Hominum causa omne ius constitutum

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Contents

One Hundred Issues of Slovenia's Human Rights Journal: The birth of constitutional democracy and the follow-up start of the academic debate on human rights

Peter Jambrek

Anticipating the publication of the first issue of Dignitas, the new Slovenian Human Rights Journal, the editor[1] and the publisher[2] mailed at in January 1999 to the members of the Editorial Board the following message:

"We proudly announce that the first issue of Dignitas - the Slovenian Human Rights Journal is in print now and will be published at the beginning of March this year[3] at the latest. As you may remember, nearly three years have passed since the inception of the project in May 1995[4]. The delay may be attributed to mainly two factors, lack of seed capital to start the project, and the heavy workload of those editors, who were at that time still judges of the Slovenian Constitutional Court, including the editor of the publication[5]. Things have since changed for the better, at least for the Journal. The publishing house *Nova revija* provided means to start the Journal, and support from the Slovenian Ministry of Science appears probable and stable enough to risk the new venture.

You were kind enough to accept membership in the Advisory Board of the Journal at the time of its initiation. We feel obliged, given the time that has passed since, to ask you again to continue Your commitment. We sincerely hope that you will honor us by

[1] Peter Jambrek, former President of the Constitutional Court, serving at the time also as justice of the European Court of Human Rights at Strasbourg.
[2] Niko Grafenauer, head of the Slovenian Publishing House Nova revija, in Slovenia well known as the dissident intelectuals' journal which triggered Slovenian independence and democracy movement in the late eighties.
[3] That is, in the year 1999.
[4] In May 1995 the Constitutional Court of Slovenia agreed to start publishing the new journal devoted to the law of human rights. At that time its focus was translating and publishing key decisions of the European Court of Human Rights and selected international Constitutional Courts' judgements.
[5] The term of his office at the European Court of Human Rights and at the Constitutional Court of Slovenia ended in 1998.

reaffirming your membership. Almost everything remains same - the editorial philosophy and design, the Slovenian and the international members of the new Editorial Advisory Board, and the *Nova revija* publishing house.

There are two changes, however, which should be noted: First, the Slovenian Constitutional Court, under whose auspices the project was initiated, agreed to transfer its responsibilities to an independent non-for-profit-institution, i.e. Slovenian Human Rights Institute, which will offer editorial services to the new journal. Secondly, organization of the editorial services was simplified ...

...We thus hope that all members of the former »editorial board« and of the former »advisory board« will now agree to continue serving in advisory capacity to the new Slovenian Human Rights Journal. Upon the condition that all members of the two former bodies will agree to continue serving, the new Editorial Advisory Board will be composed of the following members:

Paul Mahoney, Vincent Berger, Rolv Ryssdal, Jadranko Crnić, Ludwig Adamovitsch, Laszlo Solyom, Sergio Bartole, Franz Matscher, Antonio La Pergola, Helmut Steinberger, Jochen Abr. Frowein, Louis Favoreu, Livio Paladin (the international members of the Board), and (from Slovenia) Marijan Pavčnik, Drago Demšar, Stanko Ojnik, Dušan Ogrizek, Miroslava Geč Korošec, France Bučar, Peter Jambrek, Mitja Deisinger, Albin Igličar, Arne Mavčič, Anton Perenič, Lovro Šturm, Lojze Ude and Boštjan M. Zupančič_ (the Slovenian members the Board)...

...It appeared obvious that we dedicated the first issue to the memory of the late president of the European Court to whom we all owe so much, to Mr. Rolv Ryssdal."

New Journal's application for funding addressed to the responsible Council of Europe body and the Slovenian Ministry of Justice gave the following explaation of its mission:

"The main purpose of the new law journal is to inform the Slovenian professional readership of the case law and of the scholarly commentaries of the key judgements of the European Court of Human Rights. Its intent is to follow the development of the European case law at a close look, i.e., as soon as possible after the publication of the new judgement. A judgement will be translated and published either in its unabridged form, only partly, or as a summary, depending on the judgement's importance. In this

respect the editorial concept of the journal is similar to the concept of the journals published by *N.P.Engel Verlag (Europaeische Grundrechte, Human Rights Law Journal, Droits de l' Homme*), or the Austrian Institute for Human Rights Newsletter..."

Responsibility for publishing of the Journal switched again from the Human Rights Institute to the academia, i.e., to the two private law faculties[6] which in 2008 joined in founding the present day New University. Twenty regular issues of the journal were published over the ten years period from 1999 till 2008/2009, added by a number of thematic issues.

Contents of the journal also expanded from its modest initial aim of publishing key translated European constitutional case law into a journal aiming in addition at scientific explanation of human rights issues: Its editorial policies aim to publish original scientific articles and short case notes on constitutional and international human rights law. It occasionally also publishes concise translations of critical judgments of the European Court of Human Rights of the Council of Europe, especially those regarding the claims of Slovene complainants, legal commentaries on decisions of the European Court of Justice, key documents, studies, opinions, and conclusions of the European Commission for Democracy through Law (Venice Commission), and general information about important events in the area of human rights protection in Slovenia and internationally.

Peter Jambrek left editorial office transfer editorial responsibility to dr. Jernej Letnar Černič, another professor at the New University. Under his guidance peer review process was encouraged, publication frequency was increased, while publication malpractice and plagiarism were prevented and discouraged by statement on publication ethics and its implementation in practice.

After the fact-finding introduction to the 100th issue of Dignitas, the main and only Slovenian Human Rights journal, it seems crucial to point to the Journal's role in Slovenia's threefold transition from the three main twentieth century European totalitarian[7]

[6] They are the Faculty of Government and European Affairs at Brdo pri Kranju (Slovenia) in collaboration with the European Faculty of Law at Nova Gorica (Slovenia). The journal was and still is published under the auspices of the Slovenian section of the International Commission of Jurists and the Slovenian Comparative Constitutional Law Association.

[7] That is, the political, economic, social and ideological suppression of human rights and fundamental freedoms.

regimes: from its suffering under fascism, national socialism and communism[8].

The lagging law teaching in view of the democratic transition

Constitutional and other parts of public law in the communist nations of central and eastern Europe was, until its rebirth[9] in the early 1990s, idiosyncratic, to say the least. It represented a strange mix of totalitarian ideology and the well known *formulae* of European constitutionalism. Slovenia, as one of the six constituent units of the Socialist Federative Republic of Yugoslavia, was a part of this strange legal development, until it began to fall apart in June 1991.[10]

In addition to the federal Constitution, each of the six constituent republics also had its own basic act, a replica of the central one. The ensuing normative order may best be described as a set of intertwined constitutional dictatorships. The system was difficult to understand by a normal legal mind, untrained and inexperienced in the specific legal hypocrisies and inconsistencies developed by the communist pseudo- legal doctrines.

In its 221-page text divided into five parts, the Constitution of the Socialist Republic of Slovenia of 1974[11] also contained a 17-page chapter entitled "Freedoms, Rights, and Duties of Men and Citizens." This chapter was one of the eight chapters in the part on "Social Structure" and consisted of Articles 195-251. These articles regulated less known rights, such as the "inalienable right of each worker to self-management" the "right and duty to participate in social self-defense,"[12] or the "right and duty to maintain and develop physical and mental capacities by means of bodily activities," many constitutional duties, and an impressive number

[8] Major parts of Slovenia were suffering under fascism of Mussolini's Italy after the First World War, under national socialism during the Second World War, and under communism the whole period of the Cold War following the end of the Second World War, that is from 1945 till April 1990 plural parlamentary elections in Slovenia.
[9] For details, see: Council of Europe, The Rebirth of Democracy: 12 Constitutions of Central and Eastern Europe, Strasbourg: Council of Europe Press, 1995.
[10] See also: Peter Jambrek, "Constitutional Law Teaching in Slovenia," in Jean-Francois Plaus (ed.), L'Enseignement du droit constitutionnel, Brussels: Bruylant (with Institut des Hautes Etudes Europeenes), 2000, 86-94.
[11] Promulgated on 28 February 1974 and superceded by the Constitution of the Republic of Slovenia of 23 December 1991.
[12] I.e., inter alia, to spy on others and to collaborate with the Secret Service.

of social and economic rights of "working people," and nearly all basic rights and fundamental freedoms recognized by the European Convention and by other well known international instruments.

The wording of most of these classic rights did not include any restrictions or limitations such as those enshrined in the second paragraphs of Articles 8-11 of the European Convention, and of Article 2 of Protocol No. 4 of the same Convention. However, articles on specific "freedoms, rights, and duties" were preceded by general provisions which stated that they could only be implemented "in the mutual solidarity of the people and by the realization of the duties and responsibilities of everyone towards all and of all towards everyone," and that they may *only* [sic] be restricted by the "equal freedoms and rights of others," and by "the interests of the socialist community determined by the Constitution."

The crucial "interests of the socialist community" were regulated in the 24-page "Introductory Part" on "Fundamental Principles." These included, *inter alia,* the "founding power of the working class," "social ownership of the means of production," "socialist self-managerial democracy as a specific manifestation of the dictatorship of the proletariat," "the revolutionary abolishment of class exploitation," etc. Human rights and freedoms were also defined as an "inalienable part and manifestation of socialist self-management democratic relationships."

Chapter X of the Introductory Part of the Fundamental Principles, however, described the role of the League of Communists and of the Socialist Alliance of the Working People in, *inter alia,* the following terms: "The League of Communists, the initiator and organizer of the National Liberation Struggle and of the Socialist Revolution, and the conscious bearer of the endeavors and interests of the working class, became by the law of historic development the organized leading ideological and political force of the working class and of all working people in the construction of socialism [...] it is the main initiator and bearer of political activity for the protection and further devel- opment of the socialist revolution and socialist self-management social relationships, and especially for the fostering of the socialist social and democratic consciousness, and is responsible therefore."

The above quotations may appear a bit tedious and out of time. It may, however, be remembered that in Slovenia less than

thirty-five years ago these same Fundamental Principles were still vigorously defended not only by the then incumbent members of the political nomenclature, but also by the then lecturing professors and constitutional law scholars. Typical occasions at which such constitutional principles were propagated included public rebuttals of dissident constitutional ideas and models, including notions of human rights when distinguished and set aside from the official constitutional ideology.

Furthermore, the above quotations indicate the specific kind of constitutional, administrative, and judicial protection of basic rights in Slovenia, and probably elsewhere in Central and Eastern Europe, before the legal and practical inauguration of democracy and the rule of law. While human rights may have been found in books, their protection from the point of view of an individual potential victim, nevertheless, depended on the two general sets of restrictions:

First, the legally binding interests of the 'socialist community', 'the dictatorship of the proletariat', the 'socialist revolution', or the 'working class', and secondly on the interpretative efforts of the two prime avant-garde organizations – the League of Communists and the Socialist Alliance of the Working People. It may be recalled in this context that the League was not an abstract body acting mainly on the grounds of its statutory principle of 'democratic centralism', or on the grounds of the strict subordination of lower bodies to the supreme ones, headed by the Central Committee and its Secretary General or, later, President.

The constitutional and the derived legal system for the protection of individual human rights, therefore, provided for a general and virtually unlimited justification of restrictions. Their specific 'legitimate aims' were substituted for by the ideological notions of 'socialism', 'revolution', or 'working class'. The 'proportionality' and 'necessity' of interferences or the lack of protection, on the other hand, were, in accordance with the constitutional principles, left to be measured and assessed by the Communist Party officials. Their role was therefore – at least in the former Yugoslavia – fully legitimate. There also existed various operational ways their influence was made practical. Here, however, other kinds of considerations regarding the separation of powers and the independence of the government administration and the judiciary under the former regime enter the discussion.

On a more general administrative and legislative level, large segments of society were excluded from public involvement in the decision process. Intellectuals were branded as being elitist; managers were portrayed as power and privilege seeking. Religious feelings considered reactionary were excluded *a priori* on the grounds of the strictly applied principle of the separation of the church and state. Loyalty to the primordial, local, and ethnic identities was labeled separatist, antisocialist, and counterrevolutionary, while class interests were considered to be represented by the ruling proletarian party. Within the ensuing political vacuum, the ruling party elite was able to manipulate a fictitious consent, in most cases without the need to resort to force, at least towards the end of the life of the system.[13]

Levits observed[14] that in the socialist law family, typically represented by the Soviet legal system, legal norms were interpreted in the case law, by state authorities, and in the legal doctrine mainly by application of the grammatical method. Other methods, such as historical, systematic, and teleological, were not applied due to their specific effect that allowed for an autonomous interpretation of legal norms. In contrast to Western legal systems, where the rule of law fosters the relative independence of legal professions and institutions, the autonomous interpretation of legal norms had a contradictory effect in the system of the socialist law family because it posed a threat to party power' as a manifestation of the free will of the subject apply- ing the law.

It would appear at first sight that the former Slovene[15] constitutional framework of human rights not only allowed for but even required a systematic and teleological interpretation of human rights clauses by means of supreme constitutional principles, which the Constitution itself defined as "the fundamental principles of socialist self- management society and its progress, representing the foundation and perspective for interpretation of the Constitution and of the laws, as well as for the activities of all and everyone."[16] In this sense the former Slovene system

[13] For more on the artificial tranquility of authoritarian rule, see: Peter Jambrek, "Human Rights in a Multiethnic State: The Case of Yugoslavia," in Vojtech Mastny, Jan Zielonka (eds.), Human Rights and Security, Boulder: Westview Press, 1991, 177-201.
[14] Egils Levits, "Interpretation of Legal Norms and the Notion of 'Democracy' in Article 1 of Satversne," in Human Rights in Latvian Legal Theory (Riga: The Institute of Human Rights of the University of Latvia, 1997).
[15] As a part of the Yugoslav constitutional framework of human rights.
[16] The last, XII, Principle within the Introductory Part of the Constitution of the Socialist Republic of

appears to differ from Soviet legal systems. On the other hand, it required the 'autonomy' of the legal professions and legal institutions only *vis-à-vis* the common-sense and international interpretation of the human rights provisions – in order to subordinate their understanding and application to the extra-legal assessment of the Communist Party. The former Yugoslav system in this respect appears more 'complex' and 'developed' when measured by the yardstick of its faithfulness to the original revolutionary orthodoxy.

During the pre-democratic period university research and teaching of constitutional law closely followed the legal texts. It was devoted to their exegesis, utilized the same 'terminology', and, at least in Slovenia, did not show any signs of critical detachment from the official views and wordings. The pre-1990 textbooks, essays, and re- search reports appear from the present-day point of view hopelessly useless, written in a pseudo-legal jargon which, if taken seriously, represents an assault on the established language of human rights.

An exception to the above was represented by specialized sectors of the legislature, jurisprudence, and doctrine which evolved in civil, criminal, and administrative law parallel to 'normal' European legal thinking. Such enactments and applications of constitutional human rights provisions were to a certain extent able to ignore other constitutional contexts, and could thereby purify the otherwise obligatory ideological pollution produced by 'constitutional principles'. Such developments, of course, were impossible to begin with in the fields covered by the constitutional norms regulating voting rights, industrial, farming, banking, and insurance property rights, freedom of association, freedom of expression and the press, religious freedom, or involvement in local self-government, the independence of the judiciary, and the principles of the rule of law.

The first serious rupture with the official constitutional system on the general level was represented by the publication of the 'Writers' Constitution' in April 1988. By the end of 1987 a group of lawyers and social scientists, with the moral support of the Association of Slovene Writers, drafted a 'Model Constitution' of Slovenia. The drafters quite simply informed themselves of the

Slovenia of 1974.

main UN instruments regarding human rights and by and large incorporated human rights provisions from the European Convention into the first part of their constitution. The other part of the 'Constitution', on state organization and the judiciary, reiterated the well known constitutional provisions of European parliamentary democracies, notably those of the Bavarian and German Federal Constitutions.

None of the established lawyers, judges, parliamentarians, or constitutional law professors participated in the project. On the contrary, after its publication, a number of legal authorities criticized the draft from various angles:

The senior professor of constitutional law at the Ljubljana Law Faculty stated that the draft ignored the "communal" and "delegate" systems, "whose roots are in the basic cells of self-government in the community and in associated labor." Both are substituted for by the institutions of representative democracy, *inter alia,* the multiparty system (Strobl, 1988, pp. 17–18) – the critique concluded.

The other senior professor was of the opinion that the criticized draft was too ambitious in trying to eliminate "our present system, the assembly system," while it "offers so casually the concept of the separation of powers with all its consequences" (Kristan, 1988, pp. 40–46).

A junior professor of constitutional law pointed out the fact that the draft represented "an almost total break with the constitutional development of Slovenia, and was therefore almost certainly inapplicable to the positive constitutional order of the Socialist Republic of Slovenia." He also criticized the total break with the established terminology and the introduced model of the division of powers (Grad, 1988, pp. 36–38).

Another junior professor of constitutional law, who chaired the meeting on behalf of the Central Committee of the League of Communists, in his concluding remarks pointed to elements in the draft, which invite "sharp political reaction and negation," invited participants to distinguish "useful" from "harmful" elements, "progressive" from "reactionary," and expressed his personal opinion that the draft would, "if offered as the basis for the elaboration of a new Slovene constitution, require and even provoke negative political qualification" (Ribičič, 1988, pp. 54–59).

But it so happened that the Berlin Wall fell only one and a half years later[17], that in Slovenia the first free parliamentary elections after the Second World War took place in April 1990, that the coalition of new democratic parties won the elections and formed its own government, and that it started immediately the process of drafting a new Slovene Constitution. Its drafting was entrusted to a group of lawyers led by those who had also drafted the 'Writers' Constitution'. The text from 1988 thus became, contrary to the Party's expectations from only two years before, and after some legal polishing and parliamentary modification, the presently valid Constitution.

After the adoption of the new Slovene Constitution in December 1991, the teaching of constitutional and other branches of public law in Slovenia followed the new text. In 1992 a textbook was published written by several authors (Kaučič, 1992), for the teaching purposes of the basic introductory course at the Law Faculty in Ljubljana. In 1993 and in 1994 three academic authors from the Law Faculty in Maribor published another textbook on Slovene constitutional law, and in 1996 another edition of the basic Ljubljana Law Faculty textbook authored by four Ljubljana-based university professors was published. Several other treatises covering specific topics of the new constitutional law were also authored.

For quite some time the teaching and contents of the respective university textbooks have been restricted to a conceptual interpretation of the basic constitutional text, added partly by analyses and descriptions of comparative and historical contexts. The eighteen and a half years (January 1992 to June 2010) of voluminous Constitutional Court jurisprudence by and large has not yet entered the outlines and reading lists of the university courses on constitutional law. Jurisprudence represented an auxiliary instrument for elucidation of selected topics, but was not yet included as the main subject matter and method of interpretation of the constitutional text. I therefore continue this presentation with a brief discussion of the evolution of Slovene constitutional jurisprudence.

The inauguration of democratic transition in Central and Eastern Europe in the early 1990s was as a rule preceded by grass-

[17] The quoted discussion took place on 12 May 1988.

roots discontent, the rapid spread of dissident ideas which undermined the legitimacy of the communist system and by mass movements which evolved into opposition political parties. The process led to the first democratic elections[18] followed by legal-institutional reforms. Constitution drafting in most countries represented the first necessary precondition for systemic legal change. Completely new constitutional texts and changes in old constitutions by means of constitutional amendments as a rule were explicitly linked with "the constitutional heritage of Europe[19]," by means of the elaboration of principles such as the rule of law or *Rechtsstaat*, the separation or division of powers, the right to fair trial conducted by an independent judiciary, parliamentary democracy, and basic human rights provisions.

An important safeguard guaranteeing respect, observance, and implementation of the new constitutional provisions was provided by the introduction of constitutional courts entrusted with judicial review of the constitutionality of either legislative and administrative general acts and/or the concrete government acts whereby individual constitutional rights were violated according to *Verfassungbeschwerde* applicants.

Constitutional reform itself only represented the initial stage of the transition. Early on after the overthrow of communist regimes in 1989, Ralph Dahrendorf commented that it would take six months to reform the political systems, six years to change the economic systems, and sixty years to effect a revolution in the peoples' hearts and minds[20]. The new constitutional courts Central and Eastern Europe thus not only were faced with the difficult task of elaborating general and abstract constitutional provisions. They also had to adjudicate cases where the constitutionality of legislative and other legal acts was challenged with regulated specific processes on institutional and economic transition from dictatorship to democracy.

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[18] In Slovenia the first democratic elections to the legislature took place in April199, later than elsewhere in Central and Eastern Europe due to the delay caused by the strain produced by the parallel process of the disintegration of the former Yugoslav Federation. The central, Belgrade based power elite curbed the democratic process in the subordinate federal units, mainly by its well founded anticipation of the interaction between the twin processes of national and democratic emancipation.

[19] See the papers presented at the Montpellier Unidem Seminar organized in co-operation with the Faculty of Law and Economics of the University of Montpellier on 22-23 November 1996.

[20] Vojtech Cepl suggested that Dahrendorf probably borrowed the part about hearts and minds from Masaryk, and linked it to Michael Nowack's concept of moral culture. See Vojtëch Cepl, "Transformation of Hearts and Minds in Eastern Europe," paper presented to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 4 December 1995.

Separation from the imperial states of Soviet Union and Yugoslavia and the related nation-building gave rise to human rights issues of citizens, foreigners, and ethnic majorities and minorities. New foundations of government called for the articulation of the constitutional principles of democracy, the rule of law and the separation of powers. The new foundations of the economy raised the issues of transition from political control over the economy to the ownership rights of legal entities and natural persons. And retrospective justice triggered cases where the constitutionality of specific processes of restitution, retribution, lustration, affirmative action, and reverse dis- crimination was challenged.

These issues as a rule are not regulated by constitutions themselves, and only partly by transitional and concluding provisions on the implementation of the basic constitutional text. Such task was and still is *via facti* left to constitutional courts.

The Slovene Constitutional Court is an obvious example. Since 1990 it has repeatedly found itself in the crossfire of the two main competing social and political forces, each one represented by an array of 'their own' lobbies, parties, intellectual circles, media, and economic interests and institutions. One of the two blocks is composed of the various interests rooted in the enduring 'deep structures' of the social system, thus defending the continuity, status quo, and preservation of vested interests, privileges, and positions. The other bloc represents the interests of the large social segments and groups which were victims of systematic and large-scale discrimination under the communist regime, led by new political and intellectual elites.

Each judgment addressing one of the key issues derived from this structural conflict is carefully scrutinized and subject to respective criticisms, which as a rule utilize non-legal arguments. The doctrine of the political question is frequently invoked, mostly in a simplified and barely recognizable form of accusations of the political bias of individual judges of the court as an institution.

Be that as it may, the jurisprudence of the Constitutional Court, neatly edited in one or two heavy volumes per year, represents the only authoritative and legally argued application and interpretation of the Constitution. It represents an obvious and key element to be incorporated into the academic teaching of constitutional rights and freedoms in Slovenia, and probably also elsewhere in Central and Eastern Europe.

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Dignitas, in its one hundred issues during the past one quarter of the century duly reflected the above controversies of legal transition from dictatorship to democracy in the twenty-first century, resting upon half a century of utter neglect of human rights and fundamental freedoms from 1940 – 1990, and upon ten years of starting-up the fragile new order of constitutional democracy during the last decade of the twentieth century.

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Leveraging Slovenian National Space Law for Sustainable Development and Human Rights Protection including SWOT Analysis

*Aida Gajić**

ABSTRACT

This article offers a comprehensive analysis of Slovenia's emerging role in the space sector, underscored by the enactment of the 2022 Space Activities Act. As a new participant in the international space community, Slovenia has demonstrated a strategic intent to harness space for national development, innovation, and international cooperation. Central to this analysis is the scientific question of how space technologies, regulated by national space law, can be utilized to protect and enhance human rights. An inductive research approach is employed to present a case study of a Slovenian private actor developing and launching nanosatellites, aimed at supporting the theory that small satellites can contribute to meeting the Sustainable Development Goals (SDGs). The research also examines the regulation of space within the framework of new global governance, with a particular emphasis on the role of the private sector, and seeks to deepen understanding of the importance of space in safeguarding basic human rights on Earth. However, significant challenges, such as technological and financial barriers, as well as intense global competition, pose threats to Slovenia's space sector. To assess the development of this sector, the article applies a SWOT[1] analysis. Space Activities Act from 2022 serves as the foundational legal framework for regulating all space-related activities within and beyond Slovenia's borders. Aligned with international treaties and standards, the Space Activities Act emphasizes sustainable practices and space debris mitigation, reflecting Slovenia's commitment to responsible space exploration. Key provisions of the

* Aida Gajić is a PhD student at European Faculty of Law.

[1] SWOT analysis stands for strengths, weaknesses, opportunities and threats.

law include comprehensive licensing procedures, stringent safety and environmental regulations, and measures to encourage public and private sector involvement in space activities. The article concludes with strategic recommendations to leverage Slovenia's institutional frameworks and partnerships to enhance its position in the global space sector. It advocates for adaptive strategies to navigate the evolving landscape of international space law. Through this SWOT analysis, the article provides insights into how Slovenia can maximize the potential of its space sector to contribute to economic growth, technological advancement, and the protection of human rights through regulated space technologies.

Keywords: Space Activities Act, Slovenia's Space Sector, SDGs, Human Rights protection, SWOT analysis

Slovenska vesoljska zakonodaja za trajnostni razvoj in varstvo človekovih pravic s SWOT analizo slovenskega vesoljskega sektorja

POVZETEK

Članek ponuja celovito analizo vloge Slovenije v vesoljskem sektorju, ki je podprta s sprejetjem Zakona o vesoljskih dejavnostih iz leta 2022. Slovenija je kot nova udeleženka v mednarodni vesoljski skupnosti pokazala strateško namero izkoristiti vesoljski sektor za nacionalni razvoj, inovacije in mednarodno sodelovanje. V središču analize je raziskovalno vprašanje, na kakšen način uporabiti vesoljske tehnologije, ki jih ureja nacionalna vesoljska zakonodaja, za zaščito in krepitev človekovih pravic. Z induktivnim raziskovalnim pristopom je predstavljena študija primera slovenskega privatnega sektorja, ki razvija nanosatelite in deluje na področji visoke vesoljske tehnologije. Namen analize je podpreti tezo, da majhni sateliti in vesoljska tehnologija prispevajo k uresničevanju ciljev trajnostnega razvoja (SDG). Raziskava obravnava tudi ureditev vesolja v okviru novega globalnega upravljanja s posebnim poudarkom na vlogi zasebnega sektorja in poskuša poglobiti razumevanje pomena vesolja pri varovanju temeljnih človekovih pravic na Zemlji.

Obenem slovenski vesoljski sektor ogrožajo pomembni izzivi, kot so tehnološke in finančne ovire ter močna svetovna konkurenca. Za oceno razvoja tega sektorja je v članku uporabljena SWOT analiza. Zakon o vesoljskih dejavnostih iz leta 2022 služi kot temeljni pravni okvir za urejanje vseh z vesoljem povezanih dejavnosti znotraj in zunaj meja Slovenije. Omenjeni ZVDej je usklajen z mednarodnimi pogodbami in standardi, poudarja trajnostne prakse in zmanjševanje količine vesoljskih odpadkov, kar odraža zavezanost Slovenije k odgovornemu raziskovanju vesolja. Ključne določbe zakona vključujejo celovite postopke izdaje dovoljenj, stroge varnostne in okoljske predpise ter ukrepe za spodbujanje vključevanja javnega in zasebnega sektorja v vesoljske dejavnosti. V zaključku so poudarjena strateška priporočila za uporabo institucionalnih okvirov in partnerstev Slovenije v namen krepitve njenega položaja v vesoljskem sektorju na mednarodni ravni. Zavzema se za prilagodljive strategije , ki so nujno potrebne na področju mednarodnega vesoljskega prava. S SWOT analizo članek ponuja vpogled v to, kako lahko Slovenija z regulacijo vesoljskih dejsvnosti čim bolj izkoristi potencial svojega vesoljskega sektorja ter tako prispeva h gospodarski rasti na nacionalnem nivoju ter tehnološkemu napredku in varstvu človekovih pravic v globalnem smislu.

Ključne besede: Zakon o vesoljskih dejavnosti, slovenski vesoljski sektor, cilji trajnsotnega razvoja, varstvo človekovih pravic, SWOT analiza

1. Introduction

In recent years, Slovenia has demonstrated its ambitions in the field of space exploration through an increasingly active engagement with the international community and prominent players in the space sector. One of the more visible developments in space sector is the establishment of the Slovenian Space Office within the Ministry of the Economy, Tourism and Sport, which works closely with other relevant ministries and institutions to promote and raise awareness of space activities. The activities of the Slovenian government include collaboration with the European Space Agency, the recent signing of the Artemis Accords with the US government, and the growing visibility of

the private space sector. Despite Slovenia's relatively small size, these developments have placed the country in the spotlight of potential major powers in the field of space activities. Slovenian space activities are under the authority of the Ministry of the Economy, Tourism and Sport, which closely cooperates with other relevant ministries and institutions to promote and raise awareness of space activities. Slovenia's efforts to become a full member of the European Space Agency in 2024, reinforced by the recent signing[2] of the understanding regarding its membership and the adoption of the Space Activities Act, provide a robust legal framework for both governmental and private entities to operate in this field, despite some shortcomings. The exploration and utilisation of space have transcended geopolitical boundaries, offering boundless opportunities for scientific discovery, technological advancement, and economic growth. In this context, Slovenia, situated in the heart of Europe, has demonstrated a keen interest in leveraging space as a strategic domain for innovation and development. This article proceeds to examine the evolving role of Slovenia in the space arena. It considers the legislative framework, strategic partnerships, educational initiatives, and commercial ventures that underpin this journey through SWOT analysis.

2. Slovenian's Commitment to International Space Law

Slovenia is a signatory to four international treaties; OST, ARRA, LIAB and REG[3], but did not accept the MOON Agreement.[4] Membership of multilateral international treaties is of paramount importance for Slovenia, as it confirmed its status as a successor

[2] The Accession Agreement between the Government of the Republic of Slovenia and ESA to the Convention for the Establishment of a European Space Agency and the related conditions was signed following the mandate given by the Government at its 105th regular session on 30 May 2024.

[3] Agreement on the rescue of astronauts, the return of astronauts and the return of objects launched into outer space with Succession entered into force in 1992 , Liability Convention with succession from former SFRJ entered into force in 1992. Outer Space Treaty and Registration Convention were ratified in 2019.

[4] The practice of succession of the Republic of Slovenia is based on the internal legal acts of the Resolution on the Proposal for the Agreed Reunification of the SFRY and the Constitutional Law for the Implementation of the Fundamental Constitutional Charter on the Independence and Independence of the Republic of Slovenia. The legal basis at international level is governed by the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

state (Grašek, 2013) and enabled it to act as a sovereign state in the international community.

State succession in international law occurs when one state replaces another in terms of sovereignty over a territory. This process raises questions about the validity of treaties, membership of international organisations, state property, debts, archives, the rights of populations and nationality. State succession ensures stability in international relations by regulating the transition of the »old state« to the »new state« (Polak Petrič, Pajnkihar, 2024). Article 8(2) of the Constitution of the Republic of Slovenia stipulates that ratified international treaties are directly applicable[5], thereby obviating the need for their provisions to be transposed into the laws of the Republic of Slovenia (Petrič, 2019).

2.1. Space Law and Its Connection to General International Law

While state sovereignty shapes the character of international law, space law operates as a *lex specialis*, meaning it consists of specialized legal principles governing activities in outer space, distinct from general international law (Von der Dunk, 2020). However, it is essential to ensure that space law remains connected to general international law to prevent it from becoming isolated, stagnant, and ineffective. Overemphasizing space law as a *lex specialis* could indicate a lack of understanding of general international law, which must be avoided (Lyall & Larsen, 2018). Law should be consistent across all domains, including space, where "we seek the rule of law, not rule by law," (Lyall & Larsen, 2018, p. 944) where rules are followed only when convenient for the powerful and changed at their request**.**

This leads to Evolving Perspectives on Customary International Law where a growing body of contemporary literature (Roberts, 2001; Roozbeh, 2010; Petersen & Lepard, 2010) has emerged that questions the traditional understanding of what constitutes a rule for the creation of customary international law. As an example, the essence of Lepard's theory is the reduction of the two constitutive elements of customary law to one - opinio iuris: »a norm of

[5] The Constitution of the Republic of Slovenia, Article 8:" Laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly."

customary international law arises when States generally believe that it is desirable, now or in the foreseeable future, to have an authoritative legal principle or rule prescribing, permitting, or prohibiting a particular course of conduct" (Petersen & Lepard, 2010, p. 795). The practice of states is not perceived as a compulsory requirement, but rather as evidence of this belief. With this emphasis on opinion juris, Lepard follows a popular trend among international law scholars.

This approach downplays the importance of state practice, reflecting a trend towards emphasizing norms with moral effects, such as human rights law. Despite the discrepancies between official declarations and actual practice, treaties and customary international law remain fundamental to regulating the exploration and use of outer space. "As we often observe discrepancies between official declarations of states and actual practice in this field" (Petersen & Lepard, 2010, p. 795), it can be generally concluded that these sources, in particular treaties and customary international law, play a very important and fundamental role in the international legal regulation of the exploration and use of outer space. They provide the framework under which activities in outer space are carried out. Regarding international conventions, five major United Nations treaties on outer space have been finalised under the auspices of the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS).

2.2. Interaction between national and international Space Law

The sources of law can be defined as the systems or processes that give rise to international law. If a rule or norm is endorsed by one of the recognised sources, it can be accepted as part of a system of law. Conversely, if it cannot be confirmed by one of these sources, it is a mere assertion and cannot be binding on any international actor. Another unique aspect of international law is that the "mere violation of the law may lead to the creation of a new law" (Higgins, 2018, p. 19). Understanding the doctrine of sources in public international law is therefore essential to clarify what is binding in space law and what is mere interpretation or assertion. While describing interaction between national and international Space Law, it should be stressed that the presence or absence of a particular provision in the domestic

legal structure of a State, including its constitution, if any, cannot be used to avoid an international obligation. Otherwise, the basic purpose of the operation of international law would be defeated, leading to a great deal of uncertainty as to the relationship between the domestic and international legal frameworks (Shaw, 2008).

It is important to understand the relationship between national space law and the sources of international space law. In general, space law consists of two levels of laws and regulations (Ma, 2014). The first level is international law, which governs the rights and obligations of States and intergovernmental organisations operating in outer space. The second level is the national level, or the adoption of the formal domestic legal frameworks that enable a State to operate in space. The fact is that the formal and legal resources of international space law are not sufficient for today's activities and the rapid technological advances in this field, and therefore the international community seeks to address this problem, which arises within the activities of States as well as other international entities, through the channels of soft international law, or so-called *soft-law instruments*, which are non-binding documents or *non-legally binding documnts*, and through the adoption of national laws (Marchisio, 2022; Sancin, Grünfeld & Ramus Cvetkovic, 2021). The international community is also undergoing drastic changes in which economic, cultural, political and social relations have become much more interconnected, particularly in the space sector (Jakhu, Freeland & Chan, 2021). The concrete example of licensing and authorisation of space activities at the level of national law is a more straightforward process, as national space laws are applied within the framework of a country. For example, the Republic of Slovenia, more specifically the Ministry that is in charge for technology, issues a licence to carry out space activities on its territory on the basis of the Space Activities Act.[6]

On the other hand, it is an irrefutable fact that a significant proportion of space activities has been privatised, which has led

[6] Space Activities Act, Article 4, Licence:"(1) Space activities shall be conducted on the basis of a licence issued by the ministry responsible for technology (hereinafter: the ministry) following an application by the operator. (2) The ministry shall issue the licence within four months of the date of receipt of a complete application for the issuing of the licence. (3) The Government of the Republic of Slovenia shall determine, by way of a decree, the contents of the application referred to in paragraph one of this Article."

to the involvement of the commercial sector (Jacobson, 2020). Consequently, the response of national law to space activities is becoming increasingly important. Furthermore, we are currently in a period of transition, a period during which formal international law is being complemented by informal forms of new global governance involving civil society as well as the private sector. This allows the international community to act more flexibly and to react more quickly to technological developments in the space sector. While the space sector acknowledges the value of some regulations, it is essential to strike the right balance. Improving these procedures would benefit both the commercial and the civil sector, as a loosening of restrictions and a more flexible legal regulatory environment has proven to be more economically beneficial for the countries themselves (Jacobson, 2020). To operate and meet the challenges of current developments in the space sector, an ideal mix of international treaties, guidance, standards, national laws, and private sector best practice is needed. The formula for the optimal relationships between the various actors in this field is not straightforward to determine. However, the skeleton that would most appropriately enforce both *hard* and *soft international law* must satisfy the first and foremost principle of international space law, which is the welfare of all mankind and the preservation of the space environment for future generations through the prism of justice *infra legem*, *praeter legem* and *contra legem* (Higgins, 2018). Consequently, the equal sharing of the benefits of outer space must be ensured.

2.3. Big steps forward to sustainable use of Space with signing the Artemis Accords

On 19 April 2024, Slovenia officially signed the Artemis Accords[7], a framework for sustainable space exploration. This makes Slovenia the 39th country to join the accords and the third European country to do so within a span of five days, following Switzerland and Sweden (Foust, 2024). The Artemis Accords, initiated in 2020, is built upon the Outer Space Treaty of 1967 and em-

[7] The Artemis Accords. Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for the Peaceful Purposes. United States of America, NASA, introduced on 13.10.2020.

phasise principles such as transparency, interoperability, and the preservation of space heritage. This move aligns with Slovenia's commitment to the peaceful use of space. Slovenia, which has been an associate member of the European Space Agency since 2016, views this as a strategic step to enhance its role in global space exploration and to develop its space sector.

The Artemis Accords is the basic basis for international cooperation with other space agencies and has the pre-legislative character of a bilateral agreement (Von der Dunk, 2022). Also classified as a Memorandum of Understanding (Von der Dunk, 2022) this document has more significance than a geneticist's agreement but is still less binding than a treaty would be.

The document is divided into thirteen sections, each representing one of the principles of the implementation of space activities and the functioning of inter-parties in the space sector. The Artemis Accords aim to establish best practices of conduct and, over time, to become part of customary international space law by adhering to basic legal principles, which are also the source of international law. The importance of respecting the principles set out in existing international agreements is stressed »with a view to implementing the provisions of the Outer Space Treaty and other relevant international instruments, thereby establishing a political consensus on mutually beneficial practices for the future exploration and use of outer space, with a focus on activities carried out in support of the Artemis programme« (The Artemis Accords, 2020, p.1).

It is notable that the Artemis Accords act as an alternative to the failed Moon Treaty but in a non-legally binding manner. Of particular significance is the section dealing with resource exploitation and the redistributive regime relating to benefits derived from space resources.[8] The document states that the

[8] The Artemis Accords, section 10:" 1. The Signatories note that the utilization of space resources can benefit humankind by providing critical support for safe and sustainable operations. 2. The Signatories emphasize that the extraction and utilization of space resources, including any recovery from the surface or subsurface of the Moon, Mars, comets, or asteroids, should be executed in a manner that complies with the Outer Space Treaty and in support of safe and sustainable space activities. The Signatories affirm that the extraction of space resources does not inherently constitute national appropriation under Article II of the Outer Space Treaty, and that contracts and other legal instruments relating to space resources should be consistent with that Treaty. 3. The Signatories commit to informing the Secretary-General of the United Nations as well as the public and the international scientific community of their space resource extraction activities in accordance with the Outer Space Treaty. 4. The Signatories intend to use their experience under the Accords to contribute to multilateral efforts to further develop international practices and rules applicable to the extraction andutilization of space resources, including through ongoing efforts at the COPUOS."

exploitation of space resources does not in itself constitute national appropriation under Article II of the Outer Space Treaty. It will be of interest to observe how Slovenia will decide to utilise space resources in the future. As a signatory to the Artemis Accord, it is likely that Slovenia will be in favour of the use and exploitation of resources, but it must be borne in mind that the resources of space are for the benefit of humanity as a whole. Furthermore, it asserts that the safety zones defined in Section 11, are necessary for the transparency of information and coordination, and thus for the prevention of harmful interference and the fulfilment of the obligations of due diligence. While the Artemis Accords promote the extraction and exploitation of resources, they do not provide for an international regime, as provided for in the Moon Treaty in Article 11. Time and the practice of States and opinio juris will determine whether the AA document is a solution in the right direction and whether it offers consistent rules of conduct for all actors. It is true that the solutions offered in the AA are innovative and represent a certain progress, but to what extent they do so remains to be seen and determined by the practice of all the subjects of international law. If one understands international law as a process, the Accords may be seen as a good way of bringing together the public and private sectors at international level.

3. Going further with Slovenia's Space Activities Act

The most obvious way to make international space law work coherently is to introduce national laws governing space activities. Much practical space law is being developed in the various legal systems of the world, particularly in the legal systems of space-active States. The development of space law is thus taking place in three directions (Steer, 2017). Firstly, the domestic legal order is responding with new national laws dedicated to space activities, i.e., the establishment of new structures and procedures to deal with space activities. Secondly, by applying the existing rules of the national legal system to space activities or, in the third case, by applying the international law theory of »self-executing treaties« and achieving a direct transposition of international agreements into the national normative system.

The peculiarity of space law is that "in addition to sovereign states, non-state structures such as private entities, international organisations, and even individuals" (Steer, 2017, p. 4) have been increasingly involved in recent decades and play a key role in the development of this sector. Given the rapid progress and interdisciplinary nature of the space sector, this branch of international law needs flexible rules, including in the form of non-binding legal instruments, which will support its long-term objectives and allow it to grow in different directions. The regulatory environment for space law is rudimentary and in need of updating, if not revision since it was conceived thirty to forty years ago. It was envisaged that we would have about ten commercial launches a year, launching about twelve to fifteen satellites, but we are now doing ten times more in all areas (Jacobson, 2020). Thus, today, the term transnational law is also in use, and includes relations and relationships between states. Non-state actors are involved in shaping the processes of international law (Steer, 2017). The relationship between transnational and national law is leading to new forms of global governance which, to be more flexible and to respond more quickly to a rapidly changing global world, uses soft law approaches and can become a binding legal norm through national legislation.

National legislation guided by international space treaties should be tailored to align with the specific interests, socioeconomic development, legal traditions, and current and planned space activities of each country. One of the key motivations for adopting national legislation is to create a competitive regulatory framework that will enhance the opportunities for private entities to engage in space activities within the country's territory. Historical evidence suggests that many countries have established national space legislation as the most effective means of implementing international obligations under space treaties (Tapio & Soucek, 2022).

Slovenia has opted for the first path, adopting the Space Activities Act in April 2022 with the intention of facilitating more effective participation in space activities. The Act allows for a more precise, transparent, and authentic engagement within the international community. The primary motivation for the enactment of the national legislation was the aspiration to facilitate

the full operationalisation of the European Space Agency within the internal space sector, as well as the operation of research and educational institutions engaged in space activities.[9] In light of the obligations imposed by international treaties, such as the State's liability for damages to third countries, the legislation introduced oversight of space activities and established a national register of space objects. In the case of Slovenia, the national law fulfils the commutative subjective condition, that is, the legal consciousness of the State, which shapes customary international law. The practice of the Slovenian State, the objective condition, is in the making and will certainly be better formulated with the creation of the Space Activities Act.

Slovenian Space Activities Act is primarily concerned with personal and territorial jurisdiction. Through the Act, the State implements certain international legal obligations arising from ratified treaties. Through the law, the State implements certain international legal obligations arising from ratified treaties. For example, Art. VI of OST; "international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities... shall require authorization and continuing supervision".[10] Article 2 of Space Activities Act defines the scope of application and, in line with the OST, establishes control also over space activities outside the territory of Slovenia carried out by Slovenian citizens and legal entities established in Slovenia. Thus, it can be noted that the Act, in establishing a real connection with legal persons, is based on the seat theory and thus deviates from the internationally established theory of incorporation, which is used to determine the nationality of legal persons in the light of the provision of diplomatic protection (Sancin, 2021).

An example of the implementation of guidelines for the long-term sustainability of space activities is Article 5 of the Space Activities Act, which fully supports the preservation of the space environment for future generations. Even if it is not explicitly stated that »environment« also refers to the space environment, this can be inferred from the individual points of the article. Point (b) calls

[9] Predlog zakona o nadzoru vesoljskih dejavnosti – Proposition of Space Activities Act, 2018-2130-0005, p. 1.
[10] OST, art. VI.

for compliance with international standards; »space activities are conducted in accordance with the international standards and guidelines of internationally recognised standardisation organisations on the safety and technology of space activities;«. Similarly, point (c)[11] mentions the need to protect the environment. The most illustrative reference to the space environment is Article 5(e), which lists the limitation of the generation of space debris as one of the conditions for licensing.[12] It thus also fulfils one of the guidelines[13] of UNGA Resolution 68/74 on Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space. Article 5(e) also provides mitigation of space debris as one of the conditions for licensing "with the applicable UN Space Debris Mitigation Guidelines and for limiting adverse environmental effects on Earth or in outer space or adverse changes in the atmosphere".[14]

Slovenia thus follows and promotes the sustainable development of outer space and implements the LTS guidelines as a non-legally binding document. However, the definition of space debris in Article 3 of the Space Activities Act, is inadequate and lacks precision. It describes space debris as »space objects remaining in space after the cessation of space activities or as a consequence of space activities, or space objects that return to Earth uncontrolled«.[15] It does not mention that space debris also includes particles of these space objects that are separated from the main source, whether controlled or uncontrolled. There is also no mention of the non-functionality of the facility being in space. The linguistic interpretation of the word »termination« does not cover the intention of termination and the consequence that follows. Termination can be intentional or unintentional. In the practice of States, waste is defined as those objects that are no longer able to perform their function. They are not necessarily valueless to the State exercising jurisdiction over them. It

[11] Space Activities Act, article 5(c): "space activities do not pose a threat to national defence, public order, the safety of people or their property, national intelligence and security operations, and protection against natural or other disasters and do not negatively affect public health, the environment or aviation."
[12] Space Activities Act, article 5(e): "space activities envisage measures for limiting the generation of space debris in accordance with the applicable UN Space Debris Mitigation Guidelines and for limiting adverse environmental effects on Earth or in outer space or adverse changes in the atmosphere."
[13] Recommendations on national legislation relevant to the peaceful exploration and use of outer space, UN General Assembly, A/RES/68/74, 16.12.2013.
[14] Space Activities Act, 5(e).
[15] Space Activities Act, article 3.

has been suggested that it is the same State, and only that State, which can determine whether its facility is functional. Although a space object might be perceived by others as completely useless, it may in fact still have some value. For example, an inactive space object may be held in reserve for future activities, may carry valuable classified information, or may otherwise be of interest to other States (Viikari, 2007). Therefore, the criterion of »functionality«, at least if understood in a purely technical sense, may not be the most useful linguistic interpretation as set out in the Slovenian law, namely »cessation of activities«. To distinguish space debris from other space objects, it should be noted that even apparently non-functional - inactive space objects can be valuable assets.

The Government of the Republic of Slovenia shall determine, by way of a decree, the educational, technical, financial, safety and environmental criteria to establish the meeting of criteria referred to in paragraph one of Article 5, which is highly progressive for small countries like Slovenia. To these criteria, Article 6 of the Space Activities Act adds insurance of the minimum amount of EUR 60,000,000 per loss event for the duration of space activities.

Space Activities Act provides the basis for access to the premises and installations of licence holders and for inspection of documentation.[16] The operator is also obliged to report events or facts that may affect the validity of the licence and the existence of an accident or hazard.[17] However, this does not include reporting irregularities that could cause danger or damage. It also includes the revocation of the licence[18] and the imposition of a fine[19] in the event of an offence, which is relatively low, but does not include the suspension of the licence or the modification of the duration of the licence. However, there is an option for the Ministry responsible for technology to set a deadline for the operator to remedy the irregularities before revoking the licence, which shall not exceed one year.[20]

Article 13 of the Space Activities Act provides that the operation of a space facility, for which a licence has been issued may

[16] Space Activities Act, article 17.
[17] Space Activities Act, article 15.
[18] Space Activities Act, article 12.
[19] Space Activities Act, article 18.
[20] Space Activities Act, article 12(3).

be transferred to another operator who is a citizen of the Republic of Slovenia or a legal entity established in the Republic of Slovenia only with the authorisation of the Ministry responsible for technology,[21] provided that the new operator meets certain legal conditions issuing a licence and has insurance in place. If the management of a space facility is transferred to an operator of another country, the Ministry shall give its consent to the transfer only if the RS has concluded an international agreement with that country on the regulation of liability for damages.[22] Such a regime thus provides the possibility of concluding international treaties establishing responsibility for a particular space object. This has implications for the regulation of the increasingly common on-orbit transfers in practice, whereby there is a transfer of ownership, but not necessarily an explicit transfer of responsibility by the launching State. There are differences of opinion in theory regarding this issue (Sancin, 2021).

Under the Registration Convention, when a launching state launches a space object into space, the launching state must record the launch in its national register and provide information about the object to the Secretary-General of the United Nations for inclusion in the international register. This State of Registry then has »jurisdiction and control« over the object in accordance with Article VIII of the Outer Space Treaty. One interpretation of Article VIII is that "the State of registry has exclusive jurisdiction to regulate the space object, its personnel, and any related disputes" (Sundahl, 2017, p. 43). Starting from Article I of the Convention on Registration of Objects Launched into Outer Space, such a State may be the State that launches or commissions the launch of a space object, the State from whose territory or platform the space object is launched[23]. As stated, there are four possibilities for naming and identifying a State Party as a launching State, namely it can be the State that launches the space object, the State that commissions the launch of the space object, the State

[21] Space Activities Act, article 13(1).
[22] Space Activities Act, article 13(2).
[23] The Convention on the Registration of Objects Launched into Outer Space, Article I, defines the launching or launching State as follows: »For the purposes of this Convention, the term 'launching State' means [...]« (i) The State which launches or commissions the launch of a space object; (ii) The State from whose territory or facility the space object is launched; (b) The term 'space object' includes the components of a space object and its launch vehicle and its components; (c) The term »State of Registry« means the State of launch in whose registry the space object is held in accordance with Article II.

that launches the space object from its territory or the State that launches the space object from its platform. It is precisely because of the different possibilities of determining the launcher's auction that it is necessary to keep a register at international level, where it is clearly stated who owns the space object and who thus also assumes responsibility for the damage caused and the other consequences that may follow.

For this reason, the maintenance of a national register, as provided for in Article 14 of the Space Activities Act, is of paramount importance. Article 14 of the Space Activities Act outlines provisions for the establishment and maintenance of a register by the Ministry for the purpose of collecting data on space objects launched into outer space. This register is intended to be public and maintained as an electronic database. The Republic of Slovenia is designated as the state of registration for space objects entered into its register. Objects eligible for entry include those for which the ministry has issued a license for space activities or those covered by international agreements regarding liability for damage. Operators are required to provide necessary data for entry within 30 days of launch or transfer to another operator. Data to be entered in the register include details such as license number, object name, launch information, orbital parameters, purpose, operator and owner information, and status of the object. Operators must notify the ministry of any changes to the registered data within eight days. Personal data collected in the register is used to identity verification and is kept permanently. The ministry is responsible for notifying the United Nations Secretary-General of entries, changes, and amendments to the register in accordance with international conventions. The government is tasked with issuing detailed regulations for maintaining the register.

Article 16 establishes a clear framework for assigning liability and ensuring compensation for damages caused by space objects, while also outlining conditions under which the state can seek reimbursement from operators. This article has certain limitations on reimbursement: which is limited by the total sum insured, except in specific circumstances which refers to intentional damage, damage caused due to gross negligence or if the damage results from non-compliance with licensing conditions or contravention of the Act.

In general, the biggest shortcoming of the Space Activities Act is the lack of clearly defined terms such as space object, space debris, space activities manager, and environment, which is mentioned in Article 5. Clearly defined authorisation and licensing implementing the LTS guidelines are of utmost importance for the sustainable development of space activities both in Slovenia and internationally. Relatively low sums of sanctions could lead to abuses, where foreign entities would lease Slovenia's low penalties and carry out illegal space activities here that would not be possible abroad due to the higher penalties. This could even lead to a kind of *space shopping* (Sancin, 2021).

4. Slovenian Space Strategy: a step towards STEM education and collaboration with ESA

The strategy presented by Slovenia was developed after the law was adopted. It is based on five pillars, which highlight the importance of promoting and developing space activities, broadening participation in space exploration, promoting the development and use of space applications, securing the next generation of scientists, and promoting entrepreneurship.[24] During the public hearing on the strategy[25], the several proposals were presented.[26] These included the integration of the LTS guidelines into national best practices and legislative frameworks, with an emphasis on enhancing awareness of their importance for stakeholders in the space sector. Additionally, the establishment of a space sustainability rating for private entities was proposed to promote more sustainable practices across the global space industry. In this way, Slovenia could serve as a model, following the lead of other similar countries like Austria.

Central to Slovenia's space aspirations is its strategic partnership with the European Space Agency, a collaboration that opens doors to a wealth of resources, expertise and opportunities in space exploration and technology development. Through its membership in ESA, Slovenia gains access to cutting-edge projects and initiatives ranging from Earth observation and sat-

[24] Further reading in the Slovenian Space Strategy from year 2023.
[25] Public haering took palce in April, 2023.
[26] The proposals outlined were put forward by the author during the public hearing on the strategy.

ellite navigation to human spaceflight and exploration missions. Slovenia's commitment to space education is also reflected in the establishment of ESERO Slovenia, a dedicated platform aimed at promoting STEM (Science, Technology, Engineering and Mathematics) education and fostering a culture of space literacy among students and educators alike. Through its collaboration with ESA and ESERO Slovenia, Slovenia aims to create a new generation of space enthusiasts and professionals with the skills and knowledge to drive future advances in space science and technology. ESERO supports the European formal primary and secondary education community. From 2023/2024, it started a gradual expansion into different forms of non-formal education, involving pre-school children and families.[27] By encouraging young people to pursue technological and scientific studies, ESERO will help in the long term not only the development of the space sector, but of all high-tech industries, which are already suffering from a lack of adequate human resources. Although the project is well designed for the younger generations and provides a basic introduction to the space sector, it lacks specificity and focus on the education of young people who are about to make decisions on higher education. There is a perceived lack of projects aimed at students in social or natural sciences in higher education that are feasible in Slovenia by Slovenian staff. This is assumed to be due to the lack of professional staff in the space sector. Nevertheless, Slovenia provides assistance in establishing connections with European and global organisations and in integrating with them. As an example of collaboration, we would also like to mention the multidisciplinary student research group SpaceDent, which operates in the Open Laboratory of the Faculty of Mechanical Engineering in Ljubljana and participates in the ESA Academy PETRI. It involves students of mechanical engineering, dental medicine and electrical engineering who are preparing dentistry for long-term missions to the Moon and Mars.[28]

[27] Further reading about the project in O projektu ESERO, ESERO, e-source.
[28] Further informations availabe in "Priložnosti za inštitucije, podjetja in študente na področju vesoljskih tehnologij" which was published online by The Ministry of the Economy, Tourism and Sport, e-source.

5. Slovenian space sector in achieving SDGs – case studies

In addition to the five pillars that the office already has in the proposed strategy, this article is stressing the importance of implementing policies that would promote the sustainable development of the space sector and that would take care of the use of space applications for the achievement of the Sustainable Development Goals set by the United Nations (Space4SDGs). In the study provided by United Nations Office for Outer Space Affairs it is clearly presented the positive impact of GNSS and EO, with special focus on European GNSS and Copernicus, in achieving sustainable development and specific SDGs (UNOOSA, 2018) and they "could be used to support the achievement of the SDGs not only in Europe but worldwide" (UNOOSA, 2018, p. 1). The best results will be achieved when telecommunications, global navigation satellite systems (GNSS) and Earth observation (EO) satellites and services collaborate to achieve common goals and meet clear user requirements (UNOOSA, 2018). Two European flagship projects; European GNSS and Copernicus in synergy can lead to great support for achieving SDGs for the benefit of all humankind (Gajić, 2023). "These services are supporting a continuously increasing number of users in many different market application domains: from transport related services (for example aviation, road, maritime and rail) and consumer solutions to professional applications; for example, agriculture, construction and infrastructure monitoring" (UNOOSA, 2018, p.1.). Therefore, the use of space applications and the expertise of Slovenian companies is crucial for the achievement of the SDGs (Gajić, 2023). A well-defined strategy that leverages space technologies and knowledge to address the Earth's most pressing problems is crucial, as it highlights the direct connection between each Sustainable Development Goal (SDG) and space applications (Gajić, 2023).

Slovenian companies like Sinergise and Space.si exemplify this approach by contributing to the fight against poverty through the use of satellite imagery and advanced data processing techniques. The case study of Sinergise, with its extensive earth observation data archive, demonstrates how such resources can significantly advance the achievement of SDGs on a glob-

al scale, reinforcing the role of space technology in sustainable development.

Sinergise can use machine learning to find patterns in the data, further enhancing its use. Recorded satellite imaginary provide further important information about the processed zones for their customers coming from the field of agriculture, real-estate, GIS-tools, remote sensing, and machine learning. Organization Sinergise and their service Sentinel-hub is supporting Sustainable Development Goal 2 with their space technologies that can help increasing productivity of agricultural cultivation through informed management processes, improving the efficiency of the utilization of existing assets, (including land, seeds, fertilizers, plant protection agents and water). Decisions are supported by software services based on data generated by space systems, GNSS and EO, as well as by terrestrial technologies. Sinergise has developed several integrated applications for administration and control, such as: farm Registry, Land Parcel Identification System, On-the-spot controls, Animal controls. Components of the applications can handle, for example, land consolidation, meliorations, disease outbreak, forestry, and others. Services can be used within the institution, government, or general public.

Referring to this case study it is obvious that the use of space technologies is working in positive correlation to ending hunger more accurately, is in intersection with SDG 2 which is Zero Hunger to end hunger, achieve food security, improved nutrition, and promote sustainable agriculture. Human Rights that are related to this exact SDG are Right to adequate food [UDHR art. 25; ICESCR art. 11; CRC art. 24(2)(c)] and international cooperation, including ensuring equitable distribution of world food supplies [UDHR art. 28; ICESCR arts. 2(1), 11(2)].

Another example led by a company Space–SI, Slovenian Centre of Excellence for Space Sciences and Technologies, has developed several successful technology demonstration cases utilising the Nemo-HD microsatellite for the Soča, Sava, Drina and Danube rivers in the Alpine, Ionian-Adriatic and Danube EU macroregions. The new technologies are now being transferred and tested in India in collaboration with the cGanga Centre for Ganga River Basin Management and Studies and the Indian Institute of Technology Kanpur as part of the Ganga and Sava River Twinning

initiative. The space industry is no longer the exclusive domain of major countries and industrial conglomerates. It has become democratised both geopolitically and financially, with the costs of developing, launching, and deploying micro and nanosatellites being significantly reduced.[29]

The Space-SI Centre of Excellence was established with the objective of uniting the academic, scientific, and technological potential within Slovenia. This initiative offers Slovenian scientists and engineers the opportunity to participate competitively in space research and missions. Furthermore, it seeks to connect the Slovenian public with these processes, which are of great importance to society as a whole and are often invisible. The objective is to enable more sustainable management of water resources (SDG 6). This is achieved by implementing satellite data and digital twin models into integrated water resources and river basin management at all levels, including through transboundary cooperation. Furthermore, international cooperation and capacity-building support will be expanded through River Twinning approaches.

SDG 6 aims to ensure the availability and sustainable management of water and sanitation for all, with specific targets including universal and equitable access to safe and affordable drinking water, sanitation, and hygiene for everyone. It also focuses on reducing pollution, increasing water-use efficiency, and promoting participatory management of water and sanitation services. This goal aligns with the right to safe drinking water and sanitation as recognized in ICESCR Article 11, and the right to health as outlined in UDHR Article 25 and ICESCR Article 12. Additionally, it emphasizes equal access to water and sanitation for rural women, as stated in CEDAW Article 14(2)(h).

The second objective of this private actor is to improve actions to combat climate change and its impacts (SDG 13). This is achieved by strengthening resilience and adaptive capacity to climate change. Integration of satellite data and digital twin models to optimise climate change measures into national policies, strategies, and planning. Improved education, awareness-raising and human and institutional capacity for adaptation to climate change as well as impact reduction and early warning. SDG 13

[29] Satellite Data and Digital Twin Models to Support River Basin Managment, United Nations, Department of Economic and Social Affairs Sustainable Development, e-source.

calls for urgent action to combat climate change and its impacts, with specific targets that include strengthening resilience and adaptation to climate change and natural disasters, particularly in marginalized communities, as well as the implementation of the Green Climate Fund. This goal is closely linked to the right to health, which includes the right to a safe, clean, healthy, and sustainable environment, as recognized in various international human rights instruments such as UDHR Article 25(1), ICESCR Article 12, CRC Article 24, CEDAW Article 12, and CMW Article 28. Additionally, SDG 13 supports the right to adequate food and safe drinking water, as outlined in UDHR Article 25(1) and ICESCR Article 11. Furthermore, it upholds the right of all peoples to freely dispose of their natural wealth and resources, as stated in ICCPR and ICESCR Article 1(2).

Another goal is SDG 15 which is to enable sustainable use of terrestrial ecosystems, combat desertification as well as halt land degradation and biodiversity loss.[30] SDG 15 focuses on protecting, restoring, and promoting the sustainable use of terrestrial ecosystems, including the sustainable management of forests, combating desertification, halting, and reversing land degradation, and stopping biodiversity loss. The specific targets include the sustainable management of freshwater, mountain ecosystems, and forests, combating desertification, halting biodiversity loss, and fighting against poaching and trafficking of protected species. This goal supports the right to health, which encompasses the right to a safe, clean, healthy, and sustainable environment, as recognized in UDHR Article 25(1), ICESCR Article 12, CRC Article 24, CEDAW Article 12, and CMW Article 28. It also aligns with the right to adequate food and safe drinking water, as stated in UDHR Article 25(1) and ICESCR Article 11. Furthermore, SDG 15 upholds the right of all peoples to freely dispose of their natural wealth and resources, as articulated in ICCPR and ICESCR Article 1(2).

There are many similar practical examples[31] all leading directly or indirectly to the achievement of the Sustainable Development Goals (SDGs) set by the international community.

[30] Satellite Data and Digital Twin Models to Support River Basin Managment, United Nations, Department of Economic and Social Affairs Sustainable Development, e-source.

[31] For a more detailed information and more case studies see the appendix in European Global Navigation Satellite System and Copernicus titeled Supporting the Sustainable Development Goals; Building Blocks towards the 2030 Agenda presented by UNOOSA in 2018.

Moreover, "GlobalNavigation Satellite Systems and satellite communications can be of use in the context of an 8 billion world" (UNOOSA, 2023, p. X). At the same time, the SDGs directly fulfil and protect the human rights enshrined in binding international treaties and agreements. As the population reaches 8 billion, tackling the global challenges facing humanity as a whole is all the more important. Under current scenarios, the population will continue to grow in the coming years, peaking at between 9 and 11 billion between 2050 and the end of the century. This population increase creates challenges and opportunities that need to be addressed through appropriate policies to ensure development while addressing the sustainability of humanity's activities. Space data and services can help to address the challenges of the »8 billion world« and the successful implementation of global agendas.[32] In fact, the space sector, activities and space technologies can make a significant contribution to solving some of the key problems of the international community.

It is necessary to acknowledge that all SDGs are interrelated and that all together bring to common goods in the benefit of all humankind, where the main subject is an individual and his/her dignity in correlation to basic principles of Human Rights and their protection. Satellite imagery and space application are indispensable tool of today and future for governmental organizations, non-governmental organizations, and society for protection of Human Rights (Gajić, 2023). Constitutional democracy and the rule of law have been under stress in Slovenia and when speaking about Human Rights there is a lack of holistic, balanced, and pluralistic approach to Human Rights protection (Avbelj & Letnar Černič, 2020). It is believed that companies and other private entities, operating independently of governmental financial support, could serve as an effective support system for achieving a comprehensive path toward Human Rights protection. Although a positive approach is maintained regarding the intersections between Space Law and International Humanitarian Law, many more questions remain to be addressed. The central challenge here is to make sure that space is used in a safe, secure, and sustainable manner by an

[32] Further information about the EU Space in support of a world of 8 billion people available in the »Space2030« agenda published by UN in year 2023.

ever-increasing number of actors. Complicating this is the fact that almost all space technology can be used for military as well as civilian purposes. Although it is a novel area of global governance, this strategic importance of space means that its regulation is still mainly done through traditional instruments and institutions of global governance that are dominated by States (Introduction to Global Governance, 2023). The protection of human rights is, therefore, an important objective for global governance. A variety of actors, institutions, and instruments work towards the protection of human rights around the globe. In other words, they contribute to the global governance of human rights - sometimes called the global human rights regime.

6. SWOT (strengths, weaknesses, opportunities, and threats) Analysis

The Slovenian space sector is analyzed through a SWOT framework to identify the strengths, weaknesses, opportunities, and threats associated with its development. This analysis provides insights into the current state of the sector and offers strategic directions for its future growth and sustainability.

One of the key strengths of the Slovenian space sector is its highly proactive regulatory framework, established by the Space Activities Act of 2022. This legislation provides a solid foundation for regulating space activities, ensuring compliance with international standards, and facilitating the smooth operation of space-related initiatives within the country. The Act mandates the registration of space objects and ensures that space activities are safe and environmentally sustainable, positioning Slovenia as a leader in environmental stewardship within the space industry. Additionally, Slovenia's strategic partnerships with organizations such as the European Space Agency and its participation in international agreements like the Artemis Accords enhance its credibility and capabilities on the global stage. These partnerships, coupled with initiatives to promote STEM education and collaboration with research institutions, further strengthen the sector's innovation potential.

Despite its strengths, the Slovenian space sector faces significant challenges. The industry is relatively small, and Slovenia's

limited domestic market size and investment capabilities may hinder its expansion. A major weakness is the shortage of high-profile professionals in space law, making the country heavily dependent on international collaboration. This reliance on external partnerships could pose risks if geopolitical relations or strategic priorities shift. Additionally, while the Space Activities Act is comprehensive, there are regulatory gaps that need to be addressed, particularly in defining critical terms such as »space object« and »space debris,« to keep pace with the rapid evolution of space technologies and activities. Also, one may ask whether the stringent requirements and high standards presented in Slovenian Space Activities Act are not the result of the small number of Slovenian satellites.

The Slovenian space sector has substantial opportunities, particularly in emerging technologies. Participation in next-generation space projects, such as satellite technology, space exploration, and sustainable space practices, presents significant growth potential. The expansion of educational programs in space studies could position Slovenia as a regional hub for space education, further enhancing its innovation capacity. Moreover, the increasing privatization of space activities offers opportunities for Slovenian start-ups and businesses to innovate and enter new market segments, thereby contributing to the growth of a circular space economy.

The potential threats to the Slovenian space sector's success are rooted in technological and financial barriers. The high costs and complexity of space ventures pose significant challenges for a smaller nation with limited resources. Furthermore, while international regulatory changes may not be imminent, any future alterations to space law and policy could impact Slovenia's activities and partnerships. The global space sector is marked by intense competition, with major players investing heavily in technology and market expansion, which could overshadow the efforts of smaller countries like Slovenia. To remain competitive, it is crucial for Slovenia to maintain flexibility in its national legislation, allowing space for all actors in the space sector and ensuring the development of a highly educated workforce to support future generations.

Picture 1: SWOT Analysis of Slovenian Space Sector

Threats	Strengths
- Technological barriers - High costs of space ventures - Alternations in international law - Competitive global landscape	- Proactive regulatory framework - Supervision and state registry - Sustainability - Environmental leadership - International partnership - Education and research focus
Opportunities	**Weaknesses**
- Emerging technologies - Expansion of educational programmes - Supporting start-ups and circular space economy	- Small industry - Depending on international cooperation - Regulatory gaps - Lack of high-profile professionals; etc: space law

Source: the author's own work.

7. Conclusion: searching for an answer in pursuing a holistic approach

The development of international space law is moving from traditional governance to a new global governance of the international community that considers actors other than states. The sustainable development of space and activities on Earth using space applications leads to the achievement of the SDGs, which are the foundation for the establishment of inter-national relations based on justice, trust, and solidarity. At the same time, such conduct promotes the protection of human rights and the preservation of the space environment for future generations. The application of soft law forms of international law in the space domain is of paramount importance and allows global challenges to be met more quickly, both on Earth and in outer space. Where there are challenges, there are also opportunities. But opportunities usually require acting with a certain degree of responsibility. And it is the responsibility of international law actors to preserve the environment of outer space and to use its resources responsibly that constitutes one of the missing components of the legal and normative regulation of outer space. This statement opens another important question which needs to be answered. The

legal regulation of outer space must be seen from a broader perspective, one that is much more adapted to today's developments, both technological and in terms of raising collective consciousness. Given the technical complexity of space law and its scientific research development, there is a need to shift towards New Global Governance, where standards, declarations, and guidelines are integrated into domestic law, directly influencing actors such as the private sector and society. The central challenge lies in ensuring that space is used in a safe, secure, and sustainable manner by an ever-increasing number of actors.

SWOT analysis reveals that while Slovenia has established a promising foundation in the space sector through robust legislation, strategic partnerships, and educational initiatives, it must navigate challenges related to its size, dependency on international cooperation, and dynamic global competition. To maintain and enhance its space sector, Slovenia must capitalise on its strengths, address its weaknesses, seize emerging opportunities, and mitigate potential threats. Since international space law requires a holistic approach, the importance of a defined national law on space activities is even more important. Given the developed private sector in Slovenia, it is crucial to follow the state's transparent and precise operational guidelines from the state is critical, if not essential.

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Temporary protection of displaced persons: the case of refugees from Ukraine

*Ana Ćurčija**

ABSTRACT

Whilst armed conflict of the Russian Federation against Ukraine threatens global stability and security, it has also caused a humanitarian crisis and a mass influx of displaced persons from Ukraine to Europe. The European Union's responded to this migration crisis by activating the Temporary Protection Directive, an instrument adopted within the framework of the Common European Asylum System, that regulates the status of temporary protection. Temporary protection exists separately from the regime of international protection, as it is a pragmatic mechanism, that is activated only in emergency crisis situations. The role of temporary protection is twofold, as it namely ensures immediate reception and protection of a large number of asylum seekers with the aim of respecting the principle of non-refoulement, all while preventing the overload and breakdown of the asylum systems of the receiving countries, as it is also a shortened procedure for granting protection to refugees. In this article, we will present the mechanism of temporary protection and its application in practice, on the example of the mass arrival of refugees from Ukraine.

Keywords: international protection, temporary protection, mass influx, displaced persons, solidarity mechanism

* Ana Ćurčija, New University, Faculty of Government and European Studies, Žanova ulica 3, 4000 Kranj, Slovenia, e-mail: Ana.curcija@student.nova-uni.si.

Začasna zaščita razseljenih oseb: primer beguncev iz Ukrajine

POVZETEK

Napad Ruske federacije na Ukrajino je ogrozil svetovno stabilnost in varnost, povzročil humanitarno krizo ter množični prihod razseljenih oseb iz Ukrajine v Evropo. Evropska unija se je na to migracijsko krizo odzvala z aktivacijo Direktive o začasni zaščiti, instrumenta, ki je sprejet znotraj skupnega evropskega azilnega sistema in ureja status začasne zaščite. Posebnost začasne zaščite je v tem, da ta obstaja ločeno od režima mednarodne zaščite, saj je to pragmatičen mehanizem, ki se aktivira le v izrednih kriznih razmerah. Vloga začasne zaščite je dvojna, in sicer zagotoviti takojšen sprejem in zaščito velikemu številu prosilcev za azil s ciljem spoštovanja načela nevračanja, hkrati je to tudi skrajšan postopek za podelitev zaščite zaradi preprečevanja preobremenjenosti in zloma azilnih sistemov držav sprejemnic. V tem prispevku bomo predstavili mehanizem začasne zaščite in njeno uporabo v praksi, na primeru množičnega prihoda beguncev iz Ukrajine.

Ključne besede: mednarodna zaščita, začasna zaščita, množičen prihod, razseljene osebe, solidarnostni mehanizem

1. Introduction

On 24 February 2022, Russia invades Ukraine, which is the first armed attack on an independent and sovereign European country since the Second World War. Since then, we have watched the Russian Federation deny and violate the international legal order and threaten world peace. International law exists for the solidarity of the countries of the world, as an instrument to ensure peace and to protect human rights and fundamental freedoms, democracy and the doctrine of the rule of law. Therefore, solidarity, (especially) between European countries and with Ukraine, is (also) crucial to mitigate the war and to rehabilitate its consequences.

In this situation, the institutions of the European Union (hereinafter EU) and its Member States have a multifaceted role to play in safeguarding the values on which the EU is founded. In this paper, we focus on the EU's response in order to protect

those who, in addition to those who remain in Ukraine, suffer the consequences of this war. Since the beginning of the war until the end of December 2023, almost six million people have fled Ukraine for Europe (Operational data portal, 2023, e-source), which is the biggest refugee crisis since the Second World War (Koo, 2022, e-source). This massive and sudden influx of refugees from Ukraine posed a risk to the functioning of asylum systems in EU Member States (Scissa, 2022, e-source), whilst the refugees had to be guaranteed a prompt and dignified reception in an EU Member State and certain rights under international law. This is why the Council of the EU (hereinafter the Council) activated Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (hereinafter referred to as Directive 2001/55/EC or the Temporary Protection Directive), which regulates temporary protection status. Directive 2001/55/EC defines temporary protection as an exceptional procedure which provides immediate and temporary protection in the event of mass arrivals of persons from third world countries who are unable to return to their country because of armed conflict or systematic and human rights violations (Temporary Protection Directive, Article 2, para. 1).

Given that the Directive has been activated for the first time in 21 years after its adoption and represents one of the EU's responses to the first armed conflict by a sovereign state in Europe since the Second World War, it seems important to analyse its application in practice. We are therefore interested in the use of temporary protection for displaced persons in the case of refugees from Ukraine.

After an introductory chapter, we introduce the concept of temporary protection and, in addition to the definition, highlight its legal regulation, i.e. Directive 2001/55/EC. We first summarise the historical factors that have contributed to the legal regulation of this status in the EU. We then present the provisions of this Directive. We review its strengths and weaknesses and, on the basis of an analysis of selected theoretical works, we try to disclose why it has never been activated until 2022, after twenty-one years and numerous migration crises in the EU Member States. In the

third part, we examine the Russian invasion of Ukraine. We present the response of the EU institutions to the massive influx of people from Ukraine and the Implementing Decision 2022/382, which activated the Temporary Protection Directive. We examine the response of doctrine and international organisations to this decision. Then we illustrate the application of the Directive in practice, focusing on the response of the EU Member States. In the concluding chapter, we summarise the facts and relevant findings and critically evaluate the situation.

2. Temporary protection mechanism

2.1. Temporary protection

Temporary protection is a mechanism to cope with mass arrivals of people fleeing armed conflict, violence, climate change or disasters from their countries of origin (Coles in, Lambert, 2021, p. 249). It provides refugees with minimum standards of protection and refoulement (Guidelines on Temporary Protection or Stay Arrangements, 2014, point 4). This is a pragmatic way of providing international protection in emergency situations (Note on international protection, 1994, para. 45).

The concept is based on the assumption that if voluntary return to the country of origin is not possible, a way will be found to resettle the refugees permanently in the receiving countries (Greig, in Lambert, 2021, p. 249). The majority doctrinal view is that temporary protection has become part of customary international law (for a more detailed argument, see: Greig, in Lambert, 2021, p. 252).

Lambert explains and justifies, with reference to the profession, that temporary protection imposes an obligation on states to respect the principle of *non-refoulement* and requires states and international organisations to cooperate and find durable solutions (Greig, in Lambert, 2021, p. 250). The link between the obligation to receive and protect large numbers of persons and the obligation to find durable solutions for their continued stay in the receiving countries in the event of an inability to return to their country of origin is a positive aspect of temporary protection. The doctrine points out a number of shortcomings of this protection, including the fact that while beneficiaries of tempo-

rary protection are initially granted reception and basic rights, after a certain period of time they should be guaranteed full rights set out in the Convention relating to the Status of Refugees (hereinafter also the Geneva Convention) and its Protocol relating to the Status of Refugees (hereinafter also the New York Protocol). Integration of beneficiaries of temporary protection in receiving countries is often the durable solution, as they face contemporary challenges such as natural disasters, armed conflicts and cooperation between countries to find durable solutions is often lacking Greig, in Lambert, 2021, p. 250).

Premature return of asylum seekers to their country of origin, which is no longer safe for them, would violate the principle of non-refoulement. As a result, beneficiaries of international protection reside legally in the receiving countries and are guaranteed rights under both the provisions of the Geneva Convention and human rights standards. This leads to an almost inevitable integration of these persons in the receiving countries, as the stabilisation process in the refugees' countries of origin takes longer or occurs slowly or not at all (Durieux, 2021, pp. 678-679). This, Durieux explains, is the problem with the Geneva Convention's arrangements for the mass arrival of displaced persons. It does not define the extent of the principle of non-refoulement when the mass arrival of displaced persons threatens the internal security of the receiving State and it does not define the strain on its resources, nor does it define the legal situation of persons in the event of their mass arrival and, lastly, it does not define the extent of the international community's solidarity in receiving these persons and providing durable solutions for their continued stay in the receiving States (Durieux, 2021, p. 679).

At EU level, the European Commission (hereinafter the Commission) has clarified in its proposal for a Temporary Protection Directive that temporary protection is not a third form of protection alongside refugee and subsidiary protection status, but a tool serving the Common European Asylum System, (Proposal for a Council Directive on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2000, p. 3, 1.5 point) and that the temporary protection mechanism should not prejudge the approval of refugee status

(Ibid, p. 27, recital 10). Temporary protection therefore does not fall within the scope of international protection under Directive 2011/95/EU.

2.2. Temporary Protection Directive

2.2.1. Historical background

The concept of temporary protection has its origins in Australasia, and its understanding and regulation in international law is mainly based on European practice and European law (Durieux, 2021, p. 686). Temporary protection came into focus in the 1990s (Durieux, 2021, p. 686) when the war in the countries of the former Yugoslavia, which caused a humanitarian and migration crisis, made it necessary to provide protection to 1.8 million refugees and displaced persons who had fled Bosnia and Herzegovina for Europe (A Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia, 1992, pt. 1). At the time, the United Nations High Commissioner for Refugees (hereinafter UNHCR) proposed temporary protection, considering that it would not be practical to deal with such a large number of displaced persons from third countries on an individual basis. It also envisaged that temporary protection should ensure reception, respect for basic human rights and the return of displaced persons to their countries of origin when the situation in those countries becomes suitable for return (A Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia, 1992, pt. 5).

The creation of the institution of temporary protection had to be in line with the standards of protection of the rights of refugees guaranteed by the Geneva Convention and the European Convention on Human Rights, as the European countries receiving refugees from the former Yugoslavia are all signatories to both conventions (Kälin, in Durieux, 2021, p. 687). The UNHCR took on the position that the migration crisis of the mass influx of displaced persons from the former Yugoslavia could be solved with its help and with the help of European countries (Ogata stresses need for solutions to refugee plight, 1996, e-source. The UN High Commissioner stated that conditions must be created to allow refugees to return to Bosnia). This position, as Durieux explains, meant that countries could provide a

lower level of protection in the form of temporary protection, because their help would ensure the return of those persons to their home countries. Temporary protection in the international community comes into play in crisis situations where, as already explained, it is assessed that the displaced persons will be able to return to their country of origin after a reasonable period of time (Durieux, 2021, p. 688).

During the migration crisis of refugees from the former Yugoslavia, EU Member States had their own national legal frameworks for regulating temporary protection (Beirens et al., 2016, p. 4). As mass arrivals continued until the late 1990s, especially in 1999 due to the Kosovo crisis, different national regimes led to secondary movements, with uneven burdens on certain Member States with large numbers of asylum seekers (Akram, Rempel, in: Beirens et al., 2016, p. 5). The need for harmonisation of temporary protection status in EU Member States has become apparent (Muriel Guin, in: Beirens et al., 2016, p. 5). The Commission has played a key role, having been given the power to harmonise the migration and asylum policies of EU Member States following the adoption of the Maastricht Treaty (Durieux, 2021, pp. 688-689). When the Tampere Conclusions also set the objective of reaching agreement on temporary protection on the basis of solidarity between EU Member States in the event of a mass influx of displaced persons (Presidency Conclusions, Tampere European Council, 1999, point 16), the Commission proposed the adoption of a Directive on Temporary Protection in October 2000, which was subsequently adopted in July 2001 (Durieux, 2021, p. 689). The Directive binds all Member States except Denmark (Directive 2001/55/EC, 2001, recital 26).

2.2.2. Selected provisions

The Temporary Protection Directive is the first instrument adopted within the Common European Asylum System to harmonise EU Member States' asylum systems (Beirens et al., 2016, p. 8). The two main purposes of this Directive are to establish minimum standards for temporary protection in the event of a mass influx of displaced persons from third countries and to support the balancing of reception efforts and the consequences of reception between Member States (Directive 2001/55/EC,

2001, Article 1). In its proposal for a Temporary Protection Directive, the Commission outlined its objectives: to ensure the immediate protection and rights of beneficiaries of temporary protection; to prevent the collapse of national asylum systems in the event of a mass influx of displaced persons; to clarify the relationship between temporary protection and the protection provided for in the Geneva Convention; and to ensure that there is a balance of efforts and a practical implementation of the principle of solidarity between Member States in the reception of beneficiaries of temporary protection (Proposal for a Council Directive on minimum standards for giving temporary protection in the event of mass influx of displaced persons, 2000, pp. 6-7, point 5.1).

According to Article 2.a of the Temporary Protection Directive, temporary protection is an exceptional procedure to be triggered in the event of a mass or imminent arrival of displaced persons and to provide immediate and temporary protection to these persons, in particular where there is also a risk that, as a result of the mass arrival, the asylum system will not be able to process the arrival without adverse effects on its effective functioning.

The Directive defines displaced persons as third-country nationals or stateless persons who, as a result of armed conflict, endemic violence, or because they are at high risk or because they have already been the victims of systematic or generalised human rights violations, have been forced to leave their country of origin or have been evacuated, and are unable to return to a safe and durable situation because of the situation in their country of origin (Directive 2001/55/EC, 2001, Article 2(c)).

Mass arrival is defined as the spontaneous arrival or arrival by evacuation programme of a large number of displaced persons from a particular country or a particular geographical area (Directive 2001/55/EC, 2001, Article 2(d)). Mass arrival is the main criterion for activation of temporary protection, which must include the following elements: (1) the arrival of an extremely large number of persons; (2) the displaced persons come from a particular third country or geographical area; (3) the displaced persons cannot return to their country of origin; (4) such arrival threatens to cause adverse effects on the asylum systems of the Member States (Beirens et al., 2016, p. 38).

The Directive also stipulates that when applying temporary

protection, Member States respect human rights and fundamental freedoms and the principle of non-refoulement, and have the specific right to provide more favourable conditions for beneficiaries of temporary protection than those laid down in the Temporary Protection Directive (Directive 2001/55/EC, 2001, Article 3, points 2 and 5). Temporary protection shall be granted, implemented and terminated after regular consultation with UNHCR and other relevant international organisations (Directive 2001/55/EC, 2001, Articla 3, para. 3).

The existence of a mass influx of displaced persons is established by a Council implementing decision adopted by qualified majority. The Council Decision activates or establishes temporary protection in all EU Member States for the displaced persons to whom it applies. The Council adopts the decision on the basis of a proposal from the Commission. In addition, Member States have the right to request the Commission to propose that the Council adopt the decision. The European Parliament is informed of the adoption of the decision (Directive 2001/55/EC, 2001, Article 5).

Temporary protection lasts for one year, with the possibility of automatic renewal for up to one more year. Where the grounds for protection are of a longer duration, the Council, acting on a proposal from the Commission, shall decide to extend the temporary protection for a further year. Member States shall have the right to address a request to the Commission to submit to the Council an extension of the temporary protection. The European Parliament shall be informed of the Council's decision (Directive 2001/55/EC, 2001, Article 4).

Temporary protection ends when the maximum duration is reached or when the Council adopts a decision on a proposal from the Commission, which also examines any request by Member States to end temporary protection after finding that the situation in the displaced persons' country of origin has become safe and durable for their return to that country. The European Parliament is to be informed of the decision (Directive 2001/55/EC, 2001, Article 6).

EU Member States have funding from the European Refugee Fund to implement the measures set out in the Temporary Protection Directive (Directive 2001/55/EC, 2001, Article 24). They take in persons eligible for temporary protection on the basis of mutual solidarity, with an indication of their reception capacity,

which is then specified in the Council implementing decision activating temporary protection (Directive 2001/55/EC, 2001, Article 25, para. 1).

The Temporary Protection Directive also contains a so-called solidarity mechanism. Member States ensure that persons who have not yet arrived on their territory but who meet the conditions for temporary protection have expressed their willingness to be admitted to their territory. Where the number of displaced persons exceeds the reception capacity of a Member State, the Member State concerned is provided with appropriate support (Directive 2001/55/EC, 2001, Article 25, para. 2 and 3). The Solidarity Mechanism also provides for cooperation between Member States on the relocation of beneficiaries of temporary protection, taking into account their consent to relocation. When a Member State is overwhelmed, it can send a request for the transfer of beneficiaries of temporary protection to all Member States, informing the Commission and the UNHCR, which will then inform the Member States of their reception capacities to transfer beneficiaries of temporary protection to their territory. Once the transfer has taken place, the residence permit and the obligations arising from the temporary protection status shall cease in the Member State of departure, which shall be obliged to provide the new receiving State with information on the temporary protection status. The obligations arising from the temporary protection status are then transferred to the new receiving State (Directive 2001/55/EC, 2001, Article 26).

2.2.3. Advantages and disadvantages of the Temporary Protection Directive

The Temporary Protection Directive has its advantages and disadvantages. It has the advantage of a shortened procedure which provides immediate protection against refoulement, while avoiding overburdening Member States' asylum systems. Another positive aspect of the Temporary Protection Directive is that it allows beneficiaries of temporary protection to apply for asylum at any time during the period of protection (Directive 2001/55/EC, 2001, Article 17, para. 1).

Furthermore, the Temporary Protection Directive provides for a comprehensive set of rights for beneficiaries of tempo-

rary protection, which, while less than that granted to persons with refugee status, is greater than that granted to applicants for international protection (Durieux, Hurtwitz, in Durieux, 2021, p. 690). This advantage also proves to be a certain disadvantage since providing such range of rights can be financially burdensome for certain Member States, which may make temporary protection an unattractive solution (Beirens et al., 2016, p. 25).

Mass arrival is defined broadly in the Temporary Protection Directive, allowing temporary protection to be activated in different cases of mass arrivals and in different situations of pressure on Member States. This means that the grounds for activating temporary protection depend on an assessment of each individual mass arrival case (Beirens et al., 2016, p. 15). However, the generality of this definition makes it difficult to apply in practice, as there are no criteria to determine in advance when there is a large-scale arrival of displaced persons. This leads to dilemmas and different understandings on when it is appropriate to activate temporary protection.

The side effects referred to in Article 2a of the Temporary Protection Directive and the criteria for determining side effects should be clarified, given that there are differences between Member States' capacities to cope with a mass influx of displaced persons. The generality of the provisions of the Directive results in the activation of temporary protection being at the discretion of EU Member States, making the activation process itself lengthy and politicised and the likelihood of activation actually taking place very low (Beirens et al., 2016, pp. 17-19).

The question arises whether it is not a weakness of this Directive that the Commission is the sole initiator of the procedure and that the Member States do not have the power to propose directly to the Council the activation of temporary protection (Beirens et al., 2016, p. 17). The European Parliament does not have a prominent role in the decision-making process. For this reason, and because of the generality of the definitions of the key concepts, the procedure of activation of temporary protection itself may become the subject of political debates in the Council, rather than the subject of a judgement on whether the conditions for activation of temporary protection are met (Beirens et al., 2016, pp. 20-22).

The Temporary Protection Directive is the first and still the only legally binding instrument that allows for the sharing of the efforts to admit large numbers of persons between Member States. However, it is precisely voluntary solidarity that has proved to be the biggest weakness of the Temporary Protection Directive. Indeed, the objective of the Directive to ensure a balance of efforts between Member States has been found to be undermined by the absence of clearly defined rules on fair burden sharing and relocation and by the absence of common criteria for calculating the reception capacity of each Member State (Beirens et al., 2016, p. 23). Another thing that complicates fair burden-sharing is the provision in Article 25(2) of the Directive that beneficiaries of temporary protection may declare their wish before they arrive in the EU that they wish to be admitted to the territory of a particular Member State (Directive 2001/55/EC, 2001, Article 25, para. 2). Although this provision is not in itself a negative aspect of the Directive, it may be problematic in practice, as it may lead to a disproportionate number of persons expressing their willingness to reside in the territory of only those Member States which provide higher standards of benefits. This is due to the fact that in practice common standards of temporary protection are not ensured in all EU Member States (Beirens et al., 2016, p. 24).

These weaknesses are the main reasons why the Temporary Protection Directive was not activated before 2022. When migration flows put pressure on Member States' asylum systems in 2011-2014 due to the arrival of large numbers of people from Tunisia, Libya and Syria in Europe, the Italian and Maltese governments proposed to activate this mechanism. The response of the Council (Justice and Home Affairs) at the time was that the criteria for activation were not met. The Directive was not activated even in 2015, when around one million displaced persons from Syria entered the EU illegally (Ciğer, 2022, e-source), which at the time was considered as a larger influx of asylum seekers at one time than in the whole period 2001-2014 combined (Beirens et al., 2016, p. 33). As such an influx put severe pressure on the asylum systems of Greece and Italy, Council Decision (EU) 2015/1601 was adopted in 2015, ordering the relocation of a number of refugees from Italy and Greece to other EU Member States. Hungary and Slovakia opposed the decision and brought proceedings

before the CJEU in the joined cases of *Slovakia v. Council and Hungary v. Council*. Recitals 225-227 show that Slovakia pleaded that activating temporary protection would be a better way to deal with the migration crisis in Italy and Greece (CJEU *Slovakia v. Council and Hungary v. Council,* C643/15 and C-647/15, 26.7.2017).

The CJEU agreed with the Council when it took the view that the temporary protection mechanism would not provide an effective response to the crisis situation in Italy and Greece in the specific case at hand, since the Temporary Protection Directive provides that persons are entitled to temporary protection in the Member State in which they are located, which would not relieve Italy and Greece of the large number of migrants who have already arrived on their territory. On Slovakia's argument regarding the decision to grant international protection status by Implementing Decision 2015/1601 instead of temporary protection status, which confers a lesser range of rights on its beneficiaries, the CJEU stated that this was a political decision, the appropriateness of which it could not judge (CJEU *Slovakia v Council and Hungary v Council*, C643/15 and C-647/15, 26.7.2017, points 256 and 257 of the Explanatory Memorandum).

Based on the EU's responses to migration crises in the past, there has been a general consensus among experts that the Temporary Protection Directive has not been applied, mainly due to political disagreement between Member States. Some experts consider that the use of temporary protection depends mainly on political will, as its activation initially requires a proposal from the Commission and then the approval of a qualified majority in the Council (Schultz et al., 2022, e-source). Garlick notes that the behaviour of some Member States during the 2015 migration crisis shows that they were concerned that activating the Directive would encourage more refugees to come from Syria (Garlick, 2016, pp. 116-119). Garlick's opinion is confirmed by a study carried out on temporary protection. This study states that some Member States are reluctant to apply temporary protection because activating this mechanism would be proof that their asylum systems are not functioning. On the other hand, some Member States consider that the activation of temporary protection is unjust, since it would work to the advantage of those Member States that are unable to process the increased number of asylum

applications because they have long ignored the need to reform their asylum systems. Moreover, the study shows that some Member States find temporary protection an unattractive option because, by introducing it, they would not be able to have sufficient control over which persons they allow to enter their territory (Beirens et al., 2016, p. 35).

3. Temporary protection in the case of refugees from Ukraine

3.1. Russian Federation attack on Ukraine

The invasion of Ukraine by the Russian Federation began on 24 February 2022. Although Russian President Vladimir Putin initially defiantly declared that it is not an armed conflict but a »special military operation« (Clark, et. al., 2022, p. 1), the Russian army's attacks aimed at occupying cities across Ukraine (The Russian Invasion of Ukraine, 2022) show the motive for Russia's military aggression - the drive to occupy and change the regime in Ukraine, a former member of the USSR (Clark, et. al., 2022, p. 1). The President of Ukraine, Volodymyr Zelensky, immediately declared martial law and called for a general mobilisation of the militarily capable population of Ukraine, while the armed conflict itself has caused millions of people to flee Ukraine, especially when the Russian army started targeting civilians with rockets and artillery in its 'special military operation'. One of the first attacks on civilians took place in Mariupol, twenty days into the war, when the Russian army bombed a theatre where hundreds of people, mostly women, children and the elderly, were sheltered (The Russian Invasion of Ukraine, 2022).

Such unprovoked attack has been widely condemned by the international community. The United Nations High Commissioner for Refugees, Filippo Grandi, condemned Russia's actions and called for cooperation on the first day of the armed conflict to provide humanitarian assistance to those fleeing the war and seeking protection in neighbouring countries. In his statement, he also called on neighbouring countries to keep their borders open to refugees from Ukraine and expressed support for all those who will be able to cope with the arrival of the forcibly displaced Ukrainian population (Statement on the situation in Ukraine at-

tributed to UN High Commissioner for Refugees Filippo Grandi, UNHCR, 2022, e-source).

3.2. The European Union's response

On 24 February 2022, the European Council held an extraordinary meeting in Brussels and in its conclusions expressed support for Ukraine and strongly condemned the military aggression by the Russian Federation, which it described as a flagrant violation of international law and the United Nations Charter, and a threat to European and global stability (European Council Conclusions on unprovoked and unjustified military aggression by Russia against Ukraine, 2022, point 1). The conclusions also announced the adoption of additional restrictive measures against Russia and Belarus (European Council Conclusions on unprovoked and unjustified military aggression by Russia against Ukraine, 2022, point 5).

3.2.1. Preparation of Implementing Decision 2022/382

In this light, on 2 March 2022, the Commission made a proposal for the adoption of an implementing Decision on the determination of the existence of a mass influx of displaced persons from Ukraine with the effect of imposing temporary protection for the first time since 2001, when the Temporary Protection Directive was adopted. In its proposal, the Commission predicted that the EU would face a mass influx of displaced persons from Ukraine, given that more than 650,000 displaced persons arrived in the EU via Poland, Slovakia, Hungary and Romania between 24 February and 2 March, and that this number is set to increase. In the light of the situation, it concluded that activation of temporary protection is an appropriate way to provide immediate protection to persons from Ukraine and to enable them to have access to the same rights in all EU Member States. On the other hand, Commission pointed out that temporary protection is also a way to avoid straining the asylum systems of Member States, which would undoubtedly be under extreme pressure due to such a large-scale mass influx (Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July

2001 and having the effect of introducing temporary protection, 2022, pp. 1-2).

In addition, Ukrainian citizens can enter and stay legally in the EU for 90 days without a visa. Those Ukrainian nationals who resided in the EU before the outbreak of the war will be able to apply for international protection after the expiry of their period of legal residence in an EU Member State. In this case, the Commission estimates, temporary protection will further relieve the burden on Member States' asylum systems to process asylum applications (Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001 and having the effect of introducing temporary protection, 2022, p. 2). The Commission notes that the right of citizens of Ukraine to move freely within the EU without a visa allows persons to choose the Member State in which to enjoy their temporary protection rights and to join their family or friends in the extensive diasporas that exist across the EU, which will facilitate the balancing of efforts in managing mass arrivals between Member States. In such cases, the Commission does not rule out the possibility for these persons to take advantage of the possibility of legal migration. Temporary protection, as explained by the Commission, will allow Member States to effectively manage and control the flow of displaced persons from Ukraine, with additional support for those Member States that are overburdened. To this end, Member States will communicate to each other and to the Commission, through the Solidarity Platform, their reception capacities and the number of persons enjoying temporary protection on their territories, as provided for in Article 27 of the Temporary Protection Directive, with the Commission playing a coordinating role (Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001 and having the effect of introducing temporary protection, 2022, p. 3).

3.2.2. Adoption of Implementing Decision 2022/382

The Council acted swiftly on the Commission's proposal and unanimously adopted Council Implementing Decision (EU)

2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of imposing temporary protection (Implementing Decision 2022/382), which entered into force on the day of its publication, i.e. on 4 March 2022 (Council Implementing Decision 2022/382, 2022). This swift EU response to the humanitarian and migration crisis was praised by the United Nations High Commissioner, Filippo Grandi, immediately after the activation of the Temporary Protection, and was considered an appropriate way to provide protection and stability to refugees from Ukraine (Grandi, 2022, e-source).

As mentioned earlier, Ukrainian nationals have the right to move freely within the EU for 90 days during a 180-day period. This does not affect their ability to be issued with a residence permit at any time during that period. Implementing Decision 2022/382 also clarifies that beneficiaries of temporary protection can only enjoy the rights of temporary protection status in the territory of the Member State which issued the residence permit (Council Implementing Decision 2022/382, 2022, seventeenth recital).

Beneficiaries of temporary protection are persons who left Ukraine on or after 24 February 2022 because of the military invasion by the Russian armed forces. According to Council Implementing Decision 2022/382, these are: (1) Ukrainian nationals who resided in Ukraine before 24 February 2022 and their close family members; (2) stateless persons or nationals of third countries other than Ukraine who enjoyed international protection or equivalent national protection in Ukraine and their close family members (Council Implementing Decision 2022/382, 2022, Article 2).

It is further provided that either this Decision or protection under national law may be applied to third-country nationals and stateless persons who have proved that they were lawfully residing in Ukraine on the basis of a permanent residence permit before 24 February, if they are unable to return to a safe and durable situation in their countries of origin (Council Implementing Decision 2022/382, 2022, Article 2, para. 2). If they cannot produce the relevant documents, Member States must propose another appropriate procedure (Council Implementing Decision 2022/382, 2022, recital 12).

The Commission subsequently clarified that temporary protection does not, in principle, apply to the following categories

of persons: (1) Ukrainian nationals and stateless persons or nationals of third countries other than Ukraine who have enjoyed international or equivalent protection in Ukraine, and that have, before 24 February 2022, been displaced from Ukraine or left Ukraine before that date for reasons such as work, study, vacation, family or medical visits or for other reasons; (2) stateless persons or third-country nationals, other than nationals of Ukraine, who can prove that they have, before 24 February 2022, had a valid permanent residence permit in Ukraine, but who may be able to return to their country or region of origin in a safe and durable manner; and (3) stateless persons or third-country nationals other than Ukraine who were temporarily lawfully residing in Ukraine prior to 24 February 2022 for the purpose of work or study, both in the event that they are able to return to their country or region of origin, and in the event that they are not able to return to a safe and durable situation in their country or region of origin (Commission Communication on operational guidelines for the implementation of Council Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of imposing temporary protection 2022/C 126 I/01, 2022).

Implementing Decision 2022/382 provides that Member States may extend the protection provided for in that Decision to the above categories of persons (Implementing Decision 2022/382, 2022, Article 2, paragraph 3). The Decision therefore leaves Member States free to decide whether to grant temporary protection, while advising them to at least admit such persons to their territory on humanitarian grounds, without requiring them to present a valid visa or evidence of sufficient means of subsistence or valid travel documents, in order to ensure their safe passage with a view to their return to their countries of origin (Implementing Decision 2022/382, 2022, thirteenth recital).

3.2.3. Reactions of the professional public to the adoption of Implementing Decision 2022/382

We would also like to add the reaction of some experts who were surprised by the activation of temporary protection for refugees from Ukraine in the EU, as they considered the Tempo-

rary Protection Directive to be a dead letter. McAdam estimated that temporary protection will save millions of people who have fled Ukraine, while also pointing out that this form of protection should not be an excuse to grant fewer rights than those guaranteed by the Geneva Convention and the New York Protocol (McAdam, 2022, e-source). Goodwin-Gill believes that the activation of the Temporary Protection Directive is undoubtedly a positive response by the EU, revealing that the scale of mass arrivals is not an obstacle to the provision of protection when Member States cooperate with each other. He suggests that the reason for the use of temporary protection is the inevitability of the situation, the immediate need for protection and the fact that the war is so close to Europe. Although there are uncertainties about finding durable solutions, he believes that temporary protection is the most appropriate way to comply with the principle of non-refoulement at this time, given the situation (Goodwin-Gill, 2022, e-source). Uncertainty about what will happen to persons with temporary protection if they are unable to return to Ukraine and what the EU's approach will be in this case was also highlighted by other experts. Enríquez considers that temporary protection is an appropriate response to the current situation, but notes that if the situation in Ukraine does not stabilise after the end of temporary protection, the integration of refugees from Ukraine who will apply for asylum will be even more challenging for Member States, whose administrative and financial resources will be strained, and for the refugees from Ukraine themselves, as it is difficult to find job and accommodation stability in some Member States (Enríquez, 2022, e-source). In this context, Koo also warns that temporary protection is not a permanent solution and that EU values and solidarity will be tested if the situation in Ukraine becomes a long-term situation. Koo further points out that there are differences in the treatment of temporary protection between third-country nationals and citizens of Ukraine (Koo, 2022, e-source), as it is clear from Implementing Decision 2022/382 that not everyone is eligible for temporary protection unless Member States themselves decide to extend temporary protection (Council Implementing Decision 2022/382, 2022, Article 2, para. 3).

Experts are trying to find out what is the reason for the EU's solidarity with refugees from Ukraine, as in the past the EU has been strongly criticised precisely for the lack of cooperation be-

tween EU Member States in dealing with migration crises. Ciğer assessed that the activation of temporary protection depends on the political will of the Commission and the Council. This now exists in the case of refugees from Ukraine, because of the rapid and large-scale displacement of people from a European country as a result of unjustified Russian aggression (Ciğer, 2022, e-source). Karageorgiou and Noll argue that the lack of solidarity in past migration crises shows that the EU is united only when it is politically appropriate to do so, which is why solidarity in the EU as such does not refer to refugee protection (Karageorgiou, Noll, 2022, e-source). The dilemmas regarding the reasons for solidarity in the mass influx of refugees from Ukraine are best explained by van Selm's assesment. She notes that the reason for activating temporary protection is that the EU had to respond not only to a humanitarian crisis, but also to Russian aggression, which risks destabilising Europe and the entire regional security architecture. The fact that the EU activated the Temporary Protection Directive in the wake of the war in Ukraine shows that the solidarity of the EU Member States is demonstrated when they have to be united for reasons that go beyond the issue of forms of protection for displaced persons. The second reason van Selm points out is that Ukraine borders four EU Member States and the rapid and imminent arrival of large numbers of refugees at their borders has left the EU with virtually no alternative but to activate temporary protection (Van Selm, 2022, e-source).

3.3. Temporary protection in practice

According to the Commission, it should not be a barrier to entry to the EU if displaced people do not carry travel documents, as all Member States are obliged to admit them on humanitarian grounds (Information for people fleeing the war in Ukraine, European Commission, 2022, e-source). All Member States in principle allow the entry of nationals of Ukraine who do not have travel documents (European Union/Ukraine: EU member states start implementing Temporary protection directive, Fragomen, 2022, e-source) on the basis of other identity documents such as an identity card, an expired driving licence or passport or a birth certificate, if they have applied for temporary protection. In addition, Member States bordering Ukraine allow all displaced per-

sons from Ukraine to enter on humanitarian grounds, regardless of whether they are in possession of travel documents (Information for people fleeing the war in Ukraine, European Commission, 2022, e-source). Poland, which faces the highest migration pressure, in practice allows entry to any person coming from Ukraine, even if they do not have any documents (Information for new Arrivals From Ukraine - Arrival to Poland, UNHCR Help Poland, 2022, e-source). In Hungary all displaced persons from Ukraine are allowed entry, even without a passport or visa (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 20). Slovakia as well allows entry without a passport or visa (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 36). Romania allows entry to all persons who have come from Ukraine, but if they have no documents to enter its territory, they must apply for asylum (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 33).

In practice, temporary protection is intended to ensure simplified entry into EU countries by allowing border guards to partially waive border checks (Ukrajina: Komisija predlaga začasno zaščito za ljudi, ki bežijo pred vojno v Ukrajini in smernice za mejne kontrole, Evropska komisija, 2022, e-source). Once admitted, the competent authorities of the Member States should inform the person that he/she is eligible for temporary protection and give him/her guidance on how to obtain this status (Informacije za osebe, ki bežijo pred vojno v Ukrajini, Evropska komisija, 2022, e-source).

The European Council on Refugees and Exiles (hereinafter ECRE) fact sheet, which provides an overview of the application of temporary protection in the Member States for the period up to June 2022, shows that in practice, persons have to lodge an application with the designated competent authority of each Member State in which they wish to benefit from temporary protection. If a person is eligible for temporary protection, after a certain period of time he/she obtains a residence permit and, on that basis, the rights deriving from the temporary protection status (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022), which is undoubtedly a faster process compared to the international protection application procedure, which takes, according to Halpin, approximately

nine to fifteen months (Halpin, 2022, p. 12).

When extending temporary protection to categories of persons other than those listed in Article 2(1) of Implementing Decision 2022/382, Member States are competent to regulate their own rules in this area. This discretionary power leads to significant differences in the Member States' arrangements in this area (Information for new Arrivals From Ukraine - Arrival to Poland, UNHCR Help Poland, 2022, e-source). For example, almost all Member States, except Austria, Estonia, Greece and Hungary, grant the right to temporary protection to stateless persons or third-country nationals who were permanently resident in Ukraine before 24 February and are unable to return to a safe and durable situation in their countries of origin (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, pp. 7, 14, 16 and 20). The Netherlands grants temporary protection only to third-country nationals, not to stateless persons (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 29). France and Finland offer temporary protection to immediate family members of stateless persons or third-country nationals who were permanently resident in Ukraine before 24 February and who are unable to return to a safe and durable situation in their countries of origin (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, pp. 15 and 17). In Slovenia, Luxembourg and Portugal, all stateless persons or third-country nationals who are unable to return to a safe and durable situation in their countries of origin, even if they have been temporarily residing in Ukraine, are entitled to temporary protection (The EU Temporary Protection Directive in practice, 2022, p. 2). Finland has the same arrangement as the states mentioned in the previous sentence (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p.17). In Bulgaria, all stateless persons or third-country nationals who have expressed a wish to be granted temporary protection before 31 March 2022 are entitled to temporary protection. Germany also grants temporary protection to third-country nationals who are unable to return to their countries of origin and who have been legally residing on the territory of Ukraine for durable reasons (e.g. to study or work), even if they do not have a permanent residence permit (Information

Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 4).

Austria and Germany also grant temporary protection status to those citizens of Ukraine who, before 24 February, resided in the territory of those Member States on the basis of a residence permit which is about to expire or which they cannot renew for any reason if they cannot return to Ukraine (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, pp. 7 and 18). Spain shall also grant temporary protection status to those citizens of Ukraine who were legally residing on its territory before 24 February (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 40). The Czech Republic grants temporary protection to citizens of Ukraine who were temporarily residing on its territory without a visa or on the basis of a temporary visa before 24 February (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 12). Finland, the Netherlands and Ireland grant temporary protection to citizens of Ukraine if they were already residing on their territories before 24 February, albeit under different conditions. France grants temporary protection to Ukrainians who were temporarily residing in Europe before 24 February and who cannot safely return to Ukraine. Ukrainian nationals who fled just before 24 February are entitled to temporary protection in Finland, Croatia, Luxembourg and Germany. Belgium grants them temporary protection if they left Ukraine after 24 November 2021, Sweden after 30 October 2021 and the Netherlands if they fled Ukraine after 27 November 2021 (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, pp. 5-6).

Based on the ECRE Information sheet, it is worth pointing out that in regards to the rights granted to displaced persons who are beneficiaries of temporary protection, all EU countries offer access to housing, social protection, education for children and young people, the labour market and health care, to varying degrees. All Member States have introduced the possibility of free public transport, reception centres, border counselling, information centres, psychological support and mental distress call centres. Furthermore, all Member States provide assistance in finding private accommodation, including a social allowance.

Persons with temporary protection are entitled to pocket money in all Member States. The amount and duration of the cash assistance depends on the individual Member State and the personal circumstances of the person with temporary protection. Member States provide assistance in finding employment and, in principle, all Member States have stated that they are committed to supporting the employment of persons with temporary protection and to providing them with vocational training. Most Member States provide free courses in their official languages (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022).

The EU supports Member States' solidarity with Ukraine in several ways. It provides financial assistance to Member States for measures to be taken in the context of the implementation of temporary protection rights, and it also provides financial assistance to Ukraine and Moldova. The Commission provides operational guidance for the efficient, rapid and safe crossing of borders by displaced persons, while EU agencies ensure the presence of their technical assistance staff at Member States' borders. In addition, through its Solidarity Platform, the EU ensures the exchange of information on Member States' reception capacities and coordinates their cooperation (Ukraine: EU steps up solidarity with those fleeing war, European Commission, 2022, e-source). At the beginning of the migration crisis, six Member States committed to accept refugees from Ukraine via Moldova in March 2022 through coordination and participation in this platform. The first transfer was made on 19 March 2022 from Moldova to Austria (Ukraine situation flash update #5, 2022, pp. 4-5). The relocation of Ukrainian refugees from Moldova to the territory of the Member States has continued uninterrupted. Finally, in September 2022, Austria, France, Germany, Ireland, Italy, Latvia, the Netherlands, Norway, Portugal, Spain and Switzerland transferred Ukrainian refugees to their territory from Moldova (Ukraine situation flash update #28, 2022, p. 5).

Seeing as there is still no end in sight to the war in Ukraine, the Council adopted a Council Implementing Decision (EU) 2024/1836 of 25 June 2024 extending temporary protection as introduced by Implementing Decision 2022/382. In the Implementing decision 2024/1836 the Council states that the current situation in Ukraine does not allow the return of displaced per-

sons to Ukraine in safe and durable conditions. Moreover, the Council noted that the number of Ukrainian refugees in the EU is not likely to decrease anytime soon. With this in mind, the temporary protection for Ukrainian refugees has been extended until 4 March 2026. (Council Implementing decision (EU) 2024/1836 of 25 June 2024 extending temporary protection as introduced by Implementing Decision 2022/382).

4. Conclusion

The main focus of this article is the temporary protection mechanism and its application in practice. The international community was positively surprised when the EU activated the Temporary Protection Directive for the first time in 21 years after its adoption, when Russia's aggression against Ukraine triggered the largest mass influx of asylum seekers in recent history. It is particularly commendable that the response of the EU institutions and Member States was extremely swift. The Temporary Protection Directive allows Member States to dispense with complex administrative procedures for entry, which is allowed to all refugees from Ukraine on humanitarian grounds, and for the granting of residence permits, which then give rise to rights for beneficiaries of temporary protection that are the same in all Member States. For citizens of Ukraine and persons who have benefited from international protection in Ukraine, as well as third-country nationals or stateless persons who have resided permanently in Ukraine, the only condition for obtaining temporary protection is that they prove, on the basis of any identification document, that they have fled from Ukraine after 24 February 2022.

Although Member States' approaches are harmonised as regards entry and the rights they grant, we believe that temporary protection should be regulated by a Regulation. The case of protection of refugees from Ukraine has shown that regulation by a Directive cannot create common standards in all EU Member States. Standards in Member States differ drastically with regard to the granting of temporary protection to other categories of third-country nationals and stateless persons, as well as to persons who fled Ukraine before 24 February. It could be argued that these differences are not too much of a problem in the given situation, given that the categories of persons eligible for temporary

protection under Implementing Decision 2022/382 are entitled to temporary protection in all or most Member States. Moreover, these persons may benefit from the possibility of legal migration or international protection if they left Ukraine before 24 February. If third-country nationals or stateless persons who were not permanently resident in Ukraine or who left Ukraine before 24 February are not eligible for temporary protection in a particular Member State, they are allowed to enter Member States to apply for international protection, but only if they are unable to return to their countries of origin. The flexibility and options available, although not the same standards of benefits in all Member States, nevertheless allow for more protection options and for the distribution of displaced persons on the territory of EU Member States, which in particular relieves the burden on Member States bordering Ukraine. Setting aside concerns about what would be an ideal approach, it can be concluded that such an approach provides immediate protection to all displaced persons from the risk of war in Ukraine.

According to experts, based on past EU responses to migration crises, the activation of temporary protection for refugees from Ukraine has shown that the reason for the non-application of the Temporary Protection Directive is due to the political unwillingness of Member States. We do not condone or argue that temporary protection has not been needed in the past or that there are not possible double standards in some Member States with regard to refugees. Temporary protection or voluntary solidarity in the form of relocation were certainly necessary when one million refugees from Syria arrived in Europe in 2015, with Greece facing thousands of refugees per day. Some EU Member States, such as Hungary, which has closed its borders to Syrian refugees (Reid, 2022, e-source), have flagrantly violated the principles of international humanitarian law. The lack of solidarity in this situation with the burdened Member States and with the refugees really shows that the EU needs a compulsory solidarity mechanism. The EU's inadequate response to the migration crises has confirmed the need to reform the legal regime of the European Common Asylum System.

The activation of temporary protection requires political will and solidarity among Member States. This situation needs to be understood more broadly in the case of the massive influx of

refugees from Ukraine. First of all, it should be stressed that such a large-scale influx left no room for any doubt that it was a massive influx of displaced persons, which would certainly lead to the collapse of the Member States' asylum systems and endanger their internal security, while at the same time, as a consequence, would make it impossible to provide adequate protection to the displaced persons. This influx has been rapid, sudden, abrupt and directly on the borders of Poland, Hungary, Romania and Slovakia. These Member States had no choice but to accept the refugees. Moreover, there is another reason for introducing temporary protection - the hope that, with the help of the EU and other international organisations, the need to protect refugees will be temporary. The launch of the temporary protection mechanism is one of the EU's responses to the unjustified armed conflict in Ukraine, and providing adequate protection to refugees from Ukraine is one of the ways for liberal democracy to maintain stability in Europe and the world, to show solidarity and support for Ukraine, and to prevent Russia from possibly taking advantage of the EU's moment of weakness. Such a rush directly to the borders of EU Member States did not leave too much room and time to deliberate on whether or not it was appropriate to activate the Temporary Protection Directive, but was the only instrument that could be used to contain such an influx, while at the same time protecting the refugees from Ukraine and creating a united front in the face of the threat to European and world peace.

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The Right to Life During the Covid-19 Epidemic in Slovenian Society

*Tjaša Pucelj**

ABSTRACT

The outbreak of the COVID-19 epidemic led to a state of emergency and put countries around the world to the test. In this regard, Slovenia was no exception. As a response to the rapid spread of infection, countries introduced containment measures to prevent the spread of the new virus as quickly and effectively as possible, to prevent the collapse of healthcare systems and, above all, to save as many lives as possible. Human rights were at the heart of all this, especially the right to life, as it was the most at risk. The measures adopted by countries during the state of emergency had to have a relevant legal basis and had to be proportionate and limited in duration, as any interference negatively affects human rights and fundamental freedoms relative to its duration. This article focuses on the situation in Slovenia and the right to life during the epidemic, as well as presenting statutory options for the adoption of containment measures. The final chapter focuses on three of the most high-profile decisions of the Slovenian Constitutional Court, which had been adopted during the COVID-19 epidemic.

Keywords: epidemic, COVID-19, right to life, Slovenian Constitutional Court, proportionality, principle of legality

Pravica do življenja v času epidemije v slovenski družbi

POVZETEK

Izbruh epidemije koronavirusa je prinesel izredno stanje in države po svetu postavil pred velik preizkus. Slovenija pri tem ni bila nikakršna izjema. Na hitro širjenje okužb so se države odzvale z uvedbo zajezitvenih ukrepov, katerih namen je bil čim hitreje in čim učinkoviteje preprečiti širjenje novega virusa, preprečiti razpad zdravstvenih sistemov, predvsem pa rešiti čim več življenj. V središču so bile človekove pravice, še posebej pravica do življenja, saj je bila ta najbolj ogrožena. Ukrepi, ki so jih v času izrednega stanja sprejele države, so morali imeti ustrezno pravno podlago, poleg tega pa so morali biti sorazmerni in časovno omejeni, saj se negativni učinki kateregakoli posega v človekove pravice in temeljne svoboščine stopnjujejo glede na čas trajanja. Članek se osredotoča na situacijo v Sloveniji in na pravico do življenja v času epidemije. Predstavljene so tudi zakonske možnosti, ki omogočajo sprejemanje zajezitvenih ukrepov. Zadnje poglavje se osredotoča na tri odmevnejše odločitve Ustavnega sodišča Republike Slovenije, ki so bile sprejete v času epidemije koronavirusa.

Ključne besede: epidemija, koronavirus, pravica do življenja, Ustavno sodišče Republike Slovenije, sorazmernost, načelo legalitete

1. Introduction

Life and health are the most important values of a human being. In the modern world, these values are protected by laws (Czechowicz, 2021), with the right to life being among the highest or most protected constitutional rights and fundamental freedoms hierarchically. Its special position also arises from the fact that without its effective protection, the enjoyment of other rights and fundamental freedoms is not possible. The Constitution of the Republic of Slovenia commands an equal valuation of the life of all individuals and opposes the conception of a human being as an object. A human being is the subject of rights and

fundamental freedoms and must not be reduced to the level of an object or thing (Ivanc, 2011a).

However, diseases have been threatening the lives and health of people for centuries and, consequently, their existence as well. The high mortality rate is mainly due to a lack of knowledge about numerous new diseases and poor early detection systems (Czechowicz, 2021). Precisely because of the uncertainty about what the new virus will bring, the COVID-19 epidemic has deeply impacted our lives and society over the past four years. It has caused many hardships and led to various problems. It has shown us that COVID-19 is not only a medical problem but has also challenged our legislation. (Zorčič, 2021).

By declaring an epidemic, the state faced the challenge of finding appropriate measures to contain the spread of COVID-19, while also having to deal with the lack of adherence to the most basic preventive measures and the low level of vaccination coverage among the adult population (Letnar Černič, 2021). Similarly, the courts faced a challenging task regarding measures to limit COVID-19, as they had to balance between the right to life, human dignity, and health protection on one hand and the right to freedom and security, protection of personal data, freedom of assembly, equality before the law, prohibition of discrimination, consumer protection, and freedom of economic initiative on the other (Jerak, 2021).

The aim of this article is to examine the legal legislation and the legal basis for the state to take measures, as well as the decisions of the Constitutional Court of the Republic of Slovenia, in order to determine how the right to life was protected in the Slovenian society at the time of the epidemic.

2. Right to Life

Human rights can be seen as a fundamental global agreement on rights and freedoms. They apply to every human being and reach shared values, morals, and principles.

The right to life is one of the most fundamental human rights. It is the right that guarantees every individual the right to existence, security, and dignity. It is based on a universal belief that every human life is inviolable and worthy of respect. It holds a special position primarily because, without its effective protec-

tion, the enjoyment of other rights and fundamental freedoms is not possible (Ivanc, 2019a).

The right to life is protected in both Slovenian and international legal acts, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the Charter of Fundamental Rights of the European Union. All these documents aim to protect the fundamental rights of every individual regardless of their social, economic, or political background (Ivanc, 2019b).

The right to life encompasses multiple aspects. Primarily, it represents a right of negative status, as it ensures protection against arbitrary deprivation of life. This means that no individual, organisation, or state has the right to arbitrarily take away someone's life, excluding exceptional cases. Additionally, it includes ensuring safety and protection against violence. States and institutions have a responsibility to take measures to prevent violence, crimes, and conflicts that could jeopardise people's lives. This includes establishing an effective legal system that punishes those who violate the right to life (Equality and human rights commission, 2021).

The right to life also demands granting decent living conditions for each individual. This includes access to food, water, healthcare, housing, and other basic goods necessary for survival and dignified life. States and other institutions are obliged to create conditions that enable people to live a worthy life. However, the right to life does not only encompass physical security and material goods but also respect for human dignity, equality, and freedom. Every individual has the right to equal treatment before the law, freedom of expression, religious freedom, and privacy. Therefore, the right to life is closely linked to other fundamental human rights that ensure the full realisation and development of the individual (Ivanc, 2019b).

Despite the classification of the right to life as an absolute right, interference with it is permitted, but only under the most severe conditions, by the proportionality test, when necessary to protect a hierarchically equivalent right (Ivanc, 2019b).

The COVID-19 pandemic has made the right to life particularly important worldwide, as millions of lives have been lost and the impact is still felt today. During this period, life and health were

at the forefront, but the constitutional values of coexistence, mutual respect, human dignity, freedom, and solidarity were also under pressure as a result of the measures taken to protect and safeguard them (Letnar Černič, 2022).

3. Legal Regulation of the Right to Life

The importance of the right is evident from the fact that effective protection of human life has been one of the central demands of international humanitarian law since its inception. Today, the provision protecting the inviolability of human life and prohibiting the death penalty is well established both in the international and Slovenian legal systems.

3.1. Regulation in Slovenian Legal System

In the Slovenian legal system, the right to life is regulated by Article 17 of the Constitution of the Republic of Slovenia and is classified among the fundamental human rights. In the case of an epidemic, the right to life is safeguarded through the right to healthcare, which is also regulated in the Constitution, as well as in the Communicable Diseases Act, the Patients' Rights Act, the Health Services Act and the Health Care and Health Insurance Act. Additionally, we must not forget about the Criminal Code, which includes criminal offences related to endangering life due to communicable diseases.

3.2.1. Constitution of the Republic of Slovenia

Article 17 of the Constitution of the Republic of Slovenia guarantees the right to inviolability of human life. This right is classified among the constitutionally most strongly protected rights and fundamental freedoms (Ivanc, 2011a). However, it holds a special place among these rights and freedoms. Its special position arises from the fact that without its effective protection, the enjoyment of other human rights and fundamental freedoms is not possible (Ivanc, 2019a). The content of Article 17 clearly implies the requirement for a positive valuation of human life since the right to life is an inherent right of every human being, which is not transferable and cannot be waived (Ivanc, 2011a).

The permissibility of interventions or limitations of the right to life must be interpreted extremely restrictively, and it is generally allowed only in cases in which its protection conflicts with the protection of another individual's life. Limitations on the right are permitted by the provisions of the Constitution of the Republic of Slovenia only while considering the principle of proportionality, and any interference must be absolutely necessary (Ivanc, 2011a). This means that the limitation of the right must be necessary to achieve a significant objective and must be proportionate to that objective.

The right to life is closely associated with the right to healthcare, as defined in Article 51 of the Constitution of the Republic of Slovenia. In situations in which the exercise or provision of the right to healthcare is threatened, consequently endangering the right to life, which includes situations such as the COVID-19 epidemic, the Constitution of the Republic of Slovenia allows or permits the possibility for the law, through the principle of proportionality, to limit the enjoyment of the right to freedom of movement (Letnar Černič, 2019) and the right to assembly and association in order to prevent the spread of communicable diseases. While these rights are not absolute, interference with them is only possible in specifically defined cases (Vatovec, 2019).

3.1.2. Communicable Diseases Act

The Communicable Diseases Act safeguards the right to life in connection with Article 51 of the Constitution of the Republic of Slovenia, which defines the right to health care (Communicable Diseases Act, 1995). The law comes to the forefront, especially in situations with a high prevalence of communicable diseases. Such a situation arose during the COVID-19 epidemic.

Article 18 defines isolation, Article 19 defines quarantine, Articles 20 and 21 define treatment in cases of infections where the omission of treatment would endanger the health of other people or cause the spread of communicable diseases and Articles 22 through 25 cover mandatory vaccination (Communicable Diseases Act, 1995).

One of the special measures is defined by Article 37, which stipulates that during a severe epidemic of a communicable disease,

the minister responsible for public health may order healthcare workers and collaborators to work under special conditions and limit their right to strike. They may also allocate certain premises, equipment, medicines, and transportation means for the needs of healthcare activities and assign specific tasks to both natural and legal persons engaged in healthcare activities. (Communicable Diseases Act, 1995).

In recent years, the most significant change occurred in Article 39, to which Articles 39.a and 39.b were added. This change was the result of the decision U-I-79/20 of the Constitutional Court of Slovenia, dated May 13, 2021, which will be discussed further in this article. In this decision, the Constitutional Court found that the second and third points of the first paragraph of Article 39 of the Communicable Diseases Act were in conflict with the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution of the Republic of Slovenia (Constitutional Court of Republic of Slovenia, 2021a).

The purpose of the changes was to limit the Government of the Republic of Slovenia from excessively infringing on the rights of individuals during times when an epidemic is declared to prevent the spread of a dangerous disease.

3.1.3. Patients' Rights Act

The Patients' Rights Act adds quality to the existing healthcare system and places patients in a more favourable position compared to healthcare service providers (Brulc, 2008).

Article 6 defines the right of access to healthcare and the provision of preventive services. In this context, preventive services represent a high standard of the healthcare system. Together with the right of access to healthcare services, as defined in Article 51 of the Constitution of the Republic of Slovenia, which is particularly important during epidemics for protecting the right to life, these are typical declaratory or programmatic rights (Brulc, 2008). Furthermore, we can even say that the right to access healthcare does not actually differ from the right to healthcare recognised and defined in the Constitution of the Republic of Slovenia.

3.1.4. Health Care and Health Insurance Act

The Health Care and Health Insurance Act, in the first paragraph of Article 2, stipulates that everyone, meaning every person with compulsory medical insurance or other person who asserts rights from compulsory health insurance, has the right to the highest possible level of health and, at the same time, has an obligation to take care of their health. The first paragraph also specifies that no one may endanger the health of others. The second and third paragraphs further establish that everyone has the right to healthcare and the duty to contribute to its realisation (Health Care and Health Insurance Act, 1992).

3.1.5. Health Services Act

The Health Services Act regulates the content and provision of healthcare services, public healthcare services, as well as the association of healthcare organisations and healthcare workers into chambers and associations (Health Services Act, 1992).

Article 22 defines the scope of public health activities. Furthermore, the first paragraph of Article 23 states that the National Institute of Public Health is responsible for carrying out tasks in the field of public health. Its tasks are defined by Article 23a (Health Services Act, 1992).

In safeguarding the right to life during an epidemic, tasks that primarily involve monitoring communicable diseases, including healthcare-associated infections (Health Services Act, 1992).

3.1.6. Criminal Code

For the protection of the constitutionally guaranteed right to life, especially during an epidemic, Article 177 of the Criminal Code is particularly important, as it criminalises the act of transmitting or spreading communicable diseases (Criminal Code, 2008). Although this concerns an extremely important good, this criminal offence appears very rarely in judicial practice.

Certainly, the intentional spreading of communicable diseases is not only criminalised in Article 177 but also in the criminal offence of causing minor bodily harm (Article 122), causing serious bodily harm (Article 123), or causing grievous bodily harm (Article 124). Additionally, for the protection of the right to life, Arti-

cle 178 is also important, which addresses the failure to provide medical assistance (Criminal Code, 2008).

We must also not forget to mention Article 314, which criminalises causing general danger and indirectly protects the right to life as well (Criminal Code, 2008).

3.2. Regulation in International Legal Order

Standards of international legal protection of the right to life are defined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

3.2.1. Universal Declaration of Human Rights

The right to life is defined in Article 3. The right to health or healthcare is not specifically addressed as an independent right in the declaration; however, certain aspects related to the health or well-being of individuals are highlighted. In the first paragraph of Article 25, it is stipulated that everyone has the right to a standard of living adequate for their health and well-being and that of their family (United Nations, 1948).

3.2.2. International Covenant On Civil and Political Rights

The right to life is recognised and regulated by Article 6, which stipulates that every individual has the right to life, which must be protected by law, and any arbitrary deprivation of life is prohibited. In countries where the death penalty is still permitted, it may only be imposed for the most serious crimes, by a final judgment. When the deprivation of life constitutes the crime of genocide, it is understood that contracting states cannot evade any obligation to prevent and punish the crime of genocide (United Nations (General Assembly), 1996).

The Covenant does not contain a specific provision explicitly recognising the right to health. However, Article 7 defines an individual's right to physical, mental, and moral integrity (United Nations (General Assembly), 1996).

3.2.3. European Convention on Human Rights

The right to life is defined in Article 2 of the ECHR, which states that everyone's right to life shall be protected by law and that no one shall be deprived of their life intentionally except in the execution of a sentence of a court following conviction for a crime for which this penalty is provided by law (Council of Europe, 1950).

The provision abolishing the death penalty was subsequently introduced by Protocol No. 6, which entered into force on March 1, 1985, and later amended by Protocol No. 11 (Gogala, 2015).

The right to healthcare is not explicitly included as an independent right in the ECHR. However, the ECHR has ruled in cases related to the right to life (Article 2), the prohibition of torture (Article 3), the right to liberty and security (Article 5), and the right to respect for private and family life (Article 8) that the violation of the right to healthcare can be considered a violation of other human rights if an individual suffers torture or inhuman or degrading treatment due to a lack of health care (Ivanc, 2011b).

3.2.4. Charter of Fundamental Rights of the European Union

The right to life in the Charter is defined in Article 2, which states that everyone has the right to respect for their physical and mental integrity and that no one shall be condemned to the death penalty or executed (European Union, 2010).

The Charter also defines health protection in Article 35, which grants everyone the right to preventive health care and medical treatment under the conditions established by national laws and practices (European Union, 2010).

Additionally, it is important to note that health protection is also covered in the primary law treaties, with particular emphasis on the extensive provisions of Article 168 of the Treaty on the Functioning of the European Union (Terstenjak, 2020).

3.2.5. American Convention on Human Rights

The right to life is defined in Article 4, stating that every individual has the right to have their life respected, and this right shall be protected by law from the moment of conception onwards (Organization of American States, 1969).

The Convention does not regulate the right to health or healthcare.

3.2.6. African Charter on Human and Peoples' Rights

The right to life is defined in Article 4, which stipulates that human life is inviolable and that every individual has the right to respect for life and integrity. It also states that the right to life must not be arbitrarily taken away from anyone (African Union, African Charter on Human and Peoples' Rights, 1981). Additionally, the Protocol on the Rights of Women in Africa was later adopted as an adjunct to the charter, which, in Article 4, further regulates the right to life, integrity, and security (African Union, 2003).

Both the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa include the right to health.

The right to life is thoroughly regulated in both Slovenian and international legal systems, as it is a right essential for the realization of other human rights and fundamental freedoms. It is important that states respect and protect the right to life without any distinction or discrimination and take measures to punish violations.

In the connection between the right to life and the right to health or healthcare, discrepancies can be observed between Slovenian and international legal systems. The right to health is not established as an independent right in all international documents (e.g., the ICCPR, the ECHR). However, this right is indirectly included in these documents through provisions that protect the life and physical integrity of individuals. By ensuring these protections, states are obliged to provide appropriate healthcare and safeguard health.

The right to life and the right to health are internationally recognized human rights that states are obligated to respect and protect. The right to life is a fundamental right essential for the realization of other rights, while the right to health involves ensuring adequate healthcare and safeguarding individuals' health. However, since these rights are not absolute, limitations are possible but only under certain circumstances, and such limitations must comply with international legal standards.

4. Course of the Covid-19 Epidemic and Measures Taken in Slovenia

Of the external factors that can influence the situation in a country, an epidemic or pandemic are the most dangerous, as communicable diseases spread rapidly and do not recognise national borders. The problem also lies in the fact that an epidemic of a communicable disease affects not only the health situation of an individual country but also its political circumstances, as well as its economic and social conditions, with the impact depending on the overall economic development, democratic traditions, and the rule of law (Zajc, 2022).

Due to the rapid spread of the COVID-19 infection, most European countries declared an epidemic as a special form of emergency in the spring of 2020. As the situation rapidly deteriorated across Europe, with a sharp increase in the number of deaths, governments responded to the emerging circumstances by introducing measures aimed at containing the transmission of infections and safeguarding the health and lives of people. These measures, more or less, restricted the human rights and fundamental freedoms of citizens and other residents (Flander, 2021).

The outbreak of COVID-19 caught European countries off guard despite warnings from experts for some time. Slovenia was no exception in this regard. As mentioned earlier, the COVID-19 epidemic affected not only health but also economic and social conditions. Particularly affected was the balance of power between the executive and parliamentary branches of government (Flander, 2021).

5. Legal Basis of Adopted Measures

5.1. Limitation of Rights Due to the State's Positive Obligations

The right to life is one of the rights and freedoms that represent a fundamental condition for the existence and realisation of all other rights and freedoms. These are rights that have an *erga omnes* effect, meaning they apply to anyone. These rights have a negative status, as they are rights where the state or any other entity must not interfere. Exceptions only apply when

interference is permissible for state security, criminal proceedings, or preventing the spread of communicable diseases, as was the case during the COVID-19 epidemic. Furthermore, these rights also have a positive status, meaning that states have a duty of active engagement to protect individual rights. (Kovač, 2022).

The relationship between security and freedom entails a balance between two human rights. In the context of combating the COVID-19 pandemic, it primarily concerned the need to adopt measures whereby the state had to protect the lives and health of people while simultaneously encroaching on some other constitutionally protected rights of individuals. Thus, in the event of an epidemic, the state is obliged to adequately safeguard the health and lives of people. Article 5 of the Constitution of the Republic of Slovenia stipulates that the state must protect human rights and fundamental freedoms. The obligations of the state are greater, and the protected value or right in the hierarchy of human rights is higher. In the case of an epidemic seriously threatening the health and consequently the lives of people, the values that the state must safeguard are the right to life, the right to health care, and the right to physical and mental integrity. Therefore, it involves a balancing act between safeguarding the health and lives of people during a deadly disease on the one hand and restrictions on movement on the other, with these limitations being temporary during the peak period of the epidemic (Velkavrh, 2020).

If we take the main distinction between negative and positive obligations that the state has as a measure of whether the right to life requires action or omission from the state, it is clear that in the case of the COVID-19 pandemic, we are talking about positive obligations that the state had. It was expected from the state and will be expected in similar situations in the future to actively protect the constitutionally guaranteed good of human health and life in relation to third parties who pose a risk due to the transmission of the virus. Furthermore, the state, in such situations, has an operational obligation to ensure access to life-saving healthcare services while also taking measures to prevent the spread of communicable diseases that endanger lives (Kos, 2022).

5.2. Limitation of Rights Due to Declaration of State of Emergency

In Article 16 of the Constitution, the state is granted discretionary power to temporarily suspend and limit certain human rights and fundamental freedoms in exceptional situations. This article specifies that human rights and fundamental freedoms may be limited or even suspended for the duration of a state of war or emergency (Turk, 2020).

Furthermore, the second paragraph of Article 16 stipulates that despite the provision of the first paragraph of Article 16, no revocation or limitation of rights from Articles 17, 18, 21, 27, 28, 29, and 41 of the Constitution is allowed, as any such restriction or revocation would constitute an attack on the value system upon which human rights and fundamental freedoms are based (Kos, 2022).

It is important to mention Article 92 of the Constitution, which states that a state of emergency is declared when the existence of the state is endangered due to a significant and widespread threat, although the Constitution does not define what exactly constitutes a threat (Constitution of the Republic of Slovenia, 1991). Typically, in foreign legal systems and legal doctrine, this concept is interpreted to include various natural or human-made phenomena. Natural phenomena may include earthquakes, floods, epidemics, such as the situation with COVID-19, etc., while human-made phenomena may include wars, economic crises, extensive migrations, etc. However, the actual existence of extraordinary circumstances does not necessarily imply that we are already in a state of emergency in a normative sense (Žgur, 2020). Therefore, according to the Constitution, a formal declaration is required, which is detailed in Articles 92 and 108 of the Constitution (Constitution of the Republic of Slovenia, 1991).

5.3. Restricting Rights During the Covid-19 Epidemic

Since a state of emergency was not declared in Slovenia during the COVID-19 epidemic, the legal basis for the adoption of measures was provided by the Communicable Diseases Act. It is also important to mention Articles 32 and 42 of the Constitution of the Republic of Slovenia, which allow for the possibility of restricting the right to freedom of movement and the right to

assembly and association in situations where the provision of healthcare is endangered, consequently jeopardising the right to life (Ivanc, 2011c).

During the COVID-19 epidemic, the Government of the Republic of Slovenia conducted its intensive legislative activity by Article 39 of the Communicable Diseases Act, which was in force at that time in the following form:

'When measures prescribed by this Act are insufficient to prevent the spread of certain communicable diseases in the Republic of Slovenia, the Government of the Republic of Slovenia may also order the following measures:

1. Establish conditions for travel to countries where there is a risk of infection with a dangerous communicable disease and for entry from those countries;
2. Prohibit or restrict the movement of the population is infected or directly threatened areas;
3. Prohibit gatherings of people in schools, cinemas, public establishments, and other public places until the danger of spreading the communicable disease ceases;
4. Restrict or prohibit the movement of certain types of goods and products.

The Government of the Republic of Slovenia must immediately inform the National Assembly of the Republic of Slovenia and the public about the measures from the previous paragraph.'

It is important to note that the content of Article 39 changed with Article 7 of the Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy (Act Amending the Communicable Diseases Act, 2020). Prior to this change, the introductory clause referred to the minister responsible for health, and the second paragraph stipulated that the minister responsible for health must immediately inform the Government of the Republic of Slovenia, the National Assembly of the Republic of Slovenia, and the public about the measures outlined in the first paragraph (Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy, 2020)

This was found to be unconstitutional, as the Constitutional Court of Slovenia, in decision U-I-79/20 dated May 13, 2021, which will be further analysed later, determined that the second

and third points of the first paragraph of Article 39 of the Communicable Diseases Act were inconsistent with the Constitution of the Republic of Slovenia due to a violation of the principle of legality (Constitutional Court of Republic of Slovenia, 2021a). Subsequently, in decision U-I-155/20 dated October 7, 2021, the Court found the inconsistency of the fourth point of the first paragraph of Article 39 of the Communicable Diseases Act for the same reason (Constitutional Court of Republic of Slovenia, 2021b).

To understand why the Constitutional Court reached such conclusions, we need to comprehend how the principle of legality is regulated in the Slovenian legal system and what the consequent relationship is between laws and subordinate regulations, including ordinances, which was well presented in Terzić's article, which is summarised below.

The law enacted by the National Assembly of the Republic of Slovenia is the only one that can originally introduce and regulate the rights and obligations of legal entities, provided that these rights and obligations are not already determined in the Constitution of the Republic of Slovenia. In this context, the term 'originally' means that rights and obligations can also be regulated by subordinate regulations issued by the Government of the Republic of Slovenia, but only based on the authorisation in the law. Regulations or ordinances issued by the Government of the Republic of Slovenia are considered delegated acts and must be based on or derived from an act. This principle, known as the principle of legality, is found in Article 153 of the Constitution. The principle of legality is also found in Article 120 of the Constitution, whose second paragraph specifies that administrative authorities perform their tasks independently, within the framework, and based on the Constitution and laws (Terzić, 2022).

In accordance with this, we can say that the relationship between a law and an ordinance is a relationship of authorisation, as the law authorises, while the ordinance regulates the details that change so rapidly that the legislator cannot timely address them through legislation (Terzić, 2022).

Although the ordinances issued by the Government of the Republic of Slovenia during the COVID-19 epidemic regulated a significant part of our lives and encroached upon many consti-

tutional rights, there would be nothing wrong if the ordinances were in line with the law, and the law with the Constitution of the Republic of Slovenia. Unfortunately, this was not the case, as confirmed by the Constitutional Court of the Republic of Slovenia with decision U-I-79/20 dated May 13, 2021, and decision U-I-155/20 dated October 7, 2021 (Terzić, 2022).

In the decision U-I-79/20 dated May 13, the Constitutional Court found that, by reason of the incompatibility of points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act with the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution of the Republic of Slovenia, five government ordinances were also found to be inconsistent with the Constitution (Constitutional Court of Republic of Slovenia, 2021a).

In the decision U-I-155/20 dated October 7, 2021, the Constitutional Court found that due to the inconsistency of point 4 of Article 39 of the Communicable Diseases Act with Articles 49 and 74 of the Constitution, another ordinance was found to be inconsistent with the Constitution (Constitutional Court of Republic of Slovenia, 2021b).

It is important to emphasise as constitutional Judge Dr. Šugman Štubbs did in her concurring opinion regarding decision no. U-I-79/20, dated 13 May 2021, joined by Judge Dr Rok Čeferin, wrote that decision U-I-79/20, dated May 13, 2021, and decision U-I-155/20, dated October 7, 2021, do not provide an answer to the question of whether the challenged ordinances were urgent, necessary, and proportionate. A positive answer to these questions could only be obtained if it was demonstrated that the law from which the ordinances derive their existence gives the latter a sufficiently clear, substantively determinate, and thus predictable substantive basis (Šugman Stubbs, 2021a).

5.4. Response to Adopted Measures

The fact is that the COVID-19 epidemic has strongly affected not only Slovenia but also other countries across Europe and the world, as the number of deaths in all countries has been significant. Although countries, including Slovenia, initially sought to limit the spread of the COVID-19 epidemic by closing international, regional, and municipal borders, minimising interference with

human dignity and freedom as much as possible, unfortunately, it did not go without tightening measures, which also intruded into people's private lives (Letnar Černič, 2022).

However, responses across Europe varied from country to country despite comparable restrictive measures. It can be said that in Slovenia, the responses were not handled optimally. Additionally, the majority of the population had already eased their adherence to preventive measures long before their official lifting. Even the high mortality rate did not bring people together; instead, it created new conflicts or fuelled existing ones regarding constitutional values. Consequently, a significant societal division began in the country, leading to growing tensions in the socio-economic and political spheres and widespread resistance to restrictive and preventive measures, including vaccination. It is difficult to assess whether this was influenced by historical factors, opposition to the government at the time, or different interpretations of human rights, especially dignity and freedom. However, it is clear that the epidemic has shown us that we must not take values in our society for granted, as their existence depends not only on how the state understands and protects them but also on society itself (Letnar Černič, 2022).

6. Constitutional Court Decisions

During the COVID-19 epidemic, life was largely regulated by subordinate regulations adopted by the Government of the Republic of Slovenia since March 2020, as the legislator, through the Communicable Diseases Act, delegated the fight against communicable diseases to the executive branch of government. This is generally appropriate due to the need for rapid and constant responses to new evolving circumstances. However, entirely different questions arise regarding whether the legal basis granting the Government of the Republic of Slovenia the authority to issue ordinances was clear, specific, and sufficient by the principles of legality and whether the measures adopted were proportionate or unduly encroached upon human rights and fundamental freedoms. It is worth mentioning that the Constitutional Court has repeatedly emphasised in its decisions that the state authorities faced a difficult task in adopting measures to contain the spread of COVID-19 infections due to a high degree of uncertainty, par-

ticularly in the early stages of the virus, when it was scientifically and medically unexplored (Nerad, 2021).

6.1. Decision of the Constitutional Court Regarding the Prohibition of Movement Outside the Municipality Area of Temporary or Permanent Residence

The Constitutional Court reviewed the consistency of two ordinances adopted by the Government in order to contain and manage the risk of the COVID-19 epidemic, namely the Ordinance on the Temporary General Prohibition of Movement and Gatherings in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement outside the Municipality of One's Permanent or Temporary Residence and the Ordinance on the Temporary General Prohibition of Movement and Gatherings in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement outside the Municipality of One's Permanent or Temporary Residence (Constitutional Court of Republic of Slovenia, 2020).

The Constitutional Court conducted the review based on the test of legitimacy, which entails an assessment of whether the legislature pursued a constitutionally admissible objective, and on the basis of the strict test of proportionality, which comprises an assessment of whether the interference was appropriate, necessary, and proportionate in the narrower sense. The Constitutional Court assessed that by restricting movement to the municipality of one's residence, the Government pursued a constitutionally admissible objective, i.e., containment of the spread of the contagious disease and thus the protection of human health and life, which this disease puts at risk (Constitutional Court of Republic of Slovenia, 2020).

In the decision U-I-83/20 dated August 27, 2020, there is much summarizing of the positions of the Government of the Republic of Slovenia and little constitutional legal reasoning. The Constitutional Court, otherwise, carried out the review despite the fact that during the proceedings before the Constitutional Court, the ordinances ceased to be in force as it assessed that the petition raised a particularly important presidential constitutional question of a systemic nature on which the Constitutional Court had not yet had the opportunity to take a position and which could

also arise in connection with possible future acts of the same nature and with comparable subject matter.

Nevertheless, the judges were not unified in their decision. The lack of consensus within the Constitutional Court is reflected in the split between judges who supported the decision and those who disagreed with it. Despite this divergence of opinions, the Constitutional Court ultimately decided, by majority, decided to directly assess the content, namely, the proportionality of two ordinances issued by the Government of the Republic of Slovenia regarding the prohibition of movement between municipalities. In doing so, it deliberately left open the question of whether Article 39 of the Communicable Diseases Act, on which the contested ordinances were based, was in line with the principle of legality.

As it later turned out, this decision involved a methodologically flawed approach, which the Constitutional Court acknowledged in decision U-I-79/20 dated May 13, 2021, where it found that the ordinances were not in accordance with the Constitution because they were based on the unconstitutional Article 39 of the Communicable Diseases Act. The substantive assessment of subordinate acts that affect human rights and fundamental freedoms can only be carried out by the Constitutional Court after resolving the question of the legality of such an act. If there is doubt about the constitutionality of the law upon which the subordinate act relies concerning compliance with the principle of legality, the Constitutional Court is obliged to examine the constitutionality of the law. Only if the law is legally valid can the assessment proceed to determine whether the subordinate act remains within the framework of the law, and then with an assessment of its content in the specific case. If the Constitutional Court finds that the law violates the principle of legality, a substantive assessment of the subordinate act is not possible, as an illegal subordinate act has no legal effects. Therefore, the Constitutional Court should never avoid the legal norm on which the subordinate act is based.

6.1.1. Legal Experts' Responses to The Decision

Constitutional Judge Dr Mežnar, in her concurring opinion regarding decision no. U-I-79/20, dated 13 May 2021, wrote that in the decision U-I-83/20, dated August 27, 2020, the Constituti-

onal Court completely disregarded the significance and role of the legal basis, namely Article 39, and thereby ignored a series of constitutional legal axioms:

÷ regulations, ordinances, and other subordinate acts issued by executive bodies are not allowed to contradict the Constitution of the Republic of Slovenia or directly stem from it;

÷ subordinate acts are subordinate to laws, meaning they must derive from the provisions of existing laws. Executive bodies cannot adopt subordinate acts that exceed or contradict existing laws;

÷ the Constitution of the Republic of Slovenia empowers the legislator to regulate laws governing human rights and fundamental freedoms. Executive bodies do not have the appropriate authority to independently regulate human rights through the use of subordinate acts.

÷ laws must clearly define the frameworks and methods for regulating human rights and fundamental freedoms. Otherwise, such laws are unconstitutional and illegal.

÷ if subordinate acts are based on unconstitutional laws, they are unconstitutional or illegal. Such subordinate acts have no legal effect and must not be considered or executed (Mežnar, 2021).

Judge Mežnar also pointed out that, accordingly, it is difficult to assert that the content of a subordinate act, which is illegal because it is based on an unconstitutional law, is consistent with the constitutional principle of proportionality (Mežnar, 2021).

Dr Nerad, in his article wrote that it is important to emphasise that if a measure by the Government of the Republic of Slovenia is unconstitutional because it lacks a clear and specific legal basis or exceeds the legal framework, and therefore does not comply with the principle of legality, it does not necessarily mean that it is also excessive or disproportionate and therefore unconstitutional in terms of encroaching on human rights and fundamental freedoms. Conversely, a completely lawful subordinate measure may be impermissible due to its excessiveness or disproportionality in terms of encroaching on human rights and fundamental freedoms. In this case, questions regarding the constitutional compatibility of the legislative framework that envisages certain measures can be raised in terms of proportionality (Nerