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The Concept and Legal Nature of EU Values

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Abstract: Values are a fairly common concept that is used extensively at the everyday level and is the subject of study in many sciences, including philosophy, sociology, psychology, cultural studies, religious studies, economic theory, political science, etc. Following the substantiation of values as a separate philosophical category, a branch of philosophy that deals with the study of values – axiology – was formed. Values began to move into the field of law and were used mainly as categories of philosophy of law or axiology of law and only partially became the subject of study of constitutional law and legal theory, as their nature as legal categories remained questionable for a long time. The enshrining of the values on which the European Union (EU) is based in Article 2 of the TEU, together with the introduction of a special liability mechanism for the breach of values in Article 7 of the TEU, as well as the validation by the Court of Justice of the EU of the mechanism outlined in Articles 258–260 of TFEU in case of breach of EU values, has put on the agenda the issue of a paradigm shift in the legal nature of values. Have EU values become a part of law or a legal category? Have they become part of the EU legal order? The confirmation of the legal nature of values and their properties as a separate legal category of the EU's legal system would have far-reaching consequences in the future shaping of the interpretation, application, and development of EU law, national legal systems of Member States and of third counties that cooperate with the EU. The absence of such a transformation and property of values would significantly reduce the potential for influence

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and significance of the core values of the EU. The article defines which values are the core values of the EU. The author draws a conceptual distinction from related legal concepts and categories, primarily principles and norms. The author formulates law's main characteristics or attributes from the perspective of both Legal positivism and natural law doctrine, namely: normativity, binding nature, formal certainty, systematicity and coerciveness or liability, compliance with the ideals of freedom, justice, and fundamental human rights. It also analyzes the compliance of values with these attributes or key characteristics. The analysis confirms that the core EU values enshrined in Article 2 of the TEU meet these criteria, and the author concludes that values are a new category of law that has emerged within the EU legal order. The author uses mainly doctrinal legal and inter-disciplinary legal research methods to characterize the basic concepts of law and the concept of values, as well as to identify and formulate their main attributes. The comparative method is used to compare values with related legal categories, in particular principles and norms, to determine their common and distinctive features. Deduction techniques were used to identify the main characteristics of law from the perspective of Legal positivism and natural law doctrine and assess the compliance of the EU's core values with these features.

1. The Concept and Properties of Values

The Oxford Dictionary defines value as "the property of being useful or important."[1] Similarly to many other languages (English "value," German "Wert," French "Valeur," Spanish "costo," Polish "wartość"), the term "value" is linked to the cost[2] or the significance of something. That is, in general language use, the emphasis is on the significance, importance, or usefulness of something, i.e. on certain properties.

1 Oxford Learner's Dictionaries, *Value*, accessed June 7, 2024, https://www.oxfordlearnersdictionaries.com/definition/american_english/value_1.

2 The reference to value is often associated with the borrowing of this term by philosophy from political economy, where value was understood as a purely economic value, which denotes the ability of a product to be useful for a person, satisfying a certain need. For more details, see: Iryna Streletska, "Value as a Subject of Socio-Philosophical Analysis (Methodological and Linguistic-Semantic Aspects)" (PhD diss., Donetsk National University, 2008), 101–4.

Values can be objects of the material or spiritual environment, but also phenomena, objects, and their properties, as well as ideas that embody social ideals.[3] The key property of such objects or items is their capacity to be needed, necessary, significant, and important, and the ability to satisfy the needs and interests of a person, society, or humanity. Another property of values is that they serve as a basis not only for evaluation but also for making choices and decisions. G. Giordan characterizes them quite well as "beliefs and ideals that form the basis for choices and preferences, both individual and collective [...] and are defined as what is 'good' and what is desirable and capable of making a person happy."[4] Similarly, Thesing describes them as "standards that determine the direction, goals, intensity, and choice of human behaviour."[5]

Professor Calliess describes them as the basic attitudes of a society or individuals, characterized by a particular strength of conviction about their correctness.[6] Values can be compared to a system of coordinates[7] or a compass used by people as human beings in an organized society,[8] or operating

3 Krystyna Zhebrovska, *Universalism and Relativism of Legal Values in the Dialogue of Legal Systems: A Monograph* (Odesa: Phoenix, 2018), 10.

4 Quoted in: Dario Čepo, "European Values in Croatia and the European Union: The State Of Affairs," in *European Values and the Challenges of EU Membership Croatia in Comparative Perspective* (Zagreb: Centar za demokraciju I pravo Miko Tripalo, 2020), 24, accessed June 7, 2024, https://tripalo.hr/wp-content/uploads/2020/10/European-Values-and-the-Challenges-of-EU-Membership-1-70.pdf; Giuseppe Giordan, "Values," in *The Blackwell Encyclopedia of Sociology*, ed. George Ritzer (Blackwell, 2007), 5176.

5 Josef Thesing, *Die Europäische Union als Wertegemeinschaft*, 10, accessed June 10, 2024, https://www.kas.de/c/document_library/get_file?uuid=22e5a011-3e72-fa6e-5d74-77b0-e8f79e61&groupId=252038. It should also be noted that although he mentions their ethical nature, he insists that values are far from being moral precepts, as society has to live by them, to take them as a guide. As an example, he cites democracy, which cannot be forced by the state, but the majority of society should feel the need to live in accordance with the democratic consensus. See p.10.

6 Christian Calliess and Matthias Ruffert, *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta* (C.H. Beck, 2011), 33.

7 Yuliya Lypovets, "Legal Values as Ideals and Compromises" (PhD diss., National Academy of Internal Affairs 2021), 74

8 Roberta Astolfi, "Value in Law: Concept and Application within the Legal System of the EU," in *Being a Citizen in Europe: Insights and Lessons from the Open Conference*, eds. Sandra Seubert and Frans van Waarden (Zagreb: 2015), 171, accessed June 20, 2024, https://www.uu.nl/sites/default/files/being-a-citizen-in-europe-insights-and-lessons-from-the-open-conference-zagreb-2015.pdf.

system settings that determine the operation of the entire system, regardless of the programs that are installed. Values guide people according to their needs, interests, and inclinations. Thus, in a broad sense, the term "value" is used to refer to phenomena and objects, their features, as well as abstract ideas or ideals that have a positive meaning for people and society and satisfy their needs or interests.

Despite the wide range of terminology in the philosophy of law and legal theory, values are generally understood as a legally recognized imperative that a legal entity is guided by when making decisions.[9]

The core values of the EU are a particularly interesting category of values. They provide the basis for this international organization, which today represents not only an economic or political union, but also a community of values. The core values of the EU are those enshrined in Article 2 of the Treaty on European Union: human dignity, freedom, democracy, equality, the rule of law and respect for human rights, in particular those of persons belonging to minorities.[10] According to Article 3, the EU undertakes to uphold the values, to ensure their observance not only by the EU and its Member States, but also to promote them in the international arena (Article 32), especially with neighboring countries (Article 8) and candidate countries (Article 49).

By values in the sense of Article 2 of the EU Treaty, Hilf and Schorkopf understand "recognized rules that guide legal actors in their decision-making,"[11] guiding principles that are predefined and recognized by the legal system and serve as a guide for interpretation, a standard for legal

9 Josephine Seidl, "Beitrittsverfahren und Sanktionen als Sicherungsmechanismen für die Werte der Europäischen Union" (PhD diss., University of Erfurt, 2017), 15.

10 It should be noted that in the 2018 Eurobarometer survey, no conceptual distinction was made, and the following answers were given to the question "Which values best represent the EU" by 39% of EU citizens 33% "human rights," 32% "democracy," 22% "rule of law," 18% "solidarity," and respect for human life, personal freedom, respect for other cultures, equality and tolerance between 12% and 16% of respondents said that they best represent the EU. The second part of Article 2 of the TEU partially mentions some elements of the values mentioned in the first part of the article, as well as principles of a more social nature – tolerance, equality, solidarity.

11 Meinhard Hilf and Frank Schorkopf, "Art. 2 EUV [Grundlegende Werte]," in *Das Recht der Europäischen Union: EUV/AEUV: Loseblattausgabe. Kommentar*, 72nd ed., eds. Eberhard Grabitz, Meinhard Hilf, and Martin Nettesheim (C.H. Beck, 2021), para. 19.

evaluation, and "form a legitimating meaning."[12] In other words, they can be called the core of the EU's legal order, or maxims that cannot be changed either by the EU or its Member States.[13]

In its opinion, the CJEU included EU values in the constitutional basis of EU law: " [...] the EU has a unique constitutional basis. This foundation encompasses the fundamental values set out in Article 2 of the TEU."[14]

Democracy, the rule of law, freedom, and fundamental rights have become the structural features of the EU,[15] or "structural specifications and requirements for optimisation within the European Union of states and constitutions."[16] They are sometimes referred to as the constitutional and legal framework of the EU.[17] According to Professor Monica Claes of Maastricht University, Article 2 confirms "the expression of the European Union's self-perception, a description of its identity."[18]

The preamble to the Charter of Fundamental Rights points to the main features of the EU's core values – the common character of values, their universality, and indivisibility:

> The peoples of Europe, forging an ever closer alliance, are determined to live together in a peaceful future based on shared values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible universal values of

12 Christian Calliess, "Europa als Wertegemeinschaft: Integration und Identität durch europäisches Verfassungsrecht?," *JuristenZeitung*, no. 21 (2004): 1034.

13 Michal Tomášek and Václav Šmejkal, *Commentary on the Treaty on the Functioning of the EU, the EU Treaty and the Charter of Fundamental Rights of the EU* (Praha: Wolters Kluwer Czech Republic, 2024), 1255.

14 Opinion of Advocate General BOT, Opinion 1/17 of the Court delivered on 30 September 2019, ECLI:EU:C:2019:72, para. 110.

15 Markus Frischhut, *The Ethical Spirit of EU Values. Status Quo of the Union of Values and Future Direction of Travel* (Springer Cham, 2022), 13, https://doi.org/10.1007/978-3-031-12714-4.

16 Karoline Dolgowski and Dennis Traudt, "Das sind die Werte der EU! – Replik an Lucia Puttrich," Jean Monnet Ssaar, accessed November 28, 2023, https://jean-monnet-saar.eu/?page_id=141058.

17 Opinion 1/17 of the Court of Justice (full Court) of 30 April 2019 (CETA), ECLI:EU:C:2019:341, para. 110.

18 Monica Claes, "How Common are the Values of the European Union?," *Croatian Yearbook of European Law & Policy* 15, (2019): VIII.

> human dignity, freedom, equality, and solidarity. It is based on the principles of democracy and the rule of law [...].[19]

The indivisibility of values means that they cannot be interpreted in different ways, or diminished or levelled down, for example, because of cultural diversity.[20] The universality of values has also been repeatedly emphasized in both international legal instruments and EU documents.[21] This means that these values apply to all people in all countries, although it is clear that different countries may implement and protect them in different ways.

Common values apply not only to the EU, but also to the Member States. They link the values of Member States to those of the EU. Values such as human dignity, democracy, freedom, and the rule of law are enshrined in almost all Member States' constitutions and form the constitutional core of the Member States. Commonality shows that the Member States are like-minded, they share these values, they live by them, and this distinguishes them from other states.[22]

An interesting question is whether values are to be defined as a type of norms, principles, or perhaps some new legal category. Let us consider this question in more detail.

2. Legal Values and Norms of Law

The correlation between values and legal norms is an interesting issue. While some scholars identify legal values with norms, J. Datsi believes that legal values are the most general rules of law,[23] similar to the principles of law.

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19 EU(2000) Charter of Fundamental Rights of the European Union, 2000/C 364/01, 7 December 2000, Preamble, paras. 1–2, accessed July 14, 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT.

20 Čepo, "European Values in Croatia," 19, accessed July 14, 2024, https://tripalo.hr/wp-content/uploads/2020/10/European-Values-and-the-Challenges-of-EU-Membership-1-70.pdf.

21 See: EU(2019) European Parliament resolution of 18 December 2019 on the rule of law in Malta following the recent revelations surrounding the murder of Daphne Caruana Galizia, 2019/2954(RSP), para. A, accessed July 15, 2024, https://www.europarl.europa.eu/doceo/document/TA-9-2019-0103_EN.html.

22 Claes, "How Common are the Values," X–XI.

23 Jordan Daci, "Legal Principles, Legal Values and Legal Norms: Are They the Same or Different?," *Academicus International Scientific Journal*, no. 2 (2010): 109–15.

Others believe that these are completely different legal categories,[24] although some values may indeed be enshrined in legal norms,[25] and the other part, which is not directly enshrined in the norms, may be derived from their content through interpretation,[26] or act as moral, cultural or other social norms. According to this approach, values can be transformed into norms if they are institutionalized, i.e. legal mechanisms for their guarantee and protection are created. The consolidation of legal norms may be a component of the formation of such mechanisms. For example, human rights have been enshrined in numerous constitutional provisions, universal and regional conventions on the protection of human rights and fundamental freedoms. In addition, at the level of individual states, fundamental human rights and freedoms have been embodied in the constitutions of European countries, in the separation of legislative, judicial, and executive powers, as well as in democratic institutions such as freedom of speech, freedom of association, free, secret and transparent elections.[27]

In addition to the consolidation of values by norms, the reverse process may be possible, when legal norms can become values or reflect values. In this case, subjects of law will comply with them not only because of their legally binding nature and the possibility of coercion but also because of their internal conviction that values should be observed or fulfilled. If values are not institutionalized, their implementation is ensured not by state

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24 Thus, Ukrainian scholar Kozyubra points out that values, norms, and facts are heterogeneous elements of the structure of law. In addition, he emphasizes that normative formulations should not only be consistent with value ideals but also be subject to values. See: M. Kozyubra, "Principles of Law: Methodological Approaches to Understanding the Nature and Classification in the Context of Modern Globalisation Transformations," *Law of Ukraine*, no. 11 (2017): 147. Also, a well-known Ukrainian international lawyer Victor Muravyov points out that although principles and norms form the basis of EU law, they are completely different categories ("Principles and Values of the European Union and the Legal Order of Ukraine," *Actual Problems of International Relations*, no. 138 (2019): 99). The difference between principles and values is also emphasized by German lawyer J. Seidl: "Beitrittsverfahren und Sanktionen," 15.

25 Viktoriya Tychyna, *Legal Values of the European Union: A Textbook, Ministry of Education and Science of Ukraine* (Zhytomyr: State University «Zhytomyr Polytechnic», Pravo, 2023), 11–2.

26 Vasyl Kostytskyi, *Selected Problems of the Theory of Law: Textbook* (Odesa: Helvetica Publishing House, 2022), 54–5.

27 Natalia Amelchenko, *Values of the United Europe*, NGO "Agency for Legislative Initiatives," accessed November 24, 2023, 1, https://parlament.org.ua/upload/docs/European_Values.pdf.

coercion and possible sanctions, but solely by an internal sense of duty and determination to act honestly, fairly, and with dignity.[28] It should be noted that such statements will be correct, but when it comes to the EU's core values, the protection of these values is additionally ensured by special sanctions enshrined in Article 7 of the TEU.

Professor Calliess sees a different relationship between norms of law and values. He argues that every norm is based on at least one value, which is transformed and concretized through them. In this context, in his view, values not only provide legitimation for norms, but also serve as a guiding principle for interpreting and monitoring norms through their content.[29]

Values are, by their nature, more abstract categories than the norms of law or legal regulations from which rights and obligations directly derive. Some scholars justifiably point to the fact that the content of legal values is much richer and more extensive than the content of individual legal norms. Also, legal values may often initially exist in the form of philosophical, political, or religious ideas or customs and only be enshrined in legal norms over time.[30] The core values of the EU, such as the rule of law, equality, and respect for human rights are an excellent example of this. They have long existed as philosophical, religious, and political concepts, although they have had an impact on the legal sphere even before they were enshrined in the founding treaties of the EU. Values have a basic systemic nature. Thus, Article 2 of the EU Treaty states that the EU is based on values. In this respect, values can only be compared with constitutional norms, although even so, they have greater weight and a wider impact. Values can be enshrined in law through legal norms or other means, and in this case, we speak of their institutionalization. However, not all values are enshrined in law. Quite often, values are not limited to specific addressees and are not tied to specific legal consequences,[31] which distinguishes them from principles.

28 Ibid.
29 Calliess and Ruffert, *EUV/AEUV*, 33.
30 Kostytskyi, *Selected Problems*, 55.
31 Calliess, "Europa als Wertegemeinschaft," 1038–4.

3. Values and Principles of Law

Principles are understood as "basic, initial provisions,"[32] "guiding principles, initial ideas that determine the content and direction of legal regulation of social relations"[33] which "are characterised by universality, significance, higher imperative and reflect the essential provisions of theory, doctrine, systems of domestic and international law,"[34] "basic fundamental rules, which, although broad, are mandatory,"[35] "legal norms that enshrine essential elements of the rule of law,"[36] i.e. these are the most fundamental and general rules of law that define the principles of the rule of law and require specification.

In legal theory, there is an approach according to which legal values are identified with the principles of law, and the common values enshrined in Article 2 of the EU Treaty are called the constitutional principles of the EU.[37] Proponents of this approach sometimes refer to the fact that the values of the EU enshrined in the Lisbon Treaty on the European Union were called principles in previous versions. Article 21(1) of the TEU is also sometimes cited as a confirmation:

> In its actions in the international arena, the Union shall be guided by the principles which inspired its creation, development and enlargement and which it intends to promote throughout the world, namely democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the Charter of the United Nations and international law.

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32 Viacheslav Bousel, ed., *The Great Explanatory Dictionary of the Modern Ukrainian Language* (Kyiv: Perun Publishing House, 2003), 1366.

33 Petro Rabinovych, "Principles of Law," in *Legal Encyclopedia in 6 vols.*, vol. 5, ed. Y.S Shemhushenko (Kyiv: Ukrainian Encyclopedia, 1998), 128.

34 Yuriy Voloshyn, "Principle," in *Legal Encyclopaedia in 6 vols*, vol. 5, ed. Y.S. Shemshuchenko (Kyiv: Ukrainian Encyclopaedia, 1998), 110–1.

35 Rudolf Streinz, "Principles and Values in the European Union," in *Europarecht Beiheft: Beiheft 1. Liability of Member States for the Violation of Fundamental Values of the European Union*, eds. Armin Hatje and Luboš Tichý (Baden-Baden: Nomos, 2018), 10.

36 Andrew T. Williams, "Taking Values Seriously: Towards a Philosophy of EU Law," *Oxford Journal of Legal Studies* 29, no. 3 (2009): 559, https://doi.org/10.1093/ojls/gqp017.

37 Dolgowski and Traudt, "Das sind die Werte der EU!," accessed November 25, 2023, https://jean-monnet-saar.eu/?page_id=141058.

Such terminological differences, in our opinion, can be partially explained by a certain immaturity of constitutional and legal terminology at the level of the EU. On the other hand, we can indeed agree on certain common features, such as general, fundamental nature, the need to consolidate and detail them in legal regulations to ensure their correct application. For example, Czech scholars quite reasonably point out that EU principles, as well as values, determine the main parameters of the internal organization of the EU.[38] The core values also reflect the content of the relevant constitutional principles.[39]

At the same time, it should be noted that such identification does not have sufficient grounds not only because of the differences in formation, but also because of the systemic, consensual nature of legal values.[40] Their systemic nature can be confirmed by the statement made by the European Parliament in its decision of 3 July 2013, according to which "the common values enshrined in Article 2 of the TEU are the core of the rights of citizens and persons residing in the territory of the European Union."[41] The position of the Court of Justice of the EU is interesting, as it described these values as part of the autonomous "constitutional basis" of EU law – along with the general principles of EU law, the provisions of the Charter of Fundamental Rights of EU and the provisions of the Treaties.[42] In this way, the Court emphasized the distinction between values and general principles of EU law, but pointed to their common belonging to the core or "constitutional basis" of EU law. Also, former judge of the Court of Justice of the European Union E. Perillo distinguishes between EU values and principles as follows: "Values truly establish order because they are fundamental legal assets that are not available to any public authority, [...] while legal principles provide the legal basis for these orders, since they guide

38 Tomášek and Šmejkal, *Commentary on the Treaty on the Functioning of the EU*, 1270.

39 Calliess and Ruffert, *EUV/AEUV*, 32.

40 Seidl, "Beitrittsverfahren und Sanktionen," 17.

41 EU (2013) European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to European Parliament resolution of 16 February 2012) (2012/2130(INI)), para. IB.

42 CJEU Opinion 1/17, 30.04.2019, ECLI:EU:C:2019:341, para. 110; see also: CJEU, Opinion 2/13. 18.12.2014, ECLI:EU:C:2014:2454.

the actions of public institutions and protect citizens from any arbitrary use of the prerogatives of the state."[43]

It should be agreed that the EU's core values are not only closely related to the principles, but may also include them. Thus, some of the EU's core values contain general principles of law as components. For example, the elements of the rule of law include the right to an effective judicial protection[44] and the principles of equality before the law and non-discrimination,[45] which have been recognized by the EU Court of Justice as general principles of EU law. The peculiarity of values is that they have a normative and orientation function, which makes it possible to distinguish good from evil.[46]

Although the core values of the EU are currently enshrined in the EU's founding documents and occupy a key place in this document, it is not entirely clear whether this category is legal and whether its features are inherent in the law.

Without attempting to delve into the basic concepts of the understanding of law (Legal positivism, natural law theory, sociological, psychological school, integrative approach, etc.),[47] and without attempting to

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43 Ezio Perillo, "National Identity Versus European Identity: From the Acquis Communautaire to the European Union's Rule of Law," accessed April 30, 2024, https://free-group.eu/2022/03/07/national-identity-versus-european-identity-from-the-acquis-communautaire-to-the-european-unions-rule-of-law/.

44 CJEU Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, Case C-64/16, EU:C:2018:117, para. 35; CJEU Judgment of 13 March 2007, Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern, Case C-432/05, ECLI:EU:C:2007:163, para. 37; CJEU Judgement of 22 December 2010, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, Case C-279/09, EU:C:2010:811, paras. 29–33.

45 CJEU Judgement of 14 September 2010, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission, Case C-550/07-P, EU:C:2010:512, para. 54.

46 Udo Di Fabio, "Grundrechte als Werteordnung," *Juristen Zeitung* 59, no. 1 (2004): 3.

47 The natural law doctrine considers law from the standpoint of the moral principles of justice, freedom, and equality inherent in it, which are conditioned by the nature of man himself. Accordingly, only a normative phenomenon that corresponds to public perceptions of freedom, equality, and justice can be considered law. A key element of the natural law doctrine is the concept of natural inalienable human rights and fundamental freedoms. According to legal positivism, law is the rules enshrined in laws and other regulations that are established and enforced by the state, i.e. it is the so-called positive law. As for human rights, i.e. subjective rights, they can be granted by the state, or taken away or restricted by

formulate any general or average definition of the concept of law,[48] since the German philosopher I. Kant was sceptical about attempts to formulate a definition of the concept of law, instead formulating only some essential properties of law.[49]

To this day, no universal definition of law has been formulated and cannot be formulated, and the most thorough studies focus on the analysis of the process of cognition of law, explanation of law, or its individual features. If we take law as an objective phenomenon as a basis, the following

it. The sociological school of law is based on the so-called "living law," i.e. social relations that are protected by the state. The law is actually made by courts and other public officials in the field of law enforcement. It is not the rules that are primary, but social relations. The legislator does not create norms, but only formulates them. Representatives of this school of thought pay attention not so much to written law as to judicial practice. The psychological school of law is somewhat less controversial. Its representatives consider law to be a manifestation of legal consciousness, a phenomenon of the human psyche, certain subjective experiences and emotions that reflect real life. There are also postmodern types of legal understanding (phenomenology, hermeneutics, anthropology and synergetics of law), and integrative approaches (liberal-legal, communicative, dialogical, realistic-positivist, invariants of legal understanding), which combine the principles underlying the previous approaches in different proportions. Read more about different types of legal understanding and schools of law: Kostytskyi, *Selected Problems*, 74–156; Mykhailo Kelman and Vasyl Stratonov, *General Theory of Law: Textbook*, 6th ed. suppl. (Kherson: OLDi-PLUS, 2020), 38–51; Marko Tsvik and Olexandr Petryshyn, eds., *General Theory of State and Law: Textbook for Students of Law Universities* (Kharkiv: Pravo, 2009), 141–5; Aleksei Yushchik, *Dialectics of Law*: *General Doctrine of Law (Critical Analysis of General Legal Concepts)* (Kyiv: "Law of Ukraine"; In Jure, 2013), 620; Oleg Leist, *The Essence of Law. Problems of the Theory and Philosophy of Law* (KNT Publishing House, 2021), 340–63; Herbert Hart, *The Concept of Law* (Kyiv: KNT, 2021), 262–82; Robert Alexy, *Begriff und Geltung des Rechts* (Agency SIR RGB, 2005), 13–152; Leo Strauss, *Natural Law and History* (Kyiv: KNT Publishing House, 2021), 123–57; John Finnis, *Natural Law and Natural Rights* (Kyiv: Centre for Educational Literature, 2021), 19–56.

48 Yushchik describes law as "a normative method of social management by which a ruling subject, interested in preserving the unity of society, sanctions (establishes and maintains) the rules of conduct that constitute the social order necessary, from his point of view, by denying arbitrariness and establishing in the communication of subjects an objective will that expresses the law of their conduct and subordinates their individual will to it as a positive law." Yushchik, *Dialectics of Law*, 632.

49 Immanuel Kant, *Works in Six Volumes*, vol. 4, part 2 (Moscow, 1965), 139–41. From the standpoint of philosophy, he identifies the following properties of law: it concerns only external, and moreover, practical relations between people (and not thoughts or desires); through law, the actions (concessions) of some people are combined with the actions of others in terms of the universal law of freedom; law is a mutual coercion that protects common freedom.

legal properties or attributes are usually cited: normativity, binding nature, formal certainty, systematicity, and coerciveness or liability. Given the developments of the natural law doctrine, it is necessary to take into account the compliance of law with the ideals of freedom, justice, and fundamental human rights.

Taking these features as a basis, it is necessary to take into account the peculiarities of international law and the law of the EU, and, in particular, the limited possibilities of coercion.

Normativity means that law regulates the behavior of legal entities and determines the degree of their freedom. It covers generally binding rights and obligations for an indefinite number of legal subjects (impersonality), and can be applied for a long time and repeatedly to an indefinite number of life situations. Positivists associate normativity with legal norms, although this understanding is somewhat narrow.[50]

The values of EU law enshrined in the EU Treaty regulate the behavior of both the EU and its Member States. For example, Article 3(1) of the TEU states that the purpose of the Union is "to promote peace, its values and the well-being of its peoples (para. 1)." Article 3(5) refers not only to the observance, but also to the promotion of values. The EU is obliged to implement values not only within its borders but also in relations with third countries. For example, Article 5 of the TEU states that "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens," "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to safeguard its values […]" (Article 21(2a)). The obligation to safeguard values rests not only with the EU, but also with the Member States, which, according to Article 32, through convergence of their actions, shall ensure, "that the Union is able to assert its interests and values on the international scene." Article 49 of the TEU requires candidate countries to "respect" the values referred to in Article 3 and to be "committed" to their promotion. Thus, the values regulate the behavior not only of the EU and its Member States, but also of other countries with which the EU cooperates, and especially of countries

[50] More about normativity: Alla Babiuk, "The Concept of Normative of Law," *University Scientific Notes* 52, no. 4 (2014): 15–21.

applying for EU membership. The content of the fundamental values and the rights and obligations arising from them are described in more detail in the EU Charter of Fundamental Rights (chapters I–VI). These rights and obligations can be repeatedly applied to an indefinite number of subjects. Thus, the requirement of normativity can be considered satisfied.

The binding nature of law is ensured through legitimation and coercion. Legitimation implies the recognition of law as an authoritative regulator. It should be noted that the authority of EU law is ensured by the supreme legal force granted to EU law in the domestic legal orders of the Member States. In addition, the EU legal order is considered one of the most efficient in the world and enjoys a high reputation for effective regulation of relations both within and outside the EU. In addition, all amendments to the founding treaties, including the Lisbon Treaty, which enshrines the EU's core values, require ratification by all EU Member States.

Formal certainty of law implies that it is enshrined in clear forms – sources of law. This ensures the accuracy, clarity, and predictability of law. It should be noted that the EU values are enshrined not only in the Treaty on European Union and the Charter of Fundamental Rights as its component. The Charter devotes six chapters to the regulation of values. In addition to the sources of primary law, values are mentioned in numerous acts of the EU institutions and enshrined in agreements with third countries, in particular in the Association and Partnership and Cooperation Agreements, as well as in numerous judgments of the EU Court of Justice.

With regard to coercion,[51] considering the specifics of the EU's legal order, it is more correct to speak of liability. Article 7 sets out sanctions for gross violation of EU values. Thus, according to Article 7(3) of the TEU, if the European Council finds that a Member State has persistently and materially violated the values referred to in Article 2, "the Council may decide by a qualified majority to suspend certain rights of the Member State concerned arising from the application of the Treaties, including the right to vote of the representative of the government of the Member State in

[51] Kelsen wrote that "Law differs from other social orders in that it is a coercive order. Its special feature is the use of coercion; this means that an act envisaged by law as a consequence of a socially harmful act must also be carried out against the will of the addressee, and in case of resistance on his part - with the use of legal force" (H. Kelsen, *Pure Theory of Law* [Universe, 2004], 45).

the Council." The EU Treaty provides for separate procedures for holding Member States accountable for violations of the rule of law, which have already been applied to Poland and Hungary.

Some critics have pointed out that suspension of the right enshrined in Article 7(3) is not solely a legal liability, but rather a political one. We can only partially agree with this. In addition, Article 258 provides for a procedure for bringing Member States to justice for breaches of Treaty obligations, including breach of Article 2 TEU, which is considered by the Court of Justice of the EU. It can be initiated by individual Member States. The procedure provided for in Article 258 was activated by the EU Court of Justice, in particular, in cases C-619/18, Commission v. Poland (independence of the Supreme Court, paras. 58 and 59), C-192/18, Commission v. Poland (independence of ordinary courts, paras. 106 and 107). Thus, the violation of EU values enshrined in EU treaties is a ground for initiating proceedings in the EU Court of Justice. The Court cannot consider violations of certain social or moral norms or philosophical concepts if they are not legal in nature and do not form an obligation under EU law.

The systemic nature of law implies that it is a set of interrelated and interdependent elements that interact with each other. The EU values are not only part of the EU legal system but are an integral part of its *aquis communautaire*.[52] In addition, the values of the EU form a separate system of values, and are interconnected. For example, references to values are made in various articles of the EU Treaty, including Articles 2, 5, 13, 21, 32, 49, the preamble, and the Charter of Fundamental Rights, which is a component of the EU Treaty. In terms of content, the values are also closely linked. They are mutually reinforcing and together they aim to ensure the primary value of respect for human dignity.

Considering compliance with the ideals of freedom, justice, and fundamental human rights as properties of law, it should be noted that the EU

[52] There is no unambiguous interpretation of the term itself. While some scholars, as well as the Draft Treaty on a Constitution for Europe, identify it with the legal system of the European Union, EU law or a set of mutual rights and obligations binding on all EU Member States. For more details, see: Roman Petrov, "*Acquis Communautaire* as a Component of the Phenomenon of the European Union Law," *European Law*, no. 1 (2012): 54–66; Victor Muraviov, "The Acquis Communautaire as a Basis for the Community Legal Order," *Miskolc Journal of International Law* 4, no. 2 (2007): 38–45.

values themselves embody these ideals and are aimed at achieving them, so this feature is obvious and does not require proof.

Thus, it can be argued that the EU values enshrined in Article 2 of the TEU meet all the criteria of law, including normativity, formal certainty, binding nature, systematicity, liability, compliance with the ideals of freedom, justice, and respect for human rights. Values as elements of EU law have specific features in relation to the principles and norms of EU law, although they are mutually related to them through institutionalization of values as they can be affirmed in the norms and principles of EU law. Thus, the fundamental values of EU law have become not only a separate legal category of EU law, but have become a basic systemic element of the legal system and the *aquis communautaire*, a key element on which the EU as a union of values is based. The transformation of EU values into a distinct legal category of the EU's legal order, and their transformation to the essential core element of EU Aquis will have far-reaching consequences in shaping the development of EU law, national legal systems of EU Member States, third counties, and other international actors that cooperate with the EU.

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A Global Analysis of Menstruation-Friendly Working Practices Through an Evaluation of International Examples

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Abstract: Gender equality is a key issue and an important element of basic human rights, especially when it comes to the workplace. Labor laws often fail to address the specific challenges women face, like menstruation and menopause. This study focuses on how menstruation is treated in labor law, with a spotlight on international practices around menstrual leave. It looks at the purpose behind these national legislation-policies, how legal frameworks differ, and how the literature evaluates the function of these institutions. The aim of the paper is to provide useful insights for future lawmakers, social partners, drawing lessons from Spain – the only EU country with such a policy – Japan, Indonesia, Taiwan and other national examples, showing how menstrual leave can support women's well-being at work. The research focuses only on the legal aspects of these menstrual leave policies, which is a very rare aspect in the literature.

1. Introduction: Developments in Labor Law Practice Concerning Women

The basic principles of labor law, especially in the area of physical aspects of work, are based on the male body, since the mass participation of women in the labor market began with the First World War. Hence, labor

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legislation, health and safety requirements and the tools for their implementation have organically focused primarily on men's health and physical parameters. The situation of women in the workplace is extremely disadvantaged, a problematic situation exacerbated by the fact that research into women's reproductive health, particularly in relation to its links with health and safety at work, is in its infancy. Moreover, only recently have policies in Europe begun to pay renewed attention to the full spectrum of the critical triangle of women's work, all three elements of the term MMM (menstruation, motherhood, menopause). This growing, but still infant, development points to a striking lack of in-depth study of MMM in occupational health and labor law research. The present research aims to address menstruation in more depth among the three Ms. Menstruation is currently not assessed from the perspective of most of the European countries' labor laws in general, although some other countries (mainly Asian countries) and a few employers are already trying to address the issue by establishing the legal institution of menstrual leave. In the following lines, we will try to present them on the basis of the available foreign literature, which will help to clarify the dimension of the development of national and even EU labor law in this direction, together with its challenges and opportunities.

2. The Menstrual Leave, as an Old-New Regulation Supporting the Reproductive Health

The latest development in global labor law in the context of menstruation is the introduction of menstrual leave at international level. Menstrual leave is defined in the international literature as a leave that allows menstruating individuals to take time off work if they are unable to go to work due to their menstruation; it is a policy that can affect menstruating individuals in a number of ways,[1] including their employment status.[2] International interdisciplinary research on menstruation is linked to the concept of menstrual health. This also provides a broad context for labor rights thinking, as it is

[1] Levitt and Barnack-Tavlaris argue that this influence can take many forms, including negative ones, as discrimination against women can promote discrimination in employment, promotion (Rachel B. Levitt and Jessica L. Barnack-Tavlaris, "Addressing Menstruation in the Workplace: The Menstrual Leave Debate," in *The Palgrave Handbook of Critical Menstruation Studies*, eds. Chris Bobel et al. [Singapore: Palgrave Macmillan, 2020], 561).

[2] Ibid.

intertwined with sustainability goals, gender equality and fundamental human rights.[3] In this way, it sets not only the direction of research but also the policy requirements.[4]

In the following lines, global examples of menstrual freedom will be presented, but the first efforts should be mentioned before the current examples, for chronological reasons. The first generation of menstrual freedom policies appeared at the beginning of the 20th century, with the Soviet Union introducing regulation in 1922, Japan in 1947 and Indonesia in 1948. The rationale for the introduction of menstrual leave in each country reflected the specific socio-economic and institutional context of the time.[5]

As mentioned in the list, in the Soviet Union this legal institution was introduced in 1922, but it is no longer part of the legal system, so we are not talking about active regulation in this case. The Bolshevik menstruation policy was aimed at women in factory jobs, and gave them two to three days of fully paid leave a month for menstruation. The rationale for this innovation was to protect women's fertility and to support their role as mothers.[6] This was abolished after only five years in 1927, as women workers felt that menstrual leave increased discrimination in the workplace,[7] which shows that almost a hundred years ago, gender discrimination was a barrier to the evaluation of menstruation in labor law. Menstrual leave reappeared in the Russian political debate in 2013, but the somewhat paternalistic proposal – which focused on the treatment of the "overburdened"

3 Julie Hennegan et al., "Women's and Girls' Experiences of Menstruation in Low- And Middle-Income Countries: A Systematic Review and Qualitative Metasynthesis," *PLoS Medicine* 16, no. 5 (2019): 31, https://doi.org/10.1371/journal.pmed.1002803.

4 Ibid., 31.

5 Marian Baird, Elizabeth Hill, and Sydney Colussi, "Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labor Entitlement to Reinforce, Remedy, or Revolutionize Gender Equality at Work?," *Comparative Labor Law & Policy Journal* 42, no. 1 (2021): 197.

6 Natalie Huet, "Spain's Menstrual Leave: The Countries That Have Already Tried and Tested Days off for Period Pain," Euronews, May 13, 2022, accessed January 31, 2025, https://www.euronews.com/next/2022/05/13/spain-s-menstrual-leave-the-countries-that-have-already-tried-and-tested-days-off-for-peri.

7 Sally King, "Menstrual Leave: Good Intention, Poor Solution," in *Aligning Perspectives in Gender Mainstreaming*, eds. Juliet Hassard and Luis D. Torres (Cham: Springer, 2020), 153, https://doi.org/10.1007/978-3-030-53269-7_9.

female body and psyche – was not successful and even outraged feminists and human rights activists.[8]

Following the Soviet example, the other countries mentioned still maintain the legal institution of menstrual leave, so we are not talking about the past. If we want to summarize the countries that currently have a general menstrual labor rights policy in force, we can list Japan, Indonesia, South Korea, Taiwan, Zambia, provinces in China, Mexico, Taiwan and one Argentine province (Federación).

In the following rows, we will try to highlight and examine as broadly as possible the variations of menstrual leave in these countries. It should be noted, however, that other countries have of course also tried to introduce this legal institution, without much success, so that the existing examples are even more noteworthy. One concrete example of a failed attempt is the Philippines, where a draft bill for a separate law was proposed by a senator in 2004. The Menstrual Leave Act would have provided that all female workers would be entitled to one day of leave per month in both the public and private sectors, with 50% of the daily rate of pay. In addition, enforcement of the special allowance by employers would have been guaranteed by fines and imprisonment. At the same time, the text of the law included stereotypical remarks that portrayed women as emotionally insecure workers. In light of this, it is therefore important to see how successfully countries have been able to capture the idea of menstrual leave.

2.1. Menstrual Leave in Japan

Japan was the second country in global history to introduce menstrual leave in 1947. The legislation is based on grassroots organization. In 1928, female conductors of the Tokyo Municipal Bus Company were denied access to toilets all day. As a result, the changing of sanitary towels was not possible. Because of this, these female workers felt it was physically impossible to do their jobs. As a result, women union lobbyists fought for legislation on paid menstrual leave. It should therefore be stressed that this legislation was the result of a grassroots initiative, thanks to the efforts of women workers.[9]

8 Huet, "Spain's Menstrual Leave."

9 Baird, Hill and Colussi, "Mapping Menstrual Leave," 196.

Thus, in Japan, since 1947, menstruating women have been protected by law (labor law) under the provisions of the Japanese Labour Standards Act.[10] According to the provision of Article 68 of the law, women who suffer from painful menstruation or who perform work that aggravates menstrual pain have the possibility to claim "seirikyuuka" (literally "physiological leave"). This leave is a natural or biological entitlement and the employer must take into account the menstrual period.[11]

The law does not specify the number of days off that can be taken, and employers have discretion to grant leave on a calendar day, half-day or even an hour, in accordance with the Japanese legal system.[12] Employers have a wide discretion in this matter, as the wording of the legislation implies that no pay is payable for this period, as it is up to the employer to decide whether or not to treat the days of menstrual leave as paid leave. Due to the historical nature of the Japanese legislation, an impact assessment has already been carried out on this legal instrument, but unfortunately it is disappointing. Indeed, according to data from the Japanese Ministry of Labour for 2020, 30% of companies voluntarily provide full or partial pay for employees who take menstrual leave. A startling result of the survey is that only 0.9% of the women workers concerned take advantage of menstrual leave.[13] This may be due to a social environment that may stigmatize the menstrual process and the women involved. This circumstance and result draws attention to the importance of assessing the social impact of legal instruments. Unfortunately, women who have taken menstrual leave have faced negative consequences in the workplace, such as discrimination and harassment by employers.[14] There have been

10 Labour Standards Act, Act No. 49 from 1947; Beatrix Asboth, "Menstruációs szabadság – példák a nagyvilágból," Euronews, May 26, 2022, accessed January 31, 2025, https://hu.euronews.com/2022/05/26/menstruacios-szabadsag-peldak-a-nagyvilagbol.

11 The legislation is the following: "When a woman for whom work during menstrual periods would be especially difficult has requested to leave, the Employer shall not have said women work on days of said menstrual period" (Baird, Hill and Colussi, "Mapping Menstrual Leave," 195).

12 Ibid., 196.

13 Asboth, "Menstruációs szabadság."

14 Baird, Hill and Colussi, "Mapping Menstrual Leave," 196; Hilary H. Price, "Periodic Leave: An Analysis of Menstrual Leave as a Legal Workplace Benefit," *Oklahoma Law Review* 74, no. 2 (2022): 189.

numerous lawsuits over the fact that the female workers concerned have not received the benefits they were entitled to for continuous attendance in view of the fact that they had legally taken menstrual leave under the mentioned law.[15]

Given the decades-old history of this legal institution, some of the scarce international literature on the subject relates to the Japanese system. Dan draws attention to the criticisms of the Japanese system by the social partners. Japanese trade unions, despite the above, have stressed that menstrual leave should be granted not only in the case of painful menstruation but also when menstruation is asymptomatic, since the purpose of menstrual leave is to protect women's fertility.[16] In the face of numerous criticisms and practical difficulties, the Japanese Ministry of Labour has made efforts to abolish the regulation, according to Honda-Howard and Homma, in response to increasing gender discrimination in the workplace.[17] Despite these efforts, Japanese menstrual leave remains a living legal institution in force to this day.

2.2. The Emergence of Menstrual Leave in Indonesia, South Korea and Taiwan

Indonesia is the third country to have legal menstrual freedom in the first half of the 20th century.[18] The original provision dates back to 1948 and was re-regulated in 2003. This reform was a "weakening" of the regulation, as it removed the compulsory nature and made menstrual leave collectively negotiable, and removed the previously compulsory paid nature of the menstrual leave.[19] Under the 2003 regulation,[20] Indonesian law allows

15 Baird, Hill and Colussi, "Mapping Menstrual Leave," 196.

16 Alice J. Dan, "The Law and Women's Bodies: The Case of Menstruation Leave in Japan," *Healthcare for Women International*, no. 1–2 (1986): 13.

17 Baird, Hill and Colussi, "Mapping Menstrual Leave," 196; Dan "The Law and Women's Bodies," 9–11.

18 In Indonesia, there are many public holidays, and breastfeeding can also be a reason for taking time off. Sayed Qudrat Hashimy, "The Legal Paradigm of Menstrual Leaves Policy in the United Arab Emirates, Kuwait, and Afghanistan," *Journal of Disease and Global Health* 16, no. 1 (2023): 18.

19 Baird, Hill and Colussi, "Mapping Menstrual Leave," 196.

20 Article 81(1) of the Labour Law No. 13 of 2003 states that female workers who feel pain during their menstruation and who report it [to the employer] are not obliged to go to work on the first and second day of menstruation (ibid.).

a maximum of two days paid leave per month, specifically for the first two days of menstruation,[21] but further details are left to the parties. The employee is also subject to a prior notification obligation in relation to the use of days off. Indonesia's policy on menstrual leave may appear effective on paper, but in practice it is not, as large companies based there, which may thus be obliged to grant menstrual leave, often require menstruating workers to provide evidence of their use of leave, which is an affront to human dignity.[22] This situation, which is a serious violation of women, their human dignity and fundamental rights, is further compounded by Baird, Hill and Colussi's assertion that menstrual leave has become a means of differentiating between white and blue collar workers, thereby weakening solidarity between workers. Women in the white-collar sector perceive the use of this leave as an embarrassment, a reference to women's different physicality from men, and, in their view, as an obstacle to women's emancipation. On the other hand, women who do hard physical work, such as those in mining or industrial work, support and take advantage of this opportunity.[23]

South Korea is another country with a long history of menstrual leave legislation. In 1953, the Labor Standard Act (LSA) came into force, providing protection for working adult women. The Act included a provision protecting mothers, which gave women one day of paid menstrual leave per month. The motive behind the South Korean legislation was therefore to protect motherhood. The 2007 revision[24] of the LSA, however, changed menstrual leave from paid to unpaid, and made prior application by the woman concerned a necessary condition for receiving the benefit.[25] This means that in South Korea they have one day of unpaid menstrual leave per month under the LSA 2007. In contrast to the above regulation, employers in this country are obliged to grant this leave, with fines of thousands of euros for breaches of this obligation,[26] and

21 Price, "Periodic Leave," 193.
22 Ibid., 194.
23 Baird, Hill and Colussi, "Mapping Menstrual Leave," 198.
24 In another source 2001 (Ibid., 200).
25 Price, "Periodic Leave," 190.
26 Despite the threat of fines for employers, only a fifth of female workers in South Korea took advantage of this leave, according to a 2018 survey (Asboth, "Menstruációs szabadság").

may even face criminal prosecution.[27] However, unfortunately, as in Indonesia, South Korean practice shows that employers here do not apply menstrual leave properly, for example by often demanding evidence from female applicants that is in violation of human dignity.[28] This problematic employer practice exists in the present, for example in April 2021, former Asian Airlines CEO Kim Soo-cheon was fined two million won for rejecting 138 requests for menstrual leave from 15 flight attendants between 2014 and 2015. The employer argued that the workers who applied did not present proof of menstruation, making them ineligible for menstrual leave.[29]

Unlike the examples above, the formulation of Taiwan's menstrual leave policy is closely linked to the provision of sick leave.[30] Taiwan sets a tight limit on the amount of menstrual leave it grants menstruating women, with one day off per month and three days off per year, according to legislation drafted on January 16, 2022 under the Gender Equality in the Workplace Act. Article 14 of the law provides, in an unusual way, that female workers who experience difficulties[31] in their work during their menstrual period, are entitled to one day of menstrual leave per month. However, if the total number of days of leave taken under the menstrual leave scheme does not exceed three days in a year, these days cannot be treated as sick leave and counted according to the rules for sick leave. Any additional days of leave taken as menstrual leave shall be counted as sick leave.[32] Sick leave is 30 days per year. In total, women workers are therefore entitled to a total of 33 days of leave linked to their health situation.[33] Of this, three days of menstrual leave is a differential, a discount, compared to workers who are not entitled to menstrual leave. The financial aspect of this special calculation method should also be examined. Menstrual leave is paid at 50% of

27 Baird, Hill and Colussi, "Mapping Menstrual Leave," 201.
28 Price, "Periodic Leave," 190.
29 Baird, Hill and Colussi, "Mapping Menstrual Leave," 201.
30 Ibid.
31 I must briefly draw attention to the progressive approach to regulation. Here, freedom of menstruation is not only linked to painful menstruation according to the text of the legislation, but can be justified by any symptom of it.
32 Asboth, "Menstruációs szabadság."
33 Baird, Hill and Colussi, "Mapping Menstrual Leave," 202.

the daily rate of pay, in line with the rules for sick leave.[34] In the literature, this Taiwanese menstrual leave is presented as a measure to support national birth rates. However, one study found that Taiwanese women rarely take menstrual leave due to a lack of flexibility, the need for medical certification and inadequate information on how to apply.[35]

2.3. Other Examples of Menstrual Leave Abroad

Vietnam has a specific legal and socio-political environment. In terms of gender rights, Vietnam has one of the most comprehensive and developed labor codes in the Southeast Asia and Pacific region. Accordingly, Vietnam enacted menstrual leave into the national labor code in November 2015 (Decree No. 85/2015). The menstrual leave provisions guarantee menstruating women workers an extra thirty minutes per day during menstruation days and at least three days per month.[36] However, as in Japan and Indonesia,[37] eligibility is subject to employer-employee negotiations, and the details are subject to individual negotiation.[38]

In Africa, Zambia introduced a menstrual leave scheme in 2015, which allows for one day per month, without the need for a doctor's certificate or prior notification by the worker.[39] The policy behind the legislation sees it as a "Mother's Day," which emphasizes the opportunity for women to become mothers.[40] This employment policy consideration in Zambia thus derives the need for labor law regulation of menstruation from maternity. However, this objective is nuanced by the fact that Zambian culture is

34 Asboth, "Menstruációs szabadság."

35 Baird, Hill and Colussi, "Mapping Menstrual Leave," 202.

36 Rizichi Kashero-Ondego and Njeri Wagacha, "The Concept of Menstrual Leave," Cliffe Dekker Hofmeyr, May 2, 2023, accessed January 31, 2025, https://www.cliffedekkerhofmeyr.com/en/news/publications/2023/Practice/Employment/employment-law-alert-2-may-2023-the-concept-of-menstrual-leave.html.

37 For more on menstrual freedom in Kuwait, the United Arab Emirates and Afghanistan, see: Hashimy, "The Legal Paradigm of Menstrual Leaves Policy."

38 Baird, Hill and Colussi, "Mapping Menstrual Leave," 205.

39 Unfortunately, practice suggests that employers expect prior notice before requesting time off, even though the legislation does not require it (Asboth, "Menstruációs szabadság").

40 Will Worley, "The Country Where All Women Get a Day Off Because of Their Period," *Independent*, January 4, 2017, accessed January 31, 2025, https://www.independent.co.uk/news/world/africa/zambia-period-day-off-women-menstruation-law-gender-womens-rights-a7509061.html.

generally patriarchal and the policy promotes the notion that the activity of childbearing and childrearing is exclusively an element and role of femininity and womanhood.[41]

In Mexico, the existence of painful menstruation (dysmenorrhea) is considered a compelling circumstance in labor law, which guarantees leave for public sector workers from 2023.[42] In this case, they emphasize the need for the women workers concerned to be physically and psychologically fit in order to exercise their labor rights.[43] However, this physiological freedom precisely defines the three main groups of beneficiaries of this freedom: middle-aged women suffering from severe dysmenorrhea; middle-aged women with menopause and menopausal symptoms; middle-aged men with andropause symptoms. Therefore, the Mexican concept covers a much wider range of people, covering not only menstruation but also menopause, extending to its symptoms, so that even in the absence of a diagnosis of disease, only the presence of symptoms provides an opportunity for rest. A specific feature of the policy is the assessment of the situation of men. The range of labor market actors concerned and benefiting from the legislation is therefore very wide.

In addition to the country-wide regulation, regional regulation of menstruation policies can also be examined. One of Argentina's provinces, Federación, is worth highlighting, as since 2014 it has guaranteed female public sector workers the right to request paid time off if they are assessed as unable to work due to menstruation ("women's day").[44] Another example is India, where there is no law regulating menstrual leave and no

41 Price, "Periodic Leave," 191.

42 Jorge de Presno and David Puente, "The Congress Of Mexico City Approves The Proposal For 'Menstrual Leave'," Basham, March 6, 2023, accessed January 31, 2025, https://basham.com.mx/congress-of-the-cdmx-approves-the-proposal-for-menstrual-leave; María Nayeli Ortega Villegas, "Menstrual Leave in Mexico: Implications of the Initiative Proposed by Mexico City Congress," Medscape, March 28, 2023, accessed January 31, 2025, https://www.medscape.com/viewarticle/990188?form=fpf.

43 Official Gazette, Government Gazette, vol. 203, no. 119, accessed January 31, 2025, https://legislacion.edomex.gob.mx/sites/legislacion.edomex.gob.mx/files/files/pdf/gct/2017/jun291.pdf.

44 Lidia de la Iglesia Aza and Bernadett Solymosi-Szekeres, "La menstruación en el entorno laboral," *Lan Harremanak – Revista De Relaciones Laborales* 51, (2024): 70, https://doi.org/10.1387/lan-harremanak.26149.

central provision for paid menstrual leave, but we cannot forget the Indian states of Bihar and Kerala. These states have introduced a policy on menstrual leave for women. Bihar has been providing two days paid menstrual leave per month to women workers since 1992. Kerala has also allowed menstrual leave for female students in all universities and educational institutions in 2023, along with a number of other measures to support women and mothers.[45] Continuing the series of regional social policies, in October 1992, the national government of China passed the Law of the People's Republic of China on the Protection of Women's Rights and Interests, which requires employers to take into account women's physical fitness, while providing special protection for menstruation. Article 26 of the law states that all work units shall protect the safety and health of women during work and physical labor, taking into account the specific characteristics of women and in accordance with the law, and shall not entrust them with work and physical labor that is not suitable for women. Women shall have special protection during menstruation, pregnancy, maternity and breastfeeding. Although this legislation does not specifically provide for menstrual leave, it does consider menstruation to be an important circumstance in the context of health and safety at work.[46] This entitles women in certain provinces in China, on a regional basis, to one or two days of paid menstrual leave per month – provided they have a medical certificate. Such provinces are Hainan and Hubei. Hainan issued a non-binding soft regulation in 1993, while Hubei issued a binding policy in 2009. These examples inspired regulatory moves in Anhui and Ningxia provinces later in 2016.[47] In Anhui, menstrual leave provides one or two days of paid leave on presentation of a medical certificate. Similarly, in Ningxia, the provincial government policy provides for two days of mandatory leave per month to improve women's working conditions, although it is not clear whether the leave is paid or whether it requires a medical

45 "Issue of Menstrual Leave for Women," Drishti, July 11, 2024, accessed January 31, 2025, https://www.drishtiias.com/daily-updates/daily-news-analysis/issue-of-menstrual-leave-for-women.

46 Baird, Hill and Colussi, "Mapping Menstrual Leave," 200.

47 King, "Menstrual Leave: Good Intention, Poor Solution," 153; Baird, Hill and Colussi, "Mapping Menstrual Leave," 200.

certificate.[48] The non-binding nature of Hainan's policy has meant that it has not been implemented effectively. Furthermore, as in other countries, this provision is controversial in these provinces. Opponents cite various problems with the policy, including additional costs due to the absence of female workers. Another common counter-argument, according to Chinese opponents, is that it is not clear whether the worker is actually sick or just abusing the female status advantage.[49] The issue is also being pursued in Hong Kong, where in 2016 an organization, the ADPL (Hong Kong Association for Democracy and People's Livelihood), petitioned the government to introduce menstrual leave. The proposed policy would introduce one day of leave per month, specifically highlighting its extension to civil servants as a first step. It is proposed that medical certification would not be required, as this would further exacerbate the burden on women in the workplace. The proposal also seeks to revolutionize gender relations in the workplace and explicitly challenges androcentric notions of the worker.[50]

2.4. Spanish Regulation

Until the manuscript is closed, Spain is the only EU country[51] that has taken action and enacted menstrual leave into law in 2023. It should be added, however, that in March 2017, Italy had already proposed legislation on paid menstrual leave, which ultimately failed.[52]

In Spain, prior to the 2023 amendment, women's health risks were, in the absence of any particular doctrinal reflection, managed by social security, without any specific norm, through the legal institution of sick leave and sick pay. Accordingly, in the event of incapacity for work due to sickness, the rate of remuneration could be determined on the basis of four criteria, based on complex calculation rules, the details of which are

48 Ibid., 206.

49 Price, "Periodic Leave," 194.

50 Baird, Hill and Colussi, "Mapping Menstrual Leave," 207.

51 de la Iglesia Aza and Solymosi-Szekeres, "La menstruación en el entorno laboral," 58–89.

52 Price, "Periodic Leave," 187; Anna Momigliano, "Giving Italian Women 'Menstrual Leave' May Backfire on Their Job Prospects," *Washington Post*, March 24, 2017, accessed January 31, 2025, https://www.washingtonpost.com/news/worldviews/wp/2017/03/24/giving-italian-women-menstrual-leave-may-backfire-on-their-job-prospects/.

as follows. According to the Spanish rules, the employer is not obliged to pay for the first three days of sick leave during the period of incapacity. Between the fourth and the fifteenth day, the employee is entitled to an absence allowance equal to 60% of the calculation base (average salary), paid by the employer. Between the 16th and 20th day, the employee also receives a 60% benefit, but this is now covered by social security, so the literature still refers to this period as sick leave, which is more correctly regarded as sick pay. From the 21st day onwards, the benefit is 75% of the calculation basis, paid by social security (the reasoning behind this is that if someone has a health problem over such a long period of time, which prevents them from working, they need increased provision for subsistence).[53]

The regulation of menstrual leave in Spain is contained in Law No. 1/2023 of 28 February 2023 ("Organic Law"), which amends Law No. 10/2010 of 3 March on Sexual and Reproductive Health and Voluntary Termination of Pregnancy, and which entered into force on June 1, 2023. During the process of drafting the law, it has already been strongly criticized by various political parties for its innovative and ambitious nature. Undoubtedly, this is a law that creates new rights for women in the field of social security, which can be dogmatically described as the right to work without pain, and which therefore has a strong fundamental rights dimension. The legislation is extremely ambitious in nature and aims, among other things, to break with the outdated systems that still exist in Spanish law on the biological status of women. This issue has so far been ignored by the Spanish legislator, and the new possibilities created by the legislation therefore extend the range of events protected by social security. Indeed, the explanatory memorandum to the legislation explains that the risk events linked to specific situations of temporary incapacity for

[53] Daniel Perez Del Prado, "Women's Health and Labour Law," September 2024, accessed January 31, 2025, https://www.roudou-kk.co.jp/wp-content/uploads/2024/09/%E5%AD%A3%E5%88%8A%E5%8A%B4%E5%83%8D%E6%B3%95286%E6%8E%B2%E8%BC%89%E3%80%8C%E5%A5%B3%E6%80%A7%E3%81%AE%E5%81%A5%E5%BA%B7%E3%81%A8%E5%8A%B4%E5%83%8D%E6%B3%95%E3%80%8D%E3%83%80%E3%83%8B%E3%82%A8%E3%83%AB%E3%83%BB%E3%83%9A%E3%83%AC%E3%82%BA%E3%83%BB%E3%83%87%E3%83%AB%E3%83%BB%E3%83%97%E3%83%A9%E3%83%89%E6%B0%8F-%E5%8E%9F%E6%96%87%E5%8E%9F%E7%A8%BF.pdf.

work include (secondary) dysmenorrhea associated with menstruation,[54] or menstruation causing secondary incapacity. In such a case, a woman with secondary dysmenorrhea, i.e. other gynecological problems such as endometriosis, fibroids or pelvic inflammatory disease, is entitled to sick leave, adenomyosis, endometrial polyps, polycystic ovaries, or any type of difficulty in menstrual blood flow, which may be associated with symptoms such as dyspareunia, dysuria, infertility or heavier than normal bleeding. In practice, this legislation aims to eliminate any negative prejudice in the workplace against these pathological situations and proven gynecological conditions. But this is not the only reference in the law to menstrual health, as it includes the use of free menstrual management products in educational centers, as well as in prisons and social centers, so that vulnerable women can have access to them.[55]

The regulation on menstrual leave is thus placed in the General Social Security Act, in Articles 169–176, as amended by the above-mentioned Act. A new section has been added to the previous legislation on sick leave, stating that temporary incapacity for work during which a woman suffers from menstruation causing secondary incapacity for work, provided that she is receiving health care under the health insurance scheme, is to be considered a special type of sick leave or sickness benefit.[56] It should be noted that the placement of the regulation is somewhat ill-considered in certain respects, as the General Social Security Act nowhere defines what is meant by "secondary incapacity for work," so that the explanatory memorandum of Act No. 1/2023 must be consulted to understand the concept. This shows that the conceptual set of the Social Security Act is not complete in this respect.[57]

Under the new legislation, the use of menstrual leave therefore requires a temporary loss of capacity to work, a medical provision for health care, and certain provisions imply that the specific medical condition must be diagnosed by a gynecologist. This differs from the rules on ordinary sick

54 Mariagiulia Bernardi et al., "Dysmenorrhea and Related Disorders," *F1000Research*, no. 6 (2017): 1645, https://doi.org/10.12688/f1000research.11682.1.

55 de la Iglesia Aza and Solymosi-Szekeres, "La menstruación en el entorno laboral."

56 Ibid.

57 Ibid.

leave and sick pay, under which a certificate from a general practitioner is sufficient.[58] In addition, although menstrual leave is regulated within the incapacity for work due to sickness, there are other different circumstances, such as the fact that the specialist may issue the relevant certificate with a validity of one year, so that it is not necessary to present a certificate to the employer for every occurrence of sickness, i.e. for every menstruation. A further difference is that the remuneration, unlike the four-step calculation mentioned above, is 75% of the calculation base representing average earnings from the first day onwards.[59]

As regards remuneration, the rules are more advanced, as from the first day the worker is entitled to benefits paid by the social security system, unlike the fourth day under the general rules described above. In addition, the period of menstrual leave, often wrongly referred to as 3–5 days[60] – although no such restriction exists in terms of the monthly rate[61] – the days concerned do not have to be counted towards sick leave and sick pay for general incapacity for work, which also makes the regulation advantageous. As a third important advantage, which is also true of the general rules in general, the use of menstrual leave is not dependent on prior insurance periods or prior payment of contributions. The costs of menstrual leave are therefore covered directly by the social security system, at a rate of 75% of the worker's average earnings.[62]

As this is new legislation, it is worth looking at the related position papers to see how the legislation applies. In this respect, it should be pointed out that Rodriguez, who is the Minister for Equal Opportunities, stressed at the time of drafting the legislation that it should be interpreted as meaning

58 Ibid.

59 Perez Del Prado, "Women's Health and Labour Law."

60 For example, in the following sources: Drishti, "Issue of Menstrual Leave for Women"; Isabel Jackson, "A Year on from Spain's Menstrual Leave Law – What Have We Learned?," People Management, June 10, 2024, accessed January 31, 2025, https://www.peoplemanagement.co.uk/article/1876316/year-spains-menstrual-leave-law-%E2%80%93-learned.

61 Perez Del Prado, "Women's Health and Labour Law."

62 Jessica Pearson and Michelle Morgan, "Menstrual Leave in the Workplace," Shoosmiths, September 8, 2023, accessed January 31, 2025, https://www.shoosmiths.com/insights/articles/menstrual-leave-in-the-workplace.

that the worker would only be entitled to leave in the event of serious health complaints.[63] This narrows the scope of the legislation considerably.

Unfortunately, there has been little empirical research on the monitoring and impact of menstrual leave in Spain, so there is little empirical research to date. However, since the entry into force of the Spanish law, there have been 1,559 menstrual leave withdrawals, according to the Spanish Ministry of Integration, Social Security and Migration. In addition, it was found that between June 1, 2023 and April 24, 2024, an average of 4.75 people took menstrual leave per day, while the average duration was 3.03 days.[64]

3. Comparison of International Examples

The above examples of national and regional social policies on menstruation show that menstruation is a very important factor in the development of labor law and social law. A difference can be observed in the underlying motivations. The introduction of such a legal provision can be justified by the argument of promoting reproductive health (Spanish legislation), which focuses on menstruation in the lens of health and safety protection at work (China). Menstruation can also be assessed as a gender-specific issue in the field of labor law (Vietnam), which promotes the protection of mothers and women (South Korea, Zambia), but its impact, which may be linked to the birth rate, cannot be ignored, and its demographic dimension must also be assessed (Taiwan). An important argument is made by Spain, which stresses the right to work without pain, and by Mexico, which concludes that physical and mental well-being is essential for the exercise of labor rights.

In addition to the argumentation, the specific regulations and their main motives may be instructive for legislators working on the social and labor rights assessment of menstruation. To this end, the main points of the above research findings can be illustrated in the following table.

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63 András Mizsur, "Menstruációs szabadság bevezetését tervezik Spanyolországban, három nap járna a fájdalmaktól szenvedő nőknek," Telex, May 12, 2022, accessed January 31, 2025, https://telex.hu/kulfold/2022/05/12/spanyolorszag-menstruacios-szabadsag-torveny-tervezet.

64 Jackson, "A Year on from Spain's Menstrual Leave Law."

TABLE 1. Table comparing national examples of menstrual leave

Country, region	Regulation	Remuneration	Experiences
Japan	Labor law – regulation does not specify the number of days off.	It is up to employers to decide whether they are remunerated.	One third of companies guarantee full or partial pay on a voluntary basis, however, less than 1% of female workers take menstrual leave (for socio-cultural reasons).
South Korea	Labour law – one day per month, to be issued by the employer, prior request required.	Unpaid leave.	Despite the risk of fines for employers, 1/5 of female workers take up this option; employers' practices that violate human dignity.
Indonesia	Labor law – possibility of up to two days per month, details to be worked out by the parties in a collective agreement; may be paid in case of pain; workers must give prior notice before taking advantage of the service.	Paid leave.	Employers often fail to provide menstrual leave, and require material evidence of an offensive nature that violates human dignity.
Taiwan	Labor law – one day per month, but up to three days per year, for difficulties due to menstruation (wider than just painful menstruation).	Sick leave at the same rate as sick leave, 50% of the average salary.	Rarely used due to lack of flexibility, the need for medical certification and inadequate information on how to claim.
Zambia	Labor law – one day per month, no medical certificate or prior information required.	n/A	Although there is no legal requirement for prior information from the employee or a medical certificate, employers still require them.
Vietnam	Labor law – thirty extra minutes a day during menstruation days and at least three days a month, with the parties negotiating the details individually.	n/A	n/A
Chinese provinces	Labor law – 1–2 days per month possible, medical certificate required.	n/A	Where not mandatory, not effectively implemented; fear of misuse.
Spain	Social security law – no maximum monthly rate + medical certificate required.	Covered by social security (75% of the income used as the basis for calculation).	Trade unions fear stigmatization (employers less likely to hire women); 1 year 1559 claims.

Source: own compilation

The data above shows that there are significant differences in national rules on menstrual leave, so there is no uniform concept and no best practice approach to menstruation in labor law. One can talk about a social security-based approach (Spanish solution), but the labor law approach is more common. There are provisions for paid rest periods, but this is not necessarily a feature (South Korea, Japan). There are some provisions that are cogent, but also some that explicitly allow derogations from the law up to the level of the collective agreement, while in others it is entirely up to the parties to agree on the details in individual agreements, or even the employer's unilateral decision may influence the implementation of menstrual leave, as in the Japanese example on pay. There are also differences in the amount of time off and in the conditions (medical certificate, prior notification), which are not covered in this study, but which the author highlights: can menstrual leave be granted only in cases of painful menstruation (dysmenorrhea) or in a wider range of cases (e.g. heavy bleeding)? The above examples also include a more progressive solution covering a wider range of cases, such as Taiwan, and a much narrower scope example for Spain. Therefore, we can conclude that it is of utmost importance for the national legislator to assess the full range of options, as there are many points where a nation's menstrual policy can be specific. An evaluation of the legal structure of these examples is beyond the scope of this paper, but we draw attention to the importance of this evaluation, which the author intends to publish in forthcoming research.

4. Conclusion

The international scientific discourse is increasingly turning towards previously unexamined, almost taboo subjects, including menstruation, one of the unfairly neglected M's (menstruation, motherhood, menopause). Menstruation, working during menstruation, is a situation that affects a large part of the world's population and is therefore difficult to accept if a national legal system does not regulate the labor and social law aspects of this natural phenomenon. One of the main reasons for this is the nature of patriarchal social structures and legal constructions, which ignore women's specific characteristics. There are very few nations where the legal system regulates menstruation in any way, or associates it with any supportive

measures. The paper presents the main known examples of national or regional employment policy instruments, with a focus on Asian countries. These regulations were analyzed, which led to the conclusion that there is no universal, flawless and exemplary menstrual leave and its framework, but that its functioning is also greatly influenced by the social context and the attitude of the social partners. Unfortunately, despite the fact that menstrual leave is introduced in a country, there are still instances of degrading treatment of female workers, and even menstrual leave itself induces it. This underlines an important lesson that must be emphasized both by the legislator and by the social partners: in order to improve the situation of women, in addition to the very important creation of labor and social law institutions, it is also important to change the cultural and social environment, which in the long term can only be based on the related educational activities.

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European and EU Standards of Rights and Protection of Child Victims of Crime and Their Implementation in the Polish Criminal Process Through Amendments to the Code of Criminal Procedure in 2020–2023

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Abstract: The basic assumption of the article is to examine to what extent the latest amendments to the Polish Code of Criminal Procedure (CCP) are in line with international standards of rights and protection of child victims of crime. It should be noted that between 2020 and 2023, the Polish justice system has undergone significant evolution in this area, striving to meet the standards of child-friendly justice specified by legal acts of the Council of Europe and European Union legislation. The following acts were of particular importance here: of 13 January 2023, 7 July 2023, 27 July 2023 amending the provisions of CCP introducing, among others, the institution of individual assessment of the needs of victims (Article 52a), the legal representative of a minor victim (Article 51 § 2a) and amending the procedures for interviewing minor victims and witnesses specified in Articles 185a–185c and f of the Polish CCP. All these amendments will be assessed in the context of the standards set by the Council of Europe Convention on the Protection of Children against sexual exploitation of 25 October 2007 and the Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011. Regarding EU standards, it is necessary to examine the standards of rights

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and protection of child victims of crime contained in Directive 2011/93/EU of 13 December 2011 on combating sexual abuse and sexual exploitation of children and Directive 2012/29/EU of 25 October 2012 on minimum standards of protection, rights and support for victims of crime and the draft amendments to this directive of 23 July 2023. This article highlights the most important of the Polish CCP changes in 2020–2023 and presents the current state of implementation of the above mentioned European and EU standards into Polish criminal procedure.

1. Introduction

The establishment of Council of Europe and EU standards relating to child victims is justified on the one hand by the magnitude of crimes committed against children and, on the other hand, by studies indicating their special status as victims and witnesses of such crimes requiring appropriate regulation of their protection and interview procedures.[1] In the case of a child witness, the problem of credibility is particularly pronounced since, as studies show, children, especially in the early stages of development, have a limited ability to perceive and communicate their observations, a natural tendency to confabulate and a susceptibility to suggestion. At the same time, for a child, being a witness is particularly difficult and stressful. Taking into account all these factors, the literature indicates that those who interview children face two tasks: they must strive to obtain a full, credible description of the event and carry out this activity in such a way as to protect the child's psyche damaged by the experiences. The European and EU standards outlined below provide for the essential protective rights of child victims in the criminal process. Noting a certain multiplication (duplication) of these standards in the acts of the Council of Europe and the EU, one can notice that they do not generally refer to the rights of children as active parties

[1] For more, see: Cezary Kulesza, *Wiktymologia procesowa* (Białystok: Temida 2, 2020), 65–74; Matthew McVarish, Marci Hamilton, and Miguel Hurtado, "Justice Unleashed; Ending Limitations, Protecting Children," Brave Movement, 2023, accessed July 10, 2024, https://cdn.bravemovement.org/files/Justice-Unleashed-In-Europe.pdf; Katarzyna Makaruk et al., "Diagnoza przemocy wobec dzieci w Polsce 2023," Fundacja Dajemy Dzieciom Siłę, Warsaw 2023, accessed July 12, 2024, https://fdds.pl/_Resources/Persistent/0/e/3/9/0e397c8f31d01856cd8d4a9430e56eade6648565/Diagnoza%20przemocy%20wobec%20dzieci%20w%20Polsce%202023%20FDDS.pdf.

to criminal proceedings. It seems that the first act of EU law providing for the rights of victims of crime (including children) to active participation in the criminal process is Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

The Polish criminal procedure implementing European and EU standards has for years provided for specific protective procedures for the interview with a minor as a witness, which are premised on achieving both of the above-mentioned goals of interviewing a child. It should be added that, in addition to protecting the child from trauma and secondary victimization, they must take into account the guarantees of the rights of the accused under the ECHR standard of fair trial.

2. European Convention on Human Rights

Referring to European standards, it should be noted that the rights of crime victims (and thus the rights of child victims) are inextricably linked to human rights.[2] In the sphere of international law, however, it should be noted that the European Convention on Human Rights (ECHR) of 1950[3] does not refer to the procedural rights of victims of crimes, as it essentially regulates the positive obligations of states to their citizens: to provide them with effective criminal law protection against violations of the fundamental rights guaranteed by Article 2 ("Right to life"), Article 3 ("Prohibition of torture") or Article 8 ("Right to respect for private and family life").[4] A landmark in the European Court of Human Rights's (ECtHR) implementation of the positive duties of the state in cases of domestic violence was the 2009 judgment in the case of Opuz v. Turkey.[5] The case concerned a perpetrator who abused the applicant and her mother for years; the Court found a violation not only of Articles 2 and 3 but also of Article 14 of the ECHR in the form of gender discrimination. Pointing to the positive obligation of state authorities to take effective action by operational measures to prevent domestic violence,

2 Albin Dearing, *Justice for Victims of Crime. Human Dignity as the Foundation of Criminal Justice in Europe* (Vienna: Springer, 2017), 9–24.

3 European Convention on Human Rights of 4 November 1950, Journal of Laws 1993, No. 61, item 284.

4 Andrew Ashworth, Ben Emmerson, and Alison Macdonald, *Human Rights and Criminal Justice*, 3rd ed. (London: Sweet & Maxwell, 2012), 790–823.

5 ECtHR Judgment of 9 June 2009, Case Opuz v. Turkey, application no. 33401/02, hudoc.int.

the ECtHR noted at the same time that a condition for the emergence of such a positive obligation is that the state obtains knowledge of a real threat to a particular individual and, despite this, does not use the means at its disposal to eliminate it.

In the current ECtHR case law on children, it is appropriate to point to the judgment (Grand Chamber) of the ECtHR of 15 June 2021 in the case of Kurt v. Austria.[6] The complaint concerned a situation where Austrian authorities failed to protect the applicant and her children from her violent husband, which led to the murder of their son (the husband shot his son at school and then committed suicide). In the judgment, the ECtHR clarified the operation of the general principles applicable to domestic violence cases under Article 2 of the ECHR. However, the Court recognized the rationale of the Austrian government, that based on the circumstances of the case, there was nothing to indicate a real and imminent danger of a risk of further violence by the husband against the applicant's son outside the areas for which the previously applied restraining order was in effect. As a result, the Court accepted that the measures adopted to protect against further victimization of the child were adequate and concluded that there was no violation of Article 2 of the ECHR.

3. Lanzarote Convention

European standards for the protection of children from sexual abuse of any kind were set by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007,[7] also known as the Lanzarote Convention, ratified by all Member States (MS) of the Council of Europe (on 26 September 2014 by Poland). It introduced the obligation for parties to the Convention to criminalize intentional conduct involving the sexual abuse of children (Articles 18–23). The Convention also contains criminal-procedural regulations (Chapter VIII) defining the principles of pre-trial and trial proceedings in cases of crimes under the Convention, including that pre-trial and judicial proceedings are to be conducted in the best interests of the child and with respect for the child's

6 ECtHR Judgement of 15 June 2021, Case Kurt v. Austria, application no. 62903/15, hudoc.int.

7 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 ratified by Poland on 26 September 2014 (Journal of Laws of 2015, item 609) came into force on 1 June 2015.

rights, not to intensify or compound traumatic his or her experiences and that the procedural authorities should provide the child with the necessary assistance (Article 30). The initiation of proceedings in such cases must not depend on the filing of a notice or accusation by the victim, and the withdrawal of testimony by the victim must not prevent further proceedings (Article 32). The initiation of pre-trial proceedings should not be prevented by uncertainty about the actual age of the victim (Article 34 (2)).[8]

Parties to the Convention are to ensure that their domestic laws concerning the practice of certain professions involving work with children do not, for reasons of confidentiality, prevent such persons from informing the relevant services responsible for child protection of any reasonable suspicion that a child has been the victim of sexual abuse or sexual exploitation. In addition, the Convention recommends encouraging any person who knows or suspects, in good faith, that a crime of sexual abuse and sexual exploitation of a child has been committed to report such a case to the relevant authorities (Article 12).

4. Istanbul Convention

The Lanzarote Convention's provisions on the protection of children's rights are referred to by the Council of Europe Convention on preventing and combating violence against women and domestic violence, signed in Istanbul on May 11, 2011, also known as the Istanbul Convention.[9] The Convention obliges MS to ensure that in providing protection and support to victims, due attention is paid to the rights and needs of children who witness all forms of violence covered by the Convention. Measures of protection and support should include age-appropriate psychological assistance and social support for children witnessing violence and should be undertaken, taking into account the best interests of the child (Article 26). It is clear from the wording of Article 26 of the Istanbul Convention that it applies to minor victims and witnesses in the factual sense, that is, children who have been harmed by acts of violence or have witnessed them. However, it undoubtedly also applies to

8 Kamil Federowicz, *Przesłuchanie małoletnich i ofiar przestępstw seksualnych* (Warsaw: Wolters Kluwer, 2020), 36 et seq.

9 Convention on preventing and combating violence against women and domestic violence, signed in Istanbul on 11 May 2011, ratified by Poland on 6 February 2015 (Journal of Laws of 2015, item 961), came into force on 1 August 2015.

children appearing as witnesses in a criminal trial.[10] Article 27 obliges parties to the Convention to adopt measures to encourage persons who witness acts of violence falling within the scope of the Convention or who have reasonable grounds to suspect that such an act may be committed or that further acts of violence may be expected, to report this to the competent organizations or authorities, should be considered important from the point of view of the effectiveness of the prosecution of violence against children. In turn, Article 28 stipulates that parties are required to take the necessary measures to ensure that confidentiality rules imposed by domestic law on persons in certain professions do not, in appropriate circumstances, prevent them from reporting to competent organizations or authorities a reasonable suspicion that a serious act of violence falling within the scope of the Convention has been committed or if further acts of violence may be expected.[11]

The rights of victims of violence (including children) related to their participation in the criminal process are regulated in Chapter VI of the Convention. Article 49, which begins this chapter, contains (as does Article 30 of the Lanzarote Convention) a general obligation on the states parties to the Convention to ensure that the pre-trial investigation and prosecution of all forms of violence covered by the Convention are conducted without undue delay and, at all stages of the criminal proceedings, with respect for the rights of the victim. The drafters of the Convention stressed that any measures taken to implement the commented provision do not violate the right to defense and the requirements of a fair and impartial trial guaranteed by Article 6 of the ECHR.[12] Other regulations provide for the obligations of MS to provide measures for prompt response, prevention and protection against such crimes (Article 50), the use of prohibitions and orders (Article 53), and

10 Cezary Kulesza, "Ochrona i wsparcie [Art. 26]," in *Konwencja o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej. Komentarz*, eds. Ewa Bieńkowska and Lidia Mazowiecka (Warsaw: Wolters Kluwer, 2016), 332.

11 Cezary Kulesza and Piotr Starzyński, "Ochrona i wsparcie [Art. 26–28]," in *Konwencja Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej. Komentarz*, eds. Ewa Bieńkowska and Lidia Mazowiecka (Warsaw: Wolters Kluwer, 2016), 349–367.

12 See: Cezary Kulesza, *Prawa dziecka pokrzywdzonego przestępstwem w polskim systemie wymiaru sprawiedliwości w świetle standardów europejskich* (Warsaw: Wolters Kluwer, 2024), 37–41; *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, Council of Europe Treaty Series, no. 210 (Brussels: Council of Europe, 2011), 43, accessed May 10, 2024, https://rm.coe.int/16800d383a.

limiting the admission at trial of evidence related to the victim's previous sexual life and lifestyle (Article 54). Article 55 stipulates the obligation to prosecute crimes of violence regardless of the initiative of the victim. Existing commentaries justify the omission of an analysis of these provisions and reports on the implementation of the Convention in Europe.[13]

5. Directive 2011/93/EU

The most important piece of EU legislation in combating sexual crimes against children is undoubtedly Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011.[14] Its scope and construction are similar to the Council of Europe Convention of 25 October 2007 described above. However, one should consider the different binding forces of European conventions and EU directives. While the former, in the case of their ratification by Poland, become, as international agreements, the source of Polish law binding directly, the EU directives are not "self-executing" and require implementation into Polish law by appropriate laws. The EU legislator leaves the national legislator a certain amount of freedom in the statutory determination of achieving the goals set by the directive.

As for the criminal procedural regulation of the directive, as with the Lanzarote Convention, MS must take the necessary measures to ensure that the prosecution and indictment of the crimes referred to in Articles 3–7 are not conditional on the filing or withdrawal of a complaint or indictment by the victim or his or her representative, and the prosecution itself should be effective (Article 15). The directive also recommends that the confidentiality rules that national law requires of professionals, whose main duty is to work with children, should not prevent those professionals from reporting to child protection services any situation where they have reasonable grounds to believe that a child is being harmed as a result of the crimes referred to in Articles 3–7 (Article 16).

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13 Sławomir Hypś, "Implementation of the Istanbul Convention into the National Criminal Legislation in Poland," *Review of European and Comparative Law* 55, no. 4 (2023): 221–42; Group of Experts on Action against Violence against Women and Domestic Violence, "1st General Report on GREVIO'S Activities," Council of Europe, April 2020, 24–41, accessed June 10, 2024, https://rm.coe.int/1st-general-report-on-grevio-sactivities/16809cd382.

14 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, OJ L335, 17 December 2011.

The directive attaches great importance to the protection, support and assistance of child victims of sexual abuse, and MS are to provide them, guided by the best interests of children (Article 18(1)). In describing these measures, it should be noted that they are similar in principle to the protection and support measures provided by the Lanzarote Convention; on the other hand, they have been in some way duplicated by a more universal later EU act as applying to all victims of crime, namely Directive 2012/29/EU, commented on later in the article. With regard to the commented Directive 2011/93/EU, it should be pointed out that specific measures to provide child victims with assistance and support that enable them to exercise their rights under the directive were taken after an individual assessment of the specific situation of each child victim, taking due account of the child's views, needs and concerns (Article 19(2) and (3)). Since children are victims with special protection needs, the special protection measures provided for in Article 20 of the directive apply to them, namely – a special representative for an aggrieved child if, under national law, persons with parental authority cannot represent the child due to a conflict of interest between them and the aggrieved child or if the child is unaccompanied or separated from the family.

Noting the potential for conflict between the protective rights of the child and the rights of the accused, the directive states in Article 20(3) that "Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations relating to any of the offences referred to in Articles 3 to 7":

- interviews with child victims are held without undue delay after the facts are reported to the competent authorities, if necessary, in premises specially designed or adapted for this purpose, and conducted by or with the participation of specialists properly trained for this purpose and, if possible, by the same person;
- the number of interviews be as limited as possible and conducted only in cases where it is strictly necessary for the purposes of pre-trial or judicial proceedings;
- the child victim may be accompanied by a legal representative or, in appropriate cases, an adult of the child's choice, unless a reasoned decision to the contrary has been made regarding that person.

In turn, Article 20(4) stipulates that interviews with a child victim or witness could be audiovisually recorded and that these recorded interviews could be used as evidence in criminal court proceedings.

In addition, Article 20(5) provides for protective measures for the child during the trial, namely the exclusion of the public hearing in such cases or ensuring that the child victim can be questioned in the courtroom without being present, in particular through appropriate communication technologies. As indicated in the literature, compared to the catalogue of special protection measures for child victims of crimes set forth in Articles 23 and 24 of Directive 2012/29/EU, the catalogue in the commented directive is somewhat more extensive, as it specifically includes the additional protection measures set forth in Article 20(2) and (3) of the latter.[15]

6. Directive 2012/29/EU

The preamble to Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012[16] indicates that "children's best interests must be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child." It also points out that child victims should be recognized as the full bearers of rights set out in the directive and thus be entitled to exercise those rights in a way that takes into account their ability to form their own opinions (paragraph 14).

As for the content of the directive itself, it is worth noting Article 1(2), according to which, when the victim is a child, the best interests of the child must be considered first and evaluated on a case-by-case basis. In turn, the child's age, maturity level, opinions, needs, and concerns must be considered first. The child and the person exercising parental authority over the child or the legal representative must also be informed of measures or rights specifically addressed to the child. Undoubtedly, the general provisions of Chapter 3 of the directive governing

15 Ewa Bieńkowska, *Wiktymologia* (Warsaw: Wolters Kluwer, 2018), 198.

16 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L315, 14 November 2012.

the participation of all victims in criminal proceedings (Articles 11–17) apply to children.[17]

However, from the point of view of the problems of this study, the most important is Chapter 4 of the Directive on the protection of victims and the recognition of victims with special protection needs.[18] It is appropriate to highlight Article 22(1), which stipulates that MS must ensure that the victims "receive a timely individual assessment" to determine whether they have specific protection needs and whether it is reasonable to apply to them (if they so wish) the special measures provided for by Articles 23–24. In turn, point 4 of Article 22 explicitly accepts that victims with special protection needs are children since, as victims, they are, as it were, by definition, vulnerable to secondary and repeat victimization, intimidation and retaliation. It should be added that according to Article 2(c), any person under the age of 18 is considered a child. However, even children are subjected to the individual assessment set forth in Article 22(1) to determine whether and to what extent they would benefit from the special protective measures specified in Articles 23 and 24. Moreover, even if the individual assessment supports, in the opinion of the assessor, the application of the protective measures provided for in Articles 23 and 24, the will of the victim, including the wish not to benefit from these measures, must be taken into account when making such a decision (Article 22(6)).[19] Once made, the individual assessment need not be final since if the elements on which it is based change significantly, it should be updated throughout the criminal proceedings (Article 22(7)). Article 24 stipulates that where the victim is a child (and therefore a person under 18 years of age), the Member State should provide for the following measures: all pre-trial hearings of the victim may be audiovisually recorded, and such recording

17 Cezary Kulesza and Piotr Starzyński, "Udział w postępowaniu karnym," in *Dyrektywa Parlamentu Europejskiego i Rady 2012/29/UE. Komentarz*, eds. Ewa Bieńkowska and Lidia Mazowiecka (Warsaw: Wolters Kluwer, 2014), 130–228.

18 For more, see: Lidia Mazowiecka, ed., *Indywidualna ocena służąca ustaleniu szczególnych potrzeb ofiar przestępstw w zakresie ochrony* (Warsaw: Wolters Kluwer, 2015); Kulesza, *Wiktymologia procesowa*, 126–31.

19 European Commission, DG Justice, "DG Justice Guidance Document," Bruxelles: December 2013, accessed June 25, 2024, https://commission.europa.eu/document/download/f1f42e20-e4a1-4d8b-a1ef-d06acccba34e_en?filename=crd_guidance_en_0_updated.pdf.

may be used as evidence in criminal proceedings. Procedures for audio-visual recording and their use are determined by national law.

In pre-trial and court proceedings, in accordance with the role of victims in the relevant justice system, the competent authority should provide the victim with a special representative in situations where, according to national law, persons exercising parental authority are excluded from representing children as a result of their conflict of interest with the child, or in situations where the child is unaccompanied or separated from the family (Article 24(1b)). In addition, when a child victim has the right to legal counsel, he or she is entitled to his or her own legal counsel and representation, on his or her own behalf, in proceedings in which there is or may be a conflict of interest between the child victim and those exercising parental authority (Article 24(1)(c)). This can be considered a kind of *lex specialis* to Article 13, defining the right of victims to legal aid.

Article 24(2) establishes a kind of presumption, providing that where it is impossible to determine the age of a victim, and there is reason to believe that the victim is a child, such victim should be considered a child.

Following a series of consultations with EU MS and studies, including an assessment of the functioning of Directive 2012/29/EU in MS, the European Commission has published a draft directive of the European Parliament and of the Council of 23 July 2023, amending Directive 2012/29/EU.[20]

Among the most important proposals relating to child victims, one can point to the obligation of MS to establish "targeted and integrated child support services," providing for the provision of such friendly and targeted specialized services to ensure the age-appropriate support and protection necessary to comprehensively address the diverse needs of child victims. Such targeted and integrated child-victim support services should be organized in the form of a coordinated multi-agency mechanism and be provided at a single location, following the Barnahus model.[21]

The draft clarifies the principles of individual assessment of victims with special protection needs (Article 22 of the directive) and recommends

[20] See: Kulesza, *Prawa dziecka pokrzywdzonego przestępstwem*, 83–100.

[21] See: Mary Mitchell, Laura Lundy, and Louise Hill, "Children's Human Rights to 'Participation' and 'Protection': Rethinking the Relationship Using Barnahus as a Case Example," *Child Abuse Review* 32, no. 6 (2023): 1–7, https://doi.org/10.1002/car.2820.

that such assessment be made permanently, depending on the situation. In order to ensure effective protection of the child victim in cases where the person with parental custody of the child is suspected (accused) of committing a crime or there is a conflict of interest between the child and the person with parental custody, the draft adds a provision ensuring that in such cases, notification of the crime, medical examination or forensic interview, referral to support services or psychological support, and other actions concerning the child should not be subject to the consent of the person with parental or legal custody, and must have the child's best interests at heart (amended Article 24 of the directive).

7. The Protective Rights of a Child Witness in the Polish Justice System

Due to the rich literature relating to the role of the victim in the criminal process, this chapter focuses on the rights of the child as a witness and party to the proceedings in light of the amendments to the Polish Code of Criminal Procedure (CCP) of 1997 in recent years, most notably those made by the Acts of 16 December 2020,[22] 7 July 2022,[23] 13 January 2023,[24] 7 July 2023[25] and 28 July 2023.[26]

A very significant change to the CCP in the protection of the child victim as a party to the proceedings and as a witness should be considered the introduction by the amendment of 16 December 2020 of Article 52a providing for individual assessment of the needs of victims concerning their protection. This provision, in the current wording of § 1, stipulates that in the case of evidentiary actions with the participation of victims, taking into account the need to apply the victim protection measures listed in this regulation, the body conducting criminal proceedings must determine the circumstances of the case, in particular regarding the characteristics

22 Act of 16 December 2020, Journal of Laws, item 155, Act amending the CCP effective 9 February 2021.

23 Act of 7 July 2022, Journal of Laws of 2022, item 2600, as amended, Act amending the CCP effective 1 October 2023.

24 Act of 13 January 2023, Journal of Laws of 2023, item 289, Act amending the CCP effective 15 August 2023.

25 Act of 7 July 2023, Journal of Laws of 2023, item 2600, as amended, Act amending the CCP effective 1 October 2023.

26 Act of 28 July 2023, Journal of Laws of 2023, item 1606, Act amending the CCP effective 15 February 2024.

and personal conditions of the victim, as well as the nature and extent of the negative consequences of the crime. According to § 3 of Article 58a, the findings referred to in § 1 are made by the body conducting criminal proceedings using a questionnaire for individual assessment of the victim no later than before the commencement of the proceedings are drawn up based on a model developed on the basis of a regulation of the Minister of Justice. In the context of children's rights, it should already be noted that the individual assessment will not be carried out in particular when the application of such a protection procedure is mandatory, such as in the case of a victim and a witness under 15 years of age at the time of interview (Articles 185a and 185b). This provision is undoubtedly an implementation of the previously described Article 22 of Directive 2012/29/EU.

Protective procedures for interviewing a child differ in the subject matter concerning the child (a child victim of a crime or a child who is merely a witness to a crime, a child who is under the age of 15 or 18), the subject matter concerning the crime (the types of crimes in which these modes of interview are used), and the intensity of child protection measures in these procedures. Based on the above criteria, the following child interview procedures can be conventionally distinguished:

(1) Rules for interviewing a child under Article 171 § 3, 4a and 8 of the CCP.
(2) Interviewing a minor (who is under 15 years of age at the time of interview) victim and witness of crimes specified in Chapters XXIII, XXV and XXVI of the Criminal Code by the court at a session (Articles 185a and 185b of the CCP).
(3) Interviewing a minor victim of sexual crimes specified in Articles 197–199 of the Criminal Code by the court in session (Article 185c of the CCP).
(4) Interviewing a witness with a disorder by the court in session (Article 185e of the CCP).
(5) Interviewing a victim at the trial in the absence of the accused (Article 390 of the CCP).

Undoubtedly, the procedure for interviewing a minor witness under Article 171 has the broadest scope in terms of subjects and objects, but compared to the other procedures, it offers the lowest degree of protection for the child (interview in the presence of the accused and the possibility of multiple interviews, including at trial).

On the other hand, hearings under Articles 185a–c and 185e, f of the CCP provide the widest range of protection for minor witnesses (or witnesses with disorders); the common principles for such hearings can be pointed out as follows:

- the principle of indispensability and one-time interview, which is conducted using audio recording;
- ensuring the freedom and credibility of testimony[27] and protection from trauma and secondary victimization by conducting the interview by the court in a session with the participation of an expert psychologist, possibly legal representatives, guardians, a representative or an adult person designated by the minor, but without the presence of the accused.

The analysis will be limited to the current state of the law in describing the different types of interviews applicable to child witnesses, with particular attention to the changes introduced by the amendment to the CCP of 13 January 2023 (effective 15 August 2023).

After the amendment of 13 January 2023, if the person being interviewed is under 18 years of age, the activities with his/her participation should, if possible, be carried out in the presence of the legal representative or actual guardian unless the good of the proceedings prevents this (Article 171 § 3 of the CCP). Studies of the procedural practice of Western countries and Polish experience indicate that interviewing children in the presence of parents or guardians was more effective and reduced the trauma resulting from the crime.[28] In addition, as of 15 August 2023, the legislature strengthened the protection of the privacy of all witnesses,

[27] For more about credibility of the children's testimony in sexual abuse cases, see: Jacquelynn F. Duron, "Searching for Truth: The Forensic Interviewer's Use of an Assessment Approach While Conducting Child Sexual Abuse Interviews," *Journal of Child Sexual Abuse* 29, no. 2 (2020): 183–204; Elaine Craig, "Child's Play or Sexual Abuse? Reviewing the Efficacy of the Justice Framework in Dealing with Child on Child Sexual Abuse in the United Kingdom," *Journal of Child Sexual Abuse* 29, no. 6 (2020): 734–48; Ines Chima et al., "Child Sexual Abuse Myth Scale: Validity and Reliability Evidence in the Portuguese Context," *Journal of Child Sexual Abuse* 29, no. 7 (2020): 802–20; Charlotte A. Bücken et al., "'Nothing Happened': Legal Implications of False Denials Among Abused Children," *Child Abuse Review* 32, no. 2 (2023): 1–11.

[28] For more, see: Alicja Budzyńska, "Ochrona małoletnich pokrzywdzonych przestępstwem w procedurach karnych. Perspektywa psychologiczna," in *Dziecko uczestniczące w postępowaniu karnym*, ed. Lidia Mazowiecka (Warsaw: Wolters Kluwer, 2015), 44–6.

introducing the new § 4a, which prohibits asking a witness questions about his or her sex life unless necessary for the resolution of the case. At the same time, the amended § 6 indicates that such questions and irrelevant questions would be waived. As noted in the explanatory statement of the draft amendment, this regulation will, at the same time, fulfil the requirements of Article 54 of the Istanbul Convention. Article 171(8), added by this amendment, requires the interviewing authority to provide information to a witness under 18 years of age before the first interview about the course, manner and conditions of the interview. The obligation to properly instruct the child witness is also indicated in its case law by the ECtHR.[29]

The legislator, through the amendment of 13 January 2023, amended Articles 185a § 1, 185b § 1, 185c § 1 and introduced new Article 185e of the CCP, effective 15 August 2023, in such a way that the repeated interview with a minor victim is subject to the court's granting of the evidentiary request of an accused who had no defense counsel at the time of the first interview of the victim.[30]

To summarize the considerations relating to protective procedures for the interview of minor witnesses (Articles 185a and 185b, as well as the provisions of Articles 185c and 185f insofar as they can be referred to child witnesses), the basic change in this regard was the restriction by the amendment of 13 January 2023 of the possibilities of repeated interview of such a minor witness. It introduced the general rule that the re-examination of a child is possible only if significant circumstances come to light, the clarification of which requires re-examination, or if the evidentiary request of the accused, who had no defense counsel at the time of the first interview with the victim, is granted. This evidentiary motion will not be binding on the court and can be dismissed on the grounds provided for in Article 170, and the decision to dismiss the motion will not be appealable. Thus, to sum up, it can be said that in the case of the dismissal of the request of the defendant for a repeated interview, who had no defense counsel at the time of the first interview of the minor, then, taking into account that

[29] ECtHR Judgment of 22 June 2021, Case R.B. v. Estonia, application no. 22597/16, hudoc.int.

[30] For more, see: Olga Trocha, Monika Horna-Cieślak, and Paulina Masłowska, *Metodyka reprezentacji małoletniego pokrzywdzonego w sprawach przestępstw seksualnych* (Warsaw: Wolters Kluwer, 2024), 217–23.

the defendant does not participate in the special modes of the interview under Articles 185a–185c and 185e, it may be that the defense will be deprived of any opportunity to participate in the interview of the minor witness. Thus, it seems that as a result of the amendment of 13 January 2023, the legislator has dangerously upset the balance between the guarantees of the right of the accused under Articles 6(3)(c) and 6(3)(d) of the ECHR and the right to protect the minor victim from secondary victimization.[31]

It is also worth pointing out the amendment to the preventive measure specified in Article 275a of the CCP, introduced by the Act of 13 January 2023 on the preventive measure by extending the order provided for therein to periodically order the defendant for a violent crime committed against a cohabiting person to leave the premises occupied jointly with the victim to include a restraining order prohibiting the defendant from approaching the victim at a specified distance if there is a reasonable fear that the defendant will again commit a violent crime against that person, especially if he/she has threatened to commit such a crime.

The protection of the freedom of testimony of all witnesses, including child victims, in court proceedings is undoubtedly the aim of Article 390 of the CCP. Of particular note from the point of view of protecting victims (including children) is Article 390(3). It stipulates that, in the cases provided for in § 2, the presiding officer may also conduct an interview using technical devices that allow this action to be conducted at a distance with simultaneous direct transmission of video and audio. As for recent amendments, it is important to note the addition to Article 390 of the CCP by the amendment of 7 July 2023, a new § 4. It provides for special protection when interviewing at trial as a witness the victims of the most serious crimes (subject to a statutory penalty of a mandatory minimum of eight years of imprisonment), namely intentional crimes against life and health, against liberty or crimes involving violence or unlawful threats: an interview under conditions that exclude direct contact with the accused. Paragraph 4 provides a solution that in the case of the existence of the conditions

[31] Kulesza, *Prawa dziecka pokrzywdzonego przestępstwem*, 250–5; see also: Cezary Kulesza, "Conflict between the Rights of Victim of a Crime and the Rights of the Accused under the German and Polish Justice System in the Context of the Case-law of European Courts," *Studia Iuridica Lublinensia* 29, no. 4 (2020): 135–64.

specified in the provision and the filing of a request by the victim, the application of the institution of ordering the accused, by the presiding judge, to leave the courtroom for the duration of the interview with the person in question, while providing the accused with the opportunity to participate in this part of the hearing with the use of technical devices used for remote interview with direct video and audio transmission is relatively obligatory.

Concluding the discussion of protecting the child victim in court proceedings, it is appropriate to point to Article 360 § 1(2) of the CCP. It stipulates that the court may exclude the openness of the hearing in whole or in part if at least one of the defendants is a minor or for the duration of the examination of a witness who has not reached the age of 15. As indicated in its case law, the ECtHR has repeatedly pointed out that in the course of criminal proceedings, certain steps may be taken to protect the victim, provided that they are reconcilable with the adequate and effective exercise of the right of defense.[32]

8. The Rights of the Child Victim as a Party to the Proceedings

In a Polish criminal trial, an aggrieved child may act not only as a witness but also as a party to the proceedings, so the obligation provided for by EU standards (see Article 4 of Directive 2012/29/EU) to inform the child of his or her rights is particularly relevant here. As for the principle of procedural information (sometimes referred to as the principle of procedural loyalty), the new § 3 added by the amendment of 13 January 2023 to Article 16 of the CCP stipulates that if the participant in the proceedings is a person who has not reached the age of 18, or a person who is vulnerable, particularly due to age or health, the manner of instruction should be adapted to the person's age, health and mental development. This provision should be considered important as the preamble to Directive 2012/29/EU clearly indicates that both the UN 1989 Convention on the Rights of the Child and Directive 2011/93/EU should be respected in the justice system with regard to the observance of children's rights.[33]

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[32] See: ECtHR Judgment of 13 October 2020, Case Frăncu v. Romania, application no. 69356/13, hudoc.int.

[33] Ewa Bieńkowska and Lidia Mazowiecka, "Preambuła," in *Dyrektywa Parlamentu Europejskiego i Rady 2012/29/UE. Komentarz*, eds. Ewa Bieńkowska and Lidia Mazowiecka (Warsaw: Wolters Kluwer, 2014), 42–4, 54–5.

It is also worth noting the introduction by the Act of 28 July 2023 of the specified obligation in Article 21 of the CCP (incumbent on the prosecutor and the court, respectively) on the initiation and completion of *ex officio* proceedings against a parent or legal or actual guardian to the detriment of a minor – the family court with jurisdiction over the place of residence of the minor must be notified immediately (Article 21(1)(4)).

The amendment of 7 July 2022 expanded the rights of the victim under Article 49a of the CCP in such a way that the victim may, until the conclusion of the proceedings, file not only a request for damages and compensation for the harm suffered under Article 46 of the CCP (Article 49a § 1) but also a motion to adjudicate the criminal measure introduced by this amendment of the prohibition of contact with the victim specified in Article 41a § 1a of the Criminal Code (Article 49a § 1a of the CCP).[34] In turn, the new Article 49b, introduced by the amendment to the CCP of 16 December 2020, states that if doubts about the age of the victim cannot be removed, and there is a reasonable suspicion that the victim is a minor, the provisions of this Code concerning minor victims must be applied to the victim. This provision is undoubtedly an implementation of Article 24(2) of Directive 2012/29/EU.[35]

As mentioned earlier, in Polish pre-trial criminal proceedings, a child victim may act as a procedural party. However, due to the level of psychophysical development, the child is most often unable to effectively exercise his or her rights as a party to proceedings. An important change from the point of view of the representation of a minor victim in criminal proceedings in a conflict of interest between the minor and his/her parents or guardians is the addition by the amendment of 28 July 2023 to Article 51 new § 2a. It states that the court and, in pre-trial proceedings, the prosecutor immediately, no later than within seven days from the date of the occurrence of the circumstances referred to in Article 98 § 2 of the CCP, apply to the guardianship court for the appointment of a representative for the child referred to in Article 99 § 1 of the Family Code. Currently, by virtue of

[34] For more, see: Agata Ziółkowska, "Środki karne," in *Kodeks karny. Komentarz*, ed. Violetta Konarska-Wrzosek (Warsaw: Wolters Kluwer, 2023), 302–15.

[35] Hanna Paluszkiewicz, "Pokrzywdzony," in *Kodeks postępowania karnego. Komentarz*, ed. Katarzyna Dudka (Warsaw: Wolters Kluwer, 2023), 159.

99^1 § 1 of the Family Code, which also applies in criminal cases, a child's representative in criminal cases may be an attorney or legal counsel who demonstrates special knowledge of cases involving children.[36] The premise of the child's procedural representative is to increase the effectiveness of protecting the child's procedural rights as a party to the proceedings since, as research indicates, the activity of legal representatives and guardians representing the child is unsatisfactory.[37] It should be added that the effectiveness of prosecuting sexual crimes is to be served by the principle of prosecuting them *ex officio* and the legal obligation to prosecute them set forth in Article 240 § 1 of the Criminal Code.

9. Summary

The following table presents the most recent changes to the Polish CCP analyzed above regarding the protective rights of the child victims as witnesses and their rights as parties to the proceedings, juxtaposed with the standards of European and EU law, whose implementation was intended by the 2020–2023 amendments of the CCP.

Table 1. Rights of the child victims of crime in the amended Polish CCP in comparison with European and EU standards

Regulations of the Polish CCP	Purpose of regulation	Implemented European standard	Implemented EU standard
Protective rights of a child witness			
Interviewing the minor victim and witness by the court in a "blue room" session – Articles 185a, 185b and 185c of the CCP.	Protecting the minor witness from the trauma of having to re-examine him or her at a public hearing in the presence of the accused while reviewing the credibility of his or her testimony and ensuring the accused's right to counsel.	Article 35 of the Lanzarote Convention	Article 23(2) and (3) and 24(1) of Directive 2012/29/EU Article 20(3) and (4) of Directive 2011/93/EU

[36] For more, see: Trocha, Horna-Cieślak, and Masłowska, *Metodyka reprezentacji małoletniego*, 80–104.

[37] Kulesza, *Prawa dziecka pokrzywdzonego*, 205–10.

Regulations of the Polish CCP	Purpose of regulation	Implemented European standard	Implemented EU standard
Interviewing the child under Article 171 of the CCP.	Providing the child with the freedom to testify by being accompanied by a legal representative, guardian or trusted person; protecting the child from questions concerning the child's sexual sphere, informing the child in a way that he or she will understand about the rules and conduct of the interview.	Article 54 of the Istanbul Convention	Article 20(3)(f) of Directive 2011/93/EU Article 4 and 23(3)(c) of Directive 2012/29/EU
The principle of legalism mandating that all public offences against children be prosecuted *ex officio* (Article 10 of the CCP) combined with the civic duty to report crimes and the legal obligation incumbent on state and local government institutions (Article 304 of the CCP) and the universal legal duty (also incumbent on medical professionals) to report crimes against children listed in Article 240 § 1 of the Criminal Code.	Ensuring the effective prosecution of all crimes against children regardless of their will and the standpoint of their legal representatives or guardians, and regardless of whether they have reported the crime. Increasing the effectiveness of detection (reducing the number) of crimes against children and the effectiveness of prosecution of their perpetrators.	Articles 2 and 3 of the ECHR Article 12 and 32 of the Lanzarote Convention Articles 26–28, 43 and 44(4) of the Istanbul Convention	Articles 15 and 16 of Directive 2011/93/EU
Ordering the perpetrator of domestic violence to leave a place of shared residence with victims of violence or prohibiting contact with them as a preventive measure (Article 275a) or his or her voluntary departure from such a place as a condition of police supervision (Article 275 § 3 of the CCP).	Protect the child from the danger of secondary victimization and intimidation by the perpetrator of domestic violence during the criminal process.	Article 31(1)(f) of the Lanzarote Convention Articles 52 and 53 of the Istanbul Convention	
Interviewing a child as a witness at a trial in the absence of the accused (Article 390 of the CCP).	Protecting the child witness from the trauma of testifying at trial in the presence of the accused and ensuring the freedom of his or her testimony.	Article 36 (2)(b) of the Lanzarote Convention Article 56(1)(i) of the Istanbul Convention	Article 20(5) of Directive 2011/93/EU Art.19, 23(3)(a) and (b) of Directive 2012/29/EU

Regulations of the Polish CCP	Purpose of regulation	Implemented European standard	Implemented EU standard
The court can exclude the public from the hearing for the time of the interview with a witness who has not reached the age of 15 (Article 360 § 1 (2) of the CCP).	Protecting the child witness from the trauma that may result from testifying at an open and public hearing and ensuring the freedom of his or her testimony.	Article 36(2)(a) of the Lanzarote Convention	Article 23(3) (d) of Directive 2012/29/EU
Rights of the child as a party to proceedings			
The obligation to adapt the manner of instructing the child to the child's age, health and mental development (Article 16 § 3 of the CCP).	Informing the child of his or her rights and responsibilities in a way that he or she can understand and enable the child to exercise them consciously and effectively.	Article 31(6) of the Lanzarote Convention Article 56(1)(c) of the Istanbul Convention	Articles 3 and 4 of Directive 2012/29/EU
The right of the child victim to submit, until the end of the trial, a request for reparation of damages and compensation for the harm suffered under Article 46 of the Criminal Code and a request to impose on the accused a criminal measure prohibiting contact with the victim (Article 49a of the CCP).	Implementation of the victim's right to compensation for the damage and harm caused by the crime and to ensure his or her protection after the end of criminal proceedings.	Article 31(1)(6) of the Lanzarote Convention Article 53 of the Istanbul Convention	Article 16 of Directive 2012/29/EU
The statutory presumption provides that if doubts about the age of the victim cannot be removed, and there is a reasonable suspicion that he or she is a child, the provisions on child victims apply to him or her (Article 49(b) of the CCP).	This regulation serves to improve the standards of criminal proceedings involving child victims and is of particular importance with regard to situations where the application of a certain procedure or procedural institution is related to the minority of the victim, such as in the case of the need to appoint a representative (Article 51 § 2 of the CCP).	Article 34(2) and 35(3) of the Lanzarote Convention	Article 18(3) of Directive 2011/93/EU Article 24(2) of Directive 2012/29/EU

Regulations of the Polish CCP	Purpose of regulation	Implemented European standard	Implemented EU standard
The court, and in pre-trial proceedings, the prosecutor, immediately, but no later than within 7 days from the date of determining that the interests of the child are in conflict with the interests of the legal representatives or guardians (Article 98 § 2 of the Family and Care Code) applies to the guardianship court for the appointment of the child's procedural representative referred to in Article 99 § 1 of the Family and Care Code (Article 51 § 2a of the CCP).	Securing effective representation of a child in the criminal process when parents or guardians cannot provide it.	Article 31(4) of the Lanzarote Convention	Article 20(1) of Directive 2011/93/EU Article 24(1) (b) of Directive 2012/29/EU

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Work-Life Balance in US Law Using the Example of California

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Abstract: In the United States, parents' entitlements, including the right to childcare leave, are regulated primarily by federal law and state law. An example of a state law, which is discussed in this paper, is the law of California, which is one of the leading states in terms of worker rights. The implementation of a work-life balance policy in California is mainly focused on extending childcare leave entitlements, guaranteeing that this leave is paid, enabling flexible work arrangements and facilitating the use of these entitlements by men.

1. Preliminary Comments

The situation in the labor market is not easy for women caring for their children. In the United States, there has been a significant increase in the number of working women, and at the same time they are disproportionately burdened with childcare responsibilities. Only 32% of working fathers regularly participate in childcare. As a result, the difficulty of combining work and childcare primarily affects women.[1] Therefore, it is important to

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[1] See: Chelsey Jonason, "Keeping Mothers in the Workplace. Shifting from McDonnell Douglas to Protect Employees Who Use FMLA Leave," *American Bar Association Journal of Labor & Employment Law* 32, no. 3 (2017): 453.

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develop solutions that will at least reduce this difficulty. Childcare responsibilities shared by parents and flexibility in employment are manifestations of a work-life balance policy. In the United States, leave entitlement regulations have been expanded over the years to provide statutory protection for the period of childcare, which can be used by both mothers and fathers. Also, efforts have been made to create flexible workplaces.

Difficulties in entering work and personal life may, on the one hand, occur when acting, which may be prohibited by neglecting non-work responsibilities, including family ones, or avoiding them.[2] Excessive work effects are the result of what causes the consequences of reducing the frequency of employee's work.[3] The negative effects of this conflict include: an increased stress level, job dissatisfaction, reduced performance or burnout. Lack of work-life balance affects employee's mental health and well-being.[4]

In the United States, parents' entitlements, including the right to childcare leave, are regulated primarily by federal law and state law. Federal law includes the Family and Medical Leave Act (FMLA) of February 5, 1993, which guarantees to workers the right to take leave to deal with family problems and serious health issues without fear of losing their jobs. The example of state law discussed in this paper is the law of California. One must keep in mind that California is one of the leading states in terms of worker rights. In 2002, California became the first US state to provide paid family leave to those who want to take time off from work to establish a bond with their newborn baby or provide care for family members in need. Two and a half years later, statistics showed that: (1) women had filed 80% of paid family leave requests in California, twice as many as men; (2) nearly 90% of the requests concerned establishing a bond with a newborn baby

2 Joseph G. Grzywacz and Nadine F. Marks, "Reconceptualizing the Work-Family Interface: An Ecological Perspective on the Correlates of Positive and Negative Spillover Between Work and Family," *Journal of Occupational Health Psychology* 5, no. 1 (2000): 111–8, quoted in: Anna M. Skórska, "In Search for Balance in Life Professional and Personal Preferences and Expectations of Poles," *Rynek pracy* 187, no. 4 (2023): 8 et seq.

3 Jeffrey V. Johnson and Jane Lipscomb, "Long Working Hours, Occupational Health and the Changing Nature of Work Organization," *American Journal of Industrial Medicine* 49, no. 11 (2006): 921–9, quoted in: Anna M. Skórska, "In Search for Balance," 8 et seq.

4 See: Sanja Stojković Zlatanović and Marta Sjeničić, "Normative Approach to Workers' Mental Well-Being in the Digital Era," *Review of the European and Comparative Law* 57, no. 2 (2024): 72.

and the remaining 10% concerned caring for family members; (3) of those who took the leave to establish a bond with their newborn baby, 0.4% were foster parents, 0.7% were parents who had adopted a child, and the rest, more than 98%, were biological parents.[5]

Parents' entitlements are regulated by the California Family Rights Act (CFRA) and the Pregnancy Disability Leave Act (PDL). In addition to legislation, the actions taken by employers are also important. Many companies in California, especially those in the technology sector, have a corporate culture supportive of parents, promote a parent-friendly work culture and offer not only flexibility, but also support programs, such as on-site child care spaces, paid parental leave and other forms of family support. Companies are introducing their own solutions, more favorable than those provided for in the regulations, which are intended to make it easier for employees to have a work-life balance. Despite the progress achieved in many sectors, flexible work arrangements are not available in all industries to the same extent. For example, in sectors where physical presence is required (such as manufacturing or retail), the ability to benefit from flexible work hours may be limited. This also applies to California, which has a diverse labor market. In larger cities such as San Francisco and Los Angeles, work flexibility is more common than in smaller urban centres. Flexible work arrangements are a response to the growing demand for work-life balance. However, the availability of such arrangements depends on the industry, company size and location.

Some states have made minor improvements in specific areas of their work-life balance policies to improve the minimum standard under the FMLA. In Iowa, for example, women have greater access to pregnancy-related medical leave under the state law than under the federal law. Even though the Iowa state law provides leave for women in smaller companies and with shorter working hours than the federal FMLA, the state law provides a shorter maximum leave period (a maximum of eight weeks, compared to 12 weeks under the FMLA). Pennsylvania provides longer leave periods for its state government employees but has not passed legislation

[5] Paula G. Ardelean et al., "The Development of Employment Rights and Responsibilities from 1985 to 2010," *American Bar Association Journal of Labor & Employment Law* 25, no. 3 (2010): 449 et seq.

that broadens access to such leave for workers in the private sector. In 2008, New Jersey adopted programs founded on much older and well-established temporary disability insurance schemes that workers had previously used to take time off from work due to serious health problems. Other states have expanded the federal FMLA by making unpaid family and medical leave available to employees who are not covered by the federal law. However, the reality is that 18 states, including, for example, Georgia, North Carolina, Utah and Wyoming, do not have any state laws or policies that help private sector workers or even state government employees to better meet the work-related family needs when a new baby is born.[6]

The problem, however, is that only half of all employees have access to unpaid leave protected by labor laws under the FMLA. In the United States, only 11% of workers have access to paid family leave provided by their employers. Only about 50% of first-time mothers can arrange any form of paid leave in the form of sick days or holidays, for example under disability or other insurance. Moreover, less than 40% of all workers have access to short-term disability insurance through their employers. Such disability insurance provides partial pay during an employee's sick leave.[7]

The US legislation does not define the term "work-life balance," but it appears, for example, in the literature of programs of state action to improve the situation of parents caring for children. It is clear from § 2601(b) of the FMLA that the purpose of the act is to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to advance the national interest in preserving family integrity.

Work-life balance policies influence the formation of employees' entitlements related to parenthood and childcare in a way that enables them to achieve the right balance between their careers and work, and their private and family lives. It is also intended to lead to equality between men and

6 Paid family and medical leave provides families time to care without jeopardising their financial stability; see: David A. Rosenfeld, Nina G. Fendel, and Anne Yen, *California Workers' Right*, 5th ed. (Berkeley: Center for Labor Reseach and Educatio, University of California, 2016), 19–20.

7 Ibid., 19.

women in terms of labor market opportunities and to encourage men to take an equal share of parenting and caregiving responsibilities.[8]

A review of childcare leave entitlements under federal law and California state law helps determine the criteria for obtaining the right to take this leave, the duration of the leave and the safeguards that create certain guarantees for the employee, as well as the ways to make the workplace flexible. This will allow us to assess the extent to which employees can implement the work-life balance concept. In addition, the comparison of these solutions with European law, specifically with Directive 2019/1158, will enable their evaluation.

2. Right to Childcare Leave

2.1. FMLA

The Family and Medical Leave Act (FMLA) is a federal law that grants to eligible employees 12 weeks of unpaid leave to establish bonds with their newborn baby, care for a sick family member, that is leave needed for certain family and medical reasons (including the birth of a child and a serious health problem of a child or other family member). During this time, the employee's job is protected, since his or her employer must guarantee the employee's right to return to the same or comparable position at the end of the leave. Also, during the leave, the employee cannot be made redundant or have his or her employment conditions worsened upon return to work. During the leave, the employer continues the employee's group health insurance under the same conditions as before the leave.

The employer may not refuse to grant the leave to an employee, but employees may agree on the dates and details of this leave in a manner consistent with the organizational needs of the company. Employees of companies

[8] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers (OJ L 2019.188.79), hereinafter referred to as Directive 2019/1158. For more on the concept of a work-life balance policy, see: Barbara Godlewska-Bujok, "*Work-life balance* po polsku – najważniejsze refleksje po nowelizacji z 2023 r." ["Work-Life Balance the Polish Way – The Key Thoughts After the 2023 Amendment"], *Radca Prawny* 35, no. 2 (2023): 11 et seq.

with 50 or more employees are entitled to the leave if they have worked for their company for at least 12 months, including at least 1,250 hours.[9]

2.2. CFRA

The California Family Rights Act (CFRA)[10] is a state law and, like the FMLA, it allows eligible employees to take 12 weeks of unpaid, protected leave in a period of 12 months to establish bonds with their new child in connection with the birth, adoption, or placement of a child in foster care, or to care for a seriously ill family member – a child, a parent or a spouse, or due to the employee's serious health problems (i.e., for specific family-related or medical reasons). The scope of the term "family member" has been expanded to include registered partners living in the same household and adult children. This leave can be used by both mothers and fathers. Parents can choose to take the leave at the same time, or the father may take the leave later when the mother has used up her part of the leave. The leave can be taken at one time or divided into parts depending on the circumstances. The employer may not refuse to grant the leave to an employee.

This leave may be granted if the employee meets the conditions specified in the law. The employees benefitting from this entitlement must have worked for the employer for at least 12 months, including at least 1,250 hours, in the case of an employer with 50 or more employees.

The employees are entitled to job protection, which involves a guaranteed right to return to the same or comparable job after the leave. During an employee's leave under the CFRA, his or her employer is required to maintain his or her group health insurance under the same conditions as if the employee did not take the leave.[11]

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9 For more information, see: James J. McDonald, Jr., *California Employment Law. An Employer's Guide* (Society for Human Resource Management, 2020), 28 et seq., 194 et seq.; Lisa Guerin and Sachi Clements, *The Essential Guide to Federal Employment Laws* (NOLO, 2022), 211 et seq.; David A. Rosenfeld, Nina G. Fendel, and Anne Yen, *California Workers' Right*, 5th ed. (Berkeley: Center for Labor Research and Education, University of California, 2016), 138; Rebecca J. Mead et al., *The Struggle to Juggle Work and Family* (Los Angeles: Center for Labor Research and Education, School of Public Policy and Social Research, UCLA, 2000), 12–8.

10 California Government Code Section 12945.2. California Code of Regulations, Title 2, sections 11087–11098.

11 Rosenfeld, Fendel, and Yen, *California Workers' Right*, 139–40; California Code of Regulations, title 2, sections 11087–11098.

2.3. PFL

California offers a Paid Family Leave (PFL) program, which allows both men and women to take a partially paid leave to care for a newborn baby. The mother cannot transfer her PFL to the father, but both can use their individual PFL entitlements at different times, allowing for a longer combined leave.

The leave is partially paid to ensure a partial compensation for the loss of the parents' wages for both the mother and the father so that they can care for their newborn child. During the PFL, the parents' wages in California are paid by the California Employment Development Department (EDD)[12] and not by the employer. The PFL program typically provides payment of about 60% to 70% of the employee's previous wages for up to eight weeks. The pay can be received in full at one time or divided over a 12-month period. The funds come from payroll taxes, which are paid by employees as part of the State Disability Insurance (SDI) premiums. Employees should meet certain conditions, such as an adequate number of hours worked and paid SDI premiums. Employers may allow employees to use holiday, sick, or paid leave, or other leave to supplement the PFL benefits to receive 100% of their wages.

Employers may be required to maintain health insurance under the same conditions as before the leave. In order to bond with their newborn baby, employees can take a leave at any time during the first 12 months after the baby is welcomed into the family.

The PFL does not provide job protection, but only financial benefits for the duration of the leave. However, employees may qualify for job protection under other leaves they are entitled to under other laws, which may be taken at the same time as the PFL. For example, the Fair Employment and Housing Act (FEHA) does not provide job protection during the PFL, but provides job protection for those receiving disability insurance (DI) due to a disability related to pregnancy, childbirth or health problems.[13]

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12 Employment Development Department. State of California, accessed October 30, 2024, https://edd.ca.gov/.

13 For more information, see: Rona Levine Sherriff, *Balancing Work and Family* (Sacramento: California Senate Office of Research, 2007), 7 et seq.; California. Work and Family Advisory Committee, "The Future of California. Work and Family Programs. Report and Recommendations" (The Committee 2000), 20 et seq.

2.4. PDL

The Pregnancy Disability Leave (PDL) is granted to the mother only and is intended to be taken before and after childbirth in connection with the inability to work due to pregnancy or childbirth. The mother cannot transfer this leave to the father.

The PDL is a pregnancy disability leave and is granted to employees who are incapable of working due to pregnancy, childbirth or related medical conditions. The PDL covers a range of pregnancy-related conditions, including severe morning nausea, prenatal and postpartum care, postpartum recovery and any pregnancy-related complications.

All employees working for an employer with five or more employees can benefit from the PDL. There are no requirements regarding the minimum total work experience or the number of hours worked. The PDL leave may be up to four months long.

Employers must guarantee the right to return to the same or other comparable job at the end of the leave. In addition, employers are required to continue the employee's group health insurance during the PDL under the same conditions as if the employee did not take the leave.

The PDL is an unpaid leave, so employees can use sick leave, holiday leave or paid disability benefits (such as state disability insurance [SDI] or paid family leave [PFL]) to receive benefits during that period. It is worth noting, however, that California's disability insurance system has been expanded to provide partial replacement benefits for employees in California.[14]

3. Flexible Work Arrangements

Another element of the work-life balance policy, in addition to providing employees with leave for family-related reasons or serious health problems, is the expansion of workplace flexibility arrangements. California law allows for flexible work arrangements, but such arrangements require the consent of a majority of a company's employees, which can limit their availability.[15]

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[14] California Code of Regulations, Title 2, Sections 11035–11051; California Government Code, Section 12945.

[15] California Commission on the Status of Women and Girls (CCSWG): Women's Policy Research (IWPR), accessed October 30, 2024, https://women.ca.gov/.

In addition, California's law requires overtime to be accrued after eight hours of work per day, which complicates the adoption of flexible work schedules at no additional cost to the employer.[16]

However, more and more companies in California offer family-friendly policies. Elements of flexible work arrangements include: (1) flexible working hours: employees are allowed to adjust their work start and end times to meet their needs better than standard working hours; (2) remote work, which allows employees to perform their work from home or another location outside the office; remote work can be full or partial, allowing for greater flexibility in child care, especially in emergencies when a child is sick; (3) part-time work, which can be combined with other flexible forms of employment, such as remote work or flexible work hours; (4) child care breaks: breastfeeding breaks or other forms of breaks related to caring for young children; (5) a shorter work week, where employees work longer for fewer days per week, giving them an extra day for child care or other family responsibilities; (6) job sharing: two people share one full-time position, allowing each to work part-time.[17]

4. Work-Life Balance Using Microsoft as an Example

As for a work-life balance policy, companies can introduce their own solutions that do not violate federal and state laws. An example is of such a company as Microsoft, which offers more favorable leave entitlements and flexible work arrangements.

For most jobs, Microsoft allows its employees to work remotely for a part of the time – less than 50% of the work hours is considered standard – assuming that the manager can cooperate with his or her team. Flexible work schedules are also possible. However, part-time work still

[16] For more information, see: Jennifer Barrera, "California Must Fix Labor Laws to Reflect Shift to Remote and Hybrid Work Arrangements," Advocacy, December 1, 2022, accessed October 30, 2024, https://advocacy.calchamber.com/2022/12/01/california-must-fix-labor-laws-to-reflect-shift-to-remote-and-hybrid-work-arrangements/; Mead et al., *The Struggle to Juggle Work and Family*, 19–35; Joan C. Williams, *Reshaping the Work-Family Debate. Why Men and Class Matter* (Harvard University Press, 2012), 38–9; California. Work and Family Advisory Committee, "The Future of California," 6–7; Government Code, section 19851.

[17] "Making Flexible Work Arrangements," SHRM, accessed October 30, 2024, https://www.shrm.org/topics-tools/tools/toolkits/managing-flexible-work-arrangements.

requires the approval of a supervisor. In addition, Microsoft has extended the parental leave for mothers and fathers. New mothers are granted eight weeks of fully paid disability maternity leave and all parents of new children are granted 12 weeks of parental leave, of which four weeks are paid and eight weeks are unpaid. As a result, parental leave paid at 100% has been extended to a total of 12 weeks for all mothers and fathers of new children. For biological mothers, this is in addition to the eight weeks of maternity leave on account of their inability to work, which they were entitled to previously, which is paid at 100%, allowing them to take a total of 20 weeks of fully paid leave if they choose to do so. In addition, biological mothers are offered an extended possibility to take a short-term disability leave two weeks before the scheduled delivery date to cope with the physical effects of the pregnancy and prepare for the upcoming childbirth.[18]

Microsoft also offers to the eligible parents a flexibility in taking the leave. They can take the parental leave in one uninterrupted 12-week period or divide the leave into two periods. Parents also have the option of gradually returning to work part-time.[19]

Another entitlement offered to Microsoft's employees is 12 paid days off (including two floating days off), in addition to the paid leave to which employees are entitled. In addition, the company encourages its employees to work during hours that are most suitable for them and that allow them to complete tasks as expected. Work schedules can therefore vary according to individual needs. Working hours can be discussed with the recruiter and/or hiring manager during the recruitment process.[20]

At Microsoft, there is a concept of "unlimited time off," called "discretionary time off," which applies to all employees in the US and involves a more flexible leave policy. Microsoft offers 10 days of corporate leave, leave of absence, sick and mental leave and time off for jury duty or mourning. Workers employed on an hourly basis and workers outside the US cannot be granted unlimited time off. Federal and state laws that govern wages

18 "Flexible Work," Microsoft, accessed October 30, 2024, https://careers.microsoft.com/v2/global/en/flexible-work.

19 Kathleen Hogan, "The Employee Experience at Microsoft: Aligning Benefits to Our Culture," Microsoft, August 5, 2015, accessed October 30, 2024, https://blogs.microsoft.com/blog/2015/08/05/the-employee-experience-at-microsoft-aligning-benefits-to-our-culture/.

20 Ibid.

and work hours make it difficult to offer unlimited time off to workers employed on an hourly basis, and workers outside the US retain their current leave benefits under the laws in force in other countries.[21]

Some companies in California, especially in the technology sectors, actively promote the taking of leave by men, offering the same leave terms for both sexes and supporting parents in sharing family responsibilities.[22]

5. Directive (EU) 2019/1158 on the Work-Life Balance for Parents and Carers

In the countries of the European Union, supranational law is EU legislation, which is binding, for example, in the form of directives. This is a legal act that requires implementation into national law. This changes national law either by modifying existing regulations or issuing a new piece of legislation. A directive stipulates minimum standards, so each member state must develop its own regulations on how to implement these rules.[23] The applicable directive in the field of parental rights is Directive of the European Parliament and of the council (EU) 2019/1158 of June 20, 2019 on work-life balance for parents and caregivers and repealing Council Directive 2010/18/EU.[24] The purpose of the Directive (EU) 2019/1158 on the work-life balance for parents and carers is to facilitate the achievement of a balance between work and personal life, divide the parental rights between the parents, ensure a level playing field for both sexes in the labor market, as well as provide possibility for personal care for a child. Directive 2019/1158 defines the individual entitlements related to paternity leave, parental leave, childcare leave,

21 Tom Warren, "Microsoft Employees Are Getting Unlimited Time Off," The Verge, January 11, 2023, accessed October 30, 2024, https://www.theverge.com/2023/1/11/23550470/microsoft-employees-unlimited-time-off-2023.

22 Loeb & Loeb LLP and Society for Human Resource Management (SHRM), which discuss these issues in detail; Michelle La Mar, Sarina Saluja, and Kimberly Stallworth, "A Recap of the New California Employment Laws That Took Effect in 2023," Loeb & Loeb LLP, February 2023, accessed October 30, 2024, https://www.loeb.com/en/insights/publications/2023/02/a-recap-of-the-new-california-employment-laws-that-took-effect-in-2023; "Managing Workplace Flexibility in California," SHRM, accessed October 30, 2024, https://www.shrm.org/topics-tools/tools/toolkits/managing-workplace-flexibility-california.

23 See more: "European Union Directives," European Union, accessed October 30, 2024, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=LEGISSUM:l14527&frontOfficeSuffix=%2F.

24 OJ L188, 12 July 2019, item 79.

the granting of time off in emergencies (resulting from force majeure) and flexible work arrangements for employees who are parents or guardians.

Paternity leave is granted on the occasion of the birth of a child to the father or the equivalent second parent. It is a paid leave and its duration is 10 working days. EU member states may allow flexible use of this leave. The right to paternity leave does not depend on the total work experience or length of employment, nor does it depend on the employee's marital or family status (Article 4 of Directive 2019/1158).

Parental leave is a leave granted to parents due to the birth or adoption of a child for the purpose of caring for the child (Article 3(1)(b) of Directive 2019/1158). It is four months long and should be taken before the child reaches a certain age – a maximum of eight years. However, Directive 2019/1158 encourages fathers to take parental leave by providing that two months of parental leave may not be transferred to the other parent. To be granted parental leave, employees may be required to have worked for the employer for a certain period of time or have a certain total work experience, but these periods may not exceed one year. Parental leave may be taken on a flexible basis (Article 5 of Directive 2019/1158).

A new entitlement is care leave, which allows the provision of personal care or support to a relative or a person living with the employee in the same household who requires substantial care or substantial support for serious medical reasons (Article 3(1)(c) of Directive 2019/1158). Care leave may be granted for five days per year (Article 6 of Directive 2019/1158) and is unpaid. Within the meaning of the Directive, a relative is defined as a son, a daughter, a mother, a father, a spouse, or a partner in a civil partnership, where national law recognizes such partnerships (Article 3(1)(e) of Directive 2019/1158).

Another new entitlement is the right to time off due to force majeure for urgent family matters caused by an illness or an accident, if the employee's immediate presence is necessary. Member states may limit an employee's right to time off for reasons associated with force majeure to a certain amount of time per year or per specific incident (Article 7 of Directive 2019/1158).

Flexible work arrangements mean the ability of an employee to adjust his or her work organization, including remote work, flexible work schedules, or reduced working hours (Article 3(1)(f) of Directive 2019/1158).

Employees with children up to at least eight years old have the right to request flexible work arrangements (Article 9 of Directive 2019/1158).

The exercise by an employee of his or her worker rights related to his or her parental and caregiving functions should not adversely affect the employee's status and treatment in the workplace (Article 11 of Directive 2019/1158).[25]

6. Conclusions

The regulations that govern the granting of childcare leave and obtaining payments during this period are quite complex. This is because state and federal laws overlap in terms of the acquisition of the right to leave of absence and becoming eligible for disability or sick leave. State policies most often broaden the minimum federal policy limit set by the FMLA. In the event of a conflict between state and local laws, the law that is more favorable to employees applies.[26]

The CFRA and the FMLA guarantee to parents the right to 12 weeks of leave to care for their newborn baby. Leaves under the FMLA and the CFRA are not consistent, as employees in California may qualify for 12 weeks of leave in different situations. Pregnancy and childbirth are treated as a serious health condition that justifies up to four months of PDL for pregnancy-related disability, and then another 12 weeks of leave available under the CFRA can be taken to care for and bond with the newborn baby. The father can take PFL after the mother's maternity leave ends. In addition, fathers who qualify for a leave under the CFRA may also need up to 12 weeks to care for and bond with their newborn or newly adopted child. Therefore, if the mother takes advantage of California's PDL program, then the father can use some or all of the 12 weeks of leave available under the FMLA during that program. Otherwise, the female employee

[25] For more information on Directive 2019/1158, see: Justyna Czerniak-Swędzioł, "Urlop opiekuńczy i zwolnienie od pracy z powodu działania siły wyższej – (nie) trafione uprawnienia pracownicze?" ["Care Leave and Time off from Work Due to Force Majeure – (Im-) Pertinent Worker Rights?"], *Monitor Prawa Pracy*, no. 1 (2024): 14 et seq.; Katarzyna Wełpa, "Projektowane zwolnienie od pracy z powodu działania siły wyższej w perspektywie wdrożenia dyrektywy 2019/1158 do polskiego porządku prawnego" ["The Planned Time off from Work Due to Force Majeure from the Perspective of Implementation of Directive 2019/1158 in the Polish Legal System"], *Monitor Prawa Pracy* 19, no. 3 (2022): 21 et seq.

[26] McDonald, Jr., *California Employment Law*, 311.

can take the PDL on account of her pregnancy and childbirth, then another six weeks of leave under the CFRA to bond with her newborn child, and shortly after returning to work she can take another 12 weeks of leave for a justified reason under the FMLA.[27] However, it should be borne in mind that only part of the leave is paid, and it can be extended if the employee is benefitting from the national disability insurance. In total, the relevant laws offer significant protections and benefits to ensure that pregnant workers and new parents take the necessary leave without fear of losing their jobs or healthcare benefits.

This demonstrates that the legislation governing the right to childcare leave, the sharing of childcare duties between parents and the provision of flexible work arrangements are the main elements of ensuring the work-life balance of employees. However, the involvement of fathers in childcare is not sufficient: for example, in 2018, only 25% of those who requested PFL to care for their newborn babies were men. Despite the increase, however, most men do not take full advantage of the leave they are entitled to.[28] Only increased awareness and a change in employers' policies can improve this situation.

On the other hand, a comparison of the provisions of US laws and the solutions arising from European law, especially Directive 2019/1158, shows that their objectives are the same. This is because their basic intention is to create conditions for work-life balance by enabling the sharing of parental rights between parents and using time off from work to care for children in a flexible manner. The types of these leave entitlements and their lengths in the US and European laws are different, and it is difficult to assess clearly in which laws they are more favorable. Indeed, under the US law, employees may benefit from their parental entitlements for various reasons, including illness and disability. Systems/programs for securing these entitlements also vary, and include those created by employers themselves. Therefore, the parents may be eligible to benefit from different types of parental entitlements.

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27 Paid family and medical leave provides families time to care without jeopardising their financial stability, p. 20. For more information, see: Rosenfeld, Fendel, and Yen, *California Workers' Right*, 153.

28 "Reports," California Commision on the Status of Women, accessed October 30, 2024, https://women.ca.gov/reports.

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The ICJ's Advisory Opinion on Kosovo as a Tool of Costly Counter-Secession

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Abstract: Secessions are costly. That does not mean that counter-secessions more generally, and international judicial opinions as tools of counter-secession specifically, are costless. The trajectory of the International Court of Justice's 2010 Advisory Opinion (Opinion) on Kosovo's declaration of independence is a case in point. Initially deemed as not unfavorable to Kosovo's independence from Serbia, over time, the Opinion proved a useful counter-secession tool for the opponents of Kosovo's independence. The current structure of the international legal system and the dynamics of power politics facilitated leveraging the Opinion as a mechanism of counter-secession efforts. It is shown that not even the sponsorship of a secessionist state such as Kosovo by an individual dominant power like the United States can override the structural impediment to recognizing new states: the absence of coherent norms on state recognition in international law. Moreover, the support of powers such as Russia and China has meant that Serbia, as a counter-secessionist state, could use the Opinion to sustain the lack of international consensus on Kosovo's independence, engage in a campaign for Kosovo's derecognition, and extract concessions from Kosovo's main independence sponsors. Serbia's use of the Opinion as a tool for counter-secession has proven costly, however, as its sovereignty has become beholden to the whims of great power politics in a similar way to which Kosovo is indebted to the main sponsors of its independence.

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1. Introduction

Secessions are controversial. Unless secessionist states can secure the wider consensus of the international community and alignment of interests, they have trouble overcoming the final hurdle to becoming members of the club of states: recognition of peer states, particularly great powers.[1] In this respect, counter-secessionists have an advantage over secessionists: they can block international recognition of secessionists by playing on peer states' self-interests in protecting their own territorial integrity from future secessions.[2] However, counter-secessions have received far less academic attention than secessionist movements and their strategies.[3] In the sparse literature dealing with counter-secessions, classical tools of counter-secession, such as maintaining a claim to the territory, undermining the legitimacy of secessionists, or preventing bilateral recognition and acceptance in international organizations, have received more attention than decisions of international judicial bodies, which are rarely used as tools of counter-secession.[4]

The lack of attention to decisions of international courts as tools of counter-secession makes the International Court of Justice (ICJ) 2010 Advisory Opinion (Opinion) on Kosovo's 2008 Declaration of Independence (KDI) worth revisiting, for two reasons. Firstly, although the Opinion – a rare case in which all five permanent members of the UN Security Council (UNSC) presented their opinions on the question of secession[5] – has

1 Ryan D. Griffiths and Louis M. Wasser, "Does Violent Secessionism Work?," *Journal of Conflict Resolution* 63, no. 5 (2019): 1310–36, https://doi.org/10.1177/0022002718783032; Bridget Coggins, "Friends in High Places: International Politics and the Emergence of States from Secessionism," *International Organization* 65, no. 3 (2011): 433–67, https://doi.org/10.1017/S0020818311000105.

2 Peter Krause, "The Strategies of Counter-Secession: How States Prevent Independence," in *The Routledge Handbook of Self-Determination and Secession*, eds. Ryan D. Griffiths, Aleksandar Pavković, and Peter Radan (Routledge, 2023), 425–6.

3 Ibid., 425.

4 James Ker-Lindsay, "The Counter-Diplomacy of State Recognition," in *Routledge Handbook of State Recognition*, eds. Visoka, Gëzim, John Doyle, and Edward Newman (Routledge, 2020), 295–305.

5 International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010 (International Court of Justice July 22, 2010; hereinafter: the Opinion).

been analyzed and criticized in detail,[6] its later trajectory and use by opponents of Kosovo's independence and recognition is rarely discussed. Secondly, while the costs and the rationales for and against Kosovo's secession have been well-discussed,[7] the costs of counter-secession have to date attracted little attention.[8]

This paper shows that the Opinion, initially deemed (at the very least) not unfavorable to Kosovo's independence from Serbia, ultimately proved to be a more helpful tool for its opponents' counter-secession strategy. The current structure of the international legal system and the dynamics of power politics facilitated a leveraging of the Opinion as a mechanism of counter-secession efforts. It is shown that not even the sponsorship of a secessionist state such as Kosovo by an individual dominant power like the United States can override the structural impediment to recognizing new states: the absence of coherent norms on state recognition in international law. Moreover, the support of powers such as Russia and China has meant that Serbia, as a counter-secessionist state, could use the Opinion to sustain the lack of international consensus on Kosovo's independence, engage in a campaign for Kosovo's derecognition, and extract concessions from Kosovo's main independence sponsors. However, while using the Opinion as a tool for counter-secession was partially successful, it has also proven costly. In using the Opinion as a counter-secessionist tool to sustain its formal sovereignty over Kosovo, Serbia has made its remaining sovereignty ambiguous and beholden to whims of power politics in a way similar to that by which Kosovo is beholden to its main independence sponsors.

Part Two of the paper briefly discusses the NATO intervention that preceded the KDI, the process that led to the Opinion, and state reactions to the KDI and the Opinion. It shows that the ICJ, in its Opinion, reframed

6 See: Marko Milanovic and Michael Wood, eds., *The Law and Politics of the Kosovo Advisory Opinion* (Oxford: Oxford University Press, 2015).

7 Ryan D. Griffiths, *Secession and the Sovereignty Game: Strategy and Tactics for Aspiring Nations* (Cornell University Press, 2021); Shpend Kursani, "Costs of International Recognition: Palestine's and Kosovo's Struggle with Negotiated Statehood," *Geopolitics* 29, no. 1 (2024): 174–202, https://doi.org/10.1080/14650045.2022.2151903.

8 Scott Pegg, "How Parent States Prevent Recognition," in *The Routledge Handbook of Self-Determination and Secession*, eds. Ryan D. Griffiths, Aleksandar Pavković, and Peter Radan (Routledge, 2023), 429–42.

Serbia's question to respond to it by reiterating the uncontroversial opinion that international law is largely neutral or silent on declarations of independence, and did so in a way that initially seemed at least not unfavorable – if not partially favorable – to Kosovo's independence.[9] Part Three of the paper shows that the initial reactions to and impressions of the Opinion were misleading: Serbia and its leading backer, Russia, successfully used the Opinion as one of the arguments to prevent Kosovo's inclusion in international organizations, extract concessions from the main sponsors of Kosovo's independence, and campaign for the derecognition of Kosovo. In Part Four, it is argued that using the Opinion as a tool of counter-secession was possible because, firstly, the Opinion left the question of Kosovo's status in the murky waters of state recognition and, secondly, because Serbia was able to rely on the support of Russia and China as dominant powers, but ultimately paid the price for this support by becoming an object of power politics.

2. Kosovo's Independence and the ICJ Advisory Opinion

2.1. The NATO Intervention and the 2008 Kosovo Declaration of Independence

The 2008 Kosovo Declaration of Independence (KDI) is best described as a final chapter in Serbia's abuse of extreme counter-secession measures that ranged from suppression of the population in a secessionist province, through denial of territorial autonomy, to ethnic expulsion of Kosovo's Albanian majority.[10] During the 1980s, Serbia subjected Kosovo's majority Albanians to widescale repression and, in 1989, abolished Kosovo's constitutional autonomy within Serbia. In 1999, Serbia, then part of the Federal Republic of Yugoslavia (alongside Montenegro), launched a large-scale military action in Kosovo, committing widespread atrocities and expelling some 800,000 Kosovo Albanians. These atrocities prompted NATO's legally disputed military intervention in Kosovo and the bombing of Serbia in early 1999, an act that NATO described as a humanitarian action.[11]

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9 The Opinion. For a comprehensive review of various aspects of the Opinion, see: Milanović and Wood, *The Law and Politics of the Kosovo Advisory Opinion*.

10 For a general overview of counter-secession strategies, see: Krause, "The Strategies of Counter-Secession."

11 Anthea Roberts, "Legality vs Legitimacy: Can Uses of Force Be Illegal but Justified?," in *Human Rights, Intervention, and the Use of Force*, eds. Philip Alston and Euan Macdonald

Following the NATO intervention, in June 1999, the UNSC adopted Resolution 1244 (UNSC 1244), guaranteeing the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, and placing Kosovo under interim UN administration until the settlement of Kosovo's final status. The hope was that NATO's intervention and departure of Serbia's strongman Slobodan Milošević in 2000 would re-orient the country away from extreme nationalistic policies and toward the recognition of Kosovo's independence. As Serbia's post-Milošević governments refused to recognize Kosovo's independence, and both Serbia and Kosovo rejected the compromise Ahtisaari plan in 2007,[12] NATO powers – primarily the US, the UK, and major EU states – decided to support the KDI in February 2008. The rationale for supporting the KDI was that the failure of the parties to reach an agreement and Serbia's past atrocities against Kosovo Albanians made Kosovo a unique case for remedial secession from Serbia as a host state, even if the host state does not consent secession.[13] Immediately prior to the KDI, Russia, China and several EU member states (Spain, Slovakia, Romania, Greece and Cyprus), among others, strongly opposed Kosovo's independence unless Serbia consented to it. Opposition notwithstanding, in the period following the KDI, some 70 states led by the US, the UK, France, Germany, and many other EU states, recognized Kosovo's independence.[14]

2.2. The ICJ's Advisory Opinion on Kosovo

Serbia's government decided to approach the ICJ to soften the internal and external impact of post-KDI recognitions of Kosovo, and to signal its

(Oxford University Press, 2008), 179–214; Bart M.J. Szewczyk, "Lawfulness of Kosovo's Declaration of Independence," American Society of International Law Insights, August 2010, note 2, accessed August 10, 2023, https://www.asil.org/insights/volume/14/issue/27/lawfulness-kosovos-declaration-independence.

12 United Nations, "Kosovo Status Talks Failed to Produce Agreement, Says Report to Security Council," December 13, 2007, accessed March 11, 2025, https://news.un.org/en/story/2007/12/243502.

13 Mirza Ljubovic and Asim Jusic, "Kosovo's Membership of International Organisations," *Business Law International* 25, no. 2 (2024): 173.

14 Ibid., 175.

disapproval of Kosovo's secession.[15] Despite the risks, requesting the ICJ's advisory opinion seemed like a good option for both internal and external signaling and mobilization: an opinion of the ICJ favorable to Serbia would be proof of the legality of Serbia's claim to Kosovo both domestically and internationally, whereas an unfavorable opinion would perpetuate narratives of collective victimization already embedded in Serbian society.[16] To avoid opposition from the US, the UK and France in the UN Security Council, Serbia sponsored a UN General Assembly resolution requesting the ICJ's advisory opinion on the KDI. The UN General Assembly adopted Resolution 63/3, with 77 states, including Russia, China and five EU members (Spain, Slovakia, Romania, Greece and Cyprus) voting in favor of the resolution, while most states abstained. Serbia's government interpreted the adoption of Resolution 63/3 as a sign that a majority of states supported its stance on the KDI, and that the ICJ's opinion would further confirm this.[17]

Serbia framed the question for the ICJ as: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[18] In written comments before the ICJ, Serbia explicitly stated that its question solely pertained to the issue of unilateral declaration of independence and not questions such as recognition, but stressed that the ICJ should analyze the entire issue comprehensively and opine as to whether the KDI created a new state.[19] The crux of Serbia's argument was straightforward: the KDI violates the territorial integrity and sovereignty of Serbia, as well as the legal regime

15 James Ker-Lindsay, "Explaining Serbia's Decision to Go to the ICJ," in *The Law and Politics of the Kosovo Advisory Opinion*, eds. Marko Milanović and Michael Wood (Oxford University Press, 2015), 12.

16 Asim Jusic, "The (Uncertain) Future of Kosovo's Community of Serb Municipalities: Another Republika Srpska?," Atlantic Initiative, 2024, 7, accessed August 28, 2024, https://atlantskainicijativa.org/wp-content/uploads/2024/04/Policy-Paper-Kosovo.pdf.

17 Ker-Lindsay, "Explaining Serbia's Decision to Go to the ICJ," 17.

18 United Nations General Assembly, "Request for the Advisory Opinion," October 10, 2008, accessed January 9, 2025, https://www.icj-cij.org/case/141/request-advisory-opinion.

19 See: Government of the Republic of Serbia, "Written Comments of Government of the Republic of Serbia," International Court of Justice, July 17, 2009, para. 45, accessed January 9, 2025, https://www.icj-cij.org/node/104818; and Dragan Gajin and Asim Jusic, "International Court of Justice on the Legality of Kosovo's Declaration of Independence: Analysis and Legal and Political Implications," *Democracy and Security in Southeastern Europe* 2, no. 6/7 (2011): 117.

created by UNSC 1244, whose provisions validated the territorial integrity of the FRY. Irrespective of the KDI, so Serbia argued, UNSC 1244 remains in force pending future action of the UNSC.[20]

The ICJ used its discretion to reformulate Serbia's question and disregarded the part that refers to the Provisional Institutions of Self-Government of Kosovo (PISG) as the author of the KDI. The rationale behind this was that the identity of the authors of the KDI is an unsettled issue relevant to the question of the legality of the KDI.[21] The ICJ agreed with Serbia that UNSC 1244 established an administrative regime for Kosovo that possesses an international legal character[22] and remains in force until such date as the final status of Kosovo is settled, a matter on which UNSC 1244, according to the ICJ, is silent.[23] The ICJ determined, however, that the creators of the KDI acted outside of the framework of UNSC 1244, and therefore UNSC 1244 remains valid but does not invalidate the KDI and vice versa. The two deal with different issues: UNSC 1244 is of an international legal character and establishes an interim administrative regime, while the authors of the KDI acted outside of UNSC 1244 and dealt with the final status of Kosovo.[24]

Because the portion of the question referring to the PISG of Kosovo was removed, the ICJ determined that the real issue behind Serbia's question required it to opine whether or not the declaration of independence was adopted in violation of international law,[25] determining that it was not. Critics consider that the ICJ's reformulation altered the nature of Serbia's question and turned it into a rhetorical question-and-answer of little relevance for the development of international law.[26] The Opinion focused

20 Government of the Republic of Serbia, "Written Statement of the Government of the Republic of Serbia," April 17, 2009, paras. 655–694, 907–908, accessed January 9, 2025, https://www.icj-cij.org/sites/default/files/case-related/141/15642.pdf.

21 The Opinion, paras. 50–2.

22 Ibid., para. 88.

23 Ibid., paras. 99–100, 114.

24 Ibid., paras. 109, 114.

25 Ibid., para. 56.

26 See: Peter Hilpold, "The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question," *Austrian Review of International and European Law Online* 14, no. 1 (2013): 289, https://dx.doi.org/10.2139/ssrn.1734443. For an argument that this reformulation was necessary for the ICJ to correctly examine the actual legal issue at hand,

on the legality of the KDI, and not the questions, rights, and entitlements that did or did not precede and follow on from it, i.e. self-determination, remedial secession, or the question of whether a new state was created.[27] Ultimately, the Opinion was uneventful: to state that declarations of independence as such are not contrary to international law because they do not fall under its purview is inconsequential, as it is largely uncontroversial among scholars and practitioners.[28]

The immediate impact of the Opinion on a wider audience, and reactions of the governments of Kosovo and Serbia, scholars, and states, depended on their interests and prior perspectives. For a wider lay audience that was unlikely to scrutinize the Opinion's details, a statement that the KDI does not violate international law seemed most likely favorable to Kosovo, as it appears indistinguishable from stating that the KDI is in accordance with international law. Kosovo politicians hailed the Opinion as confirming Kosovo's status as an independent state that would soon be widely recognized by most states (including Serbia) and become a member of various international organizations, first and foremost the UN.[29] States that had already recognized Kosovo in the wake of the KDI welcomed the Opinion as a post festum confirmation that the recognition of Kosovo was legal and irreversible.[30] Scholars were skeptical that the Opinion would impact Kosovo's status or quest for broader recognition in any way.[31] And

see: Alexander Orakhelashvili, "The International Court's Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the 'Foam on the Tide of Time'," in *Max Planck Yearbook on United Nations Law*, 15th ed., eds. Armin von Bogdandy and Rüdiger Wolfrum (Brill, 2011), 72–4.

27 The Opinion, para. 123.

28 Michael Bothe, "Kosovo – So What? The Holding of the International Court of Justice Is Not the Last Word on Kosovo's Independence," *German Law Journal* 11, no. 7–8 (2010): 837–39, https://doi.org/10.1017/S207183220001885X.

29 "K. Albanians hail ICJ decision as big victory," B92.net, July 22, 2010, accessed January 9, 2025, https://www.b92.net/o/eng/news/politicsarticle?yyyy=2010&mm=07&dd=22&nav_id=68621.

30 Tatjana Papic, "The Political Aftermath of the ICJ's Kosovo Opinion," in *The Law and Politics of the Kosovo Advisory Opinion*, eds. Marko Milanovic and Michael Wood (Oxford University Press, 2015), 243–6.

31 John Cerone, "The World Court's Non-Opinion," *Opinio Juris* (blog), July 26, 2010, accessed January 9, 2025, https://opiniojuris.org/2010/07/25/the-world-court%e2%80%99s-non-opinion/.

Serbia expressed dissatisfaction with the Opinion but pledged not to recognize Kosovo.[32] States that did not recognize Kosovo in the wake of the KDI did not change their attitude as a result of the Opinion: two permanent members of the UNSC, Russia and China, five EU member states (Slovakia, Romania, Spain, Greece and Cyprus), and many others continued to oppose Kosovo's independence, just as they did in the time immediately prior to the KDI.[33]

3. Use of the Opinion by Opponents of Kosovo's Independence

It was not to be expected that the primary opponents of Kosovo's independence would change their stance on the basis of the formally non-binding ICJ Opinion. However, even scholars who were skeptical of the impact of the Opinion on Kosovo's quest for broader recognition did not anticipate the extent to which the opponents of Kosovo's independence would use it as legal grounds for active opposition to Kosovo's further recognition.

In the wake of the Opinion, Russia stressed that the Opinion confirms that UNSC 1244's validation of Serbia's territorial integrity and sovereignty over Kosovo remains the universally recognized basis for continued negotiations. China's claim was similar: settlement between Kosovo and Serbia must be reached within the UN. Romania, one of five EU member states that do not recognize Kosovo, asserted that negotiations should determine the final status of Kosovo because, in its Opinion, the ICJ deliberated only on the legality of the KDI and not the question of Kosovo's recognition as a new state.[34]

Serbia leveraged the divisiveness of Kosovo's independence and the Opinion's express recognition of the continued validity of UNSC 1244 in several ways. Firstly, power rivalries among UNSC members meant that Serbia could lobby against Kosovo's membership in international organizations. Secondly, Serbia insisted that Kosovo, when participating in regional and EU-sponsored regional talks, should be represented as "Kosovo with

32 Tatjana Papic, "De-Recognition of States: The Case of Kosovo," *Cornell International Law Journal* 2, (2020): 690.

33 Papic, "The Political Aftermath of the ICJ's Kosovo Opinion," 243–6.

34 Bojana Barlovac and Sabina Arslanagic, "World Reacts to ICJ Advisory Ruling on Kosovo," *Balkan Insight* (blog), July 23, 2010, accessed January 9, 2025, https://balkaninsight.com/2010/07/23/world-reacts-to-icj-advisory-ruling-on-kosovo/.

a footnote" Finally, in alliance with Russia, Serbia campaigned for Kosovo's derecognition among states that had already recognized it.

Leveraging opposition among and between UNSC members – the US on one side, and Russia and China on the other – as well as the opposition of smaller states to the KDI, Serbia successfully prevented Kosovo from entering the UN and its bodies, as well as Interpol.[35] Due to the influence of Kosovo's main sponsors, the US and major EU states, Serbia was less successful in preventing Kosovo from becoming a member of "Western" international organizations like the World Bank and the IMF in 2009 and opening membership talks with the Council of Europe in 2023. Nevertheless, Kosovo's continued limited acceptance in "global" international organizations, such as the UN, prevented Kosovo from utilizing UN membership as a symbol of full statehood and heightened international legitimacy.[36]

In 2012, the EU brokered a "footnote agreement" between Kosovo and Serbia, for which Serbia was immediately rewarded with EU candidate status. According to the "footnote agreement," when participating in regional and EU-sponsored talks where Serbia is present, and also when negotiating with Serbia, Kosovo should represent itself as "Kosovo*." The asterisk refers to the footnote that reads, "This designation is without prejudice to positions on status and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence." Kosovo grudgingly accepted the footnote as a means of escaping diplomatic isolation and a step toward self-representation in EU-sponsored negotiations. For Serbia, however, the footnote symbolizes Kosovo's unsettled legal status and confirms that Serbia's claim to Kosovo's territory is grounded in the UNSC decisions and Opinion.[37] In 2012, negotiators hinted that the "footnote agreement" was a temporary and transitional solution. The transitional solution turned out to be a durable solution, however. To date, in regional and EU negotiations,

35 Ljubovic and Jusic, "Kosovo's Membership of International Organisations," 177–81.

36 Ardian Emini and Alfred Marleku, "The Prospects of Membership in International Organizations: The Case of Kosovo," *Acta Universitatis Danubius. Relationes Internationales* 9, no. 2 (2016), accessed October 20, 2024, https://journals.univ-danubius.ro/index.php/internationalis/article/view/3382.

37 James Ker-Lindsay, "The Significance of Kosovo*," *E-International Relations* (blog), March 3, 2012, accessed January 9, 2025, https://www.e-ir.info/2012/03/03/the-significance-of-kosovo/.

Kosovo still operates using an asterisk and footnote, as opposed to its official name, the Republic of Kosovo.[38]

The Opinion arguably played the role of an additional element in Serbia's campaign for the derecognition of Kosovo among states that had already recognized it. Since 2013, Serbia, with Russia's support and sponsorship, has influenced and incentivized some 15 to 20 states, including Suriname, Burundi, Papua New Guinea, Lesotho, Comoros, Dominica, Grenada, Solomon Islands, Madagascar, Palau, Togo, Central African Republic, Ghana, and Nauru, to derecognize Kosovo, in an instance of what appears to have been "derecognitions for sale."[39] The derecognition of states is controversial and rare, but not an entirely unprecedented practice: owing to China's pressure and incentives, in the period 1963–2018, nearly 50 states derecognized Taiwan.[40] For semi-recognized states such as Kosovo, which strive to join the UN and other global bodies, however, even a relatively small number of derecognitions by smaller states reduces the number of UN members recognizing it. Even derecognitions obtained by controversial means communicate delegitimization, having the effect of undermining Kosovo's attempts to gain wider international recognition and secure entry to the UN.[41]

In the post-Opinion period, the main sponsors of Kosovo's independence, the US and the EU states, pressured Kosovo into negotiating its status with Serbia. This can be viewed as a tacit acknowledgment that the Opinion did not significantly alter Kosovo's international status. From 2013 to 2023, following on from the 2012 "footnote agreement," the US and EU managed to broker several significant agreements between Kosovo and Serbia. In these agreements, the major demand upon Serbia was that

38 Doruntina Baftiu, "Kosovo*: Its Footnote Is Both A Blessing And A Curse," *Radio Free Europe/Radio Liberty*, April 21, 2024, sec. Kosovo, accessed January 9, 2025, https://www.rferl.org/a/kosovo-independence-asterisk-serbia-recognition/32912630.html.

39 Victor S. Mariottini de Oliveira, "Statehood for Sale: Derecognition, 'Rental Recognition,' and the Open Flanks of International Law," *Jus Cogens* 5, no. 2 (2023): 277–95, https://doi.org/10.1007/s42439-023-00075-y; Eugen Cakolli, "Kosovo: Between Universal Non-Recognition and 'Derecognitions'," Kosova Democratic Institute, 2020, 18–22, accessed August 18, 2024, https://www.kas.de/documents/286052/0/Policy+brief+20-09-13+Kosovo+Between+universal+non-recognition+and+derecognitions+(Eng).pdf.

40 Theodor Tudoroiu, "Taiwan in the Caribbean: A Case Study in State de-Recognition," *Asian Journal of Political Science* 25, no. 2 (2017): 209, https://doi.org/10.1080/02185377.2017.1334146.

41 Papic, "De-Recognition of States," 703–22, 730.

it would cease obstruction of Kosovo's further recognition and inclusion in international organizations. At the same time, the US and EU negotiators demanded that Kosovo create the Community of Serb Municipalities, an autonomous region of four majority-Serb municipalities in northern Kosovo.[42] However, neither of these demands has been realized. For internal political reasons (and in alliance with Russia), to date, Serbia continues to lobby against the recognition of Kosovo and opposes Kosovo's membership in international organizations. Kosovo continues to stall on the creation of the Community of Serb Municipalities, arguing that such an entity would resemble Republika Srpska, a Serb-dominated entity established by the US-sponsored Dayton Peace Agreement in Bosnia and Herzegovina, and would essentially act as an extension of Serbia and obstruct the functioning of Kosovo's institutions.

As the stalemate continued, the situation became further complicated in 2023, when ethnic Serbs and international peacekeeping forces clashed after the Kosovo government appointed ethnic Albanian mayors in four Serb-majority municipalities in northern Kosovo following the Serb population's boycott of municipal elections. The appointment of ethnic Albanian mayors in northern Kosovo was seen as an obstacle to the implementation of agreements between Kosovo and Serbia brokered by the EU and the US between 2013 and 2023. In reaction, the EU imposed financial sanctions on Kosovo's government, while the US, the main sponsor of the KDI, announced it would cease advocacy of Kosovo's recognition and the process of its integration into international organizations.[43] The ultimate threat of stopping the advocacy for Kosovo's international recognition by the main sponsor of its independence demonstrates that secessionists are unlikely to gain broader recognition without great power support sponsorship,[44] and are also beholden to their sponsors.

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42 Berta López Domènech, "The Association of Serb Majority Municipalities: The Crux of Tensions," European Policy Center, June 14, 2023, accessed August 11, 2024, https://www.epc.eu/en/Publications/The-Association-of-Serb-Majority-Municipalities-The-crux-of-tensions~517b60.

43 Jusic, "The (Uncertain) Future of Kosovo's Community of Serb Municipalities," 11–2.

44 Coggins, "Friends in High Places."

4. The Opinion as a Tool of Counter-Secession

Overall, the Opinion's trajectory seems paradoxical. The Opinion initially appeared – or was interpreted as – at a minimum not unfavorable to Kosovo and unfavorable to Serbia. However, together with Russia, Serbia coordinated a comprehensive counter-secessionist strategy. It relied on the Opinion as an additional legal argument against further recognition of Kosovo outside of the EU, and also as a bargaining chip in negotiations with the EU, with some success. In the period between the KDI in February 2008 and the Opinion in July 2010, about 70 states recognized Kosovo as an independent state.[45] Though exact figures are difficult to establish with certainty, available data suggests that, by 2023, thirteen years after the issuance of the Opinion, Kosovo was recognized by around 100 to 115 out of 193 UN member states; a lower number of recognitions than semi-recognized countries and territories such as Palestine.[46]

As scholars had anticipated, the Opinion did not significantly accelerate Kosovo's international recognition. However, the trajectory of the Opinion from being at least not unfavorable to Kosovo to becoming a tool of counter-secession was possible for two reasons. The first was that the ICJ's treatment of Serbia's question effectively made Kosovo's status a question of state recognition, while the second was that Serbia was only able to utilize the Opinion due to the support of Russia and China as dominant and rising powers. The price of this second reason, however, was that these dominant powers' support put Serbia in the unenviable position of being beholden to power politics and rivalries in a similar way to which Kosovo is indebted to its main sponsors of independence.

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45 Jusic, "The (Uncertain) Future of Kosovo's Community of Serb Municipalities," 8; "Kosovo Thanks You – Thank You from the Kosovar People!," February 17, 2024, accessed January 9, 2025, https://www.kosovothanksyou.com/.

46 Katharina Buchholz, "Kosovo & Beyond: Where The UN Disagrees On Recognition," Forbes, 2023, accessed January 9, 2025, https://www.forbes.com/sites/katharinabuchholz/2023/02/17/kosovo--beyond-where-the-un-disagrees-on-recognition-infographic/. Kosovo's Ministry of Foreign Affairs states that the number of states that recognize Kosovo's independence is 115, see: Republic of Kosovo Ministry of Foreign Affairs, "List of Acknowledgments," MPJD | MFAD, accessed August 8, 2024, https://mfa-ks.net/lista-e-njohjeve/.

4.1. State (De)Recognition Conundrum

The ICJ's rephrasing of Serbia's question set the stage for its ambiguous opinion that the KDI is not contrary to international law and does not challenge the validity of UNSC 1244. Such a response from the ICJ was perhaps inevitable. Like other international courts with limited effective influence, the ICJ seeks to protect its status by satisfying – or at least not challenging – the majority of states' interests and already-made decisions.[47] Consequently, the Opinion was sufficiently ambiguous to be acceptable to nearly everyone. With its ambiguous response, the ICJ returned the decision on Kosovo's status to states themselves and their own views on recognition, essentially murky waters from both theoretical and practical perspectives.[48]

Theoretically, constitutive and declaratory theory are the two traditional main approaches to state recognition in international law scholarship. Constitutive theory holds that a state is not a state unless and until other states recognize it. The declaratory theory posits that the existence of a state is a factual issue that does not depend on the recognition of other states. Neither of the two theories can fully explain the past or present practice of state recognition. Contrary to constitutive theory, practice shows that states can function without the full recognition of other states. Declaratory theory also concedes that states do not exist in a vacuum. Recognition by other states is often vital for the international status, rights, and obligations of a (non-)recognized state.[49]

The derecognition of states is a far less theoretically debated question, largely because such derecognition is a rare practice. The theoretical divides regarding the derecognition of states are roughly similar to those on state recognition. Constitutive theory holds that – just as states are free to recognize other states and recognition of a state by others is necessary for it be accepted – states have the freedom to derecognize other states and, in

47 Asim Jusic, "Damned If It Doesn't and Damned If It Does: The European Court's Margin of Appreciation and the Mobilizations Around Religious Symbols," *University of Pennsylvania Journal of International Law* 39, no. 3 (2018): 578.

48 James Ker-Lindsay, "Not Such a 'Sui Generis' Case after All: Assessing the ICJ Opinion on Kosovo," *Nationalities Papers* 39, no. 1 (2011): 1–11, https://doi.org/10.1080/00905992.2010.532778.

49 William Thomas Worster, "Law, Politics, and the Conception of the State in State Recognition Theory," *Boston University International Law Journal* 27, (2009): 118–21.

doing so, presumably make the unrecognized ones "lesser" or pariah states. The declaratory theory considers that, because the recognition of a state is a recognition of a fact, it cannot be undone. This stance is further reliant on Article 6 of the Convention on the Rights and Duties of States (Montevideo Convention), which prescribes that recognition is irrevocable.[50]

Both constitutive and declaratory theory approaches to derecognition of states are theoretically problematic. On the one hand, if, as the constitutive theory holds, derecognition makes the derecognized state less of a state, the sovereignty of the derecognized state is an oxymoron to begin with, because it depends on the will of others. On the other, contrary to declaratory theorists' view of derecognition, states cannot be permanently forbidden from revoking the recognition of other states, for that would limit the sovereign choice of states as to whom to recognize as an equal partner and enter into relations with.

Practically, there is yet to be a universally accepted coherent method for determining the criteria for international recognition, a mandate to recognize new states, or derecognition.[51] Whereas the first three criteria of statehood laid out in Article 1 of the Montevideo Convention, i.e. requirements of a permanent population, a defined territory, and a government, are largely factual and relatively uncontroversial, the fourth criterion – the "capacity to enter into relations with the other states," which in practice means recognition of a state by its peers – depends on the sheer will of other states. The United Nations, for example, has no formal criteria for statehood other than recognition by other states. In other words, the process of achieving "full" statehood through recognition by other states and entry into the UN is a political process.[52]

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50 Montevideo Convention on Rights and Duties of States, 1933, accessed January 9, 2025, https://treaties.un.org/pages/showdetails.aspx?objid=0800000280166aef; Gëzim Visoka, "The Derecognition of States," in *Routledge Handbook of State Recognition*, eds. Gëzim Visoka, John Doyle, and Edward Newman (Routledge, 2020), 318–21.

51 Stephen Tierney, "Legal Issues Surrounding the Referendum on Independence for Scotland," *European Constitutional Law Review* 9, no. 3 (2013): 359–90, https://doi.org/10.1017/S1574019612001216.

52 Nicolas Lemay-Hébert, "State Fragility and International Recognition," in *Routledge Handbook of State Recognition*, eds. Visoka, Gëzim, John Doyle, and Edward Newman (Routledge, 2020), 306–15.

The absence of consistently applied discernable criteria for recognizing states makes state recognition uncertain and erratic. It is a process governed not solely or even predominantly by international law but by the interests of the recognizing states and the rivalries of great powers, as demonstrated by the process of (non-)recognition of Kosovo.[53] Consider Kosovo's aspiration for membership in the UN, which is meant to be the sole signal that Kosovo is "truly" recognized: membership in the UN requires consent from all permanent members of the UNSC and two-thirds of the votes of all members of the UN General Assembly.[54] Under the present system, the support of the US as a dominant power is insufficient to secure Kosovo's membership in the UN. Ongoing non-recognition of Kosovo by Russia and China, as permanent UNSC members, blocks Kosovo's admission to the UN, having at the same time the secondary effect of showcasing the influence of Russia and China, and reinforcing their status as dominant powers. Aspiring powers and smaller states can also assert themselves by not recognizing Kosovo and voting against its membership in the UN General Assembly if for no other reason than to align with powers challenging the US- and Western-dominated international order.[55]

4.2. Power Politics and Costs of Counter-Secession

Serbia's partially successful use of the Opinion as a counter-secession tool has not come without costs. It has fostered a dependency on Russia and created a stalemate in relations with the US and the EU, thereby limiting Serbia's maneuvering space and its ability to resolve the dispute with Kosovo independently.

Russia's use of its veto power in the UNSC and its diplomatic influence in support of Serbia's opposition to Kosovo's independence has made Russia a close ally of Serbia and increased its popularity as a friendly "brotherly"

53 Cedric Ryngaert and Sven Sobrie, "Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia," *Leiden Journal of International Law* 24, no. 2 (2011): 467, 490, https://doi.org/10.1017/S0922156511000100.

54 "About UN Membership," United Nations, accessed August 23, 2024, https://www.un.org/en/about-us/about-un-membership.

55 Edward Newman and Gëzim Visoka, "The Geopolitics of State Recognition in a Transitional International Order," *Geopolitics* 28, no. 1 (2023): 372, https://doi.org/10.1080/14650045.2021.1912018.

power and protector among the wider Serbian public. At the same time, Russia "charged" for its sponsorship of Serbia's counter-secession activities by extorting economic privileges, such as control of Serbia's oil and gas industry, and increasing its influence within and over the Serbian government. Consequently, Serbia became increasingly politically, economically, and socially beholden to Russia. It is precisely for this reason that Russia is motivated to ignite and sustain a conflict between Serbia and Kosovo. Resolving the Kosovo-Serbia dispute would diminish Russia's influence in Serbia and the Western Balkans; in contrast, continued conflict provides Russia with an additional chip for bargaining with the US and the West more generally.[56]

Serbia's relations with the US and the EU also reached a stalemate. Conceding that the Opinion did not – and could not – bring about sufficient widespread recognition of Kosovo worldwide, or even throughout the EU, the US and the EU-pressured Serbia and Kosovo into further negotiations. The main idea was to avoid a "frozen conflict" scenario by normalizing Kosovo-Serbia relations using the Cold War "two Germanies" model, through which West Germany and East Germany coexisted without formal mutual recognition. Ultimately, the hope is that Kosovo and Serbia will eventually join the EU, which would diminish the likelihood of renewed conflict, while the US and EU would concurrently promote their own economic interests in Serbia and Kosovo.[57]

However, the Cold War "two Germanies" model does not fully apply to Kosovo and Serbia, and the prospect of EU membership is turning out to be an insufficient panacea.

The post-WWII partition of Germany, as well as the two states' simultaneous entry into the UN in 1973, happened with the consent of all

[56] Maksim Samorukov, "A Spoiler in the Balkans? Russia and the Final Resolution of the Kosovo Conflict," Carnegie Endowment for International Peace, 2019, accessed October 8, 2024, https://carnegieendowment.org/research/2019/11/a-spoiler-in-the-balkans-russia-and-the-final-resolution-of-the-kosovo-conflict?lang=en; Dimitar Bechev, "Russia's Strategic Interests and Tools of Influence in the Western Balkans," 2019, accessed October 8, 2024, https://stratcomcoe.org/cuploads/pfiles/russias_strategic_interests_in_balkans_11dec.pdf.

[57] Jusic, "The (Uncertain) Future of Kosovo's Community of Serb Municipalities: Another Republika Srpska?," 11.

members of the UNSC.[58] In the case of Kosovo and Serbia, no such consent exists between the permanent UNSC members, primarily the US, Russia, and China. Thus, even in an improbable scenario whereby Serbia as a "host" or "parent" state explicitly recognizes Kosovo, such recognition would not automatically lead to recognition by other states. Russia could continue opposing Kosovo's acceptance into the UN, arguing, for example, that Serbia's recognition of Kosovo was coerced and therefore illegitimate, and use its veto power to obstruct what it perceives as a US interest and NATO influence in the Western Balkans.[59] In that scenario, Kosovo would be in a position akin to that of Palestine, which, despite the recognition of some 145 UN members, is still not a full UN member because of the US veto.[60] Such a situation, while highly unusual, would not contravene international law: Serbia's recognition of Kosovo does not necessarily oblige other countries to do the same, as recognition of other states is a sovereign political choice. Hence, under present circumstances, the "two Germanies" model for Kosovo and Serbia in the UN is unlikely to work.

Theoretically, the "two Germanies" model could work for Kosovo and Serbia within the confines of the EU: Kosovo and Serbia could be members of the EU without formal mutual recognition and with the consent of those EU members who do not presently recognize Kosovo. However, the prospect of EU membership remains distant and has proven to be an insufficient incentive to propel necessary reforms in either country that would place them both on a fast track towards the EU for two reasons.

Firstly, notwithstanding Kosovo's strong desire to become a member of both NATO and the EU, Kosovo continues to suffer from economic issues, weak rule of law, corruption, and, as of late, frequent tensions between the Kosovo government and US and EU representatives on modalities of

58 Centre for European Studies, "The End of WWII and the Division of Europe," UNC-Chapell Hill Centre for European Studies, 2024, accessed August 15, 2024, https://europe.unc.edu/the-end-of-wwii-and-the-division-of-europe/; Auswärtiges Amt, "50 Years Germany in the United Nations – Article by Foreign Minister Annalena Baerbock," German Federal Foreign Office, 2023, accessed August 15, 2024, https://www.auswaertiges-amt.de/en/newsroom/news/-/2616204.

59 Jusic, "The (Uncertain) Future of Kosovo's Community of Serb Municipalities," 14.

60 "Mapping Which Countries Recognise Palestine in 2024," Al Jazeera, 2024, accessed August 15, 2024, https://www.aljazeera.com/news/2024/5/22/mapping-which-countries-recognise-palestine-in-2024.

engagement with Serbia.[61] Such recent tensions suggest that Kosovo's leadership understands that further compromises in the US–EU-brokered agreements with Serbia will not bring Kosovo closer to its goal of being a member of the UN because neither the US nor the EU, or even Serbia, is able to deliver that.

Secondly, Serbia, despite having been an EU candidate country since 2012, continues to be ruled by the nationalistic elites that governed it during the era of Slobodan Milošević and the wars of the 1990s. Over the past decade, the EU has observed an increase in democratic backsliding in Serbia but has tolerated it, supposedly to encourage Serbia to shift away from strategic alignment with Russia and China regarding Kosovo, but also to further its own economic interests.[62] Given the absence of any real progress in Serbia's EU integration over an extended period of time, it can be concluded that Serbia has no true interest in joining the EU in the long run. Rather, it should be said that Serbia is interested in prolonging the benefits of its EU candidate status, enjoying concessions from the EU in the process of endless rounds of negotiations with Kosovo.

In sum, somewhat ironically, while attempting to sustain its formal sovereignty over the aspiring state of Kosovo, Serbia has made its remaining sovereignty ambiguous by embroiling itself in the question of state recognition, an arena of great power rivalries.[63] Kosovo's status and its entry into the UN does not appear to be a matter that Serbia could resolve on its own without the consent of its counter-secessionist sponsor, Russia. The implication is that, for the foreseeable future, Serbia will bear the political and economic costs of having a semi-recognized Kosovo at its borders without being able to independently resolve the conflict, change facts on the ground, or decisively influence the trajectory of dispute resolution.

61 EU Directorate-General for Neighbourhood and Enlargement Negotiations, "Kosovo Report 2023 – European Commission," November 2023, accessed August 16, 2024, https://neighbourhood-enlargement.ec.europa.eu/kosovo-report-2023_en.

62 Tony Barber, "Why Is the EU Soft on Serbia?," January 13, 2024, accessed August 16, 2024, https://www.ft.com/content/77900656-0a52-4e1f-8d88-8ed2d7ab7264.

63 Newman and Visoka, "The Geopolitics of State Recognition in a Transitional International Order," 383.

5. Conclusion

The trajectory of the Opinion underscores the complexities and costs of using international judicial opinions as tools of counter-secession. Because the ICJ, in its Opinion, deliberated solely on the legality of the KDI, Serbia, backed by its main sponsor Russia, was able to leverage the lack of coherent international norms governing state recognition, and used the Opinion as a tool of counter-secession, with some success. The use of the Opinion as a counter-secession tool has not been costless, however. Much like Kosovo is indebted to its independence sponsors, Serbia has become beholden to the whims of great power politics. Though the Opinion is the rare case in which the ICJ has discussed the issue of secession, its aftermath points to a need for in-depth research in several understudied areas of international law. The conditions underlying – and second-order effects of – the use of international judicial opinions as one of the tools of counter-secession merit closer examination. Furthermore, the underestimated phenomenon of state derecognition, more generally, and as a tool of counter-secession, deserves further scholarly exploration.

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Non-parliamentary Representative Bodies in Post-Soviet Authoritarian States: Cases of Belarus, Kazakhstan, Kyrgyzstan and Turkmenistan. A Comparative Study

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Abstract: The following paper zooms in on the legal frameworks and the roles in the governance processes of non-parliamentary representative bodies in four post-Soviet authoritarian states: Belarus, Kazakhstan, Kyrgyzstan, and Turkmenistan. These bodies – rooted in the principles of authoritarian and populist constitutionalism – serve as instruments to strengthen executive power while presenting a façade of democratic governance. The study highlights the diverse origins, organization, and functions of these institutions, including the All-Belarusian People's Assembly, the Assembly of the People of Kazakhstan, the People's Kurultai of Kyrgyzstan, and the Halk Maslahaty of Turkmenistan. Despite differences in structure and legal mandates, these bodies share a common purpose: consolidating state authority to enhance formal societal representation. The paper reveals the instrumental role of these bodies in maintaining autocratic regimes, manipulating democratic norms, and ensuring regime stability through direct control by the executive power (the Presidents).

1. Introduction

The political systems of the former Soviet Union countries have been in the process of reform for quite some time now, and democratization is not where this process is heading in most cases. The latest constitutional cycle

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began in 2020 with Russia amending its constitution, followed by constitution amendments in Kyrgyzstan in 2021 and constitutional reforms in Belarus, Kazakhstan, Uzbekistan and Turkmenistan in 2022–2023. The scope of these reforms can be interpreted as improving the state-building process, in which the authoritarian authorities launch additional mechanisms that legally limit the possibility of the democratic alternation of governments. The undemocratic regimes of the former USSR are characterized by a low institutionalization of politics (including the party system), the president's domination in all the branches of power (including law-making competencies) and the creation of a constitutional façade of democracy, where pluralism, competitive elections and responsiveness to social needs are formally asserted though not necessarily practiced.[1]

In this context, the foundation of non-parliamentary representative bodies is a captivating research object. Such institutions are supposed to establish a direct link between the people and the president as the head of state and to implement the principle of "the people's rule," which is known from the Soviet era (Russian: *narodovlastie*). This paper examines the legal aspects of the operation of such institutions in Belarus, Kazakhstan, Kyrgyzstan and Turkmenistan. Not surprisingly, all these countries are governed by rigid and consolidated non-democratic regimes, which frequently violate the principles of the rule of law, democracy and human rights are frequently violated.[2] Their constitutional model, system of governance, and foreign policy to some extent resemble Russian practices. The paper discusses the origins and the legal position of non-parliamentary representative bodies in these countries and assesses them in the paradigm of authoritarian and populist constitutionalism. The study shows that as the presidents of respective republics orchestrate the activities of such bodies, they can be interpreted as deeply undemocratic practices that undermine the idea of parliamentarism. Despite this similarity, the non-parliamentary representative bodies significantly differ across countries, with their role in the constitutional systems of Belarus and Turkmenistan being far greater than in those of Kazakhstan and Kyrgyzstan.

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1 Michał Bożek, "Konstytucja fasadowa – prolegomena," *Państwo i Prawo*, no. 1 (2023): 3–28.

2 Cf. "Nations in Transit 2023," Freedom House, accessed October 1, 2024, https://freedomhouse.org/sites/default/files/2023-05/NIT_2023_Digital.pdf.

2. Post-Soviet Authoritarian States and the Paradigms of Authoritarian and Populist Constitutionalism

Global constitutionalism is ever less permeated by the American vision of constitutionalism, and research has shown that the Constitution of the United States is no longer a "systemic prototype" for other countries in the modern world.[3] Constitutionalism has become a global phenomenon and evolved a range of specific varieties, for example, African, Latin American, Confucian and Socialist.[4] As non-democratic systems, such as illiberal democracies,[5] "democracies with adjectives,"[6] competitive authoritarianism[7] and others, have been spreading since the early 21st century, the legal doctrine has developed new analytical concepts, including authoritarian constitutionalism and populist constitutionalism. Both capture important features of the political systems of states that formally declare their compliance with the rule of law, pluralism and civil liberties, while the very design of these political systems contradicts democratic axiology and the concept of check and balance of the branches of power.[8] Admittedly, these concepts have mostly been applied in research on illiberal democracies and non-European authoritarian states, such as Singapore,[9] Venezuela and Hungary,[10] but this does not preclude their applicability to non-democratic post-Soviet states.

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3 Heinz Klug, "Model and Anti-Model: The United States Constitution and the 'Rise of World Constitutionalism'," *Wisconsin Law Review* (2000): 605; David S. Law and Mila Versteeg, "The Declining Influence of the United States Constitution," *New York University Law Review* 87, no. 3 (2012): 762–858.

4 Cf. Berihun Adugna Gebeye, *A Theory of African Constitutionalism* (Oxford: Oxford University Press, 2021); Ngoc Son Bui, *Constitutional Change in the Contemporary Socialist World* (Oxford: Oxford University Press, 2020).

5 Andras Sajó, Renata Uitz, and Stephen Holmes, eds. *Routledge Handbook of Illiberalism* (New York: Routledge, 2022).

6 David Collier and Steven Levitsky, "Democracy with Adjectives: Conceptual Innovation in Comparative Research," *World Politics* 49, no. 3 (1997): 430–51.

7 Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (New York: Cambridge University Press, 2010).

8 Zahary Elkins, Tom Ginsburg, and James Melton, "The Content of Authoritarian Constitutions," in *Constitutions in Authoritarian Regimes*, eds. Tom Ginsburg and Alberto Simpser (New York: Cambridge University Press 2014), 149.

9 Mark Tushnet, "Authoritarian Constitutionalism," *Cornell Law Review* 100, no. 2 (2015): 391–462.

10 Helena Alviar Garcia and Günter Frankenberg, eds., *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Cheltenham: Edward Elgar, 2019).

Under authoritarian constitutionalism, the institutions of power are controlled by one dominant party (or a non-partisan political force), which makes the main decisions and there are no legal mechanisms to question their legality; the state does not arbitrarily persecute its political opponents although it may obstruct public activity in various ways; a certain level of pluralism and some criticism of the authorities are retained; and those in power react to public moods and change their political agenda accordingly to garner as much support as possible.[11]

In today's comparative jurisprudence the paradigm of populist constitutionalism is associated with countries in which democracy is eroding and the neoliberal model of government is being undermined, as recently exemplified by Hungary and pre-2023 Poland.[12] Importantly, however, the relation between populism and constitutionalism need not be antithetical. Populist authorities use constitutions and institutions of public power to strengthen their position, relying to this end on the meeting of the public's needs.[13] The development of populist constitutionalism follows a specific trajectory. Namely, as scholars have noted, populist leaders begin by emphasizing their promise to improve the existing order, all the while obscuring their underlying consolidation of power.[14] Populist constitutionalism tends to masquerade as liberal democracy but does not pose an ideological challenge to it.[15] Authoritarian populist leaders stress their "popular" roots and background and regularly appeal to the plebiscitary rule, the "people's voice" as expressed in referenda, omitting or even disregarding

11 Mark Tushnet, "Authoritarian Constitutionalism: Some Conceptual Issues," in *Constitutions in Authoritarian Regimes*, eds. Tom Ginsburg and Alberto Simpser (New York: Cambridge University Press, 2014), 45–6.

12 Paul Blokker, Bojan Bugaric, and Gábor Halmai, "Introduction. Populist Constitutionalism: Varieties, Complexities, and Contradictions," *German Law Journal* 20, no. 3 (2019): 291–5.

13 Alexei Trochev and Alisher Juzgenbayev, "Instrumentalization of constitutional law in Central Asia," *Research Handbook on Law and Political Systems*, eds. Robert M. Howard, Kirk A. Randazzo, and Rebecca A. Reid (Cheltenham: Edward Elgar, 2023).

14 David Landau, "Populist Constitutions," *The University of Chicago Law Review* 85, (2018): 521; Berch Berberoglu, ed., *The Global Rise of Authoritarianism in the 21st Century: Crisis of Neoliberal Globalization and the Nationalist Response* (New York: Routledge, 2021).

15 Kim L. Sheppele, "Autocratic Legalism," *The University of Chicago Law Review* 85, (2018): 545.

the parliaments.[16] Sensitiveness to citizens' voice on public policy issues pushes some scholars to claim such states "consultative authoritarianism."[17]

In both paradigms, non-democratic states imitate the institutions of a democratic state with its rule of law, although they give these institutions an ulterior meaning.[18] Theirs is a fake constitutionalism, since it does not aim to protect human and civil rights and liberties but seeks to ensure the stability, and continuity of the non-democratic regime, forestalling its loss of power. Under such conditions, a constitution misses its rule-of-law protection element capable of binding the ruling elite and preventing abuses of power. As a result, it is degraded into an organizational statue.[19]

3. The Origins and Goals of Non-parliamentary Representative Bodies in Belarus, Kazakhstan, Kyrgyzstan, and Turkmenistan

Contemporary non-parliamentary representative organs have operated in four post-Soviet nations: Belarus, Kazakhstan, Kyrgyzstan, and Turkmenistan. Though sharing the aims of the structuralization of society and establishing direct communication channels with the presidents, the institutions have different competencies and relationships with other state agencies.

The history of the All-Belarusian People's Assembly (ABPA) goes back to the beginning of Alexander Lukashenko's presidency (his first tenure started in 1994). When in 1996 he put forward a constitutional amendment bill, the parliament and the Constitutional Court opposed it because it significantly strengthened the president's competencies at the expense of the other branches of power. In an attempt to defeat the Parliamentary opposition, Lukashenko called the first sitting of the ABPA as a platform for direct communication and consultation with the people of Belarus in October 1996. The ABPA unanimously supported Lukashenko's proposed amendment to the constitution and accepted the presidential programme of socio-economic development for 1996–2000. The ABPA's activities had

16 Rafał Czachor, "Instytucje demokracji bezpośredniej w systemie samorządu lokalnego w Republice Białoruś," *Przegląd Prawa Konstytucyjnego* 35, no. 1 (2017): 155–72.

17 Colin Knox and Dina Sharipova, "Consultative Authoritarianism in Central Asia," *Europe-Asia Studies* 76, no. 7 (2024): 1120–44.

18 Rafał Czachor, "Konstytucjonalizmy niezachodnie jako wyzwanie dla komparatystyki prawa," *Studia prawnicze. Rozprawy i materiały* 31, no. 2 (2022): 15–42.

19 Bożek, "Konstytucja fasadowa – prolegomena," 4.

no legal basis. Subsequent ABPA congresses were held in 2001, 2006, 2010, 2016 and 2021 as acts of support for Lukashenko's policy before the subsequent presidential elections.[20] The origins of the constitutionalization of the ABPA date back to 2019, when Lukashenko said that the state system needed modifying. In 2020, after the rigged presidential elections, Belarus was swept over by the largest wave of social protests in its history. As a response, Lukashenko announced that the constitution would be amended, the president's powers would be limited, and the democratic governance mechanisms would be improved.[21]

The latest amendment to the Constitution of Belarus of February 27, 2022[22] incorporated the ABPA into the system of state institutions. The role of the ABPA was significantly changed by part IV ("President, ABPA, Parliament, Government, Court"), Chapter 3^1 ("The ABPA"), articles 89^1-89^6 of the Constitution, which made this body an important element of the constitutional design of Belarus. It defined the ABPA as "a higher representative body of the people's power of the Republic of Belarus, which defines the strategic directions of the development of society and the state, ensures the inviolability of the constitutional system, the continuity of generations and civic accord" (Article 89^1 of the Constitution of Belarus). A further legislation, the Law on the ABPA, was adopted on February 7, 2023.[23]

The Assembly of the Peoples of Kazakhstan (APK) was established by the decree of the President of Kazakhstan on March 1, 1995 as a "consultative and advisory body under the head of state."[24] Its goal was to consolidate society and promote harmony between the various ethnic groups

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20 Rafał Czachor, *Transformacja systemu politycznego Białorusi w latach 1988–2001* (Polkowice: Wydawnictwo Uczelni Jana Wyżykowskiego, 2016).

21 Лукашенко рассказал об идеях по перераспределению полномочий президента [Lukašenko rasskazal ob ideâh po pererаspredeleniû polnomočij prezidenta], accessed October 1, 2024, https://ria.ru/20201012/belorussiya-1579373159.html?ysclid=lx1setl06z370440129.

22 Конституция Республики Беларусь [Konstituciâ Respubliki Belarus′], accessed October 1, 2024, https://pravo.by/pravovaya-informatsiya/normativnye-dokumenty/konstitutsiya-respubliki-belarus/.

23 Закон Республики Беларусь от 7 февраля 2023 г. 'О Всебелорусском народном собрании,' [Zakon Respubliki Belarus′ ot 7 fevralâ 2023 g. 'O Vsebelorusskom narodnom sobranii'], accessed October 1, 2024, https://pravo.by/document/?guid=3871&p0=H12300248.

24 Указ Президента Республики Казахстан от 1 марта 1995 г. № 2066 'Об образовании Ассамблеи народов Казахстана,' [Ukaz Prezidenta Respubliki Kazahstan ot 1 marta

of Kazakhstan.[25] In 2008, the status of the APK was regulated by law, and the plural word "Peoples" in its name was replaced with the singular "People."[26] Such a change should reflect the progress in unifying, multi-ethnic, civic nation of Kazakhstan. The 2008 law was last amended on November 18, 2022. The preamble to the Act of October 20, 2008 stated that the aim of the APK was to "conduct the state policy, ensuring social harmony and national unity and to improve the effectiveness of cooperation between state bodies, organisations and institutions of civil society in the field of interethnic relations." The APK was proclaimed to be founded on "Kazakh patriotism, the civic and spiritual-cultural community of the ethnic groups of Kazakhstan with the consolidating role of the Kazakh nation" (Article 3 of the Act of October 20, 2008). The nature of its activities is determined by the fact that it has no legal personality (Article 1, Sec. 1 of the Act of October 20, 2008). The basic tasks of the APK are: to ensure effective collaboration between state bodies and civil society in the field of interethnic relations; to promote harmony and national unity; to strengthen the unity of the people of Kazakhstan; to cooperate with the state authorities in counteracting extremism and radicalism; to participate in the shaping of the political and legal culture of citizens; and to preserve and develop Kazakh traditions, languages and culture (Article 4 of the Act of October 20, 2008).

Kurultai is a form of people's assembly with a centuries-long tradition among the Kyrgyz and other Mongolian and Turan peoples. In the modern history of Kyrgyzstan, it was first convened as the Kyrgyz Kurultai of the World in 1992 to consolidate the Kyrgyz nation and determine its development goals. In 1994, the First Kurultai of the Peoples of Kyrgyzstan was held under the slogan "Kyrgyzstan – our common home" to discuss the new state's development directions based on interethnic harmony. The idea of

1995 g. № 2066 'Ob obrazovanii Assamblei narodov Kazahstana'], accessed October 1, 2024, https://online.zakon.kz/Document/?doc_id=1003481.

25 Tadeusz Bodio and Tadeusz Mołdawa, *Konstytucje państw Azji Centralnej. Tradycje i współczesność* (Warsaw: Elipsa, 2007), 76.

26 Закон Республики Казахстан от 20 октября 2008 года № 70-IV 'Об Ассамблее народа Казахстана,' [Zakon Respubliki Kazahstan ot 20 oktâbrâ 2008 goda № 70-IV 'Ob Assamblee naroda Kazahstana'], accessed October 1, 2024, https://online.zakon.kz/Document/?doc_id=30352401.

Kurultai gatherings as an exercise in "real democracy" was revived in 2022. Importantly, Kyrgyzstan experienced serious political crises in 2005, 2010 and 2020. Called revolutions, these upheavals resembled the turmoil of "color revolutions" in Ukraine and Georgia, and their turbulent events, marked by ethnic, clan and sociopolitical divisions, resulted in changes to Kyrgyzstan's constitution. After the revolution of 2020, there was a return to authoritarian governance practices, despite the new president Sadyr Japarov's prior assurances to the contrary.[27] The 2021 amendment to the constitution, introduced the People's Kurultai as one of the new institutions of public power.[28] The current constitution stipulates that "The People's Kurultai is a consultative assembly that gives recommendations in the field of social development," and its status is determined by constitutional law (Article 7, sections 1–2 of the Constitution of Kyrgyzstan). The relevant constitutional act was adopted on July 24, 2023.[29]

The Halk Maslahaty, a non-parliamentary representative body in Turkmenistan, boasts the most complex history. Turkmenistan has experienced the least political transformation since the dissolution of the USSR and consolidated an isolationist and extremely authoritarian sultanistic regime with the cult of the consecutive presidents – Sapurmurad Niyazov and Gurbanguly Berdymukhamedov.[30] Established in 1992, shortly after Turkmenistan declared independence, the Halk Maslahaty lacked full legal underpinnings. In 2002, despite having no power in this regard, Halk Maslahaty extended Niyazov's presidency for life, without holding any elections in the future. According to the amended constitution of 2003, the Halk Maslahaty, became the "supreme representative body" and the "supreme state authority" (Article 45 of the Constitution of Turkmenistan

27 Rafał Czachor, "Reforma ustrojowa w Kirgistanie w 2021 roku na tle konstytucjonalizmu autorytarnego," *Studia nad Autorytaryzmem i Totalitaryzmem* 44, no. 2 (2022): 45–63.

28 Конституция Кыргызской Республики [Konstituciâ Kyrgyzskoj Respubliki], accessed October 1, 2024, /www.gov.kg/ru/p/constitution.

29 Конституционный закон Кыргызской Республики от 24 июля 2023 года № 146 'О Народном Курултае,' [Konstitucionnyj zakon Kyrgyzskoj Respubliki ot 24 iûlâ 2023 goda № 146 'O Narodnom Kurultae'], accessed October 1, 2024, https://cbd.minjust.gov.kg/112626/edition/1275854/ru?ysclid=lx1ut92cj3981199838.

30 Sebastien Peyrouse, "Turkmenistan: Authoritarianism, Nation Building, and Cult of Personality," *Research Handbook on Authoritarianism*, eds. Natasha Lindstaedt and Jeroen J.J. van den Bosch (Cheltenham: Edward Elgar, 2024), 356–69.

of 2003), operating separately from the Majlis, Turkmenistan's unicameral parliament. Moreover, the constitution stated that "state power in Turkmenistan is divided into the Halk Maslahaty, the legislative, the executive and the judiciary, which act independently and balance each other" (Article 4 of the Constitution of Turkmenistan of 2003). This placed the Halk Maslahaty beyond the classical model of the separation of state powers. Its 2,507 members were elected and appointed by the president.[31]

However, the 2008 amendment to the Constitution of Turkmenistan abolished the Halk Maslahaty and strengthened the position of the unicameral Majlis. Subsequently, the constitutional reform of 2020 introduced a bicameral parliament called Milli Geňeş, which consisted of the Majlis as the lower chamber and the Halk Malsahaty as the upper chamber. This change came into force at the beginning of 2021, but soon, in January 2023, Berdymukhammedov, who had resigned as President and handed power over to his son Serdar, proclaimed that the unicameral parliament should be reinstated. In March 2023, after the parliamentary elections, the Majlis began to work as a unicameral parliament again, and the Halk Maslachaty has since continued to exist as a non-parliamentary assembly of the people. Its legal position is currently regulated by the Constitution of Turkmenistan, amended in January 2023,[32] and the Constitutional Law of January 21, 2023.[33]

Turkmenistan's constitution says that the Halk Maslahaty is "the highest representative body representing the interests of the people of Turkmenistan" (Article 6[1] of the Constitution of Turkmenistan of 2023). For its part, the Constitutional Law states the Halk Maslahaty is established to "expand nationwide participation in the promotion of Turkmenistan's successes in the years of Independence, taking the country to an even higher level of development" (Article 1, paragraph 1 of the Law of January 21, 2023). As its main goal and task, the Halk Maslahaty is supposed to "engage

31 Jan Šír, "Halk Maslahaty in the Context of the Constitutional Evolution of post-Soviet Turkmenistan," *Perspectives on European Politics and Society* 6, no. 2 (2005): 321–30.

32 Конституция Туркменистана [Konstituciâ Turkmenistana], accessed October 1, 2024, https://online.zakon.kz/Document/?doc_id=31337929&pos=6;-106#pos=6;-106.

33 Конституционный Закон Туркменистана 'О Халк Маслахаты Туркменистана,' [Konstitucionnyj Zakon Turkmenistana 'O Halk Maslahaty Turkmenistana'], accessed October 1, 2024, https://maslahat.gov.tm/api/v1/uploads/laws/1680526625575315806.pdf.

the people in deciding on issues of state importance, socio-economic transformations and programmes, developing proposals, consulting and cooperating to strengthen the unity, peace and flourishing of the nation" (Article 1.2 of the Law of January 21, 2023). Hence, the Halk Maslahaty not only holds a unique legal position, one superior to Turkmenistan's parliament, but also enjoys a deep ideological justification.

4. The Composition and Organization of Non-parliamentary Representative Bodies in Belarus, Kazakhstan, Kyrgyzstan, and Turkmenistan

The ABPA has 1,200 delegates. Under the Constitution of Belarus, its *ex officio* members include: the President of Belarus, the former President of Belarus and representatives of all the branches of state power, local government bodies and civil society. The law of February 7, 2023 specified that the ABPA consisted of the members of both houses of parliament (the National Assembly), the head of the government, ministers, the heads of local executive committees and the judges of the Constitutional Court and the Supreme Court. Local councils of deputies elect their representatives to the ABPA. The procedure for electing civil society representatives is to be regulated by the Electoral Code of Belarus. The mandate of a deputy is non-professional.

The work of the ABPA is managed by the praesidium. It has 15 members and operates continuously. The law of February 7, 2023 expanded the constitutional powers of this body, making it the central organ of the ABPA. In addition to the competencies defined in the constitution, the law empowered the praesidium of the ABPA to promote judges of the Constitutional and Supreme Courts, to determine the number of their deputy chairmen, to appoint members of their praesidia and to authorize the initiation of criminal proceedings against their judges. The ABPA convenes at least once a year. Extraordinary meetings may be called at the request of the President of Belarus, the Praesidium of the ABPA, a joint resolution of both houses of parliament and upon the initiative of at least 150,000 citizens (Article 89^4 of the Constitution of Belarus).

The structure of the APK comprises several bodies. The Session of the APK, that is, a meeting of its 583 members, is held at least once a year and is the supreme body of the APK. In addition to the central nationwide

APK, there are also local APKs at the level of regions and what are called cities of republican importance. The APK is chaired by the President of Kazakhstan, who determines its agenda and appoints five members of the Senate of Kazakhstan at the request of the APK Council. Local APKs in regions and cities of republican importance are chaired by their respective akims (heads of local executive bodies, Article 14, Sec. 2 of the Act of October 20, 2008). Also, members of ethnocultural social organizations and of public authorities can be delegated to sit on the APK (Article 15, Sec. 1–2 of the Act). The register of such organizations is kept by the government. The President of Kazakhstan or the APK can by a resolution dismiss a member of the APK (Article 17, Sec. 1–2 of the Act). Following the 2018 and 2022 amendments to the Act of October 20, 2008, the sole right of the Session is to develop the directions of the APK's activities and submit them to the President of Kazakhstan for approval (Article 4 of the Act). Under the previous legal status, the APK Session elected 9 members of the Mazhilis, the lower house of the Kazakh parliament, and considered citizens' claims on issues of social order and interethnic relations. Between the APK Sessions, its current work is managed by the APK Council, whose members are appointed by the President of Kazakhstan from among the state authorities and the members of the ethnocultural organizations represented in the APK (Article 10, Sec. 2 of the Act).

The Kyrgyzstan People's Kurultai works during its annual meetings, to which 700 delegates are elected each time, with the eligibility criteria set by the decree of the President of Kyrgyzstan, taking into account ethnic, religious and age factors. For example, people under 21 years of age, public officials and members of parliament and local councils cannot serve as delegates (Article 3, Sec. 1–3 of the Act of July 24, 2023). The 17-member National Council of People's Kurultai is elected from among the delegates of the People's Kurultai. It draws up the agenda of the meetings, coordinates the work of this organ and submits to the President a request to convene a following meeting of the People's Kurultai, suggesting its date and venue (Article 11, Sec. 1–2 of the Act).

The People's Kurultai assembles to consider matters related to the activities of the public authorities and local governments, in particular: the organization of national referendums, recommendations regarding bills and programs of the development of society and the state, the preservation of

traditions and the national heritage and the settlement of interethnic disputes (Article 5 of the Act of July 24, 2023).

Turkmenistan's Constitutional Law of January 21, 2023 stipulates that "a great personality of modern times, the Hero of Turkmenistan, the Honorary Leader of Turkmenistan, the Arkadag of the nation, Honourable Gurbanguly Berdymukhamedov, whose high status of the National Leader is confirmed by law" is a permanent member of the Halk Maslahaty (Article 2, Sec. 1 of the Law of January 21, 2023). Its other members include the chairman of the Halk Maslahaty, the President of Turkmenistan, the chairman and deputies of the Majilis, members of the government, the chairman of the Supreme Court, the secretary of the State Security Council of Turkmenistan, the Prosecutor General, the Plenipotentiary for Human Rights, the hakims of *velayats*, *etraps* and cities (heads of the executive bodies in Turkmenistan's administrative divisions), the chairmen of the local Halk Maslahatys in *velayats*, *etraps* and cities, the *arhkins* (chief executives) of municipalities and the leaders of political parties, trade unions and other social organizations (Article 2, Sec. 2 of the Constitutional Law of January 21, 2023). The chairman of the Halk Maslahaty has the authority to invite any person to be its member in recognition of their significant contribution to the consolidation of the state, the unity of the nation, the protection of human rights and other merits (Article 2, Sec. 4 of the Constitutional Law of January 21, 2023).

Appointed and dismissed by the President of Turkmenistan, the chairman of the Halk Maslahaty manages the work of the body and heads its Praesidium (Article 3, Sec. 1–3 of the Constitutional Law of January 21, 2023). He is in charge of the activities of the body, signs the resolutions adopted by Halk Maslahaty and supervises their implementation (Article 11 of the Constitutional Law of January 21, 2023). The chairman can also issue decrees and instruct members of the Halk Maslahaty and other state bodies to investigate issues of state importance and develop relevant legal acts (Article 12, Sec. 1–3 of the Constitutional Law of January 21, 2023).

5. The Competences of Non-parliamentary Representative Bodies

The different origins and purposes of the non-parliamentary representative bodies in the post-Soviet countries determine their different competences and mechanisms of cooperation with other state organs, especially

the legislature and the executive. Given the important role of the ABPA and the Halk Maslahaty in Belarus and Turkmenistan, respectively, the two can be expected to be provided with competences that interfere with the democratic model of governance and the check and balance mechanism.

The ABPA has the right of legislative initiative, can propose changes or amendments to the Constitution of Belarus and also has the right to declare the state of emergency in the event of the inaction of the President of Belarus in this respect. The ABPA approves the main directions and the concept of the domestic and foreign policy of Belarus, the military doctrine and programs of the socio-economic development of the country. In addition, it holds hearings of the Prime Minister's reports on the implementation of these programs. At the request of the President, the ABPA appoints and dismisses judges of the Constitutional Court and the Supreme Court (Article 89^3 of the Constitution of Belarus). The ABPA may request the President to hold a national referendum, and the President is obligated to announce it (Article 74 of the Constitution of Belarus). It also appoints and dismisses the chairman and members of the Central Electoral Commission and confirms the validity of the presidential and parliamentary elections (Article 71 of the Constitution of Belarus). The ABPA's declaration of the election as invalid repeals the resolution of the Central Electoral Commission and results in a repeat vote.

The ABPA is the main body in the impeachment of the President of Belarus. The impeachment procedure can be initiated in the event of a serious or systematic violation of the Constitution, state treason and other grave crimes. The relevant motion is submitted by at least 1/3 of the total membership of the House of Representatives, the lower chamber of the Belarusian Parliament, or by a group of at least 150,000 citizens possessed of voting rights. The ABPA investigates the case. For accusations concerning a violation of the constitutional norms, the Constitutional Court must rule whether such a breach has indeed been committed. The resolution to impeach the President is adopted by a majority vote of the ABPA members. Failure to adopt an appropriate resolution within two months from the accusation terminates the procedure (Article 88 of the Constitution of Belarus).

The ABPA conducts its activity through resolutions. Resolutions are legally binding and may revoke legal acts and other acts of state bodies

that are against the "national security interest," except the final rulings of courts (Article 89[5] of the Constitution of Belarus). Resolutions are adopted by open ballot (Article 30 of the Law of February 7, 2023) and are implemented by the Government of Belarus (Article 107 of the Constitution of Belarus).

The APK has no significant responsibilities in Kazakhstan's system of governance. Its basic areas of activity include support for other public authorities through assisting the development and implementation of the state policy for national harmony and unity; collaboration on the development of Kazakh patriotism; development of the state language and other languages of Kazakhstan; and support for the Kazakh diaspora outside Kazakhstan (Article 6 of the Law of February 7, 2023). The most important competences of the APK include proposing five candidates to the Senate of Kazakhstan, who are appointed by the President of Kazakhstan, considering candidacies for the APK members and submitting proposals for agendas of the subsequent APK Sessions to the President of Kazakhstan (Article 10 Section 4 of the Law of February 7, 2023). The APK resolutions are adopted by a majority of the members and are not binding normative acts.

The Kyrgyz People's Kurultai is an organ that recommends social development guidelines to the executive bodies and has a certain competence of the executive and the judiciary. Specifically, it can initiate the dismissal of government members and the heads of executive bodies; it also has the right to appoint 1/3 of the members of the Judiciary Council. The People's Kurultai can initiate the legislative process, listens to the President's annual address and reports of the speaker of the Parliament, the prime minister and members of the government and other state bodies at the request of the President, the speaker of the Parliament and the government, and discusses issues of importance to society and the state (Article 6 of the Act of July 24, 2023). The legal form of activity of the People's Kurultai is resolutions. The Kurultai's resolutions are adopted by a majority vote of the total number of deputies, but they have no binding force and are only recommendations. The adoption of a resolution is directly communicated to the president, the speaker of parliament, the prime minister and other public authorities (Article 12 of the Act).

The competences of the Halk Maslahaty include: the consideration and adoption of amendments to the Constitution of Turkmenistan and constitutional laws, the right of legislative initiative, the consideration and adoption of documents determining the main directions of the domestic and foreign policy; to the hearing of the President's annual address; considering issues of peace and security (Article 10 of the Constitutional Law of January 21, 2023). The decisions of the Halk Maslahaty have full binding force; they are adopted by a majority vote of its total membership and can only be changed by another resolution of the Halk Maslahaty. The provisions are subject to mandatory implementation by the President, the Majlis, the government and other state agencies of Turkmenistan (Article 9 of the Constitutional Law of January 21, 2023). This makes the Halk Maslahaty a very powerful organ that in fact surpasses the other state institutions.

6. Conclusions

The analysis of the legal position of non-parliamentary representative bodies in authoritarian post-Soviet states in terms of authoritarian and populist constitutionalism yields several conclusions. Firstly, autocracies are committed to the institutions that create a democratic façade. They develop a system of state organs that formally ensure democratic governance, establish a bond between the government and citizens and fulfil the public's needs and demands. In this way, authoritarian regimes actively maintain their direct connections with "ordinary people" and mobilize them to express their support. In the light of populist constitutionalism, non-parliamentary representative bodies of post-Soviet states may replace parliaments as the main institution articulating the voice of the Sovereign – the Nation – while the 'will of the nation' expressed by them may be subject to manipulation.

Secondly, the non-parliamentary representative bodies in Belarus, Kazakhstan, Kyrgyzstan and Turkmenistan have different origins, goals and organization. Due to the complex ethnic composition of Kazakhstan and Kyrgyzstan, the ANK and the People's Kurultai function as political tools for facilitating the processes of state-building and nation-building. Designed to ensure support for the incumbents, they are a platform for achieving ethnic unity and have no major competencies vis-à-vis the authorities. With a strong and direct link to the President of each country,

they strive to maintain social harmony and to prevent ethnic clashes. In Belarus and Turkmenistan, the ABPA and the Halk Maslahaty play a greater role in their respective constitutional systems. While their foundation was not prompted by ethnic factors, they considerably differ in their legal position and organization. In Turkmenistan, the Halk Maslahaty is controlled by the former president, who controls his son's activities at the President's office.

The ABPA was introduced into the Belarusian constitution as part of the gradual democratization and limitation of the president's competences announced by Lukashenko in 2020. It boasts the most exhaustive and complete legal provisions of the four non-parliamentary representative bodies discussed in this paper. In legal terms, the election, procedures and powers of the ABPA resemble those of a parliament. Thus, given that Lukashenko holds a dominant position in the political system of Belarus and was involvement in the establishment of the ABPA, the ABPA can be expected to marginalize or even replace the Parliament. In the event of the transfer of the presidential power to another person (with one of Lukashenko's sons projected to be his successor), Lukashenko will retain the control of the incumbent through the ABPA.

The Halk Maslahaty in its current form was established in 2023, after Gurbanguly Berdymukhamedov ceded his presidential powers to his son. The recent constitutional reform has reinstated the Halk Maslahaty as the core element of the system of governance by conferring the supreme state power upon it. Currently chaired by Berdymukhamedov senior, the Halk Maslahaty can be regarded as a body that informally stands above the President and guarantees his protection and operational security. The Halk Maslahaty may issue legal acts that are mandatory for all the other state bodies, and its chairman personally supervises the implementation of the Halk Maslahaty's normative acts. Since Gurbanguly Berdymukhamedov enjoys great respect among the Turkmen elites as a guarantor of the balance of their interests and his cult is ubiquitous in the public sphere, there is every reason to believe that the restoration of the Halk Maslahaty instituted a system of dual power between the current president and the former one. The chairman's capacity to freely determine the membership of the Halk Maslahaty and to set its agenda transforms this institution into a supervisory board that oversees the activities of all the other state organs.

To conclude, the post-Soviet non-parliamentary representative bodies that exist in Belarus, Kazakhstan, Kyrgyzstan and Turkmenistan can be interpreted as alternatives to standard parliamentary democracy, in which the executive, headed by the prime minister, is politically accountable to parliament. In particular, the cases of Belarus and Turkmenistan confirm the ruling elites' desire to fully control the constitutional bodies of power through the mechanism of "the people's rule" and the implementation of the public's demand for strong government. The Belarusian incumbent and Turkmenistan's former President control, respectively, the ABPA and the Halk Maslahaty and in this way hold powerful tools to perpetuate their autocratic model of governance.

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The Human Right to Take Part in Cultural Life

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Abstract: The human right to take part in cultural life is rooted in dignity of the person. Cultural rights form an integral part of human rights and, like all other rights, are universal, indivisible and interdependent, that is why respecting them is essential for the preservation of human dignity and the positive social interaction between individuals and communities in a diverse and multicultural world. The concept of unity of human rights implies equality of personal, political, economic, social and cultural rights. It is a universal right to participation, contributing and access to culture. The human right to take part in cultural life must be considered in two dimensions: individual and collective. This emphasizes both the autonomy of the individual and the importance of the community. An analysis of this law allows us to point out its most fundamental elements. Both the Universal Declaration of Human Rights (Article 27) and the International Covenant on Economic, Social and Cultural Rights (Article 15) state that the human right to take part in cultural life is vested in all members of the human community. In view of this fact, States are obliged to promote culture among all social groups. States are also obliged to recognize the diversity of identities of individuals and communities residing on their territory. The international community attaches great importance to cooperation in the field of culture.

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1. Introduction

The human is a historical, biological, but also a social being, because only in society can they maintain their existence, develop spiritually and morally and pass on their achievements to the next generations. There is a vital durable core in the human being, without which no historical continuity was possible. Man is also a transcendent being. People are able to mentally transcend the spatial-temporal world and ask questions about its origin, primal cause and the sense of their own lives. Man is capable of defining his relationships not only to other people and the world, but also to God. Since the human being has a special place in the world, they are entitled to a personal dignity, which is inherent, permanent, immutable.[1] Humans are also cultural beings as they transform their natural and social environment. Man, when completely deprived of culture, cannot exist and develop.[2] He does not create this culture alone, but with other people, living in society. Human rights are contained within dignity. This dignity is related to the ontic human nature, as without dignity, the human being would not be a person and also a subject of rights and obligations.[3] Human rights are read from innate human dignity in the context of the situation in the human community as a whole. The Committee on Economic, Social and Cultural Rights (CESCR) has stated in its General Comment no. 21 that

> cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and

1 Franciszek Janusz Mazurek, *Alfreda Verdrossa i Jacquesa Maritaina koncepcja dynamiczna prawa naturalnego i praw człowieka* (Lublin: Polihymnia, 1999), 33–5; Krzysztof Orzeszyna, Michał Skwarzyński, and Robert Tabaszewski, *Prawo międzynarodowe praw człowieka*, 2nd ed. (Warsaw: C.H. Beck, 2022), 276–7; Krzysztof Orzeszyna, "The Right to a Natural and Dignified Death," *Studia Iuridica Lublinensia* 29, no. 4 (2020): 221, http://dx.doi.org/10.17951/sil.2020.29.4.221-232.

2 Alfred Verdross, *Statisches und dynamisches Naturrecht* (Freiburg: Rombach Hochschul Paperback, 1971), 84.

3 According to A. Verdross, the principle of dignity of the human person and the principle of human rights belong, alongside other principles, to the *ius cogens*, i.e. the imperative norm of universal international law ("Jus Dispositivum and Jus Cogens in International Law," *American Journal of International Law* 60, no. 1 [1966]: 59 et seq.).

positive social interaction between individuals and communities in a diverse and multicultural world.[4]

The human right to take part in cultural life was stated e.g. in the Universal Declaration of Human Rights,[5] the International Covenant on Economic, Social and Cultural Rights,[6] the African Charter on Human and Peoples' Rights,[7] the Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights (San Salvador Protocol),[8] the Arab Charter on Human Rights,[9] the Convention for the Protection of Human Rights and Fundamental Freedoms,[10] and many other special and sector-specific declarations and conventions. The formation of international standards for the enjoyment of the human right to cultural participation is primarily linked to the operation of UNESCO. Among many documents of this organization, most notable are the UNESCO recommendations

4 CESCR, General Comment no. 21, Right of everyone to take part in cultural life (Article 15 para. 1(a), of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/21 [December 21, 2009], para. 1); see: The Fribourg Declaration, Preamble, para. 2, p. 3; Krzysztof Orzeszyna and Robert Tabaszewski, "The Legal Aspects of Activities Taken by Local Authorities to Promote Sustainable Development Goals: Between Global and Regional Regulations in Poland," *Lex Localis – Journal of Local Self-Government* 19, no. 4 (2021): 1048, http://dx.doi.org/10.4335/19.3.1043-1063(2021); Krzysztof Orzeszyna, "Universalism of Human Rights: Notion of Global Consensus or Regional Idea," *Review of European and Comparative Law* 46, no. 3 (2021): 165–7, https://doi.org/10.31743/recl.12428.

5 Article 27, Universal Declaration of Human Rights, A/810 (December 10, 1948).

6 Article 15, International Covenant on Economic, Social and Cultural Rights (adopted December 16, 1966, 993 UNTS 3, entered into force January 3, 1976). See: Elżbieta Karska, "Drafting an International Legally Binding Instrument on Business and Human Rights: The Next Step towards Strengthening the Protection of Human Rights," *International Community Law Review* 23, (2021): 484.

7 Article 17, African Charter on Human and Peoples' Rights (adopted June 27, 1981, 1520 UNTS 217, entered into force October 21, 1986).

8 Article 14, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted November 17, 1988, 28 ILM 156(1989), entered into force November 16, 1999, "San Salvador Protocol").

9 Article 42, Arab Charter on Human Rights (adopted May 22, 2004, 18 HRLJ 151 (1997), entered into force March 15, 2008).

10 Article 8, Convention for the Protection of Human Rights and Fundamental Freedoms (adopted November 4, 1950, 213 UNTS 2, entered into force September 3, 1953).

adopted in 1976 regarding the participation and contribution of nations in cultural life.[11]

2. The Concept of Uniformity of Human Rights as the Basis for a Correct Understanding of the Human Right to Take Part in Cultural Life

The Charter of the United Nations[12] is the first multilateral agreement that initiated the process of creating the international human rights law. UN member states assumed therein a commitment to respect human rights, and to take steps to define, develop and codify these rights.[13] The Human Rights Commission established by the Economic and Social Council worked on the Universal Declaration of Human Rights in 1947–1948, which was eventually adopted by the General Assembly on December 10, 1948. The human rights listed in the Declaration are approached holistically and on equal terms, and thus they concern political, personal, economic, social and cultural rights. The concept of unity of human rights was not challenged in practice until 1951, at the moment of exacerbation of the Cold War, when the General Assembly amended an earlier decision to draw up a single human rights covenant and adopted a resolution providing for the initiation of work on two covenants, addressing respectively the issues of political and personal rights and of economic, social and cultural rights.[14] The restoration of unity and the return to the original position formulated by the Universal Declaration of Human Rights took place only after the end of the Cold War, at the Vienna Conference in 1993. After the Vienna Conference, which listed human rights in alphabetical, not generational order, and which pointed to the need to treat all rights equally, there are no grounds now for a generational presentation of human rights, as this can only lead to the continuation

11 See, especially Article 4, UNESCO, Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it (26 November 1976); see: Vita Czepek and Elżbieta Karska, "The Scope and Importance of Cooperation between UNESCO and the ICC for the Protection of Cultural Property," *Studia Iuridica* 95, (2022): 74–94.

12 Charter of the United Nations (adopted 26 June 1945, 1 UNTS XVI, entered into force October 24, 1945).

13 Janusz Symonides, "Powszechna Deklaracja Praw Człowieka (po 60 latach od jej przyjęcia)," *Państwo i Prawo* 12, (2008): 4.

14 It should be noted that this division was one of the reasons why Karel Vasak proposed the concept of "three generations" of human rights.

of the discussion on which of the categories of human rights is the most important.[15] Anyone who deals with the human right to participate in cultural life should note that it is a universal right to take part, participate and have access to culture. It therefore seems to be an aberration at the moment to separate personal and political rights from economic, social and cultural rights, since the human right to participate in cultural life clearly has two distinct categories: liberty rights and the right of access to cultural and scientific resources. These rights are at the center of the political and economic influence of the state and the community. They recall the important place of the common good in cognition and heritage. Science and culture define our world and determine it. It is thanks to them that in a broad sense we decide about our humanity.[16]

3. Normative Content and Restrictions of the Human Right to Take Part in Cultural Life

In the human right to take part in cultural life[17] provided for in Article 27 of the Universal Declaration of Human Rights and in Article 15 of the International Covenant on Economic, Social and Cultural Rights[18] includes both its active and passive aspects. This right includes the right to participate freely in the cultural life of society, to enjoy the arts, to participate in and benefit from the progress of science. Article 15(1) of the Covenant concerns the three human rights: the right to take part in cultural life (Article 15(1)(a), the right to enjoy the benefits of scientific progress and its applications (Article 15(1)(b) and the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic

15 Symonides, "Powszechna Deklaracja Praw Człowieka," 9–10.

16 Mylène Bidault, "Article 15," in *Le Pacte international relatif aux droits économiques, sociaux et culturels. Commentaire article par article*, eds. Emmanuel Decaux and Olivier de Schutter (Paris: Economica, 2019), 376.

17 Two terms: "cultural rights" and "the right to take part in cultural life" (right to culture) are encountered in the literature. "Cultural rights" is a much broader term, encompassing the right to learn, the right to education, the right to culture, the right to benefit from scientific and technological progress, etc. Imre Szabó, *Cultural Rights* (Budapest: Akadémiai Kiadó, 1974), 8–9.

18 International Covenant on Economic, Social and Cultural Rights (adopted December 16, 1966, 993 UNTS 3).

production of which he is the author (Article 15(1)(c)).[19] Both Article 15 of the Covenant and many other international law regulations are interpreted and reviewed through many mechanisms operating in synergy. In the context of the human right to take part in cultural life, it is primarily the Committee on Economic, Social and Cultural Rights (CESCR) and the Special Rapporteur.

In Article 15(1)(a), no detailed definition of culture has been proposed,[20] therefore this international standard should also be reconstructed from other documents that address the human right to participate in cultural life. The Convention on the Elimination of All Forms of Racial Discrimination,[21] in Article 5(e)(VI), listed the right to equal participation in cultural activities among the rights that should be guaranteed to all regardless of differences in race, color, national or ethnic origin. Also, the Declaration of Principles on International Cultural Cooperation adopted on November 26, 1966 by the UNESCO General Assembly, in Article 4 sets forth the aims of international cultural cooperation.[22] These are the development of knowledge, the stimulation of talent, the enrichment of cultures, enabling everyone to have access to knowledge, the enjoyment of literature and the arts of all nations, sharing in advances made in science and in the resulting benefits, and contributing to the enrichment of cultural life.[23]

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19 CESCR, General Comment No. 21 (2009), General Comment No. 17 (2005) § 4, CESCR, Concluding observations on the report by Brazil of 2009, E/C.12/BRA/CO/2, § 33; Yemen of 2011, E/C.12/YEM/CO/2, § 31; Spain of 2012, E/C.12ESP/CO/5, § 29.

20 "For the purposes of the present Declaration, a. The term "culture" covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and the meanings that they give to their existence and to their development; b. The expression "cultural identity" is understood as the sum of all cultural references through which a person, alone or in community with others, defines or constitutes oneself, communicates and wishes to be recognised in one's dignity; c. "Cultural community" connotes a group of persons who share references that constitute a common cultural identity that they intend to preserve and develop" (The Fribourg Declaration, Article 2 [definitions], p. 5).

21 International Convention on the Elimination of All Forms of Racial Discrimination (adopted December 21, 1960, 660 UNTS 195, entered into force January 4, 1969).

22 UNESCO, Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it (November 26, 1966).

23 Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases, and Materials* (Oxford: Oxford University Press, 2014), 1178.

The ultimate aim of that cooperation should be, according to paragraph 5 of Article IV, to raise the level of the spiritual and material life of man in all parts of the world.[24]

An attempt to formulate a definition of the individual's right to culture[25] was made by Boutros Boutros-Ghali on the basis of the documents presented above. In his opinion, every human being has the right to have access to the knowledge, arts and literature of all nations, to participate in and benefit from scientific progress and to make their own contribution to the enrichment of cultural life.[26] This right is fulfilled when the following conditions are met. The first concerns what has been set out in Article 25 of the Universal Declaration and in Article 11 of the Covenant on Economic, Social and Cultural Rights as an adequate standard of living. The second condition is the full implementation of the right to education provided for in Article 26 of the Universal Declaration of Human Rights. Without providing the individual with the minimum conditions for a livable existence and at least a minimum level of knowledge, it is impossible for the individual to enjoy the benefits of cultural life.[27] In General Comment No. 21, the CESCR explains that the concept of "culture" should be understood as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity.[28] According to R. Stavenhagen, the term "culture" means the sum of the material and spiritual activities and products of a given social group, which distinguishes it from other similar groups. This, in turn, provides individuals with the required guidelines, meanings of behavior and social

24 Roman Wieruszewski, "Prawo do udziału w życiu kulturalnym," in *Prawa człowieka. Model prawny*, ed. Roman Wieruszewski (Wrocław: Zakład Narodowy imienia Ossolińskich, Wydawnictwo Polskiej Akademii Nauk, 1991), 1020–1.

25 According to Jacques Maritain, the word "culture" refers to rational and moral life, while the word "civilization" to political and organizational life, hence the former term has a broader sense (*Religia i kultura* [Poznań: Naczelny Instytut Akcji Katolickiej, 1937], 76 et seq.).

26 Boutros Boutros-Ghali, "The Right to Culture and the Universal Declaration of Human Rights," in *Cultural Rights as Human Rights* (Paris: UNESCO, 1970), 73–4; Patrice Meyer-Bisch, Mylène Bidault, *Déclarer les droits culturels, Commentaire de la Déclaration de Fribourg* (Bruxelles: Bruylant, Schulthess, 2010), § 0–20.

27 Wieruszewski, "Prawo do udziału w życiu kulturalnym," 1021.

28 CESCR , General Comment no. 21, para. 12.

relationships in everyday life.[29] At the same time, the CESCR stated that countries should go beyond the material aspects of culture by promoting effective access to intangible cultural assets for all.[30] Access to cultural life entails also the right to one's own cultural identity.

This right consists of the right to choose and shape one's own identity, both in individual and collective terms. Thus, the human right to participate in cultural life should be approached in two dimensions: individual and collective.[31] In the human right to participate in cultural life, a direct emphasis is put on the choice to be made by the individual. The principle of individual autonomy, which originated in the norms of minority rights, was emphasized here, and now it has been extended to all people.[32] It is the individual who chooses his or her identity, cultural resources and references, whether or not to pursue a cultural activity or practice, whether or not to belong to a community. While Article 15 of the Covenant does not apply the term "community" used in the Declaration, this could suggest that the right to participate in cultural life does not have to be exercised within a community framework. However, the idea is that the concept of community should not be reduced to minorities and indigenous peoples alone, because cultural diversity should be understood in a more profound fashion. States should recognize the diversity of cultural identities of individuals and communities residing on their territory. According to A.H. Robertson, while activity within the community is a typical element, is not indispensable for exercising one's right to participate in cultural life.[33]

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29 Rodolfo Stavenhagen, "Cultural Rights: A Social Science Perspective," in *Cultural Rights and Wrongs: A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights*, ed. Halina Niec (Paris: UNESCO Publishing and Institute of Art and Law, 1998), 1–20.

30 CESCR, General Comment no. 21, para. 69.

31 Tomasz Lewandowski, "Prawo do udziału w życiu kulturalnym," in *Międzynarodowy Pakt Praw Gospodarczych, Socjalnych i Kulturalnych. Komentarz*, eds. Zdzisław Kędzia and Anna Hernandez-Połczyńska (Warsaw: C.H. Beck, 2018), 710–1.

32 See: Czepek and Karska, "The Scope and Importance of Cooperation," 75–89; Elżbieta Karska and Łukasz Dawid Oręziak, "Qualifying for International and National Protection under the Polish Legal Order: Some Remarks in the Context of the War in Ukraine," *Stosunki Międzynarodowe – International Relations* 4, no. 4 (2024), http://dx.doi.org/10.12688/stomiedintrelat.17794.1.

33 A.H. Robertson, "The Right to Education and Culture and Its International Implementation," in *International Institute of Human Rights. Ninth Study Session, Summary of Lectures*,

It seems that the adoption of such an interpretation makes the right more universal.[34] In General Comment No 17, the CESCR stated that the concept of "everyone" within the meaning of Article 15 of the Covenant means both an individual and a collective.[35] Hence, the right to participate in cultural life may be exercised in three ways: individually by an individual, by an individual together with others and by a community or group as a whole.[36] The CESCR stresses the role of the community in cultural participation, but at the same time points to the collective action of individuals.[37]

Participation in cultural life also includes: the right of everyone to act unhindered, either individually, with others, or as a community, to choose their identity, to identify or not with one or more communities.[38] A conflict may arise from the dual nature of the right to participate in cultural life. In Case Mahuika et al. v. New Zealand, the Committee on Human Rights decided that

> where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected.[39]

The recognition of the central place of the individual's choice must not lead to the denying of the validity of communities for the exercise of cultural rights. The dynamism of cultural rights is based on the introduction of equal participation within numerous community affiliations. Communities are places of interaction, creation, criticism and transfer of knowledge. Communities also store and create culture, and pass on its meaning.[40]

Strasbourg July 3–28, 1978, AHR/E/20.

34 Wieruszewski, "Prawo do udziału w życiu kulturalnym," 1019–20.

35 CESCR, General Comment no. 17, para. 2

36 CESCR, General Comment no. 21, para. 9.

37 Bidault, "Article 15," 282.

38 Lewandowski, "Prawo do udziału w życiu kulturalnym," 713–4.

39 Decision of the Human Rights Committee of October 27, 1993 in Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, paras. 9, 6.

40 Commentary on the Fribourg Declaration, p. 36 et seq.; Bidault, "Article 15," 281–2.

International instruments adopt the principle that "No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope."[41] The CESCR and the Special Rapporteur have taken a clear position on this issue. In General Comment No. 21, the Committee stated that

> applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with Article 4 of the Covenant CCPR. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed. The Committee also wishes to stress the need to take into consideration existing international human rights standards on limitations that can or cannot be legitimately imposed on rights that are intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.[42]

4. Respecting and Protecting Cultural Heritage by the State

It should be noted that States also have a number of positive obligations to promote and support cultural life.[43] The analysis of the human right to take part in cultural life allows the most basic elements of this right to be identified. The first element of this right is its universal nature. Both the Universal Declaration and the Covenant stress that participation in cultural life should be granted to all community members. Therefore, the state is obliged to disseminate culture and science among all social strata and groups, in

41 Article 4 UNESCO, Universal Declaration on Cultural Diversity (November 2, 2001).

42 General Comment no. 21, para. 19; Krzysztof Orzeszyna, "Convergence of International Humanitarian Law and International Human Rights Law in Armed Conflicts," *Studia Iuridica Lubliniensia* 32, no. 3 (2023): 247, http://dx.doi.org/10.17951/sil.2023.32.3.237-252; Bidault, "Article 15," 390–1; Krzysztof Orzeszyna, "The Common Core of the Fundamental Standards of International Humanitarian Law and International Human Rights Law," *International Community Law Review* 25, (2023): 571, https://doi.org/10.1163/18719732-bja10114.

43 Krzysztof Orzeszyna, Michał Skwarzyński, and Robert Tabaszewski, *International Human Rights Law* (Warsaw: C.H. Beck, 2023), 79–82.

particular those which are handicapped in this respect for some reasons – be it geographical, economic, historical or otherwise. This obligation is clearly formulated in Article 15(2) of the Covenant, which states that appropriate actions of states should include "those necessary for the conservation, the development and the diffusion of science and culture."[44]

The second element is openness, which means that cultural participation cannot be reduced to the culture of one country or group of countries. The international community attaches considerable importance to international cooperation in science and culture. This is reflected in Article 15(4) of the Covenant on Economic, Social and Cultural Rights, and in Article 1(2)(a) of the UNESCO Constitution, which obligates the organization to recommend international agreements that may be necessary to promote the free flow of ideas with the use of word and image.[45] The understanding of cultural rights as the rights of all people should be considered in the context of access to cultural resources and cultural heritage.

According to the CESCR, states should

> respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters; Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.[46]

5. State's Commitment to Actively Pursue the Right to Take Part in Cultural Life

The right to take part in cultural life is a liberty right and therefore States parties to the Covenant should refrain from interfering with the exercise of this right by rightholders. The CESCR has pointed out, in conjunction with Article 2(2) and Article 3 of the Covenant, that any discrimination in

44 Wieruszewski, "Prawo do udziału w życiu kulturalnym," 1022.

45 Constitution of the United Nations Educational, Scientific and Cultural Organization, UNTS Volume Number 4 (p. 275), as amended.

46 CESCR, General Comment no. 21, para. 50 a.

the exercise of the right to participate in cultural life on grounds of race, color, sex, language, religion, political or other beliefs, national or social origin, property, birth or other status is prohibited.[47] It is therefore an obligation on the part of the State to refrain, either directly or indirectly, from interfering in the exercise of the right to take part in cultural life.

As regards the nature of the obligations of States stemming from the right in question, scholars in the field usually divide human rights into those that can be exercised immediately and into rights of a programmatic nature. According to A. Michalska, what is decisive for the characterization of certain rights as programmatic, even regardless of which Covenant they are located in, is not so much the way of formulating the relevant provisions, but the type of those rights. The classification of a right in one category or another does not affect the assessment of the legal nature which is identical for both types of rights. The differences boil down to the methods of their implementation. There are two situations here: the obligation to take action to implement rights and the obligation to guarantee the level of protection required by the Covenants. The first obligation rests with the States from the moment of their ratification. However, the performance of the second obligation depends on the nature of the rights concerned. The obligations of the State resulting from the right of an individual to culture differ in scope, both subjective and objective. What differs is the group of relevant actors: culture creators and recipients, as well as the type of necessary actions that should be taken in order to implement these obligations, e.g. legislative or organizational activities. The full implementation of the right to participate in cultural life is of a programmatic nature. Participation in culture in the so-called developed countries differs significantly from that in developing countries. The capability to exercise this right depends on the prior exercise of other socio-economic rights. The UNESCO recommends, among other things, that States treat the right to participate in cultural life as a human right.[48] The CESCR, when assessing the exercise of positive responsibilities by States to ensure respect for and protection of the right to take part in cultural life, checks whether the implementation measures are reasonable and proportionate with respect for other human

47 CESCR, General Comment No. 20 of 2009.

48 Wieruszewski, "Prawo do udziału w życiu kulturalnym," 1023–4, 1026.

rights and the rules of democracy. States should adopt effective mechanisms to respond to violations of the human right to take part in cultural life by adopting appropriate standards for the protection of the right to take part in cultural life. International standards are of a general nature, they provide certain principles that should guide countries in their cultural policies. It can therefore be noted that the right of the individual to exercise the human right to take part in cultural life is largely implemented by the activities of the State.

6. Conclusions

The human right to take part in cultural life is rooted in dignity of the person. This right is an integral part of human rights, therefore it is universal, indivisible and interdependent. The concept of unity of rights is based on the assumption that personal, political, economic, social and cultural rights are equal. This right is vested in all members of the human community. The human right to take part in cultural life is one of liberty rights, therefore States should refrain from interfering with the exercise of this right by the rightholders. At the same time, it is incumbent on the States to actively pursue and positively promote participation in cultural life and the dissemination of culture to all strata and groups of society.

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The "Objective Friends" of the CJEU. The Role and Practice of the *Amicus Curiae* in the Procedural Law of the European Union

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Abstract: The figure of *amicus curiae* in the law of the European Union does not allow and has not even foreseen up to now the participation of a subject/subjects outside of a dispute, but with their own legal interest to participate as *amicus curiae*. The Court of Justice of the European Union does not allow the possibility of participation in a figure that only allows the intervention of subjects other than states and institutions, which are pre-established by Article 40 of the Statute. According to the procedural rules of the Union, the observation of a series of elements testify that such a figure is also obvious but often necessary on some disputes such as those relating to technical matters, such as competition and the environment. The practice up to now has shown that the intervention is used by associations that carry general and legal interests allowing the performance of the function of *amicus curiae* in a rigorous manner within the limits of this figure. This work, based on a more jurisprudential practice, tries to reconstruct such institute in a comparative way also through other supranational courts, thus regulating the insertions of the *amicus curiae* to the judges of Kirchenberg.

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1. Introduction

When we talk about *amicus curiae*[1] we mean a third party and/or subjects who, not being a party to a dispute, voluntarily choose to participate in a process with the final objective of helping the judging body. This is not a third party intervener from a technical point of view. It is, therefore, a figure whose objective is to defend his own right/interest suffered from a prejudice and, consequently, the outcome of the pending dispute between the parties is also very important for him.[2] In the supranational jurisdiction, the figures of the *amicus curiae*, as bearers of interests that are widespread and coincident with the parties but also independent from a transformation, are confused.[3] In the international process and generally in international law, such presence of bodies, institutions belong to the management of a process, that participate in interests of a material nature, which respect the individual dispute.

The practice of submitting *amicus curiae* briefs is well established in common law jurisdictions. It has become common practice within international cooperation organisations and in arbitral tribunals in matters of investment arbitration. This figure is also largely used in competition cases in the US and more recently in the European Union. In fact, this figure, was progressively introduced in EU Competition Law on an initiative of the same EU institution. Also the European Commission emerges as the most frequent *amicus* filer in front of US Courts, followed by Canada and Japan. A fundamental difference with the US courts is that the EU ones still exercise a very strong scrutiny on the usefulness of such a figure, while the EU Members States or EU institutions can always intervene if they wish, considering that the EU Treaties grant them directly this benefit.

1 Olga Gerlich, "More than a Friend? The European Commission's *amicus curiae* Participation in Investor-State Arbitration," in *International Economic Law: Contemporary Issues*, eds. G. Adinolfi et al. (Berlin: Springer, 2017), 253–69; Astrid Wiik, *Amicus Curiae before International Courts and Tribunals* (Baden-Baden: Hart/Nomos, 2018), 707–18.

2 Luigi Crema, "The Common Law (And Not Roman) Origins of Amicus Curiae in International Law-Debunking a Fake News Item," *Global Jurist* 20, no. 1 (2020): 3 et seq.

3 Michael K. Lowman, "The Litigating Amicus Curiae. When Does the Party Begin After the Friends Leave?," *American University Law Review* 41, no. 4 (1992): 1243 et seq.

As regards the Court of Justice of the European Union (CJEU), we have not seen the possibility of participation of subjects in the role of *amicus curiae*. The CJEU has shown a certain distrust, closure to restrictive rules of intervention for subjects other than states and institutions according to Article 40 of the Statute.[4] In particular, the rules for intervention that are provided by Article 40 of the statute are also applied to the judgments before the CJEU as well as to the tribunal according to Article 53, para. 1 of the Statute.[5]

The rule in letter a) already affirms that states and institutions intervene in disputes before the CJEU, thus, demonstrating their interest in acting. Paragraph 2 of Article 40 of the statute also states that: "[…] it is up to the bodies and agencies of the Union and to any other person if they can demonstrate that they have an interest in the resolution of the dispute submitted to the Court […]." It is clear that for other subjects that are not part of states and institutions the intervention is subject to a precise interest that is qualified through jurisprudence and as it establishes:

> […] direct and current to the resolution of the dispute […] natural or legal persons cannot intervene in cases between Member States, between institutions of the Union, or between Member States on the one hand and institutions of the Union on the other […].

These are interests that aid, from a procedural point of view, the dispute, the categories of non-privileged appellants, thus, precluding a dispute that has a constitutional character between subjects that bring interests of a public nature.

This observation does not result from preliminary reflections of the *amicus curiae* of the law of the Union but from elements and procedural rules of the Union and not only, which show a theoretical influence of this figure.[6] Practice has shown that the intervention used by associations

4 Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law* (Oxford: Oxford University Press, 2023).

5 Ibid.

6 According to O. De Shutter: "[…] nostalgie d'un statut de l'amicus curiae que les textes ne reconnaissent pas comme tel, mais qu'une certaine conception d'intervention devant le juge de l'Union européenne permet de développer à la faveur des incertitudes qui entourent celle-ci […]" ("Le tiers à l'instance devant la Cour de justice de l'Union européenne,"

representing widespread interests allows the performance of an *amicus curiae* function within certain limits of such a figure. The elements are various to outline the opportunities for the inclusion of the amicus curiae in the CJEU.

2. *Amicus Curiae* at Supranational Level

The EC acts as amicus curiae also at supranational jurisdictions, thus providing the interpretation of Union law. The EC's intervention at the European Court of Human Rights (ECtHR) is immediately noticeable. In particular, Article 36, para. 2 ECHR allows the participation of third parties as *amicus curiae* when speaking of intervention. It is, thus, stated that:

> […] proper administration of justice, the President of the Court may invite any High Contracting Party who is not a party to the proceedings or any interested person other than the applicant to submit written observations or to take part in hearings […].

Referring to the interest of justice and the need for the President's authorization, it is clear that this type of intervention is not linked to the position of the parties in the proceedings. Thus, the ECtHR as an *amicus curiae* figure has recognized since the seventies in a precise manner as well as according to Article 36, para. 1 ECHR in the intervention of the state to support the applicant and to clarify his position.[7] For the Commissioner for Human Rights of the Council of Europe the role as *amicus curiae* is submitted under the guise and scrutiny of the President himself.

The need to introduce, include the non-appellant third party to a dispute before the ECtHR, asserts its interest in being heard as a right/opportunity that has been taken into account in the intervention of the Court.[8] This is a topic that, however, has not been considered among the guidelines on the intervention of cases originating from disputes between private

in *Le tiers à l'instance devant les juridictions internationales*, eds. Hélène Ruiz-Fabri and Jean-Marc Sorel [Paris: Pèdone, 2005], 88 et seq.).

7 Laura Van den Eynde, "Amicus Curiae: European Court of Human Rights (ECtHR)," Max Planck Encyclopedias of International Law, 2019.

8 Krzysztof Wojtyczek, "Procedural Justice and the Proceedings Before the European Court of Human Rights: Who Should Have the Right to Be Heard?," in *Fair Trial: Regional and International Perspectives*, eds. Robert Spano et al. (Cambridge: Intersentia, 2021), 742 et seq.

individuals, as well as through practice directions. Third party intervention under Article 36, para. 2 of the convention or under Article 3, second sentence of protocol no. 161 of March 13, 2023[9] has been taken into consideration by the ECtHR. The intervention of third parties as support to judges with an impartial manner and with an objective based on elements of law, in fact inherent to a dispute, to a controversy to be resolved, has been put in the foreground. The ECtHR has highlighted and maintained a normative dictate by reinvigorating the decision, that the intervention *amicus curiae*, is compliant and determined to the needs of a correct administration of justice thus regulating the public interest and identifying the "third party" to participate in the trial to contribute to the determination of the relative outcome. Of course, the discretion of the President of the ECtHR in the manifestation with a precise and clear way to the role of the *amicus curiae*, is very important. A negative determined path is noted by the ECtHR. This means, that the intervention of *amicus curiae* as a subject perhaps involves an injury and puts secondary the guarantee of the integrity of the adversarial process and in fact to the incision of the legal sphere of an absent third party.[10]

According to the author's opinion, the lack of a third party as *amicus curiae*, i.e. not appearing and not taking a position at any time in a case before the Strasbourg judges, perhaps leads to a damage to one's own interests and to the reopening of a trial before the national authorities.[11] Thus, a certain type of distortion of the public interest is noted and correct administration[12] remains weakened in the face of a risk that makes an appeal to the ECtHR a simple means of appeal and nothing else from a procedural

9 Justine Batura, "The Objective Friends of the Court. New Insights Into the Role of Third Parties Before the European Court of Human Rights," EJIL:Talk!, April 19, 2023, accessed March 5, 2025, https://www.ejiltalk.org/the-objective-friends-of-the-court-new-insights-into-the-role-of-third-parties-before-the-european-court-of-human-rights/.

10 Nicole Bürli, *Third-Party Interventions Before the European Court of Human Rights. Amicus Curiae, Member State and Third Party Interventions* (Cambridge: Cambridge University Press, 2017), 178 et seq.

11 Wojtyczek, "Procedural Justice," 742 et seq.

12 Batura, "The Objective Friends of the Court."

point of view. They also remain without satisfactory human rights, which first of all must be protected and safeguarded.[13]

The subjective right of an *amicus curiae* may also have repercussions on the principle of subsidiarity, recalling and carefully rereading the preamble of the ECHR and the amendment of protocol no. 15 of June 24, 2013. The functioning of a European jurisdictional system does not diminish the work of internal judges but highlights before the ECtHR the qualification of judgments, limiting thus the evaluation of compatibility of conducts, which are attributed to the contracting states with fundamental rights established by the ECHR, by the related protocols, etc. which by all means make the work of the Strasbourg judges more functional and the values that are part of the procedural mechanism more reliable, according to Article 36, para. 2 ECHR. This means that the public interest, the correct administration of justice, the amicus curiae in the figure of non-appellant can be heard. This situation, also, respects the rights and values of a fair trial, the right to be heard, the greater protection of a procedural right, but also a general consensus that respects the need and protection of an individual interest, which ensures and protects the correct administration of justice.

Thus, the participation of the EC in ECtHR proceedings uses such a figure. Especially, for questions concerning the interpretation of Union law. The EU in the role of defendant, due to lack of jurisdiction *ratione personae* of the ECtHR whenever EU law is discussed in a dispute, remains between the applicant and the Member States. Thus, the entry of the EC into the proceedings allows the ECtHR to acquire useful elements for the interpretation of Union law.

3. Indicative Figures of the *Amicus Curiae* in the European Process

In a revealing, indicative and symptomatic way, the European Commission (EC) can appear at a trial through a preliminary reference.[14] Already

[13] ECtHR Judgement of 28 August 2023, Case I.S. v. Greece, application no. 19165/20, hudoc.int; ECtHR Judgement of 8 June 2022, Case Y.Y. v. Russia, application no. 43229/18, hudoc.int; ECtHR Judgement of 8 June 2022, Case Omorefe v. Spain, application no. 69339/16, hudoc.int; ECtHR Judgement of 10 September 2019, Case Strand Lobben and others v. Norway, application no. 37283713, hudoc.int.

[14] Clelia Lacchi, *Preliminary References to the Court of Justice of the European Union and Effective Judicial Protection* (Bruxelles: Larcier, 2020); Filipe Galvão Teles Sanches Afonso, "The

Article 23(2) of the Statute already provides for the right for the EC to present the relevant observations to the preliminary proceedings, that are part of and based on Articles 96 and 97 of the rules of procedure of the General Court.

The power of intervention has the interest and legality in a system that with a role that resembles *amicus curiae* can appear in a dispute at the CJEU. It is confirmed that the role of guarantee in a system of legality, which participates as *amicus curiae* in an autonomous manner, allows the EC to initiate an infringement procedure against an interested state through a preliminary reference,[15] as well as demonstrate the compatibility of a national rule with the law of the Union. This is a jurisdictional voluntarism, which the EC presents and acts within the framework of a normative initiative. Thus, the intervention through preliminary references and the infringement procedures initiate the confirmation of a presence of interest in an institution that the intervention of the EC as *amicus curiae* intervenes in its own interest carrying out direct appeals. The EC also intervenes in appeals for annulment that are adopted on a proposal that supports its legitimacy.[16]

Associations, non-governmental organizations that are bearers of various interests in the context of the Union through the lobbying scale, at the European Parliament, for example, interest the observations as *amicus curiae* at the CJEU. *Amicus curiae* also goes against the consent of subjects of participation in various training processes denying access to the CJEU and the relative interpretative validity of the application of such acts. Introducing the figure of *amicus curiae* allows the expansion of the transparency of a continuous dialogue with civil society at the CJEU. Therefore, it does not contribute to the strengthening and legitimacy as an institution.

The CJEU notes useful elements of the *amicus curiae*, which involve important and often excessive work in this regard. It immediately recalls the exceptional work of the ECtHR and the jurisdictions of this

European Commission as Amicus Curiae of Arbitral Tribunals: Is It a Legitimate Relationship?," *Revista de Arbitragem e Mediação* 16, no. 60 (2019): 237–57.

15 Lacchi, *Preliminary References*.

16 CJEU Judgement of 12 October 2022, Corneli v. BCE, Case T-502/19, ECLI:EU:T:2022:627; CJEU Judgement of 14 July 2022, Repubblica Italiana e Comune di Milano v. European Parliament and Council, Case C-106/19 and C-232/19, ECLI:EU:C:2022:568.

figure, which positively insert and recall many times the role of constitutional courts and the continuous dialogue with civil society through *amicus curiae*.

As *amicus curiae* we can also characterize the intervention of the Advocate General.[17] This is an intervention based on the French model of Commissaire du Gouvernement, which allows the CJEU, in an independent manner, to decide on questions relating to the subject matter of the case that are not binding on acts and/or previous practice. This is a solution that typically represents the element of *amicus curiae*. The elements so contrary and assimilative, as well as the possibility of presenting conclusions in a rigorous manner, put the statutory rules to a decision of the CJEU. We note Article 20, the last number of the statute which states in this regard: "(...) the case does not raise new questions of law, the Court may decide, after hearing the Advocate General, that the case be judged without conclusions of the Advocate General (...)." There are also powers of the figure of the *amicus curiae* who seek to deprive the parties of questions during a hearing.[18] In this way, functions of an organizational nature are carried out within a trial, also expressing opinions relating to the referral of a case to the plenary chamber according to Article 16 of the Statute. Also, the review of a judgment of the court is based on Article 62 of the Statute.[19] As regards the review of judgments admitted, through preliminary reference from the court, according to Article 256, para. 3 TFEU, are transferred to the CJEU, as well as in the phase of reform of the statute. The reform, proposed by the CJEU and after request from the European

17 Dobrochna Bach-Golecka, "Amicus Curiae or Primus Inter Pares? The Advocate General and the EU Institutional Framework," *Studia Iuridica* 54, (2012): 8 et seq.

18 Cyril Ritter, "A New Look at the Role and Impact of Advocates-General-Collectively and Individually," *Columbia Journal of European Law* 12, no. 3 (2006): 752 et seq.

19 Article 62 of the statute states that: "[…] cases referred to in Article 256, paragraphs 2 and 3, of the Treaty on the Functioning of the European Union, the First Advocate General, where he considers that there is a serious risk of the unity or coherence of Union law, may propose to the Court of Justice that the decision of the General Court be reviewed […]". In reality the review for judgments given by the General Court on appeals after decisions by specialized courts based on Article 256, para. 2 TFEU puts in second place the dissolution of the Civil Service Tribunal organized and in operation since September 1, 2016 after the reform of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L341, 24 December 2015), 14–7.

Parliament and of Council, according to ex Article 281, para. 2 TFEU of December 4, 2022, has taken into account the transfer of matters to a common system relating to value added, excise duties, code, customs, greenhouse gas emissions, etc.

From a theoretical point of view, the *amicus curiae* represents a figure of an expert who, according to ex Article 20, para. 4 of the statute, has characteristics of a comparable nature to a technical consultant foreseen and inspired in civil and criminal cases by the procedural systems of Member States of the Union. Thus, participation in a trial with an exclusive manner after the invitation of judges of the Union is foreseen and based on the scope of investigative means.

Within this context, we recall the European Data Protection Supervisor, which according to Regulation EC no. 45/2001, and in particular in Article 47, para. 1, letter i), was provided for the possibility of intervention in cases pending before the CJEU.[20] This is a rule that maintains, according to the subsequent Regulation EU no. 2018/1725[21] and in particular through Article 58, para. 4, the possibility of a public intervention. An independent intervention that respects the parties in an effective manner as a figure of participation, that is as an *amicus curiae* and not so much a technical intervention. Thus, the practice allows the guarantor to intervene in a discussion, detecting the protection of data entrusted to a large section at the CJEU. As well as a figure in the infringement procedures that have as their object national legislation within this scope.[22] This type of

[20] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L8, 12 January 2001), 1–22.

[21] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance.), PE/31/2018/REV/1 (OJ L295, 21 November 2018), 39–98.

[22] CJEU Judgement of 30 May 2006, Parliament v. Council, Case C-317/04 and C-318/04, ECLI:EU:C:2006:346, I-02457; CJEU Judgment of 9 March 2010, Commission v. Germany, Case C-518/07, ECLI:EU:C:2010:125, I-01885; CJEU Judgment of 16 October 2012, Commission v. Austria, Case C-614/10, ECLI:EU:C:2012:631; CJEU Judgment of 8 April 2014, Commission v. Hungary, Case C-288/12, ECLI:EU:C:2014:237; CJEU Judgment of 16 July 2015, ClientEarth and Pesticide Action Network Europe (PAN Europe) v. EFSA,

intervention is the subject of Article 40 of the Statute. Also, the guarantor intervenes in the conclusions of the parties within certain limits. Therefore, the CJEU clarifies as inadmissible the intervention of the guarantor within the scope of a preliminary reference since it is not a party to a national judgment according to Article 23 of the Statute, thus rejecting the rule of the regulation which also provides for the possibility that constitutes a sufficiently legal basis.[23]

4. The Figure of *Amicus Curiae* as Use of an Institution of Intervention by "Candidates"

It is taken into consideration ex Article 40 of the Statute as an absent notion that examines guidelines relating to the intervention of the third party. It is at the moment that the European judge adapts the institution as a consensus of the process of organizations that brings coherent interests considered as *amicus curiae*.

The case law regarding the intervention of representative associations is oriented towards the protection of general interests of their members. These are orientations that focus on the main issues concerning the intervention of associations in a case that represents companies operating in the sector concerned for objectives that fall within the protection of the interests of their members. Thus, the principle under examination is based on the functioning of the related consolidated sector even if the issuing of the sentence significantly affects the interests of its members.[24]

Associations directly seek a solution to the interests of their members. Associations that protect the environment have put the CJEU to specify the requirement for a direct interest for the solution of disputes related to the action that coincides with the sector of the programs of protection

Case C-615/13 P, ECLI:EU:C:2015:489; CJEU Judgment of 16 February 2024, Coillte Cuideachta Ghníomhaíochta Ainmnithe v. Commissioner for Environmental Information, Case C-129/24, not yet discussed. See also in argument: Jirí Zemànek, "Case C-518/07, European Commission v. Federal Republic of Germany, Judgment of the Court of Justice (Grand Chamber) of 9 March 2010," *Common Market Law Review* 49, no. 5 (2012): 1755–68.

23 CJEU Judgment of 12 September 2007, Satakunnan Markkinapörssi Oy and Satamedia Oy, Case C-73/07, ECLI:EU:C:2007:507, I-09831.

24 CJEU Judgment of 21 October 2014, Bayer CropScience AG v. European Commission, Case T-429/13, ECLI:EU:T:2014:920, para. 22.

of the studies to the interested sector. The practice in analysis has as its objective the adoption of measures often contested.[25]

The use of *amicus curiae* to an intervention contributes to the consensus of the participation of subjects, who bring requirements related to the litigation but with various criticisms. Associations represent general interests, but their members cannot bypass rules governing interventions.[26] Non-governmental organizations, such as ClientEarth and Greenpeace International, were not accepted for interventions in litigation concerning state aid and especially in the coal-fired electricity sector. The Spanish regime failed to show a direct interest in the resolution of the case and allowed the intervention of Greenpeace in Spain as a demonstration of impact on a field of action in its territory.[27]

Non-governmental organizations and associations are excluded from the possibility of intervening in disputes of a constitutional nature, and disputes in states, between institutions and between states and institutions lead to contributions that the subjects, who are bearers of general interests, are useful. Thus, infringement procedures and the reporting of the EC for the work of a non-governmental organization, are noted.[28] The use of the *amicus curiae* as an intervention does not demonstrate the opportunity to introduce a permanent figure to the European process thus allowing the intervention of subjects who are bearers of general interests.

5. The Role of the European Commission as *Amicus Curiae* Before National Courts

The EC intervenes in national proceedings in various ways. According to Regulation EC No. 1/2003 and Article 15(3) and (4):

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25 CJEU Judgment of 6 November 2012, Castelnou Energia v. Commission, Case T-57/11, ECLI:EU:T:2012:580, para. 10; CJEU Judgment of 7 February 2019, Bayer CropScience AG v. Commission, Case C-499/18 P, ECLI:EU:C:2019:107, para. 6.

26 Mathias Forteau, "General Principles of International Procedural Law," Max Planck Encyclopedias of International Procedural Law, 2018, para. 36.

27 CJEU Judgment of 6 November 2012, Castelnou Energia v. Commission, Case T-57/11, paras. 16–27; CJEU Judgment of 7 July 2004, Região autónoma dos Açores v. Council, Case T-37/04, ECLI:EU:T:2004:215, II-00103.

28 Mariolina Eliantonio, "The Role of NGOs in Environmental Implementation Conflicts: 'Stuck in the Middle' Between Infringement Proceedings and Preliminary Rulings?," *Journal of European Integration* 40, no. 6 (2018): 754 et seq.

> […] where necessary for the uniform application of Article 81 (now Art. 101) or Article 82 (now Art. 102) of the Treaty, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States […] competent court, it may also submit oral observations […] competent court of the Member State to transmit or ensure that documents necessary for the assessment of the case are transmitted to them (...).[29]

In this spirit of cooperation between the EC and national jurisdictions, the application of Articles 81 and 82 TEU (now Articles 101 and 102 TFEU) also entails other relevant roles.[30] The role of the EC, as *amicus curiae*, is a qualification of a support tool for the national jurisdictions, which thus takes the form of the transmission of information, presentation of opinions and the intervention of national judgments. The related communication in para. 18 also refers to the national jurisdictions, requests any kind of support from the EC, as well as the power to act *ex officio*. It is highlighted that the EC plays a role of public interest, which also maintains as neutral the respect of the parties and the national jurisdictions that also bind the expected observations. The related intervention in national judgments as *amicus curiae* in the strict sense and especially from the EC, which has the right to present written observations, has allowed the national authorities and especially those dealing with competition to provide in a necessary way the authorization to national judges.

The objectives of these observations provide useful elements for the application of Articles 101 and 102. The CJEU interprets broadly disputes relating to the tax sector and of the EC for infringement of competition rules.[31] This is an objective that has to do with para. 32 of the communication which states: "[…] the Commission will limit itself to an economic and legal analysis of the facts on which the case pending before the national

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29 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) (OJ L1, 4 January 2003), 1–25.

30 Communication from the Commission on cooperation between the Commission and the courts of the Member States of the EU for the purposes of applying Articles 81 and 82 of the EC Treaty (OJEU C101, 27 April 2004), 54 et seq.

31 CJEU Judgment of 11 June 2009, Inspecteur van de Belastingdienst v. X BV, Case C-429/07, ECLI:EU:C:2009:359, I-04833.

jurisdiction is based (...)." And it is also the same Regulation EC no. 1/2003 that includes, from the procedural point of view, to Member States the relative task of determining the procedural applicability that allows the submission of observations by the EC itself according to para. 35. This refers to rules that *amicus curiae* are part of the national procedures that are adopted *ad hoc*. The EC as *amicus curiae* before national judgments, and especially in the area of state aid, plays an important role. Note Article 29, para. 2 of Regulation EU 2015/1589 which states:

> (...) for the purposes of the consistent application of Article 107(1) or Article 108 TFEU, the Commission may, on its own initiative, submit written observations to the courts of the Member States responsible for the application of the state aid rules (...) subject to the authorisation of the court in question, it may also submit oral observations (...).

It is affirmed and noted the power of the EC, which intervenes in national judgments and the public interest, that conceives with the same way the Regulation EC no. 1/2003 and with a necessary way the relative authorization of the national judge for oral observations. Unlike the regulation the peculiarities in the matter allows the EC, which informs the Member State that has interest, the intention to do so and to present observations in a formal and precise way.[32]

These are statements and positions that are also provided for in Regulation EU 2022/2065 of the European Parliament and of the Council,[33] which specifically in Article 82, para. 2 states that:

> […] for the purposes of the consistent application of this Regulation, the Commission may, on its own initiative, submit written observations to the competent judicial authority […] authorization of the judicial authority in question, the Commission may also make oral observations […].

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32 CJEU Judgment of 13 December 2024, Kargins v. Commission, Case T-110/23, ECLI:EU:T:2024:805.

33 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 (Digital Services Act) (Text with EEA relevance), PE/30/2022/REV/1 (OJ L277, 27 October 2022), 1–102.

Thus, the EC as *amicus curiae* appears before national courts and then intervenes at the CJEU and within the scope of preliminary references. In this regard, we note the Bpost case in the competition sector, where the EC as *amicus curiae* before the judgment of the Court of Appeal of Brussels argued that the interpretation of the principle of *ne bis in idem* and the conditions of application intervene in the judgment of referral to the same CJEU.[34]

6. The Role of the European Commission as *Amicus Curiae* in International Arbitrations

As we saw from the previous paragraphs, the EC intervenes with a double, we can say, right. The right that derives from the participation in the national judgment, that the *amicus curiae* resembles a third party intervener according to Belgian law. And the right for the EC, that comes from Article 23 of the Statute. For the other parties, the assimilation of the *amicus curiae* to the third party intervener decreases the participation in the preliminary phase at the CJEU, which thus admits the parties that are in dispute. Parties such as states, EC, the institution, organ, body that contests an act. The hypotheses are thus not read to the recognition of a use of the faculty that the EC intervenes as *amicus curiae* in national judgments.

When speaking of international arbitrations and in relation to the EU, we mean Article 26 of the Energy Charter Treaty,[35] which the EC has asked to file observations as *amicus curiae* even in the absence of a provision in the treaty.[36] The EC has intervened as *amicus curiae* at the ICSID courts and in disputes between Member States and companies, thus offering interpretation in rules relating to state aid[37] to UNCITRAL arbitrations, which have started from bilateral agreements to support treaties that are not

34 CJEU Judgment of 22 March 2022, Bpost SA, Case C-117/20, ECLI:EU:C:2022:202.

35 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ L69, 9 March 1998), 1–116.

36 CJEU Order of 1 March 2021, Republiken Italien v. Athena Investments A/S and Others, Case C-155/21, ECLI:EU:C:2021:1032.

37 CJEU Order of 12 March 2019, Romatsa and others, Case C-333/19, ECLI:EU:C:2019:749.

compatible with the rules of the TFEU.[38] The practice, in the sector, has shown that the EC acts in a specific interest, that reflects the adoption of other decisions that resemble a real intervener and an *amicus curiae*.

7. Concluding Remarks

What we immediately understood from the previous paragraphs is that the figure of *amicus curiae* in the law of the Union does not present itself in an "institutional" way or as a third party intervener but plays an important role for the disputes from various places on the matter. Above all it assumes an important and precise role before the CJEU.

The introduction of this figure allows the CJEU to acquire data and information useful for the decision in a case. The environmental associations that are now many and the appropriate bodies considered in a particular way authorize acts of the EC and draw up reports of the non-governmental organizations relating to the environment and the protection of human rights. This is information that is useful for the European procedural system given that it rarely follows appeals to means of inquiry, preliminary references and on technical questions.[39] The participation in the written phase, the associations and the non-governmental organizations for the CJEU allows to acquire elements that are useful for the decision. The judgments from the CJEU according to Article 267 TFEU take into consideration in a precise way the individual legal system and thus produce the relative effects for the Member States that are certainly used to allow an open debate, for the subject under investigation, for the coming years.

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38 See the conclusions of the Advocate General Wathelet: CJEU Judgment of 19 September 2017, Slowakische Republik v. Achmea BV, Case C-284/16, ECLI:EU:C:2017:699, para. 3; see also in argument: Ellen Alden and Ali Sahin, "Towards a 'New' Law of Sustainable Foreign Investments Between International and European Union Law. Foreign Investments and Sustainability Through a New Global Perspective," *American Yearbook of International Law (AYIL)*, no. 3 (2024): 2–118.

39 See the conclusions of the Advocate General Bobek: "(...) the limits on the active legitimacy of private individuals have the consequence that particularly technical questions, where a broad investigation would be necessary, are examined in the context of preliminary references to the Court of Justice rather than to the General Court […]." (Opinion of 16 July 2020, Région de Bruxelles-Capitale v. European Commission, Case C-352/19 P, ECLI:EU:C:2020:588, paras. 142–5).

The possibility of participation in the process allows the resolution of contradictions to a system, that derives as a third party intervener, to the *amicus curiae* of associations. An intervention that leads to general interests as described in para. 3, which refers to the discriminations of the position of different entities that cannot exceed what is referred to in Article 40 of the Statute. It does not allow the participation of judgments of a constitutional nature that will be useful for further analysis.

The figure of *amicus curiae* allows the overcoming of issues that arise from a coordination with national judgments. Thus, the participation of *amicus curiae* in national judgments and within the scope of preliminary reference allows it to be the referral judgment at the CJEU, that is, the qualification of a party in the seat according to national procedural rules, excluding also to a procedural system of the Union the status that is not recognized.[40]

A coherent system allows the EC to participate as *amicus curiae* in different cases for supranational judgments and does not open the possibility at the jurisdiction of the Union. The relative opening of the *amicus curiae* at a process of the Union is a reality in continuous increase by organizations that bring widespread interests for the participation in a process before the judge of the Union and filing, consequently, the legal papers. Therefore, *amicus curiae* brief, for example, the association of Eurogroup for animals before the case Centraal Israëlitisch Consistorie van België and others of the CJEU, as well as the protection of animals during ritual slaughter, were ignored by the rules of procedure at the court.[41] However, a foundation that

[40] "[…] the qualification of party pursuant to art. 23 St. to five entities, namely the Union des associations européennes de football (UEFA), British Sky Broadcasting Ltd, Setanta Sports Sàrl, Group Canal Plus SA and The Motion Picture Association, considering that they had intervened in the national proceedings only after the preliminary ruling issued by the High Court of Justice: therefore, despite having become parties to the national proceedings as a result of the decision of the referring court […]" (CJEU Order of 16 December 2009, Football Association Premier League Ltd, Case C403/08 to C429/08, ECLI:EU:C:2009:789, I-09083).

[41] "[…] liberty to submit this Amicus Curiae brief to your attention in a spirit of constructive collaboration […] are well aware that – under the current Court's Statute and Rules of Procedure – this brief won't formally be admissible to the proceedings, we hope that it could inform your deliberation, given the nature *erga omnes* of your forthcoming preliminary judgment in such an important, consequential case […]" (CJEU Judgment of 17 December 2020, Centraal Israëlitisch Consistorie van België and Others, Case C-336/19, ECLI:EU:C:2020:1031, para. 22).

collects useful causes for the quality intervention of the *amicus curiae* has sent a brief that has conveyed to the CJEU some of its reasons.

It was also the CJEU that submitted a request to the European Parliament and the Council, under Article 281, para. 2 TFEU, to amend its statute and transfer the preliminary jurisdiction of certain matters to the Court. Among them are the common system of value added tax, excise duties, the Customs Code, the tariff classification for goods of the Combined Nomenclature, compensation and assistance to passengers, the system of greenhouse gas emission quotas. A necessary and concrete reform, precise and obvious for the introduction of *amicus curiae* at the Court of the Union, is welcomed. This can contribute also useful elements for the decision of the Tribunal to a new functioning role in matters that are rather and above all technical.

It is necessary that the CJEU should open the doors to the *amicus curiae* starting from the relative filing of written observations and trying to put and make the role of the judges more transparent from all points of view to a dispute, bringing in such a way forward the general interests of the European process. In sum, the advantages of democracy and the transparency of a process seem to overcome indications that seem to be in conflict with each other.

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The Revision of Directive 2013/11/EU on ADR for Consumer Disputes: Strengthening or Only Reorganizing ADR Rights for Consumers?

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ADR in consumer disputes, ADR framework, Directive 2013/11/EU, collective consumer ADR

Abstract: The consumer protection model introduced in 2013 by Directive 2013/11/EU has proven to be insufficient. The data have shown that not only consumers but also traders show little enthusiasm for resolving disputes based on the out-of-court procedures introduced by this act. This has resulted from the low awareness among consumers, as well as the limited objective and geographical scope of disputes that can be resolved by means of fast, transparent, and equitable ADR procedures. The stagnation and the so-far unexplored potential of the ADR framework, further intensified by the rapidly increasing virtualization of socio-economic life, justifies the need to implement changes in the field of out-of-court methods for consumer dispute resolution. The package of legislative proposals presented by the Commission, including the Proposal for Directive 2013/11/EU, can be assessed as a reorganization rather than a significant step towards the strengthening of the EU-wide ADR framework. Despite positive elements, such as the extension of the objective and geographical scope of the Directive, this document does not contain proposals for changes that would eliminate all the problems identified during the

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10-year-long application of Directive 2013/11/EU. This, in fact, requires the adoption of solutions that have a greater impact on corporate social responsibility, including the responsibility for consumer relations, increasing the degree of readiness to apply ADR procedures as determined by the parties' high awareness, the ease of implementing and transparency of the procedures while ensuring adequate quality and bridging the significant structural gaps between ADR solutions employed by the individual Member States.

1. Introduction

The protection of consumer rights is one of the most important areas of interest for the European Union. The provisions of Directive 2013/11/EU on ADR for consumer disputes,[1] introduced in 2013, were intended to ensure a high level of protection of consumer rights by guaranteeing that disputes with traders can be resolved by independent, impartial, transparent, effective, fast, and fair out-of-court methods delivered by ADR entities. However, the dynamic socio-economic changes have rendered the adopted legislation insufficient and the proposed legal instruments ineffective. More than 10 years after the enactment of the directive that is of key importance for the consumer market, the European Commission decided to initiate a legislative process aimed at eliminating the specific problems that result mainly from the limited objective and geographical scope of disputes that can be resolved on an out-of-court basis. However, it was decided, as was the case in the original act, that a minimum harmonization model with a high degree of generality in the proposed changes on the European level should be adopted, leaving the final decision on the form of the safeguard instruments to the Member States. As a result of this, in turn, the goal of Directive 2013/11/EU may still remain unaccomplished.

The need to increase the effectiveness of the ADR procedures between consumers and traders is one of the biggest challenges faced by the proposed

[1] Directive (EU) 2013/11/ of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR; OJL165, 18 June 2013), 63–79 (hereinafter: Directive 2013/11/EU).

amendments[2] presented on October 17, 2023. The current data indicate that not only consumers but also traders show little enthusiasm in resolving disputes based on procedures introduced by Directive 2013/11/EU. However, it is not only about increasing the statistical level of participation of ADR entities in the resolution of consumer disputes. It is essential to increase the long-term involvement of consumers and traders in the out-of-court model for resolving increasingly complex disputes. The low involvement of consumer market participants is a result of low awareness, procedural difficulties, and the limited objective and subjective (geographical) scope of the regulation. In the European Commission's view, the explicit extension of the subject matter of Directive 2013/11/EU and its geographical coverage to include relations with non-EU entities is intended to ensure an amicable resolution of the greatest possible number of disputes between consumers and traders.

The article offers an analysis of the proposed changes, indicating the European Commission's reasons that have initiated the process and assessing the presented changes from the point of view of the chances of increasing the effectiveness of the application of alternative dispute resolution methods in the consumer market.

2. Why Is It Necessary to Make Amendments to Directive 2013/11/EU on ADR in Consumer Disputes?

One of the instruments implementing the policy chosen by the European Union for the protection of consumer rights in relations with traders is Directive 2013/11/EU enacted in 2013. The recitals of this EU secondary legislation indicate that it aims to create a legal framework that guarantees consumers in all EU Member States equal access to tools enabling an amicable resolution of disputes with traders.[3] All this makes it necessary to consider these regulations not only as a tool for the development of alternative

[2] See: Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828 COM/2023/649 final (hereinafter: Proposal for Directive 2013/11/EU).

[3] See: Recitals of the Directive of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

dispute resolution, but above all as an instrument to ensure the safety and certainty of trading in the single market.[4]

As a result of the dynamic digitization of the consumer market, the measures introduced in 2013 do not correspond to the changing reality, particularly the increase in consumers' use of the Internet to purchase goods and services. Therefore, on the 10th anniversary of the enforcement of this particular act adopted for consumer protection on October 17, 2023, the European Commission published the outcome of the consumer ADR framework review, adopting a package of legislative proposals including the key legislative proposal amending the current ADR Directive.[5] The European Commission, based on its assessment, which includes, in particular, an analysis of the development and use of ADR entities and the impact of the Directive on consumers and businesses, came to the conclusion that the goals of Directive 2013/11/EU have been achieved only in part.[6]
Directive 2013/11/EU is a solution based on the recommendations of the European Commission issued in 1998 and 2001 which was intended to promote alternative dispute resolution for consumer disputes in the EU by creating approval processes and regular monitoring.[7] A minimum harmonization model was adopted, leaving considerable flexibility to the Member States. The evaluation of the functioning of the EU act intended to protect consumers has shown that its practical application remains low. The EU institutions attribute the limited application of Directive 2013/11/EU to several obstacles. These obstacles also justify the need to amend the directive.

4 Karol Magoń, "Implementation of the Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes – Historical Background and Legal Consequences of a Failure to Transpose the Directive within the Prescribed Time," *Zeszyty Naukowe UEK*, no. 8 (2017): 93, https://doi.org/10.15678/ZNUEK.2017.0968.0806.

5 See: Proposal for Directive 2013/11/EU.

6 Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, SWD (2023) 335 final, part 2/2, p. 36 (hereafter: Commission Staff Working Document part 2/2).

7 Alexandre Biard, "Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK," *Journal of Consumer Policy*, no. 42 (2019): 110, https://doi.org/10.1007/s10603-018-9394-z.

The first obstacle is the consumers' lack of awareness of the existence of ADR-based cross-border dispute resolution procedures.[8] The results of the European Commission's 2023 survey on consumer attitudes to cross-border trade and consumer-related issues have indicated that only 6% of consumers went to an ADR body when they were facing a conflict with a trader.[9] However, this problem itself is not an original cause but a consequence of many other difficulties. It should be stressed that the current regulations do not define precisely enough the procedural issues to be applied in a specific case related to costs, language barriers, or lack of clarity as to the applicable law to be applied in a cross-border context. This problem is all the more important because the information about the possibility of resolving a dispute using ADR tools is usually provided in the language of the trader's country of jurisdiction while, in light of Article 11 of Directive 2013/11/EU, minimum consumer protection standards under the law of the Member State of the consumer's habitual residence should be taken into account when resolving the dispute.

The second obstacle is the low level of traders' involvement in the development and application of ADR procedures to resolve disputes with consumers. As one can read from the 2019 consumer conditions scoreboard, only 30% of EU-based retailers were willing and able to use ADR while 43% were not aware of the existence of ADR.[10]

All this translates into specific results for consumers. As was emphasized in the Commission services' working document summarizing the assessment report on results, the ineffective use of the operational

8 Joanna Page and Laurel Bonnyman, "ADR and ODR—Achieving Better Dispute Resolution for Consumers in the EU," *ERA Forum*, no. 17 (2016): 150, https://doi.org/10.1007/s12027-016-0424-5.

9 "Survey of Consumers' Attitudes Towards Cross-border Trade and Consumer-related Issues 2023," European Commission, p. 14, accessed April 10, 2024, https://commission.europa.eu/system/files/2023-03/ccs_2022_executive_summary.pdf.

10 European Commission, *Consumer Conditions Scoreboard: Consumers at Home in the Single Market* (Luxembourg: Publications Office of the European Union, 2019), accessed April 10, 2024, https://commission.europa.eu/system/files/2020-07/consumers-conditions-scoreboard-2019_pdf_en.pdf.

instruments introduced by the ADR Directive causes consumers to lose €383 billion per year.[11]

It should also be noted that private tools for amicable dispute resolution provided by shopping platforms (PODR) are becoming increasingly popular. These are offered by an increasing number of shopping platforms, including major players such as Amazon, Airbnb, or Ebay.[12] In 2020, 12% of consumers who had a problem with a trader used these instruments, while only 5% resorted to ADR procedures.[13] However, the European Commission notes that these platforms, unlike the ADR schemes, are not subject to any regulatory control. In this context, the problem of ensuring transparent, fair, and equitable criteria for dispute resolution procedures with traders may emerge.[14]

The proposed amendment to Directive 2013/11/EU is not only a consequence of the fact that the goals which have been set for this act have not been fully accomplished or that the level of practical application of these regulations has been low. The reason for the amendment is primarily the current subjective (geographical) and objective limitation in the application of this act. According to the European Commission, these regulations have not been adapted to the ongoing digital transformation. In fact, it should be emphasized that, in light of the increasing virtualization of

11 See: Commission Staff Working Document Executive Summary of the Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828 SWD/2023/337 final, p. 1.

12 See: Pablo Cortés and Arno R. Lodder, "Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress," *Maastricht Journal of European and Comparative Law* 21, no. 1 (2014): 32.

13 Stefaan Voet et al., "Recommendations from Academic Research Regarding Future Needs of the EU Framework of the Consumer Alternative Dispute Resolution (ADR)," accessed April 10, 2024, https://commission.europa.eu/system/files/2022-08/adr_report_final.pdf.

14 See: Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, SWD (2023) 335 final, part 1/2, p. 16–17 (hereafter: Commission Staff Working Document part 1/2); Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Taylor & Francis, 2010), 200–4.

the social and economic life, the exchange of goods on the Internet is becoming more and more widespread, which was particularly evident during the COVID-19 pandemic. In just 10 years, the value of e-commerce has increased to EUR 518 billion, or 4 % of GDP according to 2021 data, and the share of e-commerce in retail sales is predicted to grow by one percentage point per year.[15] This creates the need to ensure new and adequate measures to protect consumer rights.[16]

Firstly, in the light of Article 2(1) in conjunction with clause (c) and (d) of Article 4(1) of Directive 2013/11/EU, the objective scope of that act covers only disputes concerning contractual obligations arising from sales or service contracts in which the consumer has paid or agreed to pay the price.[17] Moreover, under the current legislation, the scope of ADR therefore only covers disputes that are directly related to the performance of the contract.[18] Presently, however, many disputes related to the development of e-commerce are related to the misleading of the consumer at the pre-contractual stage.[19] This particularly concerns digital marketing, the use of deceptive interfaces, and recourse by traders to unfair market practices based on disguised advertising, fake reviews, or distorted price presentations, that is, anything that has an effect on the consumer's purchase decision-making process. As highlighted above, situations where consumers enter a target contract with the help of intermediaries acting without fees charged to the consumer fall outside the regulatory scope of Directive 2013/11/EU. Indeed, where an intermediary does not charge the consumer for the intermediation service, the applicability of the amicable dispute

15 See: Commission Staff Working Document part 1/2, p. 5.

16 See: Maria J. Schmidt-Kessen, Rafaela Nogueira, and Marta Cantero Gamito, "Success or Failure?—Effectiveness of Consumer ODR Platforms in Brazil and in the EU," *Journal of Consumer Policy* 43, no. 3 (2020): 676–9, https://doi.org/10.1007/s10603-020-09448-y.

17 See: Giesela Rühl, "Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: a Critical Evaluation of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market," *Journal of Consumer Policy* 38, no. 4 (2015): 448, https://doi.org/10.1007/s10603-015-9296-2.

18 See: Commission Staff Working Document part 1/2, p. 15.

19 According to the available data, two out of three consumers are affected by unfair market practices such as hidden advertising or fake reviews, see: "Consumer Condition Survey: Consumers at Home in the Single Market – 2021 Edition," European Commission, accessed April 10, 2024, https://commission.europa.eu/system/files/2021-03/ccs_ppt_120321_final.pdf.

resolution procedure will be solely governed by the rules of the specific ADR entity.[20] In the opinion of the European Commission, these areas are so important that their inclusion in the EU regulations makes it necessary to initiate an amendment procedure.

Secondly, Article 2(1) of Directive 2013/11/EU clearly defines the subjective (geographical) scope of this act, covering only consumer relations with EU-based traders. However, in the European consumer market, particularly the online market, the share of non-EU-based traders has been increasing. Consumers take advantage of the lack of restrictions that the Internet offers and have been increasingly willing to conclude contracts with non-EU-based traders. Statistics clearly show that one in eight EU citizens purchases goods or services from a non-EU-based trader every year.[21] Leaving this area outside the scope of EU law regulations can expose consumers to damages. Currently, 5–7% of the complaints lodged to the European Consumer Centres relate to non-EU-based traders.[22] Therefore, the EU legislator should show a special interest in this matter. This area, seen from the perspective of the Directive goal and the overall action taken by the European Union,[23] requires that necessary actions are taken to expand the regulations of Directive 2013/11/EU to ensure that the consumer is provided with maximum protection through the access to fair and thorough dispute resolution options outside the court process.

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20 The European Commission cites the example of the Airbnb and Booking platforms. In the case of the former, the consumer is charged with fees, which is associated with the conclusion of a contract between the intermediary and the consumer, whereas in the case of Booking no such fees are charged at the consumer level. See: Commission Staff Working Document part 1/2, p. 16.

21 "Internet Purchases – Origin of Sellers (2020 Onwards)," Eurostat, accessed April 10, 2024, https://ec.europa.eu/eurostat/databrowser/view/ISOC_EC_IBOS__custom_3007818/default/table?lang=en.

22 Commission Staff Working Document part 1/2, p. 16.

23 See: Erik Björling, "In the Procedural Surroundings of Consumer Protection: Online Dispute Resolution, the Adversarial Principle, and Tendencies toward Settlement," *Masaryk University Journal of Law and Technology* 13, no. 2 (2019): 333, https://doi.org/10.5817/MUJLT2019-2-7.

3. Goals and Proposed Amendments to Directive 2013/11/EU on ADR in Consumer Disputes

The proposals to change the EU legislation on infringements of the EU consumer protection law aim to revive the hitherto untapped potential of the ADR regulations in consumer disputes. The proposed solutions, based on the method of a minimum level of harmonization of national regulations, grant the Member States a degree of flexibility in adapting the ADR framework to their internal structure, culture, consumer awareness, infrastructure, and governance of ADR entities along with the possibility of establishing mandatory participation of traders in the out-of-court dispute resolution procedure. The shape of the Proposal for Directive 2013/11/EU is based on three major assumptions.

Firstly, it includes a plan to expand the scope of the ADR framework to cover all categories of EU consumer law disputes, which, as the Commission has assumed, is to contribute to the strengthening of the single market performance in terms of consumer protection. This means that not only domestic and cross-border disputes concerning contractual obligations but also disputes arising between traders and consumers in pre-contractual situations can be resolved, regardless of whether the consumer enters into the final contract. The planned broader objective scope also includes the adaptation of the ADR framework to the possibility of resolving disputes that arise in digital markets.

The second major idea on which the Proposal for a Directive 2013/11/EU is based is the expansion of the geographical coverage of the ADR framework through a redefinition of a cross-border dispute. The purpose of this solution is to allow non-EU-based traders to voluntarily participate in ADR proceedings according to rules applicable to EU-based traders. At the same time, the European Commission proposes to impose an obligation on the Member States to appoint ADR entities responsible for resolving disputes between EU consumers and non-EU-based traders.[24]

The third group of assumptions consists of regulations of an informative, promotional, and procedural nature relating to an ADR procedure being initiated by the consumer, which would fill the gap caused by

[24] Proposal for a Directive 2013/11/EU, p. 15.

the proposal to discontinue the European ODR platform.[25] This assumption also includes a reduction in the frequency of reporting duties imposed on ADR entities. In addition, in this group of solutions, it is proposed to impose an obligation on traders to respond to each question submitted by ADR entities on whether they agree to participate in an ADR procedure initiated at a consumer's request.

Under the first of these assumptions, the Proposal for a Directive 2013/11/EU, the scope of application of the current Article 2 of Directive 2013/11/EU has been significantly expanded. Indeed, the proposal to amend Article 2(1) of Directive 2013/11/EU assumes that the cross-border ADR framework will apply to proceedings aimed at the out-of-court resolution of disputes not only for contractual obligations, as has been the case so far, but also the violation of consumer rights at the pre-contractual stage. The extended objective scope would cover disputes arising from contractual obligations under sales and service contracts, extending the list to include disputes arising from contracts for the supply of digital content.

Furthermore, the proposal to regulate clause (b) of Article 2(1) of Directive 2013/11/EU provides for the possibility of resolving disputes relating to the infringement of consumer rights provided for in EU law in pre-contractual situations regarding unfair commercial practices and terms, breach of mandatory pre-contractual information duties, discrimination on the grounds of nationality or residence, access to services and supplies, means of legal protection with regard to non-conforming products and digital content, infringement of the right to change the supplier and the rights of passengers and travelers. As part of the minimum harmonization method in the text of the proposed Article 2(1) of Directive 2013/11/EU, the Member States would be able to reinforce the goal of the Directive by using ADR proceedings for other categories of infringements of consumer rights. This solution provides an unlimited possibility to establish broader regulation in a way that does not violate the obligations

[25] See: Proposal for a Regulation repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and (EU) 2018/1724 with regard to the discontinuation of the European ODR Platform COM/2023/647 final (hereinafter: Proposal for a Regulation (EU) No 524/2013).

arising from the Treaty on the Functioning of the European Union,[26] however, it may lead to significant disproportions in the functioning and the objective scope of disputes in which ADR entities are involved in the individual EU Member States. The planned changes also result from the proposal to amend clauses (e) and (f) of Article 4(1) of Directive 2013/11/EU, modifying the existing definitions of "domestic dispute" and "cross-border dispute" by making them cover the disputes arising from "consumer rights provided for under the EU law". According to the European Commission, the expansion of the list of disputes subject to the ADR procedure will cause their number to increase by 4.5%, i.e. by 100,000 disputes at the EU[27] level as compared to the current number. The proposed changes to the subjective scope that are in line with the goal indicated in Article 1 of Directive 2013/11/EU can be assessed as a natural process of evolution of the untapped potential of the ADR framework,[28] aiming at its revival and, at the same time, providing more extensive protection of consumer rights, determined by the trader's consent to participate in an ADR procedure or by an obligation imposed by a decision of the individual Member States. This will contribute to the greater involvement (including financial involvement) of traders by obliging them not so much to participate in ADR proceedings but rather to obligatorily respond to each and every case found on the list of disputes and which will be addressed to them via ADR entities at the request of a consumer.

Changes to the geographical scope corresponding to the second assumption of the Proposal for a Directive 2013/11/EU will also be of key importance for increasing the frequency of application of the ADR framework and consumer protection. Indeed, the proposal to amend the concept of the "cross-border dispute" contained in the current clause (f) of Article 4(1) of Directive 2013/11/EU provides non-EU-based traders with an option to participate in disputes with consumers resident in the EU. This solution may, on the one hand, contribute to the increasing scope of consumer protection in the EU market and, on the other hand,

[26] Katarzyna Marak, "Transpozycja konsumenckich dyrektyw maksymalnych na przykładzie dyrektywy turystycznej 2015/2302 do polskiego porządku prawnego," *Acta Universitatis Wratislaviensis*, no. 3977 (2019): 355, https://doi.org/10.19195/0524-4544.329.29.

[27] Proposal for a Directive 2013/11/EU, p. 10.

[28] See: Commission Staff Working Document, part 2/2, p. 36.

increase the level of competitiveness of non-EU-based traders who may be more willing to participate in the ADR procedure than traders based in the EU to build their own position and confidence among consumers in the EU market, especially the digital market. Furthermore, it should be noted that the proposal to amend Article 5(1) of Directive 2013/11/EU imposes an obligation on the Member States to "facilitate access" and to "ensure" that disputes falling within the scope of the proposals to amend Directive 2013/11/EU can be submitted to an ADR entity for traders who are not based in the EU but offer goods or services, including digital content and services, to consumers resident in the EU. Undoubtedly, the extension of the geographical coverage with the obligation for the Member States to provide ADR mechanisms for non-EU-based traders will be tantamount to an increase in costs which were not assessed in the impact assessment in Proposal for a Directive 2013/11/EU referring to disputes with non-EU-based traders. It was only generally indicated that the cost of resolving one dispute could be EUR 300 and the handling of potential new 200 thousand disputes could be estimated at EUR 60 million per year. It should be added that ADR entities incurring the costs can pass them on to traders. ADR entities may not charge traders with the costs related to the initial dispute assessment by ADR entities at the consumer's request and the questions addressed to traders in a situation where they refuse to participate in the ADR procedure, as long as it is voluntary. This is even more relevant to non-EU-based traders. In addition, the Proposal for a Directive 2013/11/EU includes an amendment to clause (d) of Article 5(2) of Directive 2013/11/EU responding to electronic dispute resolution systems by granting the parties the right to request an inspection of the ADR procedure automated outcome by a natural person. However, the Proposal for a Directive 2013/11/EU did not specify what the said inspection would consist of and what its effect would be. The power granted to the parties remains correlated with the obligation of the ADR entity to carry out the inspection, the obligation being implicit given the place of regulation of Article 5 in Directive 2013/11/EU, generating additional costs that were not taken into account in the impact assessment of the proposed amendments.

Moreover, the inconspicuous proposal to amend the current wording of clause (a) of Article 5(4) of Directive 2013/11/EU, intended for the Member

States to exclude disproportionate rules of bringing the "attempted contact" with the trader into effect by the consumer in order to discuss the complaint and resolve the problem at a stage prior to the procedure conducted by the ADR entity, poses a risk of depreciating the said attempted contact by the consumer, which should nevertheless be real and adequate and not seemingly pave the way to involve ADR entities. Nevertheless, a solution that may potentially contribute to reducing the costs incurred by ADR entities, in relation to ongoing proceedings, is the proposal to amend clause (d) of Article 5(2) of Directive 2013/11/EU enabling similar cases against the same trader to be consolidated in a single proceeding provided that the consumer has been duly informed and has not objected to this. In practice, as part of the minimum harmonization, this will mean that the Member States will have to regulate the mechanism for collective ADR proceedings[29] if they have not done this so far, and, as a matter of fact, they will have to do this from scratch since the Proposal for a Directive 2013/11/EU does not provide minimum solutions in this respect.

Within the last group of regulations amending Directive 2013/11/EU which correspond to the third assumption indicated in the Proposal for a Directive 2013/11/EU, a key significance lies in the abolition of information obligations imposed on traders as a group and entrusting the European Consumer Centres with the role of raising consumer awareness[30] of the existence of cross-border means of asserting claims through ADR procedures. Indeed, the proposed amendment includes the repeal of Article 13(3) of Directive 2013/11/EU abolishing the obligation imposed on an EU-based trader to inform the consumer of the decision to participate in a dispute resolution using ADR, with the indication of the ADR entities competent to process the dispute. However, the substitute for the proposal to abolish the said obligation is the proposal to add clause 8 to Article 5 of Directive 2013/11/EU imposing an obligation on traders to respond within

29 See: Commission Staff Working Document part 1/2, p. 61.

30 See: Commission Staff Working Document Subsidiarity Grid Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, SWD (2023) 334 final, p. 2.

a maximum of 20 working days[31] to a question asked from an ADR entity about the trader's participation in a "proposed ADR proceeding."

The phrase "proposed ADR proceeding" means that it is not a matter of giving universal consent to participate in ADR proceedings or the permanent absence of it (expressed as a general objection) but of responding in each specific dispute initiated by the consumer through ADR entities. This solution seems to be a cautious step towards the mandatory but in practice it should be considered only as a change of the communication channel. In fact, it constitutes a shift from direct communication of the decision on the trader's participation in the ADR procedure to the consumer to involvement of an "intermediary," an ADR entity through which the information from the trader will finally reach the consumer. From the point of view of information and promotion and the increase in the potential for generating higher costs on the part of traders and, at the same time, ADR entities, the form of the proposed solution can be assessed unfavorably.

One might rather propose to extend the current Article 13(1) of Directive 2013/11/EU to also cover traders who do not commit or are not obliged by a decision of the Member States to participate in ADR proceedings by imposing an obligation to communicate information on ADR entities and the position on their participation in these proceedings.[32] The public information obligation could be assessed as part of the corporate social responsibility development process, creating an opportunity for traders who would assess their involvement in ADR procedures on the *ex-ante* basis, that is, before a dispute arose, with the obligation to provide information in this respect, to attach more importance to considering their participation in ADR procedures than they would *ex post* in private correspondence and

[31] The Committee on Internal Market and Consumer Protection <Committee> presented an amendment to the Proposal for a Directive 2013/11/EU to make the trader obliged to respond within a maximum of 15 working days, optionally extendible to a maximum of 20 working days in case of complex disputes or as a result of exceptional circumstances such as a period of increased activity or an external crisis, accessed April 10, https://www.europarl.europa.eu/doceo/document/A-9-2024-0060-AM-001-057_PL.pdf.

[32] The Committee on Internal Market and Consumer Protection<Committee> presented an amendment to the proposal to amend Article 13(2) of Directive 2013/11/EU by expanding the information obligation so that it covers invoices issued by the trader, accessed April 10, 2024, https://www.europarl.europa.eu/doceo/document/A-9-2024-0060-AM-001-057_PL.pdf.

in response to a question addressed to them by ADR entities. Furthermore, it would provide a broad "advertising medium" for publicizing the existence of ADR procedures not only to consumers but also to emerging traders who had to make a general decision on whether to participate in ADR procedures without incurring fixed costs.

The proposed solutions of the Proposal for a Directive 2013/11/EU therefore duplicate the existing obligation expressed in Article 13(3) of Directive 2013/11/EU, only changing the form of communication, in a way that does not guarantee material benefits related to a greater degree of the traders' involvement, increased consumer protection or even a static increase in the number of proceedings, except for the undoubted increase in costs. The introduction of an obligation to respond in an individual and specific dispute and to decide on an *ex-post* basis whether to participate in an ADR procedure in private correspondence with the ADR entity and in the comfortable secrecy of one's office may, in practice, make it easier to take a refusal decision rather than a public declaration determining the trader's image in an ADR procedure that has been insufficiently promoted as a corporate social responsibility tool.

There is no doubt that, depending on the number of questions asked, the costs of this solution for traders will be much higher than the costs of the current solutions. In the impact assessment of the Proposal for a Directive 2013/11/EU, the Commission estimates that the trader response cost, including preparation, processing, and dispatch, will be about EUR 20 as compared to a one-off cost of about EUR 310 resulting from the current solution and informing consumers about entities and participation in the ADR procedure.[33] This solution also implies an increase in the operating costs of ADR entities. However, the broadening of the scope of the obligations of ADR entities related, i.a., to directing questions to traders would be compensated by the proposal to amend clause (a) of Article 7(2) of Directive 2013/11/EU to reduce the frequency of reporting duties imposed on ADR entities from one to two years.

The solution exempting traders from information obligations also has repercussions, as it creates an information and promotion gap in the awareness of consumers, which, under Article 14(2) of Proposal for a Directive

[33] Proposal for a Directive 2013/11/EU, p. 12.

2013/11/EU, would be filled by European Consumer Centres responsible for ADR contact points designated in the Member States. Under Article 14(3) and (4) of the Proposal for a Directive 2013/11/EU, the European Consumer Centres would aid consumers in the broad area of promotion and dissemination of knowledge about ADR procedures, providing assistance in accessing ADR entities. The question is whether their coverage and promotional resources will be sufficient to regularly raise the level of consumers' awareness of ADR procedures, replacing and, above all, expanding the reach of the existing promotional medium that traders have been obliged to employ.

The effect of the Proposal for a Regulation (EU) No 524/2013 which states in Article 2(1) that "the ODR platform shall cease to function" is a proposal to amend Article 20(8) of Directive 2013/11/EU expressed in the Proposal for a Directive 2013/11/EU. It gives the European Commission an assignment to develop and maintain an interactive digital tool to find general information on consumer protection measures and links to ADR entities' websites, filling the gap after the expiry of the ODR platform. The Commission's assignment under proposed Article 14(2) of the Proposal for a Directive 2013/11/EU would be carried out based on information provided by the Member States including the name and contact details of the established ADR contact points. In addition, the Proposal for a Directive 2013/11/EU includes a proposal to amend clauses (a) and (b) of Article 5(2) of Directive 2013/11/EU by imposing an obligation on the Member States to ensure that consumers can submit complaints and required supporting documents on-line in a traceable manner. Apart from the electronic form, the proposal includes an obligation for the Member States to ensure that consumers with limited digital skills are able to submit and access documents in a non-digital form upon request. Under the proposal to amend clause (b) of Article 5(2) of Directive 2013/11/EU, the Member States would be obliged to offer digital ADR proceedings using easily accessible and inclusive tools. In practice, taking the decision to end the ODR platform will be tantamount to dispersing and diversifying ADR tools,[34]

[34] See: Commission Recommendation of 17.10.2023 on quality requirements for dispute resolution procedures offered by online marketplaces and Union trade associations, C (2023) 7019 final.

which is of significance in the context of seeking to increase the number of cross-border proceedings, if only by unifying them in the minds of consumers while eliminating a Community-wide instrument whose potential has not been properly exploited.

4. Conclusions

The need to introduce changes in the EU regulations with regard to out-of-court methods for consumer dispute resolution in light of the presented justification and the problems identified in it which demonstrate the stagnation and hitherto untapped potential of the ADR framework is evident. The justification for the need to revise Directive 2013/11/EU is reflected in the main assumptions on which the Proposal for a Directive 2013/11/EU is based, which are intended in the Commission's view to strengthen the EU ADR framework rather than reorganize it.[35] A brief analysis of the proposed changes does not, however, warrant the thesis that the Proposal for a Directive 2013/11/EU will lead to their strengthening and the complete elimination of the problems accompanying the 10-year duration of Directive 2013/11/EU. Leaving aside the positive solution of extending the objective and geographical scope of Directive 2013/11/EU by covering disputes arising from the infringement of "consumer rights provided for in EU law," the indicator for the strengthening of the EU ADR framework should not be solely the statistics of the number of disputes initiated by consumers, which will probably increase as a result of the proposed amendments. The prospect of abolishing information obligations imposed on traders by the proposal to repeal Article 13(3) of Directive 2013/11/EU may raise the low consumer awareness of ADR procedures, the growing deficit of which may be non-convincingly and sufficiently compensated by the information policy of ADR contact points. Therefore it is not a solution that comes with the potential of making consumers and traders more involved.

The package of legislative proposals presented by the Commission, including the Proposal for Directive 2013/11/EU, can then be assessed as a reorganization rather than a significant step towards the strengthening of the EU-wide ADR framework. This, in fact, requires the adoption of solutions that have a greater impact on corporate social responsibility, including

[35] Commission Staff Working Document part 2/2, p. 6.

the sphere of responsibility for consumer relations, increasing the degree of readiness to use ADR procedures as determined by the parties' high awareness, the ease of implementing and transparency of the procedures while ensuring adequate quality and bridging the significant structural gaps between ADR solutions employed in the individual Member States.[36] In this case, it is not enough to impose an obligation on the Member States to ensure that national ADR entities act in good faith.[37] The fundamental issue affecting the perception of the Proposal for a Directive 2013/11/EU in terms of reorganizing the current ADR-related regulations is therefore the inadequate level of minimum harmonization characterized by a high degree of generality, which seems to have a too narrow regulatory effect on the solutions that would be expected to eliminate the existing problems associated with Directive 2013/11/EU. It grants the Member States too much flexibility in ensuring the useful effect of the goals set out in the provisions of the Proposal for a Directive 2013/11/EU and the effectiveness of the provisions of Directive 2013/11/EU, to be able to practically strengthen the actual consumer protection level, maximizing the potential of the EU ADR framework.

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36 See: Biard, "Impact of Directive," 136.

37 See: Article 14 (2) of the Proposal for a Directive 2013/11/EU.

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Opportunity Makes the Thief. A Risk Analysis and Vulnerability Identification Approach in Information Security Management Systems as a Method of Countering Cybercrimes

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Abstract: Data processing in ICT systems is a fundamental activity in the information society. The aim of this article is to present tools specific to information security management systems, such as risk and vulnerability analysis as solutions that can contribute to reducing the incidence of cybercrimes. Limiting the occurrence of such incidents can therefore be considered as a proactive method of preventing the presence of such criminal acts. Considerations include legal instruments such as the GDPR and the NIS2 Directive, which provide for breach and incident management procedures, as well as a risk-based approach. An analysis of vulnerabilities, together with mechanisms for their reporting and the exchange of such information between authorized entities, is proposed in the new NIS2 Directive. It is an essential tool for increasing the resilience of ICT systems by securing their weakest links. Technical standards from the information security area ISO 27000 are also covered in this article. The interdisciplinary nature of the subject matter analyzed implies a discussion of such methods of increasing the effectiveness of security in ICT systems as penetration testing and hardening.

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1. Introduction

The purpose of this article is to present the approach to securing data processing, taking into account the results of the risk management process. Its application is part of the implementation of legal requirements arising from the GDPR[1] and NIS2 Directive.[2] The issue of identifying and responding to vulnerabilities, assuming a proactive approach to ensuring the security of information systems, the mature form of which is proposed in the NIS2 Directive, will also be addressed. The application of an attitude based on ongoing risk management allows for the realization of the principle of continuous improvement in the effectiveness of security features in information systems, leading to a reduction in the number of offences committed against them.

Information is a transferable, intangible asset that reduces uncertainty.[3] Recent decades have been distinguished by dynamic political, social and technological changes, influencing the reality in the era of globalization and the development of the knowledge economy. In the information society, computing is recognized as a fundamental process determining economic growth and the formation of a network society, characterized by the dispersion and interpenetration of social relationships and open access to diverse social groups, both stationary and online. These changes were made possible by the development of the Internet and social media. The shift of social and business contacts to the online environment, apart from the undoubted benefits associated with improved communication, has also brought new risks.

Due to the global nature of the internet, countering cybercrime is an important international issue. Ensuring information security and cybersecurity is particularly important for achieving the following four goals

1 Regulation (EU) 2016/679 of The European Parliament and of The Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L119/1, 4 May 2016).

2 Directive (EU) 2022/2555 of The European Parliament and of The Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (OJ L333/80, 27 December 2022).

3 Irena Lipowicz et al., *Prawo administracyjne. Część materialna* (Warsaw: LexisNexis, 2014), 97.

of the UN 2030 Agenda for Sustainable Development[4]: build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation (goal 9), as well as ensuring healthy lives and promote well-being for all at all ages (goal 3) – e-health solutions, ensuring inclusive and equitable quality education and promote lifelong learning opportunities for all (goal 4) – e-learning tools, and making cities and human settlements inclusive, safe, resilient and sustainable (goal 11) – smart-cities concept. Current legislative work underway at the UN includes a convention against cybercrime.[5]

In the case of Europe, the Cybercrime Convention already has a 20-year history.[6] In the European Union legal system, Chapter 5 of the soft law Declaration on Digital Rights and Principles for the Digital Decade provides for the entitlement of users of cyberspace to a protected, safe and secure digital environment.[7] Furthermore, Article 3(1)(k) of the Digital Decade Policy Programme 2030 sets a target for the European Union related to seeking to improve its resilience to cyberattacks.[8] According to the content of Article 6(2) of the NIS2 Directive, maintaining the security of networks and information systems means precisely guaranteeing their resilience against any event that might compromise the availability, authenticity, integrity or confidentiality of the data processed therein. Negative situations that turn into incidents, as described here, may result from cybercriminal activities. Reducing the occurrence of such incidents can therefore be considered a proactive method of preventing the commission of criminal acts in cyberspace.

Information security management is not a state, but a continuous iterative process that should be constantly improved by identifying new

4 UN General Assembly, A/RES/70/1, Transforming our world: the 2030 Agenda for Sustainable Development.

5 UN General Assembly, A/79/460, Countering the use of information and communications technologies for criminal purposes.

6 Council of Europe Convention on Cybercrime (CETS No. 185), Journal of Laws 2015, item 728.

7 European Declaration on Digital Rights and Principles for the Digital Decade 2023/C 23/01 (OJ C23, 23 January 2023), 1–7.

8 Decision (EU) 2022/2481 of The European Parliament and of The Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030 (OJ L323/4, 19 December 2022).

vulnerabilities to information assets and the threats that may affect them. It is therefore necessary to monitor data processing processes to identify deviations from assumed parameters that form the basis for a review, the outcome of which can provide concrete justification for decisions to make changes. Information security measures should not be *ad hoc* activities, but organized in a planned and structured process.

2. Information Security Management Systems and Their Cyber Resilience

Within the scope of general systems theory, this concept is defined as a set of elements that are in a reciprocal relationship.[9] As a result of analyzing cybersecurity regulations, data protection and technical standards in the field of information security, the following features of information security management systems in a specific organization can be identified:

- It encompasses the policies, procedures, guidelines and associated resources and activities, collectively managed, undertaken to protect information.
- It represents a structured approach to establishing, implementing, operating, monitoring, maintaining and improving information security for the achievement of its business objectives.
- Technical and organizational measures for safeguarding information assets are implemented as part of the process of dealing with risks, carried out after analyzing and assessing them.

According to ISO 27001 technical standard, achieving a satisfactory level of information security implies maintaining information attributes such as confidentiality, integrity and availability. In addition, other properties such as authenticity, accountability, non-repudiation and reliability may be taken into account.[10] Ensuring the security of personal data presupposes the preservation of confidentiality and integrity (Article 5(1)(f)), as well as availability (Article 25(2) GDPR) by controllers. In turn, the NIS2 Directive implies the preservation of the availability,

[9] Ludwig von Bertalanffy, *General System Theory: Essays on Its Foundation and Development* (New York: George Braziller, 1968), 55.

[10] ISO/IEC 27001 – Information security, cybersecurity and privacy protection – Information security management systems – Requirements, Geneva 2022.

authenticity, integrity or confidentiality of information processed by important and essential entities.

The implementation of the obligations imposed on personal data controllers and essential services operators by ensuring an adequate level of security of the resources they use requires the implementation of technical and organizational safeguards that are appropriate to the state of identified vulnerabilities and threats (Articles 24 and 32 of the GDPR, as well as Article 21(1) of NIS2). These should form a complementary, effective and coherent set of elements at the core of the security management system for processed information assets.

3. Risk-Based Approach

Risk is a concept that appears in various contexts in both the legal and management sciences. For example, strict liability occurs in civil law (Articles 430, 433–436, 474 of the Civil Code[11]), as a theory of legal responsibility for consequences of inherently dangerous activities, even in the absence of fault on the part of the defendant. In technical standards, on the other hand, risk management in organizations refers to ISO 31000.[12] In the areas of information security and cybersecurity, the following levels of understanding of the concept of risk are indicated:

- It is considered as the impact of uncertainty on objectives, causing a positive or negative deviation from expectations.
- It is a potential situation in which a specific threat will exploit the vulnerability of an asset or group of assets, thereby causing harm to the organization.
- It is measured as a combination of the probability of an event and its consequences.[13]

The analyzed legal regulations concerning the protection of personal data contain a number of references to the risk-based approach. It refers both to the risks related to potential infringement of the rights and freedoms of data subjects (Article 24(1) GDPR) and those related to the specificity of

11 Act on the Civil Code of 23 April 1964, Journal of Laws 2024, item 1061.

12 ISO 31000 – Risk management – Guidelines, Geneva 2018.

13 ISO/IEC 27005 – Information security, cybersecurity and privacy protection – Guidance on managing information security risks, Geneva 2022, 2.

the processing of these resources themselves (Article 32(2) GDPR). The organizational arrangements analyzed here are also closely related to the concept of privacy by design, which is reflected in Article 25(1) GDPR.

In the case of the NIS2 Directive, the concept of cybersecurity risk management refers to the obligations of important and essential entities to select appropriate data security safeguards (Article 21 NIS2), as well as EU coordinated efforts to improve the security of critical supply chains (Article 22 NIS2).

The technical standard ISO 27005 provides guidance on how to establish an organization's risk management process. It is iterative in nature and includes the following phases: establishing the context for the analysis, risk assessment (including its identification, analysis and evaluation), selecting methods to deal with it (risk treatment) and accepting the residual risk remaining after the procedure. In addition, ongoing monitoring of the risks and reporting of the results of the actions is carried out throughout the iteration. The described process can be used both when implementing risk management mechanisms under the GDPR[14] and the NIS2 Directive.[15]

Risk management, on the one hand, allows the identification of potential events that could become incidents and the implementation of safeguards to prevent their occurrence. On the other hand, it is a method of seeking the most optimal choice of safeguards for the specific conditions and circumstances of data processing. In either case, risk mitigation will contribute to reducing the likelihood of cybercrimes in an organization using this approach.

4. Vulnerability Analysis as a Proactive Approach to Ensuring the Security of Information Systems

Complementary to the risk-based approach is the process of analyzing and exchanging information about the vulnerability of resources held, in

[14] Andrzej Kaczmarek et al., *Jak rozumieć podejście oparte na ryzyku według RODO?* (Warsaw: UODO, 2018), 10, accessed September 30, 2024, https://uodo.gov.pl/pl/file/706.

[15] Jan Kolouch et al., "Cybersecurity: Notorious, but Often Misused and Confused Terms," *Masaryk University Journal of Law and Technology* 17, no. 2 (2023): 284–5.

particular software and hardware for data processing. This is an example of activities classified in criminology as cybercrime prevention.[16]

In ISO 27000 standard, vulnerability is defined as weakness of an asset or safeguard that can be exploited by one or more threats.[17] In an analogous way, this concept is understood in Article 6(15) of the NIS2 Directive. Countermeasure activities are the cornerstone of prevention not even prior to the incident itself, but before the emergence of the threat that could potentially cause it. It is intended to lead to the elimination of causes rather than merely blocking the possibility of the effect itself. Vulnerability handling precedes and later complements the classic risk-based continuous improvement methods for information security management systems. These processes should be primarily oriented towards identifying and neutralizing established vulnerabilities of protected assets.

One of the most significant challenges for the analyzed method of cybersecurity prevention is the detection, analysis and protection of zero-day system vulnerabilities, previously unknown to its owners and developers, which have already been disclosed but is not yet patched. These vulnerabilities pose a significant threat to ICT systems because they are not mitigated by specific security features assigned to them. An attacker can therefore more easily bypass them in order to directly exploit a specific vulnerability.

Recital 44 of the NIS2 Directive indicates that a CSIRT should be able to monitor their resources connected to the Wide Area Network (in particular the Internet) at the request of important or essential entities, in order to better understand and react more quickly to critical vulnerabilities. Recital 58 et seq. points to the role of identifying and addressing vulnerabilities, as well as sharing information about them among authorized information actors, in enhancing the maturity and effectiveness of the EU cybersecurity delivery system. The wording of Article 7(2)(c) states that each Member State shall adopt a national cybersecurity strategy with policies on vulnerability management, including the promotion and facilitation of coordinated disclosure of vulnerabilities and, in accordance with

16 Wojciech Filipkowski, "Przestępczość z użyciem komputerów i ich sieci," in *Kryminologia. Stan i perspektywy rozwoju*, eds. Emil Pływaczewski et al. (Warsaw: Wolters Kluwer, 2019), 526–8.

17 ISO/IEC 27000 – Information technology – Security techniques – Information security management systems – Overview and vocabulary, Geneva 2018, 11.

Article 12, the creation of a European vulnerability database on the basis of this information.

Vulnerability management and the coordinated sharing of information on vulnerabilities among authorized actors should contribute to a more effective and flexible response to new cybersecurity threats. This proactive approach in the context of cybercrime issues can be seen as a preventive measure.

5. Technical Approaches to Reducing Vulnerabilities in Information Systems – Penetration Testing and Hardening

Penetration testing involves conducting a controlled attack on an ICT system to detect vulnerabilities that could lead to a real-world incident. The procedure is divided into three basic phases:

- Information gathering – involves obtaining data about the ICT system under test.
- Vulnerability analysis – allows to check the configuration of the tested system in order to find security gaps.
- Vulnerability exploit – exploitation of previously identified weaknesses of a system by means of algorithms adapted to their specifics, in order to gain unauthorized access to an ICT system.[18]

Penetration testing is a method of empirically verifying the security status of ICT systems. It is a simulation of an attack scenario on such solutions, which in everyday circumstances can be exploited by a threat and cause real damage to an organization.[19] Following the penetration test, a post exploitation analysis is carried out, where the aim is to assess to what extent the identified vulnerabilities are relevant to maintaining the security of resources in the information system. Once everything has been done, a report is produced as a knowledge base and source of experience.

Hardening involves the implementation of safeguards aimed not only at risk reduction, but also at blocking vulnerabilities.[20] The measures

[18] Aileen Bacudio et al., "An Overview of Penetration Testing," *International Journal of Network Security and Its Applications* 6, no. 3 (2011): 22.

[19] David Kennedy et al., *Metasploit. The Penetration Tester's Guide* (San Francisco: No Starch Press, 2025), 1–2.

[20] Aaron Echeverria et al., "Cybersecurity Model Based on Hardening for Secure Internet of Things Implementation," *Applied Science* 11, no. 7 (2021): 2.

carried out are intended to group security features into complementary layers, which constitute a hierarchically ordered arrangement of elements (vertical coherence). There should be no security gaps between ICT system components that can be exploited by threats (horizontal coherence). Improving security configurations can be a consequence of failing to achieve satisfactory security metrics after a penetration test. The hardening process involves disabling unused computer network ports (TCP/UDP) and removing unused services in order to reduce the impact of a potential ICT attack on the infrastructure in use.

As a rule, a person who performs penetration tests in consultation with an ICT system administrator (data controller) is not committing a crime because they are acting under the administrator's authority. Moreover, in 2017, the justification of acting to detect security flaws in ICT systems was introduced into the Polish legal system (Article 269c of the Penal Code[21]). *De lege ferenda*, it should be pointed out that the indicated premise limiting liability could also cover situations where, as part of Intrusion Prevention Systems and related solutions, proactive actions are taken by the system administrator to repel an ICT attack and may interfere with the attacker's ICT system.[22] It is legitimate to ask the question whether the justification of self-defense can be applied in such a situation. Can such action be regarded as repelling a straightforward attack on a good protected by law? Interpreting the ideas on the subject expressed in the literature, taking action that interferes with the functioning of the information and communication system in which protected information resources are processed can be regarded as a direct interference, by its inevitability, with an asset protected by law.[23] Undoubtedly, the Polish legal regulation in the context of the problem discussed here should be as coherent, clear and precise as possible.

The purpose of penetration testing and hardening is to increase the resistance of an ICT system to threats by reducing new identified vulnerabilities. From the point of view of cybercriminals, carrying out such activities

21 Act on the Penal Code of 6 June 1997, Journal of Laws 2024, item 17.

22 Nilotpal Chakraborty, "Intrusion Detection System and Intrusion Prevention System: a Comparative Study," *International Journal of Computing and Business Research* 4, no. 2 (2013): 4.

23 Konrad Burdziak, "Bezpośredniość zamachu, czyli kilka słów na temat obrony koniecznej w polskim prawie karnym," *Przegląd Sądowy*, no. 1 (2018): 58.

makes it more difficult to implement their previously proven modus operandi for attacks in cyberspace.

6. Methods for Rapid Response to Cyber Security Incidents According to NIS2 Directive

Cybersecurity incident means an event compromising the availability, authenticity, integrity or confidentiality of processed data. In other words, it is a case of risk realization in a protected information system. On the basis of the 2016/1148 NIS Directive, incident response was primarily the responsibility of essential service operators and digital service providers, who, in the case of more serious incidents, were assisted by the relevant CSIRT. Under the terms of cross-border cooperation, this was done through single points of contact and CSIRT networks. However, the solutions presented here proved to be insufficiently effective. The NIS2 Directive therefore introduced a new European cyber crisis liaison organization network (EU-CyCLONe) to provide a rapid response group for large-scale incidents. It complements the already existing institutional framework for the provision of cybersecurity in the EU. It should be emphasized that the new regulation in the context of the competences of the CSIRT network also draws attention to the importance of regional and sectoral Security Operations Centres (Article 15(3)(n) NIS2), which will become an intermediate level in the organizational structure of national cybersecurity systems – between the important or essential entities and the national CSIRTs.

In current ENISA reports on the Internet threat landscape and security challenges for 2030 in the EU[24] indicated that one of the most visible and increasingly prevalent phenomena of this type is becoming that of Advanced Hybrid Threats/Advanced Persistent Threats, often referred to as State-nexus threat groups, whose activities are complex with a variety of attack methods (social engineering, phishing, malware, hacking, DoS), meticulously planned, and typically have multiple steps involved.[25]

[24] "Identifying Emerging Cyber Security Threats and Challenges for 2030," ENISA, Athens 2023, 17–8, accessed September 30, 2024, https://www.enisa.europa.eu/sites/default/files/publications/ENISA%20Foresight%20Cybersecurity%20Threats%20for%202030.pdf.

[25] Ping Chen, Lieven Desmet, and Christophe Huygens, "A Study on Advanced Persistent Threats," in *Communications and Multimedia Security. Lecture Notes in Computer Science*, vol. 8735, eds. Bart De Decker and André Zúquete (Berlin: Springer, 2014), 63–72.

It is worth mentioning that Article 35 of the NIS2 Directive provides for *ex officio* notification to the supervisory authority (in Poland it is the President of the Personal Data Protection Office) of incidents which simultaneously have the characteristics of a personal data protection breach. Cooperation between institutions and exchange of information related to such incidents should make it possible to reduce duplicate, redundant formal activities and shorten the reaction time to changing circumstances of the case.

The procedures described in this part of the article are an extension of existing methods of cooperation between the actors of the EU cybersecurity system and are intended to better adapt them to the dynamics and complexity of incidents in this ICT area. This is closely related to the topic of preventing and counteracting the effects of cybercrime due to the fact that the occurrence of such incidents, excluding the spontaneous impact of natural factors, usually involves the realization of the elements of criminal acts by the attackers.

7. Conclusion

The specific nature of cybercrime, characterized by high dynamism and volatility, means that methods of preventing its occurrence and also countering its consequences require methods of reacting rapidly to the circumstances observed, involving parallel action and devoid of unjustified formalism.[26] It is also important to ensure a reliable and consistent chain of custody for incident evidence that creates a unified cause-and-effect sequence. Any delays in the information gathering and decision-making process may cause further damage and prevent full clarification of the facts.

The legal regulations analyzed in the article (GDPR and NIS2 Directive) and the accompanying technical standards in the area of information security (ISO 27000) will not, of course, replace criminal law protection instruments. However, through synergy, previously mentioned non-criminal law solutions can positively influence the effectiveness of the latter. Risk mitigation through the implementation of safeguards or the elimination of the vulnerabilities of protected resources themselves will reduce potential opportunities to commit cybercrimes, in particular those related

[26] Jerzy Kosiński, *Paradygmaty cyberprzestępczości* (Warsaw: Difin, 2015), 213.

to unlawful acquisition of information (cracking/hacking activity – Article 267 of the Penal Code), violation of data integrity in ICT systems (using malware, ransomware – Articles 268-269 of the Penal Code) or disruption of the operation of such systems (DoS/DDoS attacks – Article 269a of the Penal Code).

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Standing of Vulnerable Victims in Criminal Proceedings: Polish Regulations Vis-à-Vis EU Law

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Abstract: The aim of this article is to show the impact of the EU Victims' Rights Directive on the Polish regulations. The main focus is placed on the concept of victim, the role of victims in criminal proceedings, and also individual assessment of crime victims' needs. The findings of the analysis indicate that a set of victims' rights adopted within the framework of the EU is largely reflected in Polish regulations, as a result of efforts made by the legislator to implement the EU Directive 29/2012. At the same time, we should remember the objectives of the "EU Strategy on Victims' Rights (2020–2025)" and the proposed amendments to the EU Victims' Rights Directive, which aim to serve a more effective use of their rights in accordance with the Union's standards.

1. Introduction

The interest in victim's rights was especially visible at the end of the 20th century that seems to be linked with introducing a model of restorative justice in criminal procedures. First, this model assumed the possibility of compensation for crime victims. Secondly, it brought about reconciliation between the perpetrator and his victim. Another important aspect is

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centralized victims' rights approach, which refers to the support schemes and protective measures, particularly in regard to vulnerable victims.[1]

The main horizontal instrument of the European Union for victims' rights is the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (hereinafter: Victims' Rights Directive or VRD). Actually, it lists a quite comprehensive set of victims' rights, for example the right to understand and to be understood, the right to receive information from the first contact with a competent authority, the right to interpretation and translation, the right to access victim support services, the right to be heard, the right to safeguards in the context of restorative justice services, the right to legal aid, the right to receive a decision on compensation from the offender at the end of criminal proceedings, the right to protection, the right to avoid contact between victim and offender, the right to protection of victims with specific protection needs during criminal proceedings, the right to protection of child victims during criminal proceedings.[2]

Other relevant EU legal acts include so called Compensation Directive[3] and EU rules on European protection orders.[4] Additionally, at the EU level

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1 Joanna B. Banach-Gutierrez, "Restorative Justice and the Status of Victims in Criminal Proceedings. The Past and Future of Victims' Rights," *International Perspectives in Victimology* 11, no. 1 (2011): 45–60. The victim-centered justice prescribes that victims should be recognized and rely on their rights, see for instance: 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 victims' rights (2020–2025), COM/2020/258 final, p. 4.

2 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L315, 14 November 2012). Ewa Bieńkowska and Lidia Mazowiecka, eds., *Normy minimalne w zakresie praw, wsparcia i ochrony ofiar przestępstw, Dyrektywa 2012/29/UE. Komentarz*, 2nd ed. (Warsaw: Wolters Kluwer, 2024). The Directive has been applicable in all EU Member States except Denmark, which is not bound by the Directive, see: Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, COM (2023) 424, p. 2.

3 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ L261, 6 August 2004), 15–8.

4 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (OJ L338, 21 December 2011), 2–18; Regulation (EU)

some other instruments were adopted so that they respond to the specific needs of victims of particular crimes; these are the Anti-trafficking Directive,[5] the Directive against sexual abuse and sexual exploitation of children,[6] and the Counter-terrorism Directive providing for specific rights for victims of terrorism.[7] Importantly, the EU has also signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).[8]

Furthermore, in June 2020 the European Commission adopted the EU strategy on victims' rights (2020–2025), which highlights that "victims of crime must have access to support and protection at all times."[9] This strategy is based on a two-strand approach: (1) empowering victims of crime, and (2) working together for victims' rights. It is directly stressed that

No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (OJ L181, 29 June 2013), 4–12.

5 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L101, 15 April 2011), 1–11; Anabela Miranda Rodrigues and Maria João Guia, eds., *New Forms of Human Trafficking: Global South Highlights and Local Contexts on Sexual and Labor Exploitation* (Cham: Springer, 2024); Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims PE/14/2024/REV/1 (OJ L, 2024/1712, 24 June 2024), accessed January 10, 2025, https://eur-lex.europa.eu/eli/dir/2024/1712/oj.

6 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 (OJ L335, 17 December 2011), 1–14.

7 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L88, 31 March 2017), 6–21.

8 The Council of Europe Convention on preventing and combating violence against women and domestic violence, also known as "the Istanbul Convention", "Action against violence against women and domestic violence. Istanbul Convention," Council of Europe, accessed February 10, 2025, https://www.coe.int/en/web/istanbul-convention; Agnė Limantė and Dovilė Pūraitė-Andrikienė, eds., *Legal Protection of Vulnerable Groups in Lithuania, Latvia, Estonia and Poland* (Cham: Springer Nature Switzerland AG, 2022).

9 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 victims' rights (2020–2025), COM/2020/258 final, p. 2.

> It is crucial to empower victims of crime so they can report crime, participate in criminal proceedings, claim compensation and ultimately recover – as much as possible – from the consequences of crime. These ambitious objectives can be achieved only if the Commission and all relevant actors work together. That is why this strategy focuses also on strengthening cooperation and coordination.[10]

Accordingly, the strategy presents five key priorities: (1) effective communication with victims and a safe environment for victims to report crime; (2) improving support and protection to the most vulnerable victims; (3) facilitating victims' access to compensation; (4) strengthening cooperation and coordination among all relevant actors; and (5) strengthening the international dimension of victims' rights.[11]

We should also note that, in order to improve victims' ability to rely on their rights under the VRD, a Proposal for a Directive amending Directive 2012/29/EU has been recently published as a response to identified shortcomings in its practical application.[12]

Despite some positive developments in strengthening victims' rights and victim-centered justice in the EU, the VRD evaluation report adopted by the Commission on June 28, 2022 highlights specific problems that require improvements. Specifically, attention is paid on the issue concerning the practical application of victims' rights and also differences in how Member States have transposed the VRD into national legal orders. The reference is made, for example, to the right to individual assessment of victims' needs, the right to specialized support services, and to the right to receive a decision on compensation from the offender. It is argued that such a policy had a negative impact on exercising the victims' rights, and tackling the arising problems "requires an amendment to the VRD, which can only be achieved at the EU level."[13]

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10 Ibid., 3.

11 Ibid.

12 Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, COM (2023) 424 final.

13 Ibid., 3.

Five main problems are pointed out, which are as follows:

1. Victims do not always receive information about their rights, or they receive inadequate information that makes it more difficult or impossible for them to exercise those rights.
2. Vulnerable victims (such as children, older people, persons with disabilities, victims of hate crime and victims in detention) do not always benefit from a timely assessment of their needs for protection and are deprived of effective protection measures, such as protection orders.
3. Vulnerable victims often cannot rely on specialist support, such as extended psychological treatment, and child victims often cannot rely on a targeted approach based on multi-agency cooperation.
4. Victims' participation in criminal proceedings is often difficult due to a lack of legal advice and guidance and differences in rules on victims' status in these procedures.
5. Victims' access to compensation in domestic and cross-border cases is difficult due to the lack of state support when enforcing the ordered compensation from the offender, leading to a risk of secondary victimisation.[14]

Additionally, it is outlined that both the minimum standards on what constitutes "child-friendly and victim-centered justice have risen in the last 10 years" and therefore the amendments are necessary to adjust them to "recent developments in justice and technologies."[15]

In consequence, the revision of the VRD is tending to contribute to a well-functioning area of freedom, security and justice (hereinafter: AFS&J) in which victims' rights could be fully recognized and practically applied. This is a very important aspect in the context of the right to a fair trial which should be referred today not only to procedural safeguards and human treatment of suspects or convicted persons, but also to victims of crime.[16]

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14 Ibid., 3–4.

15 Ibid., 4.

16 In the light of international human rights standards, a key question is arising about "fair balance" between the rights granted to suspects or convicted persons and those which should be exercised by victims of crime. See, for example: Krzysztof Orzeszyna, Michał Skwarzyński, and Robert Tabaszewski, *International Human Rights Law* (Warsaw: C.H. Beck, 2023), 45–7;

2. The Concept of Victim in Polish Criminal Law

In the discourse about the concept of victim under Polish criminal law, there could be mentioned three definitions that are varied in their scopes. First of all, the Polish legislator included the definition of a victim in the Code of Criminal Procedure (Polish Code of Criminal Procedure, hereinafter: PCCP).[17] Accordingly, a victim is a natural or legal person whose legal interest has been directly violated or threatened by a crime. It could also be a state or local government institution without legal personality; or another organizational unit for which separate regulations grant a legal capacity (Article 49, paras. 1 and 2 PCCP). Hence, the definition adopted in the Polish Code of Criminal Procedure is much broader than the concept of a victim under the Victims' Rights Directive. Pursuant to the VRD "victim" means:

> (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;
>
> (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death (Article 2).

In turn, the Act on State compensation for victims of certain intentional offences of 2005 defines the concept of a victim as a natural person who died as result of a prohibited act; or suffered a serious health impairment, bodily dysfunction or health disorder which are lasting longer than 7 days (Article 2(1) of the Act).[18]

Another definition of victim is provided in the Polish Charter of Victim's Rights of 1999. In this sense, "the victim" is a natural person whose interest, protected by law, has been directly violated or threatened by the crime, as well as their relatives.[19] Further, the relatives of the victim are the persons listed in the Penal Code (hereinafter: PPC). The definition of a close person is a spouse, an ascendant, descendant, siblings, related

Barbara Gronowska and Piotr Sadowski, *Treatment of Prisoners – International and Polish Perspective* (Toruń: Wydawnictwo Naukowe UMK, 2020).

17 Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws No. 89, item 555, as amended).

18 Act on State compensation for victims of certain intentional offences, 7 July 2005 (Journal of Laws 2016, item 325). Compensation means a monetary benefit granted to an entitled person in accordance with the procedure set out in this Act (Article 2(4)).

19 Polish Charter of Victim's Rights, 1999, accessed January 9, 2025, https://www.advocem.org.pl/wp-content/uploads/2021/12/06_-_polska_karta_praw_ofiary.pdf.

in the same line or degree, a person in an adopted relationship and their spouse, as well as living together (Article 115, para. 11 PPC).[20]

The EU strategy on victims' rights 2020–2025 in reference to improving support and protection of the most vulnerable victims provides that "all victims of crime are vulnerable, but because of their personal characteristics, the nature of the crime suffered or personal circumstances some victims are even more vulnerable than others."[21] They are especially, victims of domestic violence, sexual violence, trafficking in human beings. In this context, it is crucial to mention also child victims, victims of terrorism, victims of hate crime, victims of organized crime, victims of environmental crime.[22]

In this study, the protection of victims' rights and exercising their rights in practice will be discussed only in regard to three categories of the most vulnerable victims; these are: child victims, victims of sexual offences and victims of human trafficking.

3. The Role of Victims in Criminal Proceedings and Their Legal Rights

The role of victims in criminal proceedings depends on its stage. Accordingly, with the Code of Criminal Procedure at the stage of the preparatory proceedings, the victim is a party, while in the judicial proceedings the victim may appear as a party, being an auxiliary prosecutor or else private prosecutor. This means that in cases of publicly prosecuted offences, the victim may act as an auxiliary prosecutor in addition to or in place of the public prosecutor. In turn, the victim as a private prosecutor may bring and support charges for privately prosecuted offences.

Nevertheless, the Public Prosecutor is the one who the most often represents the views and concerns of the victim in criminal courts, and the status of the victim is then rather limited to witnesses' rights. Nevertheless, in recent years, the role of the victims in criminal proceedings and their legal rights have been definitively strengthened. In this sense, we may talk about

20 Act of 6 June 1997 – Penal Code (Journal of Laws No. 88, item 553, as amended).

21 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 victims' rights (2020–2025), COM/2020/258 final, p. 7.

22 Ibid., 7–12.

evident reflection of victimological perspectives. Such an approach is rather clearly seen through introducing of the latest legal provisions into the Polish legal order. Here, we should mention that in the years 2021–2024 the Polish legislator, taking seriously the importance of the Victims' Rights Directive, introduced into the Code of Criminal Procedure some new amendments, and respectively new ordinances of the Ministry of Justice were published. In this regard, the arising questions are what does it essentially mean in the legal practice for crime victims, particularly to the most vulnerable ones like minors (child victims), victims of sexual violence or human trafficking. Also, what kind of problems have been occurring as so far in reference to crime victims' rights protection, and whether the legal rights granted to them might be fully exercised under the existing norms.

First of all, we may say that a positive aspect there is, for example, introducing the principle of presumption of age of the victim. It means that, in the event that any doubts as to the age of the victim cannot be removed, and there is a reasonable assumption that he or she is a minor, the provisions of the Code of Criminal Procedure relating to minors shall be applied (Article 49b PCCP). This serves to clarify the applicable provisions concerning the procedural guarantees to which victims are entitled. They are reflected, among others, in the provisions of the Code of Criminal Procedure regarding the victim's right to information on his rights, information on the proceedings, the right to translation (including the right to submit a notification of a crime in the language of the victim), to be heard, to legal aid, to reimbursement of expenses, to compensation or protection measures.

While special guarantees in the course of criminal proceedings for children as crime victims cover especially the recording of their interrogations by means of video and sound recording devices (Article 147 paras. 1 and 2a PCCP), there will be an appointment of a representative for the child (Article 51 para. 2 PCCP), and participation of a psychologist. The provisions protecting the most vulnerable victims, including children also provide for their interrogation following specific standards and in the rooms specially prepared for this purpose, so called "Friendly interrogation room" (Articles 185a–185c, 185e–185f).[23] Actually, the place of their interrogation

[23] Rozporządzenie Ministra Sprawiedliwości z dnia 13 stycznia 2025 r. w sprawie określenia wzorów informacji o przebiegu, sposobie i warunkach przesłuchania dla osób

and the recording should meet the standards set out in the Ordinance of the Minister of Justice[24] and the Guidelines of the Nobody's Children Foundation (currently: "Let's Give Children Strength Foundation"). The mission of the foundation is *inter alia* to undertake actions aimed at child-friendly justice. For this reason, the foundation engages in legislative activities aimed at the proper representation of the child in proceedings and the realization of the child's right to speak out in court on their cases. The foundation has been widely providing training to judges, prosecutors and psychologists. Fundacja Dajmy Dzieciom Siłę (Empowering Children Foundation) runs Child Advocacy Centres and provides a "Child-Friendly Interview Room. The application for such a room is available on the foundation's home page.[25]

Generally, we may say that in specified cases the interrogations should be conducted in such a way that allows the victim to avoid eye contact with the perpetrator, in the absence of the perpetrator in the courtroom. Also, during the interrogation in the course of the criminal proceedings one should avoid unnecessary questions, and the court can decide that the hearing should take place without the participation of the audience. In accordance with the Code of Criminal Procedure a person indicated by a victim may be present during the activities with his or her participation in the preparatory stage of the criminal proceedings, if this does not make it impossible to carry out the activities or make it significantly more difficult (Article 299a PCCP). The Code of Criminal Procedure also provides that in certain circumstances a court may exclude the public from the hearing in

przesłuchiwanych w trybie określonymw art. 185a–185c k.p.k. oraz art. 185e k.p.k. (Journal of Laws 2025, item 59).

24 Rozporządzenie Ministra Sprawiedliwości z dnia 22 września 2024 r. w sprawie sposobu przygotowania i przeprowadzenia przesłuchań w trybie określonym w art. 185a–185c oraz art. 185e Kodeksu postępowania karnego oraz warunków, jakim powinny odpowiadać pomieszczenia przeznaczone do przeprowadzania takich przesłuchań (Journal of Laws 2024, item 1477). "Friendly interrogation room" is a room specially designated for the purpose of conducting hearings pursuant to Article 185a to 185c and Article 185e of the Code of Criminal Procedure, meeting the conditions set out in this Ordinance, located at the seat of the court or outside its seat, in particular at the seat of the public prosecutor's office, the Police, a state or local government institution or an entity whose tasks include providing assistance to minors or the victims of rape.

25 "Jak pomagamy? – czyli działania pomocowe Fundacji," Fundacja Dajemy Dzieciom Siłę, accessed February 22, 2025, https://fdds.pl/jak-pomagamy.html#przesluchania-sadowe.

whole or in part (Article 360 paras. 1(1)(d) and 3 PCCP). In addition, when there is a concern that the presence of the accused could have an embarrassing effect on the testimony of the witness, the chairman may order that the accused leave the courtroom during the interview. The chairman may also conduct the interview with the use of some technical devices enabling the conduct of this activity at a distance with the simultaneous direct transmission of image and sound (Article 390 paras. 2 and 3 PCCP).

It follows from the above that some of the indicated provisions apply directly to child victims, and others to victims regardless of their age. Exercising such legal rights are becoming of significant importance, for victims of sexual violence or human trafficking.

What is important, due to the obligation for introducing the provisions of the Victims' Rights Directive into the Polish legal order, there have been introduced new rules regarding the collection of information (individual assessment) about the victim and the hearing of him or her (Article 52a PCCP). The indicated provision is of a guarantee nature for the victim. Namely, it imposes on the authority which is conducting the criminal proceedings an obligation to determine the circumstances of the case regarding the characteristics and personal conditions of the victim, as well as the type and extent of the negative consequences of the committed crime. Also, there is the obligation imposed on the competent authority which is conducting the criminal proceedings to collect from the victim a statement whether he or she wants to apply specially the protective measures or psychological assistance as specified in the provision.

Therefore, the hearing of the victim and witnesses may take place remotely with the use of technical devices recording video and sound, as well as a confidentiality of the circumstances being kept which would allow for disclosure of the witness' identity. Moreover, where there are crimes committed with the use of any violence or unlawful threats or crimes against freedom, crimes against sexual freedom and decency, crimes against the family and care of a victim who at the time of questioning is under 15 years of age, he or she should be questioned as a witness only then, when his testimony may be of significant importance for judging the case, and only once, unless important circumstances come to light, the clarification of which requires another questioning, or the accused, who did not have a defense attorney at the time of the first questioning of the victim, requests for this.

The hearing is conducted by the court at a session with the participation of psychologist, immediately, not later than within 14 days from the date of the request. The prosecutor, defense counsel and the victim's representative have the right to participate in the interview. At the main hearing, the recorded image and sound of the hearing is reproduced and the protocol of the hearing is read. Further, in cases regarding the above-mentioned crimes, a minor victim who at the time of the interview was 15 years old, is also interviewed remotely, when there is a justified fear that the interview in other conditions could have a negative impact on his mental state.

In addition to the provisions included in the Code of Criminal Procedure, there are also specific laws, namely the Act on victim and witness protection of and support, 2014[26], as well as the Act on state compensation for victims of certain intentional offences, 2005.[27] Accordingly to the provisions of the Act on victim and witness protection of and support, in the event of a threat to the mental health of the victim, a witness or their relatives, the authority conducting operational and investigative activities, or a vetting or preparatory proceedings, or the court informs the victim or witness about the possibility of obtaining any psychological assistance provided by entities that have received a subsidy for this purpose from the Victim Assistance Fund, and Post-penitentiary Assistance (commonly called "A Justice Fund," Article 43 Executive Penal Code)[28] or other entities providing psychological assistance, along with an indication of the list of these entities and the method of contact (Article 10(1) of the Act). [29]

Legal regulations on the protection of the victims' interests against the effects of crime also contain a fairly extensive catalogue of compensatory measures. These funds are located among others in the area of substantive criminal law (Article 46 PPC). However, if it proves impossible to obtain compensation from the offender through an individual redress procedure, solutions have been developed to obtain compensation from

[26] Act on victim and witness protection of and support, 2014 (Journal of Laws 2015, item 21).

[27] Act on state compensation for victims of certain intentional offences, 2005 (Journal of Laws 2016, item 325).

[28] Act of 6 June 1997 – Executive Penal Code (Journal of Laws No. 90, item 557, as amended); Ewa Bieńkowska, "Fundusz pomocy pokrzywdzonym oraz pomocy penitencjarnej po najnowszych zmianach," *Zeszyty Prawnicze* 16, no. 3 (2016): 5–22.

[29] Act on victim and witness protection of and support, 2014 (Journal of Laws 2015, item 21).

the state, i.e. obtaining funds from a public fund created to meet the needs of victims. State compensation is clearly of a subsidiary nature and, it is intended to minimize the consequences suffered by the victim of crime. Pursuant to the Act on state compensation for victims of certain intentional offences, such a compensation may be awarded in the amount covering lost earnings or other means of livelihood, costs related to treatment and rehabilitation, and funeral expenses. The state compensation may not exceed 25,000 zlotys, or 60,000 zlotys if the victim suffered death.[30]

It is worth noting that the Act on state compensation is facing criticism because of many outstanding reasons. Specially, Fundacja Pomocy Ofiarom Przestępstw (the Victims of Crime Assistance Foundation) draws attention to the issue of incorrect practice of granting compensation benefits to crime victims. The current state compensation system is considered to be ineffective and in need of some modifications. First of all, the provisions in their current form are not used adequately and what is worse may lead to secondary victimization of the crime victims. One of the main reasons is the lack of appropriate and understandable information for victims. Moreover, there is a lack of commitment to the application of this institution of law enforcement and justice authorities, which in fact should well understand, apply and inform about it. This is indicated that in the years 2005–2021 the institution of compensation was almost not used. What is more, on average, 140,000 zlotys was paid per year, although it was expected that it would be 70 million zlotys. It is argued that the procedure for examining applications is based on much formalized proceedings in civil court. This procedure also includes the participation of a prosecutor, whose role additionally complicates the proceedings for granting state compensation. In the years 2005–2021, the civil court granted only 38 compensations on average per year.[31]

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30 Act on state compensation for victims of certain intentional offences, 2005 (Journal of Laws 2016, item 325).

31 "Kompensata państwowa," January 31, 2023, Fundacja Pomocy Ofiarom Przestępstw, accessed February 22, 2025, https://fpop.org.pl/kompensata-panstwowa/; Lidia Mazowiecka, *Państwowa kompensata dla ofiar przestępstw* (Warsaw: Wolters Kluwer Polska, 2012); Stanisław Łagodziński, "Praktyka przyznawania świadczeń na podstawie ustawy z 7.07.2005 r. o państwowej kompensacie przysługującej ofiarom niektórych przestępstw," *Prawo w działaniu. Sprawy karne*, no. 9 (2011): 119–41, accessed February 22, 2025, https://iws.gov.pl/wp-content/uploads/2018/09/dr-Stanisław-Łagodziński-Praktyka-przyznawania-świadczeń-

In the years 2018–2020, the necessary funds for treatment and rehabilitation were allocated as compensation only in 34, 29 and 21 cases, respectively. In the first half of the year 2021, there were 15 compensations. In the years 2018 and 2019, there were 111 applications submitted (34 granted) and 117 (29 granted), respectively. In 2020, there were 55 such cases and 21 of them were awarded compensation, while in the first half of 2021 – there were 31 applications submitted, and only 15 of them were granted.[32]

In view of the above, the Victims of Crime Assistance Foundation has presented a draft act on state compensation for victims of intentional criminal acts committed with the use of violence. The compensation provided for in the draft Act of January 27, 2025 on state compensation for victims of intentional criminal acts committed with the use of violence assumes the possibility of an efficient and dignified return to normality for victims of this type of crime. Also, a significant change in the Act is the inclusion of children as beneficiaries.[33]

In reference to protective measures that might be used in the interests of vulnerable victims, we should highlight provisions of the Polish Penal Code. They cover some measures that are intended to affect the immediate safety of the victim and the victim's closest relatives, including a prohibition on contacting or approaching the victim, and an order to leave the premises occupied jointly with the victim.

Importantly in 2020, the Regulation of the Minister of Justice concerning the model of the instruction on the rights and obligations of the victim in criminal proceedings entered into force, which covers the updated

-na-podstawie-ustawy-z-7.07.2005-r.-o-państwowej-kompensacie-przysługującej-ofiarom-niektórych-przestępstw-119.pdf.

32 Statistical data provided by L. Mazowiecka (Patrycja Rojek-Socha, "Kompensata dla pokrzywdzonych przestępstwem nie działa," February 16, 2022, Prawo.pl, accessed November 15, 2024, https://www.prawo.pl/prawnicy-sady/kompensata-dla-pokrzywdzonych-przestepstwem-ms-rozwaza-zmiany,513489.html).

33 "Kompensata państwowa," accessed February 22, 2025, https://fpop.org.pl/kompensata-panstwowa/; Rojek-Socha, "Kompensata dla pokrzywdzonych przestępstwem," accessed February 22, 2025, https://www.prawo.pl/prawnicy-sady/procedura-przyznania-kompensat-pokrzywdzonym-do-zmiany-jest-projekt,531625.html; "Projekt ustawy o państwowej kompensacie dla ofiar umyślnych czynów zabronionych popełnionych z użyciem przemocy," February 20, 2025, Fundacja Pomocy Ofiarom Przestępstw, accessed February 22, 2025, https://fpop.org.pl/projekt-ustawy-o-panstwowej-kompensacie-dla-ofiar-umyslnych-czynow-zabronionych-popelnionych-z-uzyciem-przemocy/.

"Letter of victim's rights". This Regulation implements the provisions of both the Victims' Rights Directive and Directive 2011/99/EU on the European protection order.[34] Namely, the competent authority is obliged to provide the victim with information on his or her rights and obligations, and have the signed copy included in the files of the conducted criminal proceedings. There is also information that if the instruction provided seems unclear or incomplete to the victim, he or she may request additional specific information from the investigator about his or her rights and obligations.[35]

Besides all the provisions briefly illustrated so far, it should be mentioned that already in 1999, a document called the "Polish Charter of Victim's Rights" was adopted. This Charter forms a set of crime victims' rights, based on the available international and European legal instruments of that time. The Polish Charter of Victim's Rights has been prepared commonly by the Ministry of Justice, in cooperation with governmental and non-governmental institutions and organizations in order to provide the necessary assistance to crime victims. In a word, this document is reflecting the obligations adopted by Poland.[36]

4. Individual Assessment of Crime Victims' Needs

Although the Polish Charter of Victim's Rights for years has been functioning as a "soft law," being a certain kind of guidelines for investigative and judicial authorities, its role in strengthening the crime victims' rights should be much appreciated. It is obvious that this particular document played a key role on the path for the crime victims to be seen, and also treated in a special manner. However, in time Poland was obligated to undertake some further steps in a legal form so as to adjust Polish legal order to the requirements

[34] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (OJ L338, 21 December 2011), 2–18.

[35] Ordinance of the Minister of Justice concerning the model of the instruction on the rights and obligations of the victim in criminal proceedings of 14 September 2020 (Journal of Laws, item 1619).

[36] Joanna B. Banach-Gutierrez, "Crime Victims' Rights in the European Area of Justice and Polish Legislation," in *Nowa Kodyfikacja Prawa Karnego*, vol. 52, ed. Tomasz Kalisz (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2019), 28; Maria Wysocka and Dariusz Baj, "Polska Karta Praw Ofiar w systemie polskiego prawa," *Kwartalnik Policyjny* 54, no. 3 (2020): 8–16.

of the European Union law, including implementation of Article 22 of "the Victims' Rights Directive."[37]

Consequently, the Polish legislator has implemented into the national legal order most of the provisions indicated in the Victims' Rights Directive.[38] Here, an important element in the implementation of Article 22 of 'the Victims' Rights Directive and Article 19(3) of Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography[39] is providing for the article 52a of the Code of Criminal Procedure. The introduction of Article 52a of the Code of Criminal Procedure is at the same time the implementation of one of the fundamental principles of Polish criminal procedure, referring to legally protected interests of the victim (Article 2 §1(3)).[40]

The content of Article 52a of this Code in question directly addresses the importance of individual assessment in determining the specific protection needs of victims. The general presumption is that every victim of crime should be subject to such an assessment, with vulnerable victims during criminal proceedings being particularly vulnerable to secondary victimization, intimidation and retaliation by the offender. The determination of such risks is only possible on the basis of an individual assessment of a specific victim. To facilitate this, a questionnaire for the assessment of special protection needs has been introduced for the authorities conducting criminal proceedings (Police and Public Prosecutor's Office).[41]

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37 Bieńkowska and Mazowiecka, *Normy minimalne*.

38 Ewa Bieńkowska, *Wiktymologia* (Warsaw: Wolters Kluwer, 2018).

39 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 of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L13, 20 January 2004), 44–8.

40 Paweł Falenta, "Nowy art. 52a k.p.k. jako realizacja praw pokrzywdzonego," *Prokuratura i Prawo*, no. 6 (2021): 5–7. Pursuant to Article 2 §1(3) the provisions of this Code are intended to structure criminal proceedings in such a way that the legally protected interests of the victim are taken into account while also respecting their dignity. Article 52a in the wording of the Act of 13 January 2023, which entered into force on 15 February 2024 (Journal of Laws 2023, item 1860).

41 Michał Lewoc, Departament Współpracy Międzynarodowej i Praw Człowieka, Ministerstwo Sprawiedliwości, *Komentarz do kwestionariusza indywidualnej oceny szczególnych potrzeb osoby pokrzywdzonej w zakresie ochrony* (Warsaw 2015).

Amended Article 52a of the Code of Criminal Procedure strengthens the procedural guarantees for the victim and witness using an individual assessment questionnaire, obliging in this way the competent authorities to assess the actual situation. The purpose of the legal regulation contained in Article 52a of the Code of Criminal Procedure is to collect data and information necessary to implement appropriate support mechanisms. However, this provision introduces an optional assessment of the victim's situation by the procedural authority, generally carried out after obtaining his or her consent. Therefore, there may be a risk of taking actions that are inappropriate to a given situation.[42]

In the reported cases of sexual offenses (rape, use of helplessness or handicap, abuse of dependence), the notification of the crime, if submitted by the victim, should be limited to indicating the most important facts and evidence. In the event of cases, related to such offences, the victim, who at the time of questioning has reached the age of 15, is questioned as a witness only if his or her testimony may be of a significant importance for judging the case, and only once, unless the important circumstances come to light, the clarification of which requires some questioning again. Also, at the request of the victim, it should be ensured that the expert psychologist participating in the interview is of the same sex as the victim, unless it will result in any obstructions of the conducting proceedings. Since sexual offences violate a person's privacy and dignity, and become a cause of secondary victimization, such a special mode of questioning victims of sexual offences introduced into the Polish Code of Criminal Procedure should be evaluated positively.[43]

As for rape crimes, according to the Attorney General's guidelines, prosecutors handling such cases should keep in mind the welfare of the victim, who should be treated with due respect, culture, professionalism and dignity, preventing the phenomenon of secondary victimization. They should also ensure that the Police apply the "Police Procedure for dealing with

[42] Monika Porwisz, "Kwestionariusz indywidualnej oceny pokrzywdzonego i świadka," *Kontrola państwowa* 69, no. 3 (2024): 80–94; Rozporządzenie Ministra Sprawiedliwosci z dnia 2 lutego 2025 r. w sprawie określenia wzoru kwestionariusza indywidualnej oceny pokrzywdzonego i świadka (Journal of Laws 2025, item 161).

[43] Lidia Mazowiecka, "Z problematyki reagowania na przemoc wobec kobiet," *Prokuratura i Prawo*, no. 12 (2015): 118–27.

a person who has experienced sexual violence."[44] In the case of victims who have experienced sexual violence, the Polish Police should already from 2015 follow a specific procedure for dealing with them. Such a procedure was developed by an expert team of the Feminoteka Foundation as part of the "Stop Rape" project, in cooperation with the Government Plenipotentiary for Equal Treatment. The Feminoteka Foundation has also developed procedures for a medical facility to deal with a person who has experienced sexual violence. At this point, we should outline that interests of victims of rape and other violent crimes, especially women and children, as it was previously argued, are taken care by NGOs supporting the victims.[45]

There is also a separate procedure for dealing with people who may be victims of human trafficking. It was already in 2016 that an order was introduced by the Police Chief Commander on the performance of the Police in certain tasks in the detection of human trafficking. For this purpose, a questionnaire was developed to help identify the crime and an instruction on rights for the alleged victim of human trafficking.[46] At this point, it is worth mentioning that the La Strada Foundation plays an important role in providing support to victims of human trafficking. Practically since 1995, this Foundation has been fighting human trafficking in all its aspects. In particular, it offers legal, psychological, medical and social assistance. This Foundation conducts training for the Police, Border Guard, Public prosecutors and judges. It also undertakes preventive activities aimed at preventing human trafficking.[47]

Despite some critical remarks, there are many positive amendments introduced into the Polish legal order which aim to respect the fundamental rights of the most vulnerable victims. This human rights-based approach

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44 Wytyczne Prokuratora Generalnego z dnia 18.12.2015 dotyczące zasad postępowania w sprawach o przestępstwo zgwałcenia, PG VIIG 021/58/15; Lidia Mazowiecka, ed., *Zgwałcenie. Definicja, reakcja, wsparcie dla ofiar* (Warsaw: Wolters Kluwer, 2016).

45 Mazowiecka, "Z problematyki reagowania na przemoc," 118–27.

46 Zarządzenie nr 14 Komendanta Głównego Policji z dnia 22 września 2016 r. w sprawie wykonywania przez Policję niektórych zadań w zakresie wykrywania handlu ludźmi (Journal of Law of Polish National Police, item 61); Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (OJ L, 2024/1712, 24 June 2024), accessed January 10, 2025, https://eur-lex.europa.eu/eli/dir/2024/1712/oj.

47 La Strada, accessed February 22, 2025, https://strada.org.pl/.

is concerning such important questions, as protective measures, the right to state compensation, respect for victims' dignity during their hearings or interrogation. Specifically, children are becoming more visible subjects in the criminal proceedings. Their rights must be fully respected and, in cases of crimes committed with any violence or criminal threats, against sexual freedom and morality, against family and guardianship, and against liberty and they should testify only in premises that meet certain standards.[48]

5. Conclusions

In recent years a trend towards strengthening crime victims' rights has been observed through a number of amendments introduced into the Polish legal order to reach a certain compatibility with EU law. Generally, we may resume that Polish regulations are to a large degree accountable with the current Union's tendency towards strengthening the victim's rights, including their "access to justice." The content of the Victim's Directive 29/2012 is largely reflected in the Polish legal order. The problem of exercising those rights, however, lies in the lack of their practical application. Therefore, we can fully argue for improvement of such a situation. This could be achieved, for example, by introducing mandatory trainings for all persons who come into contact with victims of a certain type of crime or better mechanisms for financing psychological support for victims.

Turning to the latest amendments introduced by the Polish legislator, particularly the important Article 52a of the Code of Criminal Procedure, its provisions do not provide for any negative consequences in the event of

[48] Ordinance of the Minister of Justice of 28 September 2020 on preparing examination conducted under Articles 185a–185c of the Code of Criminal Procedure (Journal of Laws, item 1691); Radosław Nienałtowski, Centrum Szkolenia Policji, *Organizacja i zasady funkcjonowania przyjaznego pokoju przesłuchań dzieci* (Legionowo: Wydział Wydawnictw i Poligrafii Centrum Szkolenia Policji, 2018); Anna Zofia Krawiec, "Warunki przeprowadzania przesłuchania w trybie art. 185a–185c k.p.k.," *Prokuratura i Prawo*, no. 7–8 (2016): 88–99; Rozporządzenie Ministra Sprawiedliwości z dnia 13 stycznia 2025 r. w sprawie określenia wzorów informacji o przebiegu, sposobie i warunkach przesłuchania dla osób przesłuchiwanych w trybie określonymw art. 185a–185c k.p.k. oraz art. 185e k.p.k. (Journal of Laws 2025, item 59); Rozporządzenie Ministra Sprawiedliwości z dnia 22 września 2024 r. w sprawie sposobu przygotowania i przeprowadzenia przesłuchań w trybie określonym w art. 185a–185c oraz art. 185e Kodeksu postępowania karnego oraz warunków, jakim powinny odpowiadać pomieszczenia przeznaczone do przeprowadzania takich przesłuchań (Journal of Laws 2024, item 1477).

carrying out activities without receiving the relevant statement of the victim. Conducting a procedural action contrary to the requirements provided for in this provision will not result in the invalidity of such an act. Its practical application then raises concerns, as the provisions should be used already at the first contact with the procedural authority, while it is difficult to determine at this stage what actions will factually take place. Further, the victim may not have sufficient understanding as far as the meanings of particular procedural actions are concerned. This may lead to some doubts as to whether the procedural authorities are prepared to apply the provisions covered in this article and they are financially secured, in this regard. The weakness of doing "justice" for victims is also revealed by the granting of state compensation to victims. The reasons for this state of affairs are seen, both in the imperfection of the adopted regulations, especially as to the procedure itself, and the insufficient awareness of the victims in this regard as well.

To conclude, despite all legal regulations adopted in Poland, and also much engagement of NGO's, it seems that there is still a necessity to work out the norms aiming at more effective participation of lawyers in criminal proceedings, for exercising the victims' rights in the legal practice. The obligatory trainings for police officers, public prosecutors and criminal judges are much recommended. This could enable a better exercising of the victims' rights, through practical application of the existing laws. Hence, still the challenge appears to be the EU strategy on victims' rights (2020–2025), and also full implementation of the Victims' Rights Directive with the proposed amendments.

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State as an Heir: Balancing Public and Private Interests in Georgia and Europe. Part I: Comparative Overview

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Abstract: The Civil Code of Georgia establishes the state's right to inherit heirless estates. According to the Georgian law, the state is referred to as the legal successor. Should we always consider the state as the legitimate successor, or is this only a necessity to maintain public order? Does the state have a legitimate public interest of heirless estate and how can this be balanced against the private interests? The following subjects will be discussed in this article from the perspectives of Georgia and European countries. The question of whether the state should assume ownership of the private property in the absence of heirs is a subject that has given rise to significant discourse on topics of justice, property rights, and the role of the state in private affairs. Numerous scholars have presented a range of arguments both in favour of and in opposition to the notion of the state becoming the recipient of property that lacks heirs. Given the legal nature of the problems, it is necessary to explicitly define the state's status as a special legal heir in Article 1343 of the Civil Code of Georgia to prevent the confusion of rights and duties from leading to excessive state intervention in inheritance matters. European countries' experience is very important for creating a new legal status of the state. Because of the problem of transferring an estate when there is no heir, balancing public and private interests is a most popular issue.

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The purpose of this paper is to examine the rights and obligations of the state as a legal heir under the different regulations and how these principles affect inheritance relations in socio-legal perspectives. It compares how this issue is addressed in other European countries' legal systems and draws conclusions about the dual role of the state based on the different practice. This article aims to explore the theoretical possibilities about the state's right on the heirless estate, offering valuable recommentations for the Constitutional Court of Georgia in justifying and making decisions on this issue.

1. Introduction

Article 1343 of the Civil Code of Georgia regulates the transfer of heirless estate to the state under inheritance law, designating the state as a "sixth-degree" legal heir. However, it remains unclear: what is the purpose of considering the state as an heir? Should it truly be regarded as a legal heir, or is this necessity to maintain public order? As a testamentary heir, the state has the same rights and duties as a person would in similar circumstances. This is because the state is named as a testamentary heir based on the will of the deceased (within the bounds of testamentary freedom). Also, the state's right to inherit is not always provided from the will but from legal presumptions of inheritance.

It is essential to define the rights and duties, which are transferred to the state during heirless estate inheritance relations. For example, in testamentary succession, the state fully acquires the rights and same duties as a person. In legal succession, the states' rights are less comprehensive because of the legal status. The matter of whether the state is a "sixth-degree" legal heir or a guarantor of public order is vital to the two independent constitutional lawsuits filed by Giorgi Khorguashvili and Giorgi Arsenidze against the Parliament of Georgia. Now, the Constitutional Court of Georgia faces the challenge of determining the right status of the state for balancing public and private interests.

In the Part I the first chapter of the paper reviews theoretical perspectives of the issue. The second chapter discusses rules for the declaration of the estate as heirless in Georgia and European Countries. The third chapter analyses the state's struggle for rights in Georgia and in the Part II

the last chapter reviews the state's dilemma with the "sixth degree" heir or defender of public order. The conclusion summarises the key provisions of the research.

2. Theoretical Perspectives

The issue of whether the state should inherit property when there are no heirs touches on important discussions.[1] Philosophers and legal theorists have offered various arguments for and against the idea of the state becoming an heir to heirless property. Philosophers such as John Locke have posited that property is a natural right, and the state should intervene solely to protect property rights, not to claim them. Conversely, contemporary theorists, including Marxist scholars, posit that the state should redistribute property in a manner that benefits society. This debate frequently centres on the balance between individual rights and collective welfare, with the question of state inheritance serving as a main point for broader discussions on justice, fairness, and the role of the state. The question of state inheritance thus becomes a point of divergence, giving rise to a range of opinions and positions. While the state's legal authority to manage estates without heirs is well-defined, the broader philosophical and moral implications of this practice remain a subject of considerable debate. The determination of whether the state should inherit property is contingent upon one's philosophical and moral perspective on property rights and the appropriate scope of state intervention in private relations.[2]

The notion of being an heir can be met with disapproval due to the status of the state. Different European countries' court practices have demonstrated numerous instances that illustrates that the state is not an ordinary heir and the true substance of inheritance rights must be possessed by individuals exclusively.[3] A significant development that has streamlined

1 Gregory S. Alexander and Peñalver M. Eduardo, *An Introduction to Property Theory* (Cambridge: Cambridge University Press, 2012), 204–8.

2 See: Douglas Maxwell, *The Human Right to Property – A Practical Approach to Article 1 of Protocol No. 1 to the ECHR* (Oxford: Bloomsbury Publishing, 2022), 200–2; Ting Xu and Jean Allain, eds., *Property and Human Rights in a Global Context* (Oxford: Hart Publishing, 2015), 64–5; Frankie Mccarthy, *Succession Law* (Dundee: Dundee University Press, 2013), 30–2.

3 Galyna Lutska et al., "The Analysis of the Implementation of Inheritance Law in Selected EU Countries," *Revista Amazonia Investiga* 11, no. 49 (2022): 151–5.

cross-border successions was the implementation of Union regulations which were designed to facilitate the legal aspects of international successions for individuals. The Regulation ensures that cross-border successions are governed by a coherent legal framework, administered by a unified authority. In principle, the courts of the Member State in which citizens had their last habitual residence will have jurisdiction to deal with the succession, and the law of this Member State will apply. However, citizens retain the prerogative to opt for the application of the law of their country of nationality in determining the legal framework governing their cross-border succession. The application of a uniform legal framework by a singular authority to a cross-border succession effectively prevents the initiation of parallel proceedings that could result in potentially conflicting judicial decisions. This approach also ensures the recognition of decisions made within a Member State across the Union without the necessity for additional procedures.[4] However, the issue persists in the event that at least two member states are heirs of the heirless estate or one of the states attempts to declare the estate as heirless.

Article 33 of the Regulation is called "Estate Without a Claimant" which states

> to the extent that, under the law applicable to the succession pursuant to this Regulation, there is no heir or legatee for any assets under a disposition of property upon death and no natural person is an heir by operation of law, the application of the law so determined shall not preclude the right of a Member State or of an entity appointed for that purpose by that Member State to appropriate under its own law the assets of the estate located on its territory, provided that the creditors are entitled to seek satisfaction of their claims out of the assets of the estate as a whole.[5]

4 Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in matters of Succession and on the Creation of a European Certificate of Succession (OJ L201, 27 July 2012), 107–34.

5 Ibid., Article 33; cf. Laura Vagni, "Article 33 – Estate without a Claimant," in *The EU Succession Regulation*, eds. Alfonso-Luis Calvo Caravaca, Angelo Davì, and Heinz-Peter Mansel (Cambridge: Cambridge University Press, 2016), 458.

Georgia is not a member of the European Union yet. Because of that this regulation does not apply to inheritance relations in Georgia.[6] On the other hand, the concept of heirless estate being transferred to the state was not unknown to ancient Georgian law. The idea of transferring heirless estate to the state was developed in state law from ancient times and influenced Georgian legal traditions. The Law of Giorgi V Brtskhinvale, the Law Book of Vakhtang VI, and other legal collections addressed the issue of transferring heirless estate to the state (or, in some cases, to the church).[7] Professor Zoidze notes that in ancient Georgian inheritance law, statutory inheritance emerged first, followed by testamentary. Accordingly, the basis of state inheritance stems from statutory inheritance.[8] Professor Metreveli, however, emphasizes the primacy of testamentary inheritance, arguing that inheritance by will is a result of individual will, while inheritance by law arises from collective will.[9] For this reason, the state's role as an heir should be considered after the will of the testator has been revealed.[10] Professor Shengelia justifies the state's status as a "sixth-degree" legal heir, explaining that the state's involvement as an heir is a common occurrence in testamentary inheritance. However, in the framework of statutory inheritance, heirless estate is transferred to the state under the rule of universal succession.[11]

The foundational norm for transferring heirless estate to the state is Article 1343 of the Civil Code of Georgia, which is supported by Articles 1444 and 1492. On the one hand, the state cannot refuse to accept the inheritance that has passed to it; on the other hand, when heirless estate is transferred to the state, the state is liable for the testator's debts with the corresponding part of the heirless estate, in the same manner as an heir. For this situation

6 See: Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, June 27, 2014.

7 Shalva Chikvashvili, *Inheritance Law* (Tbilisi: "Meridiani", 2000), 105.

8 Besarion Zoidze, *Inheritance Law of Feudal Georgia* (Batumi: 1992), 10.

9 Valerian Metreveli, *History of the State and Law of Georgia* (Tbilisi: "Meridiani", 2003), 380.

10 Sigrid Weigel, "Inheritance Law, Heritage, Heredity: European Perspectives What Should Inheritance Law Be," *Law and Literature*, no. 20 (2008): 280–2, https://doi.org/10.1525/lal.2008.20.2.279.

11 Roman Shengelia and Ekaterine Shengelia, *Family and Inheritance Law (Theory and Practice)* (Tbilisi: "Meridiani", 2019), 406–7.

the phrase – *Qui providet sibi, providet heredibus* (Person who acquires wealth for himself acquires it for his heirs) – has been changed.

Article 562 of the Civil Code of the Soviet Socialist Republic of Georgia regulated the transfer of property to the state by inheritance by law and by will. Inherited property was transferred to the state: (a) if it was transferred to the state by will; (b) if the testator left no heirs by law or by will; (c) when the testator has deprived all the legatees of the right to inherit; (d) if no heir has accepted the property. In addition to the above, the State had the right to receive: the heir's share if the heir refused to accept the property in favour of the State; part of the testator's property for which no will had been made and there were no legal heirs.[12]

Also, the original text of part one of article 1343 of the Civil Code of Georgia is interesting:

> Article 1343. Transfer of Inherited Property to the Treasury
>
> If there are no heirs by law or by will, or if none of the heirs have accepted the inheritance, or if all heirs have been deprived of the right to inherit, the inherited property shall be transferred to the Treasury. If the testator was in the care of elderly, disabled, medical, educational, or other social protection institutions, the property shall be transferred to their ownership.[13]

Part one of article 1343 of the Civil Code of Georgia after the reform of 2005:

> Article 1343. Transfer of Inherited Property to the State
>
> If there are no heirs by law or by will, or if none of the heirs have accepted the inheritance, or if all heirs have been deprived of the right to inherit, the inherited property shall be transferred to the State. If the testator was in the care of elderly, disabled, medical, educational, or other social care institutions, the property shall be transferred to their ownership.[14]

The question of whether the state should inherit property in the absence of heirs is a subject of significant debate, touching on issues of justice, property

12 Cf. Mikheil Bichia, "Some Features of the Development of Georgian Private Law from the 90s to the Present Day," *Law and World* 8, no. 24 (2022): 75–104, https://doi.org/10.36475/8.4.6.

13 Article 1343, Civil Code of Georgia, pre 2005 issue.

14 Article 1343, Civil Code of Georgia, current issue.

rights, and the role of the state in private relations.[15] There are strong arguments both in favour of and against the idea of state inheritance.

> Ownership has never been absolute. Even in the most individualistic ages of Rome and the United States, it has had a social aspect. This has usually been expressed in such incidents of ownership as the prohibition of harmful use, liability to execution for debt, to taxation, and to expropriation by the public authority.[16]

Public interest and social justice scholars argue that when no heirs are available, the property should be repurposed for the common good. These funds could be allocated to social programs, infrastructure development, or community services, ensuring that wealth is utilized for the benefit of society as a whole. Another compelling argument is the prevention of property abandonment. When property remains unclaimed, it is susceptible to abandonment, deterioration, or even exploitation. The state, acting as a neutral party, can intervene to ensure the property's maintenance and utilization for the benefit of the community. This could entail converting the property for public use or redistributing it to those in need. State involvement is crucial for safeguarding the orderly and fair progression of the inheritance process. In instances where heirs are absent, the state can prevent legal ambiguities or conflicts, thereby establishing a framework for estate management that ensures the continuity of property rights and the safeguarding of public interests.

Opponents argue that inheritance is a deeply personal issue. Property, in this view, is a right that should be passed down within families or to chosen individuals. The state's assumption of property ownership could be construed as a infringement on individual liberty and the right to exercise personal autonomy over one's possessions. Critics contend that the state

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15 Cf. Lucia Ruggeri, Ivana Kunda, and Sandra Winkler, eds., *Family Property and Succession in EU Member States National Reports on the Collected Data* (Rijeka: University of Rijeka Faculty of Law Research Collection of Reports, 2019), II; European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law relating to Access to Justice*, 124–5; also: Jean-Pierre Marguénaud, Corine Namont Dauchez, and Benjamin Dauchez, *The Legitimation of Civil Law Notaries by the Law of the European Convention on Human Rights*, 2017.

16 Cited Antony Honoré in Maxwell, *The Human Right to Property*, 47.

should exercise restraint in its intervention into private property matters, except in circumstances deemed absolutely necessary. The concept of the state assuming the role of an heir is frequently perceived as an infringement on individual autonomy, representing an overreach of governmental authority. Because of that

> there is still an assumption that the right to property should guarantee a degree of stability and predictability in respect of a citizen's relationships with others and especially with their Government in matters relating to the control of resources, even where that stability means that an unjust distribution of wealth cannot be altered by judicial action. Indeed, the right to property required any attempt to redress an unjust distribution to be justified.[17]

This potential expansion of state power could be construed as a diminution of personal autonomy, resulting in an increased degree of state oversight over private matters. The state, as a bureaucratic entity, is often perceived to lack the emotional or personal connection to property that an individual or family member would possess. Critics contend that the essence of inheritance lies in the transfer of personal legacies to individuals with a tangible connection to the deceased, not to an impersonal institution. The state's involvement in inheritance could, therefore, be construed as diminishing the true essence of passing on property, which is traditionally a means to preserve family ties and personal legacies.

3. Declaration of Estate as Heirless in Georgia and European Countries (Comparative Analysis)

3.1. Georgia

Inherited property passes to the state if there are no heirs by law or by will, if none of the heirs have received the inheritance, or if all heirs have been deprived of the right to inherit. If the testator was in the care of elderly, disabled, medical, educational, or other social protection institutions, the property is transferred to their ownership.[18]

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17 Cited Tom Allen in Maxwell, *The Human Right to Property*, 48.

18 See: Roman Shengelia, Zurab Akhvlediani, and Lado Chanturia, *Commentary on the Civil Code of Georgia, Book V (Family and Inheritance Law)* (Tbilisi: "Samartali", 2000), 399–400.

The estate of inherited property includes both rights of the testator (inherited assets such as real estate, movable and immovable property, rights of claim) and the obligations (inherited liabilities) that the testator had at the time of death. This also includes the share of common property that belonged to the testator, and, if the division of property is impossible, then the value of this property. This constitutes an estate that would normally be received by an inheriting individual.[19] Due to one of the conditions stipulated in Article 1343 of the Civil Code, the state appears as heir.

It is important to distinguish between the state's acceptance of property by inheritance and the acquisition of ownership over the property. The state can inherit property that has a deceased registered owner (right of inheritance) and, on the other hand, the state can acquire ownership of property that has no registered owner or when the owner cannot be found (right of ownership). According to the Law of Georgia "On State Property," property that becomes state property is considered ownerless and heirless estate that has passed into the ownership of the state.[20] This again confirms that the state can apply to the court or notary with a request to transfer ownership of heirless estate and recognize it as ownerless.[21]

Initially, the state's right to inherit property is considered in court, while inheritance is formally recognized at the notary office, as the inheritance certificate is issued by a notary, not a judge. If we differentiate state's inheritance, we find that the state as an heir is one of the foundations for the state as a private owner.[22]

> The function of the right of inheritance is to ensure that with the death of the owner, private property – considered the basis for an individual's independent livelihood – is not lost, but rather preserved through legal succession. Without the right of inheritance, private property would automatically

19 Mariusz Załucki, "Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future," *Iowa Law Review* 103, no. 5 (2018): 2337–8, https://ssrn.com/abstract=3232732.

20 Law of Georgia "On State Property", July 21, 2010, Article 2, para. "g".

21 See: the Civil Procedure Code of Georgia, November 14, 1997, Article 310, para. "e". Also, Lado Chanturia, *Commentary on the Civil Code, Book I (General Provisions of the Civil Code)* (Tbilisi: "Meridiani", 2017), 55.

22 Frances H. Foster, "The Family Paradigm of Inheritance Law," *North Carolina Law Review* 80, no. 1 (2001–2002): 203–4.

pass into the hands of the state, which would weaken the institution of private property.[23]

Therefore, it is essential to have a clear and understandable rule for considering property as heirless. The matter of who is authorized to declare estate as heirless – a notary or a judge – nowadays depends on the specific legal case. In instances where the Law of Georgia "On Relations Arising from the Occupancy of Dwellings" does not apply to resolve the issue, the notary holds this authority. However, during the consideration of inheritance cases in court, the fact that property is heirless may be revealed. For instance, the absence of heirs or the intentional or negligent refusal of heirs to accept the estate could be established.[24]

In comparison, certain member states of the Council of the Notariats of the European Union have conferred upon notaries the authority to discuss heirless inheritance proceedings. To alleviate the workload on civil courts, a notary is empowered to adjudicate and issue a certificate of inheritance in inheritance law cases where the case is indisputably non-contentious. In numerous instances, a notary is entrusted with the authority to declare property heirless. In Italy and Malta, notaries are authorized to confirm the receipt of an inheritance in an uncontested manner and issue a certificate of inheritance, provided that they verify that no other heirs have submitted claims to receive the inheritance. In Austria, in the absence of an inheritance dispute, the notary initiates and independently conducts the proceedings for the transfer of the inheritance (to confirm the receipt of the inheritance). However, in the event of a dispute, the notary transfers the case to the court. The regional or district court with jurisdiction over the last place of residence of the deceased is designated to adjudicate contested inheritance proceedings. Contrary to the Austrian model, in the Czech Republic, the regional court appoints a notary to preside over uncontested proceedings.[25]

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[23] Decision of the Constitutional Court of Georgia of 26 June 2012, №3/1/512 in the case "Danish citizen Heike Kronqvist v. Parliament of Georgia".

[24] See: Decision of the Supreme Court of Georgia in case №as-376–2024, June 14, 2024; Decision of the Supreme Court of Georgia in case №as-1017–2023, October 13, 2023; Decision of the Supreme Court of Georgia in case №as-880–2022, October 21, 2022; Decision of the Supreme Court of Georgia in case №as-871–2019, December 21, 2020.

[25] Cf. Eamonn G. Hall, "The Common Law and Civil Law Notary in the European Union: a Shared Heritage and an Influential Future?" (Dublin: Institute of Notarial Studies, Institute

A congruent approach is adopted in Croatia. The municipal court has the authority to confirm the receipt of the inheritance by considering the applicant's request. In the event that the court determines that the request is valid, it may transfer the case to the regional notary. The notary, in turn, is obligated to consider the case with the same rights and duties as a judge. In the event of a dispute between the parties, the judge or notary is obliged to terminate the examination of the matter in the uncontested procedure. Furthermore, the judge or notary is required to advise the parties on the procedural actions. Notaries, in the context of inheritance proceedings conducted under the uncontested procedure, are empowered to distinguish between legitimate and illegitimate claims submitted for the purpose of inheritance. In Romania, the scope of responsibility for notaries extends beyond the administration of inheritance proceedings and the issuance of inheritances. They are also entrusted with the authority to adjudicate disputes pertaining to the disbursement of monetary obligations from the inheritance, in instances where such disputes arise among the parties involved.[26]

It should be assessed whether the state, as the heir of the person, has the right to property and inheritance. According to the Constitutional Court of Georgia, the constitutional norm regulating the right to property strengthens the universal right to acquire, alienate, and inherit property. This norm on the one hand, establishes a constitutional legal guarantee of the institution of private property and, on the other hand, strengthens the fundamental right. Its function is to maintain free space for an individual in the property-legal sphere, thereby providing an opportunity for personal development and the manifestation of life responsibility.[27]

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of Notarial Studies, 2015), 10–2; Emil Kowalik, "General Characteristics of Service of Procedural Documents in Polish Civil Proceedings Compared to Selected European Countries," *Review of European and Comparative Law* 59, no. 4 (2024): 93, https://doi.org/10.31743/recl.17167.

26 Notaries of Europe, *European Commission for the Efficiency of Justice, Working Group on the Evaluation of Judicial Systems – Specific Study of the CEPEJ on the Legal Professions: Notaries* (Notariats of the European Union, 2018), 11; Cornelius H. Van Rhee, "Case Management in Europe: A Modern Approach to Civil Litigation," *International Journal of Procedural Law* 8, no. 1 (2018): 27.

27 Decision of the Constitutional Court of Georgia of 29 December 2020, №2/3/1337, "Khatuna Tsotsoria v. the Parliament of Georgia," II–1.

The right to property is the cornerstone of the development of a modern democratic society, upon which economic freedom and stable civil turnover are built.[28]

> The right to property is not only the elementary basis of a person's existence, but also ensures his freedom, the adequate realization of his abilities and possibilities, and the conduct of life with his own responsibility. All of this naturally determines the individual's private initiatives in the economic sphere, contributing to the development of economic relations, free entrepreneurship, a market economy, and normal, stable civil turnover.[29]

For a person to practically use the right to property, it is not enough to grant them an abstract guarantee of property ownership. They must also benefit from a civil, private law order that enables the unhindered use of their right to property, and, consequently, the development of civil turnover. "The constitutional-legal guarantee of property includes the obligation to create a legislative framework that ensures the practical realization of the right to property and makes it possible to accumulate property through acquisition."[30]

It is essential to maintain a fair balance between fundamental rights and conflicting public interests. The need to maintain this balance also encompasses the issue of establishing constitutional order and protecting rights.[31] Granting unjustified advantages for a public purpose does not align with the constitutional and legal order concerning property.

The norm regulating property in the Constitution of Georgia clearly states that the acquisition, disposal, and inheritance of property are rights guaranteed by the Constitution.[32] Accordingly, whether the state, as the heir of a natural person, has the right to property and inheritance should be

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28 Lado Chanturia, *Ownership of Real Estate* (Tbilisi: "Samartali", 2001), 115–6.

29 Decision of the Constitutional Court of Georgia №1/2/384 of 2 July 2007 in the case "Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili against the Parliament of Georgia," II–5.

30 Decision of the Constitutional Court of Georgia №3/1/512 of 26 June 2012 in the case "Citizen of Denmark Heike Kronqvist against the Parliament of Georgia," II–33.

31 Besik Loladze, Zurab Macharadze, and Ana Pirtskhalashvili, *Constitutional Justice* (Tbilisi: "Forma", 2021), 3–4.

32 Decision of the Constitutional Court of Georgia of 26 June 2012 №3/1/512 in the case "Danish citizen Heike Kronqvist against the Parliament of Georgia," II–36.

assessed within the context of the possibility and admissibility of the state's claim to inheritance rights.

3.2. Austria

Section 749 of the Civil Code of Austria states that in the absence of heirs, the estate is distributed to the legatees, with the value of the assets being the determining factor. In the event that neither heirs nor legatees exist, the law stipulates that the state shall acquire the property and the State reserves the right to appropriate the estate, and it is not liable for the decedent's debts beyond the value of the assets received. The local authorities handle the estate, and in the absence of any rightful heirs, the state may inherit and manage the property. If the property has special value, it could be repurposed for public use.[33]

3.3. Czech Republic

In the absence of an heir, due to the Civil Code of the Czech Republic the inheritance shall devolve to the state, which is considered the statutory heir. The state is not entitled to refuse the inheritance or the right. In regard to other persons, particularly in the context of deceased debts, the state holds a status analogous to that of an heir who has made a reservation as to estate inventory. Section 1634 of the Civil Code of Czech Republic states that the state is liable for debts only up to the value of the estate of inheritance.[34]

3.4. Estonia

In accordance with the principles of universal succession, it is not permissible under Estonian law for a deceased individual to be considered as having no heir. The opening of a succession occurs upon the death of the bequeather, and the place of opening of a succession is defined as the last residence of the bequeather. In the absence of a testamentary disposition by the deceased individual, and when the rules of heirless estate succession are applicable,

[33] Gregor Christandl and Kristin Nemeth, "Austrian Succession Law Rewritten: A Comparative Analysis," *European Review of Private Law* 28, no. 1 (2020): 149–72. https://doi.org/10.54648/erpl2020007; Ruggeri, Kunda, and Winkler, *Family Property and Succession*, 1.

[34] Radim Boháč, "Inheritance Tax, Gift Tax and Real Estate Transfer Tax in the Czech Republic," *Societal Studies* 2, no. 6 (2010): 94–7; Ruggeri, Kunda, and Winkler, *Family Property and Succession*, 122.

yet no relatives or surviving spouse are found to inherit, or if all parties renounce their right to succession, the state or local government, depending on the location of the opening of the succession, becomes the heir. In the event that no successors are identified, the local government of the place of opening of a succession becomes the heirless estate successor. The government is not permitted to renounce the succession. Regardless of whether the requirements for acceptance of the succession have been met, the heirless estate successor is regarded as having accepted the succession.[35]

In the context of Estonian law, the state may be considered a legal heir in certain exceptional circumstances but the process of "stating as heir" pertains to the formal declaration and substantiation of one's right to inherit. This process frequently necessitates the utilization of notary services, and in instances of dispute, the matter may be adjudicated in a court of law. It is imperative for individuals dealing with inheritance matters to have comprehensive documentation and seek the counsel of legal professionals to ensure that their rights are duly recognized.

3.5. Germany

Section 1936 of the Civil Code of Germany is titled "The State's Right to Inheritance by Law." If, at the time of opening the estate, no relatives, spouse, or partner of the testator are alive, the estate is inherited by the federal entity in which the testator had their last place of residence.[36] If this cannot be determined, the estate is inherited by the federal entity based on the testator's place of residence, or if that is also undetermined, the estate is inherited by the federation.[37] In the case of testamentary inheritance, the testator must explicitly name the state or a federal entity as the heir in the will. Paragraph 1937 of the Civil Code of Germany specifies that the subjects of testamentary inheritance are not listed, though the testator can deprive a relative, spouse,

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35 Urve Liin, "Succession Law Procedure Coverage in Estonian Public Electronic Databases: *Ametlikud Teadaanded* and the Succession Register," *Juridica International*, no. 21 (2014): 200–5. https://doi.org/10.12697/JI.2014.21.18; Ruggeri, Kunda, and Winkler, *Family Property and Succession*, 175.

36 German Civil Code, accessed June 14, 2024, https://www.gesetze-im-internet.de/bgb/__1936.html.

37 The comparison method of the norms is often used by the Supreme Court of Georgia. See the decision of the Supreme Court of Georgia of 23 March 2010, №as-1058–1325–09.

or partner of their inheritance rights by law. However, the state is not included in this list, meaning the testator cannot state in the will that the state or a federal entity is deprived of the right of legal inheritance.[38] The court considering inheritance cases is responsible for determining the legal heir. If no heir can be determined, the court must publish a corresponding notice on inheritance rights, which is regulated by the special law "On Proceedings in Family Matters and Voluntary Justice Issues." Potential heirs may apply to the court within the established period. If no claims are made, the court will rule that the only heir to the property is the state.[39] States liability is always limited to the size of the estate.

3.6. Hungary

The State is an heir of necessity, which signifies that it is not entitled to relinquish an inheritance. The State possesses the same legal status as individuals. In the context of Hungarian law, the inheritance of the State is an acquisition subject to civil law rather than public law. Upon a person's death, his estate shall pass as a whole to his heir[40] and ultimate intestate succession by the State means that in the absence of any heirs, the estate heir shall be the State.[41] The process of inheritance is ordinarily formalized by the court system, subsequent to a period of attempts to locate potential heirs or resolve any disputes that may have arisen.

3.7. Poland

Article 935 of the Civil Code of Poland stipulates that in the absence of a spouse, relatives by consanguinity, or children of the deceased's spouse who are entitled to inherit under the law, the estate shall devolve to the municipality of the deceased's last place of residence as the designated statutory heir. In instances where the deceased's last place of residence within the jurisdiction of the Republic of Poland remains undetermined, or if

38 Shelly Kreiczer-Levy, "Inheritance Legal Systems and the Intergenerational Bond, Real Property," *Probate and Trust Law Journal* 46, no. 3 (2012): 26–7.

39 Ruggeri, Kunda, and Winkler, *Family Property and Succession*, 258.

40 Section 7:1. Act V of 2013 Civil Code of Hungary (in force on July 1, 2021).

41 Ibid., Section 7:74.

the deceased's last place of residence is located outside the country, the estate shall devolve to the State Treasury as the designated statutory heir.[42]

3.8. Slovenia

It's interesting that in the absence of heirs to the estate, it becomes the property of the Republic of Slovenia. However, if the estate becomes subject to bankruptcy proceedings, it may be converted into a bankruptcy estate. Prior to a court decision declaring the estate the property of the Republic of Slovenia, the court is required to publish a notice to unknown creditors of the estate and inform the Republic of Slovenia and known creditors of the estate that the estate is without an heir. In the absence of creditor requests for the initiation of bankruptcy proceedings within six months, the estate becomes the property of the Republic of Slovenia, which is then not liable for the debts of the deceased. In the event that a bankruptcy procedure is requested and initiated by a court, the estate does not undergo transfer to the Republic of Slovenia; rather, it becomes the bankruptcy estate.[43]

3.9. Sweden

In the absence of heirs, the estate is to be allocated to the Inheritance Fund. The Swedish Inheritance Fund is a Swedish state fund that was established in 1928. In the absence of a written will and no living spouse or close family, the property of a deceased individual is transferred to the fund. The fund receives financial contributions through gifts and wills. The primary objective of the fund is to provide financial support to non-profit organisations and other voluntary associations. The administration of the fund is undertaken by the Swedish Legal, Financial and Administrative Services Agency.[44]

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42 See: Jerzy Rajski, "European Initiatives and Reform of Civil Law in Poland," *Juridica International*, no. 14 (2008): 151–5.

43 Franci Avsec, "Legal Framework of Agricultural Land/Holding Succession and Acquisition in Slovenia," *Journal of Agricultural and Environmental Law* 16, no. 30 (2021): 37–8, https://doi.org/10.21029/JAEL.2021.30.24; Ruggeri, Kunda, and Winkler, *Family Property and Succession*, 585.

44 Mikael Elinder et al., "Estates, Bequests and Inheritances in Sweden – A Look into the Belinda Databases," Uppsala Center for Fiscal Studies, Department of Economics, Working Paper 2014:14, 7–10, accessed March 4, 2025, https://www.diva-portal.org/smash/get/diva2:766280/FULLTEXT01.pdf.

4. The State's Struggle for Rights in Georgia

In the cases established by the Civil Code of Georgia, the property of the deceased shall be transferred to the authorized entities:

(a) to elderly, disabled, medical, educational, and other social protection institutions, if the testator was supported by them;
(b) to the state, if there are no grounds for transferring the property to the entities specified in subparagraph "a".[45]

It is important to note that, in general,

> the guarantee of the right to inheritance strengthens the specific possibility of acquiring property by individuals. The right of the testator to dispose of his property by will and the right of the heir to acquire property through legal or testamentary inheritance are integral parts of the fundamental right.

However, the state, as a legal or testamentary heir, appears in this framework as the "strong party."[46] Therefore, the inheritance status of the state should be more clearly defined so that the rights and obligations acquired by it do not restrict the property rights of citizens. Decisions made on cases involving heirless estate should be legal and substantiated.

In order to receive heirless estate, the authorized entity – in this case, the state – must apply to a notary with an application.[47] The application may be submitted as a public or private act. The application can be submitted both before and after the expiration of six months from the opening of the inheritance.[48]

A certificate for the transfer of heirless estate to an authorized entity may only be issued after the expiration of six months from the opening of the inheritance. After six months, if no application for the inheritance

[45] See: Order №71 of the Minister of Justice of Georgia on Approval of the Instruction "On the Procedure for Performing Notarial Acts", March 31, 2010, Article 93; Law of Georgia "On Notarial Services", December 4, 2009, Article 38.

[46] Constitutional Court of Georgia, Decision №3/1/512 of 26 June 2012 in the case "Danish citizen Heike Kronqvist against the Parliament of Georgia".

[47] Diana Berekashvili, "Mandatory Share in Inheritance Law" (PhD diss., Ivane Javakhishvili Tbilisi State University, 2020), 185.

[48] Order №71 of the Minister of Justice of Georgia on Approval of the Instruction "On the Procedure for Performing Notarial Acts", March 31, 2010, Article 15.

has been filed with the notary bureau and the authorized entity requests the transfer of heirless estate into ownership, the notary is obliged to publish a public announcement about the request. The application must detail the circumstances of the case and provide the address of the notary office.

The application must be published in the press distributed throughout Georgia three times, with an interval of at least seven days between each publication. The costs of publishing the application are borne by the authorized entity requesting the transfer of ownership of the heirless estate. If the property is transferred to the authorized entity, other documents may be required depending on the specifics of the case (such as documents related to legal entities or to the heirless estate itself).[49]

Under the Law of Georgia "On Relations Arising from the Occupancy of Dwellings," if the issue was considered by the court, the judge had to correctly determine what was meant by heirless estate, how it should be transferred to the state, and which legal facts determined whether the property was heirless.[50] Despite the notarial procedure, the court could still determine the status of the heirless estate based on the Law of Georgia "On Relations Arising from the Occupancy of Dwellings."[51]

So, what is the state's "struggle for inheritance rights?" In one case considered by the Supreme Court of Georgia, it was established that a deceased person had children, one of whom took possession of the inheritance, and a certificate of inheritance was issued to him by a notary. The court ruled that, since the first-degree heir received the inheritance, there was no longer a basis for recognizing the property as heirless and transferring it to the state under Article 1343 of the Civil Code.

In a related example, the Supreme Court ruled that it was incorrect to involve the Ministry of Economic Development of Georgia as the legal successor of an individual by lower instances, noting that Article 1343 of the Civil Code applies only if there is heirless property that has a deceased registered owner. If a person had no property at the time of death,

49 See: Shengelia and Shengelia, *Family and Inheritance Law*, 430–1.

50 Khatuna Jokhadze, "The Contradictory Nature of State Property Denationalization in Georgia" (PhD diss., Ivane Javakhishvili Tbilisi State University, 2008), 199–200.

51 Practical Recommendations of the Supreme Court of Georgia on Civil Procedural Law Issues for Judges of Common Courts, Tbilisi, 2010, 79–80. Also, see: Leila Kokhreidze, "Persons Participating in Inheritance Disputes," *Justice and Law* 3, no. 42 (2014): 31–2.

the state cannot be considered his heir. It was established that, at the time of death, the citizen did not own the disputed property because the property had been transferred before his death, and, based on the circumstances of the case, the state was deprived of the opportunity to dispute the legality of the alienation.[52]

National Agency of State Property of Georgia applied to a notary and requested the issuance of a certificate of inheritance for the deceased's heirless property. However, the notary refused to issue the certificate because the testator's guardian had submitted a domestic will in relation to the property. As a result of the disputed relationship, the certificate of inheritance for the heirless property would not be issued until the court had ruled on the validity of the will. The court examination confirmed that the handwritten text and signature were executed by the testator, thereby validating the testator's will. According to the Supreme Court, the main principle in drawing up a domestic will is the free expression of the testator's will and the confirmation of that will with the testator's own signature, which established the validity of the will in this case without any doubt. The appearance of a natural person as a testamentary heir outweighed the interest of the state.

In a related other example, based on the Law of Georgia "On Relations Arising from the Use of Residential Tenancies," the Civil Cases Chamber of the Tbilisi Court of Appeal issued a legally effective decision declaring a citizen's property to be heirless and transferring it to the beneficiary. The citizen's grandson requested the invalidation of this decision, as he was the owner of the property and had not participated in the initial consideration of the case. The case revealed that the applicant's father had received the inherited property into actual possession, and the applicant himself had obtained his father's property by applying to a notary, thus confirming his real interest in the dispute. Since the court's decision involved property to which the applicant had a legal claim, it was necessary to invalidate the decision in order to protect the applicant's property and inheritance rights

[52] Cf. Gary E. Spitko, "Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience," *Iowa Law Review* 103, no. 5 (2018): 2183–7.

and resume the proceedings.[53] Therefore, the legal interest of the heir, as expressed by the individual, outweighed the state's interest.

The state's struggle for rights may reach an immeasurable scale, potentially limiting not only individual rights but also the rights of all owners and heirs within the state. This could generalize a problem taken in isolation to the detriment of individuals by regulating it at the legislative level. It is obvious that

> [T]he ownership of property is a right to which duties and obligations are inseparably attached. Those who have property are bound, according to their means to assist those who have not; property may not be used oppressively nor may it be monopolised by those who own it.[54]

It is essential that the state should have the limitations which will be attached to this right.

For example, in one case considered by the Supreme Court of Georgia, the court of first instance determined that a collective farm household was represented and, after its abolition, the household property belonged to the plaintiff and the defendant by right of co-ownership (the plaintiffs' and defendants' fathers were brothers, and both were registered in the same household). In this case, the household was defined by the agricultural land plot and the previously existing building on it. However, the court limited its consideration to the legal circumstances presented in the case, without examining the legal status of the parties involved in the household property. The first instance court's position was based solely on the scope of the plaintiff's claim, excluding the expected legal result.[55]

The Appellate Chamber overturned the first instance's legal reasoning regarding the existence of the household and determined that it was not a collective farm household, but a household of workers and servants,

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53 Cf. Slađana A. Kramar and Katarina Vučko, "A Guide to the Implementation of the Succession Regulation (EU) No. 650/2012," Croatian Law Centre Electronic Edition, 2020, 6–9.

54 Cited Tom Allen in Maxwell, *The Human Right to Property*, 69.

55 Cf. Anatol Dutta et al., "Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in matters of Succession and the creation of a European Certificate of Succession," *Rabel Journal of Comparative and International Private Law (RabelsZ)* 74, no. 3 (2010): 525–9.

with the property co-owned by the plaintiff and the defendant. However, because the building that had once belonged to the household no longer existed on the land plot, and the ownership right had not been registered in the public registry by the household members, the Appellate Chamber ruled that the agricultural land was the property of the state, based on Article 19(4) of the Constitution. The court rejected the parties' legal claim regarding the household and determined that, according to Article 1513 of the Civil Code, the plaintiff could not become the owner of the household property.[56]

The reasoning of the Appellate Chamber directly infringed upon the rights of the household's owners. This contradicted the legislator's intent to regulate the issue while protecting citizens' legal status, as well as balancing the state's/public interest with private rights. According to this reasoning, a misconception arises that unregistered agricultural household land plots, including those in occupied territories where buildings and structures have been destroyed, would automatically become state property, even if citizens are unable to physically dispose of them.

The Supreme Court of Georgia disagreed with the reasoning of the Appellate Chamber regarding the exclusion of the legal form of the household and the legal status of household members and non-members. The Supreme Court of Georgia clarified the following points: (a) the necessity of correctly defining what constitutes a household and applying the relevant legal norms; (b) the inseparability of household property from the legal status of household members; (c) the need to adapt the applicable norms to the specific circumstances of the case, ensuring the protection of household owners' legal status.

This decision highlights the challenges that household owners may encounter and provides a clear legal interpretation, emphasizing that Article 1513 of the Civil Code of Georgia should not be interpreted in the manner presented by the Appellate Chamber.

[56] Cf. Andrei D. Popescu, *Guide on International Private Law in Successions Matters* (Onești: "Magic Print", 2014), 47–9.

5. Summary of the Part I

Aim of this passage was to explore the role of the state as a legal heir in Georgia, raising the question of whether the state should be viewed as a legal heir or if its inheritance is more about maintaining public order. A review of examples across European Countries reveals numerous instances that illustrate the state is not an ordinary heir. When the state is named as a testamentary heir, it holds the same rights and responsibilities as any other heir, a designation that comes from the will of the deceased, respecting their testamentary freedom. However, it is important to note that the state's inheritance may not always be explicitly stated in the will; instead, it could stem from legal presumptions of inheritance as "Sixth Degree" Heir. The issue of the dilemma of the state as legal successor will be discussed in Part II.

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