that it would not establish any new human rights, but adapt the existing ones to the situation of persons with disabilities. The rights of persons with disabilities are namely enshrined in earlier human rights treaties, but they had not been exercised or enforced with respect to this group of people.[31] Yet the position was not consistent. At other times, it was already less categorically pointed out that the Convention did not create new rights "for the most part". Considering accessibility in terms of a new human right likewise has its basis in Polish legal theory.[32]

5. The principle of accessibility in the implementation of the rights of children with disabilities

Regardless of how we characterise accessibility (although this is not without significance for how accessibility is enforced – remark by KR),[33] it is inextricably linked to all the rights set out in the Convention. Raised to the status of an international law principle, it enforces a "human rights approach" in conceptualising the guarantee of the rights of children with disabilities. All the rights, guarantees, and

[31] United Nations, Press conference on convention protecting rights of persons with disabilities, 04.02.2005, https://www.un.org/press/en/2005/Disabilities_Press_Cfc_050204.doc.htm (accessed on: 18.02.2021); E. Albin, *Universalizing the Right to Work of Person with Disabilities: An Equality and Dignity Based Approach*, [in:] V. Mantouvalou (ed.), *The Right to Work*, Oxford 2017; V. Mantouvalou (ed.), *The Right to Work*, "Hebrew University of Jerusalem Legal Studies Research Paper Series" 2015, No. 15-9, p. 7; United Nations, Convention on the Rights of Persons with Disabilities Advocacy Toolkit, "Professional Training Series" 2008, No. 15, New York–Geneva, p. 10, https://www.ohchr.org/documents/publications/advocacytool_en.pdf (accessed on: 17.02.2021).

[32] See: K. Łasak, *Dostępność usług bankowych dla osób niedowidzących i niewidomych. Uwagi na tle opinii komitetu do spraw praw osób niepełnosprawnych w sprawie Szilvia Nyusti i Péter Takâcs przeciwko Węgrom*, "Gdańskie Studia Prawnicze" 2016, No. 1, pp. 265–280 (p. 277); K. Roszewska, *Accessibility – One of the Human Rights or the Means of Their Implementation*, "Law and Bonds" 2021, No. 3(37), pp. 158–176 and the subject literature cited therein.

[33] K. Roszewska, *Accessibility…*, *op. cit.*, p. 170.

protection mechanisms established under the CRPD apply to children with disabilities. At the same time, the rights enshrined in the CRC have to be read taking into account the guarantees under the CRPD.[34] Each of the rights of children with disabilities is reinforced by the principle of accessibility under Article 9 CRPD. The full enjoyment of human rights by children with disabilities on an equal basis with other children means ensuring access to all their rights in all areas of life. Ensuring access no longer requires only non-discriminatory laws and the creation of equal opportunities. Now, it requires also the active breaking down of barriers, not only architectural barriers, not only in the material world, but also social barriers, barriers in the consciousness of the general public, even the "fight against ableism", against the long history of exclusion.

The ability to enjoy some rights is strongly correlated with the provision of others. In this sense, accessibility is an emanation of the concept of the indivisibility of human rights and serves as a real levelling of opportunities. The provision of access in one area (e.g., education in the case of children) is conditional on accessibility in others (transport, architectural accessibility of school buildings, forms of the organisation of activities, etc.). In order to enjoy, for example, the right to education on an equal footing with their peers, children with disabilities may require services that their peers do not (transport services, on-site services, but also social services, given that families of children with disabilities are more likely to experience poverty).

Measures taken to ensure accessibility primarily include eliminating barriers and obstacles to accessibility, planning at the earliest possible stage for accessible solutions, implementing minimum standards and guidelines on the accessibility of facilities and services that are generally available or universally provided, ensuring that private institutions that offer facilities and services that are generally available or universally provided take into account all

[34] Cf. Committee on the Rights of the Child and Committee on the Rights of Children with Disabilities, Joint Statement The rights of children with disabilities, 23 August 2021, pp. 1–2, https://www.ohchr.org/en/treaty-bodies/crpd/statements-declarations-and-observations (accessed on: 30.06.2023).

aspects of their accessibility for persons with disabilities, and taking other measures specified in Article 9 and in the specific provisions. An invaluable achievement of the legal construction of the accessibility principle is the explicit list of the areas of accessibility and the facilities or services to which the accessibility requirement applies. Moreover, Article 9 lists ways to ensure accessibility, such as appropriate signage in buildings and other facilities as well as the provision of various forms of assistance and intermediation by other persons or animals, including guides, readers, and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public. It requires states parties to promote other appropriate forms of assistance and support to persons with disabilities, undertake or support research into affordable accessibility and the use of new technologies, including information and communication technologies, mobility aids, devices and assistive technologies (Article 4(1) (f–i)).

In its General Comment No. 2, the Committee stressed what follows from the wording of Article 9, namely that the legal status of entities, buildings, transport infrastructure, vehicles, information, communication, and services is irrelevant to the obligation to ensure accessibility. Goods, products, and services offered openly or provided to the public must be accessible to all, regardless of whether the owner or provider is a public authority or a private company. Denial of access should be considered a discriminatory act, irrespective of whether the perpetrator is a public or private entity (Section 13). The responsibility for the non-availability of facilities, goods, and services offered openly or provided to the public lies with the state.[35] While it is more difficult to enforce this obligation when the state is not a party to the Optional Protocol, it is nevertheless not impossible to enforce before a national judicial authority or the Court of Justice.

The Convention on the Rights of Persons with Disabilities explicitly refers to the rights of children with disabilities in a number of places. These are mentioned in the preamble, the general

[35] Case *Sz. Nyusti and P. Takács v. Hungary*, Committee on the Rights of Persons with Disabilities, Communication No. 1/2010, 16 April 2013, CRPD/C/9/D/1/2010.

principle (Article 3(h)), provisions on: general obligations (Article 4(3)), children with disabilities (Article 7), and awareness raising (Article 8(2)(b)), specific provisions on: freedom from exploitation, violence, and abuse (Article 16(5)), freedom of movement and citizenship (Article 18(2)), respect for home and family (Article 23), education (Article 24(2)(a) and (3)(c)), health (Article 25(b)), and participation in cultural life, recreation, leisure, and sport (Article 30(5)(d)). At other times, the Convention requires the states to take into account the "age-related needs" of persons with disabilities. The requirement to take age-related needs into account is contained in the preamble, in provisions that extend to children with disabilities (Article 7) and awareness-raising (Article 8(1)(b) and (2)(a)), and furthermore in provisions concerning the right to justice (Article 13(1)), freedom from exploitation, violence, and abuse (Article 16(2) and (4)), and respect for home and family (Article 23(1)). This means that the states must take measures that take into account the childhood and age of children with disabilities when implementing the rights enshrined in the CRPD. Furthermore, some provisions pay particular attention to gender, which is relevant to the implementation of girls' rights. These are, in addition to the provision relating to women with disabilities (Article 6), the provisions on awareness raising (Article 8(1)(b)), freedom from exploitation, violence, and abuse (Article 16), and health (Article 25(1)).

The Committee on the Rights of Persons with Disabilities has not yet commented on the provision of Article 7 in the form of a General Comment. Still, it has expressed its view on several occasions in concluding observations addressed to the EU, among others. In these, it pointed to the need for a comprehensive strategy, policy, or law that facilitates full integration of children with disabilities into all aspects of the community and life through de-institutionalisation and other measures (1), the need for appropriate mechanisms to ensure the meaningful and active participation of children with disabilities, either themselves or through their representatives, in decision-making processes covering all issues that concern or affect them (2), and the need to take measures to ensure that children with

disabilities fully enjoy their human rights on an equal basis with other children (3).[36]

In turn, in addition to the particular vulnerability of children with disabilities to abuse and discrimination, including in particular certain groups such as girls, children with intellectual or psychosocial disabilities and those requiring high levels of support, the CRC Committee and the CRPD Committee paid particular attention in their joint statement[37] to the right to inclusive education and the right to family life. Inclusive education requires the adaptation of the education system to the specific educational requirements, abilities, potentials, and preferences of each child. Moreover, it requires the provision of early intervention, accessible learning environments, and individual support at all stages of the educational process. The committees confirmed that the right to quality inclusive education is not compatible with maintaining two education systems: a mainstream education system and a special, segregated education system. In the case of the right to family life, on the other hand, the Committees called on states parties to end with placing children with disabilities in institutions on the basis of disability and to promote the development of family support for children in the community. They recalled the obligation to adopt a deinstitutionalisation strategy.

UNICEF likewise presented a perspective encompassing the full cross-section of the human rights of children with disabilities, including consideration of the lack of access to basic goods in developing countries (drinking water, food, shelter), in its Disability Inclusion Policy and Strategy.[38] Accessibility and reasonable accommodation is one of its objectives (see pp. 70–78). UNICEF declared that it would encourage governments at all levels to integrate accessibility and non-discrimination for children with disabilities into

[36] Examples of concluding observations are cited in: E.M. Chilemba, *International Law on the Rights of Children with Disabilities*, *op. cit*.

[37] Cf. Committee on the Rights of the Child and Committee on the Rights of Children with Disabilities, Joint Statement The rights of children with disabilities, 23 August 2021, https://www.ohchr.org/en/treaty-bodies/crpd/statements-declarations-and-observations (accessed on: 30.06.2023), p. 3.

[38] United Nations Children's Fund, Disability Inclusion Policy and Strategy (DIPAS) 2022–2030, UNICEF, New York, December 2022.

legislation and practice, including through capacity building with respect to service providers (p. 4).

Specific consequences for member states have been caused by the adoption of the Convention by the EU. In the opinion of the CJ, without questioning the validity of the earlier Equality Directives, they should, as far as possible, be interpreted in accordance with the Convention, which forms an integral part of EU law (CJ judgments in Joined Cases C-335/11 and C-337/11 and C-363/12, C-406/15). There are a number of sections of EU law which, prior to the signing of the Convention, regulated the rights of persons with disabilities, including those relating to accessibility.[39]

The EU's treatment of accessibility was criticised by the Committee on Persons with Disabilities during its evaluation of the first report on the implementation of the Convention, as it expressed concerns about the implementation of Article 9 of the CRPD.[40] These concerns remain valid today. A step towards implementing the principle of accessibility in line with the Convention was to be taken with the Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services,[41] called the European Accessibility Act (EAA). The Directive refers to the CRPD's understanding of accessibility and specifies that accessibility and universal design should be interpreted in accordance with General Comment No. 2: Article 9, Accessibility (2014) (Section 50 of the Preamble). Unfortunately, it has a very narrow material scope of regulation. It is worth mentioning that when referring to the implementation of Article 5 of the CRPD, the Committee on Persons with Disabilities expressed concern that the Equality Directives do not explicitly prohibit discrimination on the grounds of disability and do not provide reasonable accommodation for persons with disabilities with regard to social protection, health care, rehabilitation, education, and the provision

[39] Annex II to Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities; 2010/48/EC.

[40] CRPD/C/EU/CO/1, Section 18.

[41] OJ EU L 151/70.

of goods and services such as housing, transport, and insurance. In view of this, it recommended in its concluding observations to the European Union report of 2 October 2015 that it adopt a horizontal directive on equal treatment that would extend protection against discrimination to persons with disabilities, including through the provision of reasonable accommodation in all areas of competence.[42] The EU has not met this obligation.[43]

The relationship between international human rights instruments and EU law is undoubtedly historically loaded and quite complex. This ranges from the ambivalent attitude towards the regulation of human rights in the first acts establishing the Community, to the difficulty of accepting the concept of indivisibility of human rights in EU regulations, to the issue of the EU's various competences, which in turn affects the Convention's implementation capacity at EU level, as well as its ability to affect member state legislation.

In addition to the EAA Directive, it is worth pointing to Directive 2016/2102 on the accessibility of websites and mobile applications of public sector bodies, public procurement directives that require accessibility requirements to be taken into account, or Regulation (EU) 2017/1563 of the European Parliament and of the Council and the Directive (EU) 2017/1564 of the European Parliament and of the Council for the implementation of the Marrakesh Treaty in EU law.

6. Accessibility law in Poland in the implementation of the rights of children with disabilities

The constitutional standard for the protection of children with disabilities in Poland is based on a welfarist approach to the rights of the individual child. Its protection is included in the list of economic,

[42] Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, para. 18, p. 3.

[43] In the following reporting period, the Committee therefore inquired from the EU about the horizontal directive and the possibility of extending the scope of accessibility to areas not covered by the EAA Directive. (List of issues prior to submission of the 2nd and 3rd periodic reports of the European Union, Committee on the Rights of Persons with Disabilities, 20 April 2022, CRPD/C/EU/QPR/2-3).

social, and cultural rights and freedoms. The Constitution provides explicitly for the rights of the child only in the case of a child deprived of parental care. Then "the child has the right to care and assistance from public authorities". In principle, it says that it is the Republic of Poland that ensures the protection of their rights, and everyone has the right to demand that the public authorities protect the child from violence, cruelty, exploitation, and corruption of the child's morals. However, the Constitution does, to some extent, incorporate the standard under the CRC on the principle of participation. In the course of determining the rights of the child, public authorities and those responsible for the child are obliged to listen to (absolute obligation) and, as far as possible, to take into account the child's view (relative obligation). The Constitutional Tribunal confirms that the child's right to be heard is an "intrinsic constitutional value".[44]

The constitutional standard of protection for persons with disabilities is even poorer than this. Public authorities should, in accordance with the law, provide assistance to persons with disabilities in securing existence and preparing for work and social communication (Article 69), and are obliged to provide them with special health care, just like children, pregnant women, and the elderly (Article 68(3)).

However, Poland is bound by certain international standards for the protection of human rights, including the protection of children with disabilities. In particular, it has ratified the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Convention on the Protection of the Rights of the Child, the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms), and the European Social Charter in its original version, as well as the Convention on the Protection of the Rights of Persons with Disabilities, which has been the impetus for many legislative

[44] Judgment of the Constitutional Tribunal of 21.01.2014, SK 5/12, OTK-A 2014/1/2. See commentary in: M. Florczak-Wątor, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd Edition, LEX/el. 2021, Article 72.

changes.[45] In turn, EU membership involved Poland incorporating the common policy on persons with disabilities. Unfortunately, the revised version of the ESC and the Optional Protocol to the CRC on the notification procedure still await ratification. Poland has even omitted to sign the Optional Protocol to the CRPD.

The statutory regulations concerning children with disabilities, ranging from the issue of determining disability, special educational needs, and other disability-related rights to the issue of accessibility, are very much fragmented. As a result, a whole range of public institutions are competent for different areas of the implementation of the rights of children with disabilities. Attempts to at least coordinate them at the central level have so far been unsuccessful, despite the existence of such a body as the Government Representative for Persons with Disabilities. Coordination measures regarding accessibility of public entities have recently been undertaken by the minister responsible for regional development on the basis of the Act of 19 July 2019 on ensuring accessibility to persons with specific needs.[46] The Act sets out measures for ensuring accessibility to these persons and the obligations of public entities in this regard. The drafters assumed that accessibility should be a horizontal principle underlying the implementation of all public policies. The law undoubtedly will contribute to the gradual improvement of the accessibility of public institutions. However, the objective to render its scope systemic has not been achieved. Already Article 1(2) makes a reference in the area of digital accessibility to the Act of 4 April 2019 on the digital accessibility of websites and mobile applications of public institutions.[47] It ignores transport accessibility mentioned in the CRPD. The legislature has not brought order to the legislation in the area of accessibility law. Only to a narrow

[45] K. Roszewska, *Proces wdrażania konwencji o prawach osób niepełnosprawnych*, [in:] A. Kalisz (ed.), *Prawa człowieka. Współczesne zjawiska, wyzwania, zagrożenia. Vol. 1*, Sosnowiec 2015, pp. 107–108; K. Roszewska, *The Implementation of the Rights of Persons with Disabilities to Employment on the Basis of the Convention on the Rights of Persons with Disabilities (CRPD)*, "Białostockie Studia Prawnicze" 2019, Vol. 24, No. 2, pp. 92–97.

[46] Consolidated text, Journal of Laws of 2022, item 2240.

[47] Consolidated text, Journal of Laws of 2023, items 82, 511.

extent does the law apply to non-governmental actors. Specific obligations concerning accessibility continue to follow from many other provisions assigned to specific areas of accessibility (architectural accessibility, digital accessibility, communication accessibility, transport accessibility) or specific categories of rights, goods and services, such as education, work, health, transport, tourism, postal services, commercial services, access to cultural goods, etc.[48] The implementation of the provisions on accessibility standards and reasonable accommodation has been deficient. The legislature introduced so-called minimum accessibility requirements instead of a legal framework for implementing full accessibility. Moreover, the instrument of reasonable accommodation was treated as an alternative to universal design.[49] An important element of the Act is the elevation of the government's Accessibility Plus programme to a permanent statutory solution.

The proposed law on the accessibility of certain products and services likewise has a narrow scope of impact, with the EU being largely responsible for that fact. After all, the law implements the EAA Directive.

7. Recommendations

Many of the regulations already implemented certainly contribute to the realisation of the accessibility principle on a daily basis. However, the implementation of the accessibility principle to the extent required by the CRPD has still not taken place. A number of recommendations are listed below, among which are *de lege ferenda* demands and demands for changes in public policy towards children with disabilities. These are of a more universal nature, referring to legal acts and public policies horizontally. Specific recommendations

[48] Selected specific rights of children with disabilities will be presented and published in a later phase of the project.

[49] For more, see: K. Roszewska (ed.), *Ustawa o zapewnianiu dostępności osobom ze szczególnymi potrzebami. Komentarz*, LEX/el. 2021, commentary do Article 2 (Section 5) and to Article 4.

on specific rights will be included in papers on selected human rights of children with disabilities in the further course of the Legal Protection of Children with Disabilities study.

The following recommendations (below) are motivated by the recommendations of the UN Committee on the Rights of the Child and the UN Committee on the Rights of Persons with Disabilities as well as by the identified gaps in Poland's implementation of the principle of accessibility with regard to children with disabilities.

DE LEGE FERENDA DEMANDS

1. **Implement accessibility in accordance with Article 9 of the CRPD and General Comment No. 2, Article 9, Accessibility.** General Comment No. 2 provides guidance on the implementation of accessibility. In terms of specific rights, General Comments on those specific rights can likewise be consulted (for children, in particular: General Comment No. 3 (2016) on Article 6 – women and girls with disabilities; General Comment No. 4 (2016) on Article 24 – the right to inclusive education; General Comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention). Implementing accessibility entails:
   a) adopting horizontal national regulations (legal frameworks) covering all the areas of accessibility identified in the CRPD with the obligation to take accessibility into account at every stage, from design to development to implementation;
   b) extending accessibility obligations to private entities;
   c) implementing reasonable accommodation in national law in a broad sense,[50] with a clear indication that the refusal to apply it constitutes discrimination;
   d) ensuring that regulations take into account the impact of accessibility on the rights of children with disabilities;

[50] Cf. A. Błaszczak, *Efektywność środków ochrony przed dyskryminacją w Polsce*, "Przegląd Prawa Publicznego" 2015, No. 6, p. 46.

e) streamlining and harmonising existing regulations in view of their considerable fragmentation;
f) putting in place an effective legal framework for monitoring the provision of and compliance with accessibility standards and monitoring sanctions for its non-implementation or non-application; the states are required to develop an effective monitoring framework and monitoring bodies with adequate capacity and competence;[51] the monitoring provided for in the Accessibility Act (2019) *vis-à-vis* public entities in ensuring minimum requirements under the Act is not exhaustive of the actions that should be taken under the CRPD.

2. **Adopt accessibility standards for all areas of the lives of children with disabilities at the national and regional level in line with the CRPD.** Accessibility standards are key to implementing the principle of accessibility. Without them, human rights remain "toothless". In addition to the implementation of a legal framework for accessibility in national law, the CRPD requires the development and adoption of appropriate accessibility standards (Article 9). Accessibility standards should be implemented both nationally and locally (and even at the level of institutions related to the realisation of specific rights)[52] and should include private actors. The Accessibility Act (2019) does not provide for specific measures for the adoption of Polish accessibility standards, nor does it impose deadlines for their implementation. The adoption of national accessibility standards and organisational solutions for the quality of public services is planned in the government's Accessibility Plus Programme.
3. **Implement the European Disability Act Directive.** The prepared draft implementation of the directive (Draft law of 24.03.2022 on the accessibility of certain products and services)[53] has not

[51] General Comment No. 2 (2014) on Article 9 – accessibility, CRPD/C/GC/2, p. 10.
[52] General Comment No. 4 (2016) on Article 24 – the right to inclusive education, CRPD/C/GC/4, p. 8.
[53] Number on the list of legislative works of the Council of Ministers UC119.

been submitted to the Sejm. The deadline for implementation of the EAA Directive was June 2023.

4. **Ratify the European Social Charter (Revised) of 1996.** Poland has signed the revised version of the ECS, but has not ratified it yet.
5. **Ratify the Optional Protocol to the CRC on a communications procedure and sign and ratify the Optional Protocol to the CRPD.** On this basis, the state party recognises the jurisdiction of the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, respectively, to receive and consider communications of individuals or groups of individuals under their jurisdiction who claim to be victims of a violation of the Convention by the state party.
6. **Reform the disability and special educational needs assessment systems.** The community of persons with disabilities has been calling for years for a reform of many disability assessment systems in Poland, for their unification and simplification, and for linking them with functional assessment in order to provide fair and adequate access to services and benefits.

PUBLIC POLICY TOWARDS CHILDREN WITH DISABILITIES

7. **Identify existing gaps in all areas of accessibility identified in the Convention** that impede the enjoyment of human rights by children with disabilities.
8. **Clearly define the responsibilities of the various authorities** (including regional and local authorities) **and actors** (including private actors) that should be exercised to ensure accessibility for children with disabilities. This is required by the Committee on the Rights of Persons with Disabilities in General Comment No. 2 (Section 24). It is also of great importance to develop and strengthen the competences of local authorities responsible for adopting, applying, and monitoring accessibility standards at the local level.
9. **Identify the group persons with disabilities in the form of children with disabilities in all strategies that affect them, in particular the Disability Strategy 2021–2030**, and implement the

EU Strategy on the Rights of the Child.[54] In a number of concluding observations, the CRC Committee insists on measures such as a comprehensive strategy, policy, or law to facilitate the full inclusion of children with disabilities, including children with intellectual and psychosocial disabilities, in all areas of public life as well as on the adoption of a human rights-based approach to disability in conceptualising the rights of children with disabilities.[55] This is likewise pointed out by the CRPD Committee in General Comment No. 2. EU policy documents confirm that specific actions should target children with disabilities as a particularly vulnerable group at risk of violation of their rights.

10. **Support families of children with disabilities in line with the human rights paradigm as adopted in the CRPD and in a way that ensures the best interests of the child as well as their development and participation in line with the CRC.** The impact on children's enjoyment of their rights and their subsequent self-reliance and independence depend to a large extent on the family's commitment, competence, capacity, and resources. Families with a child with a disability are at greater risk of poverty. They require not only support in the form of cash benefits, but also the provision of universal access to public services (respite care, support in the child's treatment and rehabilitation process, counselling, psychological care, etc.). As the child grows in maturity and develops autonomy, assistive services should be provided for children to participate fully and independently in the life of their peers.
11. **Collect data on children's disabilities pursuant to Article 31 of the CRPD.** The Polish Central Statistical Office expanded the areas of research to include the area of disability a few years ago. However, the data collected is still selective and too general.

[54] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. EU strategy on the rights of the child, 24/03/2021, COM (2021) 142 final.

[55] E.M. Chilemba, *International Law on the Rights of Children with Disabilities*, *op. cit.*, p. 366.

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The Rights of Participation of Children with Disabilities in Cross-Border Family Matters

I. Introduction

According to the General comment No. 9 on the rights of children with disabilities issued in 2006, the UN Committee on the Rights of the Child (hereinafter: Committee) has estimated that there are 500–650 million persons with disabilities in the world, approximately 10 percent of the world's population, 150 million of whom are children.[1] This number has since grown considerably, along with the growth of the Earth's population.

According to a new UNICEF's report (hereinafter: UNICEF's report) the number of children with disabilities globally is estimated at almost 240 million. Children with disabilities are disadvantaged compared to children without disabilities on most measures of child well-being, the report says. UNICEF's report includes internationally comparable data from 42 countries and covers more than 60 indicators of child well-being – from nutrition and health, to access to water and sanitation, to education, and protection from violence and exploitation. These indicators are disaggregated by their functional difficulty type and severity, the child's gender, economic status, and country. The report makes clear the barriers children

[1] UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006) – The rights of children with disabilities, https://www.refworld.org/docid/461b93f72.html (accessed on: 05.05.2023).

with disabilities face to participating fully in their societies and how this often translates into negative health and social outcomes.[2]

This paper deals with only a small and perhaps special part of the rights of children with disabilities: the right of children with disabilities to participate in civil proceedings. In the study, we first examine the international legal regulatory framework of the child's right to participate. We deal with relevant provisions of the most significant UN conventions: the Convention on the Rights of the Child (hereinafter: CRC) and the Convention on the Rights of Persons with Disabilities (hereinafter: CRPD). In addition, we will analyze the relevant documents of the Council of Europe: the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice,[3] the European Convention on the Exercise of Children's Rights (hereinafter: the ECCR) and the ongoing Draft Recommendation on the protection of the best interests of the child and his or her rights in parental separation proceedings.[4]

The EU legislation is also determined by definition within the international legal framework mentioned above, but we can find specific provisions on the participation of the child in both primary and secondary EU law. In the study, we focus on the provisions and judicial practice of the Charter of Fundamental Rights of the European Union as well as the relevant provisions of the Brussels IIb Regulation from the point of view of the participation of children with disabilities in civil proceedings.[5]

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[2] Seen, counted, included, Using data to shed light on the well-being of children with disabilities, United Nations Children's Fund (UNICEF), November 2021, New York, https://www.unicef.org/press-releases/nearly-240-million-children-disabilities-around-world-unicefs-most-comprehensive (accessed on: 15.05.2023).

[3] Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies.

[4] For more about this issue, see: https://www.coe.int/en/web/cdcj/cj/enf-ise (accessed on: 15.05.2023).

[5] Council regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).

II. Definition of disability

At the beginning of the study, we have to deal with the concept of disability and its definitions, since it is essential to define it from the point of view of the participation of disabled children in civil proceedings. In judicial practice, it was a problem for a long time that neither the European Court of Human Rights (hereinafter: the ECtHR) nor the Court of Justice of the European Union (hereinafter: the CJEU) defined the concept of disability. Because of the nature of the CJEU's role, national courts frequently determined what constitutes a disability and present it as part of the factual background to disputes they refer to the CJEU.[6]

Article 1 of the CRPD defines the concept of disability. According to this, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

According to the report by UNICEF, disability is a complex and evolving concept, involving aspects of body function and structure (impairments), capacity (measured by the ability to carry out basic activities without the benefit of assistance in any form), and performance (measured by the individual's ability to carry out these same basic activities using assistance). As stated in the CRPD, disability stems from the interaction between certain conditions or impairments and an unaccommodating environment that hinders an individual's full and effective participation in society on an equal basis with others. The framework of the International Classification of Functioning, Disability and Health (hereinafter: the ICF) relies on a three-level model to describe the concept of disability.

[6] Handbook on European non-discrimination law 2018 Edition, European Union Agency for Fundamental Rights and Council of Europe, Publications Office of the European Union, Luxembourg 2018, pp. 182–183, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf (accessed on: 15.05.2023).

According to the ICF, disability can occur as:

i. an impairment in body function or structure (for example, a cataract or opacity of the natural lens of the eye, which prevents the passage of rays of light and impairs or destroys sight);
ii. a limitation in activity (for example, low vision or inability to see, read or engage in other activities);
iii. a restriction in participation (for example, exclusion from school or participation in other social, recreational or other events or roles).

The ICF framework defines disability within a *biopsychosocial model*, integrating factors pertaining to both the individual and his or her environment. In contrast, the *medical model* defines disability as a problem resulting from a medical condition. Awareness of the important role of the social context in defining disability led to the development of the *social model* of disability, which defines disability not merely as a medical condition or diagnosis but rather as a failure of the policy, cultural and physical environments of societies to accommodate differences in function.[7]

In case C-13/05 Chacón Navas,[8] the CJEU interpreted the concept of disability under Directive 2000/78/EC in a way close to a medical model of disability. However, the EU became party to the CRPD, which is now a reference point for interpreting EU law relating to discrimination on the grounds of disability.[9] The CJEU stated that "Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that of the CRPD". Consequently, the CJEU refers to the definition of disability as provided in the CRPD, which reflects the social model of disability.[10]

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[7] Seen, counted, included…, *op. cit.*, p. 10.

[8] CJEU, C-13/05, Sonia Chacón Navas v. Eurest Colectividades SA (GC), 11 July 2006.

[9] See more: CJEU, C-312/11, European Commission v. Italian Republic, 4 July 2013; CJEU, C-363/12, Z. v. A Government department and the Board of Management of a Community School (GC), 18 March 2014; CJEU, C-356/12, Wolfgang Glatzel v. Freistaat Bayern, 22 May 2014; CJEU, C-395/15, Mohamed Daouidi v. Bootes Plus SL and Others, 1 December 2016; CJEU, C-406/15, Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol, 9 March 2017.

[10] Handbook on European non-discrimination law 2018 Edition, *op. cit.*, pp. 182–183.

III. Briefly about the participation rights

In the relevant literature, the majority of authors consider the child's right to be heard in Article 12 of the CRC to be the *most significant participation right*. The CRC itself does not use the word "participation" in this Article. Its use is explained by the Committee in its General Comment on Article 12.[11]

Participation rights are possessed by individual children, by groups of children – such as disabled children – in respect of decisions which affect them, and by all children collectively.[12] They have both a social and political aspect, requiring that children be encouraged and enabled to engage both in society, broadly understood, and in democratic processes. Other "participation rights" are phrased as freedoms: of expression (Article 13 of the CRC); thought, conscience and religion (Article 14); and association and peaceful assembly (Article 15). Supporting these primary participation rights, are rights to privacy (Article 16) and of access to media and information (Article 17). Participation is also emphasized as an aspect of other rights, such as the "right to participate fully in cultural life and the arts" provided by Article 31, and specific groups are provided with bespoke participation rights, including those of disabled children, as already mentioned (Article 23) and children belonging to an indigenous minority (Article 30).[13]

[11] Ch. McMellon, K.M. Tisdall, *Children and Young People's Participation Rights: Looking Backwards and Moving Forwards*, "The International Journal of Children's Rights", 10 March 2020, p. 160.

[12] The Commission specifically highlights this interpretation in its General comment No. 12 (2009) in paragraphs 9–10. Accordingly, the general comment is structured according to the distinction made by the Committee between the right to be heard of an individual child and the right to be heard as applied to a group of children (e.g., a class of schoolchildren, the children in a neighbourhood, the children of a country, children with disabilities, or girls). This is a relevant distinction because the Convention stipulates that States parties must assure the right of the child to be heard according to the age and maturity of the child. The conditions of age and maturity can be assessed when an individual child is heard and also when a group of children chooses to express its views.

[13] R. Sandland, *A Clash of Conventions? Participation, Power and the Rights of Disabled Children*, "Social Inclusion" 2017, Vol. 5, Issue 3, p. 99.

IV. The child's right of participation at international level

Children's right to participate is multifaceted.[14] This means children's participation in all matters affecting them, such as family decisions, school, community affairs and in civil court proceedings. The latter is otherwise known as "the child's right to be heard". This is crucial for the realization of children's rights and one of the basic principles of the CRC.

In this study, I will only analyze the participation of children in civil proceedings. The child's right to participate in the procedures affecting him or her can be derived from the principle of the right to a fair trial under Article 6 of the European Convention on Human Rights.

1. THE PRINCIPLE OF THE RIGHT OF THE CHILD TO BE HEARD IN CRC

The CRC is the cornerstone instrument promoting children's rights at the international level. The CRC lays down social, civil, economic, and political standards for the protection of children's rights. It contains a set of rules and principles that guide its signatories to develop a comprehensive and coherent framework reflecting child-specific rights. It also provides for a general definition of a child as "every

[14] For more about participant's rights, see: B. Percy-Smith, N. Patrick (eds.), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice*, Routledge, London–New York 2010; A.M. Callus, R. Farrugia, *The Disabled Child's Participation Rights*, Routledge, London–New York 2016; A. Arstein-Kerslake, E. Flynn, *The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A roadmap for equality before the law*, "The International Journal of Human Rights" 2016, Vol. 20, Issue 4, pp. 471–490; L. Lundy, *Voice is not enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child*, "British Educational Research Journal" 2007, Vol. 33, Issue 6, pp. 927–942; Ch. McMellon, K.M. Tisdall, *Children and Young People's Participation Rights…*, *op. cit*.

human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".[15]

Article 12 of the CRC provides for the child's right to participate. According to Article 12 of the CRC:

> (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Committee in its General comment of No. 12 (2009) on the rights of the child to be heard found that Article 12 of the CRC is a unique provision in a human rights treaty; it addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights. Paragraph 1 assures to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with their age and maturity. Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.[16]

The Committee has identified that Article 12 as one of the four general principles of the CRC, the others being the right to non-discrimination, the right to life and development, and the primary

[15] EU Framework of Law for Children's Rights. Policy Department C – Citizens' Rights and Constitutional Affairs, European Parliament, Brussels 2012, p. 8.

[16] UN Committee on the Rights of the Child, General comment No. 12 (2009) – The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 1, https://www.refworld.org/docid/4ae562c52.html (accessed on: 10.06. 2023).

consideration of the child's best interests, which highlights the fact that this Article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.[17]

1.1. *The interpretation of child's rights to be heard on Article 12 of the*

The Committee's General comments and research by children's rights organizations analyzed in detail Article 12 of the CRC and gave details on its interpretation. In the following, we summarize their main statements.

The Committee has consistently emphasized that the child must be regarded as an active subject of rights (active participants) and that a key purpose of the Convention is to emphasize that human rights extend to children. The rights of the child set out in the two paragraphs of Article 12 do not provide the right to self-determination but concern involvement in decision-making. The significance of Article 12 of the Child Convention is that it not only requires that children be assured of the right to express their views freely but also that they should be heard and that their views be given "due weight". The Committee has rejected what it termed "the charity mentality and paternalistic approaches" to children's issues ("the parent knows what is good for the child").[18]

The Committee emphasizes that it is not enough that legislation should establish children's rights to be heard and have their views given due weight; children must be made aware of their rights. The right to information is a prerequisite for participation.[19]

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[17] Ibidem.

[18] Implementation Handbook for the Convention on the Rights of the Child, Fully Revised Third Edition, United Nations Children's Fund, Geneva 2007, pp. 149–150, https://www.unicef.org/media/96496/file/Implementation%20Handbook%20for%20the%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf (accessed on: 10.06.2023).

[19] Ibidem, pp. 152 and 159, https://www.unicef.org/media/96496/file/Implementation%20Handbook%20for%20the%20Convention%20on%20the%20Rights%20of%20the%20Child.pdf (accessed on: 10.06.2023).

In its General Comment No. 12, the Committee emphasizes that the legal term "shall assure" in Article 12 leaves no leeway for State parties' discretion. Accordingly, States parties are under a strict obligation to undertake appropriate measures to fully implement this right for all children.

States parties should assure the right to be heard to every child "capable of forming his or her own views". This phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity. The Committee emphasizes that Article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him.[20]

How does the Committee interpret the wording that "the child's views must be given due weight in accordance with the age and maturity of the child"? The interpretation of maturity can be an important help in terms of taking into account the views of children with disabilities.

The Committee found that maturity refers to the ability to understand and assess the implications of a particular matter, and must therefore be considered when determining the individual capacity of a child. Maturity is difficult to define; in the context of Article 12 of the CRC, it is the capacity of a child to express her or his views on issues in a reasonable and independent manner. The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the

[20] UN Committee on the Rights of the Child, General comment No. 12 (2009) – The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 19–21, https://www.refworld.org/docid/4ae562c52.html (accessed on: 10.06.2023).

child, the more relevant the appropriate assessment of the maturity of that child.[21]

General comment No. 12 also made it clear that the wording of paragraph 2 of Article 12, that "the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child" must apply to all relevant procedures without any limitation. It is important to emphasize that the right to be heard applies both to proceedings which are initiated by the child, as well as to those initiated by others which affect the child, such as parental separation or adoption.[22]

General comment No. 12 highlights that divorce and separation proceedings are among those civil proceedings in which the child's views are of great importance. It found that in cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts. Issues of maintenance for the child as well as custody and access are determined by the judge either at trial or through court directed mediation. Many jurisdictions have included in their laws, with respect to the dissolution of a relationship, a provision that the judge must give paramount consideration to the "best interests of the child". For this reason, all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes. Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as capable of expressing her or his own views. The Convention, however, anticipates that this matter be determined on a case-by-case basis, since it refers to age and maturity, and for this reason requires an individual assessment of the capacity of the child.[23]

[21] Ibidem, para. 30.
[22] Ibidem, para. 33.
[23] Ibidem, para. 51–52.

1.2. *Article 12 in light of Article 2 of the CRC*

This explanation is of outstanding importance from the point of view of the topic of this study. According to Article 2 of the CRC, the "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".

Based on Article 2 of the CRC the rights of the child to be heard must be guaranteed regardless of disability, so the prohibition of discrimination must apply whatever the form of their disability.

In its General comment No. 12. the Committee emphasizes that the right to non-discrimination is an inherent right guaranteed by all human rights' instruments including the CRC. According to Article 2 of the Convention, every child has the right not to be discriminated against in the exercise of his or her rights, including those provided under Article 12. The Committee stresses that States parties shall take adequate measures to assure to every child the right to freely express his or her views and to have those views duly taken into account without discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. States parties shall address discrimination, including against vulnerable or marginalized groups of children, to ensure that children are assured their right to be heard and are enabled to participate in all matters affecting them on an equal basis with all other children. The Committee welcomes the obligation of States parties in Article 7 of the CRPD to ensure that children with disabilities are provided with the necessary assistance and equipment to enable them to freely express their views and for those views to be given due weight.[24]

According to the General comment of Committee on the Rights of the Children No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, the right to

[24] Ibidem, para. 75 and 78.

non-discrimination is not a passive obligation, thus it prohibits all forms of discrimination in the enjoyment of rights under the CRC. It requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.[25] According to this general comment, among the elements to be taken into account when assessing the child's best interests is their vulnerability, including disability.

In accordance with the provision of the CRC cited above, the Committee in its General comment No. 9 (2006) the rights of children with disabilities found, that Article 2 of the CRC requires States parties to ensure that all children within their jurisdiction enjoy all the rights enshrined in the Convention without discrimination of any kind. This obligation requires States parties to take appropriate measures to prevent all forms of discrimination, including on the grounds of disability. This explicit mention of disability as a prohibited ground for discrimination in Article 2 is unique and can be explained by the fact that children with disabilities belong to one of the most vulnerable groups of children. It has been therefore felt necessary to mention disability explicitly in the non-discrimination article of the CRC.[26]

According to Article 23 of the CRC, the States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure the child's active participation.

2. DISABLED CHILDREN'S RIGHT TO BE HEARD IN THE CRPD

In addition to the CRC, the CRPD also contains specific provisions on children being heard, focusing on children with disabilities.

[25] UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para. B1, p. 11, https://www.refworld.org/docid/51a84b5e4.html (accessed on: 11.07.2023).

[26] UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006) – The rights of children with disabilities, para. 8, https://www.refworld.org/docid/461b93f72.html (accessed on: 08.07.2023).

Article 7 of the CRPD refers specifically to children with disabilities. According to this article:

> 1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
> 2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
> 3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.[27]

Ralph Sandland pointed out that Article 7(3) of the CRPD contains three modifications of the Article 12(1) CRC right. First, Article 7(3) unlike Article 12(1) refers to equality between disabled children and other children, implying that Article 7(3) is corrective (designed to buttress the rights that disabled children already possess under the CRC) rather than novel (designed to provide new rights). Secondly, the reference to capacity to form a view is absent from Article 7(3). It could be suggested that nothing turns on this because a view which has not been formed cannot be expressed. It can perhaps more plausibly be argued, however, that this is indicative of

[27] According to the Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) on equal recognition before the law, in para. 36. It is found that while Article 12 of the CRPD protects equality before the law for all persons, regardless of age, article 7 of the Convention recognizes the developing capacities of children and requires that "in all actions concerning children with disabilities, the best interests of the child (…) be a primary consideration" (para. 2) and that "their views (be) given due weight in accordance with their age and maturity" (para. 3). To comply with Article 12, States parties must examine their laws to ensure that the will and preferences of children with disabilities are respected on an equal basis with other children.

the general attitude of hostility towards "capacity" tests which runs through the CRPD, as discussed above. The third difference, that Article 7(3) CRPD unlike Article 12(1) CRC requires disabled children to be "provided with disability and age-appropriate assistance", further contradicts the claim that the CRPD is merely corrective. The right to express a view on matters which affect one, and to have that view given due weight, is essentially a civil right grounded in the state's obligation to comply with natural justice, and as such imposes "a strict obligation to undertake appropriate measures to fully implement this right for children" (CCRC, 2009, para. 19, discussing Article 12(1) CRC). But the right to assistance in the realization of that right, guaranteed by Article 7(3) CRPD, is an entitlement or "social" right, and the obligation on states in respect of such rights is that they need be provided for only "to the maximum of its available resources" (Article 4(2) CRPD, see also Article 4 CRC).[28]

The Committee on the Rights of Persons with Disabilities in its General comment No. 6 (2018) on equality and non-discrimination notes that the concept of the "best interests of the child" contained in Article 3 of the CRC should be applied to children with disabilities with careful consideration of their circumstances. (…) States parties should promote the mainstreaming of disability in general laws and policies on childhood and adolescence". It should be used to ensure that children with disabilities are informed, consulted and have a say in every decision-making process related to their situation. States parties should also adopt support measures to enable all children with disabilities to exercise their right to be heard, in all procedures that affect them, including in parliament, committees and bodies of political decision-making.[29]

In the Joint Statement of the Committee on the Rights of the Child and the Committee on the Rights of Children with Disabilities on "The rights of children with disabilities" in the title "Respect for

[28] R. Sandland, *A Clash of Conventions?…*, *op. cit*., p. 99.

[29] Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, para. 38, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=11 (accessed on: 15.05.2023).

the views of children" highlights that the standard of Article 12 of the CRC and Article 7 para. 3 of the CRPD on the right to be heard requires States parties to examine their laws and policies to ensure that the autonomy, will and preferences of children with disabilities are well understood and respected on an equal basis with other children. States parties should ensure that children with disabilities are equipped with, and enabled to use, any mode of communication, including sign language, Braille, Easy Read, alternative and augmentative modes of communication necessary to facilitate the expression of their views, and that their opinion is given due consideration.[30]

3. THE CHILD'S RIGHT TO PARTICIPATE IN RELEVANT DOCUMENTS OF THE COUNCIL OF EUROPE

The European Convention on Human Rights (hereinafter: the ECHR) is the cornerstone of the fundamental rights of the Council of Europe. Although it does not explicitly refer to children's rights, its provisions apply to children in accordance with Article 1 of the ECHR, because the rights and freedoms under the Convention must be guaranteed to "everyone" and, according to Article 14 of the ECHR, these rights must be guaranteed without "discrimination on any basis". The jurisprudence of the ECtHR was greatly influenced by the CRC, so therefore the provisions of the CRC come into effect in Europe through the jurisprudence of the ECtHR. The CRC had a significant impact on the jurisprudence of the CJEU, but its adoption is not automatic or systematic. The practice of the ECtHR sometimes differs from the CRC's interpretation. The ECtHR's practice differs from the CRC's approach precisely in connection with that of children being heard.[31]

[30] https://www.ohchr.org/sites/default/files/2022-03/CRC-CRPD-joint-statement_18March2022.docx (accessed on: 15.05.2023).

[31] For more, see: J. Fortin, *Children's right – Flattering to deceive?*, "Child and Family Law Quarterly" 2014, Vol. 26, No. 2, pp. 51–63.

3.1. *European Convention on the Exercise of Children's Rights (1996)*

With regard to the topic of the study in the following we focus here on a less well-known convention of the Council of Europe adopted in 1996, which defines the procedural rights of children. This is the European Convention on the Exercise of Children's Rights (hereinafter: the ECCR) which is a major instrument containing provisions aimed at protecting the best interests of children and promoting their rights, in particular in family proceedings (e.g., custody, access, questions of parentage, adoption, legal guardianship). The ECCR entered into force in 2000, and it has been ratified by twenty European countries.[32] The ECCR provides a number of measures to allow children to exercise their procedural rights.

The ECCR essentially complements the CRC. While the CRC establishes the fundamental rights of children, the ECCR detailed the procedural rights of children. The ECCR does not contain any special provision for disabled children.

Chapter II of the ECCR contains three parts. In Part "A" it names the procedural rights of a child. Article 3 contains the child's right to be informed and to express his or her views in proceedings, in accordance with the provisions of Article 12 of the CRC.

According to Article 3 of the ECCR, "a child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:

a) to receive all relevant information;
b) to be consulted and express his or her views;
c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision".

The Convention specifies the modalities of the implementation of this right: children may request to be assisted by a person of their choice, including a lawyer (Article 5 letter b)), they are entitled to exercise the rights of a party to the proceedings (Article 5 letter c))

[32] https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=160 (accessed on: 15.05.2023).

and they have the right to request the appointment of a special representative in case of a conflict of interests with their parents (Article 4).

According to the Explanatory report of the Convention, the Convention represents a step forward in the recognition of children's rights in family proceedings concerning them. Children are no longer merely the subject of such proceedings, they may also participate. Even if they are not given the status of parties to the proceedings, they possess a number of rights which they may exercise. In this connection, the right to request relevant information and the right to be consulted give the child concerned an effective opportunity to express his or her own views. The Explanatory Report emphasizes that it is left to States to define the criteria enabling them to evaluate whether or not children are capable of forming and expressing their own views, and States are naturally free to make the age of children one of those criteria. Where internal law has not fixed a specific age in order to indicate the age at which children are considered to have sufficient understanding, the judicial or administrative authority will, according to the nature of the case, determine the level of understanding necessary for children to be considered as being capable of forming and expressing their own views.[33]

Article 3 of the ECCR provides for the exercise of a number of procedural rights which should be given to children unless a child is considered as not having sufficient understanding.[34]

It is worth noting that while the CRC mentions a "child capable of forming his or her own views" in Article 12, the ECCR refers to a "child with sufficient understanding" in Article 3. These are not the same legal categories. It is even more interesting that while according to the CRC's general comments, the child's capable of forming his or her views is not linked to age, the Explanatory report of the ECCR indicates that the states parties can define an age limit[35] above which a child can be considered to have a sufficient level of understanding.

[33] Explanatory Report to the European Convention on the Exercise of Children's Rights, Strasbourg, 25.01.1996, Council of Europe, para. 33 and 36.
[34] Ibidem, para. 31.
[35] Ibidem, para. 36.

3.2. *Guidelines of the Council of Europe on child friendly justice (2010)*

In the following, we examine the recommendations of the Guidelines of the Council of Europe on child friendly justice adopted in 2010 (hereinafter: Guidelines) and then we examine the question of the child's right to participate in the light of the ECtHR's jurisprudence.

The child's "Participation" is the first principle in point "A" among the fundamental principles of the Guidelines. According to this provision "The right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them should be respected. This includes giving due weight to the children's views bearing in mind their maturity and any communication difficulties they may have in order to make this participation meaningful".

The fourth fundamental principle of the Guidelines in point "D" is about the "protection from discrimination". According to these provisions "The rights of children shall be secured without discrimination on any grounds. Specific protection and assistance may need to be granted to more vulnerable children, such as (…) children with disabilities".

The Guidelines stated that in all proceedings, children should be treated with respect for their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have. Language appropriate to the children's age and level of understanding should be used.[36]

The explanatory memorandum of the Guidelines makes it clear that "the reference made to the term the child who is capable of forming his or her own views should not be seen as a limitation, but rather a duty on the authorities to fully assess the child's capacity as far as possible". Instead of assuming too easily that the child is

[36] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, The Council of Europe, Council of Europe Publishing 2010, para. 54–56 of part guidelines.

unable to form an opinion, states should presume that a child has, in fact, this capacity. It is not up to the child to prove this.[37]

The leading case of the ECtHR is that of Sahin v. Germany,[38] in which the Court made a judgment in 2003. A relevant factual element in the case was that the applicant initiated proceedings in Germany in order to grant a right of access to his daughter born out of wedlock. During the first instance proceedings, the almost 4-year old child was not heard, because the expert's opinion was taken as the basis for the conflictual relationship between the parents. The court of second instance did not hear the child, who was already 5 years old at the time.

According to the ECtHR the German courts' failure to hear the child reveals an insufficient involvement of the applicant in the access proceedings. It is essential that the competent courts give careful consideration to what is in the best interests of the child after having had direct contact with that child. The court found that there was a substantive violation in the failure to hear the child's own views, and indicated that the national court had to take considerable steps to ensure direct contact with the child and that, by this means only, could the best interests of the child be ascertained.[39]

The ECtHR found that Article 8 of ECHR requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. Nevertheless, the Court found as regards the issue of hearing the child in court that it observes as a general rule it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant

[37] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, The Council of Europe, Council of Europe Publishing 2010, para. 33 of part explanatory memorandum.

[38] Case Sahin v. Germany, Application No. 30943/96, Judgment of 8 July 2003.

[39] Case Sahin v. Germany, Application No. 30943/96, Judgment of 8 July 2003, para. 47.

facts.[40] It would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.[41]

3.3. *Draft Recommendation on the protection of rights and the best interests of the child in parental separation and in care proceedings*

Since 2020, a Committee of Experts set up by the Committee of Ministers of the Council of Europe has been working on the recommendation that defines the rights and the best interests of the child in parental separation and in care proceedings.[42]

The overarching principles include the right to be heard, otherwise the right to participate. According to the Draft Recommendation, the child should be provided with a genuine and effective opportunity to express his or her views, either directly or otherwise, and be supported in doing so through a range of child-friendly mechanisms or procedures. The child's level of understanding and ability to communicate as well as the circumstances of the case should be taken into account. It should be presumed that a child is capable of forming his or her own views. Where a child needs assistance or is unable to express his or her views due to their age or capability, the child's perspective on relevant matters should, where relevant, be, nevertheless, ascertained and conveyed by a specially appointed and skilled representative or professional.

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[40] Case Vidal v. Belgium, Series A No. 235-B, Judgment of 22 April 1992, pp. 32–33, para. 33.

[41] Case Sahin v. Germany, Application No. 30943/96, Judgment of 8 July 2003, para. 47, 66, 73.

[42] See more information about the Committee of Expert on the protection of rights and the best interests of the child in parental separation and in care proceedings (CJ/ENF-ISE): https://www.coe.int/en/web/children/cj/enf-ise (accessed on: 15.05.2023). This work is also ongoing from when the manuscript was submitted at the end of July 2023.

V. The right of children to participate in civil judicial proceedings in EU law

From the point of view of our topic, international and EU law should not be sharply separated in the legislation concerning the participation of disabled children, because all Member States of the EU are parties to the CRC, and the EU itself joined the CRPD.[43] Therefore, the judicial practice of the CJEU often refers to Article 12 of the CRC as if it were EU law.[44]

1. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

From the point of view of this study, three articles of the Charter of Fundamental Rights of the European Union[45] (hereinafter: the Charter) are of outstanding importance: Article 21 on non-discrimination, Article 24 on the rights of the child, and Article 26 on the integration of persons with disabilities.

All the three articles are included in Chapter III of the Charter entitled Equality. In Article 21 under the heading "Non-discrimination" the Charter states that "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

[43] Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC).

[44] See more: Á. Mohay, *Az Európai Unió nemzetközi kötelezettségei az egyenlő bánásmód terén*, [in]: S. Erzsébet Szalayné (ed.), *Egyenlő bánásmód irányelvek – helyzetkép, Tanulmányok az uniós joganyag tagállami alkalmazásáról*, Publisher Publikon, Pécs 2019, pp. 45–61 (p. 51).

[45] The charter is legally binding. In accordance with Article 6 of the Treaty on European Union, it has the same legal value as the EU treaties. It applies to EU institutions in all their actions and to EU countries when they are implementing EU law, https://eur-lex.europa.eu/EN/legal-content/glossary/charter-of-fundamental-rights.html (accessed on: 15.05.2023).

Article 21 of the Charter extends the field of protection against discrimination to a wide range of "new" grounds such as genetic features, social origin, political opinion or property status. Moreover, the whole chapter on equality adopts new concepts that go beyond non-discrimination, as for example the acknowledgement of diversity and the integration of persons with disabilities.[46]

Discrimination on the grounds of disability is explicitly prohibited by Article 21 of the Charter. As we mentioned, the EU has signed the CRPD and has developed a "Strategy for the rights of persons with disabilities for 2021–2030".[47] The CRPD is now a reference point for interpreting the EU law relating to discrimination on the grounds of disability.[48] Under EU law, it is recognized that states have obligations to ensure reasonable accommodation to allow persons with disabilities the opportunity to fully realize their rights. At least for disability, but not limited to it, the CJEU has accepted that EU law also protects against "discrimination by association", i.e. discrimination against a person who is associated with another who has the protected characteristic, such as the mother of a child with disabilities, or discrimination against a person due to their child's disability.[49]

According to Article 24(1) of the Charter "Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken

[46] Ł. Bojarski, D. Schindlauer, K. Wladasch, *The European Charter of Fundamental Rights as a Living Instrument, Manual*, Rome–Warsaw–Vienna 2014, p. 53, https://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_manual_0.pdf (accessed on: 15.05.2023).

[47] European Commission (2021), Union of equality: Strategy for the rights of persons with disabilities 2021–2030, COM (2021) 101 final.

[48] CJEU, C-312/11, European Commission v. Italian Republic, 4 July 2013; CJEU, C-363/12, Z. v. A Government Department and The Board of Management of a Community School (GC), 18 March 2014; CJEU, C-356/12, Wolfgang Glatzel v. Freistaat Bayern, 22 May 2014; CJEU, C395/15, Mohamed Daouidi v. Bootes Plus SL and Others, 1 December 2016; CJEU, C-406/15, Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol, 9 March 2017.

[49] Handbook on European law relating to the rights of the child, 2022 Edition, European Union Agency for Fundamental Rights and Council of Europe, Luxembourg 2022, pp. 64–65.

into consideration on matters which concern them in accordance with their age and maturity". This provision is of general applicability and is not restricted to particular proceedings. The CJEU has interpreted the meaning of this provision in connection with the Brussels IIa Regulation.[50]

The CJEU in C-491/10. PPU, case Joseba Andoni Aguirre Zarraga v. Simone Pelz, interpreted the provisions of Article 24(1) of the Charter.[51] The CJEU found that since the Brussels II a Regulation may not be contrary to the Charter, the provisions of which give effect to the child's right to be heard, the child's rights must be interpreted in the light of Article 24 of that Charter. Moreover, recital 19 in the preamble to that regulation states that the hearing of the child plays an important role in the application of the regulation and recital 33 emphasizes, more generally, that the regulation recognizes the fundamental rights and observes the principles of the Charter, ensuring, in particular, respect for the fundamental rights of the child as set out in Article 24 of the Charter. In this regard, it must first be observed that it is clear from Article 24 of that Charter and from the Brussels IIa Regulation that those provisions refer not to the hearing of the child, but to the child's having the opportunity to be heard. First, it is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely "in accordance with their age and maturity", and of Article 24(2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child. Accordingly, while remaining a right of the child, hearing the child cannot, however, constitute an absolute obligation, but must be assessed having regard to what is required in the best

[50] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

[51] See more: K. Raffai, *The Principle of Mutual Trust Versus the Child's Right to be Heard – Some Observations on the Aguirre Zarraga Case*, "Hungarian Journal of Legal Studies" 2016, Vol. 57, No. 1, pp. 76–86.

interests of the child in each individual case, in accordance with Article 24(2) of the Charter.[52]

According to Article 26 of the Charter "The Union [EU] recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community".

It is worth noting that Article 26 of the Charter concerning the rights of persons with disabilities was not included in the first draft text drawn up by the Convention for the elaboration of the Charter, but it was added at a later time. The final version of the Charter did not include Article 26 in the social rights grouped together under Chapter IV of the Charter – the "solidarity rights" – but instead included it in Chapter III of the Charter entitled "Equality". This reflects a shift in the EU's approach to questions concerning disability. Article 26 represents a significant cultural progress of EU law to consider this matter as belonging to the protection of human dignity and the rights of the freedom and autonomy of people with disabilities. In addition, at the European level, Article 26 has contributed to modifying the conception of disability from a "medical approach" which conceived disability as a disease that requires medical interventions, to a "social model" related to the protection of human rights in which disability is the result of the interaction between the individual and the social environment in which he or she lives. In this framework, the Charter's provision has resulted in a change of perspective which over time had also emerged at the international level with, in particular, the 1993 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which provided an international framework for disability policy.[53]

[52] CJEU, C-491/10, Joseba Andoni Aguirre Zarraga v. Simone Pelz, 22 December 2010, para. 60–63.

[53] Ł. Bojarski, D. Schindlauer, K. Wladasch, *The European Charter of Fundamental Rights…*, *op. cit.*, pp. 56–57, https://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_manual_0.pdf (accessed on: 15.05.2023).

2. THE CHILD'S RIGHT TO PARTICIPATE IN THE FIELD OF JUDICIAL COOPERATION IN CIVIL MATTERS

From the point of view of hearing the child in the field of judicial cooperation in civil matters, the most significant secondary source of EU law is the Council Regulation EU 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter: the Brussels IIb Regulation) that entered into force on 1st of August 2022.

The strengthening of the child's rights approach can be observed in the Brussels IIb Regulation. It is clearly visible that in the Brussels IIb Regulation, major progress has taken place compared to the Brussels IIa Regulation, precisely in the area of much stronger consideration of the rights and best interests of children. In the Brussels IIa Regulation, there was no harmonized obligation for the courts of the Member State exercising jurisdiction in parental responsibility matters to provide the child with an opportunity to express his or her own views. The hearing of the child was regulated only in child abduction procedures in Article 11(2).

The opportunity of the child to express his or her views freely in accordance with Article 24(1) of the Charter and in the light of Article 12 of the CRC plays an important role in the application of the Brussels IIb regulation.

The proceedings in matters of parental responsibility as well as return proceedings should, as a basic principle, provide the child who is subject to those proceedings and who is capable of forming his or her own views, in accordance with the case-law of the CJEU, a genuine and effective opportunity to express his or her views.

Article 21 and 26 of the Brussels IIb Regulation determine uniform standards for the hearing of the child. According to Article 21 of the Brussels IIb regulation:

> When exercising their jurisdiction, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective

> opportunity to express his or her views, either directly, or through a representative or an appropriate body. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity.

According to Article 26 of the regulation, the Article 21 shall also apply in return proceedings under the Hague Convention.[54]

It can be seen that Article 21 of the Brussels IIb regulation uses exactly the same wording to define the range of children capable of forming their views as Article 12 of the CRC. Nevertheless, the Brussels IIb Regulation supplements Article 12 of the CRC with two important adjectives: the child must be given a genuine and effective opportunity to express his or her own views. The above cited leading case of the CJEU does not give any exact explanation as to when the opportunity can be considered genuine and effective, but it confirms that the court must give the opportunity to the child to

[54] Recital 39 of Brussels IIb also makes it clear that proceedings in matters of parental responsibility under this Regulation as well as return proceedings under the 1980 Hague Convention should, as a basic principle, provide the child who is subject to those proceedings and who is capable of forming his or her own views, in accordance with the case-law of the Court of Justice, with a genuine and effective opportunity to express his or her views, and when assessing the best interests of the child, due weight should be given to those views. The opportunity of the child to express his or her views freely in accordance with Article 24(1) of the Charter and in the light of Article 12 of the UN Convention on the Rights of the Child plays an important role in the application of this Regulation. The Regulation should, however, leave the question of who will hear the child and how the child is heard to be determined by the national law and procedure of the Member States. Consequently, it should not be the purpose of this Regulation to set out whether the child should be heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom or in another place or through other means. In addition, while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed taking into account the best interests of the child, for example, in cases involving agreements between the parties.

express their views.[55] According to Practice Guide all appropriate legal tools must be made available for the child to express his or her views freely.[56]

The right of the child to express views plays an important role in the recognition and enforcement of decisions, authentic instruments, and agreements. According to Article 39(2) and 41 of Brussels IIb, the recognition and enforcement of a decision in matters of parental responsibility may be refused if it was given without providing a child capable of forming their own views an effective opportunity to express his or her views in accordance with Article 21.[57]

VI. Conclusions and *de lege ferenda* proposals

From the international and EU legal provisions, the general comments, and the explanations and the statements of international courts, the following conclusions can be made regarding the disabled child's right to participate in civil judicial proceedings:

1. The procedural law situation of disabled children in cross-border civil cases is determined by the provisions of the CRC, the CRPD and the Charter analyzed in detail above.

[55] The CJEU in case C-491/10 PPU in Joseba Andoni Aguirre Zarraga v Simone Pelz para 66 stated that whilst it is not a requirement of Article 24 of the Charter and the Brussels IIa regulation that the court of the Member State obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views.

[56] Practice guide for the Application of the Brussels IIb regulation, European Commission, Luxembourg 2022, p. 192.

[57] See more: Z. Wopera (ed.), *A Brüsszel IIb rendelet kommentárja*, Publisher ORAC, Budapest 2023, pp. 247–254.

2. It follows from all the three legal documents that the right to be heard in the procedure must be ensured regardless of disability. All children are capable of expressing a view.[58]
3. The practice of the European Court of Human Rights and the Court of Justice of the European Union have also confirmed that the right to be heard must also be ensured for disabled children, because the ability to form views cannot be linked to an age-limit or intellectual capacity. It is worth noting that the CRPD and the Charter do not even link the right to be heard to the capability of forming views.
4. It should be presumed that a child is capable of forming his or her views.
5. Children with disabilities must be ensured genuine and effective opportunity to express their views. A child with a disability is ensured the genuine and effective opportunity to express his or her views if he or she receives appropriate help to exercise such an opportunity. It is the duty of the Member States or State parties to ensure this.
6. States must provide appropriate assistance, professionals (support) to children with disabilities to realize the right to be heard.
7. The disabled children must also be informed that they have the right to express their views in the proceedings affecting them.
8. The right to participate belongs to the disabled child both as an individual and as a group of disabled children; both must be provided with the opportunity to participate in the procedures affecting them.
9. Expressing views is not an obligation just an opportunity for a disabled child. The disabled child has the right not to exercise this right.

[58] There is no lower age limit imposed on the exercise of the right to participate. It extends therefore to any child who has a view on a matter of concern to them. Very small children and some children with disabilities may experience difficulties in articulating their views through speech but can be encouraged to do so through art, poetry, play, writing, computers or singing. See: G. Lansdown, *Promoting Children's Participation in Democratic decision-making*, UNICEF Innocenti Research Centre, Florence 2001, pp. 2–3.

10. The views of the disabled child must be given due weight in accordance with their maturity.[59]

Despite the clear and progressive international and EU legal regulations, the EU strategy on the rights of the child (2021–2024)[60] adopted in 2021 still does not give a favorable account of the participation of children with disabilities in the justice system.[61] It is found that children face difficulties to access justice and to obtain effective remedies for violations of their rights, including at the European and international level. Vulnerable children are often exposed to multiple and intersecting forms of discrimination. Children with disabilities experience difficulties due to a reduced accessibility of justice systems and judicial proceedings available to them, and lack accessible information on rights and remedies.[62] Data collection of

[59] The right to have their views taken seriously: It is not sufficient to give children the right to be listened to. It is also important to take what they have to say seriously. Article 12 insists that children's views are given weight and should inform decisions made about them. In accordance with their age and maturity: the weight that must be given to children's views needs to reflect their level of understanding of the issues involved. This does not mean that young children's views will automatically be given less weight. There are many issues that very small children are capable of understanding and to which they can contribute thoughtful opinions. Competence does not develop uniformly according to rigid developmental stages. The social context, the nature of the decision, the particular life experience of the child and the level of adult support will all affect the capacity of a child to understand the issues affecting them. See: G. Lansdown, *Promoting Children's Participation…*, *op. cit*., pp. 2–3.

[60] EU strategy on the rights of the child, COM (2021) 142 final, 24.03.2021, Brussels. The EU strategy on the rights of the child identifies six thematic areas in order to strengthen the general enforcement of children's rights. This strategy has been developed for children and together with children. The views and suggestions of over 10,000 children have been taken on board in preparing this strategy. See more: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0142 (accessed on: 15.05.2023).

[61] For more about the EU strategy on the rights of the child, see: M. Benyusz, *A gyermekek jövője az Európai Unióban – Mit ígér a Bizottság 2021–2024-es stratégiája?*, "Jog, Állam, Politika" 2021, Vol. 13, No. 3, https://jap.sze.hu/images/lapsz%C3%A1mok/2021/3/JAP_2021_3_benyusz_marta.pdf (accessed on: 15.05. 2023).

[62] To improve this situation, the European Commission invites the Member States to support judicial training providers and all relevant professionals' bodies to address the rights of the child and child friendly and accessible justice in their activities and enhance cooperation in cases with cross-border

children involved in judicial proceedings, including in the context of specialized courts, should also be improved.[63]

The ET Guidelines also contains a similar statement. While recognizing that all children, regardless of their age or capacities, are bearers of rights, age is in fact a major issue in practice, as very young children, or children with certain disabilities, will not be able to effectively protect their rights on their own. Member states should therefore set up systems in which designated adults are able to act on behalf of the child: they can be either parents, lawyers, or other institutions or entities which, according to national law, would be responsible for defending the children's rights.[64]

In 2009–2012, a project was conducted in England that examined the involvement of disabled children and young people in decision-making process. It was the VIPER research.[65] This research tells us that many disabled young people are still being excluded from participation and decision-making opportunities. Basic access needs to support disabled young people's participation are not being met, and children and young people with higher support needs and communication impairments face significant additional barriers to participation. The conclusions of the VIPER project were that while there has been some progress, disabled children are still further behind their non-disabled peers in terms of opportunities to be involved in decision-making. Disabled young people with

implications, to ensure the full respect of the rights of the child. See: EU strategy on the rights of the child, COM (2021) 142 final, 24.03.2021, Brussels, Part 4; Child-friendly justice: An EU where the justice system upholds the rights and needs of children, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0142 (accessed on: 15.05.2023).

[63] EU strategy on the rights of the child, COM (2021) 142 final, 24.03.2021, Brussels, Part 4. Child-friendly justice: An EU where the justice system upholds the rights and needs of children, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0142 (accessed on: 15.05.2023).

[64] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum, The Council of Europe, Council of Europe Publishing 2010, para. 97 of explanatory memorandum

[65] VIPER is an acronym; the letters mean voice, inclusion, participation, empowerment and research.

multiple impairments are often excluded from participation activities. Involvement in decisions appear to be limited to "disability" issues only and is not typically extended to more "general" services used by young people. The research found a lack of access and opportunity for disabled young people to be part of mainstream participation activities.[66]

We agree with Ralph Sandland that supported decision-making should be the ideal for all children, but there is extra support for taking this approach towards disabled children in the requirements imposed on state parties by Article 7(3) CRPD.[67]

The participation rights of disabled children have not been clarified by either the Committee on the Rights of the Child or the Committee on the Rights of Children with Disabilities. Like the committee's general comments, practice guides showing good practices should also be issued to the above-mentioned committees. As the VIPER project pointed out, there are good practices for involving young people with disabilities.[68] Creative and diverse methods must be developed to involve young people with disabilities in civil procedures.[69]

The practice of the United Kingdom may also be considered. The Personal Support Unit (PSU), whose volunteers provide free

[66] The VIPER project: What we found, November 2012, England, p. 60, https://www.ncb.org.uk/sites/default/files/uploads/files/OO193d%2520-%2520Viper%2520What%2520We%2520Found.pdf (accessed on: 15.05.2023).

[67] R. Sandland, *A Clash of Conventions?…*, *op. cit*., pp. 93–103.

[68] The VIPER project: What we found, November 2012, England, p. 62, https://www.ncb.org.uk/sites/default/files/uploads/files/OO193d%2520-%2520Viper%2520What%2520We%2520Found.pdf (accessed on: 15.05.2023).

[69] In 2020, a comprehensive study of the measures taken by various courts around the world to provide access to justice for persons with severe communication disabilities was published. The so-called transformative equality and the adaptation of the courts in order to break down various barriers are now formulated as a global human rights priority. In the course of the research, a number of documents were identified on the measures taken by the courts to ensure that persons with severe communication disabilities are equal and they promote non-discriminatory court participation. See: R. White, J. Bornman, E. Johnson, D. Msipa, *Court accomodations for persons with severe communication disabilities: A legal scoping review*, "Psychology, Public Policy and Law" 2020, November, https://doi.org/10.1037/law0000289.

assistance, is a good practice for supporting disabled children and adults in procedures. PSU provides practical guidance on what happens in court. Volunteers provide assistance in filling out various forms, or simply accompany individuals to court and provide them with emotional and moral support. This would also be a great step forward in exercising children's rights to participate.[70]

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[70] A. Maléth, *Fogyatékossággal élő felnőtt személyek lehetséges útja a támogatott döntéshozatal felé és az igazságszolgáltatáshoz történő hozzáférés*, [in:] N. Rékasi Nikolett, A. Sándor, B. Bányai, Zs. Kondor (eds.), *Divised harmony – disability science in Hungary*, Szerkesztők and Szerzők, 2020, pp. 132–151 (p. 144), https://www.researchgate.net/profile/Dora-Hangya/publication/357080386_Annyi_de_annyi_dolog_erdekel_az_eletben_fogyatekossaggal_elo_felnottek_iskolarendszeren_kivuli_felnottkepzeshez_valo_egyenlo_eselyu_hozzaferesenek_aktualis_kerdesei/links/61baf4d1a6251b553ac05a0f/Annyi-de-annyi-dolog-erdekel-az-eletben-fogyatekossaggal-elo-felnottek-iskolarendszeren-kivueli-felnottkepzeshez-valo-egyenlo-eselyu-hozzaferesenek-aktualis-kerdesei.pdf (accessed on: 15.05.2023).

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Social Security of Children with Disabilities as a Part of the State Security System of the Republic of Poland

> "No country on Earth, no political system can think of its own future otherwise than through the image of these new generations that will receive from their parents the manifold heritage of values, duties and aspirations of the nation to which they belong and of the whole human family. Concern for the child, even before birth, from the first moment of conception and then throughout the years of infancy and youth, is the primary and fundamental test of the relationship of one human being to another."
>
> John Paul II, *Address to the 34th General Assembly of the United Nations*, *02.10.1979*.[1]

Introduction

One of the fundamental functions of the state, understood as a political, sovereign, territorial and coercive organisation, is the social function, consisting in guaranteeing the necessary assistance to individuals who are unable to provide themselves with appropriate conditions for existence. This task, in times of stability and peace, grows into one of the most important tasks resting on public administration bodies. In the doctrine, it is connected with the category of social security, derived from the constitutional value

[1] John Paul II, *Address to the 34th General Assembly of the United Nations, 02.10.1979*, "L'Osservatore Romano. Weekly Edition in English" 1979, No. 42, pp. 1, 8–12.

of state (national) security.[2] Its essence is revealed through "all manifestations of activity of the state, society and individuals aimed at ensuring proper and sustainable human development by eliminating processes, phenomena and factors hindering its achievement".[3]

A social group that requires special care from the State, becoming a beneficiary of broadly understood social assistance, is children with disabilities, whose number, both in Poland and around the world, is increasing year by year.[4] This is one of the characteristics of modern civilisation and the changes that have taken place in it in the last century with its "advancement of knowledge and medical technologies, extension of human life as a result of the implementation of public health management mechanisms and general increase in prosperity, as well as cultural changes relating to health, physical and intellectual fitness and social role patterns".[5] Despite the fact that the situation of this social group has improved in recent years, it is still not satisfactory. It still struggles with barriers and, consequently, with social exclusion. This topic is very often discussed in the public debate on the demographic condition of Poland. Disabled children are seen as a chance for the socio-economic development of the country, and above all, a chance for a change in social relations. It may be possible to achieve only, however, with the use of

[2] The term "state security" was used by the constitution-maker in Articles: 31, sec. 1; 45, sec. 2; 53, sec. 5; 126, sec. 2; and 130 of the Constitution of Poland. Due to such a measure, it became a constitutional value and was a part of the broadly understood common good, due to which the development of individuals, society, and state occurs. P. Zając, L. Elak, *State Security and Hybrid Warfare: an Interdisciplinary Approach*, "Przegląd Prawa Konstytucyjnego" 2020, Vol. 58, No. 6, p. 432, http://dx.doi.org/10.15804/ppk.2020.06.35 (accessed on: 23.06.2023).

[3] P. Zając, *Definicja bezpieczeństwa społecznego okiem prawnika – krytyczna próba usystematyzowania pojęć*, "Roczniki Nauk Prawnych" 2019, Vol. 29, No. 4, p. 137.

[4] "Nearly 240 million children in the world today have some form of disability. This estimate is higher than previous figures and is based on a more meaningful and inclusive understanding of disability, which considers several domains of functioning, including those related to psychosocial well-being", UNICEF, Seen, Counted, Included: Using data to shed light on the well-being of children with disabilities, 2021, p. 152.

[5] B. Gąciarz, *Wstęp*, [in:] B. Gąciarz, S. Rudnicki (eds.), *Polscy niepełnosprawni. Od kompleksowej diagnozy do nowego modelu polityki społecznej*, Kraków 2014, p. 7.

the appropriate "legislative and non-legislative activities aimed at improving their situation and creating a coherent system of their support that would ensure their full participation in social life".[6]

The Polish authorities, recognising the issues related to the functioning of persons with disabilities, as well as their role in strengthening the potential of the Republic of Poland, adopted as one of the pillars of the implementation of national security the postulate of extending support for disabled and dependent persons, as part of improving social integration and ensuring access to public services with appropriate standards.[7] Thus, the issue of disability has become one of the determinants of state security. This study will indicate the activities of Polish authorities in the field of ensuring social security for children with disabilities in the context of the right to health protection, the right to social assistance, and to protection in cyberspace.

Place of social security in the system of state security

A fundamental value in the life of an individual, social groups and the entire state in the modern world is to ensure security. It is a guarantee of the proper development of society, and thus a guarantee of the survival of the state.

The legislator has not developed a legal definition of "state security". It does not mean, however, that the concept has been "suspended in a vacuum". Jurisprudence and doctrine try to fill this formulation with a specific content. Security, apart from the traditional approach as the freedom from threats, is understood as a state and process aimed at "ensuring the possibility of survival, development and freedom to pursue one's own interests in specific conditions, through the use of favourable circumstances (opportunities), taking up challenges, reducing risks and counteracting

[6] Uchwała nr 27 Rady Ministrów z dnia 16 lutego 2021 r. w sprawie przyjęcia dokumentu Strategia na rzecz Osób z Niepełnosprawnościami 2021–2030, "Monitor Polski" 2021, item 218.

[7] Strategia Bezpieczeństwa Narodowego Rzeczypospolitej Polskiej zatwierdzona w dniu 12 maja 2020 roku przez Prezydenta Rzeczypospolitej Polskiej, na wniosek Prezesa Rady Ministrów, p. 31.

(preventing and countering) all kinds of threats to the entity and its interests".[8] In addition, the Constitutional Tribunal ruled that this concept includes "freedom from threats to the existence of a democratic state" as well as "the need to protect against external and internal threats".[9] Thus, state security cannot be considered without reference to certain threats,[10] including both internal and external threats. They must concern the integrity of the state itself.[11] This means that not every threat will be considered in the category of state security, but only those that "affect the foundations of the state's existence, the integrity of its territory, the fate of its inhabitants or the essence of the system of government".[12] In practice, therefore, a gradation of the risk should be made.[13] The described approach means that state security should be considered in a broad perspective, including a generic approach. One of its categories is the social security of the state, which affects the fate of citizens, as the entities most exposed to a wide range of threats, both external and internal, including a negation of their rights and freedoms by state authorities.[14] However, until recently, this hasn't considered and

[8] S. Koziej, *Między piekłem a rajem: szare bezpieczeństwo na progu XXI w.*, Toruń 2006, p. 7; S. Koziej, *Bezpieczeństwo: istota, podstawowe kategorie i historyczna ewolucja*, "Bezpieczeństwo Narodowe" 2011, No. 18, p. 20.

[9] Judgment of the Constitutional Tribunal of 21 June 2005, P 25/02, Legalis.

[10] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do Art. 1–86*, Warszawa 2016, Article 31, Legalis.

[11] See: M. Pawełczyk, *Publicznoprawne obowiązki przedsiębiorstw energetycznych jako instrument zapewnienia bezpieczeństwa energetycznego w Polsce*, Toruń 2013, pp. 29–34.

[12] L. Garlicki, K. Wojtyczek, *Komentarz do Artykułu 31*, [in:] M. Zubik (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*, Second Edition, Warszawa 2016, LEX.

[13] See: M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do Art. 1–86, op. cit.*; P. Zając, L. Elak, *State Security and Hybrid Warfare…*, *op. cit.*, pp. 431–438.

[14] J. Jaraczewski, *Bezpieczeństwo państwa jako wartość chroniona w konstytucji RP*, [in:] S. Biernat (ed.), *Konstytucja Rzeczypospolitej Polskiej w pierwszych dekadach XXI wieku wobec wyzwań politycznych, gospodarczych, technologicznych i społecznych*, Warszawa 2013, p. 76. This is due to the fact that the state and its citizens are essentially united with each other and cannot exist in isolation from one another. See: W.J. Wołpiuk, *Bezpieczeństwo państwa i pojęcia pokrewne. Aspekty konstytucyjnoprawne*, [in:] W. Sokolewicz (ed.), *Krytyka prawa. Niezależne studia nad prawem. Tom II. Bezpieczeństwo*, Warszawa 2010, pp. 185–187.

reflected in the terms of general security during the discussions. Only the change of conditions and relations in the international arena made many additional aspects of security, including social security, are noticeable.[15] A multidimensional and multifaceted approach to this issue is now common and used by all countries.

The doctrine emphasises that social security is part of state security, due to the task facing modern democratic states.[16] It leads to making every effort to ensure that each individual has a real chance to participate in social life and fulfil a specific role in it, which in fact is the essence of social security. It is also worth considering the position of social security in terms of national values and needs. The way in which security is defined results from the adopted, defined value system.[17] The most important of such values are: survival, territorial integrity, political independence and quality of life. Thus, social security is part of the value of the quality of life, which includes, above all, the standard of living, the level of socio-economic development, the quality of social relations, the scope of civil rights, and the safety of life, health and property, and development prospects.[18]

In the Polish legal order, social security is mainly identified with broadly understood social protection, introduced by the legislator to Article 67 of the Constitution, according to which:

> 1. A citizen shall have the right to social security (protection – P.Z.) whenever incapacitated for work by reason

[15] For the first time, this term was officially used in American legislation, in the title of the Act – the Social Security Act of 1935, signed by President F.D. Roosevelt on 14 August 1935. This concept covered the benefits that the state was supposed to pay to its citizens in the event of old age, unemployment, disability, death and parenthood. The United Nations, recognising the universality of the message associated with the concept of social security, implemented this term to the Universal Declaration of Human Rights of 1948. P. Zając, *Definicja bezpieczeństwa społecznego okiem prawnika…*, *op. cit*., pp. 130–131.

[16] M. Leszczyński, *Bezpieczeństwo społeczne a współczesne państwo*, "Zeszyty Naukowe Akademii Marynarki Wojennej" 2011, No. 2, pp. 124–125.

[17] See: W. Kitler, *Bezpieczeństwo Narodowe RP. Podstawowe kryteria. Uwarunkowania. System*, Akademia Obrony Narodowej, Warszawa 2011, p. 31.

[18] W. Kitler, *Bezpieczeństwo narodowe. Podstawowe kategorie, dylematy pojęciowe i próby systematyzacji*, Akademia Obrony Narodowej, Warszawa 2010, p. 28.

> of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute.
> 2. A citizen who is involuntarily without work and has no other means of support, shall have the right to social security (protection – P.Z.), the scope of which shall be specified by statute.

However, there is no definition how the term "protection" should be understood and interpreted. The level, manner or model of the social protection system has not been specified, referring to the statutory regulation, hence the system is defined as dynamic or open.[19] From the analysis of Article 67 of the Constitution, nevertheless, we can conclude that the occurrence of at least one of the prerequisites indicated in the legal provision entitles one to take advantage of some specific form of social security, thus introducing equal and universal access to sickness, disability, retirement or unemployment benefits.[20] The right to social protection, in accordance with the wording of the analysed provision, is vested in citizens, including children with disabilities, which is expressly indicated also in Article 26 of the Convention on the Rights of the Child,[21] in which Poland participates and according to which:

> 1. States Parties shall recognize for every child the right to benefit from social security (protection – P.Z.), including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

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[19] K. Prokop, *Ubezpieczenia społeczne a konstytucyjna idea sprawiedliwości społecznej*, [in:] M. Czuryk, K. Naumowicz (eds.), *Prawo ubezpieczeń społecznych. Wybrane problemy*, Olsztyn 2016, p. 13.

[20] K. Lechowicz, M. Łuszczyk, *Kierunki zmian systemu zabezpieczenia społecznego w Polsce – wybrane aspekty*, "Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach" 2014, No. 179, p. 189.

[21] Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, Journal of Law of 1991 No. 120, item 526.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

The Constitutional Tribunal, dealing with the issue of social protection, stated that it covers "all [the] benefits which – from public funds – are granted to a citizen in need",[22] as well as "a system of devices and benefits to meet the justified needs of citizens who have lost their ability to work or have experienced a limitation of this ability, or have been excessively burdened with family maintenance costs".[23] The tribunal further emphasised that "the essence of the right to social security is to protect citizens in the event of certain insurance risks that result in the total or partial loss of the possibility of self-support".[24] This approach to the issue of social protection is consistent with the achievements of the doctrine, the foundations of which in this area were created by J. Piotrkowski, according to whom this concept means "the totality of measures and activities of public institutions by means of which the society tries to protect its citizens against poverty not attributable to them against the threat of being unable to satisfy basic socially recognized needs".[25]

It should be remembered, however, that the concepts of social security and social protection are not equivalent in meaning. Social security is implemented not only by public administration bodies, but also by non-governmental institutions or individuals themselves as a part of self-help. Social protection is a part of social security, which covers all issues that relate to the uninterrupted functioning of

[22] Judgment of the Constitutional Tribunal of 20 November 2001, SK15/01, OTK ZU No. 8/2001, item 252, Legalis.

[23] Judgment of the Constitutional Tribunal of 7 September 2004, SK 30/03, OTK 2004, No. 8, item 82, Legalis.

[24] Order of the Constitutional Tribunal of 21 September 2004, SK 45/04, OTK 2004, No. 8, item 87, Legalis.

[25] J. Piotrowski, *Zabezpieczenie społeczne. Problematyka i metody*, Warszawa 1966, pp. 7–8.

a person in society – their access to food, housing, clothes, medicine, and education – and thus measures guaranteeing the implementation of the right to life and health, as well as needs spiritual.[26]

Right to health care

The most important of the rights of a child with a disability is the right to health protection, the essence of which is the access to all medical services to which every citizen is entitled, without any discrimination on the grounds of their disability. In addition, however, often a child with a disability needs much broader diagnostics, constant rehabilitation and expensive treatment, as well as the purchase of specialised equipment. "Access to the multiple elements of good quality health care is therefore vital for the well-being and development of children with disabilities, and can even determine whether they survive beyond (early) childhood and into adulthood".[27]

The basic normative act in the field of ensuring access to health care for children with disabilities is the Constitution of the Republic of Poland, which in Article 68 sec. 1, guarantees everyone the right to health care. In addition, sec. 3 specifies the objectives of health protection by stating that:

> Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age.

As emphasised in the doctrine, Article 68 sec. 3 defines the principle of state policy, which means that it does not establish an independent subjective right, but is only a programme norm, which by its nature cannot be a source of direct claims.[28]

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[26] P. Zając, *Definicja bezpieczeństwa…*, *op. cit*., p. 138.

[27] L. Waddington, A. Poulos, *The Right to Health of Children with Disabilities in International Law*, [in:] J.H.H.M. Dorscheidt, J.E. Doekp (eds.), *Children's Rights in Health Care*, Netherlands, 2018, p. 357.

[28] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do Art. 1–86*, *op. cit*., Article 68.

The content of Article 68 of the Constitution does not provide grounds for constructing a substantive definition of the concept of health care. As is being indicated by the one of the judgments of the Constitutional Tribunal, it is not possible under the Constitution to specify precisely the types or categories of benefits falling within the scope of the right guaranteed by Article 68. Therefore, it is the legislator that correctly defines the organisational sphere related to the precise, unambiguous and functional construction of the health care system.[29] This may mean that despite the lack of a definition of "healthcare" itself, the construction of Article 68 indicates the subjective right of an individual to health protection and the objective order for public authorities to take such actions that are necessary for the proper protection and implementation of this right, the content of which is the ability to use the health care system, functionally focused on combatting and preventing diseases, injuries and disabilities. The doctrine indicates that "the term 'health care' includes – at least – the following conceptual scopes: 1) health protection, including health care services, as well as health promotion, 2) combatting epidemic diseases, 3) preventing the negative health effects related to environmental degradation, 4) developing physical culture".[30]

From the point of view of the adopted topic, it will be important to analyse the issue of health care, i.e. the access to health services and benefits obtained by children with disabilities. Particular attention was paid to this aspect, both in: the Convention on the Rights of Persons with Disabilities[31] (Article 25) and in the Convention on the Rights of the Child (Article 23 sec. 3).

According to Article 2 of the Act on health care services financed from public funds[32] (hereinafter: U.Św.Zdr.) the following people have the right to use health care services financed from public funds: people covered by universal – compulsory and voluntary health

[29] Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK-A 2004, No. 1, item 1.

[30] M. Dercz, *Konstytucyjne prawo dziecka do szczególnej opieki zdrowotnej*, Warszawa 2016, Chapter 1.3.

[31] Journal of Law of 2012, item 1169.

[32] Journal of Law of 2004 No. 210, item 2135, as amended.

insurance, i.e. the so-called "insured", uninsured persons (having Polish citizenship or a regulated status and residing in the territory of the Republic of Poland), who meet the income criterion for receiving social assistance benefits, as well as children and youths – up to the age of 18 – and women during pregnancy and the postpartum period. These persons may use the so-called "guaranteed services", which include: services in the field of: basic health care, outpatient specialist care, hospital treatment, psychiatric care and addiction treatment, medical rehabilitation, care and care services under long-term care, dental treatment, spa services, supplies of medical devices that are orthopaedic items and aids, emergency medical services, palliative and hospice care, highly specialised services and health programmes (Article 15 sec. 2 U.Św.Zdr.).

Persons with disabilities are entitled to benefits to the same extent as all insured persons. The exceptions are: general anaesthesia when performing guaranteed dental services and the use of composite light-curing materials for fillings, which children and adolescents with disabilities up to 16 years of age and people with a severe or moderate degree of disability are entitled to in case of a medical order.[33]

In addition, on the basis of the Act on special solutions supporting people with a significant degree of disability,[34] these persons have the right to: medical devices up to the limit of public funding specified in the relevant regulations, according to medical indications, without taking into account periods of use; use out of sequence of health care services and pharmaceutical services provided in pharmacies; reimbursed services in the field of medical rehabilitation to the amount adjusted to health needs; access to ambulatory specialist services financed from public funds without a referral from a health insurance doctor.

The Polish health care system provides that outpatient specialist care is provided on the basis of a referral from a primary care physician. However, a referral is not required for persons under

[33] Regulation of the Minister of Health of 6 November 2013 on guaranteed services in the field of dental treatment, Journal of Law of 2021, item 2148, as amended, para. 4.

[34] Journal of Law of 2018, item 932.

18 years old who have been diagnosed with a severe and irreversible disability or an incurable life-threatening disease that had arisen in the prenatal period of the child's development or during childbirth, as well as for persons with a significant degree of disability.

Children and young people up to the age of 18, and if they continue their education – up to the age of 26, disabled children up to the age of 16 and disabled children after the age of 16 if they have been diagnosed with a significant degree of disability, as well as children entitled to a survivor's pension, do not incur payment for costs of food and accommodation in a spa hospital for children, a spa sanatorium for children and a spa sanatorium as part of spa treatment or spa rehabilitation (Article 33 sec. 4 U.Św.Zdr.).

Children with disabilities also have the right to reimbursed medicines, foodstuffs intended for particular nutritional uses and medical devices issued on the basis of a prescription. The list of drugs is specified in the announcements published every 2 months by the Minister of Health, pursuant to Article 37 of the Act on the reimbursement of medicines, foodstuffs for particular nutritional uses and medical devices.[35] In a situation where a given medicine, food intended for particular nutritional uses or a medical device would not be on the reimbursement list, it is possible to take advantage of the tax relief for medicines. The right to relief is granted to persons who are dependent on the following disabled persons: spouse, own and adopted children, foreign children adopted for upbringing, stepchildren, parents, spouse's parents, siblings, stepfather, stepmother, sons-in-law and daughters-in-law – if in the tax year the income of these persons with disabilities do not exceed 12 times the amount of the social pension applicable in December 2022 (Article 26 sec. 7a point 12 the PIT Act). As part of the relief, you can deduct the amount constituting the difference between the actual expenses incurred for medicines in a given month and the amount of PLN 100 if a specialist doctor states that a disabled person should use certain medicines permanently or temporarily.

Children with disabilities who need permanent or long-term care or the assistance of another person due to their significantly limited

[35] Journal of Law of 2023, item 826.

ability to live independently and who need the permanent assistance of a carer in the process of their treatment, rehabilitation and education, are also entitled to medical devices without specifying the periods of their use (Article 47 sec. 1a–b, U.Św.Zdr.). In such a case, an order is required to receive such support. These are issued by a doctor, nurse, midwife, feldsher or physiotherapist. A detailed list of medical devices along with the amounts of reimbursement and periods of their use can be found in the Regulation of the Minister of Health on the list of medical devices issued on order.[36]

The analysis of the legal provisions on ensuring the right to health care for children with disabilities shows that the Polish authorities implement the provisions of both the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child. The system structure of health care for people with disabilities adopted by the Polish legislator is in line with the common practice adopted by most countries. It is based on placing relevant provisions in normative acts regulating specific thematic issues, such as health services, rehabilitation or access to medicines. However, it is worth considering whether it would not be a better solution to adopt a single act, strictly regulating the rights of people with disabilities, which would include provisions that are currently scattered among various normative acts. An example could be, e.g. the Disability Services Act 1986,[37] which is a detailed guide to how the Australian Government support and services are funded and provided for people with disability. A similar construction was also adopted in Spain.[38]

[36] Journal of Law of 2022, item 2319.

[37] *An Act relating to the provision of services for persons with disabilities*, http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/dsa1986213/ (accessed on: 23.06.2023).

[38] Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social, https://www.global-regulation.com/translation/spain/1466413/royal-legislative-decree-1-2013%252c-of-29-november%252c-which-approves-the-revised-text-of-the-general-law-of-rights-of-persons-with-disabilities-and-the.html (accessed on: 23.06.2023).

Right to social assistance

The Polish legislator uses very different methods of implementing social protection, expressing it, for example, in the names of legal acts.[39] Hence, it can be concluded that the Polish social protection system has been constructed on the basis of specific forms of implementation, which include: social insurance, social security, social assistance and other forms. Such a division results from the fact that this system is open and dynamic, and therefore there is no reason to close it in a specific definitional framework.

Social assistance is an action directly aimed at the activation and independence of individuals by satisfying the necessary needs and enabling them to live in conditions corresponding to human dignity. According to Article 2 sec. 1 of the Act on Social Assistance, it consists in enabling individuals and families to overcome difficult life situations that they are unable to overcome using their own rights, resources and opportunities.[40] The element of social assistance brings social protection closer to social security, the essence of which is to provide individuals with decent living conditions and enable them to achieve self-realisation.

Social assistance, as emphasised by the Constitutional Tribunal in one of its judgments, is provided through benefits that may take the form of the so-called environmental benefits, including cash benefits in the form of allowances, benefits in kind, as well as benefits in the form of services or company benefits or in the form of placement in social welfare homes. The nature of these benefits, also from the point of view of the legal position of the beneficiary, varies.[41]

One of the entitlements to apply for social assistance benefits is disability. In the case of children with disabilities, the beneficiaries of the assistance are their parents or legal or actual guardians. In terms of cash benefits for a disabled child, the first one that can be

[39] K. Ślebzak, *Prawo do zabezpieczenia społecznego w Konstytucji RP. Zagadnienia podstawowe*, C.H. Beck, Warszawa 2015, Chapter I, para. 3.

[40] Journal of Law of 2004 No. 64, item 593, as amended.

[41] Judgment of the Constitutional Tribunal of 29 September 1993, K 17/92, OTK 1993, No. 2, item 33.

pointed to is the one-off benefit from the Law on support for pregnant women and their families in "For life", the Act on Supporting Pregnant Women and Families "For Life".[42] According to Article 10 sec. 1 of the cited Act, for the birth of a live child with a certificate of severe and irreversible disability or an incurable life-threatening disease, which arose in the prenatal period of the child's development or during childbirth, a one-time benefit to the amount of PLN 4,000 is granted for this child. It is due to be paid to the child's mother or father, legal guardian or actual guardian of the child, regardless of income. The right to a one-time benefit is determined at the request of the person entitled to receive it. The necessary prerequisites for granting the requested benefit are: the birth of a live child, obtaining a certificate of his illness or disability and the period of their occurrence, the proof that the mother was under medical care; beginning of medical supervision – not later than from the 10th week of pregnancy until delivery (this prerequisite does not apply to persons legal or actual guardians of the child, as well as to persons who have adopted the child), submitting an application within 12 months from the date of birth of the child, by an authorised person; a family member who is not entitled to a family benefit abroad for a child, unless the regulations on the coordination of social security systems or bilateral agreements on social security provide otherwise; the child has not been placed in an institution providing 24/7 maintenance, or is in foster care. There is no uniform view in the jurisprudence whether the failure to meet at least one of the conditions constitutes an obstacle to granting the benefit. As indicated in one of the judgments of the Provincial Administrative Court in Bydgoszcz, "it is important that the above conditions are met jointly, i.e. failure to meet at least one of them is an obstacle to granting the benefit".[43] However, a separate opinion of the judges can be found in another judgment of the same court, which ruled that "No provision of the Act of 2016 on supporting pregnant women and families "For Life" clearly defines the legal

[42] Journal of Law of 2016, item 1860, as amended.

[43] Judgment of the Provincial Administrative Court in Bydgoszcz of 23 November 2021, II SA/Bd 1030/21, LEX No. 3318676.

consequences of a situation in which a woman seeking or who applied for a one-off childbirth benefit underwent medical care after the 10th week of pregnancy (…)." The absence of such a regulation in the Act does not mean, however, that a woman who underwent medical care after the 10th week of pregnancy and then gave birth to a child should be automatically – regardless of the circumstances of a particular case – deprived of the right to a one-off benefit on this account. In the Introduction in Article 10 sec. 5 of the Act of 2016 on Supporting Pregnant Women and Families, the "For Life" additional condition is only intended to mobilise pregnant women to care for their own health and that of the foetus. However, "this is not the main purpose of the introduced statutory regulations".[44]

The validity of the above argument may be supported by the Judgment of the Constitutional Tribunal, which dealt with the issue of granting a one-off allowance for the birth of a live child – a similar benefit contained in the Act on Family Benefits,[45] ruling that the linguistic interpretation of Article 15b sec. 5 rather indicates that being subject to medical care no later than from the 10th week of pregnancy is treated as a necessary condition. On the other hand, the teleological interpretation argues in favour of correcting this result of the linguistic interpretation and taking into account the reasons that objectively prevent the examination during the first 10 weeks of pregnancy. Therefore, bearing in mind the principles of linguistic, systemic and functional interpretation, as well as the fact that the interpretation of statutory provisions must always be made using the technique of interpreting the Act in accordance with the Constitution, it was not possible to interpret Article 15b sec. 5 to stop at linguistics. Fulfilment of the obligation to undergo medical care by a pregnant woman cannot be assessed without determining the objective possibilities of its implementation within the period indicated by the legislator. "Adoption of the opposite position would

[44] Judgment of the Provincial Administrative Court in Bydgoszcz of 7 May 2019, II SA/Bd 23/19, LEX No. 2676895. See also: Judgment of the Provincial Administrative Court in Bydgoszcz of 11 January 2022, II SA/Bd 1168/21, LEX No. 3316118.

[45] Journal of Laws of 2003 of 228, item 2255, as amended.

violate the constitutional orders to protect and care for the family, expressed in Article 18 or Article 71 sec. 1 of the Constitution".[46]

Another controversial issue is the determination of the legal nature of the deadline indicated for submitting an application for a benefit, which may give rise to certain legal consequences. Here, too, the judiciary has not developed a single, permanent line of jurisprudence. However, there is a belief that the 12-month period is a procedural right, and not a substantive preclusion term, and therefore it is possible to reinstate it.[47]

It is worth noting that the amount of the one-off benefit is not included in the income when applying for other benefits, such as: a special-purpose benefit in the event of disasters and fortuitous events, benefits and material assistance granted in special cases, remuneration for care or assistance for a foreigner.

However, a shortcoming of the analysed provision may be the lack of mention of the indexation of the amount of the benefit, which means that it is constant and independent of economic turmoil, such as inflation.

The Polish legislator has also provided the "family care cash benefits", which are established for persons requiring care or persons who provide care to disabled family members. As it is emphasised in the doctrine: "care benefits are an emanation of the 69 and 71 of the Constitution of the Republic of Poland, the obligation of the state to provide special assistance to disabled people and families meeting the condition of a difficult material and social situation, i.e., inter alia, families burdened with the need to take care of family members who are disabled or elderly; families with increased expenses".[48] Care benefits include: medical care allowances (Article 16 of the *Act on*

[46] Judgment of the Constitutional Tribunal of 22 November 2016, SK 2/16, OTK-A 2016, No. 92.

[47] Judgment of the Provincial Administrative Court in Rzeszów of 4 April 2020, II SA/Rz 1481/19, LEX No. 3031323; Judgment of the Provincial Administrative Court in Gliwice of 30 April 2021, II SA/Gl 1530/20, LEX No. 3174613; M. Kobak, *Jednorazowe świadczenie z ustawy "Za życiem"*, "Przegląd Prawa Publicznego" 2021, No. 3, pp. 26–39. Contradictory opinion: Judgment of the Provincial Administrative Court in Poznań of 19 May 2023, IV SA/Po 9/23, LEX No. 3572183.

[48] B. Chludziński, *Artykuł 16*, [in:] P. Rączka (ed.), *Świadczenia rodzinne. Komentarz*, Second Edition, LEX/el. 2023.

Family Benefits (hereinafter: Fam.Act)), special attendance allowance (Article 16a of the Fam.Act) and a nursing benefit (Article 17 of the Fam.Act).

Based on Article 16 of the Act on Family Benefits:

> 1. The medical care allowances is granted in order to partially cover the expenses resulting from the need to provide care and assistance to another person due to the inability to live independently.
> 2. The medical care allowances is payable to: 1) a disabled child; 2) a disabled person over the age of 16, if they hold a certificate of severe disability; 3) a person who has reached the age of 75.
> 3. The medical care allowances is also payable to a disabled person aged over 16 who holds a certificate of moderate degree of disability, if the disability arose before the age of 21.

From the wording of the above provision, it can be seen that in this particular legal act, the legislator understands a child with a disability as a person up to 16 years of age with a certificate of disability specified in the provisions on the vocational and social rehabilitation and employment of disabled people, which does not coincide with the definition of a child contained in Article 1 of the Convention on the Rights of the Child:

> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier,

whereas in Article 2 sec. 1 of the Act on the Ombudsman for Children,[49] it is stated:

[49] Journal of Laws of 2000 No. 6, item 69, as amended.

> Within the meaning of the Act, a child is any human being from conception to adulthood.

However, this does not mean that persons between the ages of 16 and 18 have been deprived of the possibility to apply for the above-mentioned benefit, which is stated in the further sections of the quoted provision. The discrepancy results from the disability assessment system adopted by the Polish legislator. According to Article 4a. sec. 1 the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities:[50]

> Persons under the age of 16 are classified as disabled if they have impaired physical or mental fitness for an expected duration of more than 12 months, due to a congenital defect, long-term disease or body damage, resulting in the need to provide them with complete care or assistance in satisfying basic life needs in a way that exceeds the support needed by a person of a given age.

On the other hand, persons over the age of 16 are obliged to obtain from an evaluating doctor of the Social Insurance Institution an appropriate certificate determining the degree of their disability.

The amount of the medical care allowances is PLN 215.84 per month. The allowance is not payable to: a person entitled to a nursing supplement; a person placed in an institution providing free 24-hour maintenance; if a family member is entitled to a benefit abroad to cover expenses related to the care of that person, unless the provisions on the coordination of social security systems or bilateral agreements on social security provide otherwise.

A special attendance allowance is granted to persons who are obligated to pay maintenance, as well as to spouses, if: they do not take up employment or other gainful employment or resign from employment or other gainful employment in order to permanently care for a person holding a certificate of severe disability or a certificate of disability, including indications of: the need for

[50] Journal of Laws of 1997 No. 123, item 776, as amended.

permanent or long-term care or assistance of another person due to the significantly limited ability to live independently, and the need for constant participation of the child's guardian in the process of treatment, rehabilitation and education on a daily basis. A special attendance allowance is due if the total income of the family of the person providing care and the family of the person requiring care per person does not exceed the amount of the income criterion of PLN 764 net (based on income from the year preceding the benefit period, taking into account the loss and obtaining of income, in accordance with the provisions on family benefits). The amount of the special attendance allowance is PLN 620 per month.

Nursing benefit for the resignation from employment or other gainful employment is payable to: the mother or father, the actual guardian of the child, or a person who is a related foster family member, and other persons who are obliged to pay maintenance, with the exception of persons with a severe degree of disability, if they do not undertake or resign from employment or other gainful work in order to take care of a person holding a disability certificate, including indications of: the need for permanent or long-term care or assistance of another person due to the significantly limited ability to live independently and the need for the constant participation of the child's guardian in the process of treatment, rehabilitation and education, or a person with a certificate of severe disability. The nursing benefit from 1 January 2023 is PLN 2,458 per month. Granting the right to a nursing benefit does not depend on meeting the income criterion.

In the event of the concurrence of entitlements to a parental benefit, a nursing benefit, a special care allowance, an addition to the family allowance for caring for a child during parental leave, or a guardian's allowance, one of these benefits can be granted to the entitled person

In the public debate, it is argued that the above benefits, although they are necessary to ensure at least a minimum level of existence for children with disabilities, are inadequate with regard to modern realities. First of all, attention is drawn to the low amounts of benefits, which in the case of children with disabilities that prevent them from independent existence, are insufficient to cover their

basic needs, which results from the fact that the support system depends on the economic efficiency of the state. It seems that this issue could be resolved by amending the regulations on nursing benefits. In the current legal status, parents or guardians who receive a nursing benefit must completely resign from the provision of paid work that could improve the standard of living of a child with a disability. The Polish legislator, recognising this correlation, passed the Act on the support benefit,[51] which is currently waiting for the signature of the President of the Republic of Poland. It amends Article 17 sec. 1 of the Act on family benefits, giving it a new wording, according to which:

> 1. The nursing benefit is payable to: 1) mother or father; 2) other persons who, in accordance with the provisions of the Act of 25 February 1964 – Family and Guardianship Code (Journal of Laws of 2020, item 1359 and of 2022, item 2140), there is a maintenance obligation, as well as spouses; 3) the child's actual guardian; 4) a foster family, a person running a family orphanage, the director of a care and education facility, the director of a regional care and therapy facility or the director of an intervention pre-adoption center if they take care of a person under the age of 18 with a certificate of severe disability or a certificate of disability together with indications of: the need for permanent or long-term care or assistance of another person due to the significantly limited ability to live independently and the need for constant participation of the child's guardian on a daily basis in the process of his treatment, rehabilitation and education.

After the changes, the nursing benefit will be available to parents or other persons taking care of disabled children up to the age of 18, without any restrictions on taking up employment or other gainful work. An important change is also the introduction of a higher

[51] https://orka.sejm.gov.pl/proc9.nsf/ustawy/3130_u.htm (accessed on: 23.06.2023).

amount of the care benefit if there is more than one disabled child in the family. If a parent or guardian takes care of more than one child with disabilities, the nursing benefit will be increased by 100 percent for the second and each subsequent child with disabilities. The Act also implements the Judgment of the Constitutional Tribunal of 21 October 2014[52] by abrogating the provision making the right to a nursing benefit dependent on the date of occurrence of disability in a person requiring care.

Right to protection in cyberspace

A sign of our times is the widespread technologization of life, which is intended to improve the situation of individuals functioning in a given society. Thanks to it, images have changed. New forms of communication have permanently left their mark on the "genotype" of society. We have become an information society, for which the creation, collection and circulation of information is the essence, and the computer and the Internet or all digital technologies are becoming one of the most important aspects of life.[53] New technologies have also been used by the state apparatus in public life, by creating instruments, both technical and legal, to help citizens exercise their rights, including the right to health protection, education or access to cultural goods. Cyberspace also fulfils certain social functions – it allows for socialisation and interaction with other network users. This is of particular importance in the case of children with disabilities who, thanks to the network, can establish contacts with other peers, obtain information and skills, and exercise their rights. However, the question arises whether, in connection with the transfer of our lives to the virtual world, the relevant state institutions guarantee children with disabilities online safety, and

[52] Judgment of the Constitutional Tribunal of 21 October 2014, K 38/13.

[53] M. Golka, *Czym jest społeczeństwo informacyjn*e, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, No. 67, Vol. 4, p. 254. See: K. Chałubińska-Jentkiewicz, M. Karpiuk, *Prawo nowych technologii. Wybrane zagadnienia*, LEX, 2015, Part I, Chapter 2, Point 3.

thus whether the legislation keeps up with the changes taking place in society and, through appropriate legal instruments, guarantees them legal protection against the threats of cyberspace? Or were B.P. Herbert and K.J. Anderson right when they said that: "Owing to the seductive nature of machines, we assume that technological advances are always improvements and always beneficial to humans. We deceive ourselves?".[54]

Cyberspace in the Polish legal order is defined, *inter alia*, in Article 2 sec. 1a of the State of Emergency Act[55], as:

> [The] space for processing and exchanging information created by ICT systems, referred to in Article 3 point 3 of the Act of February 17, 2005 on the computerisation of the activities of entities performing public tasks, along with the links between them and relations with users.

And for the average user of the network, it will be understood as a platform for interpersonal communication, as well as a new dimension of entertainment for society.[56] However, cyberspace has also become a place of "extremely dangerous, dangerous phenomena, threatening the rights and freedoms of man, violating his privacy, dignity, good name and honour, aimed at the secrecy of the media (…)".[57] Therefore, the question may arise whether allowing children with disabilities into such a world is responsible and justified. The answer is, of course, affirmative, because it should be remembered that thanks to access to the Internet, people with disabilities have the opportunity to actively participate in the social integration process, which is so important for themselves and their development. What's more, thanks to new technologies, they can participate in events and activities in which they would not be able to participate in the real world, and they can receive an education

[54] B.P. Herbert, K.J. Anderson, *Diuna. Bitwa pod Corrinem*, Rebis, Poznań 2009.
[55] Journal of Laws of 2002 No. 117, item 985, as amended.
[56] See: M. Marczyk, *Cyberprzestrzeń jako nowy wymiar aktywności człowieka – analiza pojęciowa obszaru*, "Przegląd Teleinformatyczny" 2018, No. 1–2, p. 61.
[57] J. Sobczak, *Przestępczość w cyberprzestrzeni między przepisami polskimi a międzynarodowymi*, "Cybersecurity and Law" 2019, Vol. 1, No. 1, p. 162.

or use cultural goods.[58] Banning access to the Internet could also contribute to the building of further barriers and lead to even greater social exclusion, as noted by the Committee on the Rights of the Child in General comment No. 25 (2021) on children's rights in relation to the digital environment, stating:

> Meaningful access to digital technologies can support children to realize the full range of their civil, political, cultural, economic and social rights. However, if digital inclusion is not achieved, existing inequalities are likely to increase, and new ones may arise.[59]

Therefore, the task of individual states should be to facilitate access to the network for everyone, while creating safe conditions for its use, through appropriate mechanisms and legal institutions that eliminate or penalise certain behaviours in cyberspace, which may be encountered by, among others, children with disabilities.

The Council of Europe in its Strategy for the rights of the child (2022–2027), indicated that the threats that individual national legislation must face include counteracting in particular: violence, including grooming, sexual and peer violence, cybersexism, from exposure to pornographic and other harmful content, cyberbullying, online hate speech, and interference with the right to privacy and personal data protection (including in the context of education settings).[60]

Polish authorities, guaranteeing the broadly understood security of their citizens, including in cyberspace, and implementing international treaties to which they are parties, have introduced specific mechanisms and instruments to the Polish legal order to counteract cybercrimes. One such normative act is the Act on the national cybersecurity system, which defines the methods of action and procedures in the event of incidents in cyberspace, and also

[58] See: J. Perry, E. Macken, N. Scott, J.L. Mckinley, *Disabilty, Inability and Cyberspace*, [in:] B. Fiedman (ed.), *Human Values and the Design of Computer Technology*, Cambridge 1997, pp. 71–73.

[59] Committee on the Rights of the Child, General comment No. 25 (2021) on children's rights in relation to the digital environment, p. 4.

[60] Council of Europe, Strategy for the Rights of the Child (2022–2027), p. 29.

establishes institutions dealing with the analysis and prevention of such events. However, due to the adopted subject of the research, the analysis will include legal mechanisms that are supposed to protect children with disabilities against specific threats on the Internet, such as: online bullying and hate speech.

There is no definition of cyberbullying in the Polish legal system, and there are no provisions directly regulating this phenomenon. This does not mean, however, that this concept is suspended in a vacuum and there are no tools to defend against it.

In the doctrine, cyberbullying is defined as bullying with the use of digital technologies.[61] It can take place on social media, messaging platforms, gaming platforms and mobile phones. It is repeated behaviour, aimed at scaring, angering or shaming those who are targeted.[62] Cyberbullying can take a wide range of forms. It can be threats and intimidation, name-calling, harassment, exclusion, gaining access to unauthorised information online or "hacking", impersonation, posting personal information, sexting/sexualised imagery or manipulation.[63]

"Nastolatki 3.0 (2021)"[64], research conducted by NASK (Scientific and Academic Computer Network – a Polish national research institute), shows that every fifth student in Poland has experienced violence on the Internet in various forms. The most frequently mentioned forms of cyber aggression included: calling (29.7 percent), ridiculing (22.8 percent), humiliating (22 percent), and scaring (13.4 percent). However, the research did not cover children with

[61] R.M. Kowalski, S.P. Limber, P.W. Agatston, *Cyberprzemoc wśród dzieci i młodzieży*, Kraków 2012; J. Patchin, S. Hinduja, *Traditional and nontraditional bullying among youth: A test of general strain theory*, "Youth & Society" 2011, Vol. 43, No. 2, pp. 727–751.

[62] https://www.unicef.org/end-violence/how-to-stop-cyberbullying (accessed on: 23.06.2023).

[63] Anti-Bullying Alliance, *Cyberbullying and children and young people with SEN and disabilities: guidance for teachers and other professionals*, https://anti-bullyingalliance.org.uk/sites/default/files/uploads/attachments/cyberbullying-and-send-module-final%281%29_1.pdf (accessed on: 23.06.2023).

[64] NASK, *Nastolatki 3.0 (2021). Raport z ogólnopolskiego badania uczniów*, Warszawa 2021.

disabilities themselves, but it should be assumed that they are also affected by this type of risk.

The fight against cyberbullying in Poland proceeds in two ways – through prevention and education, and through penalizing certain acts. In the field of education and prevention, in 2017 the Ministry of Education and Science adopted a set of recommendations and guidelines for school principals and school authorities contained in the document "Safe school. Response procedures in the event of internal and external physical threats in the school", where the procedures for responding to digital security threats in the school are included. In addition, in 2020, a guide for parents was published "Cyberbullying. Turn on harassment blocking". The Ministry also started cooperation with the National Police Headquarters and included the most important issues in the field of protection against violence on the Internet in the core curricula for teaching computer science. There are also social campaigns aimed at educating children and young people in the use of the Internet.[65] It seems, however, that these activities are not sufficient and should be intensified, which may be indicated by the fact that "the role of school in shaping competences that allow functioning in the conditions of digital transformation is definitely negatively assessed by every ninth parent and legal guardian (11 percent) and every fourth (24.4 percent) believe that the school "rather not" performs this function well".[66] In addition, the Supreme Audit Office in the report *Zapobieganie i przeciwdziałanie cyberprzemocy wśród dzieci i młodzieży*, points out that in the Polish education system there is a lack of a properly recognised scale of the threat, as well as a lack of coordination at the central level, which are not conducive to appropriate actions aimed at protecting children from cyberbullying in the field of prevention.[67]

[65] An example is the campaign "Safe in the Web" addressed to children or the Cyberhigiene Guide. Lesson plans for teachers in the field of Cyber Lessons have also been developed, adapted to the age of students, which, however, are not mandatory.

[66] NASK, *Nastolatki 3.0 (2021)...*, *op. cit.*, p. 63.

[67] Najwyższa Izba Kontroli, Zapobieganie i przeciwdziałanie cyberprzemocy wśród dzieci i młodzieży, LKI.410.002.00.2017, No. 16/2017/P/17/071/LKI, p. 11.

If a child with a disability experiences cyberbullying, there are two ways of legal protection: civil and criminal. The first may take place in the case of unlawful use of the image of the child or his name and surname (without the consent of the child's parent or legal guardian). In such a situation, the perpetrator may be civilly liable for the violation of the child's personal rights (Articles 23 and 24 of the Civil Code[68]).

Criminal liability, on the other hand, depends on the presence of features of a specific prohibited act. As already mentioned, the Polish Penal Code[69] does not strictly provide for the crime of cyberbullying. Depending on the form of this phenomenon, it will be subject to certain prohibited acts, such as: defamation (Article 212), insult (Article 216), abuse (Article 207), punishable threats (Article 190), unlawful threat forcing (Article 191 para. 1) or stalking (Article 190a). The person who commits a prohibited act after reaching the age of 17 is liable under the rules set out in the Penal Code. In the scope of proceedings in cases of punishable acts in relation to persons who committed such an act after the age of 13, but under the age of 17, the provisions of the Act on the Support and Social Rehabilitation of Minors apply.[70] The Act also regulates proceedings in cases of corruption of persons' morals who are over 10 years old but not yet of legal age. Educational measures and a corrective measure in the form of placement in a correctional facility may be applied to a juvenile offender. The family court may order placing in an institution a minor who has committed a punishable act prohibited as a crime or a misdemeanour, if it is supported by a high degree of corruption of the juvenile's morals and the type of criminal act, the manner and circumstances of its perpetration, especially when educational measures have proved ineffective or do not promise social rehabilitation of the juvenile.

A child, as a victim of cyberbullying, cannot independently take effective legal action. His powers in the field of pursuing legal

[68] Journal of Laws of 1964 No. 16, item 93, as amended.
[69] Journal of Laws of 1997 No. 88, item 553, as amended.
[70] Journal of Laws of 2022, item 1700, as amended.

responsibility for cyberbullying are exercised by the parents/legal guardians.

The analysis of the above regulations leads to two *de lege ferenda* conclusions. The first concerns the need to create a special educational programme for children with disabilities and their parents in the field of protection against cyberbullying. Such a solution works successfully in Great Britain. It should be remembered that the content addressed to this group of children must be adapted to their needs.

The second is expressed in the words of J. Podlewska, who in the field of protecting children from cyberbullying states that "The only effective solution in this situation is to create a clear, simple and enforceable legal record regarding responsibility for various forms of cyberbullying, and not to look for legal provisions to find protection for the child and retribution for the perpetrator".[71]

The second threat of cyberspace that strikes at human dignity is hate speech. Protection of children with disabilities against this type of phenomenon results, first of all, from the principle of respecting the protection of the dignity of the human person, contained in Article 30 of the Constitution as well as Article 1 Convention on the Rights of Persons with Disabilities adopted by the United Nations General Assembly on 13 December 2006 r.[72] and Article 3 para. 2. Convention on the Rights of the Child. It should be recognised that some categories of people, e.g., children with disabilities, because of their characteristics, are particularly vulnerable to actions which constitute the most severe violation of their dignity.[73] Protection from hate speech is a contemporary aspect of the protection of human rights to dignity.

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[71] J. Podlewska, *Odpowiedzialność prawna za cyberprzemoc w stosunku do nieletnich*, "Dziecko Krzywdzone. Teoria, Badania, Praktyka" 2009, Vol. 8, No. 1, p. 9.

[72] Convention on the Rights of Persons with Disabilities adopted by the UN General Assembly on 13 December 2006, Journal of Laws of 2012, item 1169, as amended.

[73] D. Habrat, *Protection of Human Dignity as a Basis for Penalization of Hate Speech against People with Disabilities in Polish Criminal Law*, "Studia Iuridica Lublinensia" 2021, Vol. 30, No. 4, p. 261.

According to Recommendation No. R (97) 20 of the Committee of Ministers to member states on "hate speech",[74] the term hate speech shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

On the basis of domestic law, as indicated by the District Court in Warsaw: "This concept is defined in the doctrinal interpretation. It is assumed that hate speech is a written, oral or symbolic statement that makes an individual or group of people the subject of an attack due to the criteria of race, ethnicity, national origin, religion, language, gender, age, disability, external characteristics, sexual orientation and identity gender, social status or political beliefs. Hate speech can intimidate, threaten, humiliate, insult, perpetuate stereotypes and lead to discrimination and even physical violence"[75] When assessing a given statement in terms of hate speech, specific circumstances should be taken into account, i.e. not only its literal content, but also its narrower and broader context, embedding the statement in a given social reality, form of statement or measures taken by entities obliged or entitled to reaction to the statement.[76]

Polish criminal law penalises hate speech in Article 256 of Penal Code (hereinafter: CC), on the basis of which:

> Whoever publicly promotes a fascist or other totalitarian state system or incites hatred on the basis of national, ethnic, racial or religious differences or because of

[74] Council of Europe, Recommendation No. R (97) 20 of the Committee of Ministers to member states on "hate speech" adopted on 30 October 1997, [in:] Recommendations and declarations of the Committee of Ministers of the Council of Europe in the field of media and information society, Strasbourg 2015, pp. 76–78.

[75] Judgment of the District Court in Warsaw of 14 August 2013, XX GC 757/12, LEX No. 1899954.

[76] *Judgment of the Grand Chamber of the Court of Human Rights of 16 June 2015, complaint No. 64569/09, Delfi AS v. Estonia*, [in:] M.A. Nowicki (ed.), *Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2015*, LEX/el., 2016.

> non-denominationalism, shall be subject to a fine, the penalty of restriction of liberty or imprisonment for up to 2 years.[77]

and in Article 257 CC, according to which:

> Whoever publicly insults a group of the population or a particular person because of their national, ethnic, racial or religious affiliation or because of their non-denominational nature, or for such reasons violates the bodily integrity of another person, shall be subject to the penalty of deprivation of liberty for up to 3 years.

As the Supreme Court emphasised in one of its rulings:

> In order to assess whether the perpetrator's behaviour met the criteria of an act under Article 256 para. 1 of the Penal Code, it is necessary not only to analyse all elements of the so-called subject matter of the crime – including the content of the statement, which would be a manifestation of incitement to hatred – but also the examination of the so-called subjective side, which boils down to determining whether the perpetrator actually intended to cause the above-mentioned effects in the recipients of this statement. It is assumed that the offense specified in Article 256 para. 1 CC may be committed intentionally, only with direct intent.[78]

At this point, it is worth focusing on the catalogue of features subject to special protection in the case of the "incitement to hatred" as well as the defamation of a group or person. In both of the cited provisions, the criteria are the same: national, ethnic, racial, religious

[77] It is worth noting that as of 1 October 2023, the above-mentioned provision will receive a new wording, according to which: "Whoever publicly promotes a Nazi, communist, fascist or other totalitarian state system or incites hatred on the basis of national, ethnic, racial, religious differences or denomination, shall be subject to the penalty of deprivation of liberty for up to 3 years".

[78] Judgment of the Supreme Court, II NSNk 12/23, LEX No. 3570699.

or non-denominational affiliation. Therefore, the question arises whether a child who has been affected by hate speech due to his or her disability will benefit from the legal protection referred to in the above provisions? The answer is, of course, negative. This is because the Polish legislator excludes the feature of disability from the criterion of protection.

The above-mentioned examples are not the only ones that may be applicable to the criminal law assessment of events related to hate speech, because law enforcement authorities also use the legal classification of other prohibited acts, such as: defamation (Article 212 CC) and insult (Article 216 CC). They are the ones who can guarantee the protection of children with disabilities. It is worth noting, however, that both of the provisions cited, i.e. Articles 212 and 216 CC, contrary to Article 256 and Article 257 CC, are prosecuted privately, which entails certain consequences. The initiation of private prosecution proceedings may take place only as a result of a complaint or an indictment being filed by the aggrieved party. A private indictment must describe the act from which the prosecutor infers the possibility of a specific type of prohibited act, and also present evidence, which means that the parent of a child with a disability will be obliged to collect and present evidence, and not, as in the case of a public complaint, law enforcement. Therefore, the natural conclusion *de lege ferenda* should be to extend the criterion of protection in Article 256 and 257 CC for the premise of disability. An example in this respect may be the Hungarian legislation, according to which:

> Any person who, before the public at large, incites violence or hatred against: a) the Hungarian nation; b) any national, ethnic, racial or religious group or a member of such a group; or c) certain societal groups or a member of such a group, in particular on the grounds of disability, gender identity or sexual orientation is guilty of a felony punishable by imprisonment not exceeding three years.[79]

[79] Act C of 2012 Penal Code, sec. 332.

It is worth adding that hate speech due to disability is not a marginal phenomenon. In 2007, the Public Opinion Research Center studied the perception of verbal violence and hate speech. As many as 20 percent of the respondents believed that the phenomenon of hatred concerns disability.[80]

Therefore, it may come as a surprise that despite the repeated recommendations of the Ombudsman, as well as 8 proposals for amendments to the regulations in which the catalogue of discriminatory grounds has been extended, the Polish authorities do not see the need to protect people with disabilities, notoriously emphasising that "Polish criminal law has appropriate instruments of criminal law response to criminal behaviours motivated by discriminatory grounds, regardless of the minority criterion identifying the victim or group of victims".[81]

Conclusions

Children with disabilities are a very delicate, but also an important tissue of society. Therefore, in order to exercise their fundamental rights, and to counteract their social exclusion, public administration bodies have a constitutional obligation to provide them with adequate and dignified living conditions. This obligation is fulfilled by providing them with social security, the essence of which is based on the removal of all barriers that would make it impossible to achieve their life aspirations.

This report analyses the Polish legal system in terms of mechanisms and legal institutions aimed at guaranteeing children with disabilities the implementation of their right to health protection,

[80] Centrum Badania Opinii Społecznej, *Społeczna percepcja przemocy werbalnej i mowy nienawiści*, BS/74/2007, Warszawa 2007, p. 8.

[81] Reply of the Government Plenipotentiary for Equal Treatment, BRT-XXI.070.3.2021.AN, https://bip.brpo.gov.pl/sites/default/files/Odp.%20ws%20mowy%20nienawi%C5%9Bci%2C%205%20maja%202021%20przes%C5%82ane%2013.05.2021.pdf (accessed on: 23.06.2023). See: D. Habrat, *Protection of Human Dignity...*, *op. cit.*, pp. 269–270.

the right to social security and the right to safe conditions for using cyberspace.

The report showed that the Polish system of ensuring social security for children with disabilities fulfils its basic role. The actions taken by the Polish authorities are part of the global trend to increase the importance of protecting the rights of children with disabilities. However, they are not devoid of certain shortcomings, which are indicated by the *de lege ferenda* conclusions proposed by the Author, taken from solutions adopted by other countries. In particular, the regulation that guarantees safe conditions for using the Internet for this social group needs improvement, which may prove to be a useful tool in the process of socialisation with peers.

The social security of children with disabilities should become one of the priorities of the social policy of each state because without making our society inclusive, sustainable, and resilient, children and adolescents with disabilities cannot fully realise their right to ensure the full enjoyment of all human rights and fundamental freedoms on an equal basis with other children. At the heart of such a society is empowerment – investing in health, social protection, and protection in cyberspace – to allow individuals with disabilities to lead fulfilled lives and to take control of their wellbeing.[82]

The report may be used as a material for further discussion on the rights of children with disabilities, as well as for studies on the implementation by Poland of the provisions of the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child.

[82] The Lancet Child & Adolescent Health, *Securing the right to health for children with disabilities*, https://doi.org/10.1016/S2352-4642(17)30156-6.

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PART III

FREEDOM OF CONSCIENCE IN THE INSTITUTIONAL ASPECT

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Freedom of Conscience from an Institutional Perspective, with a Special Focus on Conscientious Objection in the Case of Vaccination

Introduction

The COVID-19 pandemic has resulted not only in new challenges to humanity, but it has also raised important questions concerning constitutional law. To what extent should we give up fundamental rights in order to increase our security? How might the state be empowered to achieve more effective protection for its citizens? Is it possible to maintain state power within the frames of the constitution under a state of emergency?

This paper argues that freedom of conscience is a key element of personality that must be respected, even under exceptional circumstances. In order to demonstrate this, the paper first analyses the nature of human rights, then the individual and institutional aspects of conscience, before considering the international case-law regarding this right.

Finally, the paper focuses on a specific issue, i.e. how freedom of conscience should prevail in the case of mandatory vaccination.

1. Whose rights? Personal and institutional aspects of rights

Since the late 18th century, it has become increasingly clear that people have rights. As well as many important antecedents, such as the Magna Carta or the Habeas Corpus Act, political documents

from the Enlightenment, especially the US Declaration of Independence and the French Declaration of the Rights of Man and of the people, have resulted in a paradigm shift concerning fundamental rights. It was the duty of states (i.e., public authorities) thenceforth to serve the people, and not conversely, as had been the case during the age of Absolutism.

A comprehensive list of fundamental rights did not, however, emerge overnight. These rights have always been associated with social needs. When members of the society realised their need for freedom of religion, free speech and other political rights, for instance, they began to claim them, and became their rights. Different societies, however, have different needs at different times, as a result of which the history of human rights is anything but continuous. During the late 18th and early 19th centuries political and personal rights came under scrutiny, while in the 20th century, especially until the 1970s, societies put a firm emphasis on social, cultural and economic rights.

In the early period of the history of human rights it was clear that people had rights, while it fell to states, in the form of public legal bodies to secure these rights. Soon thereafter, however, there emerged a claim that fundamental rights should also be granted to several artificial legal entities, either social or economic. Human rights have since been divided into two. Some rights may also be granted to private legal entities insofar as companies and NGOs may also have property and seek to avoid being discriminated against. On the other hand, by nature they have neither dignity nor religion and neither can be educated. The distinction is, however, less solid than it might first seem. Private law entities, for instance, have no religion because they are artificial. Neither can they entertain thoughts on the supernatural. Still, due to their members' activities, Churches (as artificial legal persons) may also refer to the freedom of religion, despite not being living individuals. Believers, on the other hand, do have religious beliefs.[1] The situation is much the same in the

[1] Cha'are Shalom Ve Tsedek v. France [GC], 2000, [72]; Leela Förderkreis e.V. and Others v. Germany, 2008, § 79. Case of Magyar Keresztény Mennonita Egyház and Others V. Hungary (Applications No. 70945/11, 8 September 2014) [78].

case of universities. A university's professors educate students, so the university also possesses a freedom of education.

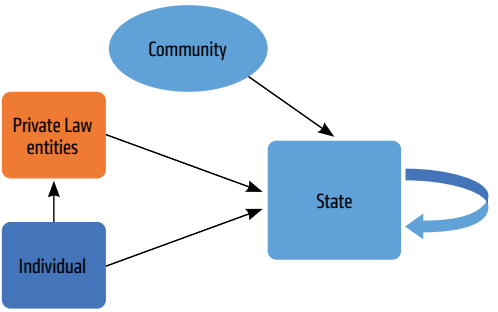
During the second half of the last century newer approaches to rights emerged. Their peculiarity is that they cannot be individualised; the bearer of the right is not a human being (nor a private law entity) but the community itself. The best example of this is the right to a healthy environment. It is not impossible to personalise the environment or nature; it is either healthy for everyone or not healthy for anyone. This aspect needs to reconsider the protection of fundamental rights. As the Hungarian constitution has it, "Hungary shall recognise and endorse the right of everyone to a healthy environment" (Article XXI Sec. 1). Individuals may have access to legal actions for the protection of the environment, but it falls to the state to endorse the right, even against itself.

In Hungarian jurisprudence and legislation, the most current issue concerns whether states or state organs may have fundamental rights. As the description above indicates, it has long seemed clear that state entities are obliged by rights, but they themselves do not own any. The Hungarian Constitutional Court praxis first acknowledged that state entities may have fundamental rights, and as a consequence that they may initiate constitutional complaint to the court in private legal relationships.[2] The Court later accepted that state entities are endowed with the right to a fair trial even in public legal relationships, when they perform their public duty.[3] The legislator verified this interpretation by modifying the act on the Constitutional Court accordingly.

[2] Decision 3091/2016. (V.12.). In this case the Constitutional Court accepted the petition of a state-run hospital in a private legal dispute.

[3] Decision 23/2018. (XII.28.) AB. In the decision the National Bank of Hungary challenged the judicial decision at the Constitutional Court. The crux of the case was that the National Bank supervised the activity of a private institution (using public authority), but the court decided against them.

Figure 1. Human Rights relations



Source: author's own preparation.

As may be seen, since the recognition of fundamental rights, there is quite a distance between the rights of human beings and the rights of private legal entities, communities and even states. It may, however, be wondered who is obliged by states. It has long been clear that it is states (public authorities). It is they who are obliged to respect and promote fundamental rights simply because they posed the greatest danger to fundamental rights. From the very beginning the claim was that public authorities should not take personal property or life; that it should promote personal security, etc, but is this still the case? What one may observe is that the application of rights is in many ways no longer a public law (state v. individual) relation but rather a private relation (between individuals). Discrimination may occur in everyday relations. Social media may apply censorship, restricting one's free speech, etc. In reality it is not exclusively, perhaps not primarily, the state that restricts fundamental rights. This brings us to the institutional aspect: what action should states take in order to secure the application of fundamental rights? To what extent should they leave the issue to individuals and how should they become involved when necessary? The rest of the chapter examines the issue in relation to freedom of conscience.

2. Freedom of conscience and conscientious objection

Democratic constitutions are likely to acknowledge, either explicitly or implicitly, the freedom of conscience. It is, however, unclear what this means and especially what it means in practice.

In an effort to clarify this, I chose a dictionary entry according to which conscience is "the sense or consciousness of the moral goodness or blameworthiness of one's own conduct, intentions, or character together with a feeling of obligation to do right or be good".[4] The definition begins with morality: conscience, religious or otherwise, is the part of the human mind that senses moral goodness. In many cases, however, morality is beyond rationality.

Human beings are rational. They make decisions based on rational arguments, on the basis of a logical chain of thought, deducing one thing from another. At the same time, they are more than just rational beings. They may make decisions on the basis of emotion, or crucially given the topic, on the basis of their conscience, motivated by morals, which is neither emotional nor rational. Since the driving force behind the three types of decisions is different, one cannot really talk about the correctness of the decision, only whether it corresponds to one or the other of the three types.

In certain cases, conscience may overrule people's rationality. Human beings have the fundamental right not to be rational, to obey their conscience, even if it makes logical sense. Conscience is personal. In many cases, it cannot be explained in logical terms; it is beyond rationality.[5]

Freedom of conscience is often considered part of freedom of religion. Torfs differentiates between three layers of freedom of religion. The first layer is that of individual religious freedom: everyone has the right to adhere to any religious conviction or belief, including the right to change one's religion, or not to be religious at all. The second layer is collective religious freedom, which implies

[4] https://www.merriam-webster.com/dictionary/conscience (accessed on: 09.04.2024).

[5] L. Csink, *Freedom of Conscience and the COVID-19 Vaccination – Reconciling Contradictory Forces*, "Law, Identity and Values" 2021, No. 1, p. 42.

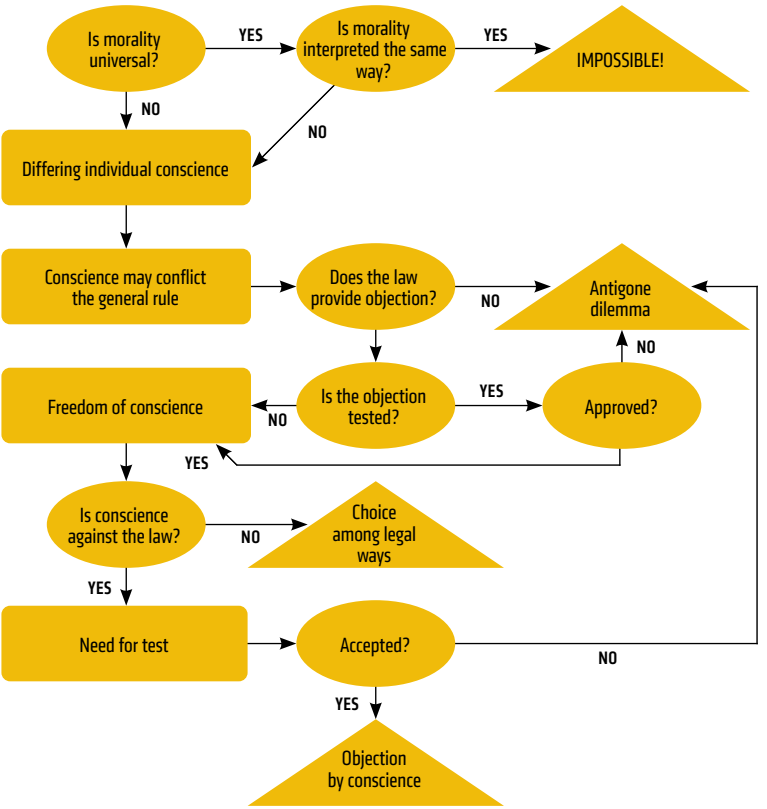
freedom of community building and the freedom to organise public demonstrations of faith. The third layer is institutional religious freedom, implying people's right to organise themselves structurally into religious groups and associations, or into communities and churches with internal norms that create a subculture.[6] Freedom of conscience may be an internal phenomenon but it also has a direct effect on the outside world. Freedom of conscience is essentially the free choice of one's views, ideology and convictions. The nature of one's convictions is irrelevant in the eyes of the law: accepting the view of a historical Church is in keeping with the idea of a free conscience, as is the acceptance of any other belief or even of atheism.[7]

Conscience is basically a concept beyond law. The law does not, and may not, regulate our moral convictions or consequent decisions in specific situations. On the other hand, it is a legal question whether we may refuse to comply with legislation for reasons of conscience: conscientious objection. The following algorithm gives an overview of the relation between conscience and law:

[6] R. Torfs, *The Presence of the Cross in Public Spaces from the Perspective of the European Court of Human Rights*, [in:] P. Stanisz, M. Zawiślak, M. Ordon (eds.), *Presence of the Cross in Public Spaces*, Cambridge Scholars Publishing, Cambridge 2016, p. 3.

[7] Atheism is not neutral, but is one possible conviction. Atheism is protected in law by the freedom of religion.

Figure 2. Overview of the relation of conscience and law



Source: author's own preparation.

First of all, one faces a fundamental question: whether morality is universal? In other words, are we all guided by the same, universal moral law, or does morality depend on culture, society, and age, and it is necessarily different for each individual? This question cannot be answered even on a philosophical level. At best, theology might shed some light on th matter, but jurisprudence absolutely cannot.

Beginning with the assumption that morality is not universal, the conviction of conscience is necessarily different. If, on the other hand, we think of morality as universal, then an additional question arises as to whether universal morality is interpreted in the same way

by everyone, which it clearly is not. We have, however, side-stepped the philosophical question: whether or not morality is universal, or people's conscientious convictions are necessarily different.[8]

These different convictions mean that situations may arise in which the individual conscience requires behaviour that contravenes that decreed by state legislature. Many argue that freedom of conscience exists only within the framework of the law, so that conscience cannot be grounds for exemptions under the law.[9] Such notions tend to be dangerous. Freedom of conscience is a constitutional right. If laws are *de facto* restrictions on constitutional rights, a constitutional right is what the law allows it to be. There is therefore no need for a constitution because it is the law that determines our rights, not the constitution. My understanding is the exact opposite: Laws should adhere to the principles of the constitution.[10]

If, in the event of a conflict between conscience and the law, the law fails to exempt one from the obligation to comply with the general rule, then the classical Antigone dilemma arises.[11] In this case, the individual is forced to make a choice: listen to his or her conscience and reckon with the consequences of failing to comply with the law, or comply with the decrees of the law by bending or setting aside their conscience. The decision itself is outside the system of law. From the perspective of the state and the law, the individual's decision is all that matters. In such a case the institutional aspect of freedom of conscience is absent.

A different case arises when the law allows the individual to neglect to comply with the demands of the law for reasons of conscience. In such cases, an additional question arises as to whether

[8] This naturally complicates the task of the state in establishing institutional protection. From the point of view of regulation, it would be simple if everyone had the same conviction of conscience. However, they do not.

[9] According to a court ruling, public health and the prevention of plagues overrule personal integrity (BH 2020.147.). I find that such a general statement oversimplifies the issue.

[10] L. Csink, *Freedom…*, *op. cit*., p. 43.

[11] In Sophocles's play the key question is whether Antigone may hold her relationship to her dead brother above human laws. The play is usually taken to symbolise the dilemma between natural law and human law, but it is also a conflict between conscience and the rule of the king (i.e., the law).

the state should scrutinise the sincerity and gravity of the reason behind the conscientious objection, or whether it is left entirely to the person concerned.[12] If the reason of conscience is checked and is found to be unjustified, then, once again, we are back at the Antigone dilemma. If there is no such check, or the reference to conscience is accepted as a result of the check, then we arrive at freedom of conscience.

The next question is whether the behaviour resulting from freedom of conscience contravenes any legal provision. In other words: is it necessary to break the law in order to obey one's conscience, or is following one's conscience completely legal: does the individual only forgo specific benefits and opportunities if they listen to their conscience? A typical example of this is the question whether Muslim women as citizens of a western country may wear a headscarf or hijab in a passport photo.[13] In such a case, there is no question of any violation of the law: not having a passport photo is perfectly legal, although they decline the opportunity to travel abroad. The institutional aspect of freedom of conscience means that the question that needs to be analysed is the extent to which the state may demand someone to follow his or her conscience.

It is a different issue when the exercise of freedom of conscience requires illegal behaviour. Ritual cleansing in a river, when bathing is otherwise prohibited, or the consumption of hallucinogenic substances, which are classified as drugs, even for sacred purposes, might serve as good examples here. In such cases, the institutional aspect of freedom of conscience requires a test that helps to navigate whether the state might waive the command of the law, yielding to conscience.

[12] According to the Military Defence Act, a request for unarmed service is rejected if the person's lifestyle and circumstances fail to coincide with the conscientious objection.

[13] According to the ICAO Guidelines for Passport Photographs, head coverings are not permitted except for religious reasons, but the facial features from the bottom of the chin to the top of the forehead and both edges of the face must be clearly shown. https://www.icao.int/Security/mrtd/Downloads/technical%20reports/annex_A-photograph_guidelines.pdf (accessed on: 09.04.2024).

In the majority of cases the legislator takes conscience into consideration and in many cases allows religious or psychological exceptions to the otherwise prescribed behaviour. Typical examples of this are the possibility of military service without a weapon, or the fact that a doctor cannot be obliged to perform an abortion. If there is, however, no set of criteria in legislation, then the institutional protection of freedom of conscience requires that the court examine whether it be legitimate that the legislation yield to the conscientious motive. In the jurisprudence of the Hungarian Constitutional Court the comparative burden test has been used on more than one occasion.[14]

As a result of this complex series of operations, we may decide whether conscientious objection is permitted in a given case.

3. Conscience and Vaccination in the Hungarian jurisprudence

3.1. HUNGARIAN CASE LAW ON MANDATORY COVID-19 VACCINATION

During and after the COVID-19 pandemic, the constitutional courts of many countries sought to determine whether mandatory COVID-19 vaccination, explicit or implicit, was constitutional. Only the reference to conscience is significant here, and within that, primarily the conclusions that might be drawn regarding institutional protection and collective responsibility. Below, the Hungarian decision will be described, before a constitutional evaluation will be made, after which aspects of conscience will be discussed.

Along with the roll out of the vaccination, the legal regulations surrounding it developed. Government Decree 60/2021. (II.12.) on the certification of protection against the coronavirus (hereinafter: GD1) introduced the protection certificate, which the legislation provided to those who:

[14] Decisions 39/2007. (VI.20.) AB, 47/2009. (IV.21.) AB.

1. had received the first dose of the vaccine;
2. were previously infected by the coronavirus;
3. had an adequate amount of antibodies in their body.

In cases (2) and (3) this would have been issued by the government office for a specific period of time, and in case (1) for an indefinite period. In cases (1) and (2) the protection certificate was issued *ex officio*, and in case (3) at the request of the person concerned upon receipt of an administrative fee. GD1 itself did not link the protection certificate with any right; this was done by subsequent legislation.

The 449/2021. (VII.29.) Government decree on the mandatory vaccination of healthcare workers as well as on the protection of workplaces against coronavirus in the 598/2021. (X.28.) Government decree, made it possible for the employer to oblige employees to be vaccinated. Additional emergency decrees on the mandatory vaccination of workers in the public sectors subsequently came into being. Government decree 13/2022. (I.20.) "on the amendment of certain government regulations related to the certification of protection against the coronavirus" changed the protection rules with effect from 15 February 2022. It recognised no natural protection, only vaccination, and only those who had received at least three jabs, two in the case of those under the age of 18, or who had received the second vaccination within the space of six months, were given a vaccination certificate.

Prior to the mandatory vaccination of healthcare workers, the Constitutional Court in the 27/2021. (XI.5.) AB had already examined the constitutionality of the legislator's equating the continuation of certain activities to a protection certificate. This decision primarily conducted a discrimination-based investigation and concluded that:

> Article XV of the Basic Law from the point of view of the group formation based on paragraph (2) of the Article tells us it is important that GD1. circumstances entitle one to protection in the sense of: at least receiving the first vaccination, or suffering from an illness caused by the infection. If these are suitable for reducing the risk of infection, the transmission of the infection, and the possibility that,

> in the event of infection, the disease will result in serious complications, leading to hospitalisation or even to death, then the situation of the holders of the vaccination certificate is different from that of those who are not entitled to the vaccination certificate (Reasoning [79]).
>
> Those who have a vaccination certificate because they have been vaccinated or have been infected do not form a homogenous group with those who do not have this condition (Reasoning [91]).

In this respect, the Constitutional Court considered those with a vaccination certificate to belong to a homogeneous group regardless of whether the reason for issuing the certificate was vaccination or prior infection, and therefore did not consider it unconstitutional that certain activities could only be carried out with this certificate.

The Constitutional Court first sought to determine whether petitioners were personally involved, as it is a criterion of individual complaint. The Constitutional Court thereby established the involvement of the petitioners, since for them the vaccination was also *pro forma* mandatory, and the lack of vaccination was accompanied by adverse legal consequences (Reasoning [47]). The substantive investigation primarily focused on the violation of the right to self-determination. Regarding the legitimate purpose of the restriction, the Constitutional Court recalled several other recent decisions and concluded that:

> infections caused by various epidemics pose a high degree of risk to the lives of individuals, or at least to their health. The fundamental legitimate aim of the epidemiological measures, including mandatory vaccinations, is therefore the institutional protection of the right to life, i.e. the state's obligation to protect life (Reasoning [49]),

adding at the same time that the existence or absence of a legitimate aim in relation to the epidemiological measures must be examined sector-by-sector, sector-specifically (Reasoning [50]).

Regarding the suitability of the restriction, the Constitutional Court held that it was not its duty to decide on scientific truths, but referred to the fact that according to the WHO and the leading medical science position, "vaccination is suitable for curbing the epidemic and mitigating its negative social and economic effects" (Reasoning [53]). The Constitutional Court subsequently concluded that "vaccination is the most effective way to combat the epidemic, with no other alternative than the widest possible inoculation of society" (Reasoning [54]). In this regard, the Constitutional Court stated the following:

> Therefore, in order to increase the number of vaccinations in the most critical sector from the point of view of overcoming the epidemic, also in health care, the Constitutional Court considers the challenged restriction necessary to achieve the legitimate purpose (Reasoning [56]).

The Constitutional Court considered that the restriction "should compare the advantages of the right to life and health with the disadvantages embodied in the restriction of the right to self-determination with respect to health" (Reasoning [58]).

In relation to the proportionality of the restriction, the Constitutional Court bore in mind that:

i. the persons affected have the opportunity to receive the vaccination (Reasoning [61]),
ii. vaccination is *de facto* not mandatory [Reasoning (62)],
iii. the state fulfilled its obligation to provide information and provided sufficient time to prepare for the rule [Reasoning (64)], and
iv. the range of those who suffer from the restriction is narrow [Reasoning (67)], while the range of beneficiaries of the restriction is wide: the entire society [Reasoning (68)].

The Constitutional Court recognised that the loss of one's job, and thereby a regular income, is a significant restriction, compared to which the loss of a lump sum severance payment is less significant (Reasoning [61]). Bearing the above in mind, the Constitutional Court found the fundamental restriction right to be proportionate.

The Constitutional Court also referred to the fact that the Medical Act made it possible to prescribe mandatory vaccination long before the pandemic, so those concerned had to reckon with the general possibility of any vaccination.

As a result of this reasoning, the Constitutional Court rejected the petition. The rationale behind the decision might be that it seems the necessary and proportionate restriction of the right to self-determination and physical and mental integrity derived from human dignity, if an emergency government decree terminates the employment of workers in a sector prioritised from the point of view of the prevention of an epidemic without compensation, and if such workers refuse the prescribed vaccination.

3.2. THE ANALYSIS OF THE DECISION

Based on the petitions, the Constitutional Court had two questions to answer: (1) whether healthcare workers may be constitutionally required to be vaccinated against the coronavirus, and (2) whether the immediate termination of the legal relationship without compensation is a constitutional legal consequence of the failure to be vaccinated.

The Constitutional Court considered the effectiveness of the vaccine against the coronavirus as a health issue, in which the representatives of medical studies, not lawyers, are called upon to take a stand. The Constitutional Court initially established that the vaccination prescribed for healthcare workers affects the right to self-determination. The decision stated that the legitimate purpose of limiting this right is that this protection against the epidemic and the minimisation of the risk of infection provide a basis for limiting basic rights, especially in the case of workers in the most important sector from the point of view of protection, the health sector.

As for the legitimate purpose, it was crucial to discern whether the decree made vaccination mandatory for healthcare workers. In this regard, the position of the Constitutional Court was contradictory: in one place it states that "in this case the decree makes vaccination *pro forma* mandatory for those employed in the health

sector who come into direct contact with patients" (Reasoning [47]), but it subsequently assessed that the decree created no *de facto* mandatory, enforceable vaccination regime (Reasoning [62]). Based on these two parts of the reasoning, it is unclear whether, if the legislator makes some criterion an unavoidable condition for the practice of an occupation, the fulfilment of this criterion is mandatory within the given profession.

All criteria may seem mandatory if there is a legal consequence for failure to fulfil them. The fact that those concerned could escape the personal consequences of the legislation cannot be said to render the requirement optional. Losing one's job, naturally an existential disadvantage, is clearly a legal disadvantage. If healthcare workers failed to ensure they were vaccinated, the legislation punished them: with the loss of their jobs and their livelihood. Vaccination should therefore not be mandatory in the regulatory framework.[15] It should be noted that if the Constitutional Court had not considered vaccination to be mandatory, it would not have had to consider the limitation of self-determination; the limitation of the free choice of occupation. If vaccination is not mandatory, the violation of the freedom of self-determination does not even arise. Limiting the freedom of self-determination arises only in the event that the legislator prescribes certain behaviour. The essence of the freedom of self-determination means precisely that on may choose between performing or not performing an action. If this freedom is actually ensured, there is no restriction on self-determination.

When examining necessity, the question arises whether vaccination against the coronavirus is the purpose of the regulation or merely a means of protection against the epidemic. Logically, it is the latter because it would hardly be constitutional to require a self-serving vaccination. In terms of necessity, the key question

[15] If the argument were acceptable that a measure is not mandatory, if it is possible to avoid the scope of the regulation, then, for example, we could not consider it mandatory if a municipality imposed any tax on residents of the settlement. It is not mandatory, as you can move out of the town. This approach is clearly wrong.

is whether vaccination is the only means of protection or whether there is a viable alternative.

Based on the prior practice of the Constitutional Court, allowing space for alternative behaviour is an important aspect of the constitutionality of the regulation. A previous decision of the Constitutional Court [39/2007. (VI.20.) AB, analysed later] decision obliged the state to enable alternative behaviour within a reasonable framework only if it still achieves the goal of the regulation.

An important question regarding the investigation into the constitutionality of the decision is therefore whether suffering a bout of COVID-19 or having a sufficient number of antibodies could be said to constitute protection against the infection, to the same extent as vaccination. If natural immunity is just as efficacious in curbing the epidemic and reducing its effects as vaccination, then there would be less justification in making vaccination mandatory. Both natural immunity or proof of a state good health via a COVID-19 test negate the necessity for vaccination. The position of the Constitutional Court has changed on this issue. In relation to the constitutionality of the vaccination certificate, the former decision stated that those who had been infected with COVID-19 and those who had had at least one vaccination were in a homogeneous group, i.e. both were protected in the terminology of the regulation. Relying on professional data, this decision stated that "after taking the first dose [vaccination], the probability of infection is very low, hospitalisation is even lower and death even more unlikely" (Reasoning [90]). On the other hand, the more recent decision took the position that "vaccination is the only way to protect against the epidemic" (Reasoning [54]), and implicitly considered the administration of the three doses to be the only real means of protection against the epidemic.

Both the Constitutional Court's two statements cannot be true at the same time. If there is an alternative to vaccination, then the compulsory vaccination of healthcare workers fails to meet the criterion of the test of the necessity of the fundamental rights, since there is a less restrictive alternative tool that is equally efficacious in achieving the legislative objective. If there is none, then the first decision is wrong in the investigation into discrimination. Either the protection certificate or the mandatory vaccination of healthcare

workers is unconstitutional; the two cannot be constitutionally justified at the same time, at least not in the way the Constitutional Court did it.

Theoretically, there is also the possibility that the state of affairs changed in the period between the two decisions: science had already changed its mind about the effectiveness of the COVID-19 vaccine. The possibility of this is reduced by the fact that only six weeks had passed between the two decisions, but even if it had happened, the Constitutional Court should have indicated the change in the state of affairs in science in the later decision. The Constitutional Court may of course rely on the position of science. It would exceed its authority if it wished to formulate scientific results pertaining to other fields by itself. The Constitutional Court must, however, consistently apply the results of science in all its decisions, and, if there is a change in the results of science, the Constitutional Court must also indicate this.

Once the Constitutional Court had established that obligatory vaccination for healthcare workers served a legitimate purpose and was a necessary means of protection against the epidemic, the Constitutional Court examined whether the termination of the legal relationship could be considered a proportionate legal disadvantage, especially given that dismissal would be with neither compensation nor severance pay. It is worth mentioning that proof of necessity alone is insufficient to make the restriction proportionate. Mitigating the effects of the epidemic and requiring vaccination for this purpose justifies no legal consequences for those who fail to meet the conditions of the regulation.[16]

From the point of view of the prevention of the epidemic the only thing that mattered was that unvaccinated doctors should avoid coming into contact with patients. Whether their employment was

[16] To illustrate the absurdity of the argument, let us assume that parking offences would be punished with long prison sentences. We would hardly consider the punishment proportionate because (1) the people involved could park legally, (2) a sign would have warned them in advance about the legal consequences of illegal parking and (3) it is in the interest of society as a whole that everyone drive and park legally. These are all important arguments, but none of them is an answer to the proportionality of the legal consequence.

terminated, whether they were only put on compulsory leave, or whether they receive severance pay was irrelevant with regard to the coronavirus pandemic. The Constitutional Court should therefore have sought to explain why it was acceptable grounds for dismissing doctors who had declined to be vaccinated, as only doctors who were uninfected with the coronavirus should have come into contact with patients. In this regard, it seems more appropriate to argue that healthcare workers could have expected that mandatory vaccinations be prescribed for them based on the Medical Act, and that this would have been part and parcel of their jobs. The Constitutional Court could have examined, for example, within the framework of proportionality, whether sending unvaccinated healthcare workers on unpaid leave might not have reserved freedom from being imprisoned, and thus whether care would not have been jeopardised. The decision neglected, however, to address this.

In such cases, however, it is still questionable whether the court chose the least restrictive means, or whether the legislator might not have had their disposal means equally appropriate but less restrictive in terms of the basic rights of those concerned. The Constitutional Court justified the constitutionality of the denial of severance pay by saying that it was a less significant loss than the loss of one's job and income. This argument, however, fails to meet labour law standards. The fact that one of the two legal disadvantages is more serious, which is, of course, a generalisation, fails to explain the constitutionality of the second restriction. In terms of labour law, it is erroneous because severance pay is compensation for work done, and loyalty to the employer and the workplace. Unvaccinated healthcare workers have cared for patients for decades and no one has disputed the professionalism of this. Even if one accepts that they might no longer be considered fully fit for healthcare work due to their not being vaccinated, there is no constitutional basis for questioning the severance pay due for the previous work they have done.

Vaccination against the coronavirus was an important means of protection against the epidemic, but the tool cannot replace the goal.

4. Institutional aspect of freedom of conscience I – What action should states take?

With regard to the institutional aspect of freedom of conscience, on the one hand, the question must be put: what action should the state take with regard to the application of this fundamental right. A practical approach to this question is particularly difficult. The state, together with society, recognises the diverse conscience of individuals, but, when the individual conscience fails to meet the expectations of the majority, the majority tends to be reluctant to yield to this conscience. This is especially true with regard to COVID-19 vaccinations. Society and legal regulations regard the refusal to be vaccinated for reasons of conscience as almost a conspiracy theory, against which action should be taken.

In accordance with the case law of the Constitutional Court, it may be appropriate to require vaccination in general or for certain sectors. In this part, that follows, only those aspects that the state must take into account in order to institutionally protect conscience have been explored.

1. Freedom of conscience dictates that the state cannot determine the validity of any conviction or religious belief.[17] It follows from this general principle that the state may not say whether vaccinations are against the conscience of individuals or not. Conscience is always personal. The idea that conscience is no more than a product of organised religion does not hold true. Simply because traditional religions do not oppose vaccination, does not mean that concerns regarding COVID-19 vaccination cannot be matters of conscience.[18]

[17] Nolan and K v. Russia (Application No. 2512/04, 6 July 2009). In the Hungarian jurisprudence the same outcome was declared with decision 27/2014. (VII.23.) AB.

[18] In their study, Pelčić *et al*. analyse the views of several religions on vaccination (G. Pelčić, S. Karačić, G.L. Mikirtichan, I.O. Kubar, F.J. Leavitt, M. Cheng-tek Tai, N. Morishita, S. Vuletić, L. Tomašević, *Religious Exception for Vaccination or Religious Excuses for Avoiding Vaccination*, "Croatian Medical Journal" 2016, No. 5, pp. 516–521). Without seeking to argue with their conclusions, it must be said that it is entirely possible for someone (religious or not) to have a view

It does not run contrary to freedom of conscience if the state seeks to ascertain the sincerity and gravity of the individual's conviction of conscience,[19] but the basis of the scrutiny can only be the individual's prior behaviour the integrity of their conscience. If the state sought to justify it by dint of external aspects, the essence of conscience would be lost.

Two objections are typically raised against vaccinations: one is that the person concerned may not wish to be vaccinated on principle, and the other concerns the origin of the vaccination, whether it is of animal origin or comes from an aborted foetus. As will be indicated below, it is important that someone may not want to be vaccinated at all, or that he or she may seek to reject just a particular vaccination. The starting point, however, must be that both are motivated by conviction.

2. In connection with conscientious objection, the question arises as to whether legal systems should introduce a general clause that anyone could invoke to protect their conscience without special legal authority. In other words: should the state recognise that the fulfilment of certain duties may be summarily refused on the basis of the freedom of conscience?

Such a clause would clearly be convenient, because questions of conscience could be handled uniformly, and the courts would have to decide on a case-by-case basis whether the reference to conscience is justified. The practice of the European Court of Human Rights, however, would deny this. *Contra legem* behaviour cannot be derived from Article 9 of the Convention alone. The practice

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not shared by religions. Freedom of conscience must be protected even if unsupported by religions.

[19] According to the decision of Kostelski v. FYR Macedonia (Application No. 55170/00, 13 July 2006) "it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion" [39].

of the examined constitutional courts is similar to this. The rule that disallows conscientious objection to vaccination is typically constitutional.[20]

3. Even in the absence of a general conscientious objection, the state must strive to ensure that, if possible, the affected parties do not end up in a conflict of conscience: that they are able to behave in accordance with their conscience without jeopardising the state's work. The conditions for this and the method of exercising exceptions to the main rule must be laid down in the legal regulations.

The fact that the legislator is not constitutionally obliged to provide an exemption from the obligation to be vaccinated does not mean that he does not do so. In the United States mandatory vaccination is generally accepted. The recent COVID-19 situation has shed new light on the century-old Jacobson v. Massachusetts case [197 U.S. 11 (1905)], which concerned the question of whether a state may prescribe mandatory vaccination during a pandemic. The court held that the statute was not invalid for an adult residing in the community and fit to receive the vaccination, as it was not in derogation of any of the rights of such a person under the Fourteenth Amendment. Interestingly, interpretations of the case vary. Certain courts view Jacobson as virtually a blank cheque for government action; others apply standard constitutional doctrines with little consideration given to the emergency issue.[21] It is worth mentioning that all US states grant medical exemptions; 45 states and Washington DC grant religious exemptions, and 15 states also allow philosophical exemptions from vaccination.[22] Courts seem to have long recognised that

[20] Although unconnected with vaccination, the Polish Constitutional Tribunal in decision K 12/14 (7 October 2015) deduced conscientious objection directly from the constitution.

[21] A.D. Farber, *The Long Shadow of Jacobson v. Massachusetts: Epidemics, Fundamental Rights, and the Courts*, "San Diego Law Review" 2020, No. 57, p. 834.

[22] O.L. Gostin, A.D. Salmon, J.H. Larson, *Mandating COVID-19 Vaccines*, "JAMA" 2021; No. 325(6):532–533, DOI: 10.1001/2020.2655, p. 532.

states are not required to provide religious exemptions to vaccination mandates, although most of them do.[23]

There is also an example of conscientious objection in relation to vaccination from the practice of the Hungarian Constitutional Court. In Hungary, numerous vaccines are mandatory for children of certain ages. A small number of parents occasionally object to their children being vaccinated, mostly on religious or philosophical grounds.

The most well-known Hungarian case dates back to 1995. The parents in question failed to comply with the vaccination protocol, which led administrative agencies to impose a fine and order the parents to have the child vaccinated. The parents challenged the administrative decision in court, but the court rejected the petition. As pointed out by the court, under the Constitution everyone has the right to freedom of thought, freedom of conscience and freedom of religion. Unless it is otherwise ordered by law, however, exercising these rights creates no grounds for exemption from the civil duties of citizens.

The parents challenged the court decision in the Constitutional Court. The court decided on the case in 2007, almost 10 years after the constitutional complaint was filed, when the child's vaccination was then practically out of the question. The decision (39/2007. [VI.20.]) proved to be a landmark decision. The Constitutional Court examined whether people may refuse obligatory vaccination by referring to their freedom of conscience. The Court argued as follows:

> In constitutional democracies it is a frequently debated issue whether citizens may be exempt from statutes that prescribe general obligations based on their conscience and their religious beliefs. (…) When considering the proportionality of the restriction of a fundamental right in this type of regulation, the Constitutional Court applies a different, so-called 'comparative test of burdens' for those whose conscience and religious freedoms are also

[23] M. Killmond, *Why Is Vaccination Different? A Comparative Analysis of Religious Exemptions*, "Columbia Law Review" 2017, No. 117(4), p. 913.

> violated by the regulations. On the one hand, one should take into consideration the basic principle of a state under the rule of law which says that everybody has rights and obligations in the same legal system, and therefore the statutes apply to all in such a way that the law treats everybody as equals (as individuals with equal dignity). On the other hand, it should not be ignored that the fundamental values of a constitutional democracy include a diversity of political opinion and also the freedom and autonomy of individuals and their communities. Therefore, it may not be established as a general rule that the freedom of conscience and religion should always be an exception from the laws that apply to all, and likewise, the rule of laws may not be declared fully applicable to the internal life of a religious community.

The Court also deemed:

> the circumstance that some of those who refuse compulsory vaccination for religious reasons or because of their conscience do not disapprove of vaccinations as a whole; they usually only object to vaccines of a certain composition (quite similarly to condemning blood transfusion). If there are several types of vaccines available, there is an opportunity to provide 'alternative rules of conduct within reasonable limits' by applying vaccines of different compositions.

As a consequence, the law should combine legislative purpose and freedom of conscience, and it should support alternative behaviour that results in the same outcome and is also in accordance with conscience.

In constitutional terms, the key element is the comparative test of burdens. The first step is examining the connection between conscience and the activity in question. The closer the connection, the more reasonable it is to make an exception to the general rule. Secondly, it is also necessary to examine the extent to which the

activity influences others. The greater the influence, the less reasonable it is to make exceptions. In terms of freedom of religion, the comparative burden test is as follows: the law may legitimately aim to restrict certain religious activities; on the other hand, religion may provide exemptions from general rules under certain conditions. There are two key issues: the extent to which the behaviour is linked to conscience (the more strongly they are linked, the more likely it will result in an exemption) and how it pertains to third parties (the more it influences others, the lower the likelihood that it will result in an exemption).[24]

Subsequent decisions of the Constitutional Court regarding COVID-19 vaccinations did not apply the conclusions of the 2007 decision. At the same time, this decision is *conscience-friendly* and its main message clearly articulates the institutional obligation of the state, the essence of which may be summarised as follows:

1. the state may impose mandatory rules, with which it might expect individuals to comply;
2. conscience in itself is not a *blank cheque*, insofar as it constitutes no automatic bailout, but
3. if there is an alternative solution that is equally suitable for the achievement of the goal, then the individual may choose this path, but
4. its cost cannot be charged to the state.

[24] The Constitutional Court used the comparative test of burdens twice (the second time was in 2009), and neither occurred under the current constitution (Fundamental Law). Still, the test is presumably still applicable. Decision 3049/2020. (III.2.) CC had a very similar outcome, without mentioning the test. That decision examined the connection between noisy religious activity and the private lives of others. The neighbours of a Muslim referred to their privacy when complaining about his loud prayers. In this case, the court of first instance concluded that, although freedom of religion covers prayers and singing, such activities must be balanced with the privacy of others. This latter covers leading a decent private life and the sanctity of the home. The Constitutional Court accepted the position and stated that the court decision was in accordance with the constitutional provision on freedom of religion. The Court added that it is necessary to balance the competing interests on a case-by-case basis.

5. Institutional aspect II – Responsibility towards the community, the responsibility of the community

1. One other aspect of the examination of institutional aspects is whether the regulation provides exemptions from vaccinations for communities and, in general, from the COVID-19 regulations. During the pandemic the legislature decreed a more or less total lockdown. The restriction extended to the entertainment industry, catering, sports and even private events. Most social events were either completely disallowed or were severely limited in relation to the number of people that could attend them and strict health protection rules.

Churches were an exception to the typical restrictions insofar as masses and religious services were permitted, or more precisely, the specific religious community could decide whether to hold them.[25] In the Spring of 2020 a lockdown on exercising religion was explicitly mentioned as a legitimate reason for banning leaving one's home. All meetings and gatherings were suspended, but religious services were and are unrestricted by law. Decisions regarding the measures religious communities adopted were left to the communities themselves – but measures that were expected to follow the general policy. As all denominations complied with this policy the approach was not really tested. How would the authorities have reacted if a religious community had shown insufficient caution?[26]

Despite the formal freedom, most communities adapted their behaviour to the state rules, both in terms of the safety rules, such as wearing masks, and whether they held their events at all. Catholic churches remained open only for individual prayer. At some Catholic churches the congregation could receive the Eucharist at the entrance of the church – after following the mass on-line at home, while Protestants mostly had on-line services.

[25] In Hungary, according to the rules of the previous Constitution, religious freedom could not be restricted, even during times of emergency. According to current regulations, religious freedom may even be suspended by special legal order.

[26] B. Schanda, *A közösségi vallásgyakorlás szabadsága járvány idején*, "Kánonjog" 2022, No. 24, pp. 81–87.

This example shows that the state regulation focused on the common identity of the religious communities. Each community had to decide whether to accept the health risks involved in holding their service. In this case, the institutional, collective conscience, overruled the individual conscience. It is conceivable that some people would have taken more risks, but the institution, i.e. the religious community, did not observe the occasions. Alignment with state rules typically followed from common conscience, i.e. common conscience was not jeopardised by the fact that religious practice was temporarily only possible on-line.

Another interesting fact is that the curfew was lifted on Christmas Eve 2020 for one night. In Hungary, this was not just a religious measure; Christmas is celebrated by practically everyone, regardless of their conscience. The same measure, however, caused religious tension in Georgia, where the restriction was lifted on Orthodox Christmas (7 January) but not on the date observed by Western Christians (24 December).

2. The pandemic also highlighted that health and a willingness to take risks are more than just private matters. The risk taken affects the lives and health of others, and this affects the individual's freedom of decision.[27] In addition to respecting the individual conscience, it is also necessary to take into consideration the way the requirement of state rule and the freedom of conscience affect third parties. This is not only a question of state regulation, but also one of society: how do individuals relate to the pandemic, the state, each other and themselves?

The pandemic posed an enormous challenge to healthcare, left economies in ruins and hindered social relations. In these circumstances there were huge hopes that medical scientists could devise a solution that would allow a return to normality. Optimism

[27] The Austrian Constitutional Court specifically stated that if the reason for the obligation to vaccinate was only the protection of the individual himself, the intervention would be unjustified. [VfGH-Erkenntnis G 37/2022, 231.]. For an analysis of the decision, see: A. Horváth: *Mások élete? A kötelező COVID-19-oltások a magyar, a német és az osztrák alkotmánybírósági döntésekben*, "Állam- és Jogtudomány" 2022, No. 3, pp. 21–28.

therefore began to grow with the arrival of vaccines. As Harrison and Wu point out, "vaccine optimism was also prominent in the public imagination during the early weeks of the COVID-19 epidemic, amidst a mixture of bravado, uncertainty and fear".[28] However, vaccine hesitancy was also unsurprising. Some were cautious and preferred to wait until there was more information on the virus and the vaccine. Some objections to vaccinations were based on freedom of conscience, leading people to refuse them on religious grounds or see the pandemic and vaccines as part of a conspiracy.

Unsurprisingly, the question of vaccination soon became a political issue. Governments rushed to secure as many vaccines as they could and sought to vaccinate as many people as possible, while some questioned whether all vaccines are effective and whether governments' vaccination policies were appropriate.

Vaccine equity is nevertheless much more important than vaccine passports.[29] As Harrison and Wu point out, once this epidemic became a part of historical memory, the development of the vaccine for COVID-19 was no indicator of a successful response, nor did it indicate the achievement of an improved health system. Vaccine confidence may have been a better indicator.[30]

Vaccine confidence plays a significant role in persuading people to seek to be vaccinated. Political marketing and vaccination mandates do not persuade people; they may even induce scepticism. Honest debates and social discussion are required. Society would have been better served if people had had honest discussions on the advantages and disadvantages of vaccination, accepting each other's standpoints, respecting different views, and the individual conscience.

To compel people is easy, but to persuade them is difficult. Regarding vaccinations, the permanent solution was to avoid propaganda, to separate the issue from politics as much as possible and to argue convincingly in favour of the importance of the vaccine.

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[28] E.A. Harrison, J.W. Wu, *Vaccine Confidence in the Time of COVID-19*, "European Journal of Epidemiology" 2020, No. 35, p. 325.

[29] R. Tanner, C.M. Flood, *Vaccine Passports Done Equitably*, "JAMA" 2021, No. 2(4), DOI: 10.1001/jamahealthforum.2021.0972.

[30] E.A. Harrison, J.W. Wu, *Vaccine Confidence…*, *op. cit*., p. 328.

In this case, the collective conscience would not work against the regulation, but would strengthen it.

6. Conclusion: *de lege ferenda* suggestions

Freedom of conscience is the most abstract fundamental right. People's conscience derives from human dignity, which leads to different behaviours in each individual. This complicates the institutional aspect of a fundamental right: the state must take into account that the individual conscience of its citizens is different and that in certain cases conscience may dictate something different from the law that binds everyone.

The state must develop an institutional solution that creates a balance between the obligation to comply with the law and compliance with the individual's conscience (conscientious objection). There are two options for this: one is a constitutional clause that generally allows individuals exemption from the obligation to comply with the law if certain conditions are met. The other option is for the legislator to examine what typical questions of conscience arise in the given area and create exemptions for them. The difference between the two options is simply whether the conscientious objection follows from the constitution or the law.

Looking at the case law of the European Court of Human Rights and a couple of European constitutional courts, it can be stated that states do not have an obligation to apply a general rule of exception. Though this is not mandatory, it is possible: in such cases, the legislation must work out a detailed test of the exemption in conjunction with judicial practice.

On the other hand, the state has a constitutional obligation to take individual conscience into account when developing regulations. In many areas it may be observed that the regulation considers individual conscience (e.g., military service, medical intervention, certain occupations). This study examined the possible cases of exemption from vaccinations, and in particular from the COVID-19 vaccination.

The main conclusion of the study is that the tool cannot replace the purpose; the regulation should expect everyone to achieve a certain goal, but the means may be chosen relatively freely with regard to the individual conscience. There is a price for listening to one's conscience. It follows from this institutional aspect that this price must be reasonable.

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The Military Conscientious Objection Clause Under Polish Legislation

1. Introduction

The issue of the institutional form of freedom of conscience in the military field should be considered as a legal construction of the conscience clause, which has been adopted in most countries in the world. Taking into account the institutions of the conscience clause adopted in various legal systems, it should be admitted that the one relating to the military is the most common in the same or very similar legislative structure. For this reason, comparative law studies should primarily take into account jurisprudence and practical aspects of the possibility of using the military conscience clause.[1]

Considerations on the military conscience clause should concern the subjective and objective side of this institution. It always depends on the political situation of the state and the structure of its armed services. Taking into account the subjective scope, the person performing military service and his attitude to this civic duty are subject to assessment. However, in a broad sense, the possibility of using the conscience clause by a professional military man must also be taken into account. In turn, when assessing the issue of even the most distant relationship with the military, once can also take into account every person obliged to incur the costs of maintaining services in a given country. This includes people

[1] T. Żuradzki, *Uzasadnienie sprzeciwu sumienia: lekarze, poborowi i żołnierze*, "Diametros" 2016, No. 47, pp. 98–128.

paying taxes, part of which is spent on defence. In addition, for some citizens, the obligation of civil benefits, both personal and in kind, is introduced. Therefore, in the broadest subjective scope, the possibility of using the conscience clause in a given country by every person, especially citizens, should be considered. Research on the subject matter is also not without problems, as the catalogue of activities subject to possible refusal is left individually to each country. Pointing to the most frequent objection, it is worth mentioning all the actions related to military acts requiring the use of weapons. However, advanced technologies no longer require you to always hold a weapon in your hand, although here, in each case, the use of this weapon and the purpose for which it was used should be considered, i.e. whether the person is an attacker or himself a defender. Advanced military methods and techniques increasingly use remote systems, so one of the next points to evaluate is taking action in such situations. The aforementioned civil benefits for the army are also worth considering, especially since such cases have already been considered by courts in Poland. The general obligation to pay taxes, and consequently the transfer of contributions to state defence from the budget, also often appears in the considerations of doctrine and jurisprudence.

The practical aspects of the possibility of using the military conscience clause are not devoid of theoretical considerations that concern the very essence and foundations of this institution. It is not entirely obvious to distinguish between the classic concepts related to conscience, i.e. freedom of conscience, the right to freedom of conscience, civil disobedience and the conscience clause. Each of them has a different subjective and objective scope. Moreover, different regulations at the national level do not always allow for the adoption of a coherent international concept.[2]

[2] M. Szabliński, *Praktyczne zastosowania wolności sumienia. Obywatelskie nieposłuszeństwo, sprzeciw sumienia, klauzula sumienia*, "Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM" 2017, Special issue, pp. 141–159; P. Śmieja, *Sumienie w świetle obowiązujących przepisów prawa*, "Annales Universitatis Mariae Curie-Skłodowska. Sectio G. Ius" 2020, Vol. 67, No. 2, pp. 201–219.

This study is not intended to be a theoretical analysis of conscience and actions resulting from its use. Apart from scientific research, there were also considerations on theories, doctrines and philosophy of law, dealing with the differentiation of the aforementioned concepts. The specific and particular subject of the research project was limited only to the practical aspects of the possibility of using the military conscience clause in Poland and the analysis of the applicable legal provisions in this regard. Thanks to this, *de lege ferenda* postulates will be indicated, supported by experience also from the international area. The chapter addresses the reasons for refusing military service with a clear distinction between religious and non-religious reasons. Part of the paper is also focused on the international aspect of the military conscience clause. The main part of the chapter is data on the possibility of refusing military service in Poland, both historically and currently.

2. Reasons for refusal of military service

A person who claims the right to conscientious objection to military service on the grounds of freedom of thought, conscience or religion is called an objector.[3] The term has also been extended to object to working for the military-industrial complex because of conscientious objection. In some countries, conscientious objectors are assigned to alternative civilian service as a substitute for conscription or military service. In the broadest definition, a conscientious objector is a person refusing to perform compulsory military service for religious, moral or ethical reasons.[4]

It should be noted that such a refusal need not be based solely on religious beliefs. Just like conscience, the source of which can be seen in non-religious guarantees, the conscience clause should take

[3] There is a Polonized version of the word: *obdżektor*. A term derived from the English words *conscientious objector*.

[4] Framework for communications of the UN Special Rapporteur on freedom of religion or belief. Report of 24.01.2023, pp. 8–9, https://www.ohchr.org/sites/default/files/documents/issues/religion/2023-01-24/SR-religion-Framework-for-communications.pdf (accessed on: 05.06.2023).

into account different behavioural attitudes. For this reason, the legal norms that introduce the conscience clause must be consistent with the original assumptions of this idea. Every source of conscience, i.e. religious, moral or ethical beliefs, should be treated equally. Difficulties may arise, however, in the form of proving the inner sphere of these beliefs. The law allows for various ways of manifesting, but then it should be considered as the implementation of freedom of religion, whether in a positive or negative form. In addition, belief systems have established ways of behaving, for example in religious rituals, and often also in actions undertaken by believers in everyday life, such as wearing a distinctive garment or symbol. The law also gives you the opportunity to change your beliefs. Therefore, it is necessary to consider the evidentiary requirements imposed on the conscientious objector. Those requirements must fulfil their role both in the field of military service and the guarantees of the human right to freedom of conscience and religion. It is not difficult to imagine a situation where a person refuses military service under the influence of changes that have occurred in his/her moral system recently.[5]

Does belonging to a particular religious group imply an attitude of conscience? In the theoretical assumption, each member of the religious community, as a believer, accepts the religious doctrine and applies it appropriately in their everyday life. In this case, the right to freedom of religion should be pointed out, involving, among others, the choice or rejection of specific religious ideas. It should be emphasised that belonging to a community is not obligatory and not required in order to exercise this freedom. On the contrary, it is a form of realising freedom of religion in practice. However, the law clearly indicates the freedom of conscience and religion, that is, it distinguishes the internal aspect from the external form of its implementation. Therefore, a clear boundary must be drawn between the internal sphere with which conscience is related and the practical aspect of the implementation of one's views, which is defined by the right to freedom of religion. Since the law allows for

[5] O. Nawrot, *Sprzeciw sumienia a prawa człowieka i ich filozofia*, [in:] O. Nawrot (ed.), *Klauzula sumienia w państwie prawa*, Sopot 2015, pp. 12–35.

the existence of a non-religious conscience, it must also recognise other sources of a negative assessment of military service, i.e. moral and ethical attitudes. The theoretical analysis of religious conscience also assumes the possibility of refusal for religious reasons by a person who does not belong to any religious association or belongs to one whose doctrine does not reject military activity. However, the regulations require proving a specific attitude, hence providing an appropriate declaration of belonging to a specific group is the simplest form of its implementation. One can consider extra-legal and unprovable issues, i.e. the actual emotional attitude of a particular person towards the doctrinal assumptions of a given community. However, the law simplifies this situation by assuming that a person formally belonging to a religious group is also a believer. On the other hand, referring to the religious doctrine, one must prove one's belonging to the community. In this way, it is easier to verify the views with the commonly known and preached doctrine. In law, there is no concept of a believer independent of a formal affiliation to a Church or other religious association. In the objective assessment of religious doctrine, lawyers are experts in religious studies, but they do not evaluate a person's beliefs. Their task is solely for present and explain the basis of belief. It is easy to list religious groups broken down by a specific attitude to military service. Nevertheless, it is difficult to verify to what extent these beliefs are shared by a person belonging to such a community. Verification of knowledge in this area may be of some help. Such action by the state would not constitute a violation of the right to religious freedom, but it would be difficult to implement in practice.[6]

Among the Christian denominations that operate in Europe and their representatives that are also present in Poland, one can distinguish those that preach unconditional pacifism. These are: the Mennonites, Hutterites, Schwenkfelders, Amish, Quakers, Moravian Brethren, Doukhobors, Molokans. Members of these denominations condemn any fight, even in defence or the so-called "just

[6] M. Skwarzyński, *Korzystanie z klauzuli sumienia jako realizacja wolności wewnętrznej czy/i zewnętrznej*, "Opolskie Studia Administracyjno-Prawne" 2015, Vol. 13, No. 4, pp. 9–21.

cause". Maintaining neutrality, resulting in the condemnation of participation in armed and political conflicts, is a doctrine represented by Messiahs, Seventh-day Adventists, Jehovah's Witnesses, and Pentecostals. Another doctrinal reason based on the principle of the non-taking of life and non-violence is used primarily by Buddhists and Hare Krishna devotees. In practice, it also happens that Catholics, Orthodox members and Protestants of some denominations claim that their religion forbids them from serving in the army. However, this is not in line with the doctrine officially proclaimed by these religious associations. Such an opinion has no basis in the official position of these Churches, which seems obvious, if only because of their field ordinariates.[7] However, such a position of the individual should not be denied, because the lack of doctrinal norms does not exclude its true intentions. This does not prevent a person from having moral or ethical views that would be in conflict with military service. It also does not imply a violation of religious rules by such a believer. In such a situation, the person's views on non-religious norms should be verified, because the individual is not able to correctly determine the source of their origin. Ethical and moral beliefs prohibiting military service are proclaimed by members and supporters of organisations that promote pacifism and anti-militarism. Most often, they preach the need to abolish the army or create an exclusively professional army.[8]

The distinction between religiously motivated conscientious objectors and those referring to ideological reservations is related to the difference in the way they are treated by the military authorities. People identifying themselves with a given pacifist denomination usually also belong to a specific religious community, which in some way represents its members and may conclude agreements with the authorities. Hence, in the past, religious groups were granted royal privileges exempting their representatives from the obligation

[7] C. Smuniewski, *Pacyfizm oczami chrześcijan. Przyczynek do badań nad rolą religii w procesach tworzenia bezpieczeństwa*, "Teologia w Polsce" 2018, Vol. 12, No. 1, pp. 75–93, http://old.luteranie.pl/pl/index.php?D=356 (accessed on: 03.06.2023).

[8] https://www.jw.org/pl/%C5%9Bwiadkowie-jehowy/faq/dlaczego-nie-idziecie-na-wojn%C4%99/ (accessed on: 03.06.2023).

of military service. In later times, structures were created to defend coreligionists.[9] Such an approach helped to objectify the motives leading to the refusal of military service. On the other hand, in the case of people who oppose recruitment to the army for ethical or ideological reasons, attitudes are much more subjective, and there is no "pacifist Church" that could effectively testify in favour of its members with its authority. Therefore, the cases of non-religious conscientious objectors are often doomed to the good will of the state apparatus, which may (or not) recognise internal moral motivation without additional formal certification.

The issue of refusal of military service is a complex problem. One of the problems is the degree of refusal to undertake military service. Selective objectors have a negative attitude towards service in a specific army or under specific conditions, and not the very fact of fulfilling a military duty, including carrying a weapon.[10] Alternative objectors are people who oppose armed service, but who do not deny universal military duty. In such cases, the solution to the problem is to direct refusing persons to auxiliary services, e.g. the medical services, or to enable them to perform alternative civil service.[11] Absolute objectors are the most radical group, denying any state right to enforce military duty. Representatives of these groups reject the alternative civil service compromise, perceiving it as a hidden form of unauthorised demands for power. Representatives of this trend usually choose the final refusal to perform military service, which is associated with a criminal sanction and imprisonment. Among the religious groups standing on absolutist positions, the most famous

[9] It is worth giving the example of the Military Service Commission held by the American Adventists during the Second World War.

[10] The impetus for opposition in this case may be, for example, the foreign nature of the state and the military (example, national minorities not wanting to serve in an army dominated by a hostile majority), the content of a military oath (e.g., the Polish refusal movement of the 1980s) or a reluctance to take part in a given armed conflict (e.g., the American objectors of the Vietnam War).

[11] For example, in health care, social care, the state sector or non-military workplaces.

are Jehovah's Witnesses, and Quakers, along with radical anarchists who also prefer such an attitude for ethical reasons.[12]

3. The military conscience clause in international law

People who opposed military service, regardless of the form in which it existed throughout history, suffered the legal consequences of their decision. The legal definition and status of the conscience clause has changed over the years and depending on the country in which it existed. In many countries, religious belief has been the starting point for the legal awarding of the conscientious objector status.[13]

Formal exemptions from combat duty were first granted in the mid-18th century in Great Britain after problems with attempts to force Quakers into military service. In 1757, when the first attempt was made to create a British militia as a professional national military reserve, a clause in the Militia Ballot Act allowed Quakers to be exempted from military service. In the United States of America, the conscientious objection clause has been allowed since the country's founding, although its regulation was left to individual states before conscription was introduced.[14]

In the legal system, apart from the norms contained in international agreements, one can distinguish soft law, i.e. postulates and declarations that do not contain sanctions. This group of documents most often includes resolutions, commentaries, and decisions of international organisations. They indicate the desired direction

[12] In more detail: W. Modzelewski, *Pacyfizm i okolice*, Warszawa 1995; W. Modzelewski, *Pacyfizm w Polsce*, Warszawa 1996; W. Modzelewski, *Pacyfizm: wzory i naśladowcy*, Warszawa 2000; W. Modzelewski, *Pacyfizm. Wzory i naśladowcy*, Warszawa 2000; T. Nowak, *Źródła europejskiej idei pacyfizmu – rys historyczny*, https://core.ac.uk/download/pdf/160609908.pdf (accessed on: 05.06.2023).

[13] T. Jasudowicz, *Odmowa służby wojskowej prawem człowieka*, Toruń 1988.

[14] R.T. Stearn, *Edwardian Peace Testimony: British Quaker against militarism and conscription c. 1902–1914*, "The Journal of the Friends Historical Society" 2010, Vol. 62, No. 1, pp. 49–66, https://www.quakersintheworld.org/quakers-in-action/171/Conscientious-Objection (accessed on: 05.06.2023); https://www.quaker.org.uk/about-quakers/our-history/ww1 (accessed on: 05.06.2023).

of interpretation of the applicable law contained in the Treaties or the direction of legislative work. Therefore, they help to define what should be accepted as binding international law. This part of the system is particularly important in the area of the protection of human rights, as it is often impossible to define directly the obligations of countries. However, striving for an ideal legal and actual state is the task of each of the international organisations dealing directly or indirectly with the protection of such human rights. Soft law documents are not directly binding, but they are often referred to by international human rights bodies as a direction of interpretation of the right norms contained in the conventions. Often, the postulates contained in soft law, after repeating their content in the judgments of international tribunals, become binding.[15]

Regulations in the area of the currently functioning system of human rights protection introduced in 1948 the freedom of conscience as a right. The United Nations General Assembly in Article 18 of the Universal Declaration of Human Rights explicitly recognised the right to freedom of conscience and religion. Despite the lack of explicit guarantees for conscientious objection, the thread of the military conscience clause emerged in 1974, when the UN Deputy Secretary-General Seán MacBride said he referred to the right to refuse to kill in his Nobel lecture.[16] In 1987, the United Nations Commission on Human Rights called on all states "to recognise that conscientious objection to military service should be considered as exercising the right to freedom of thought, conscience and religion" and to refrain from subjecting such persons to imprisonment, and that alternative service should be granted in an obligatory manner at the request of the person concerned. In the same year, the above recommendations were confirmed by the Committee of Ministers of the Council of Europe. The European Parliament spoke in a similar tone two years later. Although the right to conscientious objection

[15] J. Chrostek, *Nabieranie mocy wiążącej przez "soft law"*, "Zeszyty Prawnicze" 2022, No. 22, Vol. 4, pp. 183–208.

[16] L. Townhead, *International Standards on Conscientious Objection to Military Service*, https://www.nobelprize.org/prizes/peace/1974/macbride/lecture/ (accessed on: 05.06.2023).

is not included in the catalogue of the Convention for the Protection of Human Rights and Fundamental Values, reports prepared for the Parliamentary Assembly of the Council of Europe suggest that this right should be included in it.[17]

In 2006, the UN Human Rights Commission for the first time recognised the right to conscientious objected under Article 18, though not unanimously.[18] It is worth emphasising that the Human Rights Commission had earlier, on March 8, 1995, in its Resolution 1995/83, stated that "persons performing military service should not be excluded from the right to conscientious objection to military service".[19] This was reaffirmed on April 22, 1998, when Resolution 1998/77 recognised that "people [already] in military service may use conscientious objection".[20] It is worth noting that this entity recognised as early as 1998 that "countries should refrain from subjecting conscientious objectors to multiple penalties for non-compliance with their military service obligations".[21] It also encouraged countries to "consider granting asylum to conscientious objectors who are forced to leave their country of origin because they fear persecution because of their refusal to perform military service".[22]

In 1976, the International Covenant on Civil and Political Rights signed in 1966 entered into force, which was based on the Universal Declaration of Human Rights. The nations that have signed this treaty are bound by it. In this, for the first time, the guarantee

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[17] https://quNo.org/resource/2021/2/international-standards-conscientious-objection-military-service-2021 (accessed on: 05.06.2023).

[18] HRC views in case Yoon and Choi v. Republic of Korea, communications nos. 1321-1322/2004.

[19] E/CN.4/RES/1995/83, https://www.ohchr.org/sites/default/files/E-CN_4-RES-1995-83.pdf (accessed on: 05.06.2023).

[20] E/CN.4/RES/1998/77, https://www.ohchr.org/sites/default/files/E-CN_4-RES-1998-77.pdf (accessed on: 05.06.2023).

[21] Conscientious objection to military service; E/CN.4/RES/1998/77; see point "#5"; UN Commission on Human Rights, 22 April 1998, Retrieved 9 December 2009.

[22] United Nations High Commissioner for Human Rights (22 April 1998). "Conscientious objection to military service; Commission on Human Rights resolution 1998/77; see point "#7"; United Nations High Commissioner for Human Rights. Archived from the original on 19 November 2018.

of freedom of conscience and religion became an obligation by law. However, the International Covenant on Civil and Political Rights left the issue of conscientious objection undefined, pointing to a limiting clause covering public safety and order, health and morals, and the rights and freedoms of other people. This closed catalogue of restrictions is reproduced in all acts referring to the right to freedom of conscience and religion. For this reason, it can be argued that such restrictions would allow countries to make conscientious objection in time of war a threat to public security and mass conscientious objection a public nuisance. In General Comment No. 22 of the UN Human Rights Committee, sec. 11 of July 30, 1993, clear clarifications were made to Article 18 of the International Covenant on Civil and Political Rights. It acknowledged that although the Covenant does not explicitly refer to the right to conscientious objection, the Committee believes that such a right can be derived from Article 18, because the obligation to use lethal force may seriously interfere with freedom of conscience and the right to manifest one's religion or beliefs.[23]

Among the soft law documents in the regional system of human rights protection in Europe regarding the possibility of using the military conscience clause, the first was Resolution No. 337 of the Parliamentary Assembly of the Council of Europe of January 26, 1967, on the exercise of the right to conscientious objection to military service in the Member States of the Council of Europe. Another document, although generally declaring the issue of conscientious objection, was Recommendation No. 478 of the Parliamentary Assembly of the Council of Europe of January 26, 1967, on the right to conscientious objection. In 1967, the Parliamentary Assembly of the Council of Europe recognised the right of conscientious objectors to alternative civil service and equal treatment with other conscripts. Resolution No. 337 referred to the interpretation of Article 9

[23] Special Rapporteur on freedom of religion or belief. Framework for communications. Conscientious Objection, Office of the United Nations High Commissioner for Human Rights, Archived from the original on 17 May 2008; M. Jastrzębski, *Sprzeciw sumienia wobec służby wojskowej w międzynarodowym systemie praw człowieka*, [in:] J. Knopek, D.J. Mierzejewski (eds.), *Bezpieczeństwo narodowe i regionalne w procesach globalizacji*, Piła 2006, pp. 81–97.

of the ECHR, which obliges states to respect the freedom of conscience, and the main part of the Resolution concerned the refusal of military service. According to the resolution, alternative service may be sought for "conscientious objection or a strong conviction based on religious, ethical, moral, humanitarian, philosophical or similar motives". The justification stated that "this right should be considered as logically derived from the fundamental rights of the individual (…), which are guaranteed in Article 9 of the European Convention on Human Rights".[24] Similar content is contained in Recommendation No. 478. Letter "a" of the Recommendation No. 478 emphasised the existence of the right to conscientious objection. It is also worth mentioning Resolution No. 1763 of the Parliamentary Assembly of the Council of Europe of October 7, 2010, on the right to conscientious objection in the context of lawful medical care. It is a document that discusses the issue of the right to conscientious objection in detail and, although it directly refers to the area of medical care, in its general assumptions it should also be treated as an interpretation of the content of conscientious objection. This document has been the subject of the widest discussion in the doctrine.[25] Also, the Polish Constitutional Tribunal, examining conscientious objection, referred directly to the soft law of international law, i.e. resolutions, recommendations and decisions.[26]

The European Court of Human Rights often refers in its jurisprudence to resolutions and recommendations. It should be noted that the Convention does not explicitly provide an individual with the right to conscientious objection. And the military service itself is excluded from the concept of "forced labour", and thus not subject to the protection of the ECHR. This does not mean, however,

[24] Paragraph 1.1 of Resolution 337 specifies that refusal of military service due to conscientious objection is personal; and point 2.3 explicitly states about the right to conscientious objection.

[25] Point 2 of Resolution 1763 emphasises the need to affirm the right to conscientious objection explicitly in positive law, and points 3 and 4 also refer to it.

[26] Judgment of the TK of 7 October 2015, in case ref. K 12/14, para. 3.2.4, 6.2.3; M. Skwarzyński, *Soft law prawa międzynarodowego w kwestii sprzeciwu sumienia*, https://copch.pl/baza-wiedzy/soft-law-prawa-miedzynarodowego-w-kwestii-sprzeciwu-sumienia (accessed on: 05.06.2023).

that countries can freely limit the religious freedom of an individual. Although Article 9 does not directly indicate the right of an individual to conscientious objection to military service, in the interpretation of the Tribunal, no one can be punished for acting in accordance with their own beliefs, since there is an alternative solution in the form of alternative military service. The common practice of the member states of the Council of Europe has shown that it is absolutely possible to avoid conflicts between the citizen and the state in the pursuit of their interests. In this case, the judgment of the Tribunal reflected the behaviour of the countries. Nevertheless, the drafting of an additional protocol about the Convention would avoid many misunderstandings in the future and would constitute a further step in the harmonisation of human right laws in the member states.[27]

In the context of the military conscience clause, it is worth recalling the best-known case of Bayatyan v. Armenia in this regard.[28] In one of the most recent judgments on conscientious objection, on October 17, 2019, the case of Mushfig Mammadov and others v. Azerbaijan was considered.[29] The Tribunal agreed with the five applicants who were sentenced to imprisonment and fines under the Azerbaijani Penal Code. In this regard, the Strasbourg judges recalled that Azerbaijan was admitted to the Council of Europe on the condition that within two years of signing the agreement

[27] H. Banaś, *Sprzeciw sumienia w orzecznictwie ETPCz. Problematyka odmowy podjęcia służby wojskowej*, "Folia Iuridica Universitatis Wratislaviensis" 2015, Vol. 4, No. 2, pp. 71–90.

[28] Application No. 23459/03, ECtHR judgment of 7 July 2011, para. 51, 52 of the judgment. The judgment explicitly departed from the previous legal view on the interpretation of Article 9 of the European Convention on Human Rights. It had hitherto been assumed that freedom of thought, conscience and religion under the Convention did not include the right to obtain exemption from military service. As the ECtHR stated in a key sentence of its reasons: "opposition to military service, when motivated by a serious and insurmountable conflict between the obligation to perform military service and a person's conscience or deeply and sincerely held convictions, religious or otherwise, constitutes a conviction of sufficient persuasive force, seriousness, coherence and momentousness to be covered by the guarantees of Article 9".

[29] Application No. 14604/08, ECtHR judgment of 17 October 2019.

it would introduce a law regulating alternative military service in accordance with European standards. This is the more so in that the Constitution of this country (Article 76 § 2) gives the right to alternative service when service in the army is contrary to someone's beliefs. Despite the international commitment, there has not been a single law regulating alternative military service. The criminal proceedings and conviction of the complainants who are Jehovah's Witnesses for refusal of military training stemmed from the absence of a system of alternative service for religiously opposed conscripts.[30]

In 2001, in the Charter of Fundamental Rights, the European Union recognised the right to conscientious objection. In view of the current protection, the norm contained in Article 10 sec. 2 is a new guarantee expressed *expressis verbis* in the European system of human rights protection.[31]

4. Refusal of military service in Poland – history

In the modern era, the attitude of refusal to participate in war appears in the 16th century in radical Protestant churches. In Poland, the consideration of the refusal of military service can be considered to have begun with the pacifist attitude of the Polish Brethren, or Arians. Their community, representing radical social views, an important element of which was opposition to war and the death penalty, emerged in the 1560s. Opposition, among others, towards the military service, put the Polish Brethren in opposition to the political community, and the dispute within this religious community became topical in the period after the death of King Sigismund II August, when, during the interregnum and election, the nobility was called upon to defend the state borders and public order. In the 1670s, the main polemic within the anti-trinitarian community

[30] The Court has already ruled on several occasions in cases brought by members of this religious community, it is worth noting, for example, the judgments Erçep v. Turkey, Application No. 43965/04 and Savda v. Turkey, Application No. 42730/05.

[31] M. Skwarzyński, *Sprzeciw sumienia w europejskim i krajowym systemie ochrony praw człowieka*, "Przegląd Sejmowy" 2013, No. 6, pp. 9–26.

concerned the problem of war and the army, which resulted in the expulsion of this religious group from the Republic of Poland after several decades.[32]

Before the 18th and 19th centuries, the problem of the refusal to perform military service concerned few people in Poland, because it was related to the nature of the then army, mostly professional or formed by the religious majority, without the need to involve a pacifist minority. The problem began when, with the development of industrial society, the army became increasingly conscripted and defence duty became universal. Members of denominations refusing to serve in the military, as well as increasingly frequent pacifists, faced a specific moral dilemma. The First World War was the key moment in the construction of the idea of conscientious objection.[33]

Religious groups with a generally negative attitude towards military service are the Quakers and Jehovah's Witnesses. Due to the fact that the presence of the latter denomination in Poland dates back to the beginning of the 20th century, and that currently Jehovah's Witnesses are the third largest religious group in the country, it is worth analysing its doctrine in more detail. It is known for its great rigour in many theological and social issues, and it assumes above all political neutrality, which justifies the refusal to perform military service and cooperate with the military authorities.[34]

The tragic events of World War II influenced not only the development of a new system of the protection of human rights and

[32] K. Dojwa, *Pacyfizm jako ruch społeczny – wybrane aspekty historyczne i socjologiczne*, "Zeszyty Naukowe WSOWL" 2012, No. 2(164), pp. 157–166.

[33] The issue of objectors was faced by Britain and the United States of America, where there had previously been no traditional conscription and where radical reformist currents were more prevalent among the population. The laws introducing compulsory conscription in both countries, in 1916 and 1917 respectively, contained clauses allowing the dismissal of conscientious objectors, although they were structured differently. Similar legal norms became the rule in other European countries; R. Kasprzycki, *"Naród bez broni". Niechęć do służby wojskowej w II Rzeczypospolitej z przyczyn religijnych*, "Kwartalnik Historyczny. Rocznik CXXVI" 2019, No. 1, pp. 73–109.

[34] W. Bednarski, S. Matusiak, *Zmienne nauki Świadków Jehowy: najważniejsze zmiany w doktrynie Towarzystwa Strażnica w latach 1879–2011*, Warszawa 2012, pp. 267–269.

international order, but also led to the emergence of post-war conscientious objectors. Controversies surrounding the refusal to take the military oath appeared for most of the period of the People's Republic of Poland, not only from Jehovah's Witnesses, but also as a demonstration of political opposition. This was due to the oath, which from 1952 in the Armed Forces of the People's Republic of Poland contained typically Stalinist accents, including commitments to steadfastly "uphold the people's power" and "brotherly alliance with the Soviet Army". The pacifist issue and the protest against the applicable conditions of military service became the leading element of the activity of the Freedom and Peace Movement. Activists were arrested and sentenced to prison terms and fines. At the same time, their requests, motivated by reference to the provisions of the Act on the Universal Obligation to Defend the People's Republic of Poland of November 21, 1967, for referral to alternative civilian service were ignored. The first changes took place after the amnesty for political prisoners was announced on July 17, 1986, and the related liberalisation of the government's policy towards the opposition, including the FAP members. Protests against the service have not been associated with repression since then, and conscientious objectors were often formally postponed from reporting to their units.[35] The changes initiated by Mikhail Gorbachev in the USSR also led to a liberalisation of the approach to the military. In 1988, the content of the military oath was changed, in which references to the state system were removed, and the Soviet Army was corrected to "brotherhood in arms with allied armies". In the same year, the rules of performing military service were also amended, introducing the possibility of performing it in the form of civilian alternative service.[36]

This attitude was eased after the end of the so-called Cold War, and in Poland in the Third Republic, which recognises the right of some people to refuse military service mainly for religious reasons.

[35] A. Smólka-Gnauck, *Między wolnością a pokojem. Zarys historii Ruchu "Wolność i Pokój"*, Warszawa 2012.

[36] The last objector associated with the WiP left prison in early 1989, while Jehovah's Witnesses were still imprisoned until 1990.

These include, above all, members of extremely pacifist religious groups, i.e. Hare Krishna, Zen Buddhists and Jehovah's Witnesses, as well as people with pacifist views. In Poland, the right to refuse military service is a constitutional right. It follows directly from Article 85 sec. 3 of the Constitution of the Republic of Poland, which states that a person whose religious beliefs do not allow for military service is sent to perform compulsory alternative service.[37] After the suspension of compulsory conscription in Poland from January 1, 2010, an oral refusal to perform military service in front of the conscription board is sufficient. The conscript is then ex officio transferred to the reserve.[38]

5. Military service in Poland. Homeland Defence Act

In the last decades of the 19th century, the idea of an army based on universal conscription began to spread.[39] After the end of World War II, such regulations were recognised in many countries, not only those with democratic traditions. Immediately after the end of the war, apart from the regulations issued by the authorities representing the new system, normative acts adopted in the interwar period were still valid in Poland. The organisation and manner of performing military service was initially regulated by the Act of 1938 on

[37] "Any citizen whose religious convictions or moral principles do not allow him to perform military service may be obliged to perform substitute service in accordance with principles specified by statute".

[38] This was intended to make the army more professional. According to the justification for the suspension of conscription, compulsory military service is to return, at an unspecified time, once modern structures and personnel levels have been established. The last military conscription took place in 2008, and the last conscription within this conscription took place from 2 to 4 December 2008. There was no conscription thereafter because on 9 January 2009, the Sejm amended the law. The release from compulsory military service of the last conscripts took place in August 2009.

[39] In 1922 Norway, and in 1926 the Netherlands, introduced provisions in their legislation to allow the religiously motivated alternative military service.

universal military duty.[40] The Act did not provide for the possibility of exemption from this obligation or conversion to the so-called alternative service due to conscientious objection. It contained only norms that applied to the clergy of various denominations. Clergymen of state-recognised Christian and non-Christian denominations were included in the auxiliary military service on the basis of documents presented to the draft commission. The situation was similar with the postponement of compulsory military service and qualifying for auxiliary military service.[41]

The new Act of 1967 on the universal duty to defend the Polish People's Republic,[42] after the amendment in 1979.[43] provided the possibility of alternative military service; however, the motives that were supposed to induce conscripts to do so were not specified. The possibility of performing alternative military service inspired by religious reasons became a normative category only when the Act on Guarantees of Freedom of Conscience and Religion was passed in 1989. Pursuant to Article 3 sec. 3, due to religious beliefs or professed moral principles, citizens could apply for referral to alternative service on the terms and in the manner specified in the Act on the universal obligation to defend the Polish People's Republic. The exercise of this right required a declaration of religious beliefs or moral principles. Subsequently, in 1992, the Act on the universal protection obligation was amended and a new regulation on alternative service was issued. Pursuant to their provisions, conscripts destined for compulsory military service, basic civil defence service or military training, who did not benefit from the deferment of military service, could, due to religious beliefs or professed moral

[40] Act of 9 April 1938 on general military duty (Journal of Laws of 1938 No. 25, item 220). Date of repeal: 28 May 1950.

[41] M. Bielecki, *Odmowa pełnienia służby wojskowej przez Świadków Jehowy jako realizacja klauzuli sumienia. Uwarunkowania prawno-historyczne*, "Studia z Prawa Wyznaniowego" 2016, Vol. 19, pp. 107–128.

[42] Act of 21 November 1967 on the Universal Duty to Defend the Republic of Poland (Journal of Laws of 1967 No. 44, item 2200). Date of repeal: 23 April 2022.

[43] Act of 28 June 1979 amending the Act on Universal Obligation to Defend the People's Republic of Poland (Journal of Laws of 1979 No. 15, item 97). Date of repeal: 23 April 2022.

principles, apply to the regional conscription commission with written requests to refer them to alternative service.[44]

The Act of 2003 on Alternative Service, set out the rules for destination and referral, as well as the manner in which the service is to be carried out.[45] The delegation to adopt the act on alternative service was included in Article 85 sec. 3 of the Constitution of the Republic of Poland of 1997, which states that: "a citizen whose religious beliefs or professed moral principles do not allow him to perform military service may be obliged to perform alternative service on the terms set out in the Act". It should be noted that the right granted is not an absolute right and may be limited in the event of the occurrence of premises specified in the Constitution itself, i.e. when they are necessary in a democratic country for its security or public order, or for the protection of the environment, health and public morals, or freedoms and rights of other people. The Act indicates that the premises that may be invoked by a person expressing the will to perform alternative service are to result from religious beliefs or professed moral principles. The legislator imposed on a person subject to military qualifications the obligation to prove the truth of the premises that authorise him to perform alternative service. For this purpose, an appropriate application should be submitted, containing in particular a statement on professed religious beliefs, as well as an indication in the professed religious doctrine of the basis excluding the possibility of performing military service and demonstrating real connections with the professed religious doctrine or indicating the professed moral principles that are in conflict with the duties of the soldier performing the military service. Decisions on assignment to alternative service were to be issued by the voivodeship commission for alternative service, which was appointed and dismissed by the marshal of the voivodeship, and it was composed of 5 people. At least 2 members of the committee had to present documents confirming their knowledge in the field of religious studies or ethics. Its decision could be appealed against

[44] M. Bielecki, *Odmowa…*, *op. cit*., pp. 107–128.

[45] Act of 28 November 2003 on substitute service (Journal of Laws of 2003 No. 223, item 2217). Date of repeal: 23 April 2022.

to the committee for alternative service, appointed by the minister responsible for labour, also composed of 5 persons, including the chairman and members.[46]

The amending act of 2009 replaced the term "conscript" with the term "person subject to military qualifications" and introduced the obligation to perform compulsory military service by persons subject to such military qualifications.[47] The amendment suspended the obligation to perform compulsory military service, although it did not abolish it completely. In the event of a threat to the security of the state, if it is necessary to ensure the ability to perform tasks related to the purpose of the Armed Forces, the obligation of military service also consists in performing basic military service by persons subject to this obligation. The decision in this matter, at the request of the Council of Ministers, is made by the President of the Republic of Poland. Along with the suspension of the basic military service, the alternative service was also suspended. On the other hand, with the entry into force of the Act of 2022, the Alternate Service Act of 2003 was finally repealed. However, media reports about the return to universal conscription appear every now and then, and therefore the above comments on the regulations in force may become current.[48]

Currently, the rules for the functioning of alternative service are regulated by the Act of March 11, 2022, on defence of the homeland.[49] According to Article 563, tasks in the field of alternative service are performed by the marshal of the voivodeship.[50] Alternative service

[46] Article 14 of the Act of 28 November 2003 on alternative service.

[47] Article 13 of the Act of 9 January 2009 amending the Act on Universal Obligation to Defend the Republic of Poland and amending certain other acts (Journal of Laws of 2009 No. 22, item 120).

[48] https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8661609,-zasadnicza-sluzba-wojskowa-polacy-chce-powrotu-do-poboru-wojsko.html (accessed on: 08.06.2023).

[49] Act of 11 March 2022 on defence of the Homeland (Journal of Laws of 2022, item 2305).

[50] For example, in the Mazovia Voivodeship, the above-mentioned tasks authorised by the Marshal of the Mazovia Voivodeship are performed by the Director of the Voivodeship Labour Office in Warszawa. The Voivodeship Commission for Substitute Service in Warszawa is appointed and dismissed by the Marshal

consists in: 1) performing work for environmental protection, fire protection, health care, social assistance, care for people with disabilities or the homeless, and for public administration and the judiciary by persons subject to compulsory military service whose religious beliefs or moral reasons do not allow for the performance of this service; 2) serving in armed formations that are not part of the Armed Forces. Performing alternative service is tantamount to fulfilling the obligation of basic military service by persons subject to it. Alternative service may be performed only during the period of compulsory military service, while compulsory basic military service is performed taking into account the needs of the Armed Forces. The President of the Republic of Poland, at the request of the Council of Ministers, may introduce, by way of a Regulation, the obligation to perform basic military service, specifying the date of its commencement and completion, taking into account the needs of the Armed Forces. Currently, the Ordinance in this regard is not in force, and therefore compulsory basic military service, and thus also alternative service in the entity, is not performed.[51]

An important issue that appears more and more often in the jurisprudence of administrative courts in Poland are benefits for defence, in the form of personal and material benefits. The current Act on Defence of the Homeland indicates them in section XXI. It should be noted that the Polish courts unequivocally refuse to grant the possibility of using the conscience clause to persons who want to be exempted from these benefits. The fundamental question, however, is whether such an attitude of the courts is justified by international law and jurisprudence, and if not, whether it should be changed.

The issue of conscientious objection to defence services shows the difficulties in ensuring adequate protection for people whose religious beliefs or moral principles do not allow them to support the army with personal actions, even if they are not connected

of the Mazovia Voivodeship. Organisational and administrative support for the above-mentioned Commission is provided by employees of the Voivodeship Labour Office in Warszawa, who deal with the matters of alternative service in accordance with the duties assigned to their positions.

[51] https://wupwarszawa.praca.gov.pl/urzad/sluzba-zastepcza (accessed on: 08.06.2023).

with any participation in combat or carrying weapons. In this case, the identification of the legal problem is made difficult by the classification used in Polish law, according to which defence services constitute a form of fulfilling the constitutional obligation to defend the homeland, separate from the military service. It is worth considering whether the jurisprudence of Polish administrative courts in this matter should not change. International guarantees of the rights of conscientious objectors may also cover those public-law personal obligations of an individual towards the army, which are not considered military service under national law. The correctness of an individual decision on granting exemption from the obligation to perform personal services requires the court to assess both the sincerity and depth of the complainant's convictions and the relationship of the given benefit with the military sphere. The way to implement this protection in court practice, however, leads not through the absolutisation of religious freedom and unreflective extension on the scope of the right to conscientious objection, which is sometimes expected by the complainants, but through taking into account the evolution of the Strasbourg jurisprudence initiated in the Bayatyan case and developed, among others, in the case of Adyan and others. The most desirable scenario would be for the legislator to take this evolution into account and to amend the relevant provisions in a way that clearly indicates any doubts as to the applicable scope of protection.

Defence services in peacetime are divided into personal and in-kind. These are short-term and ad hoc benefits imposed by an administrative decision in peacetime.[52] In addition, there are other benefits that may be imposed on local government administration bodies, state institutions, local government bodies as well as entrepreneurs and other organisational units. Personal benefits consist in performing various types of ad hoc work to prepare the defence of the state or combat natural disasters and liquidate their effects; may also include the use of simple tools, and in the case of couriers, i.e. persons delivering documents of conscription to active military

[52] On a different basis also in the event of a declaration of mobilisation and in wartime.

service and summons to perform services, also owned means of transport. The obligation to provide benefits may be imposed on persons with Polish citizenship who have reached the age of 16 but have not exceeded 60 years of age. Benefits in kind, on the other hand, consist in making available real estate and movables for use for the purpose of preparing the defence of the state. Such an obligation may be imposed on state offices and institutions as well as entrepreneurs and other organisational units, as well as natural persons.[53]

From the perspective of the classification adopted under Polish law, the provision of defence services is not a form of military services, nor is it a substitute service. Instead, it is considered as the performance of the constitutional duty to defend the homeland. These services are not per se strictly military in nature. These tasks are not directly situated within the area of operation of the Armed Forces, and the person obliged to fulfil them does not become a soldier, and for this reason not does not operate in the structure of the military subordination. At the same time, however, the connection of these benefits with the military sphere is sometimes quite clear. For this reason, it provokes strong opposition from people professing pacifism and invoking their religious and moral principles in order to obtain exemption from them.[54] The position of the administrative courts on the admissibility of granting such an exemption is quite unambiguous, as the courts rule that the performance of defence services cannot be equated to military service. According to the jurisprudence, this is a separate form of fulfilling the universal duty of defence, which is not covered by constitutional and international legal guarantees concerning conscientious objection. Administrative courts are justified in resisting unauthorised interpretations extending conscientious objection to the sphere unrelated to defence. However, they should be more flexible with regard to conscientious objection to the forms of fulfilling the duty of defence functionally

[53] https://bezpieczna.um.warszawa.pl/-/swiadczenia-na-rzecz-obrony-1 (accessed on: 08.06.2023).

[54] In practice, this mainly involves members of the religious association of Jehovah's Witnesses in Poland, known for their negative attitude towards military service and their radical rejection of political involvement.

related to military service and each time assess the legitimacy of the objection in the realities of a particular case.[55]

Most of the complaints filed to administrative courts in connection with moral and religious objections expressed by the obligated persons related to personal benefits. It should be noted, however, that these benefits are of an ad hoc and short-term nature. The duration of their performance may not exceed 12 hours at a time, and in the case of couriers and persons delivering and servicing items of benefits in kind, the upper limit is 48 hours, including travel and rest. What is more, the obligation to perform them may be imposed no more than three times a year. Therefore, it is difficult to assume in advance that the motivation of persons applying for exemption is insincere and results from the desire to avoid time-consuming duties, potentially disturbing the rhythm of family life and professional career, which could have been a significant reason for evading many months of compulsory military service years ago. Personal benefits are much less burdensome in this regard. In addition, a person's obligation to provide personal services may only be potential in nature. The Act provides for the possibility for the competent authority to issue both a decision imposing the obligation to perform a personal service and a decision to designate a person to perform such services. Both types of decisions may be appealed against to the voivode.[56]

The Act contains a catalogue of persons who are not subject to the obligation of personal benefits. This catalogue includes categories of persons distinguished on the basis of their functions or character and place of work (e.g., deputies, senators, judges, soldiers on active military service, employees of certain armed security formations) or due to their special personal or social situation (e.g., severely or moderately disabled, pregnant). Among the entities not subject to this obligation, persons whose religious beliefs or moral principles do not allow them to provide services were not listed. The sphere

[55] W. Brzozowski, *Sprzeciw sumienia wobec świadczeń na rzecz obrony*, "Przegląd Sądowy" 2022, No. 3, pp. 35–52.

[56] R. Sitek, *Świadczenia na rzecz podnoszenia potencjału obronnego państwa*, "Wiedza Obronna" 2018, Vol. 262–263, No. 1–2, pp. 198–222.

of beliefs is also not considered a circumstance that justifies failure to appear on a call to perform services, because the legal provisions in this context only mentions illness or other random events. It follows that the circumstances justifying failure to appear when summoned include only temporary obstacles of an objective nature, and not the obligated person's lack of will to perform the services, regardless of their motivation.[57]

Regulations concerning benefits in kind have a similar content, albeit taking into account their separateness. They are time-limited. This type of benefits, as a rule, cannot exceed once in the case of downloading the subject of the benefit: in order to check the mobilisation readiness of the Armed Force it is 48 hours, in connection with military exercises or exercises in units to be militarised 7 days, and in connection with civil defence exercises or practical exercises in the field of common self-defence – 24 hours. As in the case of personal benefits, the obligation to provide benefits in kind may be imposed on a given entity no more than three times a year, while collecting the subject of the benefit for a week in connection with exercises – relatively the most onerous – is possible only once a year. A lump sum is paid to the holder. A certain inconvenience, however, is the obligation to inform the commune head or mayor (president of the city) about the disposal of a given real estate or movable thing. It can also be assumed that such a burden on the thing potentially reduces its market value. The difference compared to personal benefits is that the Act does not provide for issuing a decision imposing the obligation to provide benefits in kind, but only on the allocation of real estate or movable property for the purposes of benefits in kind.[58]

The Act does not include a catalogue of entities exempt from the obligation to provide benefits in kind, but it indicates which objects may not become the subject of such benefits. An expression of

[57] G. Lewandowski, *Świadczenia na rzecz obrony w procesie pozamilitarnych przygotowań obronnych państwa. Stan aktualny oraz kierunki rozwoju*, "Wiedza Obronna" 2019, Vol. 269, No. 4, pp. 77–104.

[58] Z. Filip, *Świadczenia obywateli na rzecz obrony – prawda i mity*, "Annales Universitatis Paedagogicae Cracoviensis. Studia de Securitate" 2020, No. 10(1), pp. 257–268.

respect for the freedom of thought, conscience and religion of obligated persons are among the inclusions in the catalogue of "temples, houses of prayer and rooms of churches and other religious associations with legal personality, together with objects intended for religious worship". However, the regulations do not take into account the possibility of refraining from performing a benefit in kind due to the moral objection of the possessor of the thing to the potential way of its use or the nature of the institution that would use it.[59]

Courts examining complaints against decisions on the use of services for the defence services use the repetition of the arguments formulated by the complainants. They usually point to the contradiction of this obligation with regard to their religious and moral principles, referring to the constitutional and international standard of the protection of freedom of thought, conscience and religion. This increase in interest in the prospect of obtaining exemption from the obligation to provide defence services for religious reasons results from changes in the understanding of the concept of conscientious objection in international law, in particular in jurisprudence and soft law.[60] This is manifested not only in the increased number of cases, but also in the content of individual complaints. Whereas previously the applicants' arguments were vague and not very extensive, they now make regular references to the Bayatyan case, including phrases referring to a "strong and insurmountable conflict" and "sufficient persuasiveness, seriousness, coherence and relevance" of the given beliefs. The complainants usually refer to the fact that their conscience, "trained in the Bible", does not allow them to learn the secrets of the military arts. The concept of military art is understood broadly, since such duties include performing work as a driver in an evacuation group, transporting equipment and evacuating supplies, performing courier duties consisting in delivering cards for conscription for military service, evacuating

[59] Art. 628 para. 2 and 5 of the Act of 11 March 2022 on the defence of the Homeland.

[60] In the European legal space, a milestone in the approach to conscientious objection to military service came with the 2011 judgment of the European Court of Human Rights by the Grand Chamber in the case of Bayatyan v. Armenia.

people for a war port or even regulating the movement of means of transport. The applicants' attitude on this issue is one-sided, their conscience does not allow them to "participate even in the slightest degree in activities related to military service, even if they do not involve carrying weapons and taking part in military activities" and "participating in the fulfilment of benefits for defence would mean advocating military causes, which would be displeasing to God". Therefore, it is about rejecting any form of services for the army, even if they were not directly related to the handling of weapons or other regular service in its structures.

Polish administrative courts consistently reject such a broad definition of conscientious objection. In the opinion of the Supreme Administrative Court, the complaints unlawfully extend the guarantees concerning military service to other forms of the general duty of defence. The solution provided for in the Constitution of the Republic of Poland is an alternative only to military service and is an exception. It should be emphasised that defence benefits are not a form of military service and it is not possible to obtain exemption from them on the basis of conscientious objection. In addition, the Supreme Administrative Court emphasised that referring to the arguments from the Bayatyan case cannot be applied to defence services because they are not military service or alternative service. The reasoning of the administrative courts with regard to conscientious objection to defence services is based on a cautious assumption to prevent the risks associated with the uncontrolled expansion of the right to conscientious objection. However, a very important thing should be noted and emphasised. The current Strasbourg jurisprudence shows that guarantees regarding conscientious objection to military service should be interpreted functionally, and thus refer to various forms of fulfilling personal duties by an individual towards the army.[61] It follows that the assessment in terms of compliance with Article 9 pf the ECHR may be subject to

[61] In its 2017 judgment in Adyan and Others, the Court held that these guarantees can apply not only to military service itself, but also to closely related alternative service.

all national solutions specifying the manner in which an individual fulfils his personal public law obligations towards the armed forces.[62]

In 2020, the Supreme Administrative Court issued an important judgement on the obligation to perform personal services for defence. It ruled that the freedom of conscience and religion is not violated in every situation of conflict of beliefs with the obligation imposed by law. It stressed that substitute service in peacetime in the form of driving is different from the obligation to defend with a weapon in hand. The right to conscientious objection is not absolute and must be in accordance with national laws. The case concerned the applicant's assignment to perform personal services in the event of mobilisation and, during the war, consisting in performing work as a category C driver in an evacuation group. It was about transporting equipment and evacuating supplies.

The applicant stated that he was a Jehovah's Witness and his conscience did not permit military training. Nevertheless, the commune head assigned the applicant to perform personal services for the defence. The complainant disagreed with this decision and applied to the Voivodeship Administrative Court in Wrocław. The court of the first instance indicated that the scope of the civic duty of defence extends to all citizens of the Republic of Poland. It is a universal obligation. Military service is therefore a qualified form of civic duty to defend the homeland. At the same time, he admitted that performing defence services is not a form of military service. The court of the first instance emphasised that the catalogue of persons exempt from the obligation to provide personal services is a closed catalogue and its expansion is unacceptable, and the provisions of the ECHR do not explicitly contain a subjective right to refuse to act contrary to one's own convictions. The applicant relied on the incorrect interpretation and, consequently, the incorrect application of Article 53 sec. 1 of the Constitution of the Republic of Poland, as well as incorrect interpretation and, consequently, incorrect application of Article 9 of the Convention, Article 18 of the International Covenant on Civil and Political Rights and Article

[62] https://czasopismo.legeartis.org/2021/08/przekonania-religijne-swiadczenia-osobiste-obronnosci-uchylenie-zobowiazan/ (accessed on: 05.06.2023).

10 of the Charter of Fundamental Rights of the European Union. In the opinion of the Supreme Administrative Court, it is correct to state that both the provisions of the Constitution of the Republic of Poland and the provisions of international acts could not be the basis for releasing the complainant from the obligation to perform personal services for the defence of the state in connection with his objection dictated by conscience, professed moral principles and spiritual life. This is due to the fact that the obligations imposed on Polish citizens regulated by the Act on the universal duty to defend the Republic of Poland may be combined with restrictions on the freedom to manifest one's religion or beliefs. In addition, Article 10 sec. 2 of the Bill of Rights implies that the right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right. Thus, the wording of this provision does not imply an absolute right to refuse to act against one's conscience, because its implementation must be in accordance with national laws. The Supreme Administrative Court admitted that the obligations imposed on the complainant under the general duty to defend the Republic of Poland constitute a restriction of his rights arising from the freedom of conscience and religion. In this sense, the reasoning of the judgement under appeal is partly incorrect, although this did not affect the outcome of the case.[63]

In turn, in 2023, the Supreme Administrative Court dealt with the case of a man who, for religious reasons, did not agree with the imposition on him of a statutory obligation to perform personal services, which were to consist in immediately, in the event of mobilisation or war, appearing at the indicated place for the evacuation of people. The man argued that such a decision by the voivode was against his conscience and the moral principles professed by him as a Jehovah's Witness. He appealed against it to the Provincial Administrative Court in Szczecin, which did not, however, share his position. The case was therefore referred to the Supreme Administrative Court, which issued a final judgement and dismissed the complaint. The court decided that the man cannot be released from this task

[63] Reference: Judgment of 1 December 2020, II OSK 1434/18, https://orzeczenia.nsa.gov.pl/doc/8433B1ACAD (accessed on: 01.06.2023).

even when it conflicts with his conscience and professed moral principles, and those that guide him in spiritual life. It noticed that the dispute concerns the conflict between the obligation imposed on a citizen by both the statute and the constitution, and beliefs and conscience, which are also protected by the provisions of the highest legal act and international acts. Both courts ruled that Polish law does not provide for the possibility of exempting a person who invokes the right to refuse to act against his or her conscience in fulfilling the task.[64] This is despite even international standards stating that the exercise of the right to conscientious objection is possible within national law. The Supreme Administrative Court also invoked the constitutional principle of proportionality, but found that there are no objective premises to assess the situation threatening the identity and integrity, formed by conscience and the religion professed by a man.[65]

When analysing another issue related to defence services, it is impossible not to mention the issue of paying taxes. It is worth noting that the tactic of invoking conscientious objection as a justification for refusing to provide funds for the military was found by the Strasbourg Court to be obviously unacceptable. National courts have the right to examine, while maintaining the conditions of procedural fairness, whether the internal conflict experienced by a given person is real and insurmountable. This serves to prevent abuse of the exemption from the obligation. However, the validity of conscientious objection cannot be made conditional on formal affiliation to a religious community having certain beliefs. The court assesses the depth and sincerity of the beliefs of a particular person, and not an abstract review of the compliance of a legal obligation with religious doctrine. From this perspective, the arguments of Polish administrative courts, when they try to demonstrate on the moral and theological level the possibility of reconciling defence

[64] https://www.rp.pl/prawo-dla-ciebie/art38348971-swiatopoglad-i-religia-nie-uchronia-przed-mobilizacja-do-wojska (accessed on: 01.06.2023).

[65] File reference: Judgment of 4 April 2023, III OSK 2062/21, https://orzeczenia.nsa.gov.pl/doc/A738F2D0DF (accessed on: 05.06.2023).

services with the truths of faiths, for example, of Jehovah's Witnesses, seem to be misplaced.[66]

6. Summary

The end of the 1980s brought major changes in the situation of conscientious objectors in the world, which was significantly influenced by the end of the Cold War. In 1987, the United Nations Commission on Human Rights adopted a resolution recognising conscientious objection as a human right and advocating universal recognition of the right to conscientious objection to military service. Two years later, this was clarified, calling on member states to amend their legislation to allow alternative service in a non-repressive form. In the same year, the European Parliament took a similar position. The transition of most European armies to professional volunteer service largely solved the problem of conscientious objectors. No one is forced to take up a gun and potentially kill another human being anymore.[67]

Poland, like other European countries, has in the past repressed people with pacifist views, and above all religious groups that propagated such views, e.g. for this reason, the only religious group forcibly expelled from Poland in 1658 were the pacifist Polish Brethren. The situation did not change in the interwar period, as well as in the People's Republic of Poland, which forcibly conscripted or punished

[66] M. Bielecki, *Glosa do wyroku Sądu Administracyjnego w Szczecinie z dnia 14 czerwca 2018 r. II SA/Sz462/18*, "Studia Prawnoustrojowe" 2020, No. 48, pp. 295–303.

[67] Despite the fact that international organisations support the right to refuse military service on worldview grounds as one of human rights, this right is still not recognized in many countries. Out of about 100 countries with compulsory military service, only 30 recognize the right to refuse military service. There is currently a steady increase in the number of objectors refusing military service in Europe. Non-European countries, primarily those at war severely punish those who refuse military service; see: M. Mróz, *Odmowa służby wojskowej ze względu na przekonania i służba zastępcza w ustawodawstwie wybranych państw europejskich (Niemcy, Francja, Hiszpania)*, Warszawa 1996; https://euromil.org/wp-content/uploads/2022/03/1702_Conscientious_objection.pdf (accessed on: 05.06.2023).

with imprisonment all men who demanded exemption from military service for religious or ideological reasons. In the second half of the 1980s, people refusing to perform military service co-created the Freedom and Peace Movement.[68]

Currently, due to the suspension of the universal obligation of military service in Poland, it might seem that scientific research in the field of the military conscience clause takes on the significance of a historical study. However, it is worth considering, observing recent developments in the international arena and the internal policy of the Polish authorities, that this obligation may be reinstated. Taking into account international jurisprudence and the subject matter of cases subject to the conscience clause, considerations should also be started in Poland on the issue of conscientious objection to defence services, as well as the refusal to pay taxes for defence. Today, the military conscience clause is not only the right to conscientious objection to armed service. The professionalisation of the army does not preclude its use by civilians, but also by professional soldiers. It should be emphasised that, according to the jurisprudence of the ECHR, domestic law that does not include the conscience clause and does not provide for alternative military service for persons whose beliefs do not allow for active military service violates human rights.[69]

However, it is difficult to determine the appropriate procedure for invoking beliefs contrary to military service and assessing its credibility. Therefore, fundamental questions arise: does this process imply the need to belong to a specific religious association? Various interpretations are possible here. It seems that a person who invokes religious beliefs should derive them from the doctrine of a particular religion and any possible motivation should be verified in terms of compliance with its doctrine. However, can you refuse referring to religious beliefs to a man who does not belong to any religious association and creates a religious doctrine on his own? Freedom of conscience refers to the inner sphere of man, which is

[68] J. Czaputowicz, *Program i inicjatywy Ruchu „Wolność i Pokój" w zakresie polityki międzynarodowej*, "Pamięć i Sprawiedliwość" 2017, No. 30, pp. 179–202.

[69] This is according to the Court's June 12, 2012 ruling in Case No. 42730/05, Savda v. Turkey.

visible on the outside by manifesting it towards other people. After all, the premise of professed moral principles can be applied both to people who derive it from specific religious beliefs, and to non-believers, referring to religious motivation, related to belonging, for example, to a subculture that preaches pacifist views.

7. *De lege ferenda* conclusions

The norms in force in the Polish legal system as well as the jurisprudence of international tribunals in the field of conscientious objection in relation to conscripts are of rather negligible importance due to the lack of an obligation to perform military service. However, a stable political situation cannot be guaranteed, and therefore, along with the possible reintroduction of compulsory military service, there will also be a need to provide alternative ways of its implementation.

Taking into account the information presented above, the following *de lege ferenda* conclusions can be drawn:

i. the abolition of compulsory military service for citizens and the introduction of a professional army cannot constitute a justification for not introducing provisions on the military conscience clause;
ii. applicable regulations should take into account the changing international jurisprudence and soft law;
iii. the practical assessment of invoking the military conscience clause must always be resolved with respect for the principle of proportionality;
iv. the wide objective scope of the implementation of the constitutional obligation to defend the homeland should be reflected in various forms of imposed obligations;
v. military personnel should be trained in the scope of applicable provisions on the conscience clause;
vi. any practical action regarding the military conscience clause should take into account the discrete matter of the individual's freedom of conscience and not violate this right;

vii. conflicts over specific matters should take into account the type of conscientious objection and the motivation of the person invoking it, but not discriminate against a person on the basis of their beliefs.

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Freedom of Conscience and Public Employees in Hungary

1. Introduction

This chapter on the freedom of conscience in the public sphere in Hungary, especially in public administration, is divided into four major parts. Following a brief conceptual introduction, in Part 1 I highlight the most prominent legal and illegal areas of the contemporary international context,[1] regardless of their importance in Hungary; in Part 2, which focuses on Hungary, I provide some general background information on public sector employees, (public sphere personnel) in general,[2] and about those who belong to the broadly interpreted public administration, the personnel of which includes civil servants and other government employees on a national, regional and local level, and which consists both of those who excercise public authority and those who provide different services. In Part 3, I shall catalogue the types of public administration employment, and, since the legal status of each of those categories is regulated by Parliamentary Acts in Hungary, my first research question seeks to discover which major legal aspects of public employment (civil service), such as selection and appointment,

[1] Each state uses legislation to regulate and limit the scope of its employees and their rights and obligations. These rules are country-specific and the details vary considerably, but, despite the differences, there are common problems regarding the freedom of contrast that cuts across national borders.

[2] The term *public employee* means an employee of a public employer, but does not include elected representatives.

remuneration, career path, labour relations, rights and obligations or termination of service, influence the freedom of conscience more, if at all. This indoubtedly requires a number of certain legal cases related to the practices of Hungarian public administration – in order to find out which areas are the most frequent from the perspective of the freedom of conscience. My aim here is to compile a "problem map".

Finally, in Part 4, I shall say some words about the possible legal and illegal solutions, i.e. *de lege ferenda* suggestions. This chapter seeks to explore the concepts of conscience in theory and practice in the Hungarian context. It offers insights into the way conscience might, and perhaps must, be both accommodated and supported more appropriately in the practice of the 21st-century Hungarian public administration. My suggestions, (or proposals,) will seek answers to specific questions such as:

1. Will the new systems for reporting abuse that employers will have to set up under a new Hungarian Act affect the freedom of conscience in public administration? If so, in what way? How can the law be further developed, if it should?
2. In January 2018, the Trump administration established the Conscience and Religious Freedom Division within the Department of Health and Human Services' Office of Civil Rights with the explicit goal of intensifying the legal protection of religious and conscientious objections in health care.[3] Do we need anything similar in Hungary or in Poland?
3. Does the existence and quality of governmental consultative mechanisms in some way influence the freedom of conscience within the Hungarian public administration?
4. Do codes of ethics and standards of conduct of administrative authorities have any influence on the freedom of conscience of public employees?

[3] J. Raifman, S. Galea, *The New US "Conscience and Religious Freedom Division": Imposing Religious Beliefs on Others*, "American Journal of Public Health" 2018, No. 108(7), pp. 889–890; S. Johnson, *Conscience and Religious Freedom Division Marks Its First Anniversary with Action*, "Hastings Center Report" 2019, No. 49(2), pp. 4–5.

5. I would, finally, like to put forward as a topic for our research that a specific lack of conscience is a moral and legal problem within decision-making proceedings in public administration in cases when artificial intelligence is used or shortly will be.

The main method here will be to review the relevant primary legal sources (actual law in the form of acts, governmental decrees, court cases, etc.) and secondary legal sources, such as Hungarian and international scientific literature that explains the primary sources, the legal practice and the elements, specific circumstances, determining the broader social environment, so that through these sources all the main scientific questions may be answered. My chapter therefore seeks to be an introduction, complementing or even replacing the Hungarian and international scientific literature on the topic.

2. Heart of the matter

Freedom of conscience from the perspective of my paper is a twofold phenomenon: on the one hand it must be interpreted and evaluated from the perspective of the different categories of public employees, but, on the other hand, also from the side of the potential clients and customers. This dichotomy also makes it worth noting that the study is primarily concerned with the freedom of conscience of public sector staff, rather than with the freedom of conscience of clients and other persons who come into contact with them, or only exceptionally, if it has a bearing in terms of what is being said.

One issue of a normative legal source or other official action taken by a broadly interpreted "public employee" that restricts one's liberty to live in harmony with one's conscience would be a burden on the free exercise of conscience. Such a burden would not count as a violation of the right to freedom of conscience if the law or official action in question is necessary to serve a legitimate state (government) interest. The right to freedom of conscience is therefore neither absolute nor without exceptions: it is a right to be balanced against

others.[4] But what if the person whose (right to) freedom of conscience is under serious pressure is a public employee (e.g., a cabinet civil servant)? What, if any, are the specific circumstances to be taken into account, when such a person's right to freedom of conscience is balanced against other rights? On the one hand, public service personnel are expected to be responsible for democratically elected governments (or local authorities), and, on the other hand, as the policy space becomes more complex, they are forced to exercise more discretion in their responsibilities, (particularly important for new administrative task types without precedent), and their individual and professional conscience is seriously challenged under such pressures.[5] To get to the heart of the matter, where are the moral, political, professional and legal limits of loyalty within public administration?

More precisely, government employees, along with elected officials and others, must fulfil basic obligations of public service and adhere to laws and regulations that provide equal opportunity regardless of race, colour, religion, sex, national origin, age, or disability, and in some jurisdictions, gender identity and sexual orientation,[6] but, at the same time, freedom of conscience remains a sensitive and, in many aspects, enigmatic question (contested concept) both from the point of view of the service providers and the consumers/clients. The main question for ethics, law, theology, and other social sciences is whether it is possible, to honour individual integrity and moral beliefs without harming those with different beliefs and values, and if so, how to do so?[7]

I shall try to examine the precise relationship between the freedom of conscience and freedom of expression, because those elements of freedom of conscience which are visible to the outside world and accessible to other people, are also to a significant extent

[4] W. Chavkin *et al.*, *Balancing Freedom of Conscience and Equitable Access*, "American Journal of Public Health" 2018, No. 108(11), pp. 1487–1488.

[5] See more: M.K. Deutscher *et al.*, *Conscience in public administration: More than just a chirping cricket?*, "Canadian Public Administration" 2019, No. 62(4), pp. 181–201.

[6] W. Chavkin *et al.*, *Balancing Freedom of Conscience and Equitable Access*, *op. cit.*, p. 1487.

[7] Ibid.

linked to freedom of expression. What then are the main aspects of that relationship? The most important of these are:

1. If employees share detrimental opinions about the employment relationship and more specifically about the employer, on social media, it may give rise to problems for the employer.[8] In such cases, the balance tends to tip in the direction of the employee's freedom of expression, on the one hand, and the "duty of loyalty" on the other. The question is whether the former might be limited in order to fulfil the latter, and if so to what extent. I will examine cases that depict the labour law's treatment of opinions posted on social networking sites and the scope and extent of the protection they enjoy under fundamental rights.
2. We should also examine the possibilities and limits of employees flouting employers' instructions. The conflict between the constitutional commitment of the state in law enforcement and the right to freedom of conscience and religion of the person acting is most acute when the member of the authority acting is required to enforce a norm which is in direct conflict with his or her own internal convictions. What if an employee disagrees? What if he or she refuses to carry out carry out the orders he or she has been given?[9]

If I broaden the concept and the notion of public administration, doctors and teachers are also included as workers in public administration, and this gives rise to several new problems related to the issue of conscience. There is, for example, a question related to Hungarian teachers: does unjust conduct by the State, especially the limited right of teachers to strike, constitute ground for unlawful civil disobedience by those teachers? What should be the legal consequences of such deeds? This is the topic of my next paper. I shall point out some questions related to the freedom of conscience of Hungarian teachers, such as the new legal environment, civil disobedience, the right to strike and the interests of the pupils. The issue

[8] A. Vereb, *Ne szólj szám…? A közösségi médiában közölt vélemények a munkajogi bírói gyakorlatban*, "Munkajog" 2021, No. 2, pp. 30–37.

[9] For more, see: M. Tihanyi, *Lelkiismereti és vallásszabadság a rendészeti jogalkalmazásban*, "Magyar Rendészet" 2016, No. 16(5), pp. 93–121.

also has a very strong conscientious connection: the fundamental right to strike stands in conflict with the right of children to an education, and many teachers argue that their aim, whether through strike action or civil disobedience, is precisely to protect the rights and long-term interests of those children, i.e. they see their action as a clear duty of conscience.

I chose this topic for my research because, on the one hand, this specific field is one of the major sticking points of current Hungarian legal life and politics and, on the other hand, "The teacher is the representative of the adult conscience and ultimately of the social conscience".[10]

3. Contemporary problems: international aspects

Before presenting the specifics of the Hungarian situation, I shall introduce the international aspects of the topic.

3.1. CONSCIENTIOUS OBJECTION

My first question focuses on the problem most often associated with the topic: how to define conscientious objection as practiced by public employees, especially within public administrations? In the context of public administration, civil servants and subjects of other types of legal relationships engage in acts of conscientious objection when they (1) refuse to provide lawful and professionally accepted services that fall within the ambit of their professional competence, and (2) justify their refusal by claiming that it is an act of conscience or it is conscience-based.

Within international literature some have disagreed as to whether these objection rights must be based on personal objections or whether objections might also be asserted as professional values and norms. Thought, conscience and religion are first of all internal

[10] I. Pinczésné Palásthy, *Tanítóvá lenni*, "Mediárium" 2019, No. 13(2–3), pp. 54–71.

convictions, which means that they may be interpreted in terms of constitutional law or administrative law only when they are expressed. Freedom of expression is therefore an opportunity for external expression of a broader fundamental freedom: freedom of belief. This is the reason behind the fact that within this sub-chapter I am discussing theories and practical problems closely connected with freedom of expression and not exclusively those of freedom of conscience.

The main question for ethics, law, theology, and other social sciences is whether it is possible to honour individual integrity and moral beliefs without harming those with different beliefs and values, and if so, then how? When it comes to civil or public servants' conscientious objections, then it becomes more complicated.

What differentiates these conscientious objections, actions, omissions (inactions) practiced by civil servants from similar conduct in other types of employment relationships?

In both the public administration and the wider public sector there are specific circumstances that distinguish these employees from other workers:

a) they deal with official secrets, even state secrets;
b) there are also political appointees and elected members within the administration's staff;
c) in some cases, beyond an expectation of loyalty, there is also an expectation of patriotism; moreover, in some cases the employee is even obliged to risk his or her own life – e.g., within the armed forces or law enforcement authorities;
d) the public employee does not represent themselves or a company, but the state as a whole, which creates additional responsibilities and risks;
e) requirements such as integrity, probity, impartiality a fairness are not, or are only to a limited extent, reflected in the business world, but are essential in the public sector.

All these circumstances significantly limit the possibility and scope of expressing one's own worldview within a certain public authority or especially within an administrative organ.

What are the main further contemporary approaches to the problem in question? Based on the review of the international scientific literature, what are the main legal and practical aspects of the given issue?

We firstly see the need to define the expression *employee engagement within public administration.* Kahn defined employee engagement as the "harnessing of organisation members" selves to their work roles; in engagement, people employ and express themselves physically, cognitively, and emotionally during the performance of their roles".[11] What is meant by *loyalty* and *engagement*, and what are their limits? In particular, in most cases, the balance is tipped in favour of the employee's freedom of expression in one direction and the so-called "duty of loyalty" in the other. The question is whether the former may be restricted in order to fulfil the latter, and if so, to what extent? On the one hand, it is problematic and may cause serious problems for the employer if the employee, as may happen today, shares derogatory opinions about the employment relationship, and more specifically about the employer, on social media platforms. On the other hand, it may also be a matter of concern if the employee publishes objectionable postings that may be capable of undermining trust in the employee, even if those opinions and allegations are unconnected with the particular employment relationship.

In accordance with the international scientific literature, which topics lead to an internal division within the employees, within their own conscience the most?

The most common cases with legal implications are as follows:

i. Compulsory oaths for civil servants.[12]
ii. Participation in abortion and the provision of other medical treatments.[13] Doctors may refuse certain procedures on

[11] L.L. Lemona, M.J. Palencharb, *Public relations and zones of engagement: Employees' lived experiences and the fundamental nature of employee engagement*, "Public Relations Review" 2018, No. 44(1), pp. 142–155 (p. 143).

[12] T. Drinóczi, *The decision of the Hungarian Constitutional Court about the form of the oath of the civil servants – in the context of the freedom of religion*, "ICL Journal" 2010, No. 4(3), pp. 493–497.

[13] M.A. Clauson, *The emergence of conscience rights for health care professionals: How we moved historically from conscience to conscience rights. Ethics*, "Medicine and Public Health" 2019, No. 11(4), pp. 21–29.

the basis of a legal standard (e.g., a request for a unapproved drug), a professional standard (e.g., a request for unbeneficial treatment, such as hyperbaric oxygen for a completed stroke), clinical judgment (e.g., a request for an antibiotic to treat a viral infection), or even a personal choice (e.g., in nonemergency situations doctors are free to refuse patients for nondiscriminatory reasons).[14] Apart from these circumstances, do clinicians have a further right of refusal? The bar for assessing whether to accommodate objection in health care should be high because fiduciary duty means that a clinician should never give higher priority to her or his own conscience than to the patient's needs. Some countries permit refusals only to the degree that it does not infringe on the state's obligation to offer the service and mandate that the objector provide accurate information, timely referrals, and the contested care in urgent circumstances.[15] American and international medical societies affirm these as clinicians' obligations. Distinct from the United States, the national health sectors in Norway and Portugal underscore the health care system's responsibility to ensure that care be available by paying for clinicians' or patients' travel to provide or receive abortions or by limiting the numbers of staff who object at a given site.[16]

iii. In order to deal with such problems, several new rules have been proposed internationally to shield those who work, among others, in health and social service sites receiving state funds from consequences for refusing to provide certain medical treatments on the grounds of religious belief or conscience. These rules flag objections related to abortion, sterilisation, medical assisted dying, advanced directives for end-of-life care, and, surprisingly, comprehensive approaches to HIV care, occupational health screening, vaccination, hearing screening, suicide prevention among children and

[14] D.M. Sullivan, *Professionalism, autonomy, and the right of conscience: A call for balance*, "Ethics, Medicine and Public Health" 2019, No. 11(1), p. 13.

[15] W. Chavkin *et al.*, *Balancing Freedom of Conscience and Equitable Access*, *op. cit.*, p. 1488.

[16] Ibid.

same-sex marriage licences.[17] Many argue that a request for exemption from the consequences of refusal to fulfil legal or professional duties should be accommodated only if it is not discriminatory and harms might be mitigated.

iv. The participation of health professionals and/or teachers, etc. in political protests and/or civil disobedience.[18]

v. Vaccination (earlier related to vaccines made using human cells, but more recently in cases of the COVID-19 vaccine).

vi. Same sex civil marriage (licences) and gender topics. The question of whether a province may, for example, require civil marriage commissioners to perform same sex weddings, in spite of their religious objections, has been addressed by the Canadian courts in a series of cases. In each of these cases the issue is framed by the courts as a contest between religious freedom, or even nonreligious beliefs, and sexual orientation equality, that must be resolved through the balancing of these competing interests. In each of these cases the court strikes the balance in favour of sexual orientation equality, determining that the equality rights of same-sex couples outweighs the religious freedom of marriage commissioners.[19]

vii. The lack of conscience is also emerging as a new element and issue in the literature – as a new problem in administrative law enforcement; the long-standing automated decisions, the use of Chat GPT and other AI-driven platforms in legal decision-making raises a number of conscience and legal liability issues. This is an area that deserves independent research.

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[17] M.K. Deutscher *et al.*, *Conscience in public administration…*, *op. cit.*, p. 181; W. Chavkin *et al.*, *Balancing Freedom of Conscience and Equitable Access*, *op. cit.*, p. 1487.

[18] D. Chong, *Political Protest and Civil Disobedience*, [in:] D.J. Wright (ed.), *International Encyclopedia of the Social & Behavioral Sciences*, second Edition, 2015.

[19] R. Moon, *Conscientious Objections by Civil Servants: The Case of Marriage Commissioners and Same Sex Civil Marriages*, 2015, pp. 1–26. Available at: SSRN 2631570, 2015 –papers.ssrn.com (accessed on: 10.06.2023).

3.2. THE NATURE AND INTENSITY OF CONSCIENCE ISSUES MAY ALSO DEPEND ON THE TYPE OF PUBLIC SERVICE SYSTEM

Finland and Bulgaria are two examples of countries remote in terms of the principles of their public service and their application. For Finland, independence, impartiality, objectivity, trustworthiness of government, transparency, accountability and responsibility are core values. For Bulgaria, we see similar concepts, but also values such as loyalty, stability, hierarchical subordination, etc., are prominent. Independence versus hierarchical subordination/loyalty suggest that while Finland focuses on public service, Bulgaria is more drawn to the government and this may clearly have an impact also on the conflicts of conscience that arise.

3.3. OFFICIALS OF PARTICULAR STATES AND INTERNATIONAL ORGANISATIONS

Here, conflicts of conscience may arise in balancing the interests of the international organisation and the home state with the expectations of the home government, and in the enforcement of political considerations.

3.4. THERE IS AN ONGOING DEBATE ON THE LEVEL OF PROTECTION PUBLIC ADMINISTRATIONS SHOULD GIVE TO NONRELIGIOUS CLAIMS OF CONSCIENCE COMPARED WITH RELIGIOUS CLAIMS OF CONSCIENCE

Two reasons one might give greater protection to religious claims of conscience are as follows: (1) tradition favours religious claims of conscience and (2) governments are less competent to deny religious claims of conscience than nonreligious claims.

3.5. IN WHAT NEW, ALTERNATIVE WAYS ARE LEGAL SYSTEMS AND PUBLIC ADMINISTRATIONS SEEKING TO ADDRESS THESE PHENOMENA?

i. Some new institutional answers have been given to make the treatment of conscience issues more transparent to society as a whole. As was mentioned above, in January 2018, the Trump administration established the Conscience and Religious Freedom Division within the Department of Health and Human Services' Office of Civil Rights with the explicit goal of intensifying legal protection of religious and conscientious objections in health care. Do we need similar legislation in Hungary or in Poland?
ii. More effective, complex protection of whistleblowers is a new goal. Whistleblowers are vital in maintaining an open and transparent society, as they expose misconduct or hidden threats. To ensure that they are better protected against detrimental consequences, EU Directive 2019/1937 on the protection of whistleblowers came into force on 16 December 2019. Hungary has also tried to implement it recently.
iii. Further measures have been taken to reduce the pressure and intensity of conscience-related issues in the areas concerned (e.g., health care, education). Today, states as well as companies acting as employers recognise the importance of establishing a work environment where differences are treated with respect and inclusion. Diversity, equity and inclusion programmes, including employee training, should include religious and nonreligious differences. It is the responsibility of both the employer and the employee to be aware, knowledgeable and respectful of a wide range of religious and nonreligious beliefs.
iv. A new direction is the assessment, clarification and weighing of the consequences and damages caused by conscientious objections, even on a scientific basis. What are the harms of accommodating refusals to duties? The first, direct harm of accommodating refusals to fulfil legal or professional duties is hindering an individual's ability to exercise a right to

obtain a legal service or good. There are also indirect harms: exempting professionals from duties may undermine trust and respect for the profession or even for the public administration as a whole. Objection might increase the workload of those willing to provide services, as they pick up the slack from those who refuse. There may also be several further aspects. Quantifying this complex damage, both at the societal level and within public administrations, is a new task of growing importance.

3.6. DEVELOPMENT OF TESTS, USED BY COURTS, TO DETERMINE WHETHER A BELIEF-BASED CLAIM CAN BE JUSTIFIED OR NOT

What are the main aspects to be considered in the case of court-administered tests to determine belief based claims in general? One example has been used by the European Court of Human Rights (ECHR) in some cases.

The first question asks how well-founded, serious, coherent and relevant/important the belief is. It is important that its truthfulness, its objective validity is irrelevant, at least in those cases that involve religious truth. Renáta Uitz, in examining the ECHR's practice on freedom of religion, states that "in the application of Article 9, a claim is not worth defending because the applicant's religious views conform to the teachings of a recognised Church, but because the applicant's own conscience or deep and sincere religious convictions are sufficiently cogent, serious, well-formed and important to call for the protection of Article 9".[20]

The second is the existence of a logical connection between the belief and the certain breach of the law (the harm to the rights of others). The third question is whether the person who claims that his or her beliefs must be taken into account takes seriously his or her beliefs or whether it is little more than a flimsy excuse. If the answer

[20] R. Uitz, *A lelkiismereti és vallásszabadság az Emberi Jogok Európai Bíróságának gyakorlatában – a Kokkinakis-ítélettől az állami semlegesség követelményéig*, "Állam- és Jogtudomány" 2017, No. 4, pp. 106–116 (p. 107).

to all three questions is in the affirmative, the infringement may be established and further legally assessed, depending on the relevant circumstances of the specific case and the specific legal context.

4. Conscience issues in the Hungarian public administration

Above, the international context and the main directions of the issue under discussion were presented. Beyond health care and education, what are the main categories of public employees in Hungary? What are the operational aspects, areas of activity and other facts along which the difficulties related to the conscience of public administration staff are most "concentrated" in Hungary? What are the new lines of "investigation"? It will be seen that, in addition to the classical jurisprudential approaches, religious studies, theology, philosophy, sociology and political science also provide useful contributions to the study. Indeed, a highly interdisciplinary approach seems justified.

4.1. COMPOSITION OF THE PUBLIC SECTOR IN HUNGARY

Traditionally, the Hungarian public sector has been staffed as follows: after the regime change in 1990 the categories of those employed in the public sector have been: 1) the civil service; 2) uniformed services (police, intelligence services and the armed forces, who enjoy a special constitutional status); 3) judges, prosecutors, political appointees (members of Parliament, local elected councils and mayors), and, by far the largest group of about half a million persons; 4) public servants (nurses, doctors, teachers, social workers, etc. of public institutions). All these categories collectively form the category of public employees.[21] The legal status of each of the categories

[21] Gy. Gajduschek, V. Linder, *The Civil Service System in Hungary*, [in:] A. Patyi, Á. Rixer (eds.), *Hungarian Public Administration and Administrative Law*, Passau 2014, p. 501.

above has been regulated by Acts of Parliament. Civil servants are those public employees who work in offices of central and local public administrations, i.e. in the offices of the ministries, central and territorial level agencies, as well as in the offices of municipalities and independent agencies. As of 2010, however, this group is further divided into two main groups whose legal status is also different in some aspects: those known as *cabinet civil servants*, who work in offices under the ultimate hierarchical control of the Cabinet (ministries, central agencies and their regional units), and all others, who do not. If we want to differentiate this latter group we might call them noncabinet civil servants. Due to the changes that shifted – in 2 or 3 steps – several functions previously carried out by municipalities to central agencies, the number of cabinet civil servants has largely increased parallel to a drop in noncabinet civil service personnel.[22]

Since the regime change, the civil service legislation has been characterised by dynamic changes, the culmination of which was Act CXXV of 2018 on Government Administration (hereinafter: Kit.), which radically transformed the regulation of civil service legal relations. While professionalism, political neutrality, merit and career security were at the forefront of government personnel policy during the establishment of the democratic rule of law at the time of regime change, the traditional concept of civil service has been reassessed, and the "technocratic and expert public administration is playing an increasingly minor role". As a consequence, changes in legislation are (1) clearly pointing towards more open personnel policy systems, and (2) the internal differentiation of the civil service is increasing, fragmentation is growing and some categories of public servant are being excluded from the scope of Act XXXIII of 1992 on the Legal Status of Public Servants.[23]

In 2023 in Hungary in the broadest sense of the term the public employment in Hungary consisted of several clusters of employees

[22] Ibid.

[23] On 14 October, 2020, the Hungarian Parliament adopted Act C of 2020 on the Healthcare Service Relationship which fundamentally transforms the employment relationships at State run healthcare service providers. Act LII of 2023 on teachers' careers has also been adopted.

in the public service, i.e. those employed by publicly financed organisations. This included employees of the legislative branch (elected members of local councils and the national parliament, as well as mayors), as well as those employed by the judiciary. It also included organisations of the executive branch, such as members of the armed forces, the so-called public servants employed in organisations typically providing human public services, such as schools and hospitals, and civil servants i.e. employees of the civilian public administration. For those employed by government owned enterprises, including central and local government owned ones, and enterprises owned directly as well as indirectly – through holding-type structures – the general labour code[24] is applied.

Another way to define the scope of public employment is to focus on the legal employment status of employees rather than on the type of the employing organisation. According to this typology, within the executive branch there are separate legal statuses for employees of the army,[25] for those of the armed and security forces,[26] for attorneys, for public servants, for members of the Cabinet (including state secretaries), and for civil servants. For employees of government owned enterprises the general labour code is applied. Within the broad category of civil servants two major, important categories must be separated: a) government officials (*kormányzati igazgatás tisztségviselői*),[27] and b) civil service officials (*közszolgálati tisztviselők*).[28] We must also mention that there are also some special legal statuses in accordance with the rules of Act CVII of 2019 on Organs of Special Status and the Status of their Employees. With regards to the basic character of the civil service

[24] Act I of 2012 on the Labour Code.

[25] Act CCV of 2012 on the status of the military personnel (Status Act) (*A honvédek jogállásáról szóló 2012. évi CCV. törvény*).

[26] Act XLII of 2015 on the Service Status of Professional Members of Law Enforcement Agencies (*2015. évi XLII. törvény a rendvédelmi feladatokat ellátó szervek hivatásos állományának szolgálati jogviszonyáról*).

[27] According to Article 3 of the Kit. Government officials are available in: a) political service, b) as a Commissioner, or c) in a government employment relationship.

[28] See: Act CXCIX of 2011 on the Civil Service Officials (a közszolgálati tisztviselőkről szóló 2011. évi CXCIX. törvény (Kttv.).

system (the term, unless otherwise indicated, hereinafter used to refer to all the above sub-groups) this is somewhat ambiguous. On the one hand there are frequently somewhat symbolic elements of a career type framework present in the system, such as the strict legal separation between general (labour) and civil service employment, the principle of seniority (fixed promotion scheme) and unilateral appointment, fixed remuneration, and stricter rules (in comparison with the general labour code rules) on the conflict of interests. These are, however, rhetorical and symbolic rather than well-elaborated and practically significant elements of the regulatory framework. On the other hand, however, the features pointing towards a more open, position based civil service are much more characteristic and have more practical significance. These include the lack of compulsory competitive recruitment and promotion processes, the almost complete lack of protection against arbitrary dismissal and the complete lack of protection against terminating managerial appointments, the increasing share of posts with unique salary arrangements, and so on:

> According to Weber, (…) bureaucracy defines a form or design of organisation which assures certainty of the behaviour of employees. Division of labour and specialisation are guaranteed in the organisation. Every job is accomplished according to a persistent system of abstract rules. This guarantees homogeneity and synchronisation. From the Weberian formulation, one can deduce a set of structural characteristics and another set of behavioural features.[29]

This classical approach is relevant to questions of conscience insofar as it expects the disciplined suppression of individual interests and considerations in the civil service, and the definite self-limitation of the individual. The question can therefore be formulated as: where do newer behaviours break through this classic "wall"?

[29] Public Personnel Administration – Alagappa University, p. 46.

4.2. THEORETICAL FOUNDATIONS

Once again it should be emphasised that the law can only deal with a conscience that is expressed, is manifested in action or inaction (in some cases, conduct that can be qualified as omission), and that action often means the oral, written or other expression of an opinion. That expression of opinion nowadays especially takes place through the platforms of the modern mass media and, in particular, social media. This approach also implies, of course, the assumption that a person's words and actions are reasonably inferred from his or her convictions, or are explicitly "conscience-driven".

4.2.1. *New directions in contemporary Hungarian jurisprudential research*

Without claiming to be exhaustive, the following represents the main directions Hungarian jurisprudence considers relevant:

Firstly, if we begin from the directions in which the broader social science studies and jurisprudence, which use the results of these studies and are also linked to them, are exploring the topic of conscience, then we must note, in accordance with Kéry, that today in the attempts at describing the concept of conscience what we find is not so much the focus, but more often we encounter "its adjectival form, the term *conscientious*". He gives the four main characteristics of a conscientious person as having:

i. a well-defined, clear and serious world view;
ii. a well-developed sense of purpose – insofar as he knows what his tasks are in relation to his worldview; he faces facts, draws rational conclusions from them, and regularly aligns his tasks with his goals (also referred to as purposefulness);
iii. a strong sense of responsibility – insofar as he feels a sense of duty to solve problems he has recognised and considers his own;
iv. the adherence to the perceived good, even at the cost of sacrifice.

Secondly, the emergence of Christian conscience as a new line of investigation in the Hungarian literature is also instructive. In one of his studies, Gergely Deli places Christian conscience at the centre of his concept of law.[30] He suggests that, in addition to the prevailing constitutionalism based on human dignity, which is individualistic, consequence-oriented, expressed in human rights and "rational", there is also an "emotional" constitutionalism (legal concept) based on human salvation, which is personal, intention-oriented, and which makes sins the subject of its concern, and which is measured by the Bible rather than by the existing law, by the existing legal sources.[31] It also raises the question of the basis on which a Christian – in our case, a public servant – may sue when it comes to resolving a conflict of conscience.[32]

Thirdly, we can see the emergence of institutional conscience and social conscience. According to the *BH 2017.8.258* judgment, it is still clear that the "Conscience and religious conviction are part of the human quality and can only be possessed by a natural person (a living human being)", but the emergence of institutional conscience and social conscience can be observed within the Hungarian scientific literature. In addition to the frequent question of corporate social conscience and responsibility (CSR), the importance of the research on the social responsibility of public authorities, which goes beyond their own direct tasks and is not regulated by law, is also emerging.[33]

[30] G. Deli, *A lelkiismeret alkotmányossága*, "Acta Humana" 2020, No. 3, pp. 55–71 (p. 55).

[31] Ibid.

[32] See also: Á. Rixer, *The Legal and Theological Concepts of Christian Liberty*, [in:] *Christianity and Human Rights: Perspectives from Hungary*, A. Koltay (ed.), Ludovika Egyetemi Kiadó, Budapest 2021, pp. 39–68.

[33] M. Gáspár, *Társadalmi közfelelősség. Van-e közigazgatás a bürokrácián túl? Az önkormányzatiság újraértelmezésének egy lehetséges gondolati kerete*, "Új Magyar Közigazgatás" 2016, No. 9(3), pp. 33–36. See also: Á. Rixer, *A New Direction for Public Administration: Personalness*, "Journal of Humanities and Social Science" 2020, No. 25(5), pp. 37–49.

Fourthly, in the context of the COVID pandemic, *infodemic*[34] research on fake news and misinformation during the pandemic became a separate subject of investigation. In his study, Ungvári provides a comparative legal picture of the exercise of the right to freedom of expression during a coronavirus epidemic. The main concern is to protect the individual's right to health and to enforce public health considerations in general in a way that fully respects freedom of expression and other fundamental rights and democratic values. The difficulty and complexity of the task are compounded by the fact that much of the misinformation and pseudo-news is not illegal.[35]

5. Categorisation of institutions, legal sources, enforcement practices and legal reasoning related to the conscience issue within public administration in Hungary

In the following section, we shall examine in more detail where and to what extent issues of conscience and, as mentioned above, of expression of opinion – which is difficult to separate from conscience – appear in the personnel of Hungarian public sector institutions, i.e., we will identify a) the main groups of legal institutions, b) the typical types of conflicts and c) the main elements and key aspects of the legal arguments used in legal decisions on these issues. Due to space limitations, only a limited number of cases are presented here. I aim to draw the most general conclusions.

[34] An infodemic is too much information including false or misleading information in digital and physical environments during a disease outbreak, https://www.who.int/health-topics/infodemic#tab=tab_1 (accessed on: 10.08.2023).

[35] A. Ungváry, *A véleménynyilvánítás szabadságának korlátozása a koronavírus-járvány idején*, "Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica" 2022, No. 40(1), pp. 111–134.

The vast majority of the examples and legal cases that will be used here are connected with so-called public servants employed in budgetary organisations typically providing human public services, such as education and health services.

5.1. PROTECTING INSTITUTIONS

The central preliminary question is: how can the substantive law limit or reduce problems related to the conscience within Hungarian public administration through its own means? The answers are as follows:

By pre-established, pre-emptive, legal-type rules (some prohibitive, others explicitly permissive, allowing exceptions), interpreted and consolidated by the practice of the administrative authorities:

a) laying down general principles, thereby also guiding employees in matters of conscience, such as the principle of loyalty, the protection of economic interests, and the protection of reputation, which may restrict some rights of the employees;
b) specific provisions of labour law and other branches of law in normative acts, such as:
   - conflict of interest rules,[36]
   - the right to refuse a patient's request for treatment (according to Article 131 par. (1) of Act CLIV of 1997 on Health Care where "A doctor directly involved in patient care may refuse to examine a patient who comes to him (…) because of his personal relationship with the patient (…), provided that he refers the patient to another doctor"; thus, the legislator excludes in advance any conflict of conscience,
   - a whistleblower protection system: Act XXV of 2023 on Complaints, Public Interest Reports and the Rules for Reporting Abuses (the "Complaints Act"), issued this

[36] G. Kappel, *Az egészségügyi szolgálati jogviszony rendszere – különös tekintettel az összeférhetetlenségi szabályokra, valamint ezek hatására a köz- és magánegészségügyben*, "Közjogi Szemle" 2022, No. 3, pp. 108–118.

year (promulgated on 25 May 2023), imposes a number of obligations on the employers concerned, including public authorities; this ensure that some whistleblowing is not abused but may be done safely, thus also ensuring and facilitating conscientious behaviour,

- the elimination of classic social conflicts (e.g., the old Hungarian tradition of informal payments, gratuities within the health care system) where Act C of 2020 on the Healthcare Service Relationship has led to a significant wage increase in the sector, but at the same time, informal, bribery-type payments have been formally phased out of the system and banned in general by the new legal provisions,
- the operation of various external consultative mechanisms; with regard to the consultative institutions of modern democracies, it is of fundamental importance for high-quality and sustainable public administration and good governance that social expectations, information and other knowledge are all reflected in public administration directly, i.e. not only through the knowledge and filters of public administration personnel; the existence of these consultation mechanisms is an elementary expectation (demand), a matter of conscience even on the part of those working in public administration,
- the exploration of both international and Hungarian literature revealed clearly identifiable buzzwords and guiding themes: the main terms that came to the fore in description attempts included corporatism, "governance" approaches, multi-level governance, the characteristics of government decision-making,[37] the requirement of quality legislation,[38]

[37] L. Kéri, *Government decision-making from an organisational sociological perspective*, [in:] S. Pesti (ed.), *Public Policy. Textbook*, Rejtjel Publishers, Budapest 2001, p. 218.

[38] T. Drinóczi, *Quality legislation and reducing administrative burdens in Europe*, HVG-ORAC Publishing House, Budapest 2010, pp. 61–123; K. Orbán, *Improving a quality legislative system*, http://hatasvizsgalat.kormany.hu/download/3/ea/20000/A%20hat%C3%A1svizsg%C3%A1lati%20rendszer%20tervezett%20m%C5%B1k%C3%B6d%C3%A9se.pdf (accessed on: 21.05.2023).

the need for co-ordination,[39] social dialogue,[40] forms of social participation, the characteristics of civil society,[41] the features of proposing, consultative and advisory bodies, the democratic deficit and the need for a service providing public administration[42]. Issues of conscience and other related issues are closely linked to the perception of the role of the public administration and the way this fits in with the personal position, views, opinions, experience, etc. of the public employee (public servant),

- dispute resolution fora within the Hungarian civil service: e.g. the Public Service Interest Conciliation Forum (*Közszolgálati Érdekegyeztető Fórum*) in Hungary;

c) and there are also further provisions in individual employment contracts or collective agreements or other internal documents of the authorities with similar objectives; in this area, the question of whether and to what extent Biblical standards may be incorporated into these documents is also an independent aspect of research.[43]

These are the main normative rules that serve to prevent the development or aggravation of problems related to the conscience issues within the Hungarian public sphere, especially in public administration.

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[39] Co-ordination ensures coherence between the different administrative bodies concerned, relieves the burden on the government and enables the involvement of social interest groups in decision-making (for more details on the levels of co-ordination, see: L. Lőrincz, *The basic institutions of public administration*, HVG-ORAC, Budapest 2005, p. 105; Zs. Antal, N. Kiss, *Organizational Administration and Management*, NKE, Budapest 2016). It may be argued here that the European Union itself might be perceived as a single immense co-ordinative mechanism.

[40] External consultative bodies and mechanisms are often framed in the context of social dialogue at both national and EU level. Z. Rácz, *Introduction*, [in:] T. Kékesi (ed.), *MultiScience – XXX. microCAD International Multidisciplinary Scientific Conference. Hungary, University of Miskolc*, ME, Miskolc 2016, pp. 1–8.

[41] J. Szalai, *Contested forms of solidarity: An overview of civil society organizations in Hungary and their impact on policy and the social economy*, "CPS Working Papers" 2017.

[42] J.F. Bader, *Gerichtsinterne Mediation am Verwaltungsgericht*, Duncker & Humblot GmbH, Berlin 2009.

[43] Á. Rixer, *A Biblia szövegeinek felhasználhatósága az egyházi fenntartású intézmények belső dokumentumaiban*, [in:] N. Birher, Á.O. Homicskó (eds.), *Az egyházi intézmények működtetésének etikai alapjai*, Budapest 2019, pp. 25–36.

5.2. LEGAL PRACTICE

As has been pointed out above, the clearest form of expression of conscience is the expression of opinion, both publicly and privately. In this section, I will briefly describe the judicial practice of this in the context of Hungary.

Freedom of expression is a right of communication under Decision 31/1992. (V.26.) of the CC, and certain segments of freedom of opinion/belief (freedom of religion, freedom of speech, freedom of the press, etc.) come after human dignity and the right to life.[44]

Article IX of the Fundamental Law of Hungary states that everyone has the right to freedom of expression, but the exercise of freedom of expression shall not be directed against the human dignity of others. The right to freedom of expression has not only been enshrined in law, but has also been the subject of a number of court decisions and constitutional court decisions in Hungary, which have defined the concept of freedom and its limits in the light of the various rights of the individual.

The exercise of the right to freedom of expression is based on Article 10 of the ECHR. The exercise of freedom of expression may be restricted and sanctioned in a democratic society because of security, territorial integrity, public safety, the prevention of disorder or crime, public health or morals, the reputation or rights of others, preventing the disclosure of confidential information and the protection of the authority and impartiality of the courts, etc.

The freedom of expression protects the opinion without taking its value and content of truth into account. Practicing the right of freedom of expression is, however, not without limits. If the given act falls within the frames of the freedom of expression, it must be examined whether the constitutional legal measure ensuring protection should be applied to it or not. The practice of the fundamental

[44] Gy. Kiss, *Managerial prerogative és a véleménynyilvánítás szabadsága*, [in:] L. Pál (ed.), *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*, Budapest 2022, p. 13.

right has to be compared with other fundamental rights and constitutional values.

In labour law the fundamental right of the freedom of expression dominantly causes a conflict between the personal rights to honour and reputation. Bearing in mind that freedom of expression both affects the employee and the employer, not only employees' right to honour and reputation but employers' rights regarding reputation and their economic, organisational interest, also appear as limiting rights.[45] It also covers the employer's business and other secrets and the way they are protected.[46] The dissolution of the conflict is justified because the protection of the latter rights is the legitimate aim of limiting the freedom of expression. Besides oral and written expressions, the circumstance of manifestation should also be examined, as its method may also cause a violation of personal rights. In its judgement of 10 November 2021, the Labour Council of the Curia of Hungary highlighted with regards to the freedom of expression that opinions expressed in political or scientific arguments are not facts. Criticism, judgment and argument only form the bases of personal protection if it makes offense via its expression, i.e. the method of communication. The fact in itself that the expressed thoughts are considered hurtful or degrading by the subject forms no basis for the violation of personal rights.

The subordination of the content of the employment relationship imposes its own specific restrictions on the exercise of freedom of expression, but whether there is a corresponding fundamental right to freedom of expression requires scrutiny.

In the case-law of the Curia, it has been observed that criticism of the employer's actions is not protected if the employee's expression of his or her opinion infringes the employer's important interests by criticism that fails to "meet the requirement of moderation" (*mértéktartás követelménye*).[47]

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[45] Sz. Bors, *A véleménynyilvánítás szabadsága és egyes személyiségi jogok kollíziója a munkajogban*, "Jog, Állam, Politika" 2022, No. 14(1), pp. 217–235 (p. 217).

[46] Gy. Kiss, *Managerial prerogative és a véleménynyilvánítás szabadsága*, *op. cit.*, p. 17.

[47] EBH 2004.1050.

In its Decision 14/2017. (VI.30.) CC, the Constitutional Court, sets out the following specific standards in the relationship between freedom of expression and labour law: a) an employee's public communication intended merely to damage the employer's reputation or favourable image is not protected; b) an employee's communication intended merely to use offensive or insulting expressions relating to the private or family life of the employer's representative is not protected; c) and it is the same if the purpose is openly to criticise or question a value system or a policy embodying a value-based conviction represented by the employer.[48]

The "prestige of the profession" or even the "fair balance" between competing individual and community interests are also essential arguments,[49] but the duty of loyalty is also only a consideration of the employer's interests and nothing more, not some kind of moral identification.[50]

Freedom of expression entitles all employees to the freedom of expression without limitations, but labour law systems create boundaries for this seemingly total freedom. These restrictions are varied since different kinds of action taken by employers to prevent the harmful exercise of rights and sanctions harming the employees are all known. The CC, Curia, European Court of Human Rights and EUB have a wide range of case laws in this sense, focusing primarily on the ways, the necessity, and the proportionality of the limitations of freedom of expression along with the legitimate sanctions the employer may apply.

The fundamental right of freedom of expression may be exercised within limits in the world of work, so, for example, an employer

[48] B. Török, *A munkavállaló szólásszabadságának alkotmányjogi keretei*, [in:] L. Pál (ed.), *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*, Budapest 2022, p. 34.

[49] B. Bitskey, *Nem illeti meg a véleménynyilvánítás szabadságából fakadó alapjogi védelem a munkavállaló által közzétett szakmai jellegű közlést, ha annak nincs közéleti kötődése*, "Munkajog" 2018, No. 4, pp. 49–51.

[50] Gy. Berke, *Véleménynyilvánítás és a "Tendenzbetrieb-problematika"*, [in:] L. Pál (ed.), *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban: A Magyar Munkajogi Társaság 2021. június 23-i vitaülésén elhangzott előadások, hozzászólások*, Budapest 2022, p. 54.

request for a justification report from a public employee who publicly criticises the correctness of the employer's action does not in itself constitute a violation of the right to privacy that is not a basis for compensation for pecuniary damage.[51]

In the case Baka v. Hungary, the ECHR examined the following aspects:[52]

1. Was freedom of expression restricted? Is there a causal link between the measure and the exercise of the right to freedom of expression?
2. Was the restriction justified:
   a) on the basis of a legal provision or for a legitimate aim,
   b) was the measure necessary (reasons given for the interference were relevant and sufficient) and
   c) was the measure proportionate to the legal objective pursued?

In what follows, I shall examine cases that provide a picture of the labour law treatment of opinions posted on social networking sites and the scope and extent of their protection under fundamental rights. With regard to the content and tone of Facebook and other communications, it may generally be said that judicial practice does not tolerate abusive, rude, obscene or extremist statements, whether they be directed at the employer, at employees or at other persons, such as customers. On the contrary, the judicial practice generally includes, i.e. protects, the freedom of expression for posts that are acceptable in their manner of communication and are not unduly offensive or insulting, in line with the Constitutional Court's Decision 14/2017. (VI.30.) CC.

The Hungarian judiciary has developed an uniform and consistent practice in relation to the public sector, and the best-known cases are good examples of this. The same standard was applied in the case of a social worker,[53] a paramedic[54] and a police officer[55] who had been criticising their employers on Facebook, and in the case

[51] EH 2018.08.M23: Kúria, Mfv.II.10.609/2017.
[52] Case 20261/12.
[53] Debreceni Ítélőtábla Mf.50025/2020/4. számú határozata.
[54] Kúria Mfv.10124/2019/3. számú határozat.
[55] Kúria Mfv.10381/2018/4. számú határozat.

of the teacher who wrote racist posts not directed at the employer but also publicly on Facebook[56].

In summary, based on the case law examined, it be concluded that freedom of expression in the public employment relationship(s) is not typically infringed directly, but as a consequence or as a consequence of preventative measures taken by the employer. By this is meant that the violation of human rights itself rarely occurs by means of an actual prohibition or restriction. This is of course not excluded. See typically employment contract clauses, but more typically the consequence of the employee's opinion is the imposition of sanctions by the employer (termination of employment, disciplinary proceedings) or the prospect of such sanctions, even indirectly.[57]

Of course, freedom of conscience may take other forms than that of public expression of a certain opinion. Other typical fields have been the refusal to take an oath, more recently vaccine refusal,[58] and also civil disobedience of the teachers. It should be noted here that (the) rights of conscience are usually couched as *negative rights*, i.e. the right to refuse a requested treatment and also the requests, orders of the employer.[59] The dilemma of both the civil service oath and mandatory vaccinations is based on a generally binding requirement, compliance with which may lead to a "breach of conscience".

5.3. INTENTIONAL OMISSION

Intentional omission occurs when, as a law enforcer (e.g., a police officer), that officer fails to enforce legal-type rules, and that satisfies their conscience. This is dangerous because it overburdens the legal system with rules that are not applied and also damages trust

[56] Kúria Mfv.10098/2019/4. számú határozat.

[57] M.L. Zaccaria, *Korlátozott szabadság? A véleménynyilvánítás joga a munkaviszonyban*, "Jogtudományi Közlöny" 2022, No. 77(1), pp. 24–32 (p. 31).

[58] https://infostart.hu/belfold/2023/06/14/per-lett-abbol-hogy-nem-akarta-beoltatni-magat-a-katona (accessed on: 10.07.2023). See also: A. Pécsi Ítélőtábla Mf.30071/2022/7. számú határozata szolgálati viszony jogellenes megszüntetésének megállapítása tárgyában.

[59] D.M. Sullivan, *Professionalism, autonomy, and the right of conscience…*, *op. cit.*

in the legal system as a whole. Some law enforcers in Hungary, for instance, do not agree with the criminalisation of homelessness and therefore refuse to apply the already adopted and partly discretionary rules. Legislative intent therefore often fails to achieve its purpose because without the motivation and consent of the law enforcers the law is powerless.

Following the 2018 amendment to the Hungarian Fundamental Law criminalising homelessness,[60] the law enforcers (police) in many cases failed to comply with the rules of Article 6(1) of Act XLIV of 2018, which contains the specific offence. This they could easily do due to the discretion and vague interpretation of the law, and in many cases due to their conscience.[61] In 2020, a total of only 3 proceedings were opened, and the application of the law has now practically ceased.[62] The reasons include that "legislative intent often fails to achieve its purpose because without the motivation and consent of the law enforcers, the law is powerless".[63]

5.4. SENSITISATION

In parallel with legal rules and beyond, sensitisation of public employees (especially within public administration) has also become an important factor. Conscience is not a static phenomenon, but it can be shaped and moulded, and not only by legislation. Sensitisation is constantly expanding its role in public service training and further training.[64]

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[60] Alaptörvény XXII. Cikk (3) bek.: "Tilos az életvitelszerű közterületen tartózkodás."

[61] M. Tihanyi, *Hajléktalanság az alkotmányos rendészet tükrében*, "Belügyi Szemle" 2019, No. 67(6), pp. 100–112 (pp. 107–110).

[62] A. Szabó, *Hiába a nagy vihart kavart törvény, nem igazán büntetik a hajléktalanokat Magyarországon*, p. 2, https://qubit.hu/2021/01/11/hiaba-a-nagy-vihart-kavart-torveny-nem-igazan-buntetik-a-hajlektalanokat-magyarorszagon (accessed on: 22.08.2023).

[63] Ibid, p. 3.

[64] E. Svelta, *Önismeret és együttműködés a közszolgálatban*, p. 6, http://hdl.handle.net/20.500.12944/100461 (accessed on: 02.05.2023).

5.5. REGULATION BY NONSTATE ACTORS

Regulation by nonstate actors takes into account the official law only as an *ultima ratio* and the market is left to prevent mass conflicts of conscience in advance in its own interests. Facebook, for example, began to work by restricting freedom of expression as if it was a state. They set up their own court-like organisation, which uses Facebook's own soft laws as quasi-laws.[65] On the positive side, however, that legal expertise has been preferred to algorithmic content filtering, and there is also the possibility to challenge the decisions of Facebook's Audit & Risk Oversight Committee by appeals.[66]

6. Summary and suggestions

The real value of this study lies in the fact that it provides a more or less comprehensive overview of the main types of conflicts of conscience in the public sector, groups together the legal instruments designed to prevent them and highlights the most important cornerstones of the practice of law enforcement.

In the public sector, one of the most intense areas of freedom of conscience is the problem of posts on social media (e.g., Facebook) by public employees. In Hungarian public service training and further education, however, a teaching methodology that mainly reflects the employer's perspective and emphasises prohibitions can be observed. The importance of the issue is increased by the fact that the activities of public administrations are increasingly moving online, i.e. the usage of the social media is not important only because of the issues of employment. This calls for a strengthening of relevant training.

Research on conflicts of conscience within public administrations also shows that the latency, i.e. the number of cases that fail to become legal proceedings, is very high. Accordingly, for further

[65] A. Farkas, *A véleménynyilvánítás szabadságának korlátozása a közösségi médiában*, "Ars Boni" 2022, No. 10(1-2), pp. 14–36 (p. 28).
[66] Ibid, p. 35.

research in this area, documentary analysis (e.g., analysis of resignation declarations) and interviews with people who have already left the civil service may help to form a more accurate picture of the main types of conscientious conflicts. The case studies presented also indicate that the vast majority of conscientious objection cases are related to public servants or those who are no longer covered by Act XXXIII of 1992 on the Legal Status of Public Servants (public health workers, teachers), while for some administrative positions there is little or no data or case studies to analyse, such as government officials. Here again, it is clear that for political positions, solutions and methods beyond classical jurisprudential analysis are needed for more appropriate research.

Interesting results and additional information may also be obtained by ascertaining the extent to which conflicts of conscience are caused by beliefs that are explicitly religious in nature and which may be traced back to Christianity by examining court decisions.

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Freedom of Religion vs. Freedom of Conscience

> "And when we die, and you are sent to heaven for doing your conscience, and I am sent to hell for not doing mine; will you come with me, for fellowship?".
>
> Sir Thomas More to the Duke of Norfolk in Robert Bolt's *A Man for All Seasons.*

Introduction

Religious freedom has a history. Traditional norms on freedom of religion did not refer to conscience yet,[1] but modern constitutions and human rights documents acknowledge freedom of religion and freedom of conscience as twin rights.[2] Religion by nature supposes a community, a community professing the same faith. Conscience is highly personal. Religion determines conscience, but conscientious conviction has to become personal.

Different denominations may have slightly different traditions and attitudes with regard to individualism in the formation of conscience. The conscience of a Catholic remains his or her conscience and will not be substituted by the Magisterium of the Church. Conscience, however, is subject to guidance.[3] "Faith communities" form and guide the conscience of their followers. They may also determine

[1] E.g., Act 43/1895 in Hungary as the first general statute on religious freedom.
[2] E.g., Article 111 of the Constitution of the Republik of Poland of 17 March 1921.
[3] "In the formation of their consciences, the Christian faithful ought carefully to attend to the sacred and certain doctrine of the Church," Dignitatis humanae 14.

objective borderlines of conduct that cannot be challenged by its members. There is no freedom of religion within a religious community.[4] The freedom of members is the freedom to leave, not a freedom to shape the community upon their desire. But members of a religious community are certainly not deprived of their freedom of conscience.

Exercising rights related to conscience presupposes conscience. Pope John Paul II – based on his earlier philosophical work on the inherent dignity of the person, an anthropology of a realistic personalism[5] – regards conscience as a personal capacity to adhere to an objective truth. Certainly, this objective nature of truth is a target of debate in the postmodern age.

> Turning now to the interpretation of human action, which is conscious action, we already know that this action together with the entire dynamic linking of the act with the person is accomplished in the field of consciousness, though it is by no means identified with consciousness. Action is not conscious only by being made conscious.[6]

An upright and morally sound conscience would object to actions that are inherently in contrast with it.[7]

The Catholic Church regards its authority as a help to Christians in the formation of their conscience:

> It follows that the authority of the Church, when she pronounces on moral questions, in no way undermines the

[4] P. Erdö, *Teologia del diritto canonico. Un approccio storico-istituzionale*, Giappichelli, Torino 1996, p. 150; P. Erdö, *Liberté religieuse dans l'Église? (Observations à propos des canons 748, 205 et 209 § 1 CIC)*, "Apollinaris" 1995, No. 68, pp. 607–618.

[5] K. Wojtyła, *Person and Act and Related Essays*, foreword by C.A. Anderson, translated by G. Ignatik, Catholic University of America Press, 2021, https://doi.org/10.2307/j.ctv1khdqkj.

[6] K. Wojtyła, *Person and Act and Related Essays*, *op. cit.*, pp. 90–92, https://doi.org/10.2307/j.ctv1khdqkj.12.

[7] J. Frivaldszky, *L'objection de conscience et la doctrine catholique*, "Pázmány Law Review" 2013, Vol. 1, pp. 95–104.

> freedom of conscience of Christians. This is so not only because freedom of conscience is never freedom "from" the truth but always and only freedom "in" the truth, but also because the Magisterium does not bring to the Christian conscience truths which are extraneous to it; rather it brings to light the truths which it ought already to possess, developing them from the starting point of the primordial act of faith. The Church puts herself always and only at the service of conscience, helping it to avoid being tossed to and fro by every wind of doctrine proposed by human deceit (cf. Eph 4:14), and helping it not to swerve from the truth about the good of man, but rather, especially in more difficult questions, to attain the truth with certainty and to abide in it.[8]

Conscience should provide for personal judgements. It is a divine gift, but it "is not exempt from the possibility of error. (…) Conscience is not an infallible judge; it can make mistakes. However, error of conscience can be the result of an invincible ignorance, an ignorance of which the subject is not aware and which he is unable to overcome by himself." (VS 62) Denying the objectivity of what true and good are, ruins not only the whole concept of conscience but also that of morality, and at the end fundaments of social coexistence are challenged.

The starting point expressing the optimistic vision determines the Universal Declaration of Human Rights states, that:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. (Article 1)

Each man – as well as mankind in general – has a conscience that is outraged when fundamental values are infringed, when "the highest aspiration of the common people" is not respected; that

[8] Veritatis splendor 64.

is "a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want".[9] Still 75 years after its adoption, the Universal Declaration can be seen as a common denominator that is a unique expression of the best aspirations of mankind. But conscience is not just a moral "must", and conscience can also be distorted. On the internal forum of the individual it is an internal judge. As the Second Vatican Council has put it:

> In the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience. Always summoning him to love good and avoid evil, the voice of conscience when necessary speaks to his heart: do this, shun that. For man has in his heart a law written by God; to obey it is the very dignity of man; according to it he will be judged. Conscience is the most secret core and sanctuary of a man. (Gaudium et spes 16)

Conscience, however, needs to be formed, and for the free formation of conscience freedom is essential.[10] The optimistic vision (all men have a fundamental knowledge on right and evil) has to be supplemented by the realistic statement that many probably do not work on their conscience. Even more conscience is substituted in everyday life by mood and feelings. The subject of the protection of freedom of conscience is nothing less than conscience, an inherent conviction, a firm moral judgment. An indicator for the genuine character of the conviction can be that the person is ready to accept sacrifices for the sake of his or her conscience. Only a healthy conscience can provide for guidance above legal and even moral rules.[11]

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[9] Preamble of the Universal Declaration of Human Rights.

[10] Gaudium et spes 17.

[11] G. Kuminetz, *A lelkiismeret a tomista bölcselet tükrében*, A Szent István Tudományos Akadémia székfoglaló előadásai 15, Budapest 2008, p. 56.

An institutional attempt to form conscience by the state: Teaching in ethics

Parents carry the ultimate responsibility for their children and they have a natural right to determine the education of their children.[12] Faith communities have an evident claim for a right to offer their teaching to future generations with due respect to parental decisions. Schools in medieval Europe were born in a religious setting: cathedral chapters and monasteries were the first schools, and the state has respected, endorsed and supported the Church's prominent role in education. The state supervision over the school system has been a policy of absolutism when education has become a public issue, having a compulsory nature.[13] Religious communities have remained important actors in the education system, with great national and historical differences; the path to a peaceful and equitable coexistence in harmony was often paved by intense political debate on the role of the Church and religion in education. Some counties have rather set on cooperation between Church and state with regard to education, whereas others rather marginalized religious elements in the state education system. It has to be noted that before and besides the school, it is the family and the religious communities that play a determinative role in the religious upbringing of children. These realities are, by their very nature, fields of freedom rather than of legal regulation. There is no other social structure comparable to the school system that shapes the attitude and worldview of subsequent generations – in fact schools are reflecting society as such. Parents, the state and religious communities form a delicate triangle sharing a natural interest in education.

Religious education in the narrow sense would mean that religious communities have the right to provide *religious education* in state schools and kindergartens at the request of children/students and their parents. Nonstate schools may fall under different regulation. A state that is neutral with regard to religion generally

[12] Universal Declaration of Human Rights, Article 26.3.

[13] W. Rees, *Der Religionsunterricht und die katechetische Unterweisung in der kirchlichen und staatlichen Rechtsordnung*, Pustet, Regensburg 1986, pp. 54–55.

maintains an education system that is neutral and equally accessible to all citizens. Neutrality, however, does not mean that the education system cannot be bound by certain values as well as a cultural legacy. The Constitution of Bavaria (1946) provides for the "reverence for God" as the first goal of education (Article 131(2)), and determines, that "State elementary schools shall be open to all children of school age. In them children shall be taught and educated according to the principles of the Christian creed." (Article 135). The Fundamental Law of Hungary ensure the right of children to be brought up "in accordance with the values based on the constitutional identity and Christian culture of our country" (Article XVI (1)).

In most European countries some kind of denominational religious education has survived within the state school system, whereas in countries under communist rule this right was seriously limited. As the communist regime fell, new arrangements had to be worked out respecting the fundamental rights of parents, pupils and religious communities as well as taking social changes into account.

Religious education in state schools can be organized in an "opting out" or an "opting in" model. Greece applies an opting out model with regard to Orthodox religious education, similar to Italy with Catholic religious education. In this model the main rule is that all children attend the instruction of the dominant religion, leaving the possibility to withdraw from it without any specific explanation. Parents, or in Italy pupils in secondary education, can withdraw from religious education. In a Trace on the territory established by the Treaty of Lausanne (1923) Muslim children receive Muslim religious education in the minority schools.[14] In most parts of Germany the registered denomination would automatically mean that pupils attend the religious education of their denomination at school. Parents – or pupils after the age 14 – may opt out at the beginning of every school year. In the opting out model, usually ethics classes are offered to those not attending religion classes. When all kids attend either religion or ethics, the attendance of religion classes

[14] N. Maghioros, *Religious education in Greece*, [in:] D. Davis, E. Miroshnikova (eds.), *The Routledge International Handbook of Religious Education*, London 2013, p. 134.

may be higher. As the state sets the curriculum of ethics courses, some interest may arise in the content of religion classes that can limit the discretion of religious communities. The attendance, grading, as well as the proper decree of the religion teacher, can become a matter of common interest when religion is not merely an optional afternoon activity.

Pupils (parents) may opt out from compulsory denominational religious education in most parts of Germany or opt in to optional religious education provided by mainstream denominations in countries like Italy, Poland, and a number of countries in Central Europe.[15] The access of religious communities to state schools, the criteria for a religious community to provide religious education at school, the training of teachers of religion, the determination of the curriculum, as well as funding the religious education, constitute delicate issues often regulated in concordat agreements.

Determining the content of religion classes in state schools can become a conflict zone between Church and state. Where denominational education is provided at school, the respective faith communities determine the content of the subject. Whereas the neutral approach provides information on history, arts and ethics of various religious traditions, the denominational instruction "contributes to the feeling of being at home in one's own religion and thereby allows the transmission of values in a sustainable manner."[16] According to the Basic Law of Germany "Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned."[17] Religion is one of the subjects taught, but as the state has no religion it has to cooperate with religious communities to determine the content

[15] Optional religious education in public schools is provided in: Belgium, Croatia, Hungary, Latvia, Lithuania, Austria, Poland, Portugal, Serbia, Slovakia, Spain, Greece, Ireland, Malta and Romania.

[16] H. Heinig, *Religion in public education – Germany*, [in:] G. Robbers (ed.), *Religion in public education*, European Consortium for Church and State Research, 2011, p. 176.

[17] Basic Law, Article 7(3).

of the class.[18] According to the Concordat between Poland and the Holy See, the curriculum for the teaching of the Catholic religion as well as the textbooks used are edited by the ecclesiastical authority and made known for the competent civil authorities.[19] Similar regulations are made in other agreements as well as national laws. The curricula, the textbooks and other instruments need ecclesiastical approval and consultation with the Ministry of Education, and deserves similar funding to other subjects. With regard to supervision, the Church has also the right to observe classes as well as to agree on the persons who do the state school inspection with regard to religion classes.[20]

The age limit of children making their own decisions with regard to religion – including religious education – may vary. In Austria and Germany, legal regulation sets the age when children can make their own decisions in religious issues including the attendance on religious education (*Religionsmündigkeit*). A young person over 14 is considered "mature" and may, in most Austrian and German states, freely opt out from compulsory denominational religious education or convert to another faith. Parents may make all decisions regarding religious affairs until the child is 10 years old; between the ages of 10 and 12, the parents must take their child's opinion into account, but the child may only leave the given religion with the consent of both parents. When the child is between 12 and 14, the parents may decide to leave a religious community against the child's will, and after reaching the age of 14, the child may make independent decisions, including leaving school-based religious education.[21]

In an "opting in" model, the religious education is an optional subject added to the normal school curriculum and parents/pupils have to make a positive decision to enroll into religion classes. When

[18] S. Mückl, *Staatskirchenrechtliche Regelungen zum Religionsunterricht*, "Archiv des öffentlichen Rechts" 1997, Vol. 122, No. 4, p. 517.

[19] Concordate, Article 12.2.

[20] Agreement between the Slovak Republic and the Holy See about Catholic upbringing and education (March 2004), Article II.

[21] Gesetz über die religiöse Kindererziehung, 15 July 1921, https://www.oesterreich.gv.at/themen/leben_in_oesterreich/kirchenein_austritt_und_religionen/Seite.820012.html (accessed on: 15.12.2022).

a determinative majority attends religion classes – like in Poland – it may become practically a part of the school curriculum. In this case, attention has to be paid to the equality and inclusion of those not opting for religion classes, and the teaching of ethics can be a reasonable alternative[22] or even a necessity.[23] Certainly, figures and proportions matter: a small minority cannot expect the majority not to express its religious views through participation in religion classes.[24] When it is only a small minority that opts for religion classes, then optional religion classes can be left for an afternoon hour and the religion classes may concur with a wide variety of alternative possibilities.

In "opting in" models, it is common to set a minimum number of attendants of a course for the school to provide or host religion classes of a given faith community. If religious minorities are not concentrated in certain geographical areas, they are not likely to reach the minimum requirements. Additional legal requirements may foresee a proper decree of the teacher of religion classes or a certain legal status of the religious community that may also lead to the result that only mainstream religious communities can offer religion classes at state schools.

Religious education has been converted to a neutral education on religious issues in Norway, Sweden, Denmark, the Netherlands and Great Britain. This is not religious education in the narrow sense as it does not aim at the introduction to the faith of a given religious community but rather to provide knowledge on religious culture and various religious traditions in the world.

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[22] E.g., CRC/C/POL/CO/5-6 (Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Poland), p. 25, https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhstV3zKgaAa4TwOI5sejLPolkJy6AjDqO3fTtqqZafh8lrY9noGYPGv6EehbSb4M%2FIWGDQi3Benh8H090kjbWBz2s4qh8mr0Ux0AinLnSHwp4 (accessed on: 17.05.2024).

[23] Grzelak v. Poland (Application No. 7710/02), Judgment of 15.06.2010.

[24] M. Stożek, M. Ponikowska, *Poland – Case law of the Polish Constitutional Court on matters of freedom of expression of personal convictions in public education*, [in:] P.M. Cereceda, J. De Groof (eds.), *Religious and ideological rights in education: Judicial perspectives from 32 legal systems*, Wolf Legal Publishers, Chicago 2017, p. 234.

State schools should not endorse any religion or ideology, but must provide objective information about religions and philosophical convictions. Teachers at state schools should teach on a neutral basis; they have the right to express their opinion or belief, but they should not indoctrinate their students. Schools should provide fundamental information on ethics.

In Hungary, denominational religious education was compulsory at state schools until 1949. After the communist takeover, religious education became an optional subject but elementary schools were formally obliged to ensure the possibility of it. Due to a restrictive administrative practice and the systematic harassment of parents, by the 1980s, only 4percent of children received religious education at school – mostly in rural areas. From 1990, the obstacles for religious education were removed and the cooperation of schools and churches reinforced to provide for adequate space and time for religious education and, in many areas, the schools have since become the place of religious education again. Act IV/1990 reinforced the possibility for children/students to participate in optional religious education and instruction organized by a Church legal entity in state or council educational-teaching institutions. Church legal entities could freely organize *religious education* and instruction on the demand of parents at kindergartens and on the demand of the parents and the students at schools and halls of residence. Religious education and instruction at kindergartens may be organized separately from kindergarten activities, also taking into account the daily routine of the kindergarten. They may be organized at schools in conformity with the order of compulsory curricular activities. It has become the exclusive task of Church legal entities to define the content of the religious education and instruction, to employ and supervise religious education teachers, and to execute the acts of administration related to religious education and instruction with special regard to the organization of the application for religious education and instruction, the issuance of progress reports and certificates, and the supervision of lessons. The school, hall of residence, or kindergarten is obliged to provide the necessary material conditions for religious education and instruction, using the tools available at the educational-teaching institution, with special

consideration given to the proper use of rooms and the necessary conditions for its application and operation. The kindergarten, school, or hall of residence have to cooperate with the interested Church legal entity in the course of the performance of the tasks related to the optional religious education and instruction organized by that legal entity.

An important change was introduced in 2012. Since that year ethics was introduced to the curriculum of elementary schools (grade levels 1 to 8). Children participating in religious education at schools do not take a part in the ethics classes, or, in other words, religious education has become a compulsory elective subject instead of an optional subject.[25] Religious education at state schools can only be offered by recognised Churches and not by religious associations.[26] Religious instruction in state schools is delivered by ecclesiastical entities, not by the school. The instruction is not a part of the school curriculum, the teacher of religion is not a member of the school staff, and grades are not given in school reports – only participation is registered. Churches decide freely on the content of the religious classes as well as on their supervision. Teachers of religion are in Church employment; however, the state provides funding for the churches to pay the teachers. The school has only to provide an appropriate time for religious classes as well as teaching facilities. Churches are free to expound their beliefs during the religious classes: they do not have to restrict themselves to providing neutral education, merely giving information about religion, as do the state schools. Religious education is not part of the state school's task; it is a form of introduction into the life and doctrines of a given religious community at the request of students and parents. Churches had the right to offer religious education at higher grade levels as well as in kindergartens, but this hardly happens – in practice religious education in secondary education only happens in the Church run schools.

The teaching in ethics clearly aims at the formation of identity and moral behaviour. As it says in the curriculum of the course:

[25] Act XCX/2011, § 35.
[26] Act CCVI/2011, § 21.

> The fundamental aim of ethics is to shape and stabilise individual and community identity, the creation of cooperation between individuals and groups. This is achieved through cultural traditions, the teaching of ethical principles, social rules, and the development of socio-emotional skills in the mind of the individual. It includes the important relationships of human beings with their peers and communities, his/her environment and himself/herself. In this way, it offers the learner a synthesis in which personal experiences and knowledge are acquired in other areas in a reflective way reflecting on his/her own personal experience. The content is also closely linked to the development areas of other subjects. The main aim of moral education is to develop the moral sense and moral reflection of the learner. to help the learner to identify social rules, patterns of behaviour and to develop his or her own awareness of their own evolving values. The subject of ethics prepares the learner for the individual management of his or her life and social environment and his/her social environment from an ethical perspective, while exploring and developing his/her own knowledge. Its tools include questioning, exploration of hidden views and dilemmas, reasoning, persuasion, reflection, reflection and debate. persuasion, interpretation of social norms and community values. The activities of the learning community provide a model of what values or behaviours help or hinder cooperation, what emotional values or conflicts of values may arise, and the most appropriate ways to resolve them.

Conscientious dissent protected

Conscientious objection and even dissent should enjoy protection. Protection can be provided by positive recognition of needs in order to avoid litigation, especially in cases where claims are numerous and the procedure can be established. Conscientious objection to the military service or the right of medical personel not to take a part

in abortion[27] could be obvious examples. Dissent may be a lighter form of objection. The level of conflict is certainly a different one in questions of life and death than with regard to a discomfort caused by a general requirement. One could also argue that only conviction deserves protection, desires not. On the other hand, it seems to be appropriate that a sensitive regulation aims at avoiding or reducing conflict cases.

Dissent enjoying positive protection

Non-affiliation may need positive protection. In the Hungarian legal system, examples vary from the census to education and taxation issues. Not to share sensitive personal data – like data on religious affiliation – has been recognized by law. Public data bases shall not contain personal data on religion.[28] On the census, the question on religious affiliation is optional: in 2022, more than 40 percent of respondents refused to answer it. Almost 16 percent of respondents stated not to belong to any religious community. Not answering the question on religion may have highly different reasons. Some citizens may just be tired at the end of the questionnaire, others may truly be shy about their belonging, whereas for some it may be a way to express their distance towards the census and any kind of institutions as such. The free choice between denominational religious education and ethics is given in all state schools.

Since 1998, the major form of public funding of religious communities is a tax assignment system, as income tax payers were given the right to assign 1 percent of their tax to a religious community of their choice or to alternative public funds. Beginning with the tax return for the year 1997 (due in March 1998), income tax payers could direct that 1 percent of their income tax be paid to a Church of their choice or to a public fund. Another 1 percent could be

[27] For Hungary § 14 Act LXXIX/1992 recognizes this right: "Except for reasons endangering the life of the pregnant woman, doctors and health care professionals shall not be obliged to perform or assist in the performance of an abortion."
[28] Act IV/1990, § 3(2).

directed to NGOs, museums, theatres, and other public institutions. From 2012 to 2019, the "religious" 1 percent could only be directed to incorporated religious communities. From 2020 this possibility is open to supporters of all religious communities, including recognized and registered Churches as well as religious associations.[29] The possibility remains that taxpayers can direct their assignment to an alternative fund if they wish to be sure that their money shall not be used by any religious community.

Hungarian law requires an oath when taking public offices as well as upon naturalization. The general text of these oaths is neutral, but the oath-taker has a free choice to add, according to his convictions, the traditional formula "so help me God". Certainly, some people may use the religious formula from conviction, others just for tradition.

Dissent enjoying general protection

PHARMACIES

The general norm on pharmacies requires that certain medicines have to be in stock in all pharmacies and in general all licensed medicines have to be dispensed in all pharmacies – if not in stock, then upon order.[30] There is no question that all pharmacies are obliged to stock anti-tetanus immunoglobin. In a small area of the country, it is compulsory for pharmacies in that area to stock serum against viper bites. These obligations do not raise any concerns with regards to conscience. Abortive products, "morning after" pills and contraceptives raise various moral issues that may well result in conscientious doubts, concerns, as well as objections. There is no positive recognition of the conscientious rights of pharmacists. In the lack of positive acknowledgement, general principles and constitutional rights may be invoked in order to resolve conflict situations. An important factor in assessing such a situation is that a consumer has unhindered

[29] Act CXXVI/1996.
[30] Decree 8/2008. (I.8.) EüM.

access to a product in another pharmacy for the medicine that a particular pharmacist has a conscientious objection to providing. It is to be appreciated that a pharmacist with a conscientious objection forgoes income in order to comply with his conviction.

Conclusions – *de lege ferenda*

Respecting the liberty of conscience should not lead to full subjectivism. To the contrary: supposing that there is an objective notion on truth and moral good, the legislator can rely on the notion of natural law even if this principle has to be taken as reconciled with the requisite of democratic legitimacy.

An open discourse on the fundaments of social coexistence is inevitable in the search for the common good. Fundamental rights constitute an inherent core of the common good. Discomfort and even collisions cannot be fully avoided in a society. But the liberty of a minority can enrich the majority as well. When conflicts can be avoided or reconciled, this enables a better coexistence.

By the nature of conscience, no legislator will ever be able to set up a legal structure that would provide for an easy and comfortable procedure to invoke conscientious objection. Even more, such an attempt would not do any good to the protection of the freedom of conscience (too much comfort reduces the readiness for sacrifices and finally the dignity and the firmness of conscience). There will be always a number of cases where litigation is inevitable and more so: courts are the appropriate institutions to find the right balance between competing rights and interests. But in other cases – especially when the number of claims is significant – it is right to facilitate the exercise of conscientious objection in a smooth and well regulated way. The protection of the identity of faith-based institutions (institutions maintained by religious communities) seems to be essential, especially when the sensitivity of a society for religious claims is declining.

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Institutional Protection of Conscience in Selected Legal Professions. The Example of an Advocate, an Attorney at Law, a Notary and a Court Bailiff

Introduction

This report is based on the analysis of the current legal situation in Poland, which takes into consideration hierarchically different legal norms. For the purpose of this study, the dogmatic method was applied to examine the Constitution of the Republic of Poland of 2 April 1997, international law, acts and codes of professional ethics (sets of rules) within four selected legal professions, i.e. lawyer, attorney-at-law, notary and court bailiff. Reference was made to the comparative legal background, foreign law, i.e. the French Bar Act. The stance prevailing in legal doctrine was considered, also the judicial practice was analyzed, especially the judgments of the Constitutional Tribunal. The study is interdisciplinary.

1. Freedom of conscience and religion. Introductory and general remarks

Freedom of conscience and religion stems from the essence of man, which means that it is natural and therefore inalienable. Currently, it belongs to the category of fundamental human rights and is a source of other rights and freedoms, which is why it is sometimes called

the "law of rights".[1] Hence, the public authorities of a democratic state governed by the rule of law have the obligation to respect and protect it – in the factual, individual and also institutional dimensions. In view of the above, the question arises whether lawyers in Poland have the right to the institutional protection of conscience? The goal of this research is narrowed to certain representatives of legal professions, i.e. an advocate, an attorney at law, a notary and a court bailiff.

The focus of the research is, however, conscientious objection understood as an element of freedom of conscience and religion, whereas the conscience clause is understood as a concretized and institutionalized form of this freedom. Therefore, conscientious objection is often treated as a manifestation of human religious freedom on a social, possibly moral or ethical level.[2] On the other hand, the conscience clause is often identified with a more advanced state of legal regulations. The existence of such a conscience clause in a specific act allows its addressee (e.g., a soldier, a doctor, a pharmacist, a lawyer) to approach or look at a given institution or factual state from the point of view of the individual's religious sensitivity, or alternatively his/her worldview or ethical and moral attitudes.

The situation is made complicated by the fact that there is a scientific disagreement as to the nature and origin of human conscience. Some believe that it is of the strictly religious origin or is based on religious morality, while others detach the conscience from religious foundations. They give this concept a purely secular (lay) character, or they perceive its sources in various systems of values (mixed – religious and secular). Such a broad dimension is imparted to the concept of "conscience" by the Polish Constitution of 2 April 1997.[3]

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[1] J. Szymanek, *Wolność sumienia i wyznania w Konstytucji RP*, "Przegląd Sejmowy" 2006, No. 2, p. 39.

[2] P. Stanisz, *Klauzula sumienia*, [in:] A. Mezglewski, H. Misztal, P. Stanisz, *Prawo wyznaniowe*, 3rd Edition, Warszawa 2011, p. 104, item 111; M. Skwarzyński, *Conscientious Objection. The Perspective of a Central European Country*, p. 199, [in:] M. Skwarzyński, P. Steczkowski (eds.), *The influence of the European system of human rights into national law*, Katolicki Uniwersytet Lubelski, Lublin 2018, pp. 95–108.

[3] P. Winczorek, *Wolność wyznaniowa*, "Państwo i Prawo" 2015, No. 4, p. 7.

Consequently, in the Polish constitutional law and religious law the concepts of "freedom of conscience" and "freedom of religion" are separate concepts.

Conscientious objection and the conscience clause are present only in some legal regulations of a lower level in the hierarchy of norms, e.g. laws. However, the appearance of such legal regulations cannot be perceived as an attempt to make the state confessional or to build the religious community and state.

It must be noted that freedom of conscience and religion is not only a human right to a specific worldview (and its externalization), but it is also the right to deal with one's own conscience. It also means freedom from coercion to act contrary to one's conscience. Hence the right of every person (including a lawyer) to conscientious objection understood in a broad and general sense, also in its normalized (institutionalized) form called the conscience clause. Historically, the earliest conscience clause appeared in the laws on soldiers in active service. Over time, it was also guaranteed to doctors and pharmacists, and later, selectively, to representatives of other professions, the catalogue of which is still open. Therefore, there are no legal and factual obstacles for lawyers of different specialties to be able to use this right.

What lies at the core of the concept of conscientious objection is the need to be guided by moral values and to reject solely formalized legal norms. This is a kind of safety valve in case legal norms violate basic ethical or moral norms.[4]

In Polish literature there is a view that freedom of conscience is never the absolute right and may be subject to limitations. The answer to this perhaps may be found in the Constitution of 1997 (Article 31, para. 3). At this point, it is worth recalling the view prevailing in the literature on the subject (by Jakub Pawlikowski) that conscientious objection may be invoked not only by doctors

[4] G. Radbruch, *Ustawowe bezprawie i ponadustawowe prawo*, [in:] G. Radbruch (ed.), *Filozofia prawa*, translated by E. Nowak, Wydawnictwo Naukowe PWN, Warszawa 2023, pp. 250–251.

and nurses, but also by representatives of other professions,[5] and therefore by lawyers of various specialties, too.

2. The concept of conscientious objection and the conscience clause

Both concepts, i.e. conscientious objection and the conscience clause, provoke serious interpretation problems in Polish law. These controversies are evident not only in the doctrines of constitutional law and religious law, but also in judicial decisions. In the legal doctrine there are two divided opinions on this matter. Some believe that conscientious objection and the conscience clause should be treated as synonymous concepts with the same scope of meaning. On the other hand, others believe that these are separate, different concepts.

2.1. CONSCIENTIOUS OBJECTION AND THE CONSCIENCE CLAUSE – AS DIVERSES CONCEPTS

However, the prevailing views are that in fact the conscience clause is a directly concretized and institutionalized legal norm which guarantees freedom of conscience to every person (a doctor, a pharmacist, a lawyer, etc.).[6] The supporters of the necessity to distinguish between conscientious objection and the conscience clause are, above all, some judges of the Constitutional Tribunal (e.g., Sławomira Wronkowska-Jaśkiewicz, Andrzej Wróbel, and Prof. Ewa Łętowska). They ruled (the first two) in the case concluded with the judgment of 7 October 2015, file ref. N. K 12/14 (on the

[5] J. Pawlikowski, *Spór o medyczną klauzulę sumienia a konstytucyjne zasady równości i bezstronności światopoglądowej władz publicznych*, "Studia z Prawa Wyznaniowego" 2019, Vol. 22, pp. 41–82.

[6] M. Skwarzyński, *Korzystanie z klauzuli sumienia jako realizacja wolności wewnętrznej czy/i zewnętrznej*, "Opolskie Studia Administracyjno-Prawne" 2015, No. 13, fascicle 4, pp. 9–21.

unconstitutionality of Article 39 of the Act on the professions of doctor and dentist).[7]

Also, Prof. Ewa Łętowska[8] holds the view that the conscience clause and conscientious objection are two separate concepts, although both protect human conscience and morality. In her opinion the word "objection" has a negative connotation and is a broader concept than the conscience clause, which has a positive tone and is institutionalised by law. An objection may be illegal, entailing possible penal sanctions, because it is already on the brink of civil disobedience. The correct use of the conscience clause allows the addressee using it to exculpate from liability (criminal, civil or disciplinary).

2.2. CONSCIENTIOUS OBJECTION AND THE CONSCIENCE CLAUSE – SYNONYMOUS CONCEPTS

Putting an equation mark between these two concepts, or rather the failure to notice significant differences between them, is still present in Polish literature and judicial decisions, although in the past it used to be a more frequent phenomenon. A good example which confirms the above thesis is the publication by Anna Machnikowska, entitled Conscience Clause in the Profession of Lawyer.[9] However, the vast majority of the text is devoted to considerations in the field of freedom of conscience and religion, which currently fall into the conceptual category of conscientious objection occurring in various legal professions.

[7] OTK-A 2015/9/143. See: Article 39 of the Act of 5 December 1996 – Law on the professions of doctor and dentist, Journal of Laws of 2023, item 1516, as amended.

[8] E. Łętowska, *Tylnymi drzwiami ku uniwersalnej klauzuli sumienia? (uwagi na marginesie "sprawy drukarza" przed TK)*, "Państwo i Prawo" 2022, No. 2, pp. 1–2.

[9] A. Machnikowska, *Klauzula sumienia w zawodzie prawnika*, [in:] O. Nawrot (ed.), *Klauzula sumienia w państwie prawa*, Spółdzielczy Instytut Naukowy, Sopot 2015, p. 127.

Three authors of the academic textbook entitled "Religious Law"[10] – A. Mezglewski, H. Misztal and P. Stanisz – are of the similar opinion.

3. Conscientious objection and conscience clause – different concepts

3.1. CONSCIENTIOUS OBJECTION AND CONSCIENCE CLAUSE – DERIVATIVES OF THE RELIGIOUS FREEDOM OF AN INDIVIDUAL

Each person, including a lawyer, has the right to act (in private and professional life) in accordance with their own conscience and the right to freedom from the specific coercion to act against their own conscience. It seems that the very general right to conscientious objection is too weak a guarantee of this freedom.[11] However, the institutionalization of this objection in the form of a "conscience clause" is a much stronger guarantee. Therefore, the possibility of invoking the conscience clause in some professions is considered a fundamental right, guarding freedom of conscience, as well as human dignity. And here we come to the conceptual scope of the "conscience clause" and its limits or limitations. It is evident that the right to a conscience clause in a given profession can be called, defined or limited in various ways, but only in exceptional situations.[12]

[10] A. Mezglewski, H. Misztal, P. Stanisz, *Prawo wyznaniowe*, 3rd Edition, Warszawa 2011, pp. 117–118.

[11] M. Skwarzyński, *Protecting Conscientious Objection as the "Hard Core" of human dignity*, "Ius Novum" 2019, Vol. 13, No. 2, pp. 275–296.

[12] W. Johann, B. Lewaszkiewicz-Petrykowska, *Wolność sumienia i wyznania w orzecznictwie konstytucyjnym – status jednostki*, [in:] *Wolność sumienia i wyznania w orzecznictwie konstytucyjnym, XI Konferencja Europejskich Sądów Konstytucyjnych*, "Biuletyn Trybunału Konstytucyjnego" 1999, Special issue, p. 21; M. Skwarzyński, *Korzystanie ze sprzeciwu sumienia w kontekście zasady równouprawnienia i kryterium zawodu*, "Studia z Prawa Wyznaniowego" 2016, No. 19, pp. 63–83.

3.2. CONSCIENTIOUS OBJECTION AND CONSCIENCE CLAUSE – DERIVATIVES OF SOCIAL COMPROMISE

It seems that the conscience clause is/or could be a "compromise solution" between the doctor using it and the patient. It would arguably be so if all lawyers (practicing the profession of lawyer, legal advisor, notary or bailiff) had it guaranteed.[13] Thanks to this clause, the lawyers themselves and their clients could act according to their consciences, and the price of this compromise would be tolerance of certain difficulties or inconveniences by both parties. The introduction of such conscience clauses would constitute an extension of the guarantees at the level of the right to conscientious objection already expressed in the Constitution of the Republic of Poland itself (Article 53, para. 1).[14]

The essence of the problem boils down to the fact that the conscience clauses found in some laws are reserved only for selected professions (e.g., doctors, pharmacists, nurses, the military) and they differ in content. There are no comprehensive regulations, this institutionalized but general clause of conscience.[15] Indeed, every person has their right to conscientious objection directly guaranteed in Article 53, para. 1 of the Constitution of the Republic of Poland. However, this conscientious objection can too easily get out of control and become a form of civil resistance (an act of civil disobedience).

[13] Z. Cichoń, *Klauzula sumienia w różnych zawodach*, [in:] *Prawnik katolicki a wartości prawa*, Kraków, Dom Wydawniczy "Stoja" 1999, pp. 44–51.

[14] K. Szczucki, *Klauzula sumienia – uwagi de lege lata i de lege ferenda*, "Studia Iuridica" 2009, No. 50, pp. 168–169; cf. S. Biernat, *Dissenting opinion*, [in:] *The Constitutional Tribunal judgment of 7 October 2015*, file ref. K 12/14, OTK-A 2015, No. 9, item 143.

[15] A. Machnikowska, *Klauzula sumienia…*, *op. cit*., pp. 127–142.

4. Conscientious objection in international law[16]

The right to freedom of conscience and religion was also protected in international law after World War II. This applies to the sphere of an individual's personal beliefs (in the internal forum), as well as their externalization. The latter is subject to numerous restrictions. Among the more important sources of law should be mentioned the Universal Declaration of Human Rights adopted by the United Nations on 10 December 1948, as well as the European Convention on Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950.[17, 18] The Parliamentary Assembly of the Council of Europe took the stance that the right to use the conscience clause is one of the human rights.[19]

[16] M. Skwarzyński, *Współoddziaływanie ius cogens i soft law w prawie międzynarodowym w kontekście sprzeciwu sumienia*, pp. 281–287, [in:] B. Kuźniak, M. Ingelevič-Citak (eds.), *Ius cogens – soft law, dwa bieguny prawa międzynarodowego publicznego*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2017, p. 479; M. Skwarzyński, *Impact of the ECHR case law on the use of conscientious objection in Poland*, pp. 127–140, [in:] A. Stępkowski (ed.), *Contemporary Challenges to Conscience. Legal and Ethical Frameworks for Professional Conduct*, Peter Lang, Berlin–Bern–Bruxelles–New York–Oxford–Warszawa–Vien 2019, p. 296.

[17] Journal of Laws of 1993 No. 61, item 284, as amended.

[18] M. Skwarzyński, *Sprzeciw sumienia w europejskim i krajowym systemie ochrony praw człowieka*, "Przegląd Sejmowy" 2013, No. 6, pp. 9–26; M. Skwarzyński, *Orzecznictwo Europejskiego Trybunału Praw Człowieka w zakresie klauzuli sumienia*, pp. 285–293, [in:] P. Stanisz, A.M. Abramowicz, M. Czelny, M. Ordon, M. Zawiślak (eds.), *Aktualne problemy wolności myśli, sumienia i religii*, Wydawnictwo KUL, Lublin 2015, p. 384.

[19] Among others, in Resolution No. 337 of 1967 on the right to conscientious objection and Recommendation No. 478 of 1967 on the right to conscientious objection, as well as Resolution No. 1763 of 7 October 2010 on the right to conscientious objection in legal medical care.

5. The relation of the Catholic Church to the conflict of conscience, conscientious objection and the conscience clause

Contemporary social teaching of the Catholic Church should be taken into account when discussing the issues of the conflict of conscience, morality and ethics of lawyers in Poland. The Catechism of the Catholic Church of 1992 is an important source of information.[20] The sixth article of the Catechism was devoted to "Moral conscience" (No. 1776–1802), which offered guidance on how to distinguish good from evil in everyday life and how to recognize the moral value of one's actions. Elsewhere in this document (No. 1787) it is indicated that: "Sometimes a person encounters situations that make the moral judgment less certain and hinder the decision. But he/she should always seek what is right and good, and discern the will of God as expressed in the law of God".

The Catholic Church is aware that conscientious objection is not properly regulated in secular law.

Pope John Paul II (1978–2005) spoke about the attitude of Catholic lawyers who are in the situation of conflict of conscience. For example, during the speech to members of the International Union of Catholic Lawyers in 2000, he pointed out that the basis of the law is justice and called on lawyers to defend dignity and[21] the right to life. According to the Pope, the law, detached from moral foundations, carries various threats, such as violation of the dignity of other people. Judges should take special care of this.

And during the speech to the members of the Tribunal of the Roman Rota in 2002[22] on the indissolubility of marriage, the Pope indicated the special attitude of lawyers in such situations. First of all, they should refuse to represent clients in divorce cases, and

[20] *Catechism of the Catholic Church*, 2nd Edition, corrected and supplemented, Wydawnictwo Pallottinum, Poznań 2020, p. 269.

[21] John Paul II, *Speech to members of the International Union of Catholic Lawyers; 24 November 2000*, https://opoka.org.pl/biblioteka/W/WP/jan_pawel_ii/przemowienia/prawnicy_24112000.html, (accessed on: 24.07.2023).

[22] John Paul II, *Speech to members of the International Union of Catholic Lawyers…*, *op. cit.*

if they are already working on such cases, then it should be only if they are aimed at legal consequences other than dissolution of the marriage. Like judges, they should work towards the goal of reconciling spouses.

We will also come across the objection of the lawyer's conscience in the Compendium of Social Doctrine of the Church of the Pontifical Council for Justice and Peace (Chapter 3 entitled "Political power", point C) entitled "Right to conscientious objection", No. 399).[23] This document states that: "The citizen is not obliged in conscience to comply with the orders of the civil authorities if they are contrary to the requirements of the moral order, the fundamental rights of persons or the indications of the Gospel".[24] Unjust laws make morally righteous people experience dramatic problems of conscience: "when they are required to cooperate in morally evil actions, they have the duty to refuse to participate in these actions".[25] This refusal is not only a moral obligation, but also a fundamental human right that should be recognized and protected by civil law: "Whoever invokes conscientious objection cannot be exposed not only to criminal sanctions, but also to any other negative legal, disciplinary, material or professional consequences".[26]

6. Freedom of conscience in the Polish Constitution of 2 April 1997[27]

The sources of the freedom of conscience can be found in the Polish constitution. Article 30 directly guarantees that: "The inherent and inalienable dignity of the human being is a source of freedom and rights of the human being and the citizen. It shall be

[23] *Kompendium nauki społecznej Kościoła*, Jedność, Kielce 2005, p. 120, https://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_pl.html (accessed on: 26.07.2023).

[24] Cf. *Catechism of the Catholic Church*, 2242.

[25] Cf. John Paul II, *Encyklika Evangelium vitae*, 73: AAS 87 (1995), pp. 486–487.

[26] John Paul II, *Encyklika Evangelium vitae*, 74: AAS 87 (1995), p. 488.

[27] Journal of Laws of 1997 No. 78, item 483, as amended.

inviolable. The respect and protection thereof shall be the obligation of public authorities". This provision is located in the second chapter dealing with *Freedoms, rights and duties of man and citizen*. Notice also, "Human freedom is subject to legal protection" (Article 31, para. 1 of the Constitution) and "Everyone is obliged to respect the freedoms and rights of others. No one shall be forced to do what the law does not require him to do" (Article 31, para. 2 of the Constitution). This is the more so in that "the Republic of Poland is a democratic state governed by the rule of law, implementing the principles of social justice" (Article 2).

However, the guarantee of fundamental importance is Article 53, para. 1, which provides that: "Everyone shall be guaranteed freedom of conscience and religion". When exercising conscientious objection in the practice of individual legal professions (and not only the legal one), Article 53, para. 7 is of significance ("No one shall be compelled by organs of public authority to disclose his worldview, religious convictions or belief").

6.1. CONSCIENTIOUS OBJECTION AND THE CONSCIENCE CLAUSE IN RULINGS OF THE CONSTITUTIONAL TRIBUNAL

The Polish Constitutional Tribunal in its decisions to date holds the opinion that conscientious objection must be respected irrespective of whether there are current legislative provisions confirming such objection within specific professional groups, including the legal professions. The basis for this thesis is the already historic decision of the Constitutional Tribunal of 15 January 1991, file ref. U 8/90, and the Tribunal's decision of 7 October 1992, file ref. U 1/92, in relation to doctors (based on Article 82, para. 1 of the Constitution of 1952).

On the basis of the theses of the judgment of the Constitutional Tribunal of 7 October 2015, file ref. K 12/14[28], it should be recognized that "the freedom of conscience of every human being is a primary and inalienable category, which constitutional law and

[28] Act of 5 December 1996 on the profession of doctor and dentist (i.e., as published in Journal of Laws of 2023, item 1516, as amended).

international regulations only vouch for. Freedom of conscience – including that element of it which is conscientious objection – must therefore be respected regardless of whether there are legislative provisions confirming it". Thus, the Act on the profession of doctor and dentist under review by the Tribunal does not create a privilege for the physician in the form of a conscience clause but merely confirms it.

7. Professional (corporate) self-government of advocates, attorneys at law, notaries and court bailiffs

The legal professions listed in the title are at present professions of public trust, and form (each of them separately) their own professional self-government with autonomous and independent corporate authorities. Membership in it is mandatory for every advocate, attorney at law, notary and court bailiff (as well as trainee advocates, attorneys at law, notaries and bailiffs and bailiff assessors). Otherwise, respective legal professions cannot be performed. Each lawyer is bound by the obligation of his own professional secrecy, and for its violation there is disciplinary, as well as criminal and civil (compensatory) liability. The highest penalty is removal from the corporation, which is equivalent to a ban on practicing a given profession and the impossibility or very limited possibility of subsequent migration to another corporation.

7.1. ADVOCATE AND ATTORNEY AT LAW

Currently in Poland, only advocates and attorneys at law – as two independent corporate professions – have full rights to "provide legal assistance to their clients, to cooperate in the protection of civil rights and freedoms, and to cooperate in the development and application of the law". In the performance of their professional duties, they are "independent and subject only to laws." Their work consists in *providing legal assistance and, in particular, providing legal*

counsel (legal consultation in the case of attorneys at law – Z.Z.), *drawing up legal opinions, drafting legal acts and appearing before courts and authorities.*

Thus, the professions of advocate and attorney at law are related. In Poland (in 2023) there were approximately 22,000 advocates (of whom more than 40 percent were women), whereas there were more than 50,000 attorneys at law (of whom more than 50 percent were women).

Historically, the profession of advocate was known in pre-partition Poland (before 1793), and in its modern form it appeared still in the era of the Warsaw Duchy after 1810, following the example of French legal solutions. The contemporary tradition of the self-governance of advocates in independent Poland goes back to 1918.[29] Initially, distinct post-partition regulations on advocates were in effect in each of the three parts of Poland. It was not until 1938 that the law and the profession of advocate were unified. Advocates performed their duties during World War II, and later during the period of the socialist state (1944–1989).

On the other hand, attorneys at law boast a lesser, 41-year tradition – they appeared among the legal professions in Poland in 1982. Initially, they were employed in enterprises which they represented in court and in front of public administration authorities. It was only in the 1990s that they were given the opportunity to represent individual clients, mainly in civil, commercial, administrative cases and cases concerning labour law and social security. The range of cases was constantly expanded. Since 1 July 2015, attorneys at law have had the same defensive powers as advocates, also in criminal cases. The divisive separation between these legal professions is currently of an organisational and historical nature, and therefore artificial. There are postulates for the merger of the two professions and corporations into one.

The basic difference between an advocate and an attorney at law is connected with the form of employment and the manner of providing work. An attorney at law has a wider range of possibilities

[29] M. Zaborski, *Ustrój adwokatury polskiej w latach 1918–2018 w perspektywie historyczno-prawnej*, "Palestra" 2018, No. 11, pp. 101–132.

and manners of work than an advocate, as he/she can practice the profession in an attorney at law's office (in a team or as an individual) and simultaneously anywhere else or exclusively on a full-time or part-time basis as an attorney at law. An attorney at law may be employed on a full-time basis by his/her client. Many attorneys at law work in their firms and at the same time on a part-time basis in state and private companies, in state or local government administration, in universities, etc. An advocate, on the other hand, can practice his/her profession in a law firm (in a team of advocates or individually) and cannot work part-time anywhere except in university employment.

Law firms with a corporate-mixed team (i.e., with advocates and attorneys at law in a team) are quite popular. It is not prohibited to be both an advocate and at the same time work with an attorney.

7.2. NOTARY

Public notaries are members of a profession of public trust and enjoy the protection of the law like state officials. They practice their profession in private notary offices, most frequently as a single person and less frequently in a team with other notaries. The scope of activity of a notary includes, among other things, the drafting of notarial deeds, deeds of succession certification, certificates, protests of bills of exchange and cheques, drawing up protocols, preparing extracts, copies and extracts of documents, acceptance of money for safekeeping, securities, documents, etc.

In Poland (2022) there were approximately 4 thousand notaries (of whom 64 percent were women), who ran approximately 3,100 notary offices. Historically, in pre-partition Poland the profession of public notary – as it is understood today – did not exist. There were only ecclesiastical notaries (canonical from 1284) and in the monarch's chancellery, as well as some private ones. The profession of public notary appeared on Polish lands after 1808 with the introduction of the French Napoleonic Code in the Duchy of Warsaw. At that time, particular courts had court scribes (also known as deed scribes). There was a distinct profession of public

notary in each of the three partitions in the 19th century, and it continued in independent Poland (from 1918) until the profession was unified in 1933.[30] From 1951 to 1991, notary public was a nationalised profession of public trust. Between 1989 and 1991, the profession was privatised.[31] Today, notaries are titled with the historical title of "rejent".

7.3. COURT BAILIFF

Court bailiffs conduct their own business activities and are affiliated with the National Council of Bailiffs. In the organizational sense, a bailiff is assigned to a particular district court, whose territorial jurisdiction constitutes his/her so-called bailiff's district. Nevertheless, bailiffs can conduct their activities in the entire territory of Poland.

Bailiffs are public officers who exercise a profession of public trust and conduct service for the administration of justice. However, they cannot be full-time employees of courts. The main task of a bailiff is to enforce (execute) court decisions regarding monetary and non-monetary claims and to secure claims. In addition, bailiffs execute orders for securing an inheritance, sometimes personally deliver court notices and pleadings directly to the addressee or determine the current address of the addressee, and they also exercise official supervision over voluntary public auctions, etc.

Historically, profession of bailiff appeared in Poland in the 15th century. Bailiffs were initially officials in the royal court appointed to manage the royal estate, collect taxes imposed by the king or adopted by the Sejm, as well as secure the monarch's estate

[30] D. Malec, *Notariat Drugiej Rzeczypospolitej*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2002, p. 468.

[31] D. Malec, *Notariat polski w rozwoju dziejowym*, 2021, https://krn.org.pl/static/upload/store/Notariat_polski_w_rozwoju_dziejowym.pdf (accessed on: 26.07.2023); D. Malec, K. Skupieński, *Notariat polski. Historia i współczesność*, Krajowa Rada Notarialna, Warszawa 2006, p. 213; D. Malec, *Dzieje notariatu polskiego*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2007, p. 349.

from debtors. In Poland of the interwar period, the legal provisions on bailiffs were unified[32].

The professional self-government of bailiffs in Poland is already 26 years old (counting from 27 November 1997). In 2022 in Poland there were approximately 1,400 thousand bailiff's offices, in which 2,200 bailiffs worked and, additionally, there were approximately 1.3 bailiff assessors and about 300 trainee bailiffs. Among the bailiffs, the level of feminization is the lowest and reaches approximately 25 percent.

7.4. LEGISLATION OF PROFESSIONAL (CORPORATE) SELF-GOVERNMENT

All of the legal corporations enumerated here – of advocates, attorneys at law, notaries and bailiffs – have their professional self-governments with authorities at central and local levels. Each of them has their distinct (individual) corporate acts[33] as well as written codes of professional ethics and bylaws from which certain corporate rights and obligations follow. The Law on the Bar and the Law on Attorneys at law were passed by the Sejm in 1982,[34] the Law on Notaries dates back to 1991,[35] while the Law on Court Bailiffs dates from 2018.[36]

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[32] R. Łyszczek, *Instytucja komornika sądowego jako organu egzekucyjnego w okresie międzywojennym*, Currenda, Sopot 2007, p. 297.

[33] Article 17, para. 1 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997 No. 78, item 483, as amended; P. Sendecki, *Streszczenie wystąpienia*, [in:] A. Redzik, *Sprawozdanie z Międzynarodowej Konferencji "Etyka zawodów prawniczych w praktyce – wzajemne relacje i oczekiwania", Kazimierz Dolny, 14–15 kwietnia 2011*, "Palestra" 2011, No. 5–6, pp. 265–274.

[34] Act of 26 May 1982 – Law on the Bar, Journal of Laws of 2022, item 1184, as amended; Act of 6 July 1982 on attorneys at law, Journal of Laws of 2022, item 1166, as amended.

[35] Act of 14 February 1991 – Law on Notaries, Journal of Laws of 2022, item 1799, as amended.

[36] Act of 22 March 2018 – Law on Court Bailiffs, Journal of Laws of 2023, item 590, as amended.

In none of these four corporate laws can an explicitly expressed conscience clause or even the right to conscientious objection be found. All four legal corporations have their Codes of (professional) Ethics and in these some vague provisions guaranteeing soft forms of conscientious objection can be identified. All the regulations on professional ethics are new, not older than twelve years. Attorneys at law and advocates have the most recent regulations in ethics, as the Code of Ethics for Advocates was enacted by the Supreme Bar Council on 22 September 2022[37] and the Code of Ethics for Attorneys at law was amended on 7 February 2023.[38] The Code of Professional Ethics for Bailiffs came into effect in 2016,[39] whereas the Code of Professional Ethics for Notaries is dated 5 March.[40]

7.5. THE LAWYER'S CONSCIENCE AND THE TEXT OF THE OATH OF AN ADVOCATE, AN ATTORNEY AT LAW, A NOTARY AND A BAILIFF

Before the commencement of professional activities, each advocate takes an oath with a strictly defined content to the dean. The text of

[37] Resolution No. 230/2022 of the Board of the Supreme Law Bar Council of 22 September 2022, the consolidated text of the Collection of Principles of Bar Ethics and Dignity of the Profession (the Code of Bar Ethics), which is attached to this resolution. The resolution shall enter into force on 1 October 2022, http://www.nra.pl/admin/wgrane_dokumenty/zal-do-uchwaly-nr-82-2020.pdf (accessed on: 24.07.2023). Cf. Z. Krzemiński, *Etyka adwokacka. Teksty. Orzecznictwo. Komentarz*, 3rd Edition, Wolters Kluwer Polska, Warszawa 2008, p. 20 and the following pages.

[38] Resolution No. 884/XI/2023 of the Board of the National Council of Attorneys at law of 7 February 2023 on the announcement of the consolidated text of the Code of Ethics for of Attorneys at law, https://kirp.pl/etyka-i-wykonywanie-zawodu/etyka/kodeks-etyki-radcy-prawnego/ (accessed on: 24.07.2023).

[39] Resolution No. 1603/V of the National Council of Court Bailiffs of 6 September 2016, https://izba.gdanska.komornik.pl/wp-content/uploads/2021/01/Uchwala-KRK-nr-1603_Kodeks-Etyki-Komornika.pdf (accessed on: 24.07.2023).

[40] Resolution No. VII/21/2011 of the National Council of Notaries of 5 March 2011 on the adoption of the consolidated text of the Code of Professional Ethics for Notaries, http://www.kin.pl/kodeks-etyki-zawodowej-notariusza (accessed on: 24.07.2023).

the oath is directly inscribed in a specific corporate act and cannot be shortened, extended or changed by the oath taker. This text contains important content that lawyers should follow not only while exercising their profession, but also in their private life.

Therefore, an advocate takes a solemn oath "to fulfill his duties zealously, conscientiously and in accordance with the provisions of law (…)" (Article 5 of the Law on the Bar). According to the Code of Professional Ethics an advocate "should conduct professional activities to the best of his/her will and knowledge, with due honesty, conscientiousness and diligence" (Article 8, sentence 1 of the Code of Ethics).

An attorney at law similarly vows to the dean to "perform professional duties conscientiously and in accordance with the provisions of the law (…)" (Article 27, sec. 1 of the Law on Attorneys at law). According to the rules of professional ethics, an attorney at law "shall perform professional duties conscientiously and with due diligence taking into account the professional nature of the activity" (Article 12, sec. 1 of the Code of Ethics for Attorneys at law).

A notary takes an oath before the Minister of Justice to "perform his/her duties in accordance with the law and his/her conscience (…)" (Article 15, sec. 1 of the Law on Notaries).

A court bailiff (and a bailiff assessor) before the competent president of the court of appeals vows to "perform his/her duties in accordance with the law and his/her conscience (…)" (Articles: 17, sec. 2 and 136, sec. 1 of the Law on Bailiffs).

Thus, several issues remain to be resolved. First, is the "conscientious" fulfillment of duties by an advocate and an attorney at law and in accordance with "conscience" by a notary and a bailiff identical with regard to their scope?[41] In my opinion, guided at least by the understanding of these terms based on the dictionary definition, it should be considered that the word "conscientious" has a different

[41] According to the *Słownik języka polskiego PWN* (https://sjp.pwn.pl/szukaj/sumiennie.html, accessed on: 26.07.2023), the words "conscientiously", "conscientious" means: 1. "scrupulously discharging one's duties", 2. "performed accurately, reliably". But the word "conscience" means: "the ability to judge one's own conduct and the awareness of moral responsibility for one's actions."

scope of meaning than fulfilling duties in accordance with (the law and) "conscience". The first word ("conscientiously") puts more emphasis on accuracy, faithfulness in the performance of duties, which do not always have to be consistent with the religious or ethical views of the lawyer, but such as the legal norm (e.g., secular) and the practice of its application, interpretation, or want, which means that they can be interpreted separately from the sphere of ethical and religious experiences. After all, the profession of advocate and attorney at law can be practiced by a person who is not necessarily a believer, but an atheist or agnostic, who, after all, also have professional "conscientiousness".

On the other hand, the second concept (the performance of duties in accordance with "the law and conscience") refers to a greater extent to the ethical and religious sensitivity of a lawyer (a notary and a bailiff). In this case the term "conscience" appears in one line, in a way, "with the law", because there is a conjunction there, the conjunction "and". As a rule, the notary and bailiff must make sure they will not do anything inappropriate in their professional life that would harm this "conscience" of theirs, be contrary to it, or seriously burden this conscience, even if it were consistent with the law and the "conscientious" execution of this law.

Hence, the second question arises as to whether the above two legislative phrases are sufficient legal guarantees to enable an advocate and attorney at law to legally invoke "conscientious objection", or else whether these two phrases can act as a kind of "conscience clause". It seems that there is a guarantee differentiation and it will be stronger in the case of notaries and bailiffs than in the case of advocates and attorneys at law. In the case of the latter, a bolder use of the conscientious objection can be possible, even a kind of quasi-clause of conscience, because one can invoke a clearly and directly articulated statutory norm. Such a comfort is not available to advocates or attorneys at law.

Yet another question also arises as to whether each of the aforementioned lawyers can complete the oath with the words: "So help me God"? And is there a possibility of invoking conscientious objection derived from the content of the oath taken in this way. While bailiffs have the possibility of such an oath since 1 January 2019,

directly guaranteed in their law (Article 17, sec. 3 of the Law on Bailiffs), similarly, bailiff assessors (Article 136, sec. 2), other corporations do not have it, with the exception of judges since 1 October 2001 (Article 66, sec. 1 of the Law on the System of Common Courts)[42] and prosecutors since 1 October 2001 (Article 92, sec. 1 of the Law on Prosecutors)[43]. It should be mentioned that such rights in Poland are directly guaranteed to deputies and senators (Article 104, para. 2 of the Constitution) and the President of the Republic of Poland (Article 130). It seems that in the practice of advocates, attorneys at law and notaries, cases of such oaths with the addition at the end of the words: "So help me God", are unlikely to occur.

7.6. THE CODES OF PROFESSIONAL ETHICS AS A SOURCE OF CONSCIENTIOUS OBJECTION OF LAWYERS

7.6.1. *The Code of Ethics for European Lawyers of the Council of Bars and Law Societies of Europe (CCBE)*

The codes of professional ethics of particular legal professions are an important source of law and a guarantor of normative freedom. The Code of Ethics for European Lawyers (CCBE) of 28 October 1988[44] contains a provision (sec. 2.7. entitled "Interest of the client") the contents of which are worth quoting in full: "Subject to due observance of all rules of law and professional ethics, a lawyer must always act in the best interests of his/her client and must put the client's interests before his/her own interests or those of other legal

[42] Act of 27 July 2001 – Law on the System of Common Courts, Journal of Laws of 2023, item 217, as amended.

[43] Cf. Act of 4 March 2016 – Law on Prosecutors, Journal of Laws of 2023, item 1360. This possibility was introduced by Article 45, sec. 4 (as amended by Article 185, sec. 7 of the Act of 27 July 2001 – Law on the system of common courts, Journal of Laws of 2001 No. 98, item 1070) as of 1 October 2001.

[44] T. Jaroszyński, *Kodeks Etyki Prawników Europejskich (CCBE) w polskim systemie prawa*, "Przegląd Prawa Konstytucyjnego" 2023, Vol. 71, No. 1, pp. 217–228. See: The Code of Ethics for European Lawyers (CCBE) of 28 October 1988, https://biblioteka.kirp.pl/files/show/508 (accessed on: 24.07.2023).

professionals". The Polish Bar Council and attorneys at law became members of the CCBE on 1 May 2004.[45] This Code applies to the cross-border activities of Polish lawyers (advocates and attorneys at law) within the European Union and the European Economic Area. The standards contained in the national codes of ethics (for advocates and attorneys at law) are considered to be synonymous to those in the Code of Ethics for European Lawyers. However, it should be noted that the national codes allow "only" for the interests of the lawyer's client to be taken into account, while this European Lawyers' Code, on the contrary, requires the client's interests to be respected and put before one's own. Thus, it is not always the case in legal practice that the pursuit of one's client's interest is consistent with one's own interest, let alone consistent with one's own conscience.

7.6.2. *National codes of professional ethics for lawyers*

According to the Code of Ethics for Advocates, an advocate is obliged to observe ethical standards (Article 1, sec. 3) and, moreover, he/she should perform professional activities to the best of his/her will and knowledge, with due honesty, conscientiousness and zeal (Article 8).

An attorney at law, according to the Code of Ethics for Attorneys at law, "is obliged to perform professional activities with integrity and honesty, in accordance with the law, principles of professional ethics and good morals" (Article 6). An attorney at law, "in the performance of professional activities, should be free from any influence resulting from his/her personal interests, external pressure and interference from any side or for any reason" (Article 7, sec. 2). An attorney at law is obliged to perform professional activities conscientiously and with due diligence taking into account the professional nature of the activity (Article 12, sec. 1).

[45] Cf. Resolution No. 31/03 of the Supreme Law Bar Council of 26 October 2003 on becoming a member of CCBE, who refers to T. Jaroszyński, *Kodeks Etyki...*, *op. cit.*, p. 221.

The profession of attorney at law is also subject to a number of regulations of ethical rank, contained in the Code of Ethics for Attorneys at law. They are cumulated in Chapter 2 entitled "Unacceptable activities and conflict of interest" (Articles 25–30a). First and foremost, an attorney at law cannot engage in any activity or in any way participate in activities that would restrict his/her independence, insult the dignity of the profession, pose a threat to professional secrecy or give rise to a conflict of interest (Article 25, sec. 1). Before providing legal assistance in a case, an attorney at law is obliged to examine whether there is a conflict of interest and, if so, refuse to provide the assistance (Article 30a, sec. 1). If a conflict of interest becomes evident in the course of providing assistance in a given case, an attorney at law is obliged to resign from it, and in particular to terminate the power of attorney to all clients affected by the conflict of interest (Article 3a, sec. 2). The obligation to avoid conflicts of interest also applies to an attorney at law accepting a substitution power of attorney (Article 30a, sec. 3).

In the Code of Ethics for Notaries, we also have a number of provisions which may serve as a guarantee. The notary is obliged to: to observe basic moral principles (Article 1), to ensure compliance with the principles of professional ethics (Article 8) and to perform professional activities in accordance with the law, to the best of his/her will and knowledge and with due diligence (Article 11). The code does not mention "conscientiousness" but "diligence". The notary is obliged to refuse to carry out the activity in the event of a conflict between different parties or an obvious clash of their interests (Article 18), as well as a notarial activity that is "against the law" (Article 81 of the Law on Notaries). Moreover, a notary should, with his/her attitude and actions, uphold the good reputation of the profession and take care of the solemnity, honour and dignity of the profession (Article 7). The notary is obliged to ensure that the principles of ethics are also observed by other members of his/her professional environment and by his/her employees (Article 8). The basic principles the notary must abide by are honesty, integrity, independence and impartiality, and the maintenance of professional secrecy (Article 6). The notary is obliged to act in accordance

with his/her oath and to continuously improve his/her professional qualifications (Article 17).

The principles for the performance of service by court bailiffs are regulated by the Law on Bailiffs and the Code of Professional Ethics for Bailiffs. A bailiff, as a public officer practicing a profession of public trust, is obliged to: act in accordance with the applicable provisions of the law and his/her conscience, the oath and vow taken, the principles of social coexistence, decency, demonstrate due diligence and conscientiousness, be guided by the principles of honesty, dignity, honour and maintain legally protected secrecy (Article 6, sec. 1). A bailiff should carry out his professional activities to the best of his/her will, knowledge, in an impartial manner, with particular respect for the rights and dignity of the parties to the actions undertaken, the participants in the proceedings and his subordinates (Article 6, sec. 2). "The impartiality of the judicial officer is expressed, in particular, in making decisions on the basis of objective criteria free from personal beliefs, prejudices, preferences and the influence of others" (Article 10). A bailiff is obliged to act in accordance with the provisions of the law, court rulings issued in the course of judicial supervision, orders or recommendations of authorized administrative supervisory bodies, the oath taken and the principles of professional ethics, and to improve his/her professional qualifications (Article 25, sec. 1 of the Law on Bailiffs).

Of the four presented Corporate Law Acts and Codes of Ethics, it is only bailiffs (as well as bailiff assessors and trainee bailiffs) who are guaranteed by law the right, as well as their professional duty, "to perform in accordance with the law and their conscience (…)" (Articles 17, sec. 2 and 136, sec. 1 of the Law on Bailiffs) and (also in the Code of Ethics) "(a bailiff) shall be obliged to act in accordance with the applicable provisions of the law and their conscience, the oath and oath taken, the principles of social coexistence, and good morals". In the bailiffs' community, these principles are known and accepted.

7.7. THE PRACTICAL DIMENSION OF CONSCIENTIOUS OBJECTION IN SOME LEGAL PROFESSIONS

7.7.1. *Advocate and attorney at law*[46]

Each advocate and trainee advocate should comply with the law and the rules of the Bar ethics. Each attorney at law and trainee attorney at law has similar obligations. The two mentioned Codes of Professional Ethics have similar content.

Each advocate (and an attorney at law) enjoys full freedom and independence while performing professional activities. An advocate (and an attorney at law) must be free from the influence of the media and others; he/she must avoid the so-called "conflict of interest". For example, an advocate (and attorney at law) must not undertake to conduct a case:

i. against a close person (e.g., wife, common-law wife, child, parents, grandparents, brother-in-law), and
ii. against a person with whom he/she has a serious personal dispute (e.g., a neighbour).

An advocate and an attorney at law, like any human being, have the right to express conscientious objection. But the question arises – is it always possible? To answer this question, it is necessary to distinguish between two situations:

1. when an advocate or an attorney at law acts out of free choice,
2. and when they act *ex officio*, i.e. appointed by the corporate authorities (of advocates or attorneys at law respectively).

In the first case, it should be noted that the professions of an advocate and an attorney at law are practiced on the basis of a contract between the client and the advocate (attorney at law). The advocate can decide on his/her own whether or not to represent a particular person in a particular case.

In the second case, the decision to appoint an advocate (or an attorney at law) *ex officio* (the so-called right to defence, or legal

[46] See: M. Skwarzyński, *Sprzeciw sumienia w adwokaturze*, pp. 201–220, [in:] A. Mezglewski, A. Tunia (eds.), *Standardy bezstronności światopoglądowej władz publicznych*, Wydawnictwo KUL, Lublin 2013, p. 268.

assistance) is made by the court hearing the case or the public prosecutor.

The question should be raised as to whether an advocate and an attorney at law can invoke their right to conscientious objection:

1. as every human being he/she has the constitutional right to freedom of conscience and religion, as it is guaranteed by the Polish Constitution of 2 April 1997 (Article 53, para. 1 and 2),
2. an advocate may invoke the act the Law on the Bar (Article 28, sec.1), which guarantees that (he/she): "may refuse to provide legal assistance only due to 'important reasons', of which he/she shall inform the person concerned".

Attorneys at law have an identical provision, except that in this case there is no obligation to inform the concerned party. However, there is another one which imposes on an attorney at law the termination of a power of attorney, contract of mandate or employment contract. Nevertheless, an attorney at law has an obligation to "perform all necessary activities so that this circumstance does not have a negative impact on the further course of cases conducted by him/her" (Article 22, sec. 2 of the Law on Attorneys at law).

The concept of "important reasons" is very capacious and vague. It has been accepted for the purpose of the determination of judicial decisions that these reasons may include the following: "temporary indisposition of the advocate, difficult family situation, force majeure, lack of narrow specialization necessary for proper provision of legal assistance and 'conscientious objection' of the advocate".

Thus, in what cases can a conflict of conscience arise in an advocate or an attorney at law? Such penal cases include defence of the accused of: murder of a person, murder of a child, paedophilia, rape, accusations of abortion, euthanasia, destruction of human embryos, offences against religion such as insult of the cross or insult of the Bible, murder or abuse of an animal. Among civil cases there are those concerning divorce, compensation of the defendant priest or parish for paedophilic acts, and similar cases.

In any case an advocate (an attorney at law) should inform of the refusal to provide legal assistance without delay.

The essence of the problem boils down to the protection of competing interests, i.e. balancing the interest of the advocate (and the

attorney at law) and his/her client. It should be borne in mind that this is about protecting the interests of people in different life situations and protecting different rights; on the one hand, the right to legal assistance and, on the other, the right to freedom of conscience. On the one hand, the client cannot be deprived of the constitutional right to a proper defence or legal assistance when he/she needs it, and on the other hand, the lawyer's interest is that his/her rights (religious, moral) also do not suffer during the performance of his/her work. Currently, in Polish law, the client's rights to legal assistance are duly protected, and the lawyer's right to freedom of conscience not always so or selectively (in principle, only when he/she acts by choice).

The question arises as to why there should be such a widely guaranteed independence of practicing the profession by lawyers? The answer can be found in the Code of Ethics for Attorneys at Law, according to which "Independence in the practice of the profession of attorney at law is a guarantee of the protection of civil rights and freedoms, the democratic state governed by the rule of law and the proper functioning of the justice system" (Article 7, sec. 1).

In view of the above, an advocate (and an attorney at law) cannot accept the case which raises an objection of his/her conscience, as his/her conduct would be against ethical principles.

An advocate (and an attorney at law) acting against his/her conscience will never fully serve the client's interest. The advocate's conscientious objection may result from not only the case itself (its nature), but the evidence and the way it was obtained (illegally or unethically). In such a situation he/she should also refuse to represent the client.

The limits of professional activity of an advocate are determined by law and advocacy ethics. An advocate should be guided by the following principles; freedom and independence (Article 7), conscientiousness and protection of the interests of clients (Article 6 of the Code of Ethics); it is because an advocate must defend the interests of the client "in a courageous and honourable manner". The client's attitude to the advocate is based on trust (Article 51) and the advocate is obliged to terminate the power of attorney when it is evident from the circumstances that the client has lost trust in him/her.

An advocate should be loyal to the client, detached from the case and retain professional secrecy. However, the principle of advocacy trust and loyalty is not absolute and allows certain limitations. A lawyer must act in accordance with the law, the principles of advocacy ethics and retain respect for the court and other participants in the proceedings. Another important principle is independence[47] and avoidance of "the conflict of interest", as well as integrity. An advocate should also remember to observe the same moral standards in relation to the legal community, and therefore, he/she must not act contrary to his/her conscience, worldview or values.

7.7.2. *Advocate and attorney at law acting ex officio*

The situation of an advocate and an attorney at law who perform tasks assigned to them *ex officio* is completely different. And this is the area of the most legal controversies and dilemmas. It appears that in such a situation the right to conscientious objection disappears.

The advocate's freedom of action and the right of choice is severely limited in this respect, as everything is decided not by the advocate but by the authority that assigned this particular case to him/her – i.e. the court or the prosecutor. Will these authorities recognize the advocate's application justified by "conscientious objection" to exempt him/her from the duty to represent the client on account of "important reasons"? The situation may be difficult because:

i. it will take quite a long time before the court or the prosecutor decide to exempt the advocate, and in the meantime, the advocate must represent his/her client with due diligence, take care of the client's interests, even against his conscience,

[47] M. Król, M. Ustaborowicz, S. Wojtczak *et al.*, *Etyka zawodów prawniczych. Metoda case study*, Wydawnictwo C.H. Beck, Warszawa 2011, p. 82; Cz. Jaworski, *Niezależność i niezawisłość*, [in:] H. Izdebski, P. Skuczyński (eds.), *Etyka zawodów prawniczych: etyka prawnicza*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2006, p. 117.

ii. the advocate is appointed to defend the accused in the final stage of the proceedings and the procedure to exempt him could negatively affect the case.

7.7.3. *Conscientious objection and legal practice*

Nevertheless, advocates and attorneys at law handle cases which provoke their conscientious objection in the following way:

1. Advocates who do not want to appear in criminal cases or divorce cases, report this fact to the authorities of the Bar corporation (attorneys at law's corporation) so that they will not be appointed to manage these cases.
2. The advocate (attorney at law) uses the so-called substitution power of attorney, i.e. transfers the case to another advocate or attorney at law.
3. The advocate may refer such a client to the District Bar Council (respectively the District Chamber of Attorneys at law), which keeps lists of lawyers dealing with specific cases.

However, the lack of possibility to invoke conscientious objection is a serious problem for trainee advocates and attorneys at law. Very often they do not have any influence on what type of case they will be assigned by the patron – an advocate or an attorney at law.

7.7.4. *Freedom of conscience and the conscience clause of an advocate in France*

The French Law on the Bar of 31 December 1971 (i.a., amended on 31 December 1990), guarantees advocates in that country the right to freedom of conscience and even knows the concept of "the conscience clause". It is significant that the clearly inscribed conscience clause in the corporate law for the French Bar applies in a country that is building a secular model of state-Church relations and where there is a strict separation of the sacred and the profane. The French state has been consistently pushing religious elements from the public space to the private one, and yet it has guaranteed

a conscience clause for lawyers for years. It reads: "An advocate may request exemption from a defence that he/she considers contrary to his conscience or likely to undermine his independence."[48] A French advocate is therefore completely free to choose his/her client as well as to conduct cases *ex officio*. If the nature of the case conflicts with his/her conscience (conscience clause), he/she can terminate the power of attorney.[49] Besides, the French Law on the Bar also takes into account the advocate's freedom of conscience in the oath he/she takes (Article 3).[50]

7.8. THE PROBLEM OF THE LACK OF INSTITUTIONAL PROTECTION OF CONSCIENCE IN SELECTED LEGAL PROFESSIONS IN POLAND

1. The corporate laws of the selected legal professions do not offer a possibility for a lawyer to refuse to defend the accused or perform professional activities in the situation when these are contrary to the conscience of the lawyer performing them (an advocate, an attorney at law, a notary and a court bailiff).
2. A substitute for institutional protection of conscience in the profession of lawyer and attorney at law, but only acting *ex officio*, is the possibility of free choice of the client and the possibility of not undertaking this defence on account of "an important reason" or circumstances that may undermine his/her "independence".
3. A significant disadvantage of the Polish legal system is the inability to use conscientious objection (or it is seriously hindered)

[48] Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques: article 7, https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006068396 (accessed on: 26.07.2023).

[49] P. Szwedo, *Adwokatura francuska w dobie przemian*, "Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2013, Vol. 11, pp. 58–59, who refers to: J. Hamielin, A. Damien, *Les régles de la profession d'avocat*, Éditeur Dalloz, Paris 1995, p. 278 and the following pages.

[50] Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques: article 3, https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006068396 (accessed on: 26.07.2023).

by an advocate or an attorney at law acting *ex officio*. The same applies to trainee advocates and trainee attorneys at law.

4. A significant disadvantage is the lack of the possibility of (optionally) an advocate, an attorney at law and a notary making reference to religious content: "So help me God" – in taking their oath. Only judges and prosecutors (since 1 October 2001) and bailiffs (since 1 January 2019) have had such a possibility. It is not entirely clear why there is such (perhaps discriminatory) diversity in this respect among the legal professions in Poland.
5. The authorities of the professional self-government (of advocates, attorneys at law, notaries and court bailiffs) have no legal grounds (constitutional, statutory) to enact codes (a set of rules) of ethics or other standards that would allow lawyers to invoke conscientious objection.
6. A (quite defective, imperfect) substitute for the right of advocates and attorneys at law to use conscientious objection is a list kept by the authorities of professional self-government of those lawyers who do not want to conduct a given type of proceedings (criminal cases, divorce cases, etc.).
7. Neither the authorities of the professional self-government (of advocates, attorneys at law, notaries and court bailiffs) nor individual law firms have the right to invoke conscientious objection.

8. *De lege ferenda* postulates

8.1. DIFFERENT VERSIONS OF FUTURE LEGISLATION

In conclusion, it must be said that the possibility for a lawyer in Poland to invoke conscientious objection or the conscience clause is not a necessary element for refusing to provide legal services. In legal practice, conscientious objection is not often raised and exposed. This does not mean that issues of legal conscientious objection are not important to this community and barely present. Nevertheless, the existence of such a provision – the right to conscientious objection (the conscience clause) in Polish law, or more precisely in corporate laws, would facilitate the refusal procedure in the case of

an advocate or attorney at law acting not only by choice but, above all, *ex officio*.

1. Thus, the legal regulation of conscientious objection (alternatively the conscience clause) can be put forward in four laws for selected legal professions:
   i. An advocate may refuse to defend a client or any other advocacy activity that he/she considers to be against his/her conscience.
   ii. An attorney at law may refuse to defend a client or perform any other activity of an attorney at law that he/she considers to be against his/her conscience.
   iii. A notary may refuse to create a notarial act that he/she considers to be against his/her conscience.
   iv. *A bailiff may refuse an act of bailiff which he/she considers to be against his/her conscience.*
2. Advocates, attorneys at law and notaries could also be allowed, optionally, to take the oath with the words "So help me God". Appropriate legal regulations could be included in each of the corporate laws, following the example of the Law on Bailiffs.

8.2. LIMITATIONS ON THE USE OF CONSCIENTIOUS OBJECTION

It can also be considered whether the conscience clause proposed in such a way should be full and unconditional, or whether it should have limitations. One can imagine legal regulations in Poland allowing lawyers to exercise conscientious objection (the conscience clause), but restricted by the obligation to indicate a real possibility to acquire legal assistance from another lawyer (or an institution of professional self-government). For instance, "An advocate who refrains from defending or performing another act of an advocate for reasons of conscience is obliged to indicate another lawyer from whom the client will obtain the requested assistance". It would seem that this would be a mere technical activity. Yet the question arises whether such a limitation of the conscience clause imposed on an advocate, obliging him/her to indicate a real possibility of providing

a service inconsistent with his/her conscience, does not constitute a limitation of his/her freedom of conscience as a human being.

The mere fact that there is an obligation to seek and name another lawyer who performs objectionable activities may result in a threat to the so-called moral integrity in that naming lawyer. The effect of such legal regulations may be, in practice, the so-called "chilling effect" which consists in a lawyer's failure to exercise his/her right to freedom of conscience (the conscience clause). Any act of invoking the conscience clause is overt, and here another doubt may also arise as to whether this will not in turn violate the constitutional guarantee (Article 53, para. 7) of the lawyer invoking it.

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The Freedom of Conscience in the Institutional Aspect – The Essence of the Issue

Introduction

Conscientious objection is an individual subject's objection to some formally binding legal norm, rather than a challenge to the validity of the entire system of law governed by the state. In the idea of acting in the name of conscientious objection, the idea is to heal a given community by correcting a binding law that the beneficiary of the conscientious objection believes to be an erroneous law. In a democratic state under the rule of law, every person has the right to autonomously choose the goals he or she wants to pursue, the model of life and the system of values. Here, then, is the place for the so-called conscience clause, which is intended to help resolve the conflict that has arisen, which is essentially a conflict of values and the norms protecting those values. The article presents the issue of the conscience clause in the context of the realisation of the right to freedom of conscience. The essence of the so-called "conscience clause" is to respond when a legal norm orders the addressee to behave in a way that contradicts his conscience, thereby interfering with the essence of a person's right and freedom of conscience. The right to conscientious objection also requires guarantees of an institutional nature. Institutional protection of the human right to freedom of conscience must not be of a superficial nature.

When conscientious objection is approached in a way that precludes the evaluation of objections with regard to their contents,

people will be tempted to comment that this would open the door to any kind of objection, however absurd or even "dangerous". This is the understanding implied by the Constitutional Tribunal ruling in 2015. Liberals might want to define conscience in such a way that only "agreeable" objections can be labelled conscientious, or alternatively to make a distinction (*a priori*) between acceptable and unacceptable conscientious objection.

According to K. Wojtyła, "Conscience is first of all seeking and inquiring after this truth" so that its judgment is in "conformity with the reality of the good". Conscience, therefore, represents the practical intellect's aiming at truth in the sphere of values. This effort of conscience is "most closely connected with the reality of human freedom", because the truth discovered by conscience ensures free moral agency and preserves the "fundamental value of the person as subject of the will".[1] This chapter is devoted to the issue of freedom of conscience in the institutional aspect.

1. Freedom of conscience

Freedom of conscience is a fundamental, primary value, resulting directly from human dignity, therefore the so-called "conscience clause" occurring in state law for certain professions should not be understood as a legal basis for this freedom. Freedom of conscience and the right to act in accordance with one's conscience does not require an explicit statutory basis[2]

In a democratic state under the rule of law, every person has the right to autonomously choose the goals he or she wants to pursue, the model of life and the system of values, and even to determine what is right and wrong.[3] Here, then, is the place for the so-called

[1] K. Wojtyła, *Human Nature as the Basis of Ethical Formation*, [in:] *Person and Community: Selected Essays*, translated by T. Sandok, New York 1993, p. 263.

[2] K. Orzeszyna, *The conscience clause as a guarantee of the realisation of the right to freedom of conscience*, "Medyczna Wokanda" 2017, No. 9, p. 19.

[3] L. Garlicki, *Komentarz do art. 9*, [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, *Komentarz do artykułów 1–18*, Vol. 1, Warszawa 2010, p. 557.

conscience clause, which is intended to help resolve the conflict that has arisen, which is essentially a conflict of values and the norms protecting those values.[4]

The Universal Declaration of Human Rights is the first "law" that enshrines human rights in a charter according to the principle of universality and which is considered to have the greatest impact. According to Article 18:

> 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 teaching, practice, worship and observance.

According to Article 18 of the International Covenant on Civil and Political Rights:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and

[4] K. Orzeszyna, *The conscience…*, *op. cit*., p. 20.

> moral education of their children in conformity with their own convictions.

The "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief", passed with Resolution No. 36/55 by the UN General Assembly on 25 November 1981, affirms the previously declared norms that guarantee freedom of religion and urges states to take effective action to prevent and eliminate negative discrimination based on religion or belief. The Declaration affords special protection to the rights of parents in raising their children according to their beliefs.

The Convention on the Rights of the Child adopted in New York on 20 November 1989, declares the right of the child to freedom of thought and religion and also acknowledges that parents have the right to provide direction in a manner consistent with the evolving capacities of the child in Article 14:

> 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
> 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

International human rights conventions contain fundamentally similar provisions on the freedom of religion, although the Convention on the Rights of the Child and the other documents lay differing degrees of emphasis on protecting the integrity of the beliefs of families. Both the Covenant and the Convention make a fundamental distinction between the freedom of religion and the

freedom of religious observance: while the former is considered an absolute right, the latter may be restricted for certain reasons.

The International Covenant on Civil and Political Rights, states Article 8: Freedom from Slavery, Servitude, and Forced Labour; paragraph 3 (c)(ii): "any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors". The Human Rights Committee's position on the recognition of the right to conscientious objection has evolved over the years. In the case of L.T.K. v. Finland, the applicant was convicted of refusing to perform military service, even as alternative service. The Committee noted that the applicant was not convicted because of his beliefs or opinions as such, but because of his refusal to perform military service. In addition, the Committee noted that there are no provisions in the Covenant that include a right to conscientious objection.[5]

According to the European Convention, the individual has the full right to autonomy of thought, conscience and religion. Thus, it is guaranteed, among other things, that the individual has the freedom to choose the system of values that they wish to follow and through the prism of which they will evaluate the reality around them.

Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, states:

> 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,

[5] See Article 5.2: "The Human Rights Committee observes in this connection that, according to the author's own account he was not prosecuted and sentenced because of this beliefs or opinions as such, but because he refused to perform military service. The Covenant does not provide for the rights to conscientious objection; neither Article 18 nor Article 19 of the Covenant, especially taking into account paragraph 3(c)(ii) of Article 8, can be construed as implying that right. The author does not claim that there were any procedural defects in the judicial proceedings against him, which themselves could have constituted a violation of any of the provisions of the Covenant, or that he was sentenced contrary to law".

> 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.

Article 14 of the Convention provides for the prohibition of discrimination:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

For the freedom of religion, it is important to note that Article 2 of Protocol 1 expressly acknowledges the right of parents to provide education in conformity with their religious convictions:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

In addition to the historical role of the freedom of religion, the freedom of thought, conscience, and religion form an inseparable and prominent fundamental right that, according to the Convention, is one of the pillars of a "democratic society". Moreover, religion is a fundamental element of the cultural identities of nations. It is quite clear that G. Bonello, a former Maltese member of the Court, expressed a concurring opinion to the judgment in Lausti v. Italy:

> A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. (…) A European court should not be called upon to bankrupt centuries of European tradition.[6]

Resolution No. 1763 on the Right to Conscientious Objection in Lawful Medical Care, 2010 guarantees "No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason". Legal regulations should safeguard the freedom of conscience, should guard the private beliefs of the citizen, and not force them to accept views incompatible with personal thoughts.[7]

2. The medical conscience clause in Poland

The freedom of the individual in seeking the truth and in the corresponding profession of his or her religious convictions must be specifically guaranteed within the juridical structure of society; that is, it must be recognised and confirmed by civil law as a personal and inalienable right in order to be safeguarded from any kind of coercion by individuals, social groups or any human power (Dignitatis Humanae, 2).

This is simply to say "not every ethical norm is a legal norm, just as not every legal norm is assigned to a specific moral system".[8]

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[6] European Court of Human Rights, 18 March 2011, Case of Lautsi v. Italy, Application No. 30814/06.

[7] J. Czekajewska, *Ethical Aspects of the Conscience Clause in Polish Medical Law*, "Kultura i Edukacja" 2018, No. 4(122), p. 208.

[8] J. Czekajewska, *Ethical Aspects…*, *op. cit.*, p. 207.

However, according to the definition of Galewicz, the clause of conscience is understood in Polish medical law as both an ethical norm and a legal norm.[9]

The medical conscience clause is a legal norm under which healthcare professionals are authorised to, under certain conditions, waive the performance of medical services accepted by their applicable legislation, but incompatible with their conscience. The 1997 Constitution of the Republic of Poland in several articles, among others: 31, 35(2), 47, 48, 53, guarantees freedom of belief and freedom of conscience and a person's approved ethical system resulting from their accepted worldview. Thus, the statutory regulation of the so-called conscience clause, that is, the refusal to act in accordance with the disposition of a legal norm due to a negative moral evaluation of the behaviour that is the subject of the disposition of the legal norm cannot be considered someone's privilege or a specific form of expression of the attitudes of human conscience.

The most socially relevant situations of conflicts of conscience are regulated in the provisions that make up the so-called "conscience clauses". In Polish medical law, the conscience clause is understood as both a moral and legal norm which gives consent to selected medical professions (doctors, nurses, midwives, and laboratory technicians) to withdraw certain activities due to ethical objections. According to P. Stanisz, conscience clauses create "a state of the highest possible legal certainty."[10] The verdict of the Constitutional Tribunal of 7 October 2015 represents a watershed moment for the Polish legislature.[11] The judgment confirmed that

[9] W. Galewicz, *Jak rozumieć medyczną klauzulę sumienia?*, "Diametros" 2012, No. 34, pp. 137–141; J. Czekajewska, *Szacunek dla autonomii kobiety ciężarnej a wolność sumienia lekarza. Etyczne konsekwencje odmowy wykonania świadczeń zdrowotnych przez pracowników służby zdrowia*, "Kultura i Edukacja" 2016, No. 3, pp. 33–46.

[10] P. Stanisz, *Konstytucyjny status prawa do sprzeciwu sumienia (uwagi na kanwie wyroku Trybunału Konstytucyjnego z 7 października 2015 r., K 12/14)*, [in:] M. Szabłowska-Juckiewicz, B. Rutkowska, A. Napiórkowska (eds.), *Księga Jubileuszowa Profesora Grzegorza Goździewicza. Tendencje rozwojowe indywidualnego i zbiorowego prawa pracy*, Toruń 2017, p. 176.

[11] A doctor in the current state of the law in Poland: 1) never has to disclose the content of the religious or moral views that are the basis for conscientious

the right to refuse to act contrary to conscience is an essential part of freedom of conscience.

The possibility of exercising this right is not limited to situations in which it has been explicitly stipulated in laws.

The Constitutional Tribunal (hereinafter CT) stated that:

> the right of a physician to invoke a conscience clause within medical law relations derives not from Article 39 of the Law on Physician and Dentist Professions (hereinafter the Law), but directly from constitutional provisions and acts of international law. Therefore, there is no basis for formulating a separate right to a "conscience clause" and – as a consequence – it is clear that the legislator cannot arbitrarily shape this "privilege" or abolish it, but must respect the constitutional conditions for establishing restrictions on human and civil liberties and rights (Articles 30 and 31(3) of the Constitution).[12]

Until 2015, the discussion around the medical conscience clause in Poland focused primarily on the content of the norm of Article 39 of the Act of December 5, 1996, (herein after the Act) on the professions of physician and dentist.[13] On the one hand, there was

objection; 2) never has to justify how a conscientious objection would prevent him from performing a given service; 3) no one can verify or control his prior statement of refusal to perform services (a possible control of the statement of refusal can only apply to a situation in which the doctor does not share the belief of either the patient or his superior that "delay could cause danger of loss of life, etc"; 4) he can report his refusal to perform a given type of service at any time during his work; 5) may, at any time during work, report a refusal to provide a particular type of service.

[12] Point 4.4.5 of Judgement of the Constitutional Tribunal of 7 October 2015, K 12/14, p. 31.

[13] M. Skwarzyński, *Korzystanie z klauzuli sumienia, jako realizacja wolności wewnętrznej czy/i zewnętrznej*, "Opolskie Studia Administracyjno-Prawne" 2015, Vol. 13, No. 4; M. Skwarzyński, *Sprzeciw sumienia w adwokaturze*, [in:] A. Mezglewski, A. Tunia (eds.), *Standardy bezstronności światopoglądowej władz publicznych*, Lublin 2013, pp. 201–220; M. Skwarzyński, *Sprzeciw sumienia sędziego jako element polityki wyznaniowej*, [in:] M. Skwarzyński, P. Steczkowski (eds.), *Polityka wyznaniowa a prawo III Rzeczypospolitej*, Lublin 2016,

a dispute over the scope of freedom of conscience; on the other hand, there was a discussion about the phrases used in this provision to apply the conscience clause in practice.[14]

The subject of the content of the conscience clause was first addressed by W. Galewicz.[15] This author stated that "under certain conditions, a doctor may refuse to perform legally accepted services of a certain type if they are incompatible with conscience". Galewicz took as a starting point May's concept, according to which conscientious objection is a negative ethical judgement indicating the immorality of certain medical actions.[16] According to Galewicz, actions taken by a doctor can raise objections to his conscience in two ways:

i. They may be immoral, because in the doctor's opinion any activity of this kind is immoral (e.g., killing a human being).

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pp. 155–176; J. Pawlikowski, *Prawo do sprzeciwu sumienia w ramach legalnej opieki medycznej. Rezolucja nr 1763 Zgromadzenia Parlamentarnego Rady Europy z dnia 7 października 2010 r.*, "Studia z Prawa Wyznaniowego" 2011, t. 14, pp. 313–337; M. Skwarzyński, *Orzecznictwo Europejskiego Trybunału Praw Człowieka w zakresie klauzuli sumienia*, [in:] P. Stanisz, A.M. Abramowicz, M. Czelny, M. Ordon, M. Zawiślak (eds.), *Aktualne problemy wolności myśli, sumienia i religii*, Lublin 2015, pp. 285–293; M. Hucał, *Europejski Trybunał Praw Człowieka – obrońca czy agresor w kontekście praw osób wierzących*, [in:] P. Stanisz, A.M. Abramowicz, M. Czelny, M. Ordon, M. Zawiślak, *Aktualne problemy wolności myśli, sumienia i religii*, Lublin 2015; A. Abramowicz, *Uzewnętrznianie symboli religijnych w miejscu pracy w świetle orzeczenia Europejskiego Trybunału Praw Człowieka z dnia 15 stycznia 2013 r. w sprawie Eweida i inni v. Zjednoczone Królestwo*, *op. cit*., pp. 11–19; P. Stanisz, J. Pawlikowski, M. Ordon (eds.), *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, Lublin 2014; A. Machnikowska, *Klauzula sumienia w zawodzie prawnika*, [in:] O. Nawrot (ed.), *Klauzula sumienia w państwie prawa*, Sopot 2015, pp. 127–142; J. Zajadło, *Sędzia pomiędzy moralnym przekonaniem a wiernością prawu (na przykładzie orzecznictw sądów amerykańskich w sprawach niewolnictwa)*, [in:] *Klauzula sumienia w państwie…*, *op. cit*., pp. 143–161; Z. Cichoń, *Klauzula sumienia w różnych zawodach*, [in:] *Prawnik katolicki a wartości prawa*, Kraków 1999, pp. 44–51; P. Skuczyński, *Etyka adwokatów i radców prawnych*, Warszawa 2016.

[14] Z. Szawarski, *Nie masz prawa*, "Gazeta Wyborcza", 1 August 2014, p. 8; A. Zoll, *Każdy ma prawo do klauzuli sumienia*, "Gazeta Wyborcza", 19–20 July 2014, pp. 20–21.

[15] W. Galewicz, *Jak rozumieć…*, *op. cit.*, pp. 136–153.

[16] T. May, *Rights of Conscience in Health Care*, "Social Theory and Practice" 2001, No. 27(1), pp. 111–128.

ii. Are not immoral *per se*, and raise conscientious objection for reasons other than the nature of the activity itself.

Given the above, a doctor may exercise the conscience clause when he considers an activity based on his knowledge and experience to be medically unjustified (e.g., the use of antibiotics in a case of viral infection), harmful to the patient (persistent therapy) or of negligible therapeutic effectiveness (homeopathy).[17]

All this raises important questions. How do conscience and freedom of science correlate in such cases? Can doctors refuse to perform an activity on the basis that they do not believe in it (e.g., homeopathy) or because they consider it immoral (abortion)? These are two different issues. Belief will be subject to the law, in the sense that national courts will be able to assess the sincerity of beliefs, the degree to which the conduct is identified with the acts of the doctor in question, and whether they are immoral. The mere claim that an action is immoral carries with it the need to show incompatibility with the law and the system of social norms.

Another question arises: does conscientious objection have one specific content? What if doctors believe that refusing an abortion is immoral because it goes against free choice – can they perform an abortion (on the basis of their morality) even if it is against the law? Such a situation seems contrary to the dignity of the human person. But on the other hand, the limits of morality are set by the specific circumstances of time and place. It should be remembered that for years slavery was considered morally justified. Many years passed before the law considered slavery immoral. It seems that today's world is much more advanced in protecting the dignity of the human person and more sensitive to human harm.

The subject of the conscience clause is not only moral objections, but also the doctor's doubts about which medical actions are appropriate and which are inappropriate. This very often means choosing the lesser evil, but in fact conscientious objection should mean that the doctor is free to choose medical actions.

[17] M. Klinowski, *Czy sumienie zawodowe jest kwestią moralności?*, "Przegląd Prawa Medycznego" 2019, No. 2, p. 10.

According to R. Card's concept, the invocation of the conscientious objection should always include a justification. The moral objections that are the rationale and basis for exercising the conscience clause must be:

1. authentic (*a contrario* cannot be hypocrisy);
2. appropriate (not based on false knowledge);
3. of reliable rank (not an expression of racial or religious differences).[18]

The conscience clause applies to believing as well as non-believing physicians, and is intended to guarantee that they will refuse to perform an inappropriate health service. James Childress argues that "conscience is a kind of self-consciousness on the part of a person, the subject of which is his or her own conduct and the value or worthlessness attached to it, judged in the light of standards considered fundamental by the person".[19]

Here there is an important problem of what is the source of standards (foundations) of valuation. James Childress believes that standards are not necessarily moral rules. The category of conscience is broad and includes the protection of the moral integrity of the person,[20] which means in practice that agreement with oneself simply has value and is subject to legal protection.

The CT judgment ruled on the unconstitutionality of some of the conditions for a doctor's exercise of the right under Article 39 of the law, but directly from constitutional provisions and acts of international law.[21] This means directly that freedom of conscience is to be respected regardless of whether there are statutory provisions supporting it. Thus, the CT determined that the possibility of evading legal obligations on the basis of an appeal to conscience should apply to all practitioners of any profession.

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[18] R. Card, *Reasonability and Conscientious Objection in Medicine: A Reply to Marsch and an Elaboration of the Reason-Giving Requirement*, "Bioethics" 2014, No. 28/6, pp. 320–326.

[19] J.F. Childress, *Appeals to Conscience*, "Ethics" 1979, No. 89/4, pp. 317–318.

[20] M. Wicclair, *Negative and Positive Claims of Conscience*, "Cambridge Quarterly of Healthcare Ethics" 2009, No. 18, pp. 14–22.

[21] Judgment of the Constitutional Tribunal of 7 October 2015, p. 30.

The verdict of the Constitutional Tribunal has received a lot of criticism as well as approval.[22] Critics have pointed out that doctors have obtained too far-reaching guarantees of freedom of conscience at the expense of patients' rights.[23] W. Brzozowski pointed out that it is wrong to derive a doctor's right to conscientious objection directly from Article 53(1) of the Constitution.[24]

The CT verdict set in motion an avalanche of demands by representatives of various professional groups on the grounds of invoking the conscience clause to refuse to perform professional activities/services. One of the first was the demand to write into the Pharmaceutical Law the possibility for a pharmacist to refuse to dispense or ensure the purchase of a medicinal product. Subsequent very high-profile cases were the refusal to print posters for LGBT organisations,[25] the refusal to kill a carp, and the refusal to serve a public television journalist believed to represent the interests of the ruling party. Still another case was the refusal to protect a shopping mall where controversial paintings were on display due to the conscientious objection of the head of security.[26]

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[22] P. Stanisz, *Konstytucyjny status prawa…*, *op. cit.*

[23] Z. Szawarski, *Klauzula sumienia a prawa pacjenta*, "Res Humana" 2015, No. 5, pp. 12–16.

[24] W. Brzozowski, *Prawo lekarza do sprzeciwu sumienia (po wyroku Trybunału Konstytucyjnego)*, "Państwo i Prawo" 2017, No. 7, pp. 23–36.

[25] In 2015, a man refused to print materials promoting the LGBT Business Forum Foundation. He argued that he did not agree to promote this type of ideology. At the request of Ombudsman, the police then filed a motion to the court to punish the printer. Both the Lodz-Widzew District Court in Lodz and the District Court in Lodz decided to convict the printer under Article 138 of the Misdemeanour Code (Whoever, engaged in the professional performance of services, demands and charges more than the applicable payment for the performance, or intentionally refuses, without reasonable justification, the performance to which he is obligated, shall be subject to a fine). Despite an appeal by the Attorney General, the verdict was upheld by the Supreme Court. In June 2019 the Constitutional Court ruled that the provision under which the man was convicted was unconstitutional. According to the Constitutional Court, Article 138 of the Misdemeanour Code "constitutes an interference with the freedom of the service provider, in particular the right to decide whether to enter into a contract, the right to express one's own opinions or to act in accordance with one's conscience".

[26] M. Klinowski, *Czy sumienie…*, *op. cit.*, pp. 15–16.

After the 2015 verdict of the Constitutional Tribunal, it became clear that everyone has the right to conscientious objection, and this follows directly from the Constitution (Article 53(1) freedom of conscience and religion). However, it should be pointed out that in Poland we have an established practice of examining the legitimacy of invoking the conscientious objection clause in the context of the refusal of armed struggle (the so-called alternative service).[27] Thus, the exercise of the right to conscientious objection is subject to state control based on the criteria expressed in Article 53(5) of the Constitution in relation to religious beliefs, and to control based on Article 31(3) of the Constitution in relation to non-religious beliefs.

The consequence of the judgment of the Constitutional Tribunal is that the right to conscientious objection is granted not only to physicians, but also to other representatives of professional groups, and specifically, all professional groups have such a right.[28]

The discussed judgment of the Constitutional Tribunal confirmed the physician's conscientious objection clause contained in Article 53(1) of the Constitution, and this freedom belongs to everyone and is superior to other rights and freedoms.

The current Code of Medical Ethics of 14 December 1991 (CME), regulates the situation of conscientious objection. Article 7 stipulates that "in particularly justified cases, a physician may not undertake or refrain from treating a patient, except in cases of urgency. In not undertaking or withdrawing from treatment, the doctor shall indicate to the patient another possibility of obtaining medical assistance".

Article 6, on the other hand, stipulates "The doctor is free to choose the methods of treatment he deems most effective. However, he should limit medical actions to those actually needed by the patient in accordance with the current state of knowledge".

Article 4 contains a directive for physicians' proper behaviour: "In order to fulfil his tasks, the doctor should maintain freedom of

[27] T. Żuradzki, *Uzasadnienie sprzeciwu sumienia: lekarze, poborowi i żołnierze*, "Diametros" 2016, No. 47.

[28] W. Brzozowski, *Prawo lekarza…*, *op. cit*., p. 31; A. Zoll, *Każdy ma prawo do klauzuli sumienia…*, *op. cit*., p. 20.

professional action in accordance with his conscience and contemporary medical knowledge".

Articles 4 and 6 of the CME define the scope of professional freedom of action. Medical actions must be necessary and effective in light of current medical knowledge. CME states that medical freedom of action includes refusing to treat a patient "in particularly justified cases". The highest good is the patient's health. In a situation where medical knowledge does not give confidence in the appropriateness of the action then the doctor should refrain from treating the patient. The exception is a situation of health emergency.

The theme of a doctor's professional conscience differing from (worldview) conscience has appeared in the literature. According to this view, worldview, religious beliefs, and political views should not affect the medical profession. In the medical profession, only medical knowledge and practical experience of its application should count.[29]

According to this concept, a doctor's conscience determines in a given professional situation what duties doctors have, not what their duties are in light of their religion or worldview. The medical profession is not about having moral beliefs, but about the ability to apply medical knowledge in practice. This concept actually gets to the heart of the matter, which is what society expects from a doctor. Whether it is medical knowledge based on the values expressed in the Code of Medical Ethics is a sufficient guarantee of good medical practice, or whether only the moral convictions of physicians that constitute a proper voucher for the practice of the profession.

Here the question of protecting collective conscience arises. The possibility of undermining the validity of the law on the basis of an individual conscience clause means undermining the universality of the validity of the law. Thus, only due protection of collective freedom of conscience can, in view of the differences in moral beliefs and judgements among members of society, lead to the effective realisation of freedom of conscience. The validity (legal protection) of the collective conscience clause will allow for the preservation of one's individual conscience among members of

[29] M. Klinowski, *Czy sumienie…*, *op. cit*., pp. 22–23.

society sharing the same values. Thus, it is a situation in which the individual will feel safe, since the refusal to apply a given law on the basis of individual conscience will not settle the question of the legitimacy of the law in question. The collective conscience clause will be derived from membership in a particular moral (social) community. The autonomy of the individual in this case must be reinforced by the autonomy of a certain collective within which the individual functions. After all, it cannot be the case that an individual will be prevented from practicing his profession freely because of the lack of approval of his conduct by other members of a given community.

It is the duty of the state to ensure that every person is protected from proselytism. An institutional protection of conscience clause emanating from the individual conscience clause seems to achieve the goal of public safety and public morality. The idea is to nullify conflict situations within a given social group. According to J. Czekajewska the category of "collective conscience" is incompatible with the principles of medical ethics and medical law.[30]

3. Conscience in education

"The possibility of undermining the validity of the law on the basis of personal moral convictions, in the face of significant differences in moral beliefs and assessments among members of society, means undermining the universality of the validity of the law".[31] This takes on particular significance in a democratic state of law, where the undermining of the content of the law (immorality of the established law) should be carried out within the framework of the action of specific institutions and bodies. In a situation of conflict of values, including the conflict of morality and law, the conflict should be resolved by the relevant judicial or other bodies. Refusing to apply particular regulation on the basis of one's conscience (moral judgment) means that the individual himself decides the validity of

[30] J. Czekajewska, *Ethica…*, *op. cit.*, p. 216.
[31] M. Klinowski, *Czy sumienie…*, *op. cit.*, p. 28.

the law and supersedes the relevant bodies as to the validity of the law. Therefore, a good solution is to introduce effective protection of collective freedom of conscience. Then, when the same moral principles apply in a community, individuals will be able to act according to the guidance of their conscience without having to challenge the law. The applicability of the law will be derived from belonging to the community conscience of a given social group. In public educational institutions, the application of the conscience clause is important in the context of parents' right to raise their children in accordance with their beliefs.

The Polish Constitution recognised the protection of parenthood and family as a constitutional principle (Article 18): "(…) Marriage as a union between a man and a woman, family, maternity and parenthood are under the protection and guardianship of the Republic of Poland (….)." Among the fundamental rights and freedoms were the right of parents to raise their children, which may be restricted or deprived only in cases specified by law and on the basis of a final judgment (Article 48(2)): "(…) Parents have the right to raise their children in accordance with their own convictions. This upbringing should take into account the maturity of the child, as well as the child's freedom of conscience and religion and his beliefs. Restriction or deprivation of parental rights may take place only in cases specified by law and only on the basis of a final court decision (…)." Article 72 indicates the rights of the child and their constitutional protection and the primacy of parental custody: "(…) The Republic of Poland ensures the protection of the rights of the child (…). A child deprived of parental care has the right to care and assistance from public authorities (…). The duty of public authorities to provide special assistance to the mother before and after the birth of the child" (Article 71) – "(…) The mother before and after the birth of the child has the right to special assistance from public authorities (…)."

The child's right to be raised in the family finds full expression in the norms of the Convention on the Rights of the Child. The preamble already states that the family as "the basic cell of society and the natural environment for the development and well-being of all its members, especially children (…) should be given the

necessary protection and support". States Parties should respect the responsibility, rights and duties of parents (Article 5): "(…) States Parties shall respect the responsibility, right and duty of parents or, where appropriate, members of the extended family or the community, in accordance with local custom, legal guardians or other persons legally responsible for the child, to provide for the child, in a manner consistent with the development of the child's capacities, the opportunity to guide and advise the child in the exercise by the child of the rights conferred by the present Convention (…)," including the child's right to be raised by his parents (Articles 7 and 18): "(…) the child, from the moment of birth, shall have the right to receive a name, to acquire a nationality and, where possible, the right to know his parents and to remain in their care (…)", Article 7; "(…) States Parties shall make every possible effort for the full recognition of the principle that parents share responsibility for the upbringing and development of the child (…)", Article 18. Under the principle of subsidiarity, it is the duty of the State to support families in the realisation of their responsibilities (Article 18(2)). The Convention places special emphasis on respecting the primacy of parents in the custody and upbringing of children, which stems from the natural order.

The child's right to upbringing in the family falls within the scope of: the recognition by all of the child's subjectivity in legal and practical terms; the existence of obligations of parents, and legal guardians towards the child; the state's obligation to create conditions for the realisation of the child's right to upbringing in the family through appropriate legislation, in the implementation of pro-family legal, social and economic policies.

Under Polish law, the basic act regulating in detail the issue of relations between parents and children is the Family and Guardianship Code. The child's right to upbringing in the family is realised through the relevant provisions of the Social Welfare Act and the Education System Act.

Recognising the principle of the autonomy and primacy of the family, the Polish Constitution allows for the possibility of interference in the sphere of parental authority (Article 48(2): "(…) Limitation or deprivation of parental authority may take place only in

cases specified by law and only on the basis of a final court decision (…)." Also, the Convention on the Rights of the Child, emphasising the autonomy of the family from external influences, allows for the possibility of interference in the family aimed at preventing an unfavourable situation for the child (Article 9(1)): "(…) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when the competent authorities, subject to judicial supervision, decide in accordance with the applicable law and the applicable procedure that such separation is necessary in the best interests of the child (…)", and in justified cases by separating the child from the family (Article 20): "(…) A child deprived temporarily or permanently of his or her family environment, or when, for reasons of his or her well-being, he or she cannot remain in that environment, shall be entitled to special protection and assistance from the State. States Parties shall, in accordance with their domestic law, provide foster care for such a child (…)."

The Convention on the Rights of the Child recommends that the best interests of the child be paramount in all actions concerning children (Article 3(1)). Thus, it is the best interest of the child that is the natural imperative to care for a person who is immature and dependent on others, with a view to the child as a valuable value in itself. According to K. Orzeszyna:

> the child, for the full and harmonious development of his personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. For the development of the child, it is very important to distinguish masculinity and femininity, which belong to the natural order, which is a biological, physical, spiritual, psychological and social reality. Thus, the Convention is the basis for the formulation of the child's own right to "both parents", i.e. to experience their care, to have a personal, emotional bond with the father and mother. The balanced development of a child's personality depends to a large extent on the parents and other people raising him. In all stages of a child's development, both parents participate in the formation of emotions and feelings, each

> in their own way, the man (father) as a man, the woman (mother) as a woman. This closeness of parents provides a strong foundation for the child's security in the surrounding environment.[32]

Taking the above into consideration in a school environment, "the supportive participation of parents in the process of creating a person in his or her identity and personality as a man or woman is also an invitation to the development of their children's masculinity and femininity".[33] Not necessarily such a vision of upbringing must be promoted by the state school. Here there is a conflict of interest between the state school and its secular system of upbringing, and a model of family upbringing based on a Christian vision of the world.

"Thus, even the rejection of the reference to God, is not the expression of a tolerance that desires to protect the non-theistic religions and the dignity of atheists and agnostics, but rather the expression of a conscience that would like to see God cancelled definitively from the public life of humanity, and relegated to the subjective realm of residual cultures of the past".[34]

The changing social setting changes the understanding of exemptions. The role of educational institutions maintained by religious communities has gained a significant role in Poland from kindergarten to university. Safeguarding the rights of religious communities for shaping the identity of these institutions has to be considered on the one hand, but a realistic approach to social reality has to be considered on the other.

The right to conscientious objection will mean, in a school environment, the ability to protect religious beliefs based on an accepted value system in one's own conscience. The issue here is not the exclusion of compulsory schooling due to inappropriate school content, but the guarantee of harmonious mental development and,

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[32] K. Orzeszyna, *Prawo dziecka do wychowania przez ojca i matkę*, "TEKA Komisji Prawniczej PAN Oddział w Lublinie" 2019, No. 12(2), p. 267.

[33] Ibidem, p. 267.

[34] https://www.catholiceducation.org/en/culture/catholic-contributions/cardinal-ratzinger-on-europe-s-crisis-of-culture.html (accessed on: 29.05.2024).

in extreme cases, the refusal to perform school duties on the basis of individual moral convictions.

The only solution to this conflict in the school environment is to introduce protection of religious/moral beliefs within the activities of the institution in question. In France, the wearing of religious symbols in public school was banned in order to protect students' religious beliefs from proselytizing. It seems, therefore, that the special protection of beliefs arising from freedom of conscience in school institutions should be directly related to the guarantee of conscientious objection understood as the conscience of the school. The school cannot assume the role of a promoter of inappropriate content, and yet this is what can happen within the framework of the current legislation, starting with curricular content and ending with the selection and control of teaching staff.

The balance between the secular nature of the school and the promotion of religious/moral content is at the heart of this dispute. From the right to freedom of conscience comes conscientious objection. One cannot be indifferent to indoctrination in a state school, which can take various forms. Teachers and also students must therefore be protected from the influence of negative content opposed to their religious beliefs (such could be issues of gender equality and the theory of evolution) with the limits of criticism. On the other hand, the same teachers and students can influence each other in negative ways. The idea of a secular school therefore seems to be to promote equality for all and the prohibition of all discrimination. The problem arises when either the content of teaching or the way it is delivered contradicts the values of individual members of the school community. Here we touch on a fundamental issue, namely, to what extent does the universal and general conscience clause imply the right to refuse to perform an employee's duty that conflicts with the employee's conscientiously held beliefs. This problem has been recognised in the literature.[35]

[35] M. Mielczarek, *Realizacja wolności religijnej w zatrudnieniu pracowniczym*, Warszawa 2013, pp. 186–188; J. Stelina, *Klauzula sumienia w prawie pracy*, [in:] O. Nawrot (ed.), *Klauzula sumienia w państwie prawa*, Sopot 2015, p. 112.

P. Stanisz noted that the exercise of the general conscience clause in the context of the right to manifest religion through clothing or symbols, or to perform activities (labour duties) that are contrary to accepted moral principles, can only be done on the basis of the imitative clauses expressed in Article 31(3) of the Constitution. Thus, in the event of an employer-employee dispute, any restriction on the exercise of freedom of conscience must comply with Article 31(3) of the Constitution.[36]

The Constitution provides special protection to parents in determining the religious education their children receive. Ordinance of the Minister of Education of 13 July 2007 on the marking of pupils' work introduced the rule that marks obtained for religious education class or ethics would be included in the calculation of the "average mark" obtained by a pupil in a given school year and at the end of a given level of schooling. In this respect the ECHR observes that the above rule may have a real adverse impact on the situation of pupils like the applicant who could not, despite their wishes, follow a course in ethics. Such pupils would either find it more difficult to increase their average mark as they could not follow the desired optional subject or might feel pressurised – against their conscience – to attend a religion class in order to improve their average. It is noteworthy in this respect that the Constitutional Court in its judgment of 2 December 2009 referred to the risk that the choice of religion as an optional subject could have been the result of pressure from local public opinion, but nevertheless did not address this issue as lying outside its jurisdiction.[37]

In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom of thought, conscience and religion in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.[38] The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise

[36] P. Stanisz, *Konstytucyjny status prawa…*, *op. cit.*, pp. 184–186.

[37] European Court of Human Rights 15 June 2010, Case of Grzelak v. Poland, Application No. 7710/02, para. 48.

[38] See: European Court of Human Rights 29 May 1993, Case of Kokkinakis v. Greece, Application No. 14307/88, cited above, para. 33.

of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society.[39]

Children and students have the right to participate in religious education (religion or ethics). The parent decides on participation. There are no legislative provisions regarding any possible disputes between the parents or between a parent and a child. General principles can be used to settle either of these potential conflicts. The parents have to come to an agreement between themselves regarding issues resulting from their worldview. Like other, sensitive issues regarding education, the parental decision governs any possible disputes between the parent and the child. Polish law allows freely to opt out from compulsory denominational religious education. Parents may make all decisions regarding religious affairs until the child is 18 years old; and after reaching the age of 18, the child may make independent decisions, including leaving school-based religious education.

The instruments of law are only of limited use for settling the internal relations of families. The State may take action against the decisions of the parents (for example, against the threat of female genital mutilation on religious grounds) to protect the rights of the child, though the general rule is to protect the religious integrity of the family. It is the natural right of parents to strive to pass on their own convictions and traditions to their children. It seems that the conscience clause could be applied when the parents' upbringing interferes with the moral integrity of the child. Such situations could occur in European society, where pluralism of views is the essence of democracy.

4. The institutional conscience

In the American literature, much attention has been devoted to the so-called institutional conscience. Elizabeth Sepper[40] presents three different grounds for applying institutional conscience:

[39] See: European Court of Human Rights 10 November 2005, Case of Leyla Şahin v. Turkey [GC], Application No. 44774/98, § 107, ECHR 2005-XI.

[40] E. Sepper, *Taking Conscience Seriously*, "Virginia Law Review" 2012, Vol. 98.

mission-operation theory; the theory of collective morality; moral association theory.

These theories will be the basis for considerations for the introduction of institutional conscience in Poland.

4.1. MISSION-OPERATION THEORY

The first view of institutional conscience (the "mission-operation" theory) maintains that a healthcare corporation has moral agency, and its mission statement and operational structure represent its conscience. It is important to note, however, that business ethics discussions treat corporate social responsibility and the propriety of integrating ethics into business. They thus focus largely on whether corporations can be held morally responsible. This approach situates moral agency in the fact that healthcare facilities have an identity larger than their constituent parts and an ability to carry out acts and affect individual lives. The John Paul II Hospital remains The John Paul II Hospital, even when a shift changes or its administrators are replaced; as such, it can be held legally (and perhaps morally) responsible for its actions.

The overarching moral identity or conscience of the institution is then expressed through its mission statement and ongoing processes (such as budgeting, strategic planning, and continuing education). Under this mission-operation theory, by harmonising its decisions with the mission statement, an institution makes moral judgements and strives to maintain its integrity, like a human being.[41]

For a healthcare entity to have a recognised "conscience", the reason for refusal must be referenced in its ethical policies or "existing or proposed religious, moral or ethical guidelines, mission statement,

[41] A. Smith Iltis, *Institutional Integrity in Roman Catholic Health Care Institutions*, "Christian Bioethics" 2001, No. 7(1), pp. 95, 98–102; K.W. Wildes, *Institutional Integrity: Approval, Toleration and Holy War or "Always True to You in My Fashion"*, "The Journal of Medicine and Philosophy" 1991, No. 16, Issue 2, pp. 211, 214–15.

constitution, bylaws, articles of incorporation, regulations or other relevant documents".[42]

This mission-operation theory emphasises the value of allowing an institution to create and maintain institution-wide norms that give it a distinct identity. The theory further appreciates that institutions may provide a mechanism for reinforcement of individual norms. For instance, a weak-willed provider of a particular religious moral viewpoint might seek out an institution with that religion's policies in order to bind himself to the mast.[43]

Many business ethics and philosophy scholars who argue in favour of corporate moral agency indicate that moral personhood, inherent to human beings, must be distinguished from the limited moral agency of a corporation.[44] The mission-operation theory, however, falls far short of establishing conscience. First, it ignores the dependence of the institution on individual human beings. Because the institution lacks consciousness and agency, individuals must necessarily interpret and apply any rules or principles to specific situations (potentially exercising individual conscience). Adoption of the mission statement, strategic planning and budgeting takes place through the action of individuals. Second, the mission-operation theory is too rigid and formalistic to establish corporate conscience as analogous to individual conscience. Moral

[42] Even in the absence of legislation, hospitals in USA have asserted this position in litigation. In Brophy v. New England Sinai Hospital, for instance, the court credited the importance of a hospital's ethical policies and described requiring feeding tube removal as an "unnecessary intrusion upon the hospital's ethical integrity". See cases: 497 N.E.2d 626, 639 (Mass. 1986); Delio v. Westchester County Medical Center, 516 N.Y.S.2d 677, 693 (N.Y. App. Div. 1987).

[43] E. Sepper, *Taking Conscience Seriously*, "Virginia Law Review" 2012, Vol. 98, p. 1543.

[44] P.A. French, *Corporate Ethics*, Harcourt 1995, p. 10 (admitting his initial use of the term "person" may have confused the issue); R.C. Manning, *Corporate Responsibility and Corporate Personhood*, "Journal of Business Ethics" 1984, Vol. 3, p. 77 (arguing that the concept of personhood is beyond what we can attribute to corporations); D.T. Ozar, *Do Corporations Have Moral Rights?*, "Journal of Business Ethics" 1985, Vol. 4, pp. 277, 279–280 (arguing corporations lack moral rights).

judgment is more nuanced than the application of rules without reference to context.[45]

4.2. THE THEORY OF COLLECTIVE MORALITY

By its own admission, the moral-collective theory fails to describe institutional conscience per se. First, it ascribes conscience to a group of people, not an institution. The institution itself does not have a conscience, but rather functions as a means by which various individuals express their moral convictions. Second, the theory does not describe conscience as such. By focusing on the collective, it neglects that conscience regards not simply shared moral values or religious affiliation, but rather how each individual presents themselves to the world. It assumes that individuals who agree on universal rules can perfectly predict their individual moral judgments in advance for every possible situation. But, as we know, principles like "life is inviolable" are often insufficiently determinate to dictate agreement on particular situations.

Indeed, even affiliation with the same religion has been shown not to significantly reduce conflicts between physicians and religious health facilities over patient care.[46]

Despite its theoretical flaws, the moral-collective theory may usefully describe the value society means to capture through the shorthand of the "institutional conscience". Legislative recognition of institutional conscience might then serve to ensure individuals can live out their conception of the good life in community with others, disassociate themselves from acts or individuals of whom they disapprove, and agree on institutional norms that reinforce their own convictions.[47]

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[45] E. Sepper, *Taking…*, *op. cit.*, pp. 1543–1544.
[46] Ibidem, p. 1544.
[47] Ibidem.

4.3. MORAL ASSOCIATION THEORY

The moral-collective theory does, however, have the advantage of accurately describing some subset of healthcare businesses. For instance, an individual doctor may seek to hire a nurse committed to treat patients according to his moral vision for the practice; in this most straightforward case, the individual and institutional conscience are one and the same. At a step removed, a group of family members who hold moral convictions in common might seek to exclude from the practice those who disagree. Another step down the road, several doctors might partner based on their religious ideals. Within these tight-knit groups of individuals, the moral-collective theory prioritises the collective over the dissenting individual. The underlying concern is preventing one individual from defeating the ability of the whole to live out their shared vision of a moral life. Large and less-cohesive entities, however, do not represent associations based on moral convictions. Corporations, as conglomerate entities, exist indefinitely and independently of changes in their founders or the individuals who act as administrators or employees.[48]

Those associated with them come together for reasons other than shared moral positions. Hospitals, for instance, encompass hundreds, if not thousands, of employees and affiliates. Working conditions, pay, and convenience, among other things, likely figure into decisions to work within a particular hospital. One cannot assume the individuals are all united in their moral convictions and that institutional policy reflects each of them. Indeed, as one recent nationally representative survey of obgyns concluded, physicians "working in religious hospitals are themselves religiously diverse", and those identifying as Roman Catholic are no more likely to work in a Catholic hospital.[49]

Recognising institutional conscience for large healthcare institutions departs radically from a theory based on collective moral convictions. In a pluralistic society and healthcare system, allowing

[48] Ibidem, p. 1545.
[49] Ibidem, p. 1546.

certain individuals to live out their moral beliefs through these institutions comes at the cost of imposing those individuals' moral beliefs on others (be they patients or colleagues). Within hospitals, each board member, administrator, medical staff member, and employee may vie for institutional decisions that reflect his or her ethical, moral, or religious views. Allowing any one of these groups to represent the "conscience" of the institution raises thorny questions about whose moral convictions count.[50]

One of two broad categories of persons could be the relevant group (nurses and doctors who deliver care and those responsible for founding and running the corporate structure: the trustees, the administrator(s), the founders, or the shareholders). For Church run hospitals, the religious organisation or order with which they are affiliated could be added. Privileging founders and administrators make practical sense with regard to big-picture business decisions about facility-wide priorities, percentage of charitable care, and staffing policies. However, it is much less clear why the moral beliefs of administrators (or founders) are the relevant consideration in the care of individual patients. The remoteness of administrators from patient care should caution against allowing their moral values to override the conscientious judgments of individual doctors and nurses in particular situations. Furthermore, hospitals are not characterised by the hierarchical structure that dominates most employing institutions. Traditionally (and still today in some states), the corporate practice of medicine doctrine barred any institutional control of medical decisions.[51]

For-profit and public institutions also present particular difficulties for a vision of institutional conscience as a moral collective. Within for-profit businesses, even though moral convictions might come into play, the profit motive (in some cases, an obligation to maximise shareholder wealth) must drive decision making. With regard to public facilities, one might expect commitment to provide all the legal, medically necessary treatment, to be the public

[50] Ibidem, pp. 1546–1547.
[51] Ibidem, p. 1547.

conscience. But, because institutional conscience is undefined in law and theory, administrators of public hospitals may insist on refusal.

In Conservatorship of Morrison v. Abramovice[52], for instance, the director of a public hospital asserted personal moral grounds against removing the patient's feeding tube. In sum, at a certain juncture, "institutional conscience" no longer recognizes coming together based on shared values. It becomes merely a way to impose moral convictions on others and thwart the individual exercise of conscience. At that point, it protects societal interests neither in conscience nor in moral association. This example shows that an institutional clause may not be an ideal legal solution.

5. The propositions for protecting institutional conscience

The abovementioned theories will be the basis for considerations for the introduction of institutional conscience in Poland. The institution's overarching moral identity or conscience is then expressed through its mission and ongoing processes (such as budgeting, strategic planning and continuing education). The following provisions can be made within the operations of a given medical entity: a statement of faith for physicians and for the institution, a statement of the institution's overarching purpose (saving and preserving human life in the spirit of Christian values, attention to preserving the moral integrity of employees, the hospital's ethics are based on all-human values, including Christian values, the dignity of each person allows the hospital to refuse anti-humanistic actions, and medical knowledge cannot be the basis for actions that violate the dignity of the human person.

In order for a healthcare entity to have a recognised "conscience", the reason for refusal must be mentioned in its ethical policy or "existing or proposed religious, moral or ethical guidelines, mission statement, constitution, bylaws, statutes, regulations or other

[52] Case Morrison v. Abramovice, 253 Cal. Rptr. 530, 531, California Courts of Appeal Cases 1988.

relevant documents". In this case, they are deciding on their own moral integrity and must express it in advance.

The theory of the moral collective can usefully describe the value that society wishes to capture through the shorthand of "institutional conscience". Legislative recognition of institutional conscience can then serve to ensure that individuals can realise their conception of the good life in community with others, disassociate themselves from acts or persons they disapprove of, and agree to institutional norms that reinforce their own beliefs. This can be achieved by introducing into internal regulations such provisions that guarantee collective freedom of conscience (the hospital recognises the special position of humanistic values, including Christian values; the hospital accepts the Christian system of values; the dignity of the human person is the basis of the hospital's actions; legal norms opposed to the dignity of the human person do not apply to professional conduct; violation of the dignity of the human person is a violation of hospital ethics; the hospital respects the individual conscience of its employees; conflicts are resolved in the light of the individual conscience of its employees).

6. Balance between individual conscience and institutional protection. Conflicts zones

This entire chapter is devoted to an analysis of the institutional protection of the conscience clause. Even if we were to accept the theoretical justifications for protecting institutional conscience, the distinction that legislation draws between refusing and willing institutions cannot be supported. To the extent existing legislation seeks to promote either mission adherence or moral collectives, it misses the mark. No principle explains why a refusing employer may impose its moral norms on staff, but a willing institution must accommodate individual providers' refusing consciences with which it disagrees.

Under the mission-operation theory, the expression of corporate identity through institutional norms does not distinguish refusing institutions. All hospitals assert the delivery of healthcare as their

central moral imperative; few specify restrictions on care as a matter of mission. Within both willing and refusing hospitals, ethics committees or administrators further define their approach to healthcare delivery through bylaws, guidelines, and institutional norms.[53] Through these processes, willing as much as refusing institutions maintain a particular identity.

Similarly, under the moral-collective theory, if institutions have a conscience by virtue of the individuals who make it up, it would seem reasonable to expect all similar institutions to have consciences sufficient to trump countervailing individual claims. Yet conscience legislation protects only the right of individuals to unite in their opposition to providing particular controversial treatments. Take one example of a willing provider that meets both the mission-operation and moral-collective theories of institutional conscience. According to Planned Parenthood of New York City, it expresses its mission and core values in what look to be moral terms: "every individual deserves equal access to the entire range of quality, science-based sexual and reproductive health care services", and "every woman deserves to be treated as a morally capable decision maker entitled to make her own sexual and reproductive decisions". The dichotomy is clear in a common statutory text, which states that "[a] hospital is not required to admit any patient for the purpose of performing an abortion" and that "any employee of a hospital, doctor, clinic or other medical or surgical facility in which an abortion has been authorized is not required to facilitate or participate" in an abortion.[54]

The doctors, nurses, and administrators within the institution share these core values and join together to provide medical care in accordance with its norms. Yet its institutional conscience goes unrecognised by law. Although Catholic healthcare is the paradigmatic case of the refusing institution, many faiths regard tending to the sick as part of their mission. Several limit non-therapeutic abortions or end-of-life care, but others express no such restrictions.

[53] E. Sepper, *Taking…*, *op. cit*., p. 1548.

[54] Planned Parenthood, Mission and Values of Planned Parenthood of New York City, http://www.plannedparenthood.org/nyc/mission-values-14915.htm (accessed on: 29.05.2024).

The mission statements and affiliations with religious organisations of healthcare facilities willing to provide some array of controversial procedures are often indistinguishable from those of Catholic institutions. Yet conscience clauses assume these religious hospitals, nursing homes and clinics do not qualify for institutional conscience. The legislation provides no guarantee they can fire or decline to hire employees or associates who disagree with their religious convictions in favour of care. What is more, almost all conscience clauses recognise institutional conscience as a consequence of secular institutions' refusal. Individual employers or practice groups qualify as having a conscience, irrespective of their relationship to any formal religious teachings or structures.

For example, a clinic that only refuses to provide non-therapeutic abortions typically will have to accommodate a doctor who will not participate in therapeutic abortions, sterilizations, or contraceptive care. The plain language of the broadest clauses seems to suggest that an individual provider could become a Christian Scientist, insist on prescribing prayer to all patients, and be owed accommodation, whether he works in a refusing or willing, religious or secular institution.

In essence, the clauses create a trump card for the most refusing refuser. One might argue that privileging refusing institutions is nonetheless justified because they would suffer greater harm if individuals perform treatments to which they object. According to this argument, the accommodating of a doctor willing to undertake an abortion would degrade norms that the institution carefully developed and fostered, even to the point of destroying its identity as a refusing institution. Under this account, the refusing institution experiences an ontological harm, analogous to the integrity of the individual. Accommodation also in effect requires the institution to subsidise financially an individual with whom it disagrees, making operating rooms, support staff, and instruments available. This argument, however, does not consider that a willing facility suffers the same type of harm. Its dedication to delivering all necessary care or honouring patient autonomy is damaged by the refuser who does neither. Like a refusing institution, a willing facility must subsidise an opposing viewpoint, in this case the refusal of care to patients

who need it. Accommodation of the refusing provider imposes more significant financial burdens, such as alternate (or duplicate) staffing.

The distinction also falls apart when we consider other types of institutions. An individual or small group practice that refuses to inform patients about contraceptives may experience harm (in the form of forced association) if required to retain an associate who, in good conscience, delivers this information. Any harm, however, will be no greater than that suffered by the provider committed to reproductive freedom who must accommodate a colleague who refuses to deliver contraceptive information.

One might plausibly claim, however, that within some subset of institutions, a willing facility more easily can adapt to the presence of dissenting individuals while accomplishing its institutional goals. According to this argument, a willing hospital can both maintain its identity and redistribute staff to ensure no medical provider participates in any treatment to which he or she conscientiously objects. In practice, hospitals generally seem able to reasonably accommodate some number of refusing staff. By contrast, a hospital that has a policy prohibiting sterilisation cannot allow a sterilisation to be performed.

It may be easier for a willing hospital to accommodate refusal while providing care, the distinction does not hold up as a general principle. First, refusing hospitals similarly can distance themselves from individual providers or procedures. Courts in the USA have recognised this by sometimes ordering refusing hospitals to allow doctors without objections or from outside the facility to remove feeding tubes in compliance with patients' wishes. Faced with hospital mergers and state laws requiring the provision of emergency contraception, refusing healthcare systems also have often worked out compromises, allowing the establishment of separate facilities to provide prohibited care or the entry of outsiders to deliver information and treatment.

As the analysis suggests, the evaluation of harm cannot take place without taking the patient into consideration. Refusal risks harm to patients in ways that conscientious commitment does not.

The absolute accommodation required by some state conscience clauses may lead to greater risk of patient injury. Pennsylvania law

seems to acknowledge this, allowing facilities that provide abortion or sterilisation to apply for an exemption from anti-discrimination provisions when too many staff members refuse to participate in the procedures.

At an extreme, a willing institution forced to accommodate refusing providers loses not only its identity as offering all necessary care, but its very identity as a healthcare facility. The central moral imperative of caring for patients cedes to the facilitation of moral expression. By contrast, even if forced to perform sterilisations, the refusing hospital retains its substantive character; it remains a hospital. If there is institutional conscience in a pro-life hospital then the hospital does not perform services against that conscience. On the other hand, if there is institutional conscience in a pro-choice hospital, abortion services are available and the doctor can only use the individual conscientious objection.

Ignoring the willing provider and privileging the refusing institution are opposite sides of the same coin. Each alone generates asymmetries in the treatment of willing and refusing individuals and of willing and refusing institutions. Each lacks a strong theoretical foundation to justify the disparate treatment of refusing and willing providers. Simply speaking, the institutional conscience guarantees the preservation of the moral integrity of a given hospital.

We need to remember that every person should not only have the opportunity to make judgements consistent with their private opinion, but also demand the power of the state to protect the freedom of conscience.

"If different researchers (ethicists, lawyers, doctors) assume that everyone has the right to freedom of belief, regardless of profession, sex, place of residence and other factors, conscience is an innate category on which humanity depends. It is an evaluation-normative court, which suggests ways to solve any difficulties. The more we care about our own morality, the more the decisions we make are prudent". An individual should be free to act according to his or her conscience, and an institutional clause of conscience may serve this purpose anytime and anywhere. Freedom of conscience does not only mean the right to self-opinion, but it is the right to act according to one's own conscience. Such freedom of belief not only offers

health care professionals the right to have their own health care but, above all, to perform professional activities in accordance with their own beliefs, and this right cannot be taken away (by anybody). Nevertheless, the disclosure of information about one's own beliefs raises a concern. According to the Constitution of the Republic of Poland: No one may be obliged by the public authorities to disclose their world views, religious beliefs or creeds (Article 53 Section 7 of the Constitution of the Republic of Poland, 1997). The obligation to present private religious, political or philosophical views is forbidden.

So, what can be done to protect the rights of the doctor to freedom of conscience and respect the rights of the patient? This question was already answered by the CT. The doctor, as before 2015, will not be able to invoke a conscience clause in situations in which a delay in performing a medical service could cause a danger of loss of life, grievous bodily harm or serious disorder of the patient's health. On the other hand, in other cases, for various reasons judged to be urgent, he will be able to refuse to perform a health service (not involving medical assistance) that is inconsistent with his conscience. Another problem is connected with the obligation of the state to ensure access to health care services even if they are morally non accepted (legal abortion in some circumstances). The Ombudsman pointed out that the responsibility "for ensuring that patients have access to lawful health care services without undue delay falls on the state". In accordance with Article 68(2) of the Constitution, it is the responsibility of public authorities to ensure equal access to health care services.

How is a hospital supposed to behave which will have an institutional conscience clause and all doctors will refuse abortions? Currently, such a situation seems theoretical, but possible. One solution is to employ doctors at such a facility to perform such procedures (gettonisti). A more radical one is for the hospital to opt out from public subsidies for not performing the medical procedure in question. In either of these two cases, the state's responsibility for the health care obligation arises. Everyone has right to public health care. It seems that this type of situation when there are no doctors performing a legal abortion procedure, the responsibility

of the hospital will be decided by the court. The benefits of an institutional conscience clause outweigh the possible inconvenience of performing medical procedures that are judged negatively morally.

Conclusions

The judgment of the Constitutional Tribunal seems to be crucial for the whole legal system; it can be said that the conscience clause applies to all professions. Despite its advantages, the proposal of the institutional conscience clause has several limitations. First, it does not solve the problem of patient access in areas underserved by individual doctors. In the most difficult cases, a particular service might become unavailable in a particular community because the sole specialist (or a number of specialists) refuses to provide it. In such instances, if one may suggest requiring an objector to render necessary care if no substitute provider can be found, creating incentives for the individual refuser to work in proximity to willing providers and for the state to mitigate the problem. Legislation similarly might consider a licensing scheme that requires a certain number of willing providers per refusing providers in a given area. Additionally, or alternatively, the state might offer inducements to bring willing providers to underserved areas.

Requiring hospitals and similar institutions to accommodate all consciences might discourage some religious organisations from establishing them, despite opportunities for creative compromises.

Consequently, some scholars recommend that conscience clauses be limited to institutions affiliated with a religious organisation. Such religious oriented (sectarian) hospitals might be unique. From a patient access perspective, this approach is undeniably superior to the status quo. Public, for-profit, and non-religious oriented (sectarian) institutions would have an obligation to deliver all treatments within their abilities. At those institutions, the moral and religious viewpoints of administrators would not be imposed on individual patients, nurses, and doctors.

Ultimately, a legislative framework based on institutional category, distinguished by cohesion, size, and message, would promote

pluralism in society. Smaller facilities with cohesive staff and clear moral positions could represent an array of moral or religious approaches to medicine. Large, pluralistic institutions, though providing the same baseline level of care, could distinguish themselves in other ways as well. A hospital might have the kindest nursing staff, adopt a team-based approach to patient care, or remunerate its employees especially well.

This proposed framework, especially when combined with creative accommodations of religious hospitals, offers a manageable and coherent approach to the particular problem of the individual institution conflict. Focusing on this inherent tension between individuals and institutions is most pressing, because it cannot be satisfactorily addressed through professional standard setting. The asymmetries in treatment of the individual-institution conflict, demand legislative resolution.

Immunity from liability also oversteps the legislative purpose of protecting providers' moral integrity. Institutional arrangements and opportunities for exit and patient selection should enable a provider to safeguard his or her conscience without doing harm. The proposals would instead limit legislative involvement to non-discrimination, resolving the institution-individual conflict in favour of individuals in large institutions. If a provider were to harm a person, however, he could face liability. Removing immunity provisions from conscience legislation has benefits for both institutions and the medical profession as a whole. Under an antidiscrimination regime, hospitals and other pluralistic institutions will not be assuming the risk of liability by having refusing physicians on their staff or employing refusing nurses.

More significantly, trust in the medical profession is best fostered through a legal regime where patients are confident that a doctor who does not share their moral views will ensure no harm comes to them. Exercise of conscience would not be deterred under this approach, but refusing providers would have strong incentives to conduct early and effective notice, provide all information, and deliver referrals. This proposed framework, especially when combined with creative accommodating of religious hospitals, offers a manageable and coherent approach to the particular problem of

the individual institution conflict. Focusing on this inherent tension between individuals and institutions is most pressing, because it cannot be satisfactorily addressed through professional standard setting. The asymmetries in treatment of the individual-institution conflict demand legislative resolution.

Currently, however, most legislation extends beyond the tensions between providers and institutions. In addition to creating rights against discrimination for refusing providers, it immunises refusing providers from civil and criminal liability and assures they cannot face professional discipline for their refusal to treat patients.

In effect, conscience legislation foresees and authorises refusing providers' harming patients. Harming patients carries no repercussions for refusers. The proposal here would instead limit legislative involvement to non-discrimination, resolving the institution-individual conflict in favour of individuals in large institutions. If a provider were to harm a person, however, he could face liability.

Invoking conscience in order to refuse to perform employment obligations is rapidly spreading beyond medicine – to pharmacists, and lawyers. Future legislative efforts and scholarly thinking should strive to take conscience seriously. No longer should employees or staff within a refusing institution be presumed to share its moral positions. Instead, potential conflicts between institutional interests and individual conscience should be explored and justified. Similarly, courts should consider the equality of individual conscience in interpreting current statutes, especially those broad medical conscience clauses that plausibly can be read to allow willing providers to exercise conscience in face of countervailing policies.

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PART IV

CYBERCRIME

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The Legal Aspects of Disinformation

1. Introduction

The primary objective of this article is to identify the model of legal regulations adopted by Poland and the European Union to counter threats of disinformation. The foundation of this analysis is, therefore, a review of the Polish and European Union legal systems, aimed, in particular, at identifying the types of legal norms on the basis of which legal tool aimed at countering this phenomenon is created. These considerations will result in the identification of whether there is regulatory convergence or divergence between the two systems.

The issue appears particularly interesting from the perspective of increased legislative activity in this area, both by the European Union and at the level of national legislation in Poland. On the one hand, at the level of the European Union, the European Commission published the Strengthened Code of Practice on Disinformation, while on 1 January 2024, the Digital Services Act came into force. On the other hand, on 1 October 2023, in Poland, an amendment to the Criminal Code came into force, which modified the scope of the crime of espionage, expanding it to include a new aggravated form consisting in conducting disinformation.

Moreover, a proper study of the area thus outlined must be preceded by a thorough analysis of key concepts, including in particular the concept of "disinformation", which requires a broader reference to considerations carried out in the field of the security sciences. The above makes the research in question multidisciplinary in nature.

The entirety of the considerations carried out was based on the legal-comparative method of legal norms, supported by an analysis of legal doctrine and case law. The conclusions are presented in the summary.

2. Disinformation as an element of asymmetric operations

An analysis of the legal aspects of countering disinformation must take as its starting point a reference to considerations undertaken in the non-legal sciences, in particular the security sciences, for which certain aspects of this phenomenon and the concepts used to describe it, analysed from the perspective of threats to state security, are of essential importance.

In colloquial terms, the term disinformation means "to mislead by giving false information; false, misleading information".[1] In the security sciences, on the other hand, it is pointed out that disinformation "refers to a type of information that is, however, its opposite, false, deceitful or alleged information that misleads the recipient. The basic interpretative assumption of the term "disinformation" is its purposefulness – false information is transmitted in order to achieve a specific effect, to give the recipient apparent, useless or even harmful knowledge, which will then serve to make erroneous decisions by the said recipient, beneficial from the point of view of the disinforming entity".[2]

Disinformation understood in this way, used to guide state policy, can be identified as early as in the oldest surviving sources on the military. Sun Tzu, in a work developed in the sixth century BC. "The Art of War", wrote, "For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting

[1] *Słownik Języka Polskiego PWN*, Vol. 1, 1st Edition, Warszawa 1999, p. 365.

[2] T. Kacała, *Dezinformacja i propaganda w kontekście zagrożeń dla bezpieczeństwa państwa*, "Przegląd Prawa Konstytucyjnego" 2015, Vol. 24, No. 2, p. 51.

is the acme of skill"[3] and to achieve this it is good "sometimes [to] use cunning deceptions to alienate his minister from the sovereign".[4]

The very use of the term "disinformation" to describe this type of active operation came relatively late in Russia, in 1923, when Joseph Unshlicht – deputy chairman of the State Political Directorate of the GPU (predecessor of the KGB) – called for the creation of a special disinformation bureau to conduct active intelligence operations. As a result, the prevailing view recognises the origin of the term "disinformation", from a transliteration of the Russian word *дезинформация*.[5] The GPU was thus the first organisation in the Soviet Union to use the term disinformation to refer to its intelligence tactics.[6] In the 1950s, Soviet planners understood this concept as the activity consisting in disseminating (in the press, on the radio, etc.) "false reports designed to mislead the public".[7]

The indicated methodology of conduct is directly in line with the currently functioning concepts of warfare created in American and Russian military doctrines, referred to as actions below the threshold of war.[8] In this regard, the so-called Gerasimov doctrine, currently in force in Russia,[9] explicitly assumes that:

[3] S. Tzu, *The Art of War*, translated and with an introduction by S.B. Griffith, Oxford 1963, p. 77.

[4] Ibidem, p. 114.

[5] See: M. Wachowicz, *Ujęcie teoretyczne pojęcia dezinformacji*, "Wiedza Obronna" 2019, Vol. 266–267, No. 1–2, pp. 228– 229.

[6] See: M. Manning, H. Romerstein, *Historical Dictionary of American Propaganda*, Greenwood 2004, pp. 82–83.

[7] See: D. Jackson, *Distinguishing disinformation from propaganda, misinformation, and "fake news"*, National Endowment for Democracy, https://www.ned.org/wp-content/uploads/2018/06/Distinguishing-Disinformation-from-Propaganda.pdf (accessed on: 01.09.2023).

[8] Also referred to as fourth generation warfare, hybrid warfare, non-linear warfare, special warfare or asymmetric conflict.

[9] The name derives from the name of the chief of the General Staff of the Russian Federation Armed Forces, General Valery Gerasimov, who – in an article *Ценность науки в предвидении* (*The Value of Science is in the Foresight*) published on February 27, 2013 in the newspaper "Военно-промышленный курьер" ("Military-Industrial Courier") – reported on the concept of a new generation of war.

> (…) the very 'rules of war' have changed. The role of non-military means of achieving political and strategic goals has grown, and, in many cases, they have exceeded the power of force of weapons in their effectiveness. The focus of applied methods of conflict has altered in the direction of the broad use of political, economic, informational, humanitarian, and other non-military measures – applied in coordination with the protest potential of the population. (…) Asymmetrical actions have come into widespread use, enabling the nullification of an enemy's advantages in armed conflict. Among such actions are the use of special-operations forces and internal opposition to create a permanently operating front through the entire territory of the enemy state, as well as informational actions, devices, and means that are constantly being perfected.[10]

Thus, in this concept, non-military means are intended not only to create and provide the conditions for the effective use of military force but often even, outright replace it. The axis of the presented concept is thus the coordinated use – in order to defeat the opponent or gain an advantage over him – of the full spectrum of non-military means, including diplomatic, political, economic, technological, humanitarian and informational, while using a wide sphere of psychological and sociological influence on the population of the attacked state. It is thus "a vision of guerrilla warfare waged on all fronts using a wide variety of tools and people: hackers, the media, businessmen, information leaks and, of course, fake news and traditional conventional and asymmetric military means".[11] Measures of a non-military nature therefore do not merely take on

[10] V. Gerasimov, *Ценность науки в предвидении*, "Военно-промышленный курьер" 2013, No. 8(476), https://vpk.name/news/85159_cennost_nauki_v_predvidenii.html (accessed on: 28.08.2023).

[11] M.K. Mckew, *Doktryna Gierasimowa, czyli rosyjski sposób na wojnę: chaos, a nie bomby*, 6 September 2017, https://wiadomosci.onet.pl/swiat/doktryna-gierasimowa-czyli-rosyjski-sposob-na-wojne-chaos-a-nie-bomby/svh4poh, (accessed on: 28.08.2023).

the character of supporting military action, but are a pillar of the presented concept of next-generation war. In fact, these measures are treated explicitly as an element of warfare, designed to hit the opponent with chaos amounting to permanent unrest and social tensions, constituting an assumed strategic objective aimed at achieving victory in the war.

At the same time, the field of the security sciences emphasises that there is no single pattern of hybrid warfare, especially in its practical version. At most, it is possible to speak of a certain framework within which specific undertakings are implemented that are adapted to the changing circumstances and the external and internal situation of the particular state targeted by such actions. These activities involve, to varying degrees, a number of institutions and bodies of the state in question or entities dependent on it, with the obvious leading role of the secret services. "In the case of Russia, in addition to the state, the following are also involved in the creation and dissemination of disinformation: third sector organisations, the Russian-speaking diaspora in other countries, international foundations, 'independent' journalists and experts, the media of the oligarchs, and even representatives of the Orthodox Church".[12] Importantly, the role of these actors encompasses a range of active measures referred to as influence operations. These include information operations carried out by "mass media, radio stations belonging to the armed forces and special services, as well as cybercriminals and cyberterrorists, with threats such as the spread of fake news, false information, disinformation with the manipulation of information in a way that undermines public confidence in the authorities, the spread of information that compromises politicians, cyberattacks on government and local government servers, cybercrimes".[13] Indeed, ongoing dynamic technological advances, especially in the area of communications, mass media and social media undoubtedly

[12] See: P. Kmiecik, *Bezpieczeństwo informacyjne Rzeczypospolitej w dobie fake news – przykłady wykorzystania mediów cyfrowych w szerzeniu dezinformacji*, "Bezpieczeństwo Obronność Socjologia" 2019, No. 11/12, pp. 83–87.

[13] H. Wyrębek, *Zagrożenia hybrydowe bezpieczeństwa informacyjnego państwa*, "Polityka i Społeczeństwo" 2023, Vol. 21, No. 1, p. 320.

facilitate disinformation activities.[14] As M.K. Mckew points out, "thanks to the internet and social media, it is now possible to carry out actions that the former Soviet specialists in psychological warfare could only dream of: changing the internal politics of other states with the help of information alone".[15] Indeed, it is the digital revolution that has enabled the dissemination of disinformation, on an unprecedented scale and speed. The amount of information appearing, the assimilation of which and even more so the verification of its veracity impossible to ascertain, leads to a kind of information noise. Moreover, the simplicity of creating and distributing information via social media, which do not meet journalistic standards, leads to the deepening of information chaos, in which the contemporary human finds themselves.[16] This situation creates excellent conditions for planned and in-depth disinformation campaigns.

It should also be noted that in the modern world, especially in the countries of Western civilisation based on a democratic system of government, the importance of information and the need to protect its security goes beyond the exclusively military context, for information and access to it is one of the fundamental elements of a democratic system, guaranteeing citizens an informed ability to shape political and social organisations. "A very intriguing and logically coherent thesis is the claim that the democratic system of European countries was born precisely through information".[17] It is reliable and truthful information that provides citizens with the opportunity to co-determine the state, including making informed decisions during elections and assessing the conduct of the elected

[14] See: M. Wojnowski, *"Mit wojny hybrydowej". Konflikt na terenie państwa ukraińskiego w świetle rosyjskiej myśli wojskowej XIX–XXI wieku*, "Przegląd Bezpieczeństwa Wewnętrznego" 2015, special issue, p. 25; Ł. Skoneczny, *Wojna hybrydowa – wyzwanie przyszłości? Wybrane zagadnienia*, "Przegląd Bezpieczeństwa Wewnętrznego" 2015, special issue, pp. 46–47.

[15] M.K. Mckew, *Doktryna Gierasimowa, czyli rosyjski sposób na wojnę: chaos, a nie bomby*, *op. cit.*

[16] See: K. Kaczmarek, *Dezinformacja jako czynnik ryzyka w sytuacjach kryzysowych*, "Rocznik Nauk Społecznych" 2023, Vol. 15(51), No. 2, p. 22.

[17] A. Skwarski, P. Szkudlarek, *Rola informacji i zagrożenia dezinformacją w systemie bezpieczeństwa państwa*, "Studia Administracji i Bezpieczeństwa" 2020, No. 9, p. 13.

authorities. Verified and analysed information is also the key to correct decision-making in the process of governing the state. The functioning of the information circulation system and the responsibility of the participants in this system for the quality of the information provided is therefore particularly important, in a peculiar way becoming a guarantor of the correctness of the democratic processes. This role is all the more special in times of the ongoing information revolution and mass multiplication of information sources. This leads to a conclusion regarding the particular need to protect the integrity, confidentiality and availability of information, which is an asset and a kind of source of both military and economic advantage.[18]

Combatting disruptive activities, i.e. disinformation, becomes a special, fundamental task in a democratic state. As Senator M. Kochan pointed out:

> none of us in this hall can afford to disparage Russia's secret services. None of us who know, have read (…) have familiarised ourselves with the Gerasimov doctrine, can ignore this doctrine and the disinformation that underpins it. We are all aware of its role during the US elections, we know what role this disinformation played during Brexit, we know what enormous attention Poland probably enjoys, as the fall of the USSR did not cure Russia's great power drive. Consequently, and in view of the war going on right next to our border, no threats of espionage in our country can be ignored.[19]

Disinformation as a threat to the State is identified explicitly by Polish strategic documents, including the 2020 National Security Strategy of the Republic of Poland, indicating, inter alia, that "the

[18] See: P. Kmiecik, *Bezpieczeństwo informacyjne Rzeczypospolitej w dobie fake news…*, *op. cit.*, pp. 83–84.

[19] M. Kochan during the debate at the 65th session of the Polish Senate of the 10th legislature on 26.07.2023, https://av8.senat.pl/10Sen651 (accessed on: 28.08.2023).

Russian Federation also conducts actions below the threshold of war (of a hybrid nature), carrying the risk of a conflict outbreak (…), and also undertakes comprehensive and complex actions by non-military means (including: cyberattacks, disinformation) to destabilise the structures of Western states and societies and cause divisions among allied states"[20] and that "in the context of the digital revolution, the special role of cyberspace and information space should be taken into account. This also creates room for disinformation and manipulation of information, which requires effective strategic communication activities".[21] Identifying these threats, the Strategy, as a basic pillar of the security of the state and citizens in the area of information space, assumes the necessity of building, at the strategic level, "the ability to protect the information space (including the systemic fight against disinformation), understood as the interpenetrating layers of space: virtual (layer of systems, software and applications), physical (infrastructure and equipment) and cognitive (cognitive)".[22] Thus, it is necessary to "actively counter disinformation by building capacities and creating procedures to work with news media and social media, with the involvement of citizens and NGOs".[23]

In the context of the above, there is no doubt that the disruption of the circulation of information through disinformation mechanisms is nowadays one of the most significant asymmetric threats embedded in the concept of hybrid warfare, aimed at destabilising the information security of the state, and thus the proper functioning of its organs and social institutions.

Thus, while the identification of disinformation as a threat becomes obvious, the problem remains in defining the scope of this concept, which in turn is particularly important from the perspective of the scope of possibilities for the creation of legal tools aimed at countering these threats. An analysis of the results of research

[20] Strategia Bezpieczeństwa Narodowego Rzeczypospolitej Polskiej z 2020 r., p. 6, https://www.bbn.gov.pl/ftp/dokumenty/Strategia_Bezpieczenstwa_Narodowego_RP_2020.pdf (accessed on: 28.08.2023).

[21] Ibidem, p. 8.

[22] Ibidem, p. 21.

[23] Ibidem, p. 21.

devoted to defining disinformation conducted in the field of security sciences directly indicates the multifaceted nature of its understanding.[24] In particular, two significantly different approaches are noted. In the first, broad approach, it is noted that, despite the many definitions of disinformation, they almost always include the same designations, defining: firstly, actions, in the form of manipulation, misrepresentation, deception, concealment of true intentions, dissemination of false data and information; secondly, means, emphasising the role of disinformation as a tool of influence or information warfare; thirdly, the purpose of action, in terms of inducing the disinformed to make certain decisions, distorting the real picture of the world and things, or misleading the opponent. Thus, in this view, disinformation becomes a general concept, encompassing the various tools of information warfare. On the other hand, in a narrow sense, disinformation is understood as a method of operational work of the special services,[25] consisting in the creation of a false image of reality, which is supposed to induce the opponent to make wrong decisions, which, however, requires keeping secret both the source of the information and depriving the victim of the possibility of verifying it. From this point of view, disinformation becomes one of the tools of information warfare, carried out with the use of the mass media and the Internet,[26] in addition to propaganda or "fake news". It should be mentioned that, in contrast to the narrow understanding of disinformation, "propaganda" is identified with the practice of lying to entire societies by their state authorities (particularly identifiable in non-democratic states).[27] "Fake news", on the other hand, is media news that plays a significant role in spreading untruths, which, as far as its veracity is concerned, is neither a truth nor a lie, pursuing its intended purpose by depriving it of context or additional information that could make it credible,

[24] See: M. Wachowicz, *Ujęcie teoretyczne pojęcia dezinformacji*, *op. cit.*, p. 250.
[25] See: K. Horosiewicz, *Gra operacyjna, kombinacja operacyjna i dezinformacja jako metody pracy operacyjnej*, "Przegląd Policyjny" 2018, Vol. 3(131), pp. 41–53.
[26] See: M. Świerczek, *System matrioszek, czyli dezinformacja doskonała. Wstęp do zagadnienia*, "Przegląd Bezpieczeństwa Wewnętrznego" 2018, No. 19, p. 212.
[27] See: T. Kacała, *Dezinformacja i propaganda w kontekście zagrożeń…*, *op. cit.*, p. 51.

against which, at the same time, the trust of the audience is created, resulting from the mere fact of publication in the media.[28]

From the perspective of the above, the normative establishment of legal tools aimed at combatting threats generated by disinformation, must be linked to the introduction of a legal definition of this concept. An attempt to define it on the level of colloquial or specialist language, in the context of the above considerations, will lead to significant interpretative problems, which, from the perspective of the regulated area – directly related to the restriction of constitutional rights and freedoms, may alternatively lead to the actual ineffectiveness of the tools introduced in this way, or be subject to legitimate criticism in the context of disproportionate interference in the fundamental rights of citizens.

3. Countering disinformation in the Polish legal system

The aim of this part of the discussion is to present, provided for in the Polish legal system, the legal tools that can be used to counter disinformation. In this context, particular attention has been paid to two aspects. Presented first is the Act of 17 August 2023 amending the Act – Penal Code and some other acts,[29] which fundamentally changed the existing wording of Article 130 of the Act of 6 June 1997 – Penal Code[30] (hereinafter: CC), regulating the crime of espionage, modifying both its basic type and supplementing it with new aggravated forms, including the one related to conducting, as part of the crime of espionage, disinformation. The second aspect presented in this paper is, an analysis of the scope and limits of the correlation of tools against disinformation, in the context of the protection of civil rights and freedoms.

First of all, it should be pointed out that legal norms in Poland, establishing tools aimed directly or indirectly at counteracting

[28] See: K. Bąkowicz, *Wprowadzenie do definicji i klasyfikacji zjawiska fake newsa*, "Studia Medioznawcze" 2019, Vol. 20, No. 3(78), pp. 281–289.

[29] Journal of Laws of 2023, item 1834.

[30] Journal of Laws of 2022, item 1138.

disinformation, can be generally divided into positive and negative ones. Positive regulations, in particular of a constitutional and administrative nature, concern the organisation of the functioning of the media market, expressing "the legislator's will to properly order the issue of the standards of information transmitted through the media".[31] Negative provisions are based on administrative and criminal law norms, introducing different types of responsibility for enabling or conducting disinformation activities.

When analysing the norms of the Polish law regulating the tools that may be used to counteract disinformation, one should first refer to the provisions of the Polish Constitution, for in accordance with Article 54(1) of the Constitution of the Republic of Poland of 2 April 1997[32] (hereinafter: the "Constitution of the Republic of Poland"), the freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone. As indicated by P. Sarnacki, whose position was adopted by the Polish Constitutional Tribunal,[33] "the expression 'view' should be understood as broadly as possible, in particular not only as the expression of personal judgments as to facts and phenomena in all aspects of life, but also as the presentation of opinions, conjectures, forecasts, making judgments on controversial issues, etc., and, in particular, also informing about facts, both real and alleged".[34] The freedom to express one's views has an application both in the sphere of private and public life. At the same time, this freedom applies to both natural persons and legal persons, as well as unincorporated entities. The freedoms to obtain and disseminate information are intrinsically linked, as they concern the right to collect information and its subsequent communication to private and public recipients. The acquisition of information itself is further protected by specific constitutional rights, including, as expressed in Article 61 of the Polish Constitution, the right of

[31] D. Brodacki, *Pojęcie dezinformacji i poszukiwanie jego legalnej definicji*, [in:] P. Chmielnicki, D. Minich (ed.), *Prawo jako projekt przyszłości*, Warszawa 2022, LEX/el (accessed on: 03.09.2023).

[32] Journal of Laws of 1997, No. 78, item 483.

[33] Judgment of the TK of 05.05.2004, P 2/03, OTK-A 2004, No. 5, item 39.

[34] P. Sarnecki, [in:] L. Garlicki, M. Zubik (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 2, Warszawa 2016, Article 54.

access to public information, or Article 74(4) of the Polish Constitution, the right to information on the state and protection of the environment. "Freedom to obtain information means the freedom to seek information and the freedom to access existing sources of information. (…) The freedom to disseminate information, on the other hand, includes the freedom to make it available to different categories of recipients, freely chosen by the beneficiary of this freedom, in a form entirely dependent on him".[35] All three of the freedoms indicated are not absolute in nature and are subject to limitations under the conditions indicated in Article 31(3) of the Constitution of the Republic of Poland, which means that such limitations may be established only by means of statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Pursuant to Article 14 of the Polish Constitution, the Republic of Poland shall ensure freedom of the press and other means of social communication. At the same time, as indicated by Article 54(2) of the Constitution of the Republic of Poland, preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station. Referring to the literal wording of the constitutional norms quoted above, it should be emphasised that the freedom from preventive censorship of the social media and licensing of the press (but not of radio or television stations) is of an absolute character and cannot be restricted. "On the other hand, so-called repressive censorship, consisting in a certain control of 'views' after their dissemination, being a certain restriction of the freedoms included herein, may be introduced under the conditions specified in Article 31(3) of the Constitution of the Republic of Poland". Naturally, "this also applies to all other (than censorship) limitations of the freedoms indicated herein, which may result in particular from criminal statutes, as well as from civil law

[35] M. Florczak-Wątor, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX/el. 2021, Article 54.

provisions concerning, for example, the protection of personal rights. Undoubtedly, the commission of an offence or the infringement of personal rights may also occur through a press article, a radio programme or a relevant entry on the Internet".[36]

In Poland, in accordance with Article 213 of the Constitution, the National Broadcasting Council acts as the guardian of freedom of speech, the right to information and the public interest in broadcasting.

An important place in the group of regulations of a positive nature is occupied by media law regulations, headed by the Press Law of 26 January 1984[37] (hereinafter: "uPP") and the Radio and Television Act of 29 December 1992[38] (hereinafter: "uRiT"), which organise the media market in Poland.

The first of the aforementioned acts regulating the press market in Poland – in line with the aforementioned constitutional standards – establishes, inter alia, regulations introducing principles of journalistic work, the essential aspects of which are the obligation of the press to truthfully present the phenomena in question (Article 6, paragraph 1 of the uPP) and the diligence and reliability of journalists when collecting and using press materials, and in particular to verify the accuracy of the obtained news or specify their source (Article 12, paragraph 1, subparagraph 1 of the uPP). As indicated in the doctrine, "special diligence should be understood as, inter alia: diligence, dutifulness, inquisitiveness in searching for the truth, attention to details, accuracy, checking the compliance with the truth of the obtained information by reaching for all available sources, supporting the findings with appropriate verification of the collected materials, full presentation of the circumstances of the case, etc.". In turn, particular reliability should be understood as, inter alia: "reliability, honesty, objectivity, impartiality of the message, responsibility for the content, refraining from acting on the basis of a 'preconceived thesis', presenting misleading information or distorting facts, concreteness, criticism, giving the person concerned the

[36] P. Sarnecki, *op. cit.*, Article 54.
[37] Journal of Laws of 2018, item 1914.
[38] Journal of Laws of 2022, item 1722.

opportunity to respond to the information obtained and to present his/her position, not acting on the basis of low motives, balance and appropriateness of the presented assessments, etc."[39] The law under analysis adopts – in the footsteps of Western European democratic states – a formal concept of press freedom and the prohibition of press licensing, which boils down to a potential criminal and civil liability for those responsible for press material that violates the constitutionally or statutorily protected rights of others.[40] It is therefore the responsibility of those involved in the creation and publication of the press material and not of the title in which it was published. Such liability may be criminal – for private offences against honour (Article 212 of the CC – defamation and Article 214 of the CC – insult) and civil – for infringement of personal rights (non-property claims: for the abstention from actions threatening or infringing personal rights or for the removal of the effects of the infringement; property claims: for the payment of compensation for the harm suffered, for payment to a community purpose or for the repair of the damage caused).

The second law mentioned above governs the broadcasting market in Poland. Due to the constitutional provisions, which assume the possibility of regulatory shaping of this market, this act adopts a construction that differs from the Press Act. It assumes – apart from typical journalistic liability discussed above (Article 3 of the uRiT) – also regulatory liability related, inter alia, to refusal to grant or revocation of a licence to broadcast radio and television programmes. Administrative responsibility, defined in this way, is applicable when the distribution of a programme causes or could cause a threat to the interests of national culture, good manners and education, security and defence of the state and a threat to the security of classified information (Article 36, paragraph 2, point 1 and Article 38, paragraph 2, point 1 of the uRiT). At the same time, television programmes distributed exclusively in ICT systems (subject to registration obligations without a licence) are subject to deletion from the register in the situation where the programme

[39] See: P. Kosmaty, *Odpowiedzialność prawna dziennikarza*, "Studia Iuridica Lublinensia" 2017, Vol. 26, No. 2, pp. 37–38.

[40] Ibidem.

contains content inciting to commit a terrorist offence or threatening the security and defence of the state or in the situation where the programme presented, at least two times within the period of the last 12 months, inter alia contains content propagating actions contrary to the law, to the Polish *raison d'État* and attitudes and views contrary to morality and to the social good, in particular including content inciting hatred or violence, discriminating on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or beliefs political or any other opinion, nationality, membership of a national minority, property, birth, disability, age or sexual orientation, or inciting the commission of a terrorist offence or fostering behaviour endangering health or safety and endangering the environment. At the same time, the Act provides for criminal liability – for broadcasting a programme without a licence or distributing a programme without an entry in the register (Article 52 of the uRiT), as well as administrative liability in the form of administrative penalties, including for broadcasting a programme in a telematic system without an entry in the register (Article 53a of the uRiT), or for a broadcaster's breach of the obligations set out in the Act, including Article 18 of the uRiT specifying the requirements for programmes and other broadcasts.

It should be noted that the Chairman of the National Broadcasting Council, acting on the basis of Article 53(1) of the uRiT in conjunction with Article 18(1) of the uRiT discussed above, on 11 August 2023 – in a precedent-setting decision – imposed an administrative penalty of PLN 476,000 on Eurozet Radio Sp. z o.o., with its registered office in Warsaw, for "broadcasting messages contrary to the law, to the Polish *raison d'État* and views contrary to the social good, i.e. messages disinforming public opinion on the circumstances of the President of Ukraine's transit through the territory of Poland, broadcast on the Radio Zet programme, on 22 December 2022, at 9:00 a.m."[41] In the statement of reasons, it was indicated, inter alia, that "subsuming the facts under the relevant

[41] *Spółka Eurozet Radio z karą za emisję przekazów dezinformujących opinię publiczną*, https://www.gov.pl/web/krrit/spolka-eurozet-radio-z-kara-za-emisje-przekazow-dezinformujacych-opinie-publiczna-naruszenie-english-version-below (accessed on: 05.09.2023).

provisions of law, it should be indicated that the disinformation activities consisting in transmission of false information is considered by the Authority as propagation (in the sense of spreading, dissemination) of activities (disinformation) contrary to the Polish *raison d'État* and promotion of attitudes and views contrary to the social good".[42] As the company's management board pointed out in a statement, "assessing by the KRRiT Chairman whether the content provided by a medium is true (information) or false (disinformation) definitely goes beyond the authority of the Body defined by the legislator. The Chairperson of the KRRiT does not have the right to look into sources protected by journalistic secrecy or secret state materials in order to decide on the veracity of a broadcast. According to the law, only an independent court, to which we intend to appeal, has such powers".[43] Undoubtedly, both the issued decision and its judicial review will indeed set the limits of the possibility to use the cited regulations as tools against disinformation in Poland.

When analysing the legal tools that can be used to counteract disinformation, one should undoubtedly also pay attention to the provisions of the Act of 16 July 2004 – Telecommunication Law[44] (hereinafter referred to as "uPT") and the Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency[45] (hereinafter referred to as "uISA"), providing for powers to restrict the availability of data in ICT systems. These regulations are particularly important from the perspective of the scope of the ratione personae of their application, not limited, as in the case of the regulations of the Broadcasting Act, to the domestic media market only.

The provision of Article 180 of the uPT, obliges the telecommunications undertaking to immediately block telecommunications connections or information transmissions, at the request of authorised entities or to allow such blocking by these entities if these connections may threaten defence, state security and public security

[42] Ibidem.

[43] *KRRiT ukarała Radio Zet. Jest oświadczenie zarządu stacji*, 16 August 2023, Onet Wiadomości, https://wiadomosci.onet.pl/kraj/oswiadczenie-zarzadu-grupy-eurozet-w-sprawie-kary-krrit/f9p3j1e (accessed on: 05.09.2023).

[44] Journal of Laws of 2022, item 1648.

[45] Journal of Laws of 2023, item 1136.

and order. Such requests may be addressed to any telecommunications undertaking, but for obvious reasons, directing such requests is justified only with regard to entrepreneurs operating the network or providing services.[46] Pursuant to the wording of the quoted provision, the request for blocking may be submitted by authorised entities, understood in accordance with Article 179(3) of the uPT as the Police, the Internal Supervision Bureau, the Border Guard, the Internal Inspectorate of the Prison Service, the State Protection Service, the Internal Security Agency, the Military Counterintelligence Service, the Military Police, the Central Anti-Corruption Bureau and the National Fiscal Administration. This provision establishes two types of blocking, i.e. telecommunications calls and information transmissions. According to Article 2(24a) of the uPT, a connection is considered to be a physical or logical connection of telecommunications terminal equipment allowing the transmission of telecommunications messages. In turn, a telecommunications message is, according to Article 2(27a) of the uPT, the content of telephone conversations and other information transmitted by means of telecommunications networks. This therefore includes, inter alia, both telephone calls and text and multimedia messages. Such a broad formulation of this standard translates into the possibility to block any information transmitted in the telecommunications network on its basis.

It should be noted that the solution provided for in Article 180 uPT has become the subject of criticism of the Ombudsman, alleging, inter alia, that it poses a risk both to the freedom of speech and to the access to information, which requires considering appropriate legislative measures.[47] At the same time – similarly to the previously

[46] See: S. Piątek, *Prawo telekomunikacyjne. Komentarz*, Warszawa 2018, Commentary to Article 180 of the Act.

[47] It should be noted that the construction of the solution provided for by Article 180 of the uPT has become the subject of criticism by the Ombudsman, alleging, inter alia, that it poses a risk both to freedom of speech and to access to information, which requires consideration of appropriate legislative action (speeches to the Prime Minister of 06.08.2022 No. VII.564.25.2022.KSZ and of 01.03.2023 No. VII.564.25.2022.KSZ), https://bip.brpo.gov.pl/pl/content/rpo-internet-blokowanie-stron-premier-odpowiedz (accessed on: 06.09.2023).

indicated manner of application of Article 53(1) uRiT in connection with Article 18(1) uRiT – also the manner of application of Article 180 uPT is currently the subject of court proceedings.[48] The final court decision in this respect will undoubtedly determine the limits of using also this institution as a tool for counteracting disinformation in Poland.

A tool similar to the one discussed above, although separate as far as its subject matter is concerned, is provided for in the latter Act. Pursuant to its Article 32c of the uISA, in order to prevent, combat and detect crimes of a terrorist nature or the crime of espionage and to prosecute their perpetrators, the court, upon a written request of the Head of the ABW, submitted after obtaining a written consent of the Public Prosecutor General, by way of a decision, may order the blocking by the service provider providing electronic services of the availability in the ICT system of certain IT data connected with an event of a terrorist nature or making it probable that an offence of espionage has been committed, or of certain ICT services used or used to cause an event of a terrorist nature or making it probable that an offence of espionage has been committed. The explanatory memorandum to the Act of 10 June 2016 on anti-terrorist activities,[49] which introduced the provision in question into the Polish legal system, indicated that "the proposed solution is particularly important in the context of counteracting the activities of terrorist organisations that use the Internet to promote their ideology, post instructions on how to carry out terrorist attacks and communicate with their supporters".[50] In turn, the extension of the "specific measure to prevent and combat the crime of terrorism" in question[51] to the crime of espionage, was made by the Act

[48] *Marcin Rola triumfuje. Sąd uznał działania ABW za niezgodne z Konstytucją*, 15 May 2023, Wprost/Wiadomości/Kraj, https://www.wprost.pl/kraj/11221618/marcin-rola-triumfuje-sad-uznal-dzialania-abw-za-niezgodne-z-konstytucja.html (accessed on: 05.09.2023).

[49] Journal of Laws of 2022, item 263.

[50] Explanatory Memorandum to the draft law on anti-terrorist activities, LEX/el.

[51] Explanatory Memorandum to the Bill to amend the Act - Criminal Code and certain other Acts (print 3232), https://orka.sejm.gov.pl/Druki9ka.nsf/o/F53D07E65F8EC17AC12589B1003F2A96/%24File/3232.pdf (accessed on: 05.09.2023).

of 17 August 2023 amending the Act – Criminal Code and some other acts, "in order to more effectively identify, prevent and combat the crime of espionage".[52] As clearly indicated by the legislator, this tool relates to IT data (and not to telecommunication connections or transmissions of information, as in the case of Article 180 uPT). However. it should be noted that there is no legal definition of this concept in the Polish legal system. Thus, it can be said that these are all data (parameters, symbols, records of events, processes or states, usually constituting numerical summaries, records of facts, descriptions of situations or events[53]) which are collected, recorded, sorted, transmitted, analysed or otherwise processed by electronic information processing systems. These data are subject to blocking ordered by a court and not at the request of authorised entities, as in the case of Article 180 of the uPT. The person obliged to block is the service provider providing electronic services, within the meaning of Article 2 para. 6 in connection with para. 4 of the Act of 18 July 2002 on the provision of services by electronic means[54] (and not the telecommunications undertaking, as in the case of Article 180 uPT). The different mode and manner of application of this tool has the effect of differentiating the scope of this blocking, by making the blocked data completely inaccessible (and not limited in availability, as in the case of Article 180 uPT). This tool has not been the subject of court case law specifying in detail how it should be applied.

In the context of the two tools of counteracting disinformation described above, the Internal Security Agency comes to the fore in terms of the authority to apply them. The application of the measure of data blocking, referred to in Article 32c of the uISA, is within the exclusive competence of the Head of the Internal Security Agency, as the body authorised to request that this measure be applied. As regards the measure referred to in Article 180 of the uPT, the Internal Security Agency remains one of the entities authorised to

[52] Ibidem.

[53] See: M. Kęsy, *Informacja i systemy informacyjne w działalności gospodarczej*, "Dydaktyka Informatyki" 2011, No. 6, p. 208.

[54] Journal of Laws of 2020, item 344.

apply it. However, taking into account that the prerequisite for its application is, inter alia, a threat to state security, the Internal Security Agency remains the leading body in this respect (in the scope of a threat to defence – the Military Counterintelligence Service; in the scope of threats to public security and order – the Police). This corresponds directly to the competence of this service. Indeed, in accordance with Article 5 of the uISA, the tasks of the Internal Security Agency include the identification, prevention and combatting of threats to the internal security of the state and its constitutional order, and in particular to the sovereignty and international standing, independence and inviolability of its territory, as well as threats to the defence of the state and the identification, prevention and detection of offences, including espionage, terrorism, unlawful disclosure or use of classified information and other offences detrimental to state security.

It should be added that an important place in the system of state bodies responsible for combatting disinformation has been assigned since 18 August 2022 to the Government Plenipotentiary for the Security of the Information Space of the Republic of Poland. His tasks, according to the Regulation of the Council of Ministers of 11 August 2022[55] include coordinating the activities of government administration bodies whose responsibilities include detecting, monitoring and neutralising information threats against the interests of the Republic of Poland, within the scope of identifying and neutralising threats to the security of the information space of the Republic of Poland and responding to these threats, as well as recommending specific solutions to the Council of Ministers with regard to systemic measures aimed at increasing the capacity of the Republic of Poland to combat information threats.[56]

As pointed out in the Polish legal doctrine, "the Penal Code contains descriptions of the elements of a number of criminal acts,

[55] Journal of Laws of 2022, item 1714.

[56] See: *Żaryn pełnomocnikiem rządu ds. bezpieczeństwa przestrzeni informacyjnej RP*, "Gazeta Prawna", 9 September 2022, https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8533581,stanislaw-zaryn-pelnomocnik-rzadu-ds-bezpieczenstwa-przestrzeni-informacyjnej-rp.html (accessed on: 05.09.2023).

the realisation of which may also mean carrying out various disinformation activities. The most obvious method of combatting them by the state is therefore precisely the criminalisation of such acts. A number of provisions on intelligence and counter-intelligence protection of the state can be cited as an example".[57] The noticeable role and importance, as a tool against disinformation, of the crime of espionage has gained particular significance as a result of the changes introduced in the criminal law system, under the Act of 17 August 2023 amending the Act – Penal Code and certain other acts. This is because the quoted act fundamentally interfered with the previous wording of Article 130 of the CC regulating this offence, modifying both its basic type and supplementing it with new aggravated and privileged forms.

Pursuant to the final wording of the provision of Article 130 § 1 of the Penal Code, in Poland at present, the offence of espionage in the basic type may take the form of: taking part in the activities of a foreign intelligence service or acting on its behalf, while in both situations the offence must be directed against the Republic of Poland. Therefore, from 1 October 2023, the basic type of the offence of espionage is fulfilled by conduct taking the form of active cooperation with a foreign intelligence service, consisting in belonging to its organisational structures (taking part), or any active cooperation with a foreign intelligence service, which does not yet take the form of functioning in its organisational structures (acting for its benefit), as long as these activities are directed against the Republic of Poland, and therefore threaten or damage the external or internal interests of the Polish state. Obviously, what is at issue is the potential possibility – albeit demonstrated by the specific circumstances – of causing damage to the Polish state. The second fundamental change covered by the Act is a significant aggravation of the criminal penalty for individual types of the offence of espionage – in its basic type, such an offence is punishable by imprisonment for a term of not less than 5 years (up to 30 years).

[57] D. Brodacki, *Narzędzia prawne służące przeciwdziałaniu dezinformacji*, [in:] P. Chmielnicki, D. Minich (ed.), *Prawo jako projekt przyszłość*, Warszawa 2022.

In addition, in accordance with the amendments, the legislator maintained the two existing aggravated forms of the abovementioned crime and introduced three new ones, including the form specified in Article 130 § 9 of the CC, in which the aggravating circumstance is the carrying out, during conduct falling within the basic type, of disinformation, consisting in the dissemination of false or misleading information with the aim of causing serious disruptions to the political system or economy of the Republic of Poland, an allied state or an international organisation of which the Republic of Poland is a member, or to force a public authority of the Republic of Poland, an allied state or an international organisation of which the Republic of Poland is a member, to take or refrain from taking specific actions, punishable by imprisonment for a term of not less than 8 years (up to 30 years). It is evident – which was in fact confirmed during the debate on the act in the Senate of the Republic of Poland[58] – that disinformation, described in the constitutive elements of the offence referred to above, does not constitute an offence separate from espionage, but is its aggravated form. Disinformation is thus an element of espionage activity, which falls under the notion of taking part in the activities of a foreign intelligence service or activities for its benefit.

In the context of the issue analysed in this study, the cited new provisions on the crime of espionage acquire fundamental significance, for it introduced, for the first time in the Polish legal system, both the very notion of "disinformation" and provided its legal definition. It should be noted that this definition falls within the colloquial understanding of the term given by the Dictionary of the Polish Language, as well as within the specialist meaning given to it in the area of the security sciences, cited in the first part of these considerations. The dictionary definition of disinformation "misrepresentation through false information; false, misleading information"[59] in Article 130 § 9 of the Penal Code was restricted

[58] Debate during the 65th meeting of the Senate of the Republic of Poland of the 10th term on 26.07.2023, https://av8.senat.pl/10Sen651 (accessed on: 07.09.2023).

[59] *Słownik Języka Polskiego PWN*, *op. cit.*, p. 365.

by the legislator by introducing the notion of a public purpose connected with causing serious disturbances in the political system or economy of the Republic of Poland, an allied country or an international organisation, or forcing a public authority of the Republic of Poland, an allied country or an international organisation of which the Republic of Poland is a member, to undertake, or refrain from, specific actions. Importantly, due to the fact that disinformation was qualified as an aggravated form of espionage, the concept of disinformation acquired a narrow meaning, as one of the tools of information warfare – a method of operational work of the secret services (which is discussed in more detail in point 2 of this study).

In the context of the discussed changes in the construction of the offence of espionage in Poland, it should be noted that the same amending act extended the scope of the Head of the Internal Security Agency's ability to request, on the basis of the previously analysed Article 32c of the uISA, the application by the court, after obtaining the written consent of the Public Prosecutor General, of the so-called accessibility blockade, the offence of espionage. As indicated earlier, it consists in the blocking by the service provider providing electronic services of the availability in the ICT system of certain IT data connected with an event of a terrorist nature or making it probable that an offence of espionage has been committed, or of certain ICT services serving or used to cause an event of a terrorist nature or making it probable that an offence of espionage has been committed. Thus, in the context of the direct inclusion by the legislator, through the wording of Article 130 § 9 of the CC, of disinformation as an element of intelligence activity, the blocking mechanism specified in Article 32c of the uISA becomes a particularly important, if not the most important, legal tool in Poland aimed directly at counteracting disinformation.

In the context of the main topic of this article, attention should also be drawn to two other offences defined by the Polish Criminal Code. The first is an act covered by Article 132 of the CC, defined by legal doctrine directly as intelligence disinformation. It consists in misleading a Polish state authority, in the course of rendering intelligence services to the Republic of Poland, by supplying forged or falsified documents or other objects or by concealing true or giving

false information of vital importance to the Republic of Poland. Such an act is punishable by imprisonment for a term between one and ten years. The second one, covered by Article 224a § 1 of the CC, "can be boldly classified as disinformation activities".[60] According to this provision, whoever, knowing that a threat does not exist, notifies of an event which endangers the life or health of many persons or property of significant size, or creates a situation which is intended to induce a belief that such a threat exists, thereby inducing an action of a public utility institution or an authority responsible for the protection of security, public order or health aimed at the abrogation of the threat, shall be subject to a penalty of imprisonment for a term between 6 months to 8 years'. "Despite the obvious reference to disinformation activity in this provision, its application may pose difficulties. It is primarily concerned with the complexity of this provision and the simultaneous occurrence of several relevant factors, such as giving the impression that a threat exists and has an impact on the functioning of public institutions. It does not, therefore, constitute a protection stricto sensu against disinformation itself, but is only intended to criminalise it in the case of – as may be presumed – its most drastic manifestations".[61]

Situations related to states of emergency deserve separate attention. Pursuant to Article 20(1)(1) of the Act of 21 June 2002 on the state of emergency[62] and Article 21(1)(1) of the Act of 29 August 2002 on the state of war and the competences of the Commander-in-Chief of the Armed Forces and the principles of his subordination to the constitutional bodies of the Republic of Poland,[63] preventive censorship of the social media may be introduced throughout their duration, including press materials within the meaning of the uPP, as well as restrictions related to, inter alia, the control of correspondence, both traditional and electronic. Due to the lack of practical experience, the indicated regulations create tools that may potentially combat disinformation, which may be used – as indicated

[60] D. Brodacki, *Narzędzia prawne służące przeciwdziałaniu dezinformacji*, *op. cit.*
[61] Ibidem.
[62] Journal of Laws of 2017, item 1928.
[63] Journal of Laws of 2022, item 2091.

by the Constitution of the Republic of Poland in Article 228 – in situations of particular danger, if ordinary constitutional measures are inadequate.

4. Countering disinformation in the legal system of the European Union

The aim of this part of the discussion is to present the direction of the European Union's legislative activity in relation to disinformation and the tools being developed to combat this threat.

Firstly, it should be noted that since 2018, the European Institutions are taking intensified action against disinformation. In January 2018, the European Commission set up a high-level expert group on misinformation and disinformation online,[64] to advise on policy initiatives to combat fake news and disinformation spread online. The main outcome of this group's work was a report entitled "A multidimensional approach to disinformation", published on 12 March 2018. Among other things, it presented a definition of disinformation as "a phenomenon that goes well beyond the term 'fake news'".[65] According to the paper's authors, the concept of disinformation has been hijacked by powerful players and used in a misleading way to dismiss information with which they simply disagree:

> Disinformation as defined in this Report includes all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. It does not cover issues arising from the creation and dissemination online of illegal content (notably defamation, hate speech, incitement to violence), which are subject to regulatory remedies under EU or national

[64] High-Level Expert Group on Fake News and Disinformation spread online, HLEG.

[65] *A multi-dimensional approach to disinformation Report of the independent High-level Group on fake news and online disinformation*, p. 5, https://Op.Europa.Eu/En/Publication-Detail/-/Publication/6ef4df8b-4cea-11e8-Be1d-01aa75ed71a1/Language-En (accessed on: 08.09.2023), p. 5.

> laws. Nor does it cover other forms of deliberate but not misleading distortions of facts such a satire and parody.[66]

The report also notes that disinformation problems are deeply linked to the development of digital media. They are driven by state or non-state political actors, for-profit entities, the media, citizens, individually or in groups, and by the manipulative use of communication infrastructures that have been used to produce, disseminate and amplify disinformation on a larger scale than before, often in new ways that are still poorly mapped and understood. The report has received criticism from the practitioner community, accusing it of "completely ignoring foreign and security policy dimensions. It looks like a report prepared by academics and journalists for journalists and online platforms, which completely fails to address much of the policy debate on this phenomenon over the past two years or more. The main source of hostile disinformation in Europe (Russia) is not mentioned at all".[67]

Despite perceived criticism of the report, building on its conclusions, the European Commission published a Communication on combatting disinformation online on 26 April 2018. The document presents "a comprehensive approach that aims at responding to those serious threats by promoting digital ecosystems based on transparency and privileging high-quality information, empowering citizens against disinformation, and protecting our democracies and policy-making processes".[68]

In September 2018, the European Commission published a Code of Practice on Disinformation. It is a typical form of so-called soft regulation based on business sector self-regulation. A working group of the Multistakeholder Forum on Online Disinformation consisting

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[66] Ibidem, p. 5.

[67] J. Janda, *Eksperci o Raporcie KE o dezinformacji: UE dalej nie rozumie zagrożenia*, https://cyberdefence24.pl/eksperci-o-raporcie-ke-o-dezinfo-ue-dalej-nie-rozumie-zagrozenia-analiza (accessed on: 09.09.2023).

[68] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions tackling online disinformation: a European approach, COM (2018) 236 final, Brussels, 26.04.2018, p. 16.

of online platforms, leading social networks, advertisers and the advertising industry, was responsible for its development.[69] The Code focused on actions to reduce the impact of disinformation in five main areas:

1. improving controls on the placement of advertisements in order to unmask disinformation providers;
2. ensuring transparency of political and thematic advertisements to enable users to identify the content that is being promoted;
3. ensuring the integrity of the services provided by the platforms, including by identifying and closing fake accounts and using appropriate mechanisms to signal bot-based interactions;
4. making it easier for users to discover and access different news sources representing alternative viewpoints;
5. empowering the research community by granting access to the data held by the platforms necessary to continuously monitor disinformation on the internet.

Facebook, Google, Twitter, Mozilla, Microsoft and TikTok, among others, committed themselves to respect the code. Signatories were required to report annually on their work to combat disinformation in the form of a publicly available document.[70]

On 12 September 2018, The European Commission issued a Communication on free and fair European elections,[71] proposing measures to make online political advertising more transparent and

[69] EU Code of Practice on Disinformation, 17 July 2018, https://digital-strategy.ec.europa.eu/en/library/draft-code-practice-online-disinformation (accessed on: 08.09.2023).

[70] *Europe Direct Podlaskie. Dezinformacja stanowi jedno z najpoważniejszych zagrożeń wynikających z postępu technologicznego i cyfryzacji*, https://edpodlaskie.eu/europejski-kodeks-postepowania-w-zakresie-zwalczania-dezinformacji/ (accessed on: 08.09.2023).

[71] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of The Regions securing free and fair European elections. A Contribution from the European Commission to the Leaders' meeting in Salzburg on 19–20 September 2018, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0637&from=EN (accessed on: 08.09.2023).

to enable sanctions for the illegal use of personal data to knowingly influence the results of European elections.[72]

In turn, on 5 December 2018, the European Commission announced the Action Plan against Disinformation,[73] which complements the previously discussed documents. It lists 10 actions, which are divided into four main areas: the first, related to strengthening the capacity of EU institutions to detect, analyse and disclose disinformation; the second, on strengthening coordinated and joint responses to disinformation; the third, involving mobilising the private sector to combat disinformation; the fourth, on raising awareness and improving public resilience.

In May 2021, the European Commission presented guidelines for improving the Code of Conduct on Combatting Disinformation.[74] The process of its review thus initiated culminated in the presentation on 16 June 2022 of a new document, The Strengthened Code of Practice on Disinformation 2022.[75] Its signatories included the following 34 companies: Adobe, Avaaz, Clubhouse, Crisp, Demagog, DOT Europe, European Association of Communication Agencies (EACA), Faktograf, GLOBSEC, Google, Interactive Advertising Bureau, Kinzen, Kreativitet & Kommunikation, Logically, Maldita.es, MediaMath, Meta, Microsoft, Neeva, Newsback, NewsGuard, Pagella Politica, Reporters without Borders (RSF), Seznam, The Bright

[72] NASK, *Komunikat KE w sprawie wolnych i uczciwych wyborów europejskich (election package),* https://cyberpolicy.nask.pl/komunikat-ke-w-sprawie-wolnych-i-uczciwych-wyborow-europejskich-election-package/ (accessed on: 08.09.2023).

[73] Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan Against Disinformation, https://www.eeas.europa.eu/sites/default/files/action_plan_against_disinformation.pdf (accessed on: 08.09.2023).

[74] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions European Commission Guidance on Strengthening the Code of Practice on Disinformation, https://digital-strategy.ec.europa.eu/en/library/guidance-strengthening-code-practice-disinformation (accessed on: 08.09.2023).

[75] The Strengthened Code of Practice on Disinformation 2022, https://disinfocode.eu/wp-content/uploads/2023/01/The-Strengthened-Code-of-Practice-on-Disinformation-2022.pdf (accessed on: 08.09.2023).

App, The GARM Initiative, TikTok, Twitch, Twitter, Vimeo, VOST Europe, Who Targets Me, World Federation of Advertisers (WFA).

The new Code continues the self-regulatory strategy initiated by the Commission in 2018, based on soft regulation. Indeed, accession to the Code, as well as choosing the scope of the commitment taken, is entirely voluntary. "The enhanced Code, together with the Digital Services Act, will form an EU toolbox to combat online disinformation. The Code, in the sense of the Digital Services Act, will also be used by large online platforms to reduce the risks of spreading disinformation"[76] The new Code contains 44 commitments and 128 concrete measures, in the following areas:

1. demonetisation of information (limiting the profit opportunities of disinformation providers);
2. transparency of political advertising (reinforcing the importance of identifying the source of information);
3. service integrity (limiting manipulative behaviour);
4. the position of users (protection against disinformation by ensuring multi-source information);
5. position of scientists (supporting research on disinformation);
6. the position of the fact-checking community (reinforcing the uniformity of cooperation with information verifiers).

The signatories of the Code have established, as a forum for further cooperation, a standing task force which will meet at least once every six months to monitor and adapt the commitments to technological, social, market and legislative developments. The European Commission itself, in cooperation with the European Audiovisual Media Services Regulators Group (ERGA) and the European Digital Media Observatory (EDMO), will assess the progress in the implementation of the Code, based on the detailed qualitative and quantitative reports expected from the signatories.

A key element of the European Union's legal action, directed, inter alia, at disinformation, will become, with the entry into force on 1 January 2024 – mentioned earlier – of the so-called Digital

[76] NASK, *Nowy kodeks postępowania w zakresie zwalczania dezinformacji*, https://cyberpolicy.nask.pl/nowy-kodeks-postepowania-w-zakresie-zwalczania-dezinformacji/ (accessed on: 08.09.2023).

Services Act (Regulation (EU) 2022/2065 of The European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC).[77] It should first be emphasised that this act can be regarded as the first so-called hard EU legal instrument that can be used to combat disinformation. However, this act is not directly aimed against disinformation. It focuses on the fight against illegal online content, some of which may fall within the definition of disinformation. This does not change the fact that it contains various solutions that can be used in the fight against disinformation. Firstly, the act will apply to information posted, at least theoretically, in accordance with the law, but the intention of which is nevertheless to manipulate and confuse the recipient. In this regard:

> [T]he DSA mandates that large platforms and search engines carry out assessments of the risks that their various mechanisms of operation (e.g. content recommendation algorithms) pose to the dissemination of misleading content – and mandates that they take action to mitigate these risks, under penalty. The DSA also includes various tools that will make it easier to monitor the functioning of the algorithms used to manage content and gather evidence of their harmful effects (e.g. that they reward misinformation at the expense of valuable information). Platforms will have to proactively make much more information on this subject public, and in addition researchers, including those acting for e.g. social organisations, will be able to request access to data on this subject.[78]

Secondly, the act will also apply to unlawfully posted content. "In this area, the DSA introduces various concrete new tools, such

[77] OJ EU L 277, 27.10.2022, p. 1.

[78] NASK, *Disinformation in the light of the DSA – interview with Dorota Głowacka of the Panoptykon Foundation*, https://cyberpolicy.nask.pl/dezinformacja-w-swietle-aktu-o-uslugach-cyfrowych-wywiad-z-dorota-glowacka-z-fundacji-panoptykon/ (accessed on: 09.09.2023).

as, for example, greater transparency in the moderation process, a more effective appeals process for reporters of this type of content whose submissions were initially disregarded by the platforms, or the possibility for fact-checking organisations to apply for trusted flagger status (obliging platforms to prioritise submissions from those with such status)".[79] Assessing the effectiveness of these tools will undoubtedly be an important research focus once the Digital Services Act comes into force.

It should be added that the European Commission is currently conducting preparatory work on the so-called "Democracy Package". This initiative was presented by the President of the European Commission, Ursula von der Leyen, in her State of the Union address of 14 September 2022 and subsequently included in the Commission's Work Programme for 2023. The primary objective of the ongoing actions, as indicated by the European Commission, is to strengthen democracy against third country influence, in particular by promoting free and fair elections, intensifying the fight against disinformation and supporting media freedom and pluralism, including by developing civic space and citizen participation to strengthen the resilience of democracy from within. As part of the package, the Commission intends to adopt one directive and several recommendations.[80] This work, and especially the final outcome, seems particularly interesting from the perspective of the main topic of the present reflections.

In addition to the general regulatory activities of the European Union described above, attention should be drawn to its specific activities related to certain categories of disinformation threats.

In this context, account should be taken of the COVID-19 disinformation monitoring programme, implemented by the signatories of the Code, which acted as a transparency measure to ensure

[79] Ibidem.

[80] K. Grošek, *Defence of democracy package, including an initiative on the protection of the EU democratic sphere from covert foreign influence*, https://www.europarl.europa.eu/legislative-train/spotlight-JD%2023-24/file-defence-of-democracy-package (accessed on: 08.09.2023).

accountability of online platforms in combatting disinformation on COVID-19 and vaccines.[81]

Furthermore, in the wake of the Russian Federation's aggression against Ukraine, the European Union has taken a number of measures targeting Russian disinformation activities. In this regard, on 1 March 2022, the European Parliament adopted a resolution,[82] in which, inter alia, it condemned:

> [T]he use of information warfare by Russian authorities, state media and proxies to create division with denigrating content and false narratives about the EU, NATO and Ukraine, with the aim of creating plausible deniability for the Russian atrocities; calls on all Member States therefore to immediately suspend broadcast licensing to all Russian state media channels, including their rebroadcasting; calls on the Commission and the European External Action Service to enhance alternative online Russian-language information on the unfolding developments to counter disinformation, to ensure that EU public statements are translated into Russian and also to address Russian-speaking audiences and platforms; welcomes the announcement of the Commission President that the broadcasting of Russia Today and Sputnik would be banned in the EU, and reiterates the calls on Google and YouTube to ban war propaganda accounts.[83]

In addition, on 1 March 2022, The Council of the European Union amended Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in

[81] Coronavirus: EU strengthens action to tackle disinformation, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1006 (accessed on: 09.09.2023).

[82] European Parliament resolution of 1 March 2022 on the Russian aggression against Ukraine (2022/2564(RSP)), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IP0052 (accessed on: 08.09.2023).

[83] Ibidem, paragraph 31.

Ukraine[84] by adding Article 4g, which prohibits operators from broadcasting, enabling, facilitating or otherwise contributing to broadcast any content by the legal persons, entities or bodies listed in Annex IX (i.e., RT-Russia Today English, RT-Russia Today UK, RT--Russia Today Germany, RT-Russia Today France, RT-Russia Today Spanish, Sputnik), including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed. In addition, any broadcasting licence or authorisation, transmission and distribution arrangement with the legal persons, entities or bodies listed in Annex IX shall be suspended. The same measures, by amendment of 1 March 2022,[85] were introduced in Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Importantly, the recitals of the amending regulation explicitly point out that the Russian Federation has engaged in a systematic, international campaign of media manipulation and distortion of facts in order to enhance its strategy of destabilisation of its neighbouring countries and of the Union and its Member States. In particular, the propaganda has repeatedly and consistently targeted European political parties, especially during election periods, as well as targeting civil society, asylum seekers, Russian ethnic minorities, gender minorities, and the functioning of democratic institutions in the Union and its Member States. (Recital 6). In order to justify and support its aggression against Ukraine, the Russian Federation has engaged in continuous and concerted propaganda actions targeted at civil society in the Union and neighbouring countries, gravely distorting and manipulating facts (Recital 7). Those propaganda actions have been channelled through a number of media outlets under the permanent direct or indirect control of the leadership of the Russian Federation. Such

[84] Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's destabilising action in Ukraine, OJ EU L 65, 02.03.2022, p. 5.

[85] Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ EU L 65, 02.03.2022, p. 1.

actions constitute a significant and direct threat to the Union's public order and security (Recital 8). Interestingly, Russia Today France challenged the acts issued before the CJEU, alleging violations of the right to defence, the right to freedom of establishment, and violations of the principles of freedom of expression and information and non-discrimination on grounds of nationality. By the judgment of the ECJ of 27 July 2022, the action was dismissed.[86] "The order is based, inter alia, on an assessment of RT France's one-sided, extreme propaganda reporting and commentary used to justify the Kremlin's decision to go to war against a smaller neighbour".[87]

In the context of the reflections on the legal regulation of the fight against disinformation in the European Union, it should be added that as a result of the conclusions of the European Council meeting of 19–20 March 2015, a special East StratCom Task Force was established within the European External Action Service. Its task is to develop communication products and campaigns to better explain EU values, interests and policies in the Eastern Partnership countries (Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine).[88] The group's flagship project is EUvsDisinfo, which involves monitoring the media in 15 languages to identify, compile and expose instances of disinformation from pro-Kremlin media outlets that are disseminated in EU and Eastern Partnership countries.[89]

It is also worth noting that two regulatory approaches to disinformation are noticeable in EU member states: horizontal (e.g., Malta) – prohibiting the dissemination of disinformation in any context, as long as there is a threat of public harm; and vertical (e.g., Hungary and France) – combatting disinformation only in specific areas, e.g. during the electoral process. Two models of liability are also

[86] Case T-125/22, OJ EU C 148, 04.4.2022, p. 47.

[87] Constitutional Monitor, Grand Chamber of the General Court of the European Union dismisses Russia Today France's fast-track appeal against the ban on broadcasting within the European Union, 28 July 2022, https://monitorkonstytucyjny.eu/archiwa/22559 (accessed on: 08.09.2023).

[88] European Union External Action, Questions and Answers about the East StratCom Task Force, https://www.eeas.europa.eu/eeas/questions-and-answers-about-east-stratcom-task-force_en#11232 (accessed on: 09.09.2023).

[89] About EUvsDisinfo, https://euvsdisinfo.eu/about/ (accessed on: 08.09.2023).

applied: criminal (e.g., Malta) or administrative (e.g., France). It is also pointed out that European laws do not use the concept of disinformation directly, let alone introduce a definition of it. An exception in this respect is Lithuania, where Article 19(2) of the Law on Access to Public Information prohibits the dissemination of disinformation, understood, according to Article 2(13) of the Law, as false information that is intentionally disseminated to the public.[90]

5. Summary

The primary objective of this article was to identify the model of legal regulations adopted by Poland and the European Union in order to combat disinformation threats. Against the background of the above considerations, it should undoubtedly be pointed out that these models are different. In the European Union, the predominant attitude is directed towards the creation of soft law norms based on self-regulatory mechanisms, moreover, restricted mainly to digital service providers. In Poland, on the contrary, legal tools for counteracting disinformation adopt a full spectrum of various types of hard norms, from constitutional law norms, through civil and administrative law norms, to criminal law norms. The latter attract particular attention, mainly due to the disinformation crime, a type of espionage offence, introduced to the Polish criminal system on 1 October 2023. Moreover, against the background of the solutions of European countries, it should be pointed out that this solution duplicates the model of horizontal regulation (albeit narrowed – constituting an element of intelligence activity) with the adopted criminal type of responsibility. This is also the second case in the legislation of European countries of direct reference to the concept of disinformation and its legal definition.

The further evolution of the development of legislation in the area of counteracting disinformation raises curiosity. Will the standards

[90] Lietuvos Respublikos Visuomenės Informavimo Įstatymo Pakeitimo Įstatymas 2006 M. Liepos 11 D. Nr. X-752 Vilnius, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.280580 (accessed on: 09.09.2023).

in Poland and the European Union converge – which is likely to be a consequence of the impact of EU law on national regulations in Poland. Or, will they still be strongly diverging from each other, which may be due to separate experiences in terms of the scale of disinformation-related threats occurring in Poland and resulting from Russian actions in connection with the war conducted against Ukraine. It is undoubtedly worthwhile – at a certain interval – to carry out complementary research in this area.

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Following the Money in Cybercrime Cases

1. Introduction

The exponential growth of cybercrime is not solely attributable to technological advancements, the pervasive use of electronic communications, networks, information systems, and the ability of offenders to conceal their identity, thereby reducing the risk of arrest and prosecution. As early as the 1990s, it was observed that the transnational criminal certainly feels comfort faced with almost limitless option buttons when surfing the "global cybercandy-shop" from the comfort of his cybercafé armchair.[1]

In attacks where the perpetrators target monetisation, an important aspect for them is also to ensure the secure and anonymous transfer of criminal funds. Depending on the criminal *modus operandi*, the perpetrators use different money laundering methods, very often combining them in different configurations. The most frequently observed methods of money laundering in cybercrime cases have been analysed and are presented in this paper. The analysis encompasses the use of bank accounts, so-called money mules, as well as cryptocurrencies or money laundering through the purchase of bullion and precious metals or virtual objects in computer games.

[1] J. Haines, P. Johnstone, *Global Cybercrime: New Toys for the Money Launderers*, "Journal of Money Laundering Control" 1999, Vol. 2, No. 4, pp. 317–325, https://doi.org/10.1108/eb027198 (accessed on: 14.05.2023).

The analysis of the models used by the perpetrators allows for the selection of tools and methods leading to the de-anonymisation of the perpetrators responsible for the underlying crimes, as well as the identification of regulatory loopholes that allow the perpetrators to conceal their identity and transfer funds. The limits of bank secrecy will also be analysed and assessed, with a view to verifying its impact on the effectiveness of the response to money laundering. On this basis, the formulation of *de lege lata* remarks and de *lege ferenda* postulates will be considered, with the aim of reducing the phenomenon of money laundering in Poland.

2. Money laundering as a cross-cutting crime enabler

Most of the criminological research suggests that monetary gain is the primary driver for cybercriminals.[2] The challenge for perpetrators is to safely receive, launder and market funds from victims. Money laundering is therefore, for instance, an essential stage in any attack on the motor industry.

Following a universal pattern of criminal behaviour, money laundering consists of the following stages: 1) the collection of dirty money; 2) placement – in this stage, the perpetrators dispose of the proceeds of their illegal activities and introduce them into the financial system by purchasing certain goods characterised by a relatively high degree of liquidity, e.g.; 3) layering – at this stage, the perpetrators carry out a large number of different transactions in order to conceal the criminal origin of the funds and make it difficult for law enforcement authorities to analyse the flow of funds from the source to the current holder; 4) integration – the final stage consists of legitimising the previously placed and masked funds by giving the appearance of their legal origin and believing

[2] A. Hutchings, *Crime from the keyboard: organised cybercrime, co-ofending, initiation and knowledge transmission*, "Crime, Law and Social Change" 2014, Vol. 62, No. 1, pp. 1–20, https://doi.org/10.1007/s10611-014-9520-z (accessed on: 14.05.2023); M. Paquet-Clouston, S. García, *On the motivations and challenges of afliates involved in cybercrime*, "Trends in Organised Crime" 2022, https://doi.org/10.1007/s12117-022-09 (accessed on: 14.05.2023).

the false story of their source. Statistics indicate that between € 715 billion–€ 1.87 trillion of global GDP (2–5 percent) is laundered each year. In the EU between € 117–€ 210 billion represents suspicious activities and transactions using the EU's financial system and economy. Approximately 70 percent of criminal networks active in the EU employ some form of money laundering to fund their operations and conceal their assets. 80 percent of the criminal networks active in the EU misuse legal business structures for their criminal activities. Money laundering and terrorist financing are therefore among the most serious threats to the European Union's economy and financial system, and to the security of its citizens.[3]

At the same time, according to a report published by Europol's European Cybercrime Centre (EC3), the Internet Organised Crime Threat Assessment (IOCTA), the primary cross-cutting crime enablers, i.e. factors that straddle more than one crime area, include anonymisation tools, the criminal abuse of cryptocurrencies, and money muling, which is a type of money laundering.[4] A money mule is a person who receives money from a third party in their bank account and transfers it to another one or takes it out in cash and gives it to someone else, obtaining a commission for it. At the same time, Europol data shows that more than 90 percent of money mule transactions identified through the European Money Mule Actions are linked to cybercrime.[5] The illegal money often comes from criminal activities like phishing, malware attacks, online auction fraud, e-commerce fraud, business e-mail compromise (BEC) and CEO fraud, romance scams, holiday fraud (booking fraud) and others.

Cybercriminals must obscure the digital trails that inevitably connect their proceeds to the victims or the infrastructure that

[3] https://www.consilium.europa.eu/pl/infographics/anti-money-laundering/ (accessed on: 14.05.2023).

[4] Internet Organised Crime Threat Assessment (IOCTA), Europol, 2019, pp. 50–59, https://www.europol.europa.eu/cms/sites/default/files/documents/iocta_2019.pdf (accessed on: 14.05.2023).

[5] https://www.europol.europa.eu/operations-services-and-innovation/public-awareness-and-prevention-guides/money-muling (accessed on: 14.05.2023).

was used during committing the crime.[6] Most often, transactions received from victims are transferred through an intermediary, either a professional money launderer or someone who unknowingly forwards the money. Some criminals use more sophisticated money laundering methods.

Cybercriminals, like other monetary-oriented criminals, need to make sure that the funds they obtain from crime are safe, not only to enjoy the fruits of the crime, but also to invest in subsequent attacks. The need to ensure the anonymous use of funds is therefore also linked to the need to use some of the victims' money to prepare the next crime. The investment in further attacks depends on the perpetrator's operating model and usually involves paying for hosting services, domain names, anonymisation services (e.g., IP Proxy[7], VPN), website advertising (e.g., in the model of fake online shops or websites offering fake investments) and other necessary online services. It is important to note that some of the services used by criminals to commit crimes are legitimate and widely available online services. The providers of these services offer traditional payment methods based on fiat currencies, i.e. bank transfers, BLIK code payments, fast money transfers, payment card payments. Most of these providers do not allow payments in cryptocurrencies or using PaysafeCard. This leads to perpetrators using a variety of money laundering methods – including the use of bank accounts opened in other people's names.

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[6] M. Nazzari, *From payday to payoff: Exploring the money laundering strategies of cybercriminals*, "Trends in Organised Crime" 2023, https://doi.org/10.1007/s12117-023-09505-1 (accessed on: 14.05.2023).

[7] For example, 911[.]re, a proxy service from 2015 to 2022 sold access to hundreds of thousands of Microsoft Windows computers daily. 911[.]re was one of the original "residential proxy" networks, which allow someone to rent a residential IP address to use as a relay for his/her Internet communications, providing anonymity and the advantage of being perceived as a residential user surfing the web. The abrupt closure on 29th of July 2022 comes ten days after KrebsOnSecurity published an in-depth look at 911 and its connections to shady pay-per-install affiliate programs that secretly bundled 911's proxy software with other titles, including "free" utilities and pirated software. B. Krebs, *A Deep Dive into the Residential Proxy Service "911"*, https://www.krebsonsecurity.com/2022/07/a-deep-dive-into-the-residential-proxy-service-911/ (accessed on: 14.05.2023).

As a substantial amount of cybercrime is carried out on an as-a-service model, the criminals have to settle with the people who provide them with various services – such as preparing graphics, supplying malware or laundering money for them on a fee-for-service basis. Payments between cybercriminals are mainly based on cryptocurrency transfers, with Monero (XMR) becoming an increasingly popular cryptocurrency among cybercriminals.

Cybercriminals involved in more sophisticated cyberattacks, as well as those trading and administrating dark web marketplaces, carry out their financial transactions almost exclusively in cryptocurrencies. They extensively use obfuscation techniques to anonymise their financial activities before cashing out the illicit profits. The applied techniques include the use of mixers, swappers, over the-counter trading and decentralised exchanges. In many cases, obfuscation methods are used prior to sending the funds to exchanges.[8]

3. The most common methods of money laundering in Poland

In Poland, the most common method of money laundering is the use of bank accounts opened in the name of other people (so-called financial mules). These people are recruited either in person, on the street, through direct messages sent via instant messaging applications or through apparently legitimate job offers. Financial mules are usually people with financial problems, the unemployed, alcohol or drug addicts and foreigners. Due to the war in Ukraine and the migration wave, there has recently been an increase in SIM card registrations, as well as bank accounts used to launder money on the personal data of people with Ukrainian citizenship. At the instigation of a money mule recruiter, money mules set up bank accounts (usually in several banks) for a small fee (on average PLN 100–1,000) and sell access to them by handing over a login and password and

[8] Internet Organised Crime Threat Assessment (IOCTA), Europol, 2023, p. 11, https://www.europol.europa.eu/cms/sites/default/files/documents/IOCTA%202023%20-%20EN_0.pdf (accessed on: 14.05.2023).

documentation from the bank. In most cases, financial mules also register SIM cards with their own details, which can be used to operate the bank account (to the phone number registered with the financial mule's details, the bank sends an SMS with verification codes, which enable the perpetrators to confirm bank transactions using the account). The mules also provide a photocopy or photograph of an identity document, sometimes even a selfie with the identity document. This data then allows the perpetrators to register further SIM cards on such a person's details, and set up accounts on cryptocurrency exchanges or online currency exchanges – particularly when the transmission of a photo of an identity document or a selfie photo with an identity document is sufficient to confirm identity.

Financial mule recruiters offer to sell bank accounts and registered SIM cards on advertising portals (e.g., oglaszamy24.pl) or forums on DarkWeb.

In addition to people knowingly selling their accounts, the bank accounts of people who have taken part in a fictitious recruitment exercise and are convinced that they are working remotely for, for example, a cryptocurrency exchange or a clearing agent, are often used for transfers from victims' accounts.[9] Money mule adverts normally state that they are an overseas company seeking "local or national representatives" or "agents" to act on their behalf for a period of time, sometimes to avoid high transaction fees or local taxes. Such individuals, in addition to providing their bank accounts, very often also make withdrawals at ATMs and then cash deposits or conversions into cryptocurrency.

Victims' bank accounts to which the perpetrators have gained unauthorised access (e.g., using a fake payment gateway model or malware) are often used as indirect bank accounts for money laundering. After gaining unauthorised access to a bank customer's account, the perpetrators obtain the customer's personal data and,

[9] More about this method of obtaining accounts: https://zaufanatrzeciastrona.pl/post/facebook-blik-gadu-gadu-bitbay-i-stado-nieswiadomych-mulow/ (accessed on: 14.05.2023); A. Gryszczyńska, *Wykorzystanie COVID-19 w scenariuszach ataków opartych na socjotechnice*, [in:] J. Kosiński, G. Krasnodębski (eds.), *Rocznik Bezpieczeństwa Morskiego – Przestępczość Teleinformatyczna 2020*, Gdynia 2020.

if they are able to define a trusted payee or link an additional banking application, they gain the ability to dispose of such an account, including confirming transactions.

The methods used to launder money at each stage vary. The first stage – how the transfer is made from the victim's account – differs depending on the nature of the underlying crime. For ransomware attacks, the victim pays the ransom directly in cryptocurrency to the cryptocurrency address provided by the perpetrator. For fake online shops – the victim himself transfers the funds to the bank account of the financial mule (usually an individual, sometimes a company associated with the financial mule and an account held for a corporate entity is associated with the shop). For the CEO Fraud model and the BEC model – bank accounts held for trading companies with a financial mule as CEO are most commonly used. Funds are first transferred between bank accounts in Poland and then transferred to bank accounts in other countries. In romance scams – funds are usually deposited by victims into accounts held in foreign banks (including those in African countries). In the case of SIM SWAP or other attacks where funds representing property of significant value are to be transferred from the victim's account at once, the perpetrators, in order to avoid bank blockages, transfer these funds to the bank accounts of *bureaux de change*, where they request in advance to collect large amounts of currency in cash in person or to entities offering to sell bullion. Immediately after the unauthorised transfer of funds from the victim's account, the money launderers in the group collect cash from the bureau de change or gold bars from the bullion dealer. The gold is then transferred to those involved in the criminal enterprise as payment, using courier services or parcel machines. In this model of money laundering, the success of detection depends largely on the rapid acquisition of data on money transfers. This can be achieved by obtaining CCTV footage of exchange offices, precious metal dealers, parcel or city surveillance, or surveillance of private premises on the way in and out of the place where the money was actually collected. An obstacle to the preservation of surveillance data in Poland is the lack of regulations on the retention period of recordings and the lack of an obligation to register such surveillance. In order to determine whether there

are cameras in a given area that may have recorded data relevant to an investigation, it is necessary for police officers to carry out reconnaissance and then, once the installation of the cameras has been established, to identify the administrator of the surveillance data.

Over the past two years, investment fraud has become increasingly common in Poland. The perpetrators receive money from the victims, which is not invested, but simply transferred from one bank account to another in order to reach the persons responsible for organising the criminal activity. The damage suffered by the victims is closely linked to the scenario of the investment fraud, the involvement of the perpetrators, the adaptation of the social engineering to the customer profile, the level of technical knowledge and digital hygiene of the victim, and the level of trust that the "investor" has placed in the representative of the investment platform. Investment fraud is usually associated with very high financial losses for the victim. When manipulated by the perpetrators, the victim is convinced that he or she will receive high returns on the investment and very often starts to behave irrationally. Initially, the victim is persuaded to invest a relatively small amount – around € 100–500. After a few days, the callers inform her of the success of the investment and the multiplication of the amount paid, encouraging her to invest much larger sums. The perpetrators spend a lot of time building up a relationship of trust with the victim, offering help and advice and assuming the role of a credible expert. At this stage, if the victim wishes to withdraw the deposited funds and profit from the investment, the funds are transferred to the victim's own bank account. This is intended to inspire confidence and induce the victim to invest significantly more money. However, the funds transferred to the victim's account are not from accounts linked to the perpetrators, but from the accounts of other victims who are just starting to invest. In this way, the transfers of alleged profits, which are intended to inspire confidence in the investors, are made by the victims who make the initial payments. Thanks to the trust built up in this way, the criminals are able to convince the victims to invest their money.

In some scenarios, the victims deposited the funds themselves, often handing over their entire life savings to the criminals. In

many cases, the victims also contributed additional funds obtained through loans or borrowed from family or friends. Subsequent deposits are socially coerced from those wishing to withdraw their funds, by informing the victims of penalties or charges relating to excessive profits or necessary tax payments.[10]

In this model, in the initial stages, the money laundering is carried out using the bank accounts of victims who are unaware that the account to which they are transferring or from which they are receiving funds is the account of another victim. This model of money laundering poses a challenge to law enforcement. It is important not to re-victimise a fraud victim and treat him or her as a financial mule complicit in an organised crime group. This requires an analysis of the victim's reports and checking that the person to whose bank account the funds are transferred has not reported suspicion of the underlying act.

Online fraudsters also make frequent use of gambling platforms to launder profits, as they can be used to conceal the origins and flows of illicitly-obtained funds.

Computer games have also become an attractive tool for perpetrators who wish to legitimise assets obtained through criminal activity. If the use of computer games for money laundering models is related to the general pattern of behaviour of criminals, the "placement" phase involves the purchase of a suitably valuable character, virtual object or internal currency. The "layering" phase, in which a large number of different transactions are carried out in order to conceal the criminal origin of the funds, can be shortened or eliminated because it is impossible to determine whether the acquisition of certain virtual goods was primary or secondary, so that the person laundering money in this way can claim that the virtual property acquired was simply acquired in the context of a game. The final stage of money laundering, or "integration", may involve the disposal of valuable virtual assets, such as a game user profile containing a virtual character, individual virtual items, or a large

[10] A. Gryszczyńska, *Wykorzystanie sztucznej inteligencji w oszustwach inwestycyjnych*, [in:] B. Szafrański (ed.), *Cyberbezpieczeństwo vs. sztuczna inteligencja*, Warszawa 2024 (in print).

amount of internal virtual currency; these assets have previously been the subject of an investment, and the funds thus obtained are then declared as income derived from the effort put into the game.

When computer games are used for money laundering, the classic behavioural model described above may not be applicable or may be greatly simplified. This is of great benefit to the perpetrators, as a simplified and out-of-the-box approach significantly reduces the risk of making a mistake in the creation of a money story and, consequently, the detection of the illegal practice.

4. Methods of money laundering in Poland based on the analysis of the Polish language forum on DarkWeb – "Cebulka"

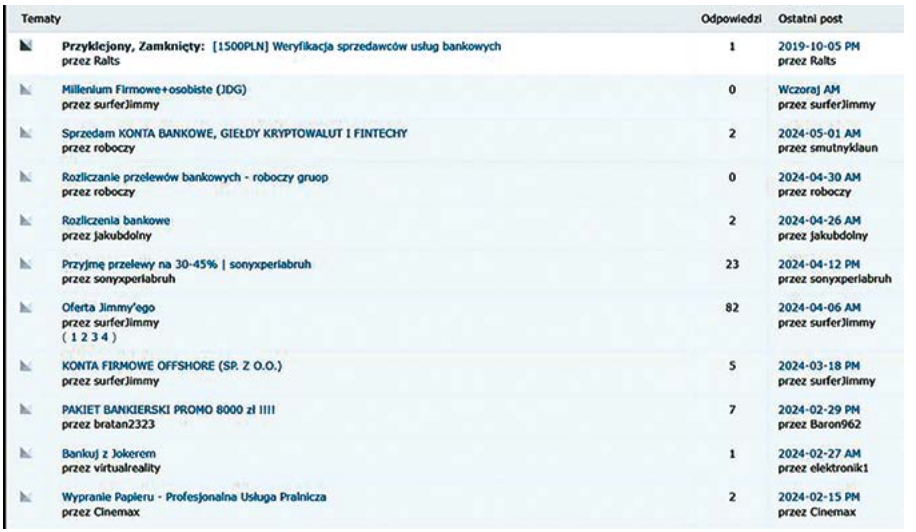
Both within the surface web and darknets there are websites similar in structure to online shopping sites that facilitate the illegal transactions. These websites go by the name of darknet market, marketplaces or underground markets. Most darknet markets are accompanied with a discussion forum. Such forums help the users tackle uncertainties related to the quality of the offered goods and services. The history of Polish services in the TOR network is a series of ups and downs, but this is beyond the scope of this study.[11] After the collapse of the ToRepublic forum, which was launched on 8 June 2013 and operated almost until the end of 2015, preceded by the publication of the service's entire database (dump) on 19 December 2015, including user data, all forum posts (including hidden sections) and private correspondence of users,[12] the most popular and longest-running Polish-language cybersecurity forum on the dark web became "Cebulka", which has been operating since 2013.

[11] For more, see: A. Haertle, *Z siedmiu jedno się ostało, czyli polskie fora w sieci TOR,* https://zaufanatrzeciastrona.pl/post/z-siedmiu-jedno-sie-ostalo-czyli-polskie-fora-w-sieci-tor/ (accessed on: 14.05.2023).

[12] For more about the possibilities of analysis using graph and network theory, see: R. Kasprzyk, *Big Data hype i studium przypadku forum ToRepublic*, [in:] K. Czaplicki, G. Szpor (eds.), *Internet. Analityka danych*, Warszawa 2019, pp. 328–345.

The "Cebulka" forum, under the "Selling" category, has a "Banking" forum where advertisements are published for the sale of bank accounts or the provision of money laundering services on a commission basis. As of 2019, the forum administrator with the nickname "Ralts" introduced a mandatory verification of sellers of banking services, preceded by a "Cebulkowicz" rank and a fee for the "Banking" title. The verification is based on whether the provider has bank accounts for sale or accepts money from other cybercriminals for laundering. Among banking services, the administration of the "Cebulka" website has included the trading of pole accounts, the renting and selling of bank accounts and e-wallets with IBAN (Revolut, TransferWise, etc.), the trading of accounts set up with the data of others in services that allow money transfers or cryptocurrency exchanges (e.g., Skrill, Zonda, Coinbase), the acceptance of money transfers (and their subsequent exchange into cryptocurrencies), and the provision of payment gateways (i.e., sites pretending to be clearing houses and banks) with an associated postal bank account. Only retailers, i.e. those selling up to 3 bank accounts, are exempt from registration. This is one of the safeguards aimed at increasing the security of dark market users and reducing the risk of customers being defrauded. The main anti-fraud mechanism is the escrow mechanism, whereby a trusted intermediary secures payment for goods or services sold through the forum until the buyer confirms that the "contract" has been fulfilled. As of 10 May 2024, there were 45 threads added to the "Banking" forum, of which 14 threads were active. The active adverts were posted by 11 users with different nicknames (see Figure 1). Due to the anonymity of the forum, it is uncertain whether these are not multiple accounts operated by a smaller number of so-called bankers.

Figure 1. Money laundering advertisements on the "Cebulka" forum



Tematy	Odpowiedzi	Ostatni post
Przyklejony, Zamknięty: [1500PLN] Weryfikacja sprzedawców usług bankowych przez Ralts	1	2019-10-05 PM przez Ralts
Millenium Firmowe+osobiste (JDG) przez surferJimmy	0	Wczoraj AM przez surferJimmy
Sprzedam KONTA BANKOWE, GIEŁDY KRYPTOWALUT I FINTECHY przez roboczy	2	2024-05-01 AM przez smutnyklaun
Rozliczanie przelewów bankowych - roboczy gruop przez roboczy	0	2024-04-30 AM przez roboczy
Rozliczenia bankowe przez jakubdolny	2	2024-04-26 AM przez jakubdolny
Przyjmę przelewy na 30-45% | sonyxperiabruh przez sonyxperiabruh	23	2024-04-12 PM przez sonyxperiabruh
Oferta Jimmy'ego przez surferJimmy (1 2 3 4)	82	2024-04-06 AM przez surferJimmy
KONTA FIRMOWE OFFSHORE (SP. Z O.O.) przez surferJimmy	5	2024-03-18 PM przez surferJimmy
PAKIET BANKIERSKI PROMO 8000 zł !!!! przez bratan2323	7	2024-02-29 PM przez Baron962
Bankuj z Jokerem przez virtualreality	1	2024-02-27 AM przez elektronik1
Wypranie Papieru - Profesjonalna Usługa Pralnicza przez Cinemax	2	2024-02-15 PM przez Cinemax

Source: Own materials.

Money laundering services have also been offered by people with different nicknames in advertisements with the status "closed". The nature of cybercrime forums is such that users have different periods of activity and appear under different nicknames, so it is not possible to say with certainty how many people are actively selling money laundering services or bank accounts through the forum.

At the same time, the "Services", "Other" and "Partnership" sections also publish offers from people offering their services for ATM withdrawals, BLIK[13] or cryptocurrency exchanges, or looking for

[13] BLIK is a mobile payment system launched in Poland in 2015, managed and developed by the company Polski Standard Płatności (PSP). It allows smartphone users to pay cashless at stationary and online shops, withdraw and deposit cash at ATMs, as well as make transfers to a phone number and generate cheques with a digital code. At the end of March 2024, BLIK was actively and regularly used by 16.3 million users in Poland, https://www.blik.com/ponad-pol-miliarda-transakcji-blikiem-i-16-3-mln-aktywnych-uzytkownikow-w-i-kw-2024-r (accessed on: 14.05.2023).

money laundering service providers, so the number of users actually offering money laundering services is much higher.

For greater security, and following the experience of the ToRepublic database dump release, no discussions or negotiations related to the purchase are available on the "Cebulka" forum. Rather, the site is a place for the publication of advertisements, while communication between buyer and seller is already encrypted, usually using Jabber Messenger, Telegram, WickrMe, and sometimes email accounts from the domain dnmx.org or protonmail.com. The success of a transaction can be deduced from the trading scores and, where applicable, the ratings of other users, although it cannot be ruled out that the same person operating the multi-account may generate favourable opinions for themselves in order to lend credibility to other forum users or to make analysis by law enforcement agencies and possible criminal liability more difficult. As the verification of the service provider is required to post advertisements for the sale of bank accounts or money laundering on behalf of the "Banking" forum, the products and data necessary for money laundering or identity theft are also available in the "Data and Information" and "Services" sections. In the section dedicated to the sale of data and information, not only packages of personal data, including logins and passwords for various services, are offered, but also scans of identity documents, selfie photos with an identity document, and even entire "KYC kits", which allow an account to be opened for selected services with the data obtained, bypassing the "Know Your Consumer" procedures (see Figure 2). In addition, high quality fake identity documents or a remote SIM card registration service for any data are offered. Personal data sets are offered at prices ranging from a few to several hundred PLN, scans of ID documents at an average of PLN 25–50 each, KYC sets from PLN 25 to 400.

Figure 2. Money laundering announcements on the "Cebulka" forum

Source: Own materials.

Accounts on cryptocurrency exchanges (around PLN 2,000) or auction portals, created using other people's data and verified, are also offered for sale. As perpetrators of cybercrime are particularly concerned with maintaining anonymity, they use fictitious or assumed identities to set up e-mail accounts, social networking profiles, domain name subscriptions, and electronically delivered services, including hosting services. The ease with which accounts can be created using fictitious or hijacked data is most often linked to the lack of proper verification of the identity of those seeking to

use electronic services. E-service providers or domain registration intermediaries are limited to accepting the data provided by the user. The lack of verification of the identity of users of e-services makes it possible to set up an e-mail account or become a subscriber to an Internet domain by providing any data. This mechanism is used by perpetrators both to conceal their own identity and to harm the person they are pretending to be.

5. Criminal liability for money laundering in Poland

The need to criminalise acts aimed at preventing or significantly impeding the disclosure of the source of property obtained through a criminal offence has been recognised both internationally and in domestic law. There are many international legal instruments that oblige Member States, including Poland, to prevent money laundering and to prosecute the perpetrators of this crime,[14] but their analysis is beyond the scope of this study.

Currently in Poland, criminal liability for the offence of money laundering is defined by Article 299 § 1 of the Polish Criminal Code.[15] Pursuant to Article 299 § 1 CC whoever receives, possesses, uses, conveys or transports abroad, conceals, transfers or converts legal tenders, financial instruments, securities, foreign exchange, property rights or other movable or immovable property, obtained from the benefits derived from a committed prohibited act, or assists in transferring their ownership or possession, or undertakes other actions that may frustrate or substantially obstruct the determination of their criminal origin or location, or their detection, seizure or forfeiture, is subject to the penalty of deprivation of liberty for between 6 months and 8 years.

[14] W. Wróbel, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom III. Commentary to Articles 278–363 of the Criminal Code*, 5th Edition, LEX 2024, thesis 4 to Article 299 of the CC.

[15] Act of 6 June 1997 – Criminal Code (i.e., Journal of Laws of 2024, item 17, as amended), hereinafter: CC.

In accordance with Article 299 § 2 CC whoever, being an employee of or acting in the name of or for the benefit of a bank, financial or credit institution, or another entity legally obliged to register transactions and people making transactions, receives against the provisions of law legal tenders, financial instruments, securities, foreign exchange, transfers or converts them, or receives them in other circumstances raising a reasonable suspicion that they have been an object of the act referred to in § 1, or provides other services aimed at concealing their criminal origin or at securing them against seizure, is subject to the penalty provided for in § 1. If the perpetrator commits the act referred to in § 1 or 2 by acting in agreement with other persons, that person is subject to the penalty of deprivation of liberty for between one year and 10 years (Article 299 § 5 CC). The perpetrator who has gained substantial material benefit from committing the act referred to in § 1 or 2, is subject to the penalty provided for in § 5. Importantly, the preparation of the acts specified in Articles 299 § 1 and 299 § 2 CC (pursuant to Article 299 § 6a) is also punishable.

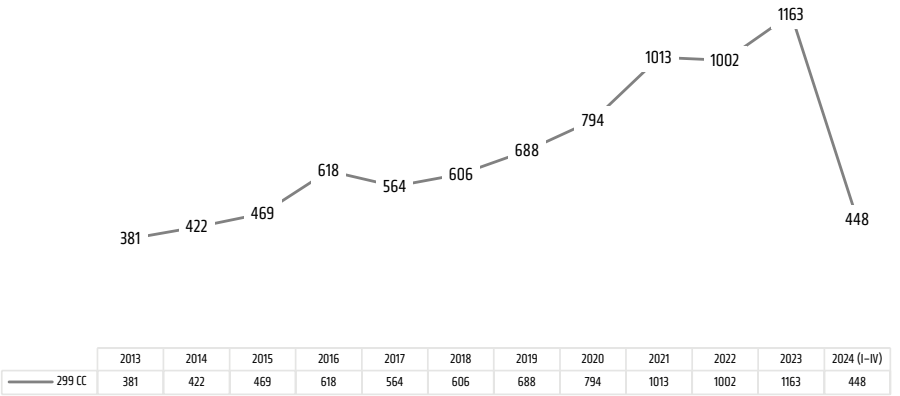
The offence under Article 299 § 1 CC is a general offence, prosecuted by public indictment. The elements defining the criminal offence under Article 299 § 1 CC are broadly defined as: 1) receiving, 2) possessing, 3) using, 4) transferring abroad, 5) exporting abroad, 6) concealing, 7) transferring or converting, 8) aiding and abetting the transfer of ownership or possession, 9) undertaking other activities which may prevent or substantially impede the determination of the criminal origin, location, detection, seizure or the decision to forfeit the assets referred to in this provision. The object of the offence may be practically any asset (property value). The offences described in Article 299 § 1–6 CC are intentional in nature and can be committed with both direct and eventual intent.[16]

The analysis of statistical data on pre-trial proceedings conducted for acts under Article 299 CC shows that the number of proceedings conducted for the crime of money laundering is steadily increasing. In 2023, the number of proceedings in which this legal

[16] Judgment of the Court of Appeal in Katowice of 12 October 2018, II AKa 353/18.

qualification was adopted amounted to 1,163, while in 2024, in the period from 1 January to 30 April – already 448 such cases were registered. The dynamics of the increase in the number of cases registered with the Prosecutor's Office under Article 299 CC is presented in Figure 3.

Figure 3. Proceedings under the Article 299 CC registered in the Public Prosecutor's Office between 2013 and 2024



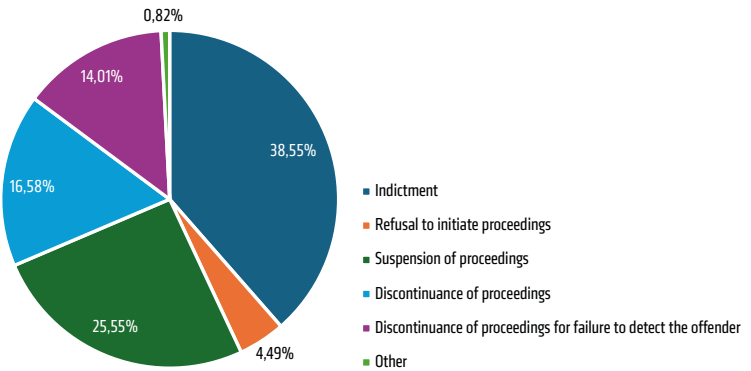
	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024 (I–IV)
299 CC	381	422	469	618	564	606	688	794	1013	1002	1163	448

Source: Own research based on reports and statistics from the PROK-SYS system.

From 2012 to 2023, 11,372 persons suspected of committing acts under Article 299 of the Criminal Code were registered with the Public Prosecutor's Office. A total of 17,032 charges of money laundering were brought against these persons. The analysis of the number of persons suspected of acts under Article 299 CC shows that the increase in the number of suspects is more dynamic than the increase in the number of proceedings conducted for an act under Article 299 CC – in 2022, 2,300 persons suspected of acts under Article 299 CC were registered, while in 2023 – 3,100 suspects. This is due both to the continuation of cases opened in previous statistical periods and to the fact that money laundering cases tend to register more suspects. These cases tend to be multifaceted, involving several persons and different stages of money laundering.

In 2023, 38.5 percent of cases conducted under Article 299 CC ended with an indictment. The way in which cases under Article 299 CC were concluded is shown in Figure 4.

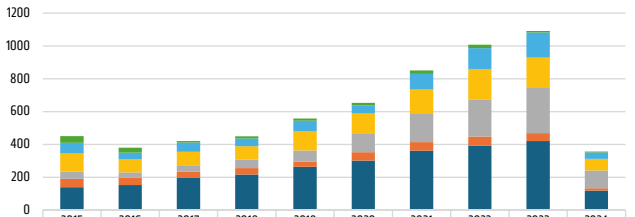
Figure 4. Grounds for concluding pre-trial proceedings conducted under Article 299 CC in 2023



Source: Own research based on reports and statistics from the PROK-SYS system.

An analysis of the ways in which proceedings under Article 299 CC are concluded shows that the number of indictments filed is increasing each year, which demonstrates the growing effectiveness in prosecuting perpetrators. The number of proceedings that are suspended is also increasing. The main reason for suspension is the need to search for a suspect who is in hiding or to obtain international legal assistance. An analysis of the termination of proceedings under Article 299 CC is presented in Figure 5.

Figure 5. Grounds for concluding pre-trial proceedings conducted under Article 299 CC



	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Other	41	30	9	13	13	16	20	21	9	6
Discontinuance of proceedings for failure to detect the offender	65	40	56	47	66	49	96	127	153	39
Discontinuance of proceedings	111	80	86	81	116	124	149	188	181	71
Suspension of proceedings	44	33	36	52	68	111	171	224	279	108
Refusal to initiate proceedings	50	44	35	39	32	51	53	55	49	14
Indictment	141	154	199	218	264	303	362	394	421	120

Source: Own research based on reports and statistics from the PROK-SYS system.

The number of money laundering cases is insignificant against the background of general statistics, which indicate that approximately 1 million cases are registered in Poland each year. Nor does it reflect the extent of the phenomenon. The low number of disclosed cases under Article 299 of the Penal Code is due to several factors. The mandatory form of procedure in these cases is an investigation, so it is the prosecutor, not the police, who takes the decision to open an investigation, the decision to file charges and the announcement of charges. It is also the prosecutor who draws up the indictment. In addition, prosecutors are obliged to inform the Chief Inspector of Financial Information of the opening of an investigation and must also fulfil the reporting obligation to inform the Organised Crime and Corruption Department of the National Prosecutor's Office in detail about the investigation. For these reasons, prosecutors often classify the actions of a financial mule as aiding and abetting the underlying offence (e.g., aiding and abetting fraud) or money laundering (Article 291 or Article 292 of the Swiss Penal Code, depending on the subjective assessment of the perpetrator's actions).

This practice complicates the quantitative analysis of money laundering in Poland and also has a negative impact on the dynamics of the proceedings and the implementation of follow-the-money

analysis due to the adopted regulations on the exemption of banks from banking secrecy.

6. Banking secrecy data collection and the dynamics of following the money

In order to investigate the transfer of the proceeds of crime, it is necessary to obtain data from a variety of financial market intermediaries, including banks, clearing agents, and other relevant entities. In order to fulfil the aforementioned requirements, it is necessary to exempt certain entities from the obligation of secrecy. The regulation of legally protected secrets in Poland is the subject of criticism due to the overgrowth and lack of uniformity of the relevant regulations.[17] A comprehensive analysis of all secrets obtained in the course of criminal money laundering proceedings is beyond the scope of this paper. One of the most significant regulations in view of the most common money laundering models involving mule accounts is bank secrecy.

Banking secrecy is regulated in the Act of 29 August 1997 – Banking Law.[18] The value protected by bank secrecy is the financial privacy of the bank customer. This derives from the constitutional right to privacy, which concerns information concerning financial and economic circumstances.[19] The purpose for which bank secrecy is established is to ensure the security of deposits and of persons collecting funds and making transactions.[20]

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[17] [17] A. Gryszczyńska, [in:] G. Szpor (ed.), *Struktura tajemnic*, *Tom VI serii Jawność i jej ograniczenia*, C.H. Beck, Warszawa 2016; G. Szpor, A. Gryszczyńska (eds.), *Leksykon tajemnic*, C.H. Beck, Warszawa 2016; M. Jaśkowska, [in:], G. Szpor (ed.), *Znaczenie orzecznictwa*, *Tom IV serii Jawność i jej ograniczenia*, C.H. Beck, Warszawa 2014.

[18] Act of 29 August 1997 – Banking Law (i.e., Journal of Laws of 2023, item 2488, as amended).

[19] P. Zapadka, *Tajemnica bankowa – cz. I*, "Monitor Prawniczy" 2015, No. 15, p. 833.

[20] Judgment of the Constitutional Court of 11 April 2000, K 15/98.

The material and personal scope of banking secrecy is set out in Article 104(1) of the Banking Act, according to which a bank, its employees, and persons acting as intermediaries of banking operations, are bound by the obligation of secrecy in relation to bank secrets, which includes all information relating to a banking operation obtained in the course of negotiations, and during the conclusion and performance of the agreement under which that operation is performed by the bank. The obligation to maintain banking secrecy therefore has a broad subjective scope and applies to all entities that have gained access to the protected information in connection with their participation in the bank's performance of banking activities. The material scope of secrecy encompasses all information concerning a banking activity, obtained during negotiations, in the course of concluding and performing the agreement under which the bank performs this activity. As observed by the Supreme Court, the legislature's use of the term "all information" indicates that the material scope of bank secrecy is based on the principle of maximisation.[21] The Banking Law also delineates the circumstances under which banking secrecy will not apply, the entities entitled to request information constituting banking secrecy, the procedure for releasing a bank from the obligation to maintain secrecy, the principles for the creation by banks (jointly with banking chambers of commerce) of institutions authorised to collect, process and make available to certain entities information constituting banking secrecy, and the principles for the processing of such information. The Banking Law also sets out a special regulation in relation to the provisions on personal data protection, which applies to banks when they process information constituting banking secrecy. This information may be used for purposes related to money laundering (Article 299 CC) or financing a terrorist offence (Article 165a CC). In such cases, the bank must notify the public prosecutor, the police or any other competent authority authorised to receive such notifications. In the event of a justified suspicion that bank operations are being used to conceal criminal

[21] Resolution of the Supreme Court – Criminal Chamber of 23 May 2006, I KZP 4/06.

activities or for purposes related to a tax offence or an offence other than those referred to in Article 165a or Article 299 CC, the bank and its employees are deemed liable (Articles 104–108 and 171(5) of the Banking Law).[22]

The communication of information covered by bank secrecy is generally contingent upon the bank being released from secrecy by a court or public prosecutor. However, there are exceptions to this general rule.

The beneficiary of bank secrecy is the person to whom the information covered by secrecy relates. Consequently, they may authorise the bank to communicate certain information to a person or organisational unit designated by them. This allows information to be obtained by law enforcement authorities in a timely manner. With regard to acts related to the hacking of bank accounts, victims are required to submit an authorisation when notifying the relevant authorities. This authorisation allows the authorities to obtain data concerning the history of log-ins to a bank account or transfers ordered from it.

According to Article 106(1) of the Banking Law, a bank shall be obliged to counter the use of its activity for purposes related to the criminal offence referred to in Article 165a or Article 299 of the Criminal Code. The principles and procedures for countering money laundering and terrorist financing are set out in the AML/CFT Law.[23]

If there is reasonable suspicion that the bank's activities are used to conceal any criminal activity or for any purposes connected with a fiscal offence or any offence other than a criminal offence referred to in Article 165a or Article 299 of the Criminal Code, the bank will notify the public prosecutor, the Police, or any other competent authority entitled to conduct pre-trial proceedings (Article 106a). The public prosecutor, the Police, and any other competent authority entitled to conduct pre-trial proceedings, after receiving such notification, may request additional information, also in the course of

[22] A. Gryszczyńska, *Tajemnica bankowa*, [in:] A. Gryszczyńska, G. Szpor (eds.), *Leksykon tajemnic*, Warszawa 2016, pp. 10–15.

[23] Act of 1 March 2018 on the prevention of money laundering and terrorist financing (i.e., Journal of Laws of 2023, item 1124, as amended).

the activities performed in accordance with Article 307 CCP.[24] Thus, if the bank is the notifying party, the trial authority may request additional information from the bank without releasing the bank from its obligation of secrecy.

In general, the court is responsible for authorising the lifting of bank secrecy. Pursuant to Article 105(2) of the Banking Act, only in certain factual situations may it take place on the basis of an order of the public prosecutor in connection with pending proceedings concerning a criminal offence or a fiscal offence:

i. against a natural person being a party to an agreement concluded with the bank, insofar as such information concerns that natural person,
ii. committed in connection with the activity of a legal person or an organisational unit without legal personality, insofar as such information concerns that legal person or organisational unit;
iii. specified in Article 165a or Article 299 of the Criminal Code;
iv. concerning the conclusion of an agreement for banking activities with a natural person, a legal person, or an organisational unit without legal personality, in order to verify whether such agreements have been concluded and to verify the duration of such agreements.

This differentiation implies that, in instances where the proceedings pertain solely to the underlying offences and do not involve money laundering, the prosecutor must submit a request to the court, which will then determine the release of the information in question. The procedure for the release of bank secrecy through the court typically takes approximately 30 days. Consequently, even if the bank's response includes information about the ATMs where the funds were withdrawn by the perpetrators, it will usually no longer be possible to secure the ATM recordings. Typically, ATM and city monitoring overwrites the data approximately four to six weeks after the recording, depending on the internal regulations adopted. In light of the necessity for a more dynamic acquisition of cash flow

[24] Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws of 2022, items 1375, as amended), hereinafter referred to as CCP.

data, it is imperative to modify the regulations pertaining to the release of bank secrecy and to facilitate the electronic transfer of provisions and requested data between the prosecution and the banks.

7. Conclusion and postulates

Today's bank robbers use keyboards rather than guns and steal digital wallets of cryptocurrency instead of sacks of cash. By operating in cyberspace, they do not have to devise a plan for a spectacular bank escape from law enforcement. Thanks to the abuse of the anonymity provided by the services available online, they remain unpunished.

The development of cybercrime, leads to the revision of current legal regulations, the development of instruments of international cooperation in cybercrime cases or the identification of new areas of criminological research. Changes in the threat landscape must be followed by changes in the substantive and procedural law.[25]

The perpetrators utilise technical tools that make it challenging or impossible to analyse network traffic (TOR), determine the IP address assigned to them by the telecommunications network operator (VPN, PROXY) or intercept the content of communication (encryption) in order to remain anonymous when logging into bank accounts utilised for money laundering or cryptocurrency exchange accounts. As a general rule, the individuals interacting with each other do not know each other's personal data, image or location, and do not discuss private matters. Communication occurs via encrypted communicators.

As a result of the division of roles employed, those most likely to be identified and apprehended by law enforcement authorities are those at the lower levels of the group structure, namely bank accounts sellers, individuals making withdrawals at ATMs, deposits at Bitcoin machines or banks and post offices. It is considerably more challenging to identify those directing the criminal activity.

[25] A. Gryszczyńska, G. Szpor, *Hacking in the (cyber)space*, "GIS Odyssey Journal" 2022, Vol. 2, No. 1, pp. 141–152, https://doi.org/10.57599/gisoj.2022.2.1.141 (accessed on: 14.05.2023).

The absence of secure financial transfer mechanisms would render the commission of crimes directed at monetisation impossible. Consequently, the individual chains used for money laundering must be eliminated. Tracking money transfers represents the most effective method of identifying and directing those who lead the group.

All cybercriminals targeting monetisation make use of money mules to launder illicit profits, whether in fiat or cryptocurrencies. Money mules are key facilitators for the laundering of illicit profits generated by cybercrime as they enable criminals to swiftly move funds across a network of accounts, often in different countries. In order to limit access to mule accounts, it is necessary to implement measures that will improve not only the rapid detection of anomalies, but also the exchange of information between banks and financial institutions and law enforcement authorities. Excessive waiting times for data from the bank most often lead to the impossibility of securing ATM or city surveillance recordings of the time and place of withdrawals. Consequently, it is imperative to amend the regulations of bank secrecy and empower prosecutors to exempt bank secrecy uniformly in all categories of cases, including proceedings concerning the underlying offence. Furthermore, in connection with the development of the prosecution's uniform IT system PROK-SYS, it is advisable to ensure electronic data exchange between the prosecution and banks. This will allow the order to be sent electronically to the bank and data on the bank account holder and transaction history to be obtained electronically. This will significantly speed up the process of obtaining data. It is important to note that a similar model of data exchange has been implemented in Poland between the public prosecutor's office system and the four largest telecommunications operators. Only through the rapid electronic acquisition of structured data will it be possible to conduct further analyses leading to the identification of accounts used for money laundering and the location of any funds that have been withdrawn or deposited.

In the latter stages of the process, once funds have been converted into cryptocurrency, perpetrators employ obfuscation techniques to anonymise their financial activities. This makes it even more challenging to analyse transfers made using money mule bank accounts

than to analyse transfers made using traditional banking channels. Mixers are the most common method of obfuscation, as mixers facilitate obfuscation by blending the funds of many users together, concealing the financial trail. This requires highly skilled investigators to utilise various methods to follow cryptocurrency (demixing, tracing cross-chain swaps, analysing liquidity pools, etc.), which slows down investigations.

Determining the perpetrators and the distributed infrastructure they use – especially servers, VPS, email accounts, cryptocurrency exchanges or bank accounts – also requires coordinated international cooperation. The laundering of their criminal funds usually happens very quickly after the fraud has taken place. This means that by the time a victim realises the scam, the money is already split through accounts based in multiple countries and laundered. Cybercrime investigations are inherently cross-border in nature, with perpetrators, electronic data and evidence necessary for criminal proceedings and victims typically located in different jurisdictions. Indeed, more than half of all investigations presently require access to cross-border electronic evidence.[26] Mechanisms for international cooperation, the preservation of electronic evidence and the exchange of data in cybercrime cases are still not effective enough and are a significant factor hindering the prosecution of cybercrime cases.

In 2023, Poland adopted a new legislation with the objective of reducing the effects of identity theft[27] and preventing smishing, vishing and spoofing.[28] The Act Amending Certain Laws in Connection with Identity Theft Prevention was enacted with the intention of allowing data subjects to reserve their PESEL number. As of 1 June 2024, financial institutions, such as banks, are obliged

[26] Recommendation for a Council Decision authorising the opening of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters, COM (2019) 70 final.

[27] Act of 7 July 2023 on Amending Certain Laws in Connection with Identity Theft Prevention (Journal of Laws of 2023, item 1394, as amended).

[28] Act of 28 July 2023 on combatting abuse in electronic communications (Journal of Laws of 2023, item 170).

to verify that the PESEL number provided is not reserved whenever a financial commitment is made or a bank account is opened. This will somewhat reduce the availability of bank accounts for money laundering. The Act on Combatting Abuse in Electronic Communications introduces new types of offences and criminal sanctions for spoofing and smishing, as well as a regulation of an administrative nature relating to the blocking of short text messages (SMS) and the blocking of calls.[29] This regulation contributes to the protection of users of financial services by reducing the number of underlying cybercrimes for money laundering. However, these are still only *ad hoc* and point solutions, and they do not address all needs.

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Combatting of the Money Laundering and Terrorism Financing in Hungary – Legally and Practically

1. Introductory remarks

In Hungary, money laundering has been criminalised since 1994. The Hungarian Anti-Money Laundering policy may be divided into two different pillars: *criminal law, and repressive measures*, which are regulated by the Hungarian Criminal Code, and *non-criminal, preventative measures*, which are specified in other Acts. Since the enactment of money laundering in the Hungarian Criminal Code, the offence has been modified several times, although there has been no significant judicial practice in connection with the offence. The main reason for the modifications were the fulfilment of the obligations of Hungary resulting from EU law and other international obligations. The reason for the latest modification of the Hungarian criminal law regulation entered into force on 1 January 2021 and was also the implementation of the latest EU directive.

With the regulation of money laundering, the Hungarian legislature implemented the provisions of the various binding and soft-law international requirements, e.g. the Recommendations of the FATF, the obligatory international conventions of the UN[1] and

[1] United Nations Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted on 20 December 1988; United Nations Palermo Convention Against Transnational Organized Crime adopted on 15 November 2000.

the Council of Europe.[2] and the directives of the European Union. At the level of the European Union, five Anti-Money Laundering Directives[3] with preventive instruments against money laundering were adopted. The primary objective of these directives is to prevent the financial sector from being used for the purposes of money laundering by requiring customer due diligence and reporting obligations. A Criminal Law Directive[4] was also issued which contains

[2] Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime adopted on 8 November 1990; Warsaw Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism adopted on 16 May 2005.

[3] The preventive directives of the European Union are as follows:

1. Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ EU L 166, 28.06.1991, pp. 77–82) (hereinafter referred to as the 1st Anti-Money Laundering Directive);

2. Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering – Commission Declaration (OJ EU L 344, 28.12.2001, pp. 76–82) (hereinafter referred to as the 2nd Anti Money Laundering Directive);

3. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and the financing of terrorism (OJ EU L 309, 25.11.2005, pp. 15–36) (hereinafter referred to as the 3rd Anti-Money Laundering Directive);

4. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or the financing of terrorism, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ EU L 141, 05.06.2015, pp. 73–117) (hereinafter referred to as the 4th Anti-Money Laundering Directive);

5. Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or the financing of terrorism, and amending Directives 2009/138/EC and 2013/36/EU (OJ EU L 156, 19.06.2018, pp. 43–74) (hereinafter referred to as the 5th Anti-Money Laundering Directive).

[4] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combatting money laundering by criminal law (OJ EU L 284, 12.11.2018, pp. 22–30) (hereinafter referred to as the Criminal Law Directive).

the repressive measures of combatting money laundering and lays down minimum standards for criminal offences and sanctions.[5]

The Preamble of the Criminal Law Directive of the EU emphasises that money laundering and the related financing of terrorism and organised crime are significant problems at an EU level because they damage the integrity, stability and reputation of the financial sector, and threaten the internal market and the internal security of the Union. In order to tackle these problems and to complement and reinforce the application of the preventive Anti-Money Laundering Directives, this directive seeks to combat money laundering by means of criminal law, enabling more efficient and swifter cross-border co-operation between competent authorities.[6] The directive first sets out the definition and the predicate offences of money laundering.

In connection with the latter, it has to be mentioned that the list of predicate offences has been significantly expanded compared to the previous and current preventive Anti-Money Laundering Directives.[7] According to the currently effective preventive directives, predicate offences of money laundering may be terrorism-related criminal offences, drug-related crimes, the activities of criminal organisations, serious fraud affecting the EU's financial interests, corruption, and all offences – including tax offences relating to direct taxes and indirect taxes – which are punishable by the deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of over six months.[8]

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[5] Article 1(1) of the Criminal Law Directive

[6] Preamble (1) of the Criminal Law Directive. See: J. Jacsó, *A pénzmosás*, [in:] A. Farkas (ed.), *Fejezetek az európai büntetőjogból*, Bíbor Kiadó, Miskolc 2017, pp. 128–129; J. Jacsó, B. Udvarhelyi, *A Bizottság új irányelvjavaslata a pénzmosás elleni büntetőjogi fellépésről az egyes tagállami szabályozások tükrében*, "Miskolci Jogi Szemle" 2017, No. 2, p. 40.

[7] See: J. Jacsó, *A pénzmosás*, *op. cit.*, p. 130; J. Jacsó, B. Udvarhelyi, *A Bizottság…*, *op. cit.*, pp. 43–44.

[8] Article 3(4) of the 4th Anti-Money Laundering Directive; Article 1(2) of the 5th Anti-Money Laundering Directive.

The Criminal Law Directive, however, lists almost thirty criminal offences that are considered criminal activity and therefore may be a predicate offence of money laundering: participation in an organised criminal group and racketeering; terrorism; trafficking in human beings and migrant smuggling; sexual exploitation; illicit trafficking in narcotic drugs and psychotropic substances; illicit arms trafficking; illicit trafficking in stolen goods and other goods; corruption; fraud; counterfeiting of currency; counterfeiting and piracy of products; environmental crime; murder, grievous bodily harm; kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling; tax crimes relating to direct and indirect taxes, as laid down in national law; extortion; forgery; piracy; insider trading and market manipulation; and cybercrime.[9] It is important to highlight that the EU legislator recognised the importance of action against cybercrime and therefore named it separately among the list of predicate offences.[10]

The aim of this article is to present the legal and practical aspects of the AML/CTF regulation of Hungary. After a brief historical overview, it examines the repressive and preventive measures against money laundering in Hungary, especially in the area of combatting cybermoney laundering. We would like to highlight the main characteristic of the fight against the financing of terrorism from the preventative approach.

[9] Article 2(1) of the Criminal Law Directive.

[10] Point v) of Article 2(1) of the Criminal Law Directive "cybercrime, including any offence set out in Directive 2013/40/EU of the European Parliament and of the Council."

2. Repressive measures against money laundering in Hungary

2.1. HISTORICAL DEVELOPMENT OF THE FIGHT AGAINST MONEY LAUNDERING IN HUNGARY

In Hungary, money laundering has been a criminal offence since 1994.[11] With this legislation, Hungary fulfilled its legal harmonisation obligation which was prescribed as a condition for its accession to the European Union, especially the implementation of the 1st Anti-Money Laundering Directive of the EU.

According to the original version of money laundering in the previous Hungarian Criminal Code[12], money laundering could be committed by dint of hiding material assets created in connection with a crime by concealing their origin or true nature, or providing the authorities with false information about their origin or true nature. Money laundering could also be established if the perpetrator acquired, used, preserved, managed, sold, or performed any financial or banking operations with the assets or acquired other material assets because of them or their consideration, if he or she knew the origin of the material goods at the time of the commission. In connection with the predicate offence, the legislative proposal originally submitted to the Hungarian Parliament in 1994 included an exhaustive list of the predicate offences of money laundering, including: terrorism, misuse of narcotic drugs and smuggling of weapons. During the debate on the bill, the list of predicate offences was widened. The text of the previous Criminal Code that was finally adopted, punished money laundering in connection with criminal offences punishable by imprisonment of more than five years, as well as illegal immigrant smuggling, misuse of narcotic drugs and violation of international legal obligations.[13] The scope

[11] Act IX of 1994 on the Modification of Criminal Law Acts.

[12] Act IV of 1978 on the Criminal Code (hereinafter referred to as the previous CC)

[13] See: E. Fejes, *A pénzmosás hazai és nemzetközi tapasztalatok alapján*, MNB Műhelytanulmányok 5, Budapest 1994, p. 53.

of the predicate offences, however, has continuously been expanded since the enactment of money laundering in the Criminal Code. In 1998, two other criminal offences, bribery and bribery in international relations, were added to the catalogue of predicate offences,[14] and according to the modification in 1999, all criminal offences punishable by imprisonment could become predicate offences of money laundering.[15]

Act CXXI of 2001,[16] which came into force on 1 April 2002, conceptually modified the criminal offence of money laundering. According to the regulation, money laundering can be committed by a person who uses an asset that has resulted from the commission of an act punishable by imprisonment in order to conceal its origin in the exercise of an economic activity, or carries out any financial or banking operations in connection with it.[17] The modification created the potential to criminalise the perpetrator of the predicate offence for money laundering (self-laundering) and it established punishment for negligent money laundering.

In 2007, Act XXVII of 2007[18] created a more differentiated regulation and distinguished between intentional money laundering committed by a person other than the perpetrator of the predicate offence, intentional self-laundering and negligent laundering. In the case of intentional money laundering committed by a person other than the perpetrator of the predicate offence, the Criminal Code distinguished between two categories of criminal conduct, which some representatives of the legal literature called dynamic and static money laundering. While dynamic money laundering typically results in the direct or indirect transformation of the assets, static

[14] Act LXXXVII of 1998 on the amendment of criminal legal acts.

[15] Act CXX of 1999 on the amendment of criminal legal acts.

[16] Act CXXI of 2001 on the amendment of Act IV of 1978 on the Criminal Code.

[17] See: Á. Péceli, *Hungary's experiences in combatting money laundering – The evolution of national criminalisation and practice*, [in:] Gy. Virág (ed.), *Combatting Cybercrime, Corruption and Money Laundering. Training for Judicial Academies of Visegrad 4 Countries*, "Studies on Criminology" 2022, No. 59, Special issue 2, pp. 245–246.

[18] Act XXVII of 2007 on the amendment of Act IV of 1978 on the Criminal Code and of other criminal laws.

money laundering tends not to involve the transformation of assets of criminal origin, which generally do not change during the commission of the criminal offence.[19] According to another interpretation, in case of the dynamic money laundering, the key aspect is the concealment, and the offence consists of criminal conduct such as transferring or converting the criminal assets, using them in business operations, or using them in the course of financial transactions. In contrast, static money laundering (e.g., acquiring, obtaining or handling the criminal assets) is the "mirror image" of the dynamic money laundering and is committed by the recipients and so-called "end-users" of proceeds, who use them or consume them instead of circulating them further.[20] This distinction of dynamic and static money laundering has also been adopted by the judicial practice, but in some cases it may be misleading. The criminal offence was later slightly modified in 2007[21] and in 2009.[22]

In 2012, a new Criminal Code was adopted in Hungary, which came into force on 1 July 2013.[23] The current Criminal Code regulates money laundering in a separate chapter,[24] which contains two criminal offences: money laundering[25] and failure to comply with the reporting obligation related to money laundering.[26] The original version of the criminal offence of money laundering in the Hungarian Criminal Code could be divided into four main categories of punishable conduct. The first three could be committed intentionally,

[19] I.L. Gál, P. Sinku, *Dinamikus és statikus pénzmosás – egy új tényállás kritikai elemzése*, "Magyar Jog" 2008, No. 3, pp. 134–135; I.L. Gál, *The New Legislation on Money Laundering in Hungary Since 2021*, [in:] Gy. Virág (ed.), *Combatting Cybercrime, Corruption and Money Laundering. Training for Judicial Academies of Visegrad 4 Countries*, "Studies on Criminology" 2022, No. 59, Special issue 2, p. 203.

[20] Á. Péceli, *Hungary's experiences in combatting money laundering*, *op. cit*., p. 248.

[21] Act CLXII of 2007 on the amendment of certain criminal legal acts.

[22] Act LXXX of 2009 on the amendment of Act IV of 1978 on the Criminal Code.

[23] Act C of 2012 on the Criminal Code (hereinafter referred to as the CC).

[24] Chapter XL of the CC.

[25] Sections 399–400 of the CC.

[26] Section 401 of the CC.

while the fourth category is negligent money laundering. Among the three intentional categories, the first two could be committed by anybody except the perpetrator of the predicate offence, while the third could only be committed by the perpetrator of the predicate offence.[27] The first category of intentional money laundering was realised when the perpetrator converted or transferred an asset arising from criminal offence or performed any financial transaction or received any financial service in connection with the asset. In such cases the aim of the offender would have to be the concealment or disguise of the origin of the asset or the frustration of the criminal proceedings conducted against the perpetrator of a punishable criminal offence committed by others. It would also be punishable were the perpetrator to conceal or disguise the origin of the asset and any right attached to the asset or any changes in this right, or concealed or suppressed the place where the asset could be found. In the second category of intentional money laundering, the legislator would punish the acquisition, safeguarding, handling, use or consumption of the asset, or the acquisition of other financial assets by way of or in exchange for the asset, or by using the consideration received for the asset. In this case, the Criminal Code required no special intent; however, the perpetrator had to be aware of the true origin of the asset at the time of commission. In the case of self-laundering, the perpetrator of the predicate offence could be held liable for money laundering if he had used the asset in his business activities or performed any financial transaction or received any financial service in connection with the asset in order to conceal the true origin of the asset.[28] The commission of self-laundering also required specific intent from the perpetrator, i.e. the concealment or disguise of the origin of the asset. This section naturally omitted the frustration of the criminal proceedings conducted against the

[27] J. Jacsó, *A pénzmosás*, [in:] T. Horváth, M. Lévay (eds.), *Magyar Büntetőjog. Különös Rész*, Wolters Kluwer Kft., Budapest 2013, p. 622.

[28] See further: B. Udvarhelyi, *Változások a pénzmosás büntetőjogi tényállásában az új Btk. hatálybalépésével*, [in:] I. Stipta (ed.), *Miskolci Egyetem Doktoranduszok Fóruma. Miskolc, 2013. november 7. Állam- és Jogtudományi Kar szekciókiadványa*, Miskolci Egyetem Tudományszervezési és Nemzetközi Osztály, Miskolc 2013, pp. 316–317.

perpetrator of the predicate offence as intent. While the above forms of conduct could only be committed intentionally, the Hungarian legislator punished negligent money laundering as well, where the punishable conduct was the same as in the case of self-laundering: the use of the asset in business activities or the performance of any financial transaction or receipt of any financial service.

It should also be mentioned that the new Criminal Code had further widened the scope of the predicate offences of money laundering. While according to the previous Criminal Code, only criminal offences punishable by imprisonment could be predicate offences of money laundering, with the new Criminal Code, the scope of possible predicate offences covers any punishable criminal offences.

2.2. THE CURRENTLY EFFECTIVE REGULATION OF MONEY LAUNDERING

The criminal offence of money laundering in the Criminal Code of 2012 was significantly modified and recodified by Act XLIII of 2020,[29] which came into force on 1 January 2021. With the new regulation, the Hungarian legislator seeks to ensure the compliance with the Criminal Law Directive of the European Union. The current regulation stipulates as follows:

Section 399 of the Criminal Code:

> (1) Any person who conceals or disguises the origin of assets derived from criminal activity, including any right on and the location of such assets, and any changes therein, is guilty of money laundering.
> (2) Money laundering shall also include where a person is involved in receiving assets derived from criminal activity from others with intent to conceal or disguise the origin of the assets, including any right on and the location of such assets, and any changes therein,

[29] Act XLIII of 2020 on the amendment of the Criminal Procedure Act and other related acts.

or in concealing, converting, transferring such assets participates in the alienation of or uses such assets, performs any financial transaction or receives any financial service in connection with those assets, or makes the necessary arrangements to that effect.

(3) Money laundering shall also include cases in which a person is involved in receiving assets derived from criminal activity from others, or in concealing, converting, transferring such assets, participates in the alienation of or uses such assets, performs any financial transaction or receives any financial service in connection with those assets, or makes the necessary arrangements to that effect:
   a) with intent of aiding efforts to prevent the enforcement of confiscation and asset recovery ordered against others, or
   b) with intent to prevent the enforcement of confiscation and asset recovery ordered against others.

(4) Any person who, in connection with assets derived from criminal activity committed by others:
   a) acquires, obtains the right of disposition over such assets, or
   b) safeguards, conceals, handles, uses, consumes, converts, transfers, or participates in the alienation of such assets is also guilty of money laundering.

(5) The punishment shall be imprisonment for up to five years for a felony if the value involved in money laundering is insubstantial in value.

(6) The penalty shall be imprisonment for between two to eight years if money laundering is committed:
   a) in respect of a particularly considerable value; or
   b) in respect of a substantial value:
   ba) in a pattern of business operation,
   bb) by a service provider defined in the Act on the Prevention and Combatting of Money Laundering and Terrorist Financing, by an officer or

employee of such a service provider in connection with the service provider's activities, or

bc) by a public official.

(7) The punishment shall be imprisonment for between five and ten years if money laundering is committed:

a) in respect of particularly substantial value; or

b) in respect of particularly considerable value:

ba) in a pattern of business operation,

bb) by a service provider defined in the Act on the Prevention and Combatting of Money Laundering and Terrorist Financing, by an officer or employee of such service provider in connection with the service provider's activities, or

bc) by a public official.

(8) Any person who engages in preparations for money laundering is guilty of a misdemeanour punishable by imprisonment not exceeding one year.

(9) An abettor or aider shall not be prosecuted if he or she commits the criminal offense defined in Subsection (3) or (4) in respect of assets derived from a criminal activity he or she has committed.

Section 400 of the Criminal Code:

(1) Any person who is involved in concealing, converting, transferring assets derived from criminal activity committed by others, or participates in the alienation of or uses such assets, performs any financial transaction or receives any financial service in connection with those assets, or makes the necessary arrangements to that effect, and is negligently unaware of the true origin of the asset is guilty of misdemeanour punishable by imprisonment not exceeding two years.

(2) The punishment shall be imprisonment for misdemeanour for up to three years if the criminal offence defined in Subsection (1):

a) involves a particularly substantial or greater value;
b) is committed by a service provider defined in the Act on the Prevention and Combatting of Money Laundering and Terrorist Financing, by an officer or employee of such service provider in connection with the service provider's activities; or
c) is committed by a public official.

(3) Any person who voluntarily reports to the authorities and reveals the circumstances of such a commission shall not be prosecuted for money laundering as specified under Subsections (1) and (2), provided that the act has not yet been revealed, or it has been revealed only partially.

According to the Hungarian legislator, the protected legal interest in money laundering is the fight against organised criminality and the financing of terrorism, the trust in the proper functioning of the legitimate economy and the protection of the financial institutions and other participants in financial life.[30]

The object of the criminal offence is the asset that derives from a criminal offence. It is a significant change compared to the above regulation, since it has broadened the scope of the possible object of money laundering. The object of money laundering was previously the material objects, but it was extended with an interpretive provision to include documents embodying property rights and dematerialised securities. These frameworks, however, have become too narrow in view of the new types of property forms that have appeared recently (various forms of electronic data used for payment, e.g. crypto-currencies).[31] The concept of asset covers a wider range of objects than previously, since it may include not only physically

[30] J. Jacsó, *A pénzmosás*, *op. cit*., p. 620; G.M. Molnár, *A pénzmosás*, [in:] B. Busch (ed.), *Büntetőjog II. Különös Rész. A 2012. évi C. törvény alapján*, HVG-ORAC Kiadó, Budapest 2012, p. 706.

[31] See: Justification of the Criminal Code.

existing objects and assets, but also rights and claims.[32] According to the explanatory memorandum of the amendment:

> the common feature of these new types of property is that their disposal can still be considered as a pecuniary benefit, and therefore as a pecuniary benefit of crime, and it is therefore essential that criminal law has an appropriate toolbox to deal with them.[33]

This amendment was necessary because this type of asset has the characteristics that make them perfectly suitable for moving values in an anonymous and untraceable way without having to worry about any borders.

According to the Criminal Code, the asset concerned has to be a result of criminal activity. Although the Act does not explicitly state that the criminal activity is required to be subject to criminalisation "under this Act", money laundering may be interpreted as acts criminalised at least by the Criminal Code of Hungary. It is therefore insufficient that the predicate offence be a criminal activity under the local legislation where it was committed. The Criminal Code does not use the term *criminal offence* but rather *criminal activity*, so money laundering may be established even if the perpetrator of the predicate criminal offence is unknown or is beyond punishment (for example, if the perpetrator of the predicate offence is under the age of criminal responsibility or has diminished responsibility).[34] The punishment of the perpetrator of the predicate offence is therefore not a prerequisite for the punishment of the perpetrator of the money laundering itself. In connection with the liability for money laundering, it is also irrelevant whether the predicate offence falls under the Hungarian jurisdiction. Money laundering today is committed almost exclusively on an international level, which means that a criminal offence committed abroad may also be a predicate

[32] I. Ambrus, *Büntetőjog 2021 – a pénzmosás újrahangolt tényállása és a hálapénz kriminalizálása*, "Büntetőjogi Szemle" 2020, No. 2, p. 6.

[33] See: Justification of the Criminal Code.

[34] I.L. Gál, *The New…*, *op. cit.*, p. 206.

offence for money laundering, provided that it is punishable in both countries. In conclusion, it may be stated that any criminal offence committed by anybody, anywhere that is punishable under Hungarian law, may be a predicate offence of money laundering.[35]

The criminal offence of money laundering has five different types. The first is so-called material money laundering, which may be committed by anybody who conceals or disguises the origin of assets derived from criminal activity, including any right on and the location of such assets, and any changes therein. The concealment of the origin of the assets means that the existence of the criminal assets is hidden from the outside world, while the disguising of the assets includes an additional requirement: a false legal title in order to make the origin of the assets appear legal. The outcome is therefore that the origin of the assets becomes concealed or disguised, which means that the assets of criminal origin are permanently distanced from their criminal origin, so that their origin appears legitimate. This form of criminal conduct is new in the Hungarian criminal law, but according to some opinions, it will be infrequently used in the judicial practice. The reason for this is that if the perpetrator manages to conceal the origin of the criminal assets, he or she could be exempt from criminal liability because of the successful money laundering. On the other hand, if the concealment is unsuccessful, money laundering cannot be established due to the lack of a criminal outcome.[36]

The second category of the criminal conducts of money laundering may be committed with the intent to conceal or disguise the origin of the assets, including any right on and the location of such assets, and any changes therein. The Criminal Code defines several punishable conducts. The receipt of the assets of criminal origin from a third party means that the assets come into the possession of the perpetrator, who thus extends his or her scope of control over

[35] See: I.L. Gál, *Pénzmosás*, [in:] P. Polt (ed.), *Új Btk. Kommentár 8. kötet, Nemzeti Közszolgálati és Tankönyv Kiadó*, Budapest 2013, p. 51; G.M. Molnár, *A pénzmosás*, *op. cit*., p. 707; M. Tóth, *A pénzmosás Magyarországon – avagy fantomból valóság*, "Ügyészek Lapja" 1998, No. 6, p. 41.

[36] I.L. Gál, *The New…*, *op. cit.*, p. 209; I. Ambrus, *Büntetőjog 2021…*, *op. cit.*, p. 6.

them. The concealment of the assets of criminal origin means an act that results in the assets being inaccessible in a physical sense. The conversion of the asset may occur if the objects of criminal origin are incorporated into another object. In the case of the transfer of the assets, they are transferred from the possession of the perpetrator and a third party acquires the right of possession thereof either through a contract or a physical act. Participation in the alienation of assets means assisting in the transfer through any active form of conduct. The use of the assets requires the transformation of the assets of criminal origin in the perpetrator's interest or the interest of a third party, for example, by using a part or the whole of the stolen money for property purchases.[37] Finally, performing financial activities or receiving financial services in connection with assets of criminal origin is defined in the interpretation provision in Section 402(2) of the Criminal Code. According to the provision:

> financial activities and financial services shall mean financial services and activities auxiliary to financial services, investment services and activities auxiliary to investment services, commodity exchange services, investment fund management services, venture capital management services, exchange services, central depository services, the activities of bodies acting as central counterparties, insurance services, reinsurance services, and the activities of independent insurance intermediaries, voluntary mutual insurance funds, private pension funds and institutions for occupational retirement provision.

The third category is the so-called money laundering with the intent of aiding and abetting.[38] The punishable conducts are the same as in the above category of money laundering, but the criminal offender has to act with the intent to aid efforts to prevent the enforcement of confiscation and asset recovery ordered against

[37] I.L. Gál, *The New..., op. cit.*, pp. 209–210.
[38] Ibidem, s. 202.

others, or with intent to prevent the enforcement of confiscation and asset recovery ordered against others.

The fourth type of money laundering may be described as laundering of stolen assets.[39] This incorporates a previously separate crime, i.e. dealing in stolen goods (fencing)[40] into the criminal offence of money laundering. It had already been suggested by a working group in 2018, that the two crimes overlapped with each other and could be consolidated into one single offence.[41] This form of money laundering may be committed by any person who acquires, obtains the right of disposition, safeguards, conceals, handles, uses, consumes, converts, transfers or participates in the alienation of assets derived from a criminal activity committed by others.

The fifth category is negligent money laundering. The punishable conduct is very similar in this case too: concealing, converting, transferring, participation in the alienation, use of assets derived from criminal activity committed by others, or performing any financial transaction in connection with them, or making the necessary arrangements to that effect. In this case, however, the perpetrator is negligently unaware of the true origin of the asset. It is important to emphasise that the punishable conduct may be committed intentionally in this case too; it is the perpetrator who is negligent and is unaware of the true origin of the asset.[42]

The first two forms of money laundering may be committed by anyone, either a person other than the perpetrator of the predicate offence, or the perpetrator of the underlying criminal offence. The third, fourth and fifth types of money laundering may only be committed by a person different from the perpetrator of the predicate offence.[43] In these three categories of money laundering, even the abettor or aider cannot be held liable for money laundering if he or she is the perpetrator of the predicate offence.[44]

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[39] Ibidem.

[40] Previously Section 379 of the CC.

[41] Á. Péceli, *Hungary's experiences…*, *op. cit.*, p. 254.

[42] M. Tóth, *Gazdasági bűnözés és bűncselekmények*, KJK-Kerszöv, Budapest 2000, p. 361.

[43] I.L. Gál, *The New…*, *op. cit.*, pp. 213–214.

[44] See: Section 399(9) of the CC.

In connection with the sanctions of money laundering, it has to be mentioned that money laundering is only punishable if the value is higher than HUF 50,000. Under the value of HUF 50,000, money laundering is only a misdemeanour.[45] If the value involved in intentional money laundering is higher than HUF 50,000, but below a substantial value (HUF 5 million), the punishment shall be imprisonment for up to five years. The penalty shall be imprisonment for between two and eight years if the money laundering is committed in respect of a particularly considerable value (HUF 50 million–500 million); or in respect of a substantial value (HUF 5 million–50 million) if it was committed as a part of business activity,[46] by a service provider defined in the Act on the Prevention and Combatting of Money Laundering and Terrorist Financing, by an officer or employee of such a service provider in connection with the service provider's activities,[47] or by a public official.[48] In the most serious cases, the punishment

[45] See: Section 177(1a) of Act II of 2012 on about the misdemeanours, the misdemeanours procedure and the misdemeanour registration system.

[46] According to Point 28 of Section 459(1) the CC, a crime is deemed to have been committed on a commercial scale if the perpetrator is engaged in criminal activity of the same or similar character to generate profits on a regular basis.

[47] See: Section 1 of Act LIII of 2017 on the Prevention and Combatting of Money Laundering and Terrorist Financing (hereinafter referred to as the AML-Act). See in details: Point 3.

[48] According to Point 11 of Section 459(1) the CC, public officials are:

a) the President of the Republic,
b) Members of Parliament, spokesmen for the nationality and Members of the European Parliament elected in Hungary,
c) constitutional court judges,
d) the Prime Minister, other ministers, state secretaries, state secretaries for public administration and deputy state secretaries, chief prefects,
e) judges, public prosecutors and arbitrators,
f) the commissioner of fundamental rights and his or her deputy,
g) notaries public and assistant notaries public,
h) independent court bailiffs, independent bailiff substitutes, and assistant bailiffs authorised to serve process,
i) members or councils of representatives of municipal governments and representatives of nationality self-governments,
j) commanding officers of the Hungarian Armed Forces, and commanders of water craft or aircraft, if vested with authority to enforce the regulations pertaining to investigating authorities,

shall be imprisonment for between five and ten years if the money laundering is committed in respect of particularly substantial value (exceeding HUF 500 million); or in respect of particularly considerable value (HUF 50 million–500 million) if the aforementioned circumstances are met. In the case of negligent money laundering, the penalty is imprisonment not exceeding two years, while in cases featuring aggravating circumstances, it is imprisonment for up to three years. In connection with negligent money laundering, circumstances may be considered aggravating if the criminal offence involves a particularly considerable value or a value greater than HUF 50 million and is committed by a service provider defined by the AML-Act or by a public official.

In connection with negligent money laundering, the Criminal Code defines the grounds for dismissing criminal liability. According to this provision, the perpetrator shall not be prosecuted for money laundering if he or she voluntarily reports to the authorities and discloses the circumstances of the crime, provided that the act has yet to be revealed, or it has been revealed only partially. The reason for this provision is that it is more important to disclose unexplored offences than to punish the perpetrator. This preferential possibility may also contribute to the detection and the prosecution of the predicate offence.[49] In this matter, the court has no discretion: if the act is yet to be fully discovered by the investigating authorities, the perpetrator has to be exempt from criminal liability.[50]

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k) members of the staff of the Constitutional Court, the Sándor Palace, the Office of Parliament, the Office of the Commissioner of Fundamental Rights, the National Bank of Hungary, the State Audit Office, the courts, prosecutor's offices, central government agencies, the Parliament Guard, Budapest and greater county government agencies, and persons exercising executive powers or serving at public bodies, whose activity forms part of the proper functioning of the agency in question,

l) members of the election committee.

[49] G.M. Molnár, *A pénzmosás*, *op. cit.*, p. 713.

[50] I.L. Gál, *The New…*, *op. cit.*, p. 217.

2.3. FAILURE TO COMPLY WITH THE REPORTING OBLIGATION RELATED TO MONEY LAUNDERING

As has already been mentioned, Chapter XL of the Criminal Code contains not only the criminal offence of money laundering, but the crime of failure to comply with the reporting obligation related to money laundering:

Section 401 of the Criminal Code:

> Any person who fails to comply with the reporting obligation prescribed by law in connection with the prevention and combatting of money laundering and terrorist financing is guilty of misdemeanor punishable by imprisonment not exceeding two years.

In Hungary, the failure to report money laundering by means of criminal law is as old as the criminalisation of money laundering. The failure to comply with the reporting obligation by legally defined parties – as a form of money laundering – was introduced by Act IX of 1994 in the Hungarian Criminal Code. In parallel, a separate Anti-Money Laundering Act was adopted in 1994 which introduced a number of obligations for the financial sector.[51] Currently in Hungary, preventive measures against money laundering are also regulated in a separate Act,[52] which was adopted in order to implement the provisions of the 4th and 5th Anti-Money Laundering Directives of the European Union.[53]

The AML-Act prescribes special duties to the service providers falling into its ambit. The scope of the AML-Act covers the following entities having a registered office, branch or business establishment in Hungary: credit institutions; financial services institutions; institutions for occupational retirement provision; voluntary mutual

[51] J. Jacsó, *A pénzmosással kapcsolatos bejelentési kötelezettség elmulasztása*, [in:] I. Görgényi *et al.* (eds.), *Magyar büntetőjog Különös rész*, Wolters Kluwer Kiadó, Budapest 2019, p. 795.

[52] Act LIII of 2017 on the Prevention and Combatting of Money Laundering and Terrorist Financing (hereinafter referred to as the AML-Act).

[53] See in details: Point 3.

insurance funds; operators accepting and delivering international postal money orders; providers of real estate agency or brokering and any related services; providers of auditing services; providers of accountancy (bookkeeping), tax experts, certified tax expert services, tax advisory activities under agency or service contract; operators of casinos, card rooms, or providers of gambling services – other than distance gambling – distance gambling services, on-line casino games; traders in precious metals or articles made of precious metals; traders in goods, involving a cash payment to the amount of HUF 3 million or more; attorneys, law firms, European Community jurists, law firms of European Community jurists (hereinafter referred to collectively as *attorney*), registered legal counsels, notaries public; fiduciary managers; providers engaged in exchange services between virtual currencies and legal tender, and/or between virtual currencies; custodian wallet providers; service providers trading or acting as intermediaries in the trade of cultural goods (e.g., works of art, antiques) where the value of the transaction or a series of linked transactions amounts to three million HUF or more; service provider storing, trading or acting as intermediaries in the trade of cultural goods (e.g., works of art, antiques) when this is carried out via free ports, where the value of the transaction or a series of linked transactions amounts to three million HUF or more; and providers of corporate headquarters services. The Act applies to customers of service providers, including their authorized representatives, agents, proxies; to directors, employees of service providers and their contributing family members; and to persons registered by the bar association who practice the profession of junior lawyer under the guidance of a bar association legal counsel.[54]

Based on their reporting obligations,[55] the directors, employees of service providers and their contributing family members shall report without delay in writing any information, fact or circumstance giving rise to a suspicion of money laundering, of the

[54] Section 1 of the AML-Act.
[55] Section 30 of the AML-Act.

financing terrorism, or that specific property is derived from criminal activity.[56]

If the service provider intentionally fails to comply with the reporting obligation prescribed by law in connection with the prevention and combatting of money laundering and terrorist financing, he or she is guilty of misdemeanour punishable by imprisonment not exceeding two years. The failure to comply with the reporting obligation therefore has consequences in criminal law in Hungary.[57]

2.4. MONEY LAUNDERING AND CRYPTOCURRENCIES

The Hungarian academic literature has already dealt with the relationship between money laundering and cryptocurrencies.[58] The biggest problem tends to be the anonymity of cryptocurrencies. The transfer is decentralized, i.e. it is performed without an intermediary, and the users make the transfers between each other. The system is based on the mutual trust of users, outside the banking system. Virtual payment systems have no supervision. The biggest challenge for law enforcement is that the money transfers cannot be linked to a specific natural person. The area was initially completely unregulated. Virtual currencies were not legal tender. It may have therefore become the target for money laundering. Money laundering in the virtual world is even less likely to be revealed. These service providers were not initially subject to the reporting obligation. In cyberspace, it is difficult to detect suspicious cases.

[56] See more about the regulation: J. Jacsó, B. Udvarhelyi, *The fight against money laundering in Hungary*, [in:] Á. Farkas, G. Dannecker, J. Jacsó (eds.), *Criminal Law Aspects of the Protection of the Financial Interests*, Wolters Kluwer Hungary, Budapest 2019, pp. 288–304, https://hercule.uni-miskolc.hu/files/5694/Criminal_law_protection_fedellel.pdf (accessed on: 24.10.2023).

[57] Section 401 of the CC. See in detail: J. Jacsó, *A pénzmosással…*, *op. cit.*, pp. 794–798; G.M. Molnár, *A pénzmosás*, *op. cit*., pp. 713–721.

[58] See for example: K. Mezei, *A kriptovaluták kihívásai a büntető anyagi és eljárási jogban*, "Pro Futoro" 2019, No. 1, pp. 79–98; Z.A. Nagy, K. Mezei, *Pénzmosás a kibertérben*, "Infokommunikáció és Jog" 2018, No. 1, pp. 26–31; P. Bálint, A.A. Lakatos, *Paradigmaváltás a pénzmosás területén a bitcoin mint kriptopénz megjelenlése*, "Infokommunikáció és Jog" 2016, No. 1, pp. 22–25.

The latest development in the recent past was the amendment of the IV AML Directive by the Regulation Transfer of Funds (TFR[59]), which extended the scope of the directive to crypto-asset service providers.

It must be underlined that from 2020[60] the scope of the Hungarian AML-Act covers service providers engaged in exchange services between virtual currencies and legal tender, and/or between virtual currencies, and custodian wallet providers.[61] Such service providers also have to report cases in which money laundering is suspected. These amendments have made it possible to address potential money laundering and terrorist financing risks arising from the use of technological innovations. In order to combat money laundering and the financing of terrorism, the competent authorities must be able to monitor, through obliged service providers, the use of virtual means of payment.

The number of reports involving virtual currencies has increased significantly. According to the report of Hungarian FIU, 38 cases involving virtual currency were reported in 2017. In this year, there had been 4 cases in which information was transmitted to the relevant authorities; 3 of which were addressed to a police authority, and 1 to the Counter Terrorism Centre.[62]

In relation to the reporting obligation, there have been several related suspicious transactions at crypto ATMs. All transactions were below the identification limit. The customer always used a different phone number and a different wallet address for each transaction. The destination of all transactions was the same. It was suspected that crypto machines were used to purchase bitcoin with

[59] Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849 (OJ EU L 150, 09.06.2023, pp. 1–39 (TRF Regulation)).

[60] In accordance with the 4th and 5th Anti-Money Laundering Directive.

[61] According to Section 3, letter 22a of the AML-Act, custodian wallet provider shall mean an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies.

[62] Report of the FIU from 2017, https://pei.nav.gov.hu/eves-jelentesek/eves-jelentes-2017, pp. 10–11 (accessed on: 24.10.2023).

the proceeds of the crime. There have also been cases of suspicious transfers from a bank account at a bank to a bitcoin account on a convertible platform. Operational analyses based on requests and information from foreign financial intelligence units have also identified risks related to virtual currencies. Individuals were defrauded of various sums of money on the promise of investing in virtual currencies.

In the prosecutorial practice, money laundering was committed by dint of cryptocurrencies in several cases. Based on information from the Prosecutor's Office of Hungary, the typical predicate offences of money laundering using cryptocurrency are fraud and drug trafficking offences.

3. Preventive measures against money laundering

Parallel with the criminalisation of money laundering and the modification of the former Hungarian Criminal Code in 1994, a separate Act[63] was adopted that prescribed specific obligations for members of the financial sector. The act was subsequently replaced by two new acts.[64] The current Legal Act regarding the Prevention and Combatting of Money Laundering and Terrorism Financing is Act LIII of 2017. It therefore has seen that in Hungary, preventative measures against money laundering are regulated not in the Criminal Code, but in a separate Act.

According to the Preamble of the Hungarian AML-Act, its objective is:

> to effectively enforce the provisions for combatting money laundering and the financing of terrorism with a view to preventing the laundering of money and other financial means obtained from criminal activities through activities

[63] Act XXIV of 1994 on the Prevention and Combatting of Money Laundering.

[64] Act XV of 2003 on the Prevention and Combatting of Money Laundering; Act CXXXVI of 2007 on the Prevention and Combatting of Money Laundering and Terrorist Financing.

> that are considered linked to potential money laundering operations, as well as helping prevent the flow of funds and other financial means used in financing terrorism.

The service providers have many obligations, from which the two most important are the customer due diligence obligation and the reporting obligation. Service providers shall apply customer due diligence measures in the following cases:

1. when establishing a business relationship;
2. when carrying out an occasional transaction that amounts to HUF 4,500,000 or more;
3. in the case of persons trading in goods, when carrying out occasional transactions in cash amounting to HUF 3,000,000 or more;
4. when carrying out an occasional transaction that constitutes a transfer of funds, as defined in Point 9 of Article 3 of Regulation (EU) 2015/847[65], in excess of HUF 300,000;
5. for providers of gambling services, other than distance gambling, when paying of winnings amounting to HUF 600,000 or more in the case of gambling services, other than distance gambling, provided through means other than communications equipment and networks, or upon the payment from players' accounts amounting to six hundred thousand HUF or more in the case of gambling services, other than distance gambling, provided through communications equipment and networks;
6. when there is any information, fact or circumstance that might give rise to a suspicion of money laundering or financing of terrorism, where the due diligence measures are yet to be carried out;
7. when there are doubts about the veracity or adequacy of previously obtained customer identification data;
8. where changes in customer identification data are recorded and customer due diligence has to be repeated on the basis of risk sensitivity;

[65] Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No. 1781/2006 (OJ EU L 141, 05.06.2015, pp. 1–18).

9. with regard to any transaction for the exchange of money involving a sum amounting to HUF 300,000 or more.[66]

In these cases, service providers shall apply due diligence measures to identify the customer, the customer's agent, the customer's proxy or other authorised representative acting before the service provider and verifying his or her identity.[67] In accordance with the identification obligation, the Act obliges the service providers to conduct ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the information the service provider has in his or her possession on the customer in accordance with the relevant regulations and whether, on that basis, actions need to be taken against the customer with a view to preventing money laundering. Under the risk sensitivity approach, service providers are required to pay special attention to all transactions and financial operations if they are complex, or unusual, e.g. unusually large or conducted in a pattern of unusual transactions, or if they have no apparent economic or lawful purpose.[68]

As has already been mentioned, in cases of any suspicion of money laundering, the financing of terrorism, or that specific property is derived from criminal activity, all relevant information, facts or circumstances must be reported by the directors, employees of service providers and their contributing family members. The report must contain the data and information the service provider has recorded regarding customer due diligence information; detailed descriptions of the information, fact or circumstances relevant to the reporting; and all supporting documents, if available. Until the report is dispatched the service provider shall refrain from performing the transaction.[69]

The report must be sent to the Hungarian Financial Intelligence Unit (FIU). The FIU performs analysis and assessment with a view

[66] Section 6 of the AML-Act.
[67] Section 7 of the AML-Act.
[68] Section 11 of the AML-Act.
[69] Sections 30–32 of the AML-Act.

to combatting money laundering and the financing of terrorism, and for the purpose of prevention, detection and investigation of criminal activities, including operational and strategic analyses. The Hungarian FIU is called the Office against Money Laundering and Terrorist Financing,[70] a unit operating within the framework of the National Tax and Customs Administration. The FIU, however, operates independently within its ambit delegated by this Act.[71]

According to the statistics provided by the Hungarian FIU, the unit receives between 8,000 and 10,000 reports annually. The vast majority of the reports come from the financial sector (banks, financial institutions, insurance companies, investment service providers, currency exchangers, etc.).[72] Money laundering using cryptocurrency has also been the subject of several cases in the analytical work of the Hungarian FIU.[73]

4. The fight against the financing of terrorism

4.1. MAIN CHARACTERISTICS

The definition of the financing of terrorism may be found in several international,[74] European and nation documents. In accordance with the IMF's definition "terrorist financing involves the solicitation, collection or provision of funds with the intention that they

[70] https://pei.nav.gov.hu/ (accessed on: 24.09.2023).

[71] Section 38 of the AML-Act.

[72] https://pei.nav.gov.hu/eves-jelentesek (accessed on: 24.10.2023).

[73] See more about the Hungarian FIU: G. Simonka, A. Tóth, *The activity of the HFIU and its role in the fight against money laundering*, [in:] Á. Farkas, G. Dannecker, J. Jacsó (eds.), *Criminal Law Aspects of the Protection of the Financial Interests of the European Union with particular emphasis on the national legislation on tax fraud, corruption, money laundering and criminal compliance with reference to cybercrime*, Wolters Kluwer Hungary, 2019, pp. 350–359, https://hercule.uni-miskolc.hu/files/5694/Criminal_law_protection_fedellel.pdf (accessed on: 24.10.2023).

[74] See: United Nations, International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999), https://treaties.un.org/doc/db/terrorism/english-18-11.pdf (accessed on: 24.10.2023).

may be used to support terrorist acts or organisations".[75] In terms of the widest range of the financing of terrorism, four main forms are known: the commission of crimes, donations, legitimate business activity, and defined geographic territorial unit control.[76]

Terrorist financing (terrorism) and money laundering share a number of common characteristics. They are characterised by their cross-border nature, they are often committed in an international context and may take a variety of forms. They are also highly flexible in the existing legislation, resulting in a dynamic change of counter-terrorist financing regime:

> Terrorists regularly adapt how and where they raise and move funds and other assets in order to circumvent safeguards that jurisdictions have put in place to detect and disrupt this activity. Identifying, assessing and understanding terrorist financing (TF) risk is an essential part of dismantling and disrupting terrorist networks. (FATF Report, 2019).[77]

They are nonprofit-oriented crimes and they seek to maximise the benefits of technological development for their own ends, e.g. cyberterrorism/cyberlaundering. There is, however, a crucial difference between money laundering and the financing of terrorism. In the case of the latter, the asset underlying the financing may also come from legal sources:

> The primary goal of individuals or entities involved in the financing of terrorism is therefore not necessarily to

[75] https://www.imf.org/external/np/leg/amlcft/eng/aml1.htm#financing-terrorism (accessed on: 24.10.2023).

[76] I.L. Gál, *A terrorizmus finanszírozása. Die Terrorismusfinanzierung*, Pécs, Pécsi Tudományegyetem Állam- és Jogtudományi Kar Gazdasági Büntetőjogi Kutatóintézet, Pécs 2010; I.L. Gál, R. Bartkó, *A kibertérben megjelenő kihvások és fenyegetések büntetőjogi kezelésének tendenciái*, "Military and Intelligence Cybersecurity Research Paper" 2022, No. 12, p. 16.

[77] FATF Report, *Terrorist Financing Risk Assessment Guidance*, July 2019, p. 3.

> conceal the sources of the money but to conceal both the financing and the nature of the financed activity.[78]

The purpose must be illegal, since the aim is the use of the asset for the combatting of terrorist crime.

It is important to highlight that the financing of terrorist acts plays a decisive role in the commission of terrorism.[79] Efforts at international,[80] European and national levels have therefore focused on what is known as "following the money", for which the use of the anti-money laundering regime has been the best tool, and prevention has been given high priority. According to Péter Polt:

> for the purpose of the fight against money laundering and terrorism financing, competent authorities should be able to follow the use of virtual currencies. The 'follow the money' method can only be used if the anonymity of blockchain-based transactions can be tackled. All this requires the ability to follow transactions. This in itself is a big challenge because of the significant number of

[78] https://www.imf.org/external/np/leg/amlcft/eng/aml1.htm#financing-terrorism (accessed on: 24.10.2023).

[79] C. Dion-Schwarz, D. Manheim, P.B. Johnston, *Terrorist Use of Cryptocurrencies: Technical and Organizational Barriers and Future Threats*, RAND Corporation, Santa Monica, CA, 2019, p. 9, https://www.rand.org/pubs/research_reports/RR3026.html (accessed on: 24.10.2023). Also available in print form.

[80] Since 2001, combatting terrorist financing has been a priority for the Financial Action Task Force (FATF). This organisation: "plays a central role in global efforts in combatting terrorist financing, through its role in setting global standards to combat terrorist financing, assisting jurisdictions in implementing financial provisions of the United Nations Security Council resolutions on terrorism, and evaluating countries' ability to prevent, detect, investigate and prosecute the financing of terrorism. Yet many countries have not yet implemented the FATF Standards effectively. They do not understand the nature of terrorist financing risks they face, nor have effective means to combat them", https://www.fatf-gafi.org/en/topics/Terrorist-Financing.html (accessed on: 24.10.2023). See the FATF Recommendations International Standards on Combatting Money Laundering and Terrorism & Proliferation, updated February 2023. See: https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html (accessed on: 24.10.2023).

> potential cryptocurrencies. Consequently, cryptocurrencies may only be detected if concrete information has emerged in connection with a specific cryptocurrency transaction.[81]

The financing of terrorism and money laundering risks are continuously changing. Globalisation, digitalisation and the new technological developments poses serious risks in the fight against the financing of terrorism, since criminals are able to use new and unregulated methods extremely quickly and effectively. The success of preventative measures against the financing of terrorism has encouraged terrorist groups to move their financing into cyberspace, taking advantage of the anonymity. The FATF pointed out that:

> virtual assets (VA) and related services have the potential to spur financial innovation and efficiency, but their distinct features also create new opportunities for money launderers, terrorist financiers, and other criminals to launder their proceeds or finance their illicit activities. The ability to transact across borders rapidly not only allows criminals to acquire, move, and store assets digitally often outside the regulated financial system, but also to obfuscate the origin or destination of the funds and make it harder for reporting entities to identify suspicious activity in a timely manner. These factors add hurdles to the detection and investigation of criminal activity by national authorities.[82]

In the fight against money laundering and the financing of terrorism, countering the financing of terrorism (CFT) is characterised by the same strategy. The fight against money laundering and

[81] P. Polt, *The impact of the challenges of the 21st century on criminal procedure Cryptocurrencies, criminal law-related issues of new asset forms*, [in:] Gy. Virág (ed.), *Combatting Cybercrime, Corruption and Money Laundering. Training for Judicial Academies of Visegrad 4 Countries*, "Studies on Criminology" 2022, No. 59, Special issue 2, p. 11.

[82] FATF Report: *Virtual Assets Red Flag Indicators of Money Laundering and Terrorist Financing*, September 2020, p. 3.

the financing of terrorism by dint of preventative measures have developed in parallel after the terrorist attacks in New York in 2001. A distinction may be made between administrative measures for preventative purposes and the instruments of criminal law prohibiting money laundering and the financing of terrorism.

4.2. THE FIGHT AGAINST TERRORIST FINANCING IN THE EUROPEAN UNION

Within the European Union the fight against the financing of terrorism tends to be characterised by framework legislation, such as directives, but also administrative obligations in the form of regulations. The 3rd Anti-Money Laundering Directive was the first instrument which included the definition of the terrorist financing:

> the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combatting terrorism.[83]

The 4th Anti-Money Laundering Directive establishes common rules on the prevention of the use of the Union's financial systems for the purposes of money laundering or the financing of terrorism.[84] In accordance with the Directive (EU) 2017/541 on combatting terrorism,[85] the Member States should criminalise the financing of terrorism in their national criminal law. The financing of terrorism is not limited to terrorist acts, but it also covers the financing of a terrorist group, as well as other offences related to terrorist

[83] Points 4–5 of Article 1 of the 3rd Anti-Money Laundering Directive.

[84] Article 1 of the 4th Anti-Money Laundering Directive.

[85] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combatting terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ EU L 88, 31.03.2017, pp. 6–21).

activities, such as the recruitment and training or travel for the purpose of terrorism, with a view to disrupting the support structures facilitating the commission of terrorist offences. The meaning of financing, as may be seen, is rather broad. It is important to highlight that the EU legislator took into account that terrorism and related crimes may be committed in cyberspace. The EU legislator sought to:

> [take] account of the evolution of terrorist threats to and legal obligations on the Union and Member States under international law, the definition of terrorist offences, of offences related to a terrorist group and of offences related to terrorist activities should be further approximated in all Member States, so that it covers conduct related to, in particular, foreign terrorist fighters and terrorist financing more comprehensively. These forms of conduct should also be punishable if committed through the internet, including social media.[86]

Article 11 of Directive (EU) 2017/541 contains the definition of terrorist financing. According to the directive:

> Member States shall take the necessary measures to ensure that providing or collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit, or to contribute to the commission of any of the offences referred to in Articles 3 to 10 is punishable as a criminal offence when committed intentionally. Where the terrorist financing referred to in paragraph 1 of this Article concerns any of the offences laid down in Articles 3, 4 and 9, it shall not be necessary that the funds be in fact used, in full or in part, to commit, or to contribute to the commission of, any of those offences. Nor shall it be required that the offender know for which specific offence or offences the funds are to be used.

[86] Preamble (6) of Directive (EU) 2017/541.

4.3. THE CURRENT REGULATION OF TERRORIST FINANCING IN THE HUNGARIAN CRIMINAL CODE

The financing of terrorism has been punishable under Hungarian criminal law since 1 March 2003, since the former Criminal Code, within the criminal offence of act of terrorism, punished the provision and collection of material means for the terrorist act as a *sui generis* crime.[87] With Act XXXIX of 2017[88], effective as of 1 January 2018, the Hungarian legislator incorporated the separate criminal offence of the financing of terrorism into the Criminal Code, in order fully to harmonise with the provisions of the International Convention on the Suppression of the Financing of Terrorism from 1999.

Section 318 of the Criminal Code:

> (1) Any person who:
>
> a) provides or collects funds with the intention that they should be used in order to carry out an act of terrorism,
>
> b) provides material assistance to a person who is making preparations to commit a terrorist act or who committed a terrorist act, or to a third party on his behest, or
>
> c) provides or collects funds with intent to support the persons provided for in Paragraph b),
>
> is guilty of a felony punishable by imprisonment of between two to eight years.
>
> (2) Any person who commits the criminal offense referred to in Subsection (1) in order to carry out an act of terrorism in a terrorist group, or on behalf of any member of a terrorist group, or supports the activities of the terrorist group in any other form

[87] F. Sántha, *Terrorizmus finanszírozása*, [in:] I. Görgényi *et al.* (eds.), *Magyar büntetőjog Különös rész*, Wolters Kluwer Kiadó, Budapest 2019, p. 543.

[88] Act XXXIX of 2017 on the amendment of the act regulating European Union and international criminal co-operation and other related laws for the purpose of legal harmonisation.

or provides or collects funds with intent to support the terrorist group is punishable by imprisonment of between five to ten years.

Section 318/A of the Criminal Code:

(1) Any person who:
   a) provides or collects funds with the intention that they should be used in order to carry out a terrorism-type offence,
   b) provides material assistance to a person who is making preparations to commit a terrorism-type offence or who committed a terrorism-type offence, or to a third party on his behest, or
   c) provides or collects funds with intent to support the persons provided for in Paragraph b),

   is guilty of a felony punishable by imprisonment not exceeding three years.
(2) In the application of Sub-section (1), the following shall be construed a terrorism-type offence:
   a) homicide [Sub-section (1) of Section 160, Sub-section (2) of Section 160, if committed in an airport, or on board an aircraft involved in international civil aviation, or on a ship at sea, or if the victim is a person under international protection];
   b) battery [Section 164, if committed in an airport, or on board an aircraft involved in international civil aviation, or on a ship at sea, or if the victim is a person under international protection];
   c) kidnapping [Sub-sections (1)–(4) of Section 190];
   d) offences against transport security (Section 232, if the committed targets an aircraft or a ship at sea);
   e) misappropriation of radioactive materials (Section 250);
   f) destruction (Section 257);
   g) assault on a person under international protection (Section 313);

h) unlawful seizure of a vehicle (Section 320);
i) public endangerment [Sub-sections (1)–(3) of Section 322];
j) interference with works of public concern (Section 323);
k) criminal offences with explosives or blasting agents (Section 324, if committed in works of public concern, or inside a public building or structure);
l) criminal offences with firearms and ammunition (Section 325, if committed in works of public concern, or inside a public building or structure).

Material assistance according to the Hungarian Criminal Code means:

the assets specified in Point 1 of Article 1 of Council Regulation (EC) No. 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combatting terrorism89, including legal documents and instruments in any form.[90]

A "terrorist group" is defined as "a group consisting of three or more persons operating in accord for an extended period of time whose aim is to commit acts of terrorism".[91]

The punishable conduct regarding the financing of terrorism involves the providing and collection of funds with the intention that they should be used in order to carry out an act of terrorism, the provision of material assistance to a person who is preparing to commit a terrorist act or who has committed a terrorist act, or to a third party on his behest, or the providing and collection of funds with intent to support the aforementioned persons. The criminal

[89] Council Regulation (EC) No. 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combatting terrorism (OJ EU L 344, 28.12.2001, pp. 70–75).
[90] Section 319(2) of the CC.
[91] Section 319(1) of the CC.

offence may only be committed intentionally; the perpetrator must be aware of the fact that he is providing or collecting the material assistance to ensure the conditions of an act of terrorism, or that he is supporting a person preparing to commit a terrorist act. The financing of terrorism is punishable by a term of imprisonment of between two and eight years, but, if it is committed in connection with a terrorist group, the punishment of the crime is a term of imprisonment of between five and ten years. If the punishable conducts, however, are committed not in connection with a terrorist act, but with a so-called terrorism-type offence, a list of which offences are regulated in Section 318/A (2) of the Criminal Code, the punishment may be imprisonment not exceeding three years.[92]

5. Conclusion

It may be considered a huge problem that there are very few cases of money laundering in judicial practice in the Hungarian judicial practice. One of the most difficult issues in connection with law enforcement regarding money laundering is often the question of the admissibility of evidence. In connection with money laundering three things must be established: firstly, that there is a predicate offence from which the object of the money laundering is derived; secondly, that the person charged with money laundering had knowledge of the fact that the object of the offence was derived from a criminal offence (or at least acted in the belief that it was derived from a criminal offence); and thirdly, that his or her intention was to engage in conduct defined in the statutory definition of money laundering. In connection with money laundering, the most difficult question is the establishment of the predicate offence, since it is often committed in another country. It must, however, be stated that it is only necessary to establish that the source of the laundered proceeds may originate only from a punishable offence as regards the predicate offence. The precise legal classification, the identity of the perpetrators, the form of the offence and the obstacles

[92] See: F. Sántha, *Terrorizmus…*, *op. cit.*, pp. 543–544.

to criminal liability are irrelevant.[93] In order to solve the problem of evidence in connection with the predicate offence, one possible solution could be the concept of autonomous money laundering, which means that money laundering has to be separated from the predicate offence, and therefore would make it possible to establish criminal liability for money laundering without precisely identifying the predicate offence and without knowing precisely the source of proceeds and the way they were generated. This concept was also supported by the Warsaw Convention of the Council of Europe and the Criminal Law Directive of the European Union.[94]

In 2012, the National Institute of Criminology carried out comprehensive research about the practical questions in connection with money laundering. According to the research, 26 criminal offences were registered between 2008 and 2011. Of these cases, only 17 criminal proceedings were completed before 2015. It can, however, be regarded as positive that all these criminal procedures concluded with the conviction of the perpetrator. The research also encompassed the typical predicate offences of money laundering. The results of the research clearly show that the predicate offences of money laundering in Hungary have been changing over recent years. Originally the most common predicate offences of money laundering were the different types of crimes related to organised criminality (drug trafficking, human trafficking, prostitution, etc.. In recent years, budget fraud, tax fraud, fraud, embezzlement and misappropriation of funds have become the typical predicate offences. According to the research, the most typical cases of money laundering are money laundering involving cash-carriers; money laundering connected to tax fraud; money laundering connected to fraud,

[93] G.B. Nagy, *Availability of evidence in criminal cases launched based on money laundering*, [in:] Gy. Virág (ed.), *Combatting Cybercrime, Corruption and Money Laundering. Training for Judicial Academies of Visegrad 4 Countries*, "Studies on Criminology" 2022, No. 59, Special issue 2, pp. 195–199.

[94] Á. Péceli, *The legal framework and the difficulties of combatting money laundering – Evolution of the criminal offence, issues and solutions from practice*, [in:] Gy. Virág (ed.), *Combatting Cybercrime, Corruption and Money Laundering. Training for Judicial Academies of Visegrad 4 Countries*, "Studies on Criminology" 2022, No. 59, Special issue 2, pp. 224, 235–237.

embezzlement or misappropriation of funds committed by legal persons; money laundering connected to pandering; and failure to comply with the reporting obligation related to money laundering.[95]

In 2015, the Office of the Prosecutor General of Hungary also carried out comprehensive research in connection with money laundering cases after 2010. While the official criminal statistic system contained only 56 money laundering cases, according to the examination of the criminal documents, 157 criminal cases could be detected that were initiated – at least partly – because of money laundering. Two-thirds of these cases were still pending at the time of the research.[96] The most typical predicate offences were fraud, information system fraud, budget fraud and other criminal offences against property. Most of the prosecuted money laundering cases were self-laundering and negligent money laundering. It also turned out, however, that the over-representation of negligent laundering was a consequence of incorrect evaluation of evidence.[97]

In 2020, the AML/CFT Department of the Office of the Prosecutor General scheduled an in-depth examination of money laundering cases between 1 January and 30 June 2020. From the selected 367 cases, 86 percent were money laundering crimes committed by a person other than the perpetrator of the predicate offence. The previously dominant self-laundering and negligent money laundering decreased from 49 percent to 2 percent and from 30 percent to 1 percent. The most common predicate offences were fraud, information system fraud, tax fraud, drug trafficking and embezzlement. In more than three-quarters of the cases the predicate was committed in another jurisdiction, which indicated the proliferation of so-called *money mule* cases. Altogether, a total value of € 34.4 million was laundered, of which € 13.9 million was secured by coercive measures,

[95] See in details: G. Kármán, Á. *Mészáros*, K. Tilki, *Pénzmosás a gyakorlatban*, "Ügyészségi Szemle" 2016, No. 3, pp. 82–97.

[96] See in details: P. Sinku, *A pénzmosás miatti bűnügyek gyakorlata – az ügyészi jogalkalmazás tapasztalatai*, [in:] A.T. Barabás, Gy. Vókó (eds.), *A bonis bona discere. Ünnepi kötet Belovics Ervin 60. születésnapja alkalmából*, Országos Kriminológiai Intézet – Pázmány Press, Budapest 2017, pp. 135–153.

[97] Á. Péceli, *Hungary's experiences…*, *op. cit.*, pp. 250–251.

resulting in an average return rate of 40 percent in money laundering investigations.[98]

These statistical data may lead us to conclude that the number of money laundering cases is slowly increasing, although their number is still very small. With the new regulation of money laundering having come into force on 1 January 2021, a further increase in money laundering cases may be expected.

It must be emphasised that in accordance with the 2022 Crypto Crime Report:

> cybercriminals dealing in cryptocurrency share one common goal: to move their ill-gotten funds to a service where they can be kept safe from the authorities and eventually converted to cash. That's why money laundering underpins all other forms of cryptocurrency-based crime.[99]

The preventive measures in the fight against money laundering and terrorist financing are crucial. The use of crypto assets is not without trace; however, the possibility of tracking arises.[100]

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[98] Ibidem, pp. 255–256, 260.

[99] Chainalysis, *The 2022 Crypto Crime Report Original data and research into crypto-currency-based crime*, February 2022, p. 10, https://go.chainalysis.com/2022-Crypto-Crime-Report.html (accessed on: 10.10.2023).

[100] J. Stürmer, *Kryptowerte als Tatertrag, Tatmittel, Tatobjekt und Tatprodukt*, "Zeitschrift für Vergleichende Rechtswissenschaft" 2023, No. 122, p. 297.

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Some Questions of Investigation in Cybercrime Cases

1. Introduction

The spread of cybercrime and the emergence of progressively newer and newer methods of committing it represent a serious challenge for law enforcement authorities. Here, in this paper, I shall seek to identify the main problems that may emerge in connection with the investigation of cybercrime.

Investigation is a crucial, decisive stage in criminal proceedings. If the recording of traces and the collecting of evidence is incomplete, or if the investigating authority makes a mistake, this can constitute an obstacle to the continuation of proceedings. In cybercrime cases these activities often require specialised expertise that members of the investigating authority may lack. The involvement of professionals with such specialised knowledge as that of the expert and special consultant may therefore be justified.

The cross-border nature of cybercrime may require international co-operation in criminal matters not only between the authorities of different states, but also between state authorities and the private sector. Nor may the examination of the main areas of international co-operation and the legal background of co-operation with service providers be omitted in this respect.

One of the basic questions concerning the investigation is what are the main areas of special regulation necessary and to what extent might existing rules be applied to this specific field of crime.

The problems we are attempting to highlight may arise not only in cases of cybercrime. The need to use electronic data as evidence arises in a significant proportion of criminal proceedings. As the new EU Regulation emphasises, "Measures to obtain and preserve electronic evidence are increasingly important for criminal investigations and prosecutions across the Union".[1]

2. Challenges of cybercrime: basic problems

Digitalisation plays an increasingly significant role in the everyday life of the average man in the street and in business. In recent decades we have had to learn a great deal and use the results of digital development with increasing frequency. It is true, that "Technological breakthroughs over the past few years have brought many positive developments for society".[2]

One of the disadvantages of technological development, however, is that its benefits are not only enjoyed by ordinary (honest, *bona fide*, etc.) users, but criminals also take advantage of the opportunities provided by the them, such that development has contributed to a new genre of crime.[3] "In e-commerce, the methods of committing crimes in the online space show an extremely diverse picture. New methods appear almost daily in accordance with technological development".[4]

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[1] Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings, Preamble (2), OJ EU L 191, 28.07.2023, pp. 118–180 (hereinafter: EU Regulation). The Regulation came into force on 18 August 2023 and it will apply from 18 August 2026.

[2] Cybercrime, European Union Agency for Criminal Justice Co-operation, https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/cybercrime (accessed on: 13.07.2023).

[3] K. Mezei, *Az informatikai bűnözés elleni nemzetközi fellépés – különös tekintettel az Európai Unió és az Egyesült Államok szabályozására*, "Jura" 2018, No. 1, p. 349.

[4] R. Nagy, *A kibertérben elkövetett vagyon elleni bűncselekmények nyomozásának egyes kérdései*, "Belügyi Szemle" 2018, No. 7–8, p. 86.

The COVID-19 pandemic provides a good example of the double edged sword of the phenomenon. The pandemic helped spread digital management in everyday matters and tasks even more. We need only consider online education, shopping and communication, which have become part of our everyday life in a short space of time. At the same time, the use of different platforms has also made us vulnerable, especially if we carry out our activities on less secure platforms. Children and the elderly, who are naive and less informed about the disadvantages of digitalisation are at greater risk than the rest of us.

> Cybercriminals exploit the speed and anonymity of the Internet to commit a range of criminal acts, from large-scale cyber-attacks to activities such as using malware, phishing and spam, or the use of crypto-currencies for illicit transactions. Further, technology can also facilitate serious organised crimes, such as terrorism and money laundering.[5]

We have to differentiate between cybersecurity challenges and challenges in combatting cybercrime. Cybersecurity problems may make it easier to commit offences and may therefore have an impact on the fight against cybercrime. The fight against cybercrime should thus be part of the cybersecurity strategy.

The Cybersecurity Strategy of the European Union in 2013 underlined that "The evolution of cybercrime techniques has accelerated rapidly: law enforcement agencies cannot combat cybercrime with outdated operational tools".[6] But not only the operational tools and IT knowledge need continuous development and improvement.

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[5] Cybercrime. European Union Agency for Criminal Justice Co-operation, https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/cybercrime (accessed on: 13.07.2023).

[6] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace (JOIN (2013) 01 final), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013JC0001 (accessed on: 05.11.2023).

The continuous training of members of the investigating authorities, the employment of the appropriately qualified professionals and the establishment of special units within the investigating authorities are of paramount importance too.

As far as cybercrime is concerned, it is even more accurate than in reference to traditional crime that criminals are at least one step ahead of the law enforcement agencies. The legislator is only able to react slowly in order to respond at the legislative level to the problems raised by progressively new methods of offending. Law enforcement agencies may only perform their duties within the existing legal framework.

Due to the shortcomings in legislation and law enforcement, perpetrators take relatively little risk:

> Being a cybercriminal offers big rewards and few risks, since, until recently, the likelihood of detection and prosecution of a cybercriminal was estimated to be as low as 0.05 % in the US. This percentage is even lower in many other countries.[7]

In some types of crime the latency is high, and, for example, a significant proportion of child pornography and blackmail messages go unreported to the authorities.

For criminals, cyberspace offers the opportunity to affect many people within a short space of time, committing criminal acts against several victims. Perpetrators can target hundreds or thousands of victims, for example with a phishing (so called Ddos) attack.[8]

Europol identified and categorised the common challenges in combatting cybercrime in 2019. The five main areas were: loss of data, loss of location, challenges associated with national legal frameworks, obstacles to international co-operation and challenges

[7] Cybersecurity. These are the top cybersecurity challenges of 2021, https://www.weforum.org/agenda/2021/01/top-cybersecurity-challenges-of-2021/ (accessed on: 05.10.2023).

[8] D. Tóth, Zs. Gáspár, *A nemzetközi bűnügyi együttműködéssel összefüggő nehézségek a kiberbűnözés területén*, "Büntetőjogi Szemle" 2020, No. 2, p. 143.

of public-private partnership.[9] Most of these issues are addressed in this study.

3. Difficulties of investigation in cybercrime cases

While some traditional investigative methods are necessary for detecting crimes committed in cyberspace, there are a number of specific characteristics of these crimes that require specialised methods. According to Zoltán Nagy, "Traditional procedural rules do not always provide a satisfactory solution for the acquisition and examination of electronic data as electronic impulses, as evidence".[10]

Almost all the authors of reports and studies on cybercrime emphasise the particular difficulties of investigating such cases. The International Organised Crime Threat Assessment (IOCTA) report of 2023 summarises the challenges in the fight against cybercrime and the complex nature of these offences as follows:

> Cyber-attacks are challenging to investigate as they consist of multiple steps from initial intrusion, via lateral movement and privilege escalation, to data exfiltration and exploitation, with multiple actors working on parts of the criminal process, and an important crime-as-a-service dimension.[11]

These specialties appear primarily, but not exclusively, in the field of recording traces, collecting, securing and preserving evidence.

[9] Common challenges in combatting cybercrime. As identified by Eurojust and Europol, June 2019, Joint Report, https://www.eurojust.europa.eu/sites/default/files/assets/2019-06-joint-eurojust-europol-report-common-challenges-in-combating-cybercrime-en.pdf (accessed on: 03.05.2023).

[10] Z. Nagy, *A joghatóság problémája a kiberbűncselekmények nyomozásában*, [in]: *Ünnepi kötet Dr. Nagy Ferenc egyetemi tanár 70. születésnapjára*, "Acta Universitatis Szegediensis, Acta Juridica et Politica" 2018, Vol. 81, Szeged, p. 757.

[11] Europol, Internet Organised Crime Threat Assessment (IOCTA) 2023, Publications Office of the European Union, Luxembourg 2023, p. 6, https://www.europol.europa.eu/cms/sites/default/files/documents/IOCTA%202023%20-%20EN_0.pdf (accessed on: 15.10.2023).

These activities require specific expertise in traces and data that can be found in cyberspace.

Although there are countless specialities in the investigation of cybercrime, the national codes of criminal procedure tend to have no separate regulation regarding law enforcement in cybercrime cases, and so too neither does Hungarian law. It is well known, however, that:

> Crime in cyberspace operates in a non-traditional way, and the threats and the vulnerabilities of cyberspace tend to make the use of (…) traditional techniques in police-investigation ineffective when applied against cybercrime and cybercriminals.[12]

We may say that one of the biggest challenges to the investigating authorities in criminal proceedings is the international nature of the offences. In these case co-operation between the authorities, the determination of jurisdiction, the referral of cases, the determination of the perpetrator's action from the aspect of criminal law and the determination of liability is primarily task.[13]

4. Some questions regarding the Hungarian regulation on investigation

Although we shall attempt to discuss the problems of investigating cybercrime on a general level, abstracted from national legislation, it seems appropriate to present some issues through the legislation of

[12] S. Jeffries, E. Apeh, *Emerging Cyber Threats and Cognitive Vulnerabilities*, https://www.sciencedirect.com/science/article/abs/pii/B9780128162033000071 (accessed on: 09.06.2023).

[13] See: Cs. Krasznai, *Húsz év a globális kiberbűnözés elleni küzdelemben – A Budapesti Egyezmény értékelése*, Külügyi Szemle 2021, Különszám, p. 202, https://kki.hu/wp-content/uploads/2021/08/12_2021_szemle_kulonszam_krasznay.pdf (accessed on: 26.10.2023).

a specific country. Below, we therefore refer to the provisions of the Hungarian Code of Criminal Procedure[14] as an illustration.

4.1. THE TASK AND STAGES OF THE INVESTIGATION

Before dealing with special problems involved in the investigation of cybercrime offence we would like to provide a short introduction to the rules concerning investigation in the Hungarian Code of Criminal Procedure (HCCP).

An investigation consists of two parts: detection and examination. In the course of the detection, the criminal offence and the identity of the perpetrator shall be detected to an extent necessary to establish a reasonable suspicion, and the means of evidence shall be located and secured. In the course of the examination and once evidence has been obtained and examined, the prosecution service shall decide whether an investigation against the suspect should be launched (HCCP 348. § (2)–(4) Paragraph).

If necessary, the preparatory procedure may also be conducted before the investigation. The purpose of a preparatory proceeding shall be to determine whether the suspicion of a criminal offence may be established (HCCP 340. § (1) Paragraph).

4.2. INVESTIGATION OF CYBERCRIME OFFENCES

In the course of investigation the main tasks of the authorities are: to define the place of the committing of the crime; to identify the person who committed the crime; to collect and preserve evidence.

These tasks are also elements of the investigation of other crimes, but in cases of cybercrime it could be more difficult and complicated to perform them.

Where was the crime committed? Where is the electronic device used for committing the crime located? And where did the outcome occur?

[14] Act No. XC of 2017 on criminal procedure (hereinafter: HCCP).

Determining the place where the crime was committed is important for determining the territorial jurisdiction. The HCCP defines the territorial jurisdiction of the court of first instance. With a few exceptions the subject-matter and territorial competence of a prosecution office shall be determined by the subject-matter and territorial jurisdiction of the court for which it operates. The competence of investigating authorities is defined by law to be other than by the HCCP.

4.3. SUBJECT MATTER JURISDICTION OF THE AUTHORITIES

In the Hungarian system there is no special prosecutor's office or court for cybercrime. With few exceptions, district courts may proceed in cybercrime cases. Regional courts shall have subject-matter jurisdiction as courts of first instance, for example criminal offences against national data assets; information system fraud causing particularly significant damage as defined in section 375(4) a) and (5) of the Criminal Code. The district court located at the seat of a regional court or, within the area of the Budapest-Capital Regional Court, the Central District Court of Pest, shall proceed with territorial jurisdiction (so-called exclusive jurisdiction) over the entire county or Budapest, respectively, regarding the following criminal offences: fraud committed using an information system (with some exceptions) and criminal offences against information systems:

> In relation to cybercrimes there are shared responsibilities between the police and the National Tax and Customs Authority. Since the Hungarian police has general jurisdiction for any kind of investigation, the central, county and local police departments also take part in the fight against cybercrime. In general, the local and county police forces carry out the investigations in simple cases, while in more important and/or international cases, possibly even involving organised crime, the specialised units of

> the Riot Police's National Bureau of Investigation carry out the criminal proceedings.[15]

Decree of the Minister of Interior No. 25 of 2013 on the subject matter jurisdiction and territorial jurisdiction of the investigating authorities of the Police determines which police body is authorised to conduct the procedure in the case of certain IT offences. Due to the complexity of the regulation, it will not be presented in this study. In most serious forms of fraud committed using an information system and offences against information system the Riot Police National Bureau of Investigation (Cybercrime Department of Criminal Service) has jurisdiction.[16]

4.4. TERRITORIAL JURISDICTION

The regulation of the territorial jurisdiction of the court of first instance seems to be somewhat complicated, but we will see that the rules provide – or at least try to provide – solutions for every possible scenario.[17]

The general rule is that, unless otherwise provided for in the HCCP, that a court has territorial jurisdiction for a proceeding where the criminal offence was committed.

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[15] Council of the European Union, *Evaluation report on the seventh round of mutual evaluations "The practical implementation and operation of European policies on prevention and combatting cybercrime" – Report on Hungary*, 31 January 2017 (hereinafter: Evaluation report – Hungary), p. 36, https://data.consilium.europa.eu/doc/document/ST-14583-2016-REV-1-DCL-1/en/pdf (accessed on: 15.10.2023).

[16] Készenléti Rendőrség Nemzeti Nyomozó Iroda, Bűnügyi Szolgálat, Kiberbűnözés Elleni Főosztály. Emergency Police National Investigation Bureau, Criminal Service, Cybercrime Department. The Cybercrime Department is divided into three departments: the Investigation Department, the Intelligence Department and the Forensic Department. A Készenléti Rendőrség szervezeti felépítése 16.02.2023, https://www.police.hu/sites/default/files/szervezeti_felepites_pdf/A%20KÉSZENLÉTI%20RENDŐRSÉG%20SZERVEZETI%20FELÉPÍTÉSE.pdf (accessed on: 27.10.2023).

[17] Here we do not deal with the rules for cases in which the criminal offence was committed outside the borders of Hungary. See: HCCP 22. §.

If a criminal offence was committed within the area of jurisdiction of more than one court, or if the place where the criminal offence was committed cannot be located, the court that took action before the other courts of the same subject-matter jurisdiction shall proceed in the case. (This rule is called precedence.)

A court with territorial jurisdiction over the home address or actual place of residence of a) the defendant or b) the victim shall also have territorial jurisdiction for a proceeding if the prosecution service files the indictment to that court.

If there is more than one defendant, a court with territorial jurisdiction over one defendant may also proceed against the other defendants, unless such a proceeding exceeds its subject-matter jurisdiction. If there is more than one such court, the rules of precedence shall apply (HCCP 21. §).

The territorial jurisdiction of investigating authorities is defined by the decree of the Minister of the Interior No. 25 of 2013, similarly to the territorial jurisdiction of the court of first instance. This decree means the competent investigating authority is that in whose area of jurisdiction the offence, in the case of serial crime the majority of offences, was committed.

If the perpetrator committed the offence in the area of jurisdiction of more than one investigating authority, or the place of commission of the crime cannot be established, the investigating authority which took action in the case earlier is competent to conduct the investigation; in the absence of any action, the investigating authority that first became aware of the offence (on the basis of its own observation or a report) (HCCP 3. § (2) Paragraph).

These rules are only the tip of the iceberg, because we may find many other rules regarding the territorial jurisdiction of authorities; but here we would like to refer only to the most important regulations.

4.5. IDENTIFICATION OF THE OFFENDER

The next question is who committed the crime?

The Evaluation report emphasises the well-known fact, that:

> Usually there are no eye witnesses to crimes committed using information systems, and the system does not keep any direct information which is enough on its own to pinpoint the identity of the perpetrator. When the system is being used by several persons, the identification of the perpetrator is difficult, and finding enough evidence that proves his or her guilt against a testimony where he or she denies the commission of the crime is also hard.[18]

Even if the IP address is known, several questions may remain open: who was the subscriber at the specific time? Did one or more persons use the given device? If more than one person had access to the given device, who used it at the time when the offence was committed? We see that if the IP address is known to the investigating authority, it does not mean that they know who the offender was.

"Perpetrators use encryption and self-covering methods or services (e.g. hyde, ip, proxy)".[19]

"When the perpetrators use methods to hide the originating IP address (with a proxy server, TOR browser, IP-spoofing, etc.), difficulties arise in identifying the place where the crime was committed, the equipment which was used and the person who committed the crime".[20] Computer networks provide a kind of anonymity[21] for criminals, making it difficult or even impossible to identify them.

The investigation therefore does not reach the stage where a specific person can be suspected of committing the crime. In

[18] *Evaluation report – Hungary*, p. 33.

[19] Ibidem, p. 41.

[20] Ibidem, p. 34.

[21] Possible anonymity of the perpetrator is emphasised by several authors. See for example: B. Laczi, *A számítógépes környezetben elkövetett bűncselekmények nyomozásának és a nyomozás felügyeletének speciális kérdései*, "Magyar Jog" 2001, No. 12, p. 726.

this case the proceeding ends without result. It must be terminated or – according to the HCCP[22] – suspended.

4.6. COLLECTION OF EVIDENCE

Although conducting proceedings within a reasonable time is a general requirement, in cybercrime cases the speedy acquisition of evidence and the recording of evidence are perhaps even more important than usual. The data are very volatile and can be easily deleted, as in the case of the recordings of security cameras, CCTV cameras, etc., which can be automatically deleted very rapidly, depending on the settings. If the investigating authority fails to obtain these recordings or other data at the beginning of the procedure, access to them later will be more difficult, even impossible.

In cases of cybercrime certain specialised knowledge may be necessary to determine what kind of evidence should be collected and what possible coercive measures may be used.

In the current HCCP, the concept of electronic data in terms of evidence is the same as the concept of computer/computerised data in the Budapest Convention.[23]

Expert opinion is a very important piece of evidence. It is frequently used in cases of cybercrime because members of the investigating authority, the public prosecutor and the judge, usually have special technical knowledge. "Digital forensics helps investigators piece together evidence and determine the timeline of events in a crime. It is mainly made up of network forensics and memory/disc analysis".[24]

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[22] HCCP 394. § (1) Paragraph: "The prosecution service or the investigating authority shall suspend the proceeding if a) the identity of the perpetrator could not be established during the investigation".

[23] Convention on Cybercrime (ETS No. 185), Budapest, 23.11.2001 (hereinafter: Budapest Convention).

[24] C. Horan, H. Saiedian, *Cyber Crime Investigation: Landscape, Challenges and Future Research Directions*, "Journal of Cybersecurity and Privacy" 2021, No. 1, p. 580, https://www.mdpi.com/2624-800X/1/4/29 (accessed on: 07.06.2023).

The HCCP provides a relatively wide possibility of involvement of experts. "If specialised expertise is required to establish or assess a fact to be proven, an expert shall be employed" (HCCP 188. §). The HCCP allows the involvement not only of an expert but also of a specialist consultant if his special knowledge is needed to detect, to search for, obtain, collect or record evidence (HCCP 270. § (1) Paragraph). The involvement and presence of the IT experts is justified if the first measures are taken, bearing in mind his suggestions, as the digital data may be searched for and recorded more effectively. The expert may determine on the spot which devices need to be seized:[25]

> The use of an IT expert became justified during inspections and house searches and the investigating authorities also had to acquire equipment suitable for recording and storing digital traces. It has also become important for investigators to have basic IT knowledge.[26]

During the search of an IT system, it must be ensured that data accessible through the system remain unchanged during the inspection and recording. One of the most important tasks when collecting evidence is to preserve it in its original state.[27] Only unaltered evidence, preserved in its original state will be valid and acceptable for forensic use before the court:

> To demonstrate that digital evidence is authentic, it is generally necessary to satisfy the court that it was acquired from a specific computer and/or location, that a complete

[25] Z. Benedek, *Digitális adatok a helyszínen*, "Belügyi Szemle" 2018, No. 7–8, pp. 150–151.

[26] Z. Mráz, *A digitális bizonyítási eszközök jelentősége a vagyon elleni bűncselekmények nyomozásában*, "Belügyi Szemle" 2018, No. 7–8, p. 99.

[27] T. Gaál, *A digitális bizonyítékok jelentőségének növekedése a büntetőeljárásokban*, "Belügyi Szemle" 2018, No. 7–8, p. 30. In his study Gaál describes in detail the rules for packaging, transportation, storage and examination of digital evidence, which are intended to ensure the preservation of the original state.

> and accurate copy of digital evidence was acquired, and that it has remained unchanged since it was collected.[28]

Mezei, with reference to Wang, has it that there are three basic criteria that must be met in relation to electronic data during an investigation: the original data must not be damaged or modified when obtaining evidence, it must be possible to prove that it matches the original data, and the analysis of the evidence must not change the original data.[29]

In the past, the seizure of electronic devices gave rise to a number of problems, for which the legislator has tried to provide solutions when creating the current rules. The seizure of electronic data is prescribed in detail (HCCP 315. §).

The seizure of electronic data shall be carried out in a manner that ensures, if possible, that the electronic data not necessary for the criminal proceeding are unaffected by it, or such data are only affected by the seizure for the shortest period possible. These rules meet the general requirement of ordering and implementing coercive measures, meaning that efforts shall be made to ensure that the application of the coercive measures results in a restriction of the fundamental rights of the person concerned only to the extent and for the time strictly necessary (HCCP 271. § (1) Paragraph).

It is important to note that not only in cybercrime investigations, but also in other criminal proceedings, investigators may come across digital/electronic traces during their work, which, if correctly interpreted, may lead to the solution of the case. This process, however, requires the acquisition of new knowledge, skills, abilities and, not least, the use of new ways of using digital/electronic evidence by members of the investigating authorities and by experts and advisers working with the investigating authorities.[30]

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[28] E. Casey, *Digital Evidence and Computer Crime. Forensic Science, Computer and the Internet*, third Edition, Elsevier, 2011, p. 60.

[29] K. Mezei, *Az elektronikus bizonyítékokkal kapcsolatos kihívások és szabályozási újdonságok*, "Belügyi Szemle" 2019, No. 10, p. 27, DOI: 10.38146/BSZ.2019.10.2.

[30] T. Gaál, *A digitális bizonyítékok jelentőségének növekedése a büntetőeljárásokban*, *op. cit.*, p. 22.

4.7. USING COVERT MEANS DURING THE INVESTIGATION

Overt and covert means may be used during the investigation, but the application of covert means is only allowed if the necessary information or evidence cannot be acquired by other (overt) means. In particular, the following covert means may be used in proceedings related to cybercrime: surveillance of payment transactions, simulated purchases, using undercover investigators and secret surveillance of an information system. Of course, other covert means can also be used. Since the application of covert means may raise many constitutional concerns, the HCCP only allows the use of these instruments, if:

a) there are reasonable grounds for believing that the information or evidence to be obtained is absolutely necessary to the purpose of the criminal proceedings and cannot be obtained by any other way;
b) its use results in no disproportionate restriction of a fundamental right of the person concerned or of another person compared to the law enforcement goal to be achieved;
c) its use is likely to lead to the acquisition of information or evidence relating to a criminal offence (HCCP 214. § (5) Paragraph).

Surveillance of payment transactions is subject to permission from a prosecutor. This means that with the permission of the public prosecutor the organisation authorised to use covert means may order that an organisation providing financial services or supplementary financial services, as defined in the Act on credit institutions and financial enterprises to record, keep data relating to payment transactions under the Act on providing payment services, transmit them to the ordering authority during a specified period.

Within the framework of the surveillance of payment transactions, the ordering entity may also order a service provider to suspend the execution of payment transactions between specified payment accounts and persons, or payment transactions that meet specified conditions (HCCP 217. § (1) Paragraph).

With the permission of the prosecution service a sham agreement may also be instigated and performed:

a) to obtain a thing or sample of it, or using services that may presumably be related to a criminal offence,
b) to acquire a thing which constitutes physical evidence or to use a service in order to strengthen the trust of a seller,
c) to obtain a thing or use a service in order to apprehend the perpetrator of a criminal offence or secure a means of physical evidence (simulated purchase) (HCCP 221. §).

An undercover investigator is a member of an organisation authorised to use covert means, who permanently conceals his or her affiliation with the organisation or his or her identity and is specifically employed in such a position.

A covert investigator may be used in criminal proceedings with the permission of the public prosecutor in order to insinuate himself or herself into criminal organisations, groups or organisations engaged in activities that may be linked to terrorism in order to carry out simulated purchases, to conduct covert surveillance and to obtain information and evidence relating to a criminal offence. It may be used in conjunction with other covert means subject to judicial or prosecutorial authorisation, or to ensure the use of such means, in addition to the independent action of the undercover investigator (HCCP 222–223. §).

Secret surveillance of an information system requires the permission of a judge (investigating judge). In the course of the secret surveillance of an information system, the organ authorised to use covert means may, with permission from a judge, secretly access data processed in an information system, and record these data by technical means. For that purpose, any necessary electronic data may be placed in an information system, while any necessary technical device may be placed at a home, other premises, fenced area, vehicle, or other object used by the person concerned, except for public areas, premises open to the public, and means of public transport (HCCP 232. § (1) Paragraph).

4.8. OTHER PRACTICAL ISSUES

An examination of the prevention of cybercrime and the fight against it took place in Hungary in 2016. Many of the problems and findings raised in the report on the investigation are still valid today and some of its findings are worth quoting.

The report summarises the problems mentioned by the Hungarian authorities, but these problems are not specific to the Hungarian criminal procedure. They may also arise in other jurisdictions. Below I mention only some of the obstacles to the investigation into cybercrime mentioned by the national authorities, while some further problems are discussed in other subsections of this paper:

- The internet has no borders, while international law enforcement and judicial co-operation is slow and time-consuming.
- Most of the required information is held by the private sector, and the legal and technical difficulties regarding data and evidence collection makes life easier for perpetrators. Non-co-operative service providers (such as Google) and some server holders do not register their clients and/or traffic data, thereby ensuring anonymity for perpetrators.[31]
- With regard to child pornography, there is considerable latency, victim identification is very difficult and procedural obstacles make it difficult to prevent secondary victimisation.
- For financial, organisational and professional reasons, the investigating authorities find it more difficult to keep up with technology advances than the perpetrators.[32]

In most cases, involvement of the service provider is essential. In criminal proceedings, the court, the prosecution service, and the investigating authority or, in cases specified in an Act, the organ

[31] *Evaluation report – Hungary*, p. 40.
[32] Ibidem, p. 41.

conducting a preparatory proceeding, may request any organisation to provide data (HCCP 261. § (1) Paragraph).

Within the framework of a data request, this refers to:

a) the transfer of data that is relevant to the criminal proceeding and is in the possession of the organisation,
b) the transfer of electronic data or documents that are relevant to the criminal proceeding and are in the possession of the organisation, or
c) the provision of information relevant to the criminal proceeding that can be provided by the organisation.

With some exceptions, the organ requested to provide data shall comply with the request within a set time limit.

The rules of investigation are not necessarily different in cybercrime cases and other cases. The effectiveness of the investigation and prosecution probably depends on no special rules. As evidence may be specific and IT knowledge develops and changes very quickly, however, the involvement of an expert and special regulation for obtaining and preserving evidence are crucial.

There are two opinions concerning the required knowledge of members of the investigating authorities:

i. they have to have *normal* investigating skills and some technical knowledge, and
ii. they have to have special technical knowledge.

The most recent development in the fight against cybercrime in Hungary is that from 1 October 2023 an independent organisational unit was established within the Police. Almost 300 newly highly qualified staff members with up-to-date knowledge strengthened the staff of the county police headquarters, the Budapest Police Headquarters and the National Investigation Bureau of the Riot Police. Their work is co-ordinated by the employees of the newly established Cyberstrategy Department of the Criminal Department of the National Police Headquarters, which also co-ordinate the entire cyberprotection activities of the police and are also responsible for international relations.[33]

[33] *Matrix project for cybersecurity*, interview with Lt. Col. László Baksa, Head of the Cyberstrategy Department, https://www.police.hu/hu/hirek-es-informaciok/legfrissebb-hireink/zsaru-magazin/matrix-projekt-a-kiberbiztonsagert (accessed on: 29.10.2023).

It is worth mentioning that in 2016 the National Prosecutorial Network dealing with Cybercrime was established. On the one hand the Network represents a knowledge base that continuously updates knowledge about crimes committed in cyberspace; and on the other hand, it concentrates the legal and IT knowledge of the prosecutor's office as much as possible. In the work of the Network the activities of the prosecutors are assisted by IT specialists, which improves the efficiency of the law enforcement.[34] Shortly thereafter, the Hungarian court organisation established a similar network: the Court Network dealing with Computer Crime, in order to provide help and knowledge support to judges among others by dint of training sessions, seminars and conferences.

Legal practitioners, members of investigating authorities, prosecutors and judges increasingly need specialised knowledge. IT tools are often used not only in the commission of cybercrimes, but also in so-called traditional crimes. According to the General Prosecutor's report regarding the year 2022:

> the number of frauds significantly increased in 2022 compared to 2021. Practical experience shows that the modus operandi of these offences is more and more connected to IT tools.[35]
>
> Further information regarding cybercrime is: that similarly to the trend of the previous years, the number of crimes called breach of information system or data continued to rise in 2022, the conclusion can clearly be drawn that increasingly greater attention should be given to cybercrimes in the application of law. All this requires special professional competence and continuous professional development, as the IT sector is also characterised by constant and intensive changes.[36]

[34] I. Lajtár, *A kiberbűnözésről*, "Ügyészek Lapja" 2019, No. 1, pp. 47–52 (p. 51).

[35] Prosecutor General's Report on Activities of the Prosecution Service in 2022 (extract), p. 7, https://ugyeszseg.hu/en/wp-content/uploads/2023/09/angol-nyelvu-kiadvanyszerkesztett-kivonat.pdf (accessed on: 30.10.2023).

[36] Prosecutor General's Report on Activities of the Prosecution Service in 2022 (extract), p. 7.

5. International co-operation in criminal matters concerning cybercrime cases

International co-operation between authorities acting in criminal proceedings is of great importance concerning several types of offences. Initially the need for co-operation in criminal matters arose in the context of organised crime.

When we speak about international co-operation, the first question we need to ascertain is the reason such cooperation is essential. As has been emphasised above, cybercrime, by its nature, is borderless and evolves swiftly, sometimes more swiftly than national authorities are able to react. As Zoltán tells us, "Crimes, that can be committed on computer networks are typically international in nature, but at the same time, law enforcement is national in scope"[37]:

> If traces of the committed crime are stored on the system of a service provider outside the country, the information can be obtained only by sending a letter rogatory, which can prolong the procedure. Furthermore, sometimes the request is not even answered.[38]

Effective reaction against this type of crime requires international criminal co-operation and harmonisation of criminal rules at an international level and the elaboration of the necessary minimum rules.[39] As has been emphasised by Eurojust "(…) effective national response to cybercrime often requires multilevel collaboration. Strengthened international co-operation is key, as cyberspace is international and cross-border in nature".[40]

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[37] Z. Nagy, *A joghatóság problémája a kiberbűncselekmények nyomozásában*, *op. cit.*, p. 756.

[38] *Evaluation report – Hungary*, p. 33.

[39] K. Mezei, *Az informatikai bűnözés elleni nemzetközi fellépés…*, *op. cit.*, p. 349.

[40] Overview Report Challenges and best practices from Eurojust's casework in the area of cybercrime, November 2020, p. 3, https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_Cybercrime-Report.pdf (accessed on: 11.07.2023).

The increase and diversification of cybercrime has called for closer links between special police units and the sharing of information with other countries.[41] As we emphasised above, timeliness is of the utmost importance in these cases since data that can help to identify the place of the offence, the perpetrator of the offence, or that may be used as evidence might quickly change, be deleted or modified. For this reason, the 24/7 contact points are of outstanding importance. They allow the receipt of requests from other Member States 24 hours a day, 7 days a week, facilitating rapid fulfilment of requests for legal assistance. Regarding Hungary, there are three such 24/7 cybercrime contact points. One is associated with the Budapest Convention (COE 24/7 network), one with the G7, and one Interpol.[42]

International co-operation methods may vary and the brainstorming workshops regarding best practice and sharing information may be useful. These are very important, less formal tools of the co-operation initiatives. There are also formal, institutional co-operation initiatives based on international treaties and conventions. The latter types of co-operation may provide effective solutions for detecting facts of cases and the identity of perpetrators, help to catch the potential offenders, and to collect and preserve evidence.

Although the formulation of international frameworks for combatting cybercrime dates back to the 1970s, and thus has a history of more than half of a century, the Budapest Convention adopted in 2001 represents the first significant step in the field of international co-operation.

Although the Convention was created within the framework of the Council of Europe, the possibility of joining it is open not only to member states of the Council of Europe. It is therefore particularly significant that – among others – the US has also ratified it. The Member States of the Council of Europe and other states signatory to the Convention believed "that an effective fight against cybercrime requires increased, rapid and well-functioning international

[41] R. Szongoth, D. Vetter, *Nemzetközi bűnügyi együttműködés a kiberbűnözés területén*, "Belügyi Szemle" 2018, No. 7–8, p. 7.

[42] R. Szongoth, D. Vetter, *Nemzetközi bűnügyi együttműködés…*, *op. cit.*, pp. 15–16.

co-operation in criminal matters".[43] Chapter III of the Convention contains the principle relating to international co-operation and detailed rules of mutual assistance.

In the beginning, the mutual legal assistant mechanism was also a determining factor in co-operation in criminal cases in the EU, but mutual recognition instruments grew in importance and today they have replaced the "classical" mutual legal assistance mechanisms. One agreement between EU countries, however, still remains in place: the convention on mutual assistance in criminal matters strengthens co-operation between the judicial, police and customs authorities.[44] The convention was signed by member states on 29 May 2000 and came into force on 23 August 2005. The Convention is based on classical mutual legal assistance, but takes a step further allowing indirect contact between the judicial authorities of member states, thus providing faster and more effective co-operation in criminal matters.

Another important step in ensuring easier international co-operation in criminal matters led to the European Investigation Order in criminal matters. Since the adoption of Framework Decisions[45] in the first decade of the 21st century (2003/577/JHA and 2008/978/JHA), it has become clear that the framework for the gathering of evidence is too fragmented and complicated. A new approach was therefore necessary[46]:

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[43] Preamble of the Budapest Convention.

[44] European Commission. Mutual legal assistance and extradition, https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/mutual-legal-assistance-and-extradition_en#:~:text=Mutual%20legal%20assistance%20is%20a%20form%20of%20cooperation,assist%20in%20criminal%20investigations%20or%20proceedings%20in%20another (accessed on: 10.07.2023).

[45] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

[46] See: Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ EU L 130, 01.05.2014, pp. 1–36, Preamble (5).

> The European Council therefore called for a comprehensive system to replace all the existing instruments in this area, including Framework Decision 2008/978/JHA, covering as far as possible all types of evidence, containing time-limits for enforcement and limiting as far as possible the grounds for refusal.[47]

The Directive on the European Investigation Order in criminal matters was adopted on 3 April 2014. Member states of the EU had to transpose the directive into their national legal system by 22 May 2017.

A European investigation order (EIO) is a judicial decision issued or enforced by a judicial authority of an EU member state, the purpose of which is to carry out investigative measures in another EU member state for the purpose of gathering evidence in a criminal case.

The EIO is based on mutual recognition, which means that the executing authority is obliged to recognise the request of the other member state and ensure its implementation. The execution must take place in the same way and under the same conditions as though the given investigative action had been ordered by an authority of the executing Member State.

Investigative measures include hearing by video-conference or other audiovisual transmission, interception of telecommunication, conducting covert investigations and gathering information on banking and other financial operations.

As Topalnakos writes, however:

> It became quickly apparent that the EIO fell short of the set targets, because the procedures and timelines prescribed in the EIO proved unsuitable for electronic information, which is more volatile and subject to swift and easy deletion.[48]

[47] See: Directive 2014/41/EU of the European Parliament and of the Council, Preamble (6).

[48] P.G. Topalnakos, *Critical Issues in the New EU Regulation on Electronic Evidence in Criminal Proceedings,* https://eucrim.eu/articles/critical-issues-in-the-new-eu-regulation-on-electronic-evidence-in-criminal-proceedings/ (accessed on: 28.10.2023).

6. Elements of international co-operation in EU

There is a number of organisations within the EU involved in international criminal co-operation. Within the scope of this study, it is neither possible to list them all, nor to give an overview of their main tasks, so below only some of the significant organisations involved in the fight against cybercrime are outlined, without claiming to be exhaustive.[49]

6.1. EUROPOL

Europol's mission is to support its Member States in preventing and combatting all forms of serious international and organised crime, cybercrime and terrorism. It is the law enforcement agency of the European Union and the organisation that supports EU co-operation in fighting crime. In the case of an international crime, they provide professional and technical assistance to member state investigations. Europol supports thousands of international investigation each year.

6.2. EUROPEAN CYBERCRIME CENTRE

> The European Cybercrime Centre (EC3) was set up by Europol to strengthen the law enforcement response to cybercrime in the EU and thus to help protect European citizens, businesses and governments from online crime. EC3 offers operational, strategic, analytical and forensic support to Member States' investigations.[50]

[49] In this study we do not deal with, among others, the European Public Prosecutor's Office.

[50] https://www.europol.europa.eu/about-europol/european-cybercrime-centre-ec3 (accessed on: 14.07.2023).

Since its establishment in 2013, EC3 has made "a significant contribution to the fight against cybercrime and it has been involved in many high-profile operations and hundreds of operational support deployments".[51]

Each year, the EC3 publishes the IOCTA, its flagship strategic report on key findings and emerging threats and developments in cybercrime, threats that impact governments, businesses and citizens in the EU. The IOCTA provides key recommendations to law enforcement agencies, policy makers and regulators to allow them to respond to cybercrime in an effective and concerted manner.

6.3. THE EUROPEAN UNION AGENCY FOR CRIMINAL JUSTICE CO-OPERATION (EUROJUST)

> Eurojust stimulates and improves the co-ordination of investigations and prosecutions, and co-operation among the authorities in the Member States. In particular, it facilitates the execution of international mutual legal assistance requests and the implementation of extradition requests. Eurojust covers the same types of crimes and offences for which the European Union Agency for Law Enforcement Co-operation (Europol) has competence, such as terrorism, drug trafficking, human trafficking, counterfeiting, money laundering, cybercrime, crime against property or public goods, including fraud and corruption, criminal offences affecting the EU's financial interests, environmental crime and participation in a criminal organisation.[52]

As can be seen from the list, cybercrime falls specifically within the competence of Eurojust, but other listed offences may also be related to cybercrime:

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[51] Ibidem.

[52] European Parliament, Judicial co-operation in criminal matters, https://www.europarl.europa.eu/factsheets/en/sheet/155/judicial-cooperation-in-criminal-matters (accessed on: 14.07.2023).

> The often borderless nature of cyber- and cyber-related crime makes effective cross-border co-operation essential to investigate and prosecute perpetrators. Eurojust supports national authorities to work together and to make use of available cross-border investigative tools.[53]

Among others, Eurojust also provides financial support to the cross-border activities of Joint Investigation Teams (JITs):

> Eurojust focuses on countering cybercrime with a view to strengthening judicial co-operation in this field, particularly by facilitating the swift handling of judicial requests – a crucial factor in addressing the issue of the volatility of data and filling gaps arising from the application of different domestic data retention rules – and the early involvement of the judiciary in cybercrime operations to ensure that data are collected in compliance with the applicable rules during the investigation phase and as a result may be tendered as admissible electronic evidence in subsequent judicial proceedings. In addition, Eurojust either produces or contributes significantly to the production of strategic products in the area of cybercrime, thus helping practitioners to further develop the necessary cyber-specific skills.[54]

Speaking about international co-operation in cybercrime cases we cannot ignore the European Judicial Cybercrime Network (EJCN) which was established in 2016. Eurojust is one of the co-operating partners in the Network.

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[53] https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/cybercrime (accessed on: 13.07.2023).

[54] Overview Report Challenges and best practices from Eurojust's casework in the area of cybercrime November 2020, p. 3, https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_Cybercrime-Report.pdf (accessed on: 11.07.2023).

The aim of the establishment of the Network was:

> to foster contacts between practitioners specialised in countering the challenges posed by cybercrime, cyber-enabled crime and investigations in cyberspace, and to increase the efficiency of investigations and prosecutions. The EJCN facilitates and enhances co-operation between competent judicial authorities by enabling the exchange of expertise, best practice and other relevant knowledge regarding the investigation and prosecution of cybercrime.[55]

6.4. THE JOINT INVESTIGATION TEAMS (JITS)

The basis of the establishment of JITs are the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (1) and the Council Framework Decision of 13 June 2002 (2) on Joint Investigation Teams.

A JIT is an international co-operation tool based on agreement between competent authorities in two or more States. It may be set up for a limited period – typically between 12 and 24 months – for a specific purpose, i.e. to carry out criminal investigation in one or more of the states involved. JITs may therefore be effective co-operation tools when national investigating authorities deal with cross border crime. A JIT is led by a member from the country in which the JIT is based, and it is the law of that country that governs the JIT's activities.[56]

A significant number of JITs have been set up since 2010 between an increasing number of Member States. The Council of the European Union adopted a resolution on a model agreement for setting up

[55] European Union Agency for Criminal Justice Cooperation, European Judicial Cybercrime Network, https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/european-judicial-cybercrime-network (accessed on: 06.07.2023).

[56] Europol, Joint Investigation Teams – JITs, https://www.europol.europa.eu/partners-collaboration/joint-investigation-teams (accessed on: 14.07.2023).

a joint investigation team (2017/C 18/01)[57] and the JIT Model Agreement is widely used by practitioners and found to be useful in facilitating the setting up of JITs, since it represents a flexible framework enabling co-operation despite differences in national legislations.[58]

In complex and time-sensitive cross-border investigations, speed and efficiency are of the essence. In many cases, however, the operational needs of the authorities involved are not fully met by the traditional channels of mutual legal assistance. Direct co-operation and communication between authorities is the most efficient method of handling the increased sophistication of organised criminal activities. JITs offer national authorities in different States a flexible framework that is relatively quick and easy to establish and enables the respective authorities to participate in the investigation in a mutually beneficial way:

> Once a JIT has been set up, the partners can directly exchange information and evidence, co-operate in real time and jointly carry out operations. Further, JITs allow for practitioners to be present during investigative measures on each other's territories, and to therefore share their technical expertise and human resources more efficiently. Direct contacts and communication enable the JIT members to build personal relations and trust, leading to faster and more efficient co-operation.[59]

[57] Council Resolution on a Model Agreement for Setting up a Joint Investigation Team (JIT) (2017/C 18/01), https://eur-lex.europa.eu/legal-content/EN-HU/TXT/?from=HU&uri=CELEX%3A32017G0119%2801%29 (accessed on: 14.07.2023).

[58] Preamble of Council Resolution on a Model Agreement for Setting up a Joint Investigation Team (JIT), 2017/C 18/01, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2017.018.01.0001.01.ENG&toc=OJ%3AC%3A2017%3A018%3ATOC (accessed on: 14.07.2023).

[59] European Union Agency for Criminal Justice Co-operation, Joint investigation teams, https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams (accessed on: 13.07.2023).

In February 2023 the Fourth JIT Evaluation Report[60] was published. It concerned the period between 2019 and 2022. Among other data we can also see how often JITs were established for different types of offences:

> The crime types looked at in new JITs are organised crime (118); money laundering activities (85); swindling and fraud (79); drug trafficking (74); trafficking in human beings (62); crimes against life, limb or personal freedom (26); migrant smuggling (20); cybercrime (20); organised property crime including organised robbery and aggravated theft (17); and forgery of administrative documents (14).[61]

As can be seen, the number of cybercrime cases in which JITs have been set up is relatively low, but we are sure that this number will increase in the next few years.

In Hungary, the prosecutor general or a prosecutor appointed by him has the authority and competence to fulfil or initiate a request for procedural legal assistance for the establishment of joint investigation team.[62]

6.5. HUNGARY

Act CLXXX of 2012 on co-operation with the member states of the EU in criminal matters must be applied during co-operation with other member states of the European Union in criminal cases, as well as during any extradition procedure based on the European arrest warrant.

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[60] Fourth JIT's Evaluation Report, February 2023 (hereinafter: JIT's Report), https://www.eurojust.europa.eu/sites/default/files/assets/fourth-jits-evaluation-report.pdf (accessed on: 13.07.2023).

[61] JIT's Report, p. 41, https://www.eurojust.europa.eu/sites/default/files/assets/fourth-jits-evaluation-report.pdf (accessed on: 13.07.2023).

[62] Act CLXXX of 2012 co-operation on criminal matters with the member states of the European Union 70/A. §.

In addition to the above, based on the European arrest warrant this act provides regulation for several forms of co-operation in criminal matters. Procedural legal assistance, execution of a decision ordering a supervisory measure to be applied instead of pre-trial detention; execution of a decision ensuring the preservation of evidence, assets subject to confiscation; the prevention and settlement of conflicts arising during criminal proceedings related to the exercise of the jurisdiction of the Member States are examples of this.

As it is written in the explanation of the Act, new forms of legal assistance may result in the speeding up of criminal legal aid traffic with the member states of the European Union, an increase in efficiency, and a shortening of domestic procedures.

In general, we may say that requests for legal assistance are sent and received by Hungarian prosecutors' offices. These usually concern interrogations, seizure and obtaining data. The number of requests for criminal legal assistance from EU member states was 3,059 in 2021, 2,992 in 2020, and 3,035 in 2019. The number of requests from other countries was 439 in 2021, 286 in 2020, and 251 in 2019. These data show the importance of co-operation within the EU. On the part of Hungary, no JIT agreement was concluded in either 2020 or 2021 and only one in 2019. As far as published statistical data[63] show, the tools of traditional co-operation are still much more widely used in Hungary.

Although we have focused here on various forms of organisational co-operation, we must not forget that bilateral co-operation is still significant in criminal matters.

6.6. A SPECIAL TYPE OF CO-OPERATION IN CYBERCRIME CASES: CO-OPERATION WITH THE PRIVATE SECTOR

Although the classic actors in criminal co-operation in fighting cybercrime cases are also the authorities of Member States, some

[63] Source of the statistical data is: https://ugyeszseg.hu/wp-content/uploads/2021/12/buntetojogi-szakag-2020.pdf and https://ugyeszseg.hu/wp-content/uploads/2022/11/buntetojogi-szakag-2021.pdf (accessed on: 13.07.2023).

service providers have such influence on the infrastructure, or some elements of it, that their co-operation is necessary in the investigation of cases.[64]

International organisations have been aware of most of the problems of cybercrime, challenges which investigating authorities face to today. Almost three decades ago the Committee of Ministers of the Council of Europe adopted a recommendation concerning problems of criminal procedural law connected with information technology.[65] This happened 6 years before the adoption of the Budapest Convention. The Committee of Ministers expressed its concern about the risk that electronic information systems and electronic information might be used to commit criminal offences. It realised the important role of service providers in detecting offenders. In order to ensure co-operation it formulated the following proposal:

> Specific obligations should be imposed on service-providers who offer telecommunication services to the public, either through public or private networks, to provide information to identify the user, when so ordered by the competent investigating authority.[66]

As members of Hungarian authorities mentioned:

> When it comes to attacks against information systems, service providers are not interested in supporting a criminal procedure with the aim of determining the criminal

[64] K. Sorbán, *Az internetes közvetítő szolgáltatók kettős szerepe a kiberbűncselekmények nyomozásában. Felelősség és kötelezettségek*, "In Medias Res" 2019, No. 1, p. 85.

[65] Council of Europe Committee of Ministers Recommendation No. R (95) 13 of the Committee of Ministers of Member States concerning problems of criminal procedural law connected with information technology, https://rm.coe.int/native/09000016804f6e76 (accessed on: 29.10.2023).

[66] Council of Europe Committee of Ministers Recommendation No. R (95) 13 of the Committee of Ministers of Member States concerning problems of criminal procedural law connected with information technology, Appendix Part III, point 12, https://rm.coe.int/native/09000016804f6e76 (accessed on: 29.10.2023).

> liability of the perpetrator. They are more interested in rebuilding the damage as soon as possible, as discreetly as possible, without damaging their reputation for reliability.[67]

It can be said that service providers are often unco-operative, sometimes even explicitly reluctant, and uninterested in providing the data available to investigating authorities.

The Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence (CETS No. 224) was adopted by the Committee of Ministers of the Council of Europe on 17 November 2021 and was opened for signature on 12 June 2022. It:

> provides a legal basis for disclosure of domain name registration information and for direct co-operation with service providers for subscriber information, effective means to obtain subscriber information and traffic data, immediate co-operation in emergencies, mutual assistance tools, as well as personal data protection safeguards.[68]

The Council of the European Union in its Council Decision (EU) 2022/722 of 5 April 2022 authorised Member States to sign, in the interest of the European Union, the Second Additional Protocol.[69]

Paragraph (10) of the Council Decision emphasised that:

> The Protocol provides for swift procedures that improve cross-border access to electronic evidence and a high level

[67] Evaluation report, p. 41.

[68] Council of Europe. Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence (CETS No. 224), https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=224 (accessed on: 31.10.2023).

[69] Council Decision (EU) 2022/722 of 5 April 2022 authorising Member States to sign, in the interest of the European Union, the Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence, OJ EU L 134/15, 11.05.2022.

> of safeguards. Therefore, its entry into force will contribute to the fight against cybercrime and other forms of crime at global level by facilitating co-operation between Member State Parties and third-country Parties, ensure a high level of protection of individuals, and address conflicts of law.

It was necessary to adopt a new regulation[70] because, as Forlani writes, in practice, despite comprehensive and wide-ranging legal co-operation instruments, difficulties remain. In brief, these are the following:

i. Internet service providers have refused to provide data in cases where the relevant authority has no jurisdiction over the place of establishment or because of the nationality of the person for whom the data is requested.
ii. Difficulties arise where a case is related to the legal system of a non-EU country (third country).
iii. Obtaining electronic evidence through judicial co-operation procedures required the involvement of the executing/requested State (judicial and/or governmental) authority.[71]

Previous instruments of international co-operation in criminal matters were based on co-operation between the authorities of two states. The following criticism was formulated against this form of co-operation:

> Obtaining electronic evidence using judicial co-operation channels often takes a long time, resulting in situations where subsequent leads might no longer be available. Furthermore, there is no harmonised framework for

[70] Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings, OJ EU L 191, 28.07.2023, pp. 118–180 (hereinafter: EU Regulation).

[71] The basis for summarising the problems is the study written by Forlani (G. Forlani, *The E-evidence Package. The Happy Ending of a Long Negotiation Saga*, https://eucrim.eu/articles/the-e-evidence-package-happy-ending-of-a-long-negotiation-saga/, https://doi.org/10.30709/eucrim-2023-013 (accessed on: 28.10.2023)).

> co-operation with service providers, while certain third-country providers accept direct requests for data other than content data as permitted by their applicable national law.[72]

The Regulation introduces a new form whereby an authority issuing the European Production and Preservation Order might co-operate directly with private-sector service providers.

"The Regulation aims to simplify and accelerate the process of securing and obtaining electronic evidence stored and/or held by service providers established in another jurisdiction".[73] The guarantees are formulated in the Regulation with regard to the requirements of necessity, proportionality and respect for the rights of the data subject.

More than five years have passed since the European Commission published two proposals on 17 April 2018 to the adoption of the Regulation, a period which was not without discussion, and negotiation, but which reached a deadlock several times.[74]

Shortly after the adoption of the Regulation some experts expressed concerns about this. As Topalnakos points out:

> this process allows the authorities of the issuing state to gain direct access to a range of data concerning citizens of other Member States without being subject to scrutiny by the judicial authorities of the enforcing state regarding the conditions for issuing and the overall legitimacy of said Orders.[75]

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[72] Preamble (8) of the EU Regulation.

[73] G. Forlani, *The E-evidence Package. The Happy Ending of a Long Negotiation Saga*, https://eucrim.eu/articles/the-e-evidence-package-happy-ending-of-a-long-negotiation-saga/, https://doi.org/10.30709/eucrim-2023-013 (accessed on: 28.10.2023).

[74] G. Forlani described the process in a concise but sufficiently detailed manner. G. Forlani, *The E-evidence Package…*, *op. cit.*

[75] P.G. Topalnakos, *Critical Issues in the New EU Regulation on Electronic Evidence…*, *op. cit.,* https://eucrim.eu/articles/critical-issues-in-the-new-eu-regulation-on-electronic-evidence-in-criminal-proceedings/ (accessed on: 28.10.2023). Topalnakos considers the obligation of the issuing state to notify the executing

7. Conclusions

The rules of investigation are not necessarily different in cybercrime cases from other cases. The effectiveness of the investigation and prosecution probably does not depend on special rules.

We think that the investigation of cybercrime does not necessarily require new, special regulation at the level of the Code of Criminal Procedure. In lower-level legislation and instructions that determine the day-to-day work, it is, however, worthwhile precisely to define the tasks to be performed and the method of procedural actions to be carried out.

Permanent training of investigators is crucial. "If investigators are able to gain a complete picture of a crime, then they will be able to take action against the criminal or potentially stop a future crime from occurring".[76]

We agree with Szongoth and Vetter that, regardless of the type of crime, the most important goal is always the identification and possible rescue of the victims, ideally preventing them from suffering further harm.[77] This is particularly important in the case of cybercrimes, during which offenders may contact and harm many people at the same time or within a short period of time.

The targets and victims of cybercrimes may be organisations, enterprises, authorities and private individuals. The possibilities for preventing the commission of crimes are different for individuals and organisations. It is an important duty of the authorities involved in criminal proceedings to draw attention to system-level errors (signalling) experienced during the proceedings.

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state prescribed in Article 8 unsatisfactory. He also emphasises that "efforts should be made to ensure that legal safeguards are in place to protect the rights of individuals subject to the European Production and Preservation Orders".

[76] C. Horan, H. Saiedian, *Cybercrime Investigation…*, *op. cit.*, p. 581.

[77] R. Szongoth, D. Vetter, *Nemzetközi bűnügyi együttműködés…*, *op. cit.*, p. 10.

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Protecting Children from Online Sexual Exploitation and Abuse

1. Introduction

Information, digital technologies and the Internet have become an integral part of modern life, and play an important role in the educational and social development of children. They also, however, expose children to new and evolving forms of sexual exploitation, a crime that is constantly evolving as digital technology develops. Online child sexual exploitation involves the use of information and communication technology as a means of sexually abusing and/or sexually exploiting children. These illegal behaviours are described as among the most heinous crimes in the world today because they victimise children, who are the most vulnerable members of society. These crimes may have existed before the advent of the Internet, but "the online dimension of child sexual exploitation and abuse has enabled offenders to interact with each other online and obtain child sexual exploitation material in volumes that were unimaginable ten years ago."[1]

The aim of this paper/research is to ascertain whether an effective fight against crimes involving the sexual exploitation of children, together with the means of child protection, prevention, education and victim support, may be ensured by an adequate definition of the relevant criminal offences, and by the introduction of a specific criminal sanction to prevent access to material of child sexual abuse.

[1] Europol, *Internet Organised Crime Threat Assessment (IOCTA)*, 2018, p. 30.

This work aims to identify and analyse the existing and new forms of online child sexual exploitation (grooming, child sexual abuse/exploitation material, live-streaming of child sexual abuse, child sexual extortion, and sexting), to describe the related international legal environment, in particular the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) and the European Union's Directive 2011/93/EU. Finally, the paper/research seeks to analyse the Hungarian statutory definition of the crime of child pornography in the Criminal Code and to introduce the practice of rendering electronic data permanently inaccessible, a special criminal measure designed to prevent access to illegal data and the continuation of the crime. The Hungarian regulation in this regard may provide useful findings for legislators of other countries, including Poland.

2. Definitions

2.1. DEFINITION OF THE CHILD: THE QUESTION OF THE AGE OF THE VICTIM

The definition of a child as a victim is not uniform in the relevant international instruments. For the purposes of the Convention on the Rights of the Child, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.[2] Both the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, also known as the Lanzarote Convention[3] (hereinafter: the Lanzarote Convention) and Directive 2011/92/EU[4] define a child as

[2] See: Article 1 of the Convention on the Rights of the Child, New York, 20 November 1989.

[3] See: Article 3 of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25 October 2007.

[4] See: Article 2a of the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

any person under the age of 18. The Budapest Convention,[5] however, uses the term "*minor*" instead of "*child*" and defines a child as any person under the age of 18, though a party may set a lower age limit, which shall not be less than 16 years.

On this basis, it may be concluded that the definition of a child under international law is generally linked to the age of 18, but some conventions allow for exceptions, which may lead to differences in the way countries regulate the concept. From a legal point of view, it would be important to have a single concept of "*child*", in order to define clearly what content or material is illegal and to be able to tackle this crime more effectively on a global level.[6] Although in Hungarian criminal law, a child is a person under the age of 14, in relation to the offence of child pornography, a person under the age of 18 may be the victim of this crime and a pornographic recording of persons under the age of 18 is considered the object of the crime.

2.2. DEFINITION OF SEXUAL ABUSE AND SEXUAL EXPLOITATION OF CHILDREN

It is often hard to distinguish between child sexual abuse and child sexual exploitation because there is a considerable overlap between them.[7] One common element is the exploitation of the lack of power and status of the child, but each refer to acts that are similar and/or overlap. The perpetrator may, for example, sexually abuse a child and then exploit him/her by selling images of the child abuse. The term "*abuse*" focuses more on the treatment of the child as the victim

[5] See: Article 9(3) of the Council of Europe's Convention on Cybercrime, Budapest, 23.11.2001.

[6] L. Dornfeld, K. Mezei, *Az online gyermekpornográfia elleni küzdelem aktuális kérdései*, "Infokommunikáció és Jog" 2017, No. 1, p. 32.

[7] *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, adopted by the Interagency Working Group in Luxembourg, 28 January 2016, p. 25.

of the crime, while "*exploitation*" refers more to the benefit of the perpetrator.[8]

Sexual abuse of children is a contact or interaction between a child and an adult, (who may be a relative, a person in a position of authority over the child, or even a stranger), or between a child and an older or more mature child, where the child is used as an object of the other individual's sexual desire. These contacts or interactions are carried out with violence, threats, pressure, bribery or deception of the child.[9] Sexual abuse of children involves practices by which a person, usually an adult, achieves sexual gratification, financial gain, or advancement through the abuse or exploitation of a child's sexuality by abrogating that child's human right to dignity, equality, autonomy, and physical and mental well-being.[10]

Sexual exploitation of children involves the sexual abuse of children and/or other sexualised acts that involve some kind of exchange (e.g., affection, food, drugs, or shelter).[11] Sexual exploiters typically take advantage of the power imbalance between themselves and a person under the age of 18 to sexually exploit them for their personal pleasure or gain.[12] Perpetrators of sexual exploitation abuse the at-risk state, vulnerability, or trust of the child and/or their own superior authority for financial gain.[13] A child is a victim of sexual

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[8] According to the UNICEF: "sexual abuse becomes sexual exploitation when a second party benefits – through making a profit or through a *quid pro quo* – through sexual activity involving a child". See: *Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children*, New York 2015, p. 7 (hereinafter: UNODOC).

[9] Pacific Perspectives on the Commercial Sexual Exploitation and Sexual Abuse of Children and Youth, UN Economic and Social Commission for Asia and the Pacific, 2009, pp. 6–7 (hereinafter: ESCAP); Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes. Criminal Law Approaches in the Age of the Information Society – Interpersonal Criminal Offences Committed in Cyberspace, with Particular Regard to the Sexual Abuse and Exploitation of Children*, [in:] Gy. Virág (ed.), *Combatting Cybercrime, Corruption and Money Laundering*, Budapest 2022, p. 98.

[10] R.J. Estes, *The Sexual Exploitation of Children: A working Guide to the Empirical Literature*, University of Pennsylvania, Philadelphia 2001, p. 6.

[11] UNODOC, 2015, p. 7.

[12] ESCAP, 2009, p. 5.

[13] Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes…*, *op. cit.*, p. 98.

exploitation if he or she, when he or she participates in a sexual activity, receives something in return, either himself or herself or for a third party. The various forms of sexual exploitation of children include the exploitation of children in prostitution, the online child sexual exploitation, the sale and trafficking of children for sexual purposes, the sexual exploitation of children in the context of travel and tourism, and some forms of child, early and forced marriage.[14]

Online child sexual abuse and online sexual exploitation, as a form of sexual abuse and exploitation of children, involve the use of information and communication technology as a means to sexually abuse and/or sexually exploit children.[15] One of the worrying trends in this area is the increasing use of the Darknet to access and disseminate child sexual abuse material. Such material may be found on both the surface and the hidden web, but the more hard-core content is found on the hidden sites, and illegal material originally shared on Darknet then later appears on the surface web.[16]

3. Forms of online sexual exploitation and abuse of children

While online child sexual exploitation and child sexual abuse are prohibited by national, regional, and international laws, and represent a serious form of violence against children, the crimes that constitute child sexual exploitation and child sexual abuse vary within these legal instruments. There have been several attempts to categorise the relevant crimes in the literature, though here

[14] *Terminology Guidelines…*, *op. cit.*, p. 25.

[15] Ibidem, pp. 23 and 28.

[16] IOCTA, Europol, 2018, *op. cit.*, p. 32. During a criminal case investigated in 2020, a large-scale international operation led by the US and South Korean authorities took down one of the largest Darknet marketplaces for child pornography, "Welcome to Video". As a part of the operation, Hungarian authorities also identified a Hungarian offender who had downloaded nearly 200 images of child pornography from the Darknet site and paid for them with cryptocurrency, https://www.police.hu/hu/hirek-es-informaciok/legfrissebb-hireink/bunugyek/a-megalapozott-gyanu-gyermekpornografia (accessed on: 11.10.2023).

I mention only one. The UN Office on Drugs and Crime uses the term "Internet-facilitated child sexual abuse" (online child sexual abuse), which has four main categories: sexual harrassment, sexual solicitation, sexual grooming, and (commercial) sexual exploitation. The latter includes four additional criminal offences: child prostitution, child trafficking for sexual purposes, the production and consumption of child pornography, and child sex tourism. Due to the limitations of space, in this study I shall focus on crimes that are increasingly, almost exclusively, committed online and which may be considered relatively new forms of sexual offences against children. These crimes are online grooming, child sexual abuse material/child sexual exploitation material, live streaming of child sexual abuse, sexual extortion of children, and sexting.

3.1. ONLINE GROOMING

The solicitation of children for sexual purposes is often referred to as "child grooming" or the "enticement of children". It may be described as a practice where an adult "befriends" a child in ordert to abuse them sexually.[17] The grooming process usually takes place online but may also be committed offline. Online grooming means approaching and misleading children online with sexual intent. It may be described as a series of acts in which an adult, as a putative friend, offers emotional-psychological support to the child and creates a false image of the child to gain the child's trust and, as an ultimate goal, sexually abuse the child.[18]

In the relevant literature, the process of grooming is divided into several stages[19] which may be summarised as follows: the first step

[17] *Terminology Guidelines…*, *op. cit.*, p. 49.

[18] Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes…*, *op. cit.*, pp. 99–100.

[19] One of the most frequently cited descriptions of the grooming process is provided by O'Connell, who describes the first two steps as phases of friedship-forming and relationship-forming in which the perpetrator gathers information about, and makes contact with the victim. He builts a bond with the child by talking about friends, family, school and social life, showing empathy to gain the victim's trust and creating the illusion of being the child's best friend. The next

is the selection of the victim, which may be based simply on liking him or her, or attraction, the greater chances of success in grooming them, or the perceived vulnerability of the child. Factors that are taken into account when selecting the victim are: the physical characteristics of the children, e.g. how attractive they are, how they dress; the child's family circumstances, e.g. the fact that the child is being raised by one parent alone or that the parent has alcohol, drug, emotional or mental health problems, which may lead to a reduction in parental supervision; the psychological vulnerability of the child, e.g. low self-confidence or naivety.[20] Children are active on various social media platforms and use a variety of communication apps that make it easy for perpetrators to access them.[21]

The second phase of grooming is gaining access to the potential victim, which begins with contact with the child. The perpetrator begins a conversation with the child and tries to create a sense of privacy, by asking for example, where the child has access to the internet and what the parents' daily routine is like.[22] Isolation also takes place during this phase: the perpetrator may try to isolate the child physically or emotionally from their surroundings, for example by encouraging the victim to hide their relationship from their family. The next step, which may be regarded as the most important phase in the grooming, involves the emotional recruitment of the victim. In this phase, the perpetrator befriends the child, gains his

is the risk-assessment phase, where the perpetrator assesses the risk of being discovered, for example, by asking the child about the location and users of the computer. Once the perpetrator feels safe, during the exclusivity phase, he attemts to create a sense of exclusivity between him and the child and to encourage the victim to keep the relationship a secret. Finally, in the sexual phase, the perpetrator's intentions are clear, and he brings sexual topics into the conversation, e.g. he sends the victim pornographic images, enquires about the victim's past sexual experiences, and describes in detail the sexual acts he would like to perform on the victim. R. O'Connell, *A typology of child cybersexploitation and online grooming practices*, Cyberspace Research Unit, 2003, pp. 8–10.

[20] G.M. Winters, M.L. Jeglic, *Stages of Sexual Grooming: Recognising Potentially Predatory Behaviours of Child Molesters*, "Deviant Behaviour" 2016, Vol. 37, p. 2.

[21] Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes…*, *op. cit.*, p. 100.

[22] *The new "Stranger Danger": Tactics used in the online grooming of children*, 1 March 2022, https://icmec.org.au/blog/the-new-stranger-danger-tactics-used-in-the-online-grooming-of-children/ (accessed on: 01.10.2023).

or her trust and creates the impression that the relationship between them is "special". By gaining the victim's trust and friendship, the perpetrator may control and manipulate the child to participate in the sexual abuse.[23]

The fourth stage is the transformation of friendship into a relationship. In doing this, perpetrators use a variety of methods, e.g. they present themselves as trustworthy and kind, praise the child's maturity and intelligence, encourage the child to disclose personal information, match their own language with that of the child, and emphasise the similarities between themselves (the perpetrator) and the child, (e.g., common interests, attitudes and ways of thinking).[24] It is also worth noting that prior to sexual exploitation, the perpetrator often assesses the potential risk of detection[25] (e.g., by asking the victim if parents or others are monitoring the child's accounts and/or digital devices), and emphasises the exclusivity of the relationship and the need for confidentiality. The final stage of grooming is the sexual abuse or exploitation of the child, either online (e.g., the perpetrator persuades or forces the child to take a photo or video of themselves with sexual content and send it to them) or offline, through a face-to-face meeting.[26]

3.2. CHILD SEXUAL ABUSE AND CHILD SEXUAL EXPLOITATION MATERIALS (CSAM, CSEM)

The "representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or representation of the sexual parts of a child for primarily sexual purposes"[27] is known as *child pornography*. As the section below will show, the relevant international legal instruments also use this term, and national criminal laws, such as the Hungarian Criminal Code, criminalise the misuse

[23] G.M. Winters, M.L. Jeglic, *Stages of Sexual Grooming…*, *op. cit.*, p. 3.
[24] *The new "Stranger Danger", op. cit.*
[25] R. O'Connell, *A typology of child cybersexploitation…*, *op. cit.*, p. 9.
[26] Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes…*, *op. cit.*, p. 100.
[27] See: Article 2 of UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography of 2000.

of images of persons under the age of 18 as "child pornography". Europol and Interpol, however, prefer the terms "*child sexual abuse material*" (CSAM) and/or "*child sexual exploitation material*" (CSEM) instead of using this concept, as this better reflects the seriousness and actual nature of the phenomenon and challenges the notion that such behaviour may occur with the consent of the child.[28] The two terms may be used interchangeably, even if the acts they cover are not exactly the same.[29]

The concept or statutory definition of the criminal offences covering child sexual abuse (the crime of child pornography) varies not only in international instruments, but also in national laws, as the definition depends on the moral, religious, social, economic and cultural factors of each country.[30] Significant differences may be seen, for example, in the object of the offence (child sexual abuse material) and the conducts of the perpetrators.

In some countries, only recordings of a real child are considered child sexual abuse material while others criminalise pornographic material consisting of realistic images of a non real child. In this context, various terms, such as "*pseudo child pornography*", "*virtual child pornography*" and "*computer-generated child sexual abuse material*" are also used. In the case of pseudo child pornography or morphed images, a real photo is digitally altered. In the first form of morphing, a pornographic image of an adult is taken and transformed into a child using graphic methods.[31] In the second form

[28] L. Dornfeld, K. Mezei, *Az online gyermekpornográfia elleni küzdelem aktuális kérdései*, *op. cit.*, p. 33.

[29] The term "*child sexual abuse material*" may be used as an alternative to "*child pornography*" for material depicting acts of sexual abuse and/or focusing on the genitalia of the child. The term "*child sexual exploitation material*" can be used in a broader sense to encompass all other sexualised material depicting children. See in: *Terminology Guidelines…*, *op. cit.*, pp. 39–40.

[30] L. Dornfeld, K. Mezei, *Az online gyermekpornográfia elleni küzdelem aktuális kérdései*, *op. cit.*, p. 32.

[31] According to an example, the hips of the female could be slimmed, breast size be reduced and pubic hair airbrushed out or thinned. The resulting image would appear to show a child. See: M. Eneman *et al.*, *Criminalising fantasies: the regulation of virtual child pornography*, p. 5, https://gup.ub.gu.se/file/207727 (accessed on: 11.10.2023).

of morphing, the face of a real child is superimposed onto an adult's body on a pornographic picture, or the photo is sexualised, for example by removing the clothing.[32] As a result of the development of ICT (Information and Communication Technology) realistic but completely fictitious computer-generated images (CGI) of children can be created. These images differ from morphed photos in that they never show a real child[33] and these materials may be defined narrowly as virtual child pornography or computer-generated child sexual abuse material.[34] Although computer-generated child sexual abuse material does not necessarily involve direct physical harm, it is harmful to children as it may be used in the grooming process. It may also contribute to the development of sexual fantasies about children, encourage the perpetrators to commit crimes and help maintain a market for child sexual abuse material.[35]

National laws may also differ in their regulation of the various forms of the associated criminal conduct of child pornography (obtaining, possession, production, distribution, sharing, etc). Many countries criminalise possession only if there is an intention to distribute the child sexual abuse material, and there are countries where there is no explicit provision for these materials at all.[36] One of the problematic criminal acts is accessing (viewing) child pornography online without downloading it. According to Hungarian practice,

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[32] L. Dornfeld, K. Mezei, *Az online gyermekpornográfia elleni küzdelem aktuális kérdései*, *op. cit.*, p. 32.

[33] M. Eneman *et al.*, *Criminalising fantasies…*, *op. cit.*, p. 5.

[34] Computer-generated child sexual abuse material is "the production, through digital media, of child sexual abuse material and other wholly or partly artificially or digitally created sexualised images of children. The realism of such images creates the illusion that children are actually involved, although this is not the case". See in: *Terminology Guidelines…*, *op. cit.*, p. 39.

[35] See: *Terminology Guidelines…*, *op. cit.*, p. 41; L. Dornfeld, K. Mezei, *Az online gyermekpornográfia elleni küzdelem aktuális kérdései*, *op. cit.*, p. 33. I note that it is still controversial whether the so-called pseudo-infantile pornography, when a young adult is portrayed in a way that gives the impression of a child, is child sexual abuse material. According to the Hungarian criminal law, it is not, but EU Directive 2001/93 explicitly includes "persons appearing to be minors" in the definition of child pornography. The harmful consequences of virtual pornography, however, may also be identified in the case of pseudo-infantile pornography.

[36] Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes…*, *op. cit.*, p. 102.

this is not considered possession or obtaining and therefore does not constitute a criminal offence, while elsewhere, e.g. in Germany, it is regulated as possession and is also criminalised by the Lanzarote Convention (knowingly obtaining access by means of information and communication technology).

Perpetrators of child pornography can obtain child sexual abuse material in various ways. The use of the aforementioned grooming techniques is widespread, but it is also common when children share or post on social media material that they have originally voluntarily produced about themselves (self-generated explicit material) and this material is then obtained by the perpetrators. Finally, child pornography content obtained in various ways may be used as a basis for sexual extortion, which can lead to further material falling into the hands of the perpetrators.[37]

Child sexual exploitation and abuse material may also be traded via various methods. It may be distributed via e-mail, text message, chat applications, chat rooms, file-sharing networks, social networks, social media platforms, and encrypted or even unencrypted communication applications (Telegram, Whatsapp, Skype) or on password-protected websites, advertising platforms and forums.[38] In addition to the visible, open internet, the darknet is increasingly becoming a place for sharing and trading child sexual exploitation and abuse material and more extreme forms of this material.[39]

3.3. LIVE STREAMING OF THE SEXUAL ABUSE OF CHILDREN

Live streaming of child sexual abuse (LSCSA) means the real-time producing, broadcasting, and viewing of child sexual abuse, and is related to sexual exploitation through prostitution, sexual performances, and the production of child sexual exploitation material.[40]

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[37] IOCTA, Europol, 2018, *op. cit.*, p. 32.

[38] Ibidem.

[39] Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes…*, *op. cit.*, p. 108.

[40] C. Drejer *et al.*, *Livestreaming Technology and Online Child Sexual Exploitation and Abuse: A Scoping Review*, "Trauma, Violence & Abuse" 2023, Vol. 25, No. 1, p. 1.

It may take place on various platforms, such as social media, online chat rooms and communication applications with video call features. The method and place of perpetration has shifted from wired internet-enabled computers to smartphones and tablets with mobile internet.[41] The viewers of live streaming can either be passive, those who "only" pay to watch, or active insofar as they may communicate with the child or the abuser, and even express wishes, for example which sexual act the child should perform, or which should be carried out on the child.[42] Detecting the crime and prosecuting the viewers is difficult, as streaming leaves no trace on the device being used as no file is downloaded. When the streaming stops, the illegal content disappears unless the offender records it.[43]

It is, however, not only the viewer of the live streaming who commits an unlawful act, but also the provider of the streaming service, who usually acts for profit. In fact, the most common form of this crime is that in which the purpose of the perpetrator is to exploit the child sexually for financial gain. There are, nevertheless, cases, particularly in relation to self-generated sexual content involving children, where the financial element is not present.[44] The live streaming of self-generated sexual material, which may take place via social media- or communication applications, does not in itself constitute a criminal offence, but it is often linked to other illegal activities. Children are often groomed or coerced by the perpetrators, for example, to participate in sexual acts in front of the camera of their laptop or phone. If the livestreaming is recorded, the resulting sexual material may, moreover, also be distributed further (the crime of child pornograpy), or may be used to commit additional crimes (sextortion or sexual coercion) by sexual offenders.[45]

Economic imbalances, extreme poverty, unemployment and existential insecurity are all importatnt factors in the development of the supply side of the live streaming of child sexual abuse.[46]

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41 IOCTA, Europol, 2018, *op. cit.*, p. 35.
42 Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes…*, *op. cit.*, p. 108.
43 *Terminology Guidelines…*, *op. cit.*, p. 47.
44 C. Drejer *et al.*, *Livestreaming Technology…*, *op. cit.*, pp. 1–2.
45 IOCTA, Europol, 2018, *op. cit.*, p. 36.
46 Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes…*, *op. cit.*, p. 109.

The Philippines remains the most common location for LSCSA. The reasons for this are the advanced IT infrastructure, the traditionally efficient sex industry, the simple methods of international money transactions and the limited police resources. In fact, for poor families, this behaviour represents a significant source of income and does not fly in the face of accepted ethical standards.[47]

Viewers may pay for live streaming in various ways. Payment by credit card or debit card has been significantly reduced. Instead, popular payment methods include using online payment services, money transfer services and local payment centres. Payments with virtual currencies are not yet widespread, as they are difficult to convert into cash on the receiving end. The use of mobile phones, for which neither a credit card nor a bank account is required, is developing into a new payment method. It is a type of Informal Value Transfer System (IVTS), where money may be deposited with neither registration nor identification, using only a mobile number and a reference number.[48]

3.4. SEXUAL EXTORTION OF CHILDREN

Although there is no uniform definition in the literature and individual cases vary greatly in practice, the simplest way to describe child sexual extortion or child sextortion is as follows: "Once the abuser obtains the sexual materials of the child, the abuser threatens the child with misusing them unless the child complies with his/her demands".[49] The elements of child sexual extortion are as follows:

1. Obtaining sexual material from a child; the perpetrator usually uses popular apps, video chat programs and persuades victims to send or share images of sexual content. In addition to images, perpetrators may also use other content to commit the offence,

[47] https://inhope.org/EN/articles/what-is-live-streamed-abuse (accessed on: 13.10.2023).

[48] IOCTA, Europol, 2018, *op. cit.*, p. 35.

[49] K.V. Acar, *Sexual Extortion of Children in Cyberspace*, "International Journal of Cyber Criminology" 2016, Vol. 10, No. 2, p. 111.

such as a screenshot of an intimate conversation, a video from the victim's webcam or private information about the victim's sexuality.[50]

2. Once the child sexual content is in the possession of the perpetrator, the *extortion* phase begins. The perpetrator usually threatens or blackmails the victim by disclosing the sexual material, for example by sharing the images or posting them on social media.
3. The purpose of the perpetrator is to obtain additional sexual content, sexual acts from the child, money[51] or other favours from the victim or simply to humiliate her or him. The threat of disclosure of the sexual content is at the heart of sextortion and distinguishes it from other forms of sexual exploitation of children. The purpose of the threat and the crime is to gain control over the victim. On the perpetrator's side, this feeling of power and the powerlessness of the victim are characteristic features of this crime.[52]

Two main types of sextortion are distinguishable. In the first type, the perpetrator and victim do not know each other to begin with, and the perpetrator contacts the victim online, via social networks or messaging applications.[53] The perpetrators often use the method of catfishing, i.e. creating a fictitious identity or a false identity on a social networking site, usually targeting a specific victim. After establishing contact, the next step is to obtain sexual content from the victim, which may be achieved by dint of various techniques. The main goal of the perpetrator is to gain the trust of the victim

[50] A. Breeann, *What is sextorsion?*, https://saprea.org/blog/what-is-sextortion/ (accessed on: 13.10.2023).

[51] This type of sextorsion may be referred to as financial sextorsion.

[52] According to Acar, although there are differences between cases, three elements always characterise sextortion. These crimes are committed in cyberspace (the interaction between the perpetrator and the victim takes place in cyberspace), possession (possession of sexual images of a child, regardless of the way they were obtained or produced) and extortion (forcing a child to perform certain acts). If any of these elements are missing, no crime is committed or sextorsion is not is committed (K.V. Acar, *Sexual Extortion of Children in Cyberspace*, *op. cit.*, p. 113).

[53] J. Wolak *et al.*, *Sextortion of Minors: Characteristics and Dynamics*, "Journal of Adolescent Health" 2018, Vol. 62, No. 1, p. 76.

and to establish a more individual relationships, which is achieved through grooming and social networking methods.

The grooming techniques used in practise are quite varied: praising the victim's qualities, compliments, emphasising common interests, inventing shared secrets, pretending to be genuinely interested in the victim's life, etc.[54] An example of the use of social networks is the case of James Kirby, who obtained sexual images of women and young girls by posing as the owner of a modelling agency and promising to make them famous models.[55] Note that sexual content may also be obtained without contacting the victim. One example of this is the downloading or recording of sexual content that the victim has inadvertently uploaded or transmitted. In another case, the content is obtained by hacking into the information system used by the child and taking control of the cameras built into mobile phones and other devices or the perpetrator accesses the child's online account without permission and steals sexual material depicting the child.[56] After the victim has sent the sexual material to the perpetrator, the perpetrator uses it for the purposes of blackmail. He or she threatens to share it online or with the victim's friends or relatives unless the victim complies with a demand.

In the second form of child sextortion the victims know the perpetrators personally. Most of these perpetrators are current or former romantic or sexual partners, but there are also cases in which victim-offender friendships and school relationships are involved.[57] As sexting remains a common form of dating, romantic expression and sexual exploration among young people, in many cases the subsequent victim initially provides the sexual content intentionally and knowingly. In typical cases, after the romantic or other

[54] A. Breeann, *What is sextorsion?*, *op. cit.* Other manipulative tactics used by perpetrators: developing a bond by establishing a friendship or romantic relationship; pretending to be younger; pretending to be female when they are really male; initially offering something to the child. See: Europol, *Online sexual coercion and sextortion as a form of crime affecting children*, 2017, p. 12.

[55] K.V. Acar, *Sexual Extortion of Children in Cyberspace*, *op. cit.*, p. 115.

[56] See: Europol, *Online sexual coercion…*, *op. cit.*, p. 12; K.V. Acar, *Sexual Extortion of Children in Cyberspace*, *op. cit.*, p. 116.

[57] K.J. Wolak *et al.*, *Sextortion of Minors…*, *op. cit.*, p. 75.

intimate relationship ends, the disappointed partner later threatens to make the content public, if the victim chooses not to return to the relationship.[58]

The damage done by sextortion, which may vary depending on whether the perpetrators carry out their threats, include the loss of friends or family relationships, moving home or changing school, financial loss,[59] and, most commonly, psychological problems, e.g. feelings of hopelessness, shame and anxiety, which may lead to depression, panic attacks, suicidal thoughts and, in the most severe cases, suicide or attempted suicide.[60]

3.5. SEXTING

The term *sexting* was first used by the Daily Telegraph in 2005, to combine the terms "sex" and "texting".[61] Sexting is a form of self-generated sexually explicit content which may be defined in the most general sense as the creation, sharing and forwarding of sexual content (e.g., images, photos, videos) via mobile phones, the internet or social media platforms.[62] There is a lack of agreement in the relevant literature on whether the term covers text messages or only image-based sexual content, and whether it includes coercion or whether sexting is voluntary by definition.[63]

Consensual sexting, i.e. where the sexual content is made or transmitted by the person concerned, is not a criminal offence, due to its lack of illegality. One of the obvious problems, however, is that the images forwarded may be transmitted without further permission or other restrictions. Victims also often create images of themselves under pressure or coercion. In this case, the sharing

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[58] A. Breeann, *What is sextorsion?, op. cit.*

[59] K.J. Wolak *et al.*, *Sextortion of Minors…*, *op. cit.*, p. 75.

[60] A. Breeann, *What is sextorsion?, op. cit.*

[61] A.M. Gassó *et al.*, *Sexting, Mental Health, and Victimisation Among Adolescents: A Literature Review*, "International Journal of Environmental Research and Public Health" 2019, Vol. 16, No. 13, p. 1.

[62] *Terminology Guidelines…*, *op. cit.*, p. 44.

[63] A.M. Gassó *et al.*, *Sexting, Mental Health…*, *op. cit.*, p. 1.

of images between young people is often done under pressure, even if it appears voluntary at first glance, so it may be difficult to distinguish from genuinely consensual sexting.[64] The forwarding and sharing of sexual content depicting a child may be done out of simple irresponsibility, but is often motivated by a desire for revenge, when one party, usually the boy or man, posts images of his partner once the relationship has broken down.[65] This conduct involving the child constitutes the crime of child pornography. In addition, sexting may also be a form of sexual bullying, in which a child is pressured into sending a picture to a friend who may also share or forward the images.[66]

4. The main international instruments fighting against sexual exploitation and the abuse of children

4.1. THE BUDAPEST CONVENTION

Among the criminal offences addressed by the research, the Council of Europe Convention on Cybercrime only covers crimes related to child pornography. As mentioned above, the Convention defines the victim of the crime as a minor: all persons under 18 years of age. The object of the crime is "child pornography", more specifically any pornographic material that visually depicts a minor engaged in sexually explicit conduct or a person appearing to be a minor engaged in sexually explicit conduct. It is important to note that virtual pornography is also punishable under the Convention, as the crime may also be committed in connection with a realistic image representing a minor engaged in sexually explicit conduct.

Article 9 of the Convention defines the criminal offences that State Parties are required to criminalise in their domestic law. These are:

[64] Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes…*, *op. cit.*, p. 107.

[65] Z. Szathmáry, *Bűnözés az információs társadalomban*, *Doktori értekezés*, Budapest 2012, p. 69.

[66] *Terminology Guidelines…*, *op. cit.*, p. 44.

i. producing child pornography for the purpose of its distribution through a computer system;
ii. offering or making available child pornography through a computer system;
iii. distributing or transmitting child pornography through a computer system;
iv. procuring child pornography through a computer system for oneself or for another person;
v. possessing child pornography in a computer system or on a computer-data storage medium.

4.2. THE LANZAROTE CONVENTION

The Lanzarote Convention defines the concept of the "sexual exploitation and sexual abuse of children" in Articles 18 to 23 of the Convention. The first crime relevant here is "offences concerning child pornography". According to Convention, the term *child pornography* refers to "any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for a primarily sexual purpose".[67] Like the Budapest Convention, it gives parties the discretion to criminalise, in whole or in part, pornographic material consisting solely of a simulated representation or realistic images of a non-existent child.

In the framework of the crime referred to as "offences concerning the participation of a child in pornographic performances", the Lanzarote Convention criminalises the recruitment of children for participation in pornographic performances, instructing/convincing/forcing a child to participate in such activities, other forms of exploitation of a child with similar purposes, profit-making activities associated with the participation of children in pornographic

[67] See: Article 20(2), The Convention criminalises the following acts: producing, possessing, offering or making avaiable child pornography; distributing or transmitting child pornography; procuring child pornography for oneself or for another person; knowingly obtaining access, through information and communication technologies, to child pornography.

performances, and intentional participation in pornographic performances involving children.[68]

The Convention explicitly criminalises forms of conduct that qualify as online grooming. Article 23 prohibits the solicitation of children for sexual purposes and requires such acts to be penalised. The conduct to be criminalised pursuant to the Convention is defined as an intentional proposal, through information and communication technologies, of an adult to meet a minor for the purpose of sexual abuse or the preparation of child pornography, where this proposal has been followed by material acts leading to such a meeting.[69]

4.3. DIRECTIVE 2011/93/EU

This Directive follows a holistic approach, encompassing provisions addressing the investigation and prosecution of offences, assistance to and protection of victims, and the prevention of such crimes.[70] In order to facilitate the prosecution of offenders, the Directive criminalises a wide range of situations of sexual abuse and exploitation, including grooming, and introduces increased levels of penalties. Maximum levels set by national legislation must not be lower than levels ranging from 1 to 10 years of prison, depending on the seriousness of the offence.[71] Another important step has been the introduction of new measures against websites containing or disseminating child pornography, consisting mainly of immediate removal at source and (voluntary) blocking by EU Member States.

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[68] See: Article of 21 of the Convention.

[69] Z. Szathmáry, M. Losonczy-Molnár, *Cybercrimes…*, *op. cit.*, p. 100. According to the opinion and explanatory note published by the Lanzarote Committee, the solicitation of children for sexual purposes does not necessarily and in a personal encounter; such acts can cause serious harm and damage to the child even without a meeting.

[70] L. Buono, *Editorial ERA Forum 3/2021: EU Strategy for a more effective fight against child sexual abuse*, "ERA Forum" 2020, Vol. 21, No. 3, p. 362.

[71] https://eur-lex.europa.eu/EN/legal-content/summary/fighting-child-sexual-abuse.html (accessed on: 10.10.2023).

The Directive provides a precise definition of child pornography and pornographic performances,[72] and defines sexual crimes against children in four categories,[73] of which the following are relevant here:

1. criminal offences related to pornographic performances involving the participation of a child;[74]
2. criminal offences concerning child pornography (acquisition or possession of child pornography; knowingly obtaining access, by means of information and communication technology, to child pornography; distribution, dissemination or transmission of child pornography; offering, supplying, making available or production of child pornography;
3. and criminal offences cover grooming: the "solicitation of children for sexual purposes".[75]

[72] According to Article 2(c), "child pornography" means: (i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct; (ii) any depiction of the sexual organs of a child for primarily sexual purposes; (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes. The definition of the "pornographic performance" (Article 2(e)) is: "a live exhibition aimed at an audience, including by means of information and communication technology, of: (i) a child engaged in real or simulated sexually explicit conduct; or (ii) the sexual organs of a child for primarily sexual purposes".

[73] These crimes are: "offences concerning sexual abuse" (Article 3), "offences concerning sexual exploitation" (Article 4), "offences concerning child pornography" (Article 5) and "solicitation of children for sexual purposes" (Article 6).

[74] This crime may be committed by: (i) causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes; (ii) coercing or forcing a child to participate in pornographic performances, or threatening a child for such purposes; (iii) knowingly attending pornographic performances involving the participation of a child (Article 4(2–4)).

[75] "The proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in Article 3(4) and Article 5(6), where that proposal was followed by material acts leading to such a meeting". (Article 6(1)).

5. The crime of child pornography in Hungarian criminal law: Articles 204 and 204/A of the Criminal Code

Since 1997, Hungarian criminal law has criminalised the production, sale or trafficking of pornographic images of minors. In 2007, the legislator recodified the statutory definition of the crime (entitled "abuse of illegal pornographic images"), criminalising new conduct and defining the victim as a person under the age of 18. The amendment to the Criminal Code in 2021 (Act LXXIX of 2021), as a part of the consistent stringency against paedophile offenders, among other things, regulates the offence of child pornography in a stricter and more differentiated manner than before.

The modifying Act "expanded the scope of the criminal conduct, increased the penalties, introduced new qualifying cases and redefined the concept of pornographic recording".[76] The amendment was justified not only by harmonisation with the relevant international instruments, but also by the fact that the rapid development of the information system has enabled the commission of child pornography online, and new forms of crime are increasingly linking this type of criminality to the world of the Internet.[77] Articles 204 and 204/A of the Criminal Code, under the title of child pornography, currently criminalise the offence in the chapter on crimes against sexual freedom and sexual morality in a rather complex statutory definition.

The passive subject (the victim of the crime) is a person under the age of 18 if the recording depicts an existing person. From 2021, Hungarian criminal law also criminalised virtual pornography, e.g. recordings produced by artificial intelligence or manipulative means (computer-generated images). In such latter cases, there would be no identifiable victim, since the crime is committed in connection with the pornographic recording of a non-existent person under the age of 18. According to the relevant case law, age needs

[76] See: the Explanatory Memorandum of the Act.

[77] Z. Márki, *A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények*, [in:] I. Kónya (ed.), *Magyar büntetőjog I–IV. – Új Btk. – Kommentár a gyakorlat számára*, Budapest 2023 (available in ORAC online Jogkódex).

to be assessed at the time the recording is made, even if the crime is later committed by other perpetrators through different conduct.[78]

The object of the crime is the pornographic recording or pornographic programmes depicting a person under the age of 18, defined in the Criminal Code as follows:

> pornographic recording:[79] the depiction of one or more other persons in a manner that depicts sexuality in a grossly indecent explicit manner, with the intent to arouse sexual desire, including the depiction of a non-existent person or persons in a realistic manner.[80]

The Criminal Code defines the term *pornographic recording* as broadly as possible and includes videos, films, photographs and all other forms of recordings. It follows from the word *recording*, however, that the drawing, painting or other graphic depiction cannot be the object of the offence.[81] It should also be noted that scientific, artistic or educational representations of the human body are not covered by the concept of prohibited pornography, even if they are indecent.[82] It is important to emphasise that a crime is only committed if the recording in question is made of another person. If someone publishes pornographic material of himself or herself, he or she will therefore not be punished for this offence:[83]

> pornographic programme: any act or performance which depicts the sexuality of another person or persons with gross indecency and which is intended to arouse sexual desire.[84]

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[78] See: BH 2010.267. (Decision of the Hungarian Supreme Court).

[79] See: Article 204(8) of the Criminal Code.

[80] By *realistic* is meant a representation that is deceptively similar to the real thing, when it is "impossible and not expected to judge whether the person is real". See: the Explanatory Memorandum of the Act.

[81] Zs. Szomora, *A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények*, [in:] K. Karsai (ed.), *Nagykommentár a Büntető Törvénykönyvhöz*, Budapest 2019, p. 467.

[82] E. Belovics (ed.), *Büntetőjog II. Különös rész*, Budapest 2019, p. 233.

[83] E. Belovics (ed.), *Büntetőjog II. Különös rész*, *op. cit.*, p. 234.

[84] See: Article 204/A (8) of the Criminal Code.

Due to the differentiation of the crime, the Code divides child pornography into two separate articles in relation to the objects of the crime. Article 204 covers crime related to pornographic recordings and Section 204/A deals with criminal conducts related to pornographic programmes. The crime covered by Article 204 falls into three different basic categories.

I. Any person who obtains or keeps a pornographic recording depicting a person under the age of eighteen, is punishable by imprisonment ranging from between one to five years.

The first case of the crime is the obtaining or keeping of a recording made by another person. Obtaining means taking possession, which may be done free of charge or for a fee, or through a crime such as theft. Downloading a data carrier from the Internet that contains the prohibited recordings also constitutes obtaining.[85] It is questionable whether viewing the recordings i.e. viewing the live stream of the recordings on a website without downloading them to the computer constitutes the obtaining of a recording, though I feel the answer appears to be no, so it would be necessary to criminalise viewing, since the protected value of the crime, i.e. the undisturbed sexual development of children, is also endangered by such viewing. The keeping of recordings means possession over a relatively longer period, including hiding the recordings.

II. Any person who who offers, supplies or makes available a pornographic recording depicting a person under the age of eighteen, is punishable by an imprisonment for between two and eight years.

Offering here means an unsuccessful call for taking up such an offer.[86] It may be an offer to buy or a free offer. *Supply of a recording* presupposes that the recipient receives it, i.e. obtains it.[87] By *making*

[85] Zs. Szomora, *A nemi élet szabadsága és a nemi erkölcs…*, *op. cit.*, p. 467.

[86] J. Jacsó, *A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények*, [in:] I. Görgényi, J. Gula, T. Horváth, J. Jacsó (eds.), *Magyar büntetőjog különös rész*, Budapest 2020, p. 257.

[87] Z. Márki, *A nemi élet szabadsága és a nemi erkölcs elleni…*, *op. cit.*

available, the recording becomes available to others, accessible to anyone.[88]

III. Any person who produces, distributes or trades pornographic recordings depicting a person under the age of eighteen, or makes such a recording available to the public, is punishable by a term of imprisonment ranging from between five to ten years.

The first conduct of child pornography here, the production, is one of the most serious acts, as it affects the victim most directly.[89] The production of a recording is to be interpreted broadly, and it is also committed by the person who develops the recordings in the laboratory, the director or cameraman of the film or video recording, etc.[90] In the case of distribution, the perpetrator transmits the pornographic recordings to several persons. This may be done by contacting just one person, who then transmits the recordings to others.[91] In comparison, trading is a systematic distribution with the aim of making a profit.[92] The latter two types of conduct have in common that they involve more than one pornographic recordings. Finally, there is making a pornographic recording available to the public by creating a situation in which more people have the clear opportunity to access the recording, for example by uploading it to the Internet.[93]

The three cases of crime outlined above are punishable more severely if the conducts mentioned therein are as follows:

a) committed against a person under the age of 12;
b) committed against a victim who is under the perpetrator's education, supervision, care or treatment, or by the abuse of

[88] J. Jacsó, *A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények*, *op. cit.*, p. 258.

[89] Explanatory Memorandum of the Act.

[90] Z. Márki, *A nemi élet szabadsága és a nemi erkölcs elleni…*, *op. cit.*

[91] Zs. Szomora, *A nemi élet szabadsága és a nemi erkölcs…*, *op. cit.*, p. 258.

[92] Ibidem.

[93] According to the case law, uploading of recordings to an online newsgroup represents "making available" as long as the recordings may be viewed, but there is no possibility to download them. If the recordings may be downloaded, reproduced or redistributed, the uploader's conduct already constitutes "distribution". See: BH 2005.133.

any other position of power or influence over the victim, or by taking advantage of the victim's vulnerability;
c) committed in an official capacity using that capacity;
d) committed on a recording involving the use of oppression or violence;
e) committed as a particular repeat offender.[94]

The most serious case is when the acts mentioned in the three cases are committed on a recording involving the use of oppression or violence against a person under the age of twelve.

The case is mitigated if the crime occurs when the conducts of obtaining, keeping or production are committed on a pornographic recording of a person or persons over the age of 14 but under 18, if the above-mentioned qualifying circumstances are not present.[95]

Given the seriousness of child pornography, the Criminal Code brings criminal law protection forward in time and punishes the preparatory acts and also the person who provides financial means for these acts. The Code takes strong action against the solicitation of children,[96] so that anyone who invites a person or persons under the age of eighteen to take a part in a pornographic recording may also be punished.[97]

As mentioned above, the crimes related to pornographic programmes are covered by a separate provision, Article 204/A of the Criminal Code:

I. Any person who takes a part in a pornographic programme in which a person or persons under the age of eighteen is involved, is punishable by imprisonment for between two and eight years.

Taking a part in a pornographic programme means participation in the programme in any capacity, e.g. as a performer or viewer.[98]

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[94] See: Article 204(2) of the Criminal Code.
[95] See: Article 204(5) of the Criminal Code.
[96] Explanatory Memorandum of the Act.
[97] A less serious form of this case is when the perpetrator invites a person or persons over the age of 14 but under the age of 18 to appear in a pornographic recording. See: Article 204(7) of the Criminal Code.
[98] J. Jacsó, *A nemi élet szabadsága és a nemi erkölcs elleni bűncselekmények*, *op. cit.*, p. 259.

A viewer is punishable if it is a live programme and the participation is therefore personal participation. A person who watches a prohibited pornographic programme on the Internet, i.e. online, commits no crime.[99]

II. Any person who gives a role to a person or persons under the age of eighteen in a pornographic programme or organises such a pornographic programme, is punishable by an imprisonment for between five and ten years.

Giving a role in the prohibited programme may be established if the victim actively participates in the programme as a result of the perpetrator's successful persuasion. In this case, the director of the programme is also punishable.[100] The organisation of the programme includes the recruitment and selection of contributors, the designation and hiring of the venue, the provision of information to the viewers, but also be established when one of these partial acts is carried out.[101]

The aggravated cases of this crime are the same as in the previous Article. The preparatory acts of the crime and provision of financial means are also punishable, as is the perpetrator who invites a person or persons under the age of eighteen to perform in a pornographic programme.

The perpetrator of child pornography be anyone, except a person under the age of 18 who produces a recording of himself or herself or keeps or makes available such a recording, etc. The crime can only be committed intentionally, and the perpetrator must be aware that the victim or the non-existent person in the recording is under the age of 18. In this context, mistake of fact may be relevant as a ground for excluding criminal responsibility.

The issue of cumulative offences – whether one or more offences must be established if the criminal act or acts are committed in relation to more than one recording or if more than one victim seen

[99] Z. Márki, *A nemi élet szabadsága és a nemi erkölcs elleni…*, *op. cit.*
[100] Zs. Szomora, *A nemi élet szabadsága és a nemi erkölcs…*, *op. cit.*, p. 258.
[101] Z. Márki, *A nemi élet szabadsága és a nemi erkölcs elleni…*, *op. cit.*

on the recording – is regulated by the Kúria's Criminal Case Law Decision 2/2018. Accordingly:

i. the number of persons on the recording is irrelevant; one offence must be established;
ii. if the perpetrator commits more than one of the three cases mentioned (Case I, Case II or Case III) in relation to the same recording, only one offence, the most serious, needs to be established; if, for instance, the perpetrator first obtains the recording (Case I) and then distributes it (Case III), he or she is only liable for distribution;
iii. if the perpetrator commits the offence in relation to more than one recording, as a general rule, one offence must be established; this rule also applies if the perpetrator commits one of the three cases (Case I, Case II or Case III) through different conducts; if, for instance, he obtains and keeps several recordings, this constitutes one offence;
iv. however, if the perpetrator commits more than one of the three cases (Case I, Case II or Case III) in relation to several different recordings, the offences are cumulative and several offences must be established; if, for instance, the perpetrator obtains three recordings and then produces three new recordings, he or she will be charged with two offences.

Previously, there was no uniform judicial practice as to whether one or more offences must be established if the perpetrator obtained several pornographic recordings. The Kúria, as we have seen, may opt for the first position as the main rule, which reduces the number of child pornography crimesin the statistics by hundreds.[102]

[102] Sz. Gyurkó, *A gyerekekkel szembeni online szexuális visszaélések és a készülő új EU rendelet háttere*, "Családi Jog" 2023, No. 3, p. 12.

6. Rendering electronic data permanently inaccessible

6.1. BACKGROUND TO INTRODUCING THE NEW CRIMINAL MEASURE

In the case of cybercrimes, in particular some offences committed on the internet, it is essential to prevent access to illegal data and the continuation of the offence. As well as child pornography, these crimes include hate speech, misleading of consumers, copyright infringements or crimes against property committed on the internet. Until 2012, however, there was no sanction in Hungarian criminal law to make illegal content inaccessible, so the possibilities for the authorities to fight against cybercriminals were very limited. The introduction of the new legislation was also required by Hungary's obligation based on Article 25 of the Directive 2011/93/EU.[103] In order to comply with the obligation to harmonise criminal law, the Hungarian legislator has added a new criminal measure to the list of criminal sanctions in the new Criminal Code which consists of rendering electronic data permanently inaccessible.[104] Hungary currently has a variety of legal measures (criminal law, administrative law, civil law) for the blocking, filtering and taking down of illegal internet content. I shall now turn to the related measure of our substantive criminal law.

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[103] Article 25: "1. Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory.
2. Member States may take measures to block access to web pages containing or disseminating child pornography towards the Internet users within their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall also include the possibility of judicial redress."

[104] Rendering electronic data permanently inaccessible, as a criminal sanction, may be enforced after the judgment has become final. In the case of several content-related cybercrimes, however, it is crucial to prevent the continuation of the offence by making the data inaccessible at an early stage of the criminal proceedings. This is the purpose of the new coercive measure introduced in the Criminal Procedure Code in 2013, rendering electronic data temporarily inaccessible.

6.2. THE RELEVANT LEGISLATION: ARTICLE 77 OF THE HUNGARIAN CRIMINAL CODE

Article 77 (1) of the HCC:

> [T]he data published on an electronic communications network shall be rendered permanently inaccessible, when:
>
> a) the disclosure or publication of which constitutes a criminal offence, or
> b) which is used as an instrument for the commission of the crime, or
> c) which is created by the commission of a crime.
>
> (2) The measure for permanently rendering electronic data inaccessible shall be issued even if the perpetrator cannot be prosecuted due to minority or insanity or due to other grounds for exemption from criminal responsibility, or if the perpetrator has been given a warning.

In the Hungarian criminal sanction system, rendering electronic data permanently inaccessible is a security measure that may be imposed independently or together with a punishment or other criminal measure. Unlike punishments that require a culpable commission of a crime, this measure may also be applied to perpetrators who are children or mentally ill, and even if the perpetrator is not liable on grounds of exemption from criminal responsibility. Electronic data may be defined as data published on an electronic communications network by an electronic communications service provider that can be identified by an IP address, URL, domain name and port number.

In principle, the measure may be applied to any crime, but the Criminal Code defines the electronic data covered by the measure in a taxative manner:

i. data whose disclosure or publication constitutes a criminal offence, e.g. child pornography, copyright infringements;
ii. electronic data used as a tool to commit an offence. e.g. in the case of fraud committed through an information system,

a fake website used by the perpetrators that resembles an Internet banking login page;

iii. electronic data created by the commission of an offence, e.g., a defamatory communication.

6.3. ENFORCEMENT OF THE CRIMINAL MEASURE

Rendering the electronic data permanently inaccessible is enforceable in two ways. First, it be done by deleting the data, which is the responsibility of the web hosting provider, who is obliged to remove the electronic data. The court specifies the hosting provider in the judgment (name, address, registered office, name of representative, etc). The court issues a notice requiring the hosting provider to delete the data within one working day of receiving the judgment or sends the notice to the state tax authority for enforcement. If the web hosting provider fails to comply with the obligation to delete the electronic data, the court may impose a fine of between HUF 100,000 and HUF 1 million based on the notice from the tax authority. The fine may be imposed again.

Secondly, the sanction may also be carried out by permanently blocking access to the data. In this case, the court sends its judgment to the National Media and Infocommunications Authority (NMHH), which organises and supervises the enforcement of the judgment. Electronic communications service providers who provide access to the data are obliged to block access to the electronic data. These service providers are Internet access providers (Yettel Zrt., VodafoneZrt.), search providers (Google, Bing) and cache providers. The NMHH contributes to the prevention of cybercrimes. The Authority operates the so-called Central Electronic Database of Decisions on Rendering Data Inaccessible (KETHA). In this electronic database, the Authority stores and processes the decisions transmitted by the court and forwards them to electronic communications service providers together with search engines and caching service providers. According to the court decision, internet access providers are obliged to block access to the electronic data referred to in the decision within one working day and to filter it

from Internet traffic. Search providers and cache providers are also obliged to block access to data found or stored as a result of a search for the data mentioned in the decision. If service providers fail to comply with this obligation, the court may impose the fine mentioned above.

I note that the Act on International Legal Assistance in Criminal Matters (1996) allows the Hungarian authorities, in the interest of smooth international co-operation, to use the procedural or enforcement legal assistance available to render electronic data temporarily or permanently inaccessible if the website is hosted by a foreign web hosting service provider. The Act allows the Hungarian authorities to comply with such foreign requests for mutual legal assistance if the web hosting service provider is Hungarian.

7. Conclusions

This study is devoted to providing an overview of the definitions relevant to the crimes related to the child sexual abuse and exploitation, the most important traditional and new forms of online sexual offences against children, and to outline the main international legal instruments for the protection of children against these heinous crimes. As a result of the research, I hope that the hypothesis has been confirmed: crimes involving the sexual exploitation of children – together with the means of child protection, crime prevention, education and victim support – should be upheld by a suitable definition of the relevant criminal offences, and by the introduction of a specific criminal sanction to prevent access to child sexual abuse material. The Hungarian statutory definition of child pornography in the Criminal Code, the most common and perhaps most serious form of online sexual offence against children, in line with the relevant EU and international standards, criminalises all forms of conduct related to child sexual abuse material and now also punishes virtual pornography. The problem remains, however, that, despite the fact that the Lanzarote Convention criminalises the act of knowingly gaining access by means of information and communication technology, Hungarian criminal law does not punish

a perpetrator who views a live stream of recordings on a website without downloading them to a computer. *De lege ferenda*, the criminal conduct "viewing" should therefore also be included in the statutory definition of child pornography. Finally, I have reviewed the sanction system in Polish criminal law and have found no similar criminal measure as the Hungarian one rendering electronic data permanently inaccessible. I think that Hungarian legislation could serve as a good example for Polish criminal law in this context.

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Cyberactivity of Terrorist Organizations

1. Introduction

In view of the growing threats posed by the large increase in cybercrime and the interest of criminals in using electronic tools and cyberspace, law enforcement agencies, but also lawmakers, face many challenges. The increasing polarization of social and political life in many areas of the world may cause an increase in the interest of some susceptible individuals in the activities of fundamentalist groups. The risk is particularly high when the activity of terrorist organizations appears on the horizon, and among researchers of issues related to terrorism there is no doubt that modern groups are very comfortable in the world of new technologies and eagerly take advantage of technological advances.

Several main goals can be seen in this work. One of them is to identify the characteristics and main assumptions associated with the forms of activity in the cyberspace of terrorist organizations. In this regard, I will attempt to answer research questions related to contemporary terrorist threats, introducing the reader to the basic concepts under consideration. First of all, it is a matter of determining what specific threats come from the use of new technologies by terrorist organizations and what areas of activity they may be interested in.

In the following section, consideration will be given to the concepts of cyberterrorism, what characterizes it, and whether it is possible to speak of significant differences between cyberterrorism

and terrorist cyberactivity. In particular, an attempt will be made to determine whether terrorist organizations use new technologies and cyberspace exclusively to carry out attacks, or whether they pursue other goals and areas of their own activity in this way. The issue of propaganda used by terrorist groups also needs special discussion to find out what goals they want to achieve in this way, as well as with what tools.

2. General characteristics of the problem

One may wonder whether considering terrorism in any form, makes sense from the point of view of the goals of the Polish-Hungarian Research Platform 2023. After all, in both Poland and Hungary, the threat of terrorism remains at an all-time low, as justified by reports from the Institute for Economics & Peace, which conducts The Global Terrorism Index (GTI) that is a comprehensive study analyzing the impact of terrorism for 163 countries covering 99.7 percent of the world's population. The GTI produces a composite score so as to provide an ordinal ranking of countries on the impact of terrorism. The GTI scores each country on a scale from 0 to 10; where 0 represents no impact from terrorism and 10 represents the highest measurable impact of terrorism. According to the 2023 report, both Poland and Hungary are classified as countries with no terrorist incidents recorded.[1]

The aforementioned report shows that the problem is primarily serious on the African continent, as well as in the Middle East, while in Europe the higher risk is recorded in Germany and France.[2] In the absence of a real threat, is there any point in discussing terrorism from the point of view of Polish and Hungarian researchers? It seems that at least several arguments can be found to shape an affirmative answer to this question. First of all, security is a state that changes over time as a result of various political, social and

[1] Institute for Economics & Peace, *Global Terrorism Index 2023*, IEP, Sydney 2023, p. 9.

[2] Ibid, pp. 8–9.

economic events, so it is impossible to predict how long the current state will remain. In addition, the absence of terrorist events does not mean that the special services do not have to deal with situations where terrorists try to use any European territory for any purpose, but some threats are levelled before they erupt, and this is due to the preparation for such threats.

Finally, it cannot be overlooked that there is an armed conflict going on across the eastern border of the European Union involving mercenary groups that use terrorist methods and are suspected of committing many war crimes, being supported by the Russian government, whose interests can hardly be considered to coincide with European ones. The last important argument is that terrorists are increasingly turning to new technologies and their activity in the area of cybercrimes, which can be tools for fundamentalist organizations to achieve their goals. Since these are cross-border crimes, it will be necessary for the services to participate in international cooperation, even if we are not directly affected by the problem.

Let's begin by clarifying the key points about terrorism. It is not the purpose here to deliberate on definitions, so let's assume for the purposes of this work that we will consider terrorism to be the calculating use of unlawful force or violence, primarily against civilians, seeking to instill fear, aimed at forcing a society or government to act in accordance with the ideological, political or religious goals of the aggressor.[3] As can be seen, there are three interrelated factors such as the identity of the perpetrator, the methods used and the motivation that distinguish terrorism from what we call everyday crime.[4]

The fact that terrorist attacks are often planned and carried out by groups and organizations poses an important challenge to understanding both terrorism and counterterrorism. On top of this, let's note that attacks by terrorist organizations are extremely diverse with respect to many dimensions, such as lethality, tactics, targeting

[3] See: Federal Bureau of Investigation, *Terrorism in the United States 1999: 30 Years of Terrorism – A Special Retroperspective edition*, U.S. Department of Justice, Washington 1999; U.S. Department of Defense, *Joint Publication 1-02: Department of Defense Dictionary of Military and Associated Terms*, 8 November 2010.

[4] B.F. Kingshott, *Terrorism: Definitional Problems*, [in:] J.R. Greene (ed.), *The Encyclopedia of Police Science*, Routledge, New York 2007, p. 1260.

practices, ideology and organizational evolution. Existing research reveals complex relationships among terrorist organizations that analysts must take into account to fully understand patterns of terrorist activity.[5]

Acts of a terrorist nature are specific crimes, due to the factors discussed above, so they pose a very high threat to public safety. The chapter deals with the cyberactivity of terrorist organizations, so let's narrow the consideration to the issue of new technologies in an attempt to explore the problem of new threats that may arise. Contrary to emerging stereotypical patterns, terrorist organizations cannot be associated with groups of indigent, poorly educated members, with a simple ideology behind them. These are groups with an elaborate structure, a multi-resource, and an often complex financing system, which among their members have outstanding specialists who understand new technologies and all the potentials inherent in them.

The cited report by the Institute for Economics & Peace notes that particular threats come from terrorists' use of drones and artificial intelligence.[6] Unmanned aerial vehicles have become ubiquitous, appearing both in the civilian market as a recreational tool that allows photographing vast areas, but also in the military market, where drones perform many more functions. Meanwhile, the ongoing war on Ukrainian territory shows that also the vessels available to civilians have modification capabilities that make them lethal machines.

UAS (Unmanned Aircraft Systems) clearly contribute to the growth and development of societies in many ways, but they also open up a world of new opportunities for terrorist targets. These devices offer users an ever-increasing level of accuracy and reliability, as well as easy integration of custom features. In the current global security environment, the risk of terrorist groups acquiring, developing expertise and effectively using UAS appears to be facilitated by a number of concurrent factors, including:

[5] E. Miller, *Terrorist Organizations*, [in:] G. Bruinsma, D. Weisburd (eds.), *Encyclopedia of Criminology and Criminal Justice*, Springer, New York 2014, p. 5155.

[6] Institute for Economics & Peace, *op. cit.*, pp. 72–74.

- the unregulated and increasingly sophisticated civilian market for UAS technology;
- the wide availability of unregulated, uncontrolled and unsecured explosives that can be used as UAS payloads;
- access to explosive precursors (ammonium nitrate, peroxide, etc.);
- the availability of technical knowledge from terrorists or affiliated persons, as well as the transfer of this knowledge and experience.[7]

On the other hand, there are legitimate concerns about the use of artificial intelligence, which enables rapid action with micro precision, but on a macro scale, and thus allows for the streamlining of cyberattacks and digital disinformation campaigns. Notable risks are posed by tools such as ChatGPT, which can be used in the areas of disinformation, cybercrime and terrorism. Such tools enable low-skilled hackers to transform basic phishing schemes into professional attacks. In addition, it is possible to write malware capable of mutating to evade detection, and it can help terrorists industrialize the creation and personalization of malicious websites and scams based on social engineering. Here, the use of artificial intelligence by terrorists to recruit, spread hatred and support insurgency could be a particular threat, as case studies show that new technologies can have long-term social consequences.[8]

It appears that the risks associated with terrorist cyberactivity may be much broader than the use of UAS and AI. Threat issues related to new technologies in the area of finance should also be taken into account. Research has already been conducted on the links between terrorist organizations and the use of cryptocurrencies, but it may be questionable whether cryptocurrencies are actually attractive to terrorists. Some researchers note that there are a number of factors that make cryptocurrencies unattractive to terrorist activities. They are primarily related to the risks faced by all users of cryptocurrencies,

[7] United Nations Office of Counter-Terrorism, *Protecting Vulnerable Targets from Terrorist Attacks Involving Unmanned Aircraft Systems (UAS). Good Practices Guide*, United Nations, New York 2022, p. 2.

[8] Institute for Economics & Peace, *op. cit.*, p. 74.

namely: unpredictable and sudden fluctuations in cryptocurrencies, holding them in wallets vulnerable to crackers, or the growing interest of the secret services and their increasingly better training.[9] Other studies show that the use of cryptocurrencies by terrorists has so far been episodic and relatively irregular, as they are used by other groups with better technical backgrounds. The authors note, however, that even if the use of cryptocurrencies for terrorist purposes has not reached the status of a phenomenon or has become more of a systemic threat, the potential proliferation of the scale of such activities cannot be ignored.[10]

There may be many more potential threats related to the use of new technologies by terrorist organizations, although contemporary reports by international organizations mainly point to the problems described above. In the following part of the Chapter we will analyze other threats related to the activity of terrorist organizations in cyberspace, but for the sake of order of the considerations carried out, let us focus on issues related to the goals of terrorist organizations. Understanding this issue will help identify other important areas of terrorist cyberactivity.

3. Cyberterrorism and terrorist cyberactivity

Terrorist activity in cyberspace is nothing new, after all, the term "cyberterrorism" was used almost two decades ago. Most notably, Dorothy Denning, a professor of computer science, has put forward an admirably unambiguous definition in numerous articles and in her testimony on the subject before the House Armed Services Committee in May 2000.

Cyberterrorism is the convergence of cyberspace and terrorism. It refers to unlawful attacks and threats of attacks against computers,

[9] A. Brill, L. Keene, *Cryptocurrencies: The Next Generation of Terrorist Financing?*, "Defence Against Terrorism Review" 2014, Vol. 6, No. 1, p. 15.

[10] Z. Goldman, E. Maruyama, E. Rosenberg, E. Saravalle, J. Solomon-Strauss, *Terrorist Use of Virtual Currencies. Containing the Potential Threat*, Center for a New American Security, Washington 2017, p. 39.

networks and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objectives. Further, to qualify as cyberterrorism, an attack should result in violence against persons or property, or at least cause enough harm to generate fear. Attacks that lead to death or bodily injury, explosions, or severe economic loss would be examples. Serious attacks against critical infrastructures could be acts of cyberterrorism, depending on their impact. Attacks that disrupt nonessential services or that are mainly a costly nuisance would not be considered such attacks.[11]

Over two decades, technological advances have resulted in the emergence of completely different tools using electronic solutions, especially in the Internet space. It seems that the cited definition, as it refers primarily to attacks committed using cyberspace, does not fully take into account the cyberactivity of terrorists, who may use new technologies for completely different purposes. A number of scientific or legal definitions have emerged over the years.

Many countries have adopted their own legal definitions. This alone can be problematic given the global nature of acts of cyberterrorism, but the general gist of these definitions is the same. Cyberterrorism refers to illegal behaviour involving computer or Internet technology that:

i. is motivated by an ideological, political or religious cause;
ii. aims to intimidate the government or a section of the public to varying degrees;
iii. seriously interferes with the broader infrastructure.[12]

This means that the scope of cyberterrorism is characterized by an element of attack, although not necessarily associated along the lines of conventional terrorist attacks. In turn, the cyberactivity of terrorists will include other activities related to the realization of the goals of terrorist organizations, but these will not necessarily

[11] G. Weimann, *Special Report 119*, United States Institute of Peace, Washington 2004, p. 4.

[12] K. Hardy, G. Williams, *What is 'Cyberterrorism'? Computer and Internet Technology in Legal Definitions of Terrorism*, [in:] T.M. Chen, L. Jarvis, S. Macdonald (eds.), *Cyberterrorism: Understanding, Assessment, and Response*, Springer, New York 2014, pp. 20–21.

be activities aimed at causing direct harm in the form of an attack with the collateral goal of widespread intimidation.

Let's consider the issue of the use of cyberspace by terrorist organizations, what forms it takes, as well as what goals accompany these activities. Certainly, there are many reasons why modern terrorist organizations actively use the Internet environment. These include the following reasons, among others:

- easy accessibility: anyone can have an Internet access from anywhere, either on a land-line or on radio or satellite connection or through WLAN net-works. This way, for instance one can get access to the Internet even from the desert;
- the rules are minimal, there is no censorship: this is well perceptible from de-bates going on nowadays about how the Internet could be regulated, thus pre-venting the spread of the objectionable web sites;
- the target audience is potentially huge: access to the given content is unrestricted, the number of those getting access is affected only by the capacity of the server or the bandwidth;
- anonymity of communication: due to the problem of detectability, it is not known who is communicating with whom at the given time;
- information flow is very fast: as soon as a web page is prepared, it is put on the Internet and from that moment on it is accessible to anyone;
- its formation is very cheap, it does not require big costs: its infrastructural background has to be provided only once, which, from that moment on, can be used freely;
- its multimedia environment: in which possibilities are given (audio, video, image, text) by which deterrence, propaganda, etc. can be made to a significant extent;
- traditional mass media regards the Internet as its source more and more: they often refer to the various Internet news portals.[13]

[13] Z. Haig, L. Kovacs, *New Way of Terrorism: Internet and Cyber-terrorism*, "Arms Security" 2007, Vol. 6, No. 4, pp. 659–671.

The Internet can be used by terrorists for at least several purposes such as:

- communication;
- promoting actions and goals;
- terrorists talk on Internet;
- radicalizing new members;
- financing;
- planning attacks;
- training members;
- execution.[14]

According to the author of the study, one of the methods of communication used by terrorist organizations is to communicate through encrypted messages on various online forums, where terrorist organizations in the form of encrypted text leave a message to their members. The encrypted message can be read in public. In order to understand the meaning of the message, members of the terrorist organization must have a "book" of codes to decrypt the messages. The activities of terrorist organizations are sometimes heavily promoted, drawing attention to: ideas, goals and actions they can take. Their main target is the public, not the victims. Many websites or social network profiles associated with some terrorist organizations publish speeches by terrorist leaders or other members of their organization's higher structures. These speeches most often represent rhetoric that positively justifies the use of force to achieve various ultimate goals (e.g., religious, political, ideological or ethnic prejudices).[15] These claims are supported by other studies, as it was noted more than a decade ago – when the focus was more on conventional threats of terrorist attacks – that terrorists use cyberspace to organize, communicate and influence those vulnerable to radicalization.[16]

[14] See: V. Rusumanov, *The Use of the Internet by Terrorist Organizations*, "Information & Security: An International Journal" 2016, Vol. 34, No. 2, pp. 139–148.
[15] Ibid, pp. 139–141.
[16] HM Government, *A Strong Britain in an Age of Uncertainty: The National Security Strategy*, HM Government, London 2010, p. 30.

To the mentioned fields of activity can certainly also be added the issue of recruiting members. The reach of the Internet provides terrorist organizations and sympathizers with a global pool of potential recruits. Limited-access cyberforums provide a place for recruits to learn about and support terrorist organizations[17]. The use of technological barriers to entry on recruitment platforms also increases the complexity of tracking terrorism-related activity by intelligence and law enforcement personnel. The Internet can be a particularly effective medium for recruiting minors, who make up a high percentage of users. Propaganda disseminated via the Internet to recruit minors can take the form of cartoons, popular music videos or computer games. Tactics used by websites run by terrorist organizations or their affiliates to reach minors have included mixing cartoons and children's cartoons with messages promoting and glorifying acts of terrorism, such as suicide attacks. Similarly, some terrorist organizations have designed online video games to be used as recruitment and training tools.[18]

It is worth adding that such recruitment tools use a variety of mechanisms that affect the psyche of those who can potentially be recruited. The widespread sense of humiliation and insecurity is essentially based on a whole range of highly disparate, specific local conditions. As in the past, this gives fringe groups the opportunity to justify resorting to terrorism.

All such diverse and significant waves of political radicalization that have led to terrorist actions share several structural features. First, they all unfold in a favourable environment that is generally characterized by a widespread sense of injustice, real or perceived, among the population segments or entire societies concerned. The sense of injustice, exclusion and humiliation has always been a powerful force in politics and a major driver of change. Nothing creates such fertile ground for political radicalization as a sense of belonging

[17] See: D. Denning, *Terror's Web: How the Internet is Transforming Terrorism*, [in:] Y. Jewkes, M. Yar (eds.), *Handbook of Internet Crime*, Willan Publishing, Cullompton 2010, pp. 194–213.

[18] United Nations Office on Drugs and Crime, *The Use of the Internet for Terrorist Purposes*, United Nations, New York 2012, p. 5.

to the camp of those who have fallen behind in human progress, but at the same time sustaining strong and aspirational symbols of empowerment. When people feel resentment or injustice, they are more prone to radicalization. A typical feature of such an environment conducive to radicalization processes is a deep-rooted mutual distrust, which offers a favourable framework for portraying the opponent in terms of "us versus them". The second common feature of all forms of radicalization leading to violence is that it always takes place at the intersection of a favourable environment and personal trajectory. Not all individuals who share the same sense of injustice or live in the same polarized environment choose to become radicalized, much less to use violence or terrorism. Specific personal experiences, kinship and social relationships, group dynamics and learning to use violence are needed to trigger the actual process. It should be emphasized that violent radicals or terrorists are not people with mental disorders, as psychiatric and psychological studies have clearly shown. In other words, those who engage in terrorist activities do not stand out psychologically.[19]

From the examples analyzed, it appears that the cyberactivity of terrorist organizations is geared towards internal and external communication, promoting their own activities, radicalizing members, and recruiting new members. It seems that it will not be an abuse if we consider all of these activities in general under the category of propaganda used by terrorist groups. And propaganda, especially in view of the previously defined risks associated with the use of artificial intelligence by terrorists, can be particularly dangerous in terms of spreading disinformation, which is one of the greatest threats to public security. For these reasons, the following discussion will focus on the problem of propaganda used by terrorist organizations.

[19] Expert Group on Violent Radicalisation, *Radicalisation Processes Leading to Acts of Terrorism*, A concise Report submitted to the European Commission on 15 May 2008, p. 9.

4. Propaganda as a particular form of terrorist cyberactivity

Terrorist organizations move efficiently in cyberspace to disseminate propaganda materials, the purpose of which is to inform the largest possible audience about the actions of the groups, to cause widespread fear and chaos, but also to interest susceptible individuals in the ideas that are the background for criminal activity. Let's take a broader look at the last-mentioned issue because of its cognitive significance.

In part, we have mentioned the factors that lead to an increase in interest in the activities of fundamental groups in some units. In addition to this, other issues can be mentioned. Predisposing factors for involvement in terrorism also include: the presence of emotional vulnerability, alienation or disenfranchisement; dissatisfaction with the current life situation and the belief that conventional political activity is useless for improving it. Added to this may be a belief that engaging in violence against the state is not inherently immoral, and promoting a sense of closeness to those experiencing similar problems. A factor of particular importance is that recruits expect to feel a sense of reward for engaging in terrorism. This reward may come in the form of increased status, respect or authority within the individual's immediate peer group, the broader racial movement or wider religious community, or a personal spiritual or emotional reward. For example, suicide bombers typically believe they will be rewarded in the afterlife.[20]

The Internet is a platform that allows the rapid and massive flow of information, so finding potential members does not pose many problems for terrorist organizations, although it is also worth noting that the ways of conducting propaganda and recruitment activities are far from primitive.

The Internet has revolutionized terrorism in many ways. For example, activities that were once conducted face-to-face, such as

[20] J. Horgan, *From Profiles to Pathways and Roots to Routes: Perspectives from Psychology on Radicalization into Terrorism*, "The Annals of the American Academy of Political and Social Science" 2008, Vol. 618, pp. 84–85.

fundraising or training, are now conducted through websites and virtual training camps. Geospatial imagery, such as Google Earth, can be used to research locations and plan potential attacks. Hacking and cyberattacks offer the possibility of causing massive damage to a country's infrastructure from a computer located halfway around the world. Similarly, the Internet has become a dangerous tool for propaganda and terrorist recruitment.[21]

The problem under discussion is worth analyzing using the example of Islamic terrorist organizations. However, it is worth emphasizing that in no way can terrorism be identified exclusively with Islamic radicalism, since similar patterns of activity can be found in the activity of terrorist groups with completely different goals of activity. Organisations that invoke the falsely conceived idea of jihad in their activities have specialised in advanced propaganda-recruitment methods used in cyberspace.

The scale and effectiveness of the operations even led to the creation of such terms as "cyberjihad", "electronic jihad" or "e-jihad", which, without getting into semantic issues, suggest conducting operations in cyberspace. The idea of such a form of conducting terrorist activities was linked to the so-called Islamic State (Daesh, IS) and the problems of carrying out armed conventional operations by this terrorist group after the collapse of the self-proclaimed caliphate in the territories of Syria and Iraq operating in 2014–2019.

Daesh has vowed to continue its armed jihad, even against other Muslims – going openly against religious norms in Islam – through four mechanisms:

i. Globalization of jihad.
ii. The use of "breeding grounds" for extremism, such as geopolitical conflicts – particularly those in which Muslim populations or minorities may be repressed – as an instrument for creating sympathy for their cause, creating polarization, and demonizing the "enemy".
iii. An emphasis on promoting a "virtual caliphate" and "electronic jihad".

[21] A.V. Lieberman, *Terrorism, the Internet, and Propaganda: A Deadly Combination*, "Journal of National Security Law & Policy" 2017, Vol. 9, No. 95, p. 101.

iv. A particular emphasis on extending previous successful efforts at ideological reinforcement through hatred and the mobilization of minors under the age of 18 – previously recruited mainly from Syria's major cities and called Akhbal Al Khilfa (caliphate youths), as well as liberating dormant cells and individuals acting on their own.[22]

According to Europol's 2021 data, Daesh propaganda continued to highlight the military achievements of local insurgencies that copied its brand in an attempt to show its global reach. IS-supporting media continued to dominate the production and distribution of pro-IS propaganda. Their publications – which included original creations, altered content and translations – eclipsed the number of official IS's publications. It's also worth noting that IS's online supporters continued to test new, decentralized "open source technologies" to disseminate their propaganda messages. IS-supporting media continued to threaten declared enemies, including EU countries, and praised previous attacks carried out by IS or inspired by IS in their productions. The new content relied on quotes from influential but deceased figures to rally supporters. In addition, it stressed the importance of releasing prisoners and praised the efforts of its supporters in a "media jihad". The group also continued to attack critical infrastructure and energy targets around the world as part of its "economic warfare" strategy.[23]

A particularly dangerous form of digital propaganda by terrorist organizations is encountered in the use of computer games. Extremists using video games is not a new practice; groups such as Hezbollah were creating video games as early as 2003 for recruitment purposes. There are various challenges in dealing with extremist narratives and strategies emerging in these video games and video game platforms. Extremists exhibit agile behaviour on game-related platforms, often moving between different platforms to avoid

[22] B. Laytouss, *New Terrorism and the Use of Electronic Jihad,* Brussels International Center, Brussels 2021, pp. 3–4.

[23] European Union Agency for Law Enforcement Cooperation, *Online Jihadist Propaganda 2021 in Review*, Publications Office of the European Union, Luxembourg 2022, p. 6.

detection, and are adept at speaking in a codified manner. They are often able to leverage the basic integral features of these game environments (such as in-game chat) to develop their narratives into sometimes mainstream communications. The elements that make game environments appealing to audiences make it difficult to monitor extremist behaviour. There is often a high degree of anonymity in game chat rooms and game-related communication platforms. Small platforms can therefore face difficulties in moderating content.[24]

The research shows that there are three main ways in which terrorist organizations operate in relation to computer games:

- the production of bespoke games;
- modding (modifying) mainstream games;
- in-game chat: grooming.

The main problem is game modification and the use of in-game chat. Many games allow users to create their own modifications. This positive form of creativity can be exploited by extremists. Examples include versions of Grand Theft Auto and Call of Duty modified by Daesh supporters. This tactic puts powerful game engines at the disposal of extremists. Extremist mods attract press attention and give the illusion of credibility and technical competence to those unfamiliar with the ease of mod development. In-game chat features, both text and chat, provide a possible avenue for extremists to "groom" vulnerable users. Recruiters can target people on open platforms and begin to build relationships before inviting these people into more closed environments. The nature and functionality of these chat features vary widely from platform to platform. Examples of first contact by extremists via in-game chat are rare, but not unknown to practitioners.[25]

It is worth adding that gamification is a powerful motivational tool, and extremism is no exception. It is the use of design elements of existing games in a non-gaming context, aimed at changing behaviour. Gamification can involve "top-down" efforts to rank

[24] Radicalisation Awareness Network, *Extremists' Use of Video Gaming – Strategies and Narratives*, Conclusions Paper, RAN 2020, p. 2.
[25] Ibid, p. 3.

extremist users (through "radicalization metrics", providing incentives to reach a level by completing tasks and gaining access to secret groups) or "bottom-up" efforts by supporters praising attackers with "high scores". Gamification has the potential to increase engagement and identification with extremist content. In general, terrorist organizations use computer games for recruitment purposes, but also to spread their own ideology and increase the number of supporters. This is particularly dangerous because through computer games it is possible to target young people, who are far more susceptible to manipulation. (The reader can read a more in-depth analysis supported by examples in a separate publication.)[26]

In conclusion, it is worth mentioning that it has been suggested that extremists and terrorists, who are often pioneers in the digital space, have new opportunities through games and related platforms. These individuals have innovated faster than we could react, and have increased their digital advantage as a result. There are concerns that video games and related platforms can be used to spread digital propaganda and for radicalization and recruitment. However, the relationship between radicalization, recruitment and games is often complicated, and there is ongoing debate as to what the main intention of extremists is. At stake may be strengthening beliefs, building and empowering communities, and developing more robust online ecosystems.[27]

However, it should be mentioned that there is a distinct lack of particularly empirical research and literature in this area, which makes it necessary to intensify the academic world's interest in these issues. The game has high stakes, since the mechanisms used in cyberspace by terrorist organizations can not only be imitated by criminal groups with other business objectives, but the scale of such activities can also be strengthened through the use of artificial intelligence, which is already in the hands of criminals.

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[26] See: A. Al-Rawi, *Video Games, Terrorism, and ISIS's Jihad 3.0*, "Terrorism and Political Violence" 2016, Vol. 30, No. 4, pp. 1–21.

[27] S. Lakhani, *Video Gaming and (Violent) Extremism: An Exploration of the Current Landscape, Trends, and Threats*, Publications Office of the European Union, Luxembourg 2021, p. 3.

5. Conclusions

Many terrorist threats are transnational, which is the basis for the requirement for cooperation – including the exchange of relevant information – at the national, but also sub-regional, regional and international levels.

We mentioned that currently the main threats are seen on the grounds of terrorist groups' use of UAS and artificial intelligence. While the use of drones can hardly be categorised as a cyberactivity of terrorist groups, it is worth noting that it is a major threat of conventional attacks, while at the same time these devices are very much using modern technological solutions, artificial intelligence, as well as wireless network solutions. Cooperation between state actors and a wide range of non-state actors (including private sector industry and commercial actors, civil society, including academia and NGOs) is essential to ensure that the design and development of laws and regulations is fit for purpose. Thus, it appears that issues of UAS use require further regulation. Regulations should address the issues of identifying the supply chains used to acquire, procure and develop small UAS and components for them. The current guidelines also indicate that evidentiary issues related to drone use need to be addressed in the law, as there will be more criminal prosecutions with drone evidence or it's remains in the future.[28]

As is evident from the considerations carried out, the issue of the cyberactivity of terrorist organizations seems to be particularly relevant, but as such it cannot be equated with cyberterrorism. The point here is that terrorist organizations use electronic space on a much broader scale than one might think, and carrying out attacks is often not an end in itself. Cyberspace gives terrorist organizations many opportunities to spread information about their own activities, so first and foremost it can be said that it is all in the service of digital propaganda. It is very effective because of its low-cost and effective

[28] See: United Nations Office of Counter-Terrorism, *Preventing Terrorists from Acquiring Weapons: Technical guidelines to facilitate the implementation of Security Council resolution 2370 (2017) and related international standards and good practices on preventing terrorists from acquiring weapons.*

international reach to target audiences. What's more, studies have shown that one of the main goals of terrorist propaganda is geared towards recruiting new members, and among the tools used for this are primarily computer games, their modifications, as well as chat rooms inside gaming services. This means that young people with an unformed worldview, particularly susceptible to the highfalutin slogans used in social engineering mechanisms, may be particularly vulnerable to radical content.

The question remains as to how these issues can be combatted or addressed by lawmakers. It is difficult to expect here a mass discouragement of computer games, as well as the banning of their use by minors, since such mechanisms are simply ineffective and very easily circumvented. Combatting content promoted by terrorist groups, on the other hand, is a completely different matter, as these require moderation in public spaces, and the responsibility should lie with online content providers, which is in line with European regulatory aspirations, which are discussed in another text, which was written as part of the Polish-Hungarian Research Platform 2023. However, it seems that extensive legal regulations will be of no use if soft ways of shaping human behaviour are not symmetrically applied, which should be based primarily on public education about threats.

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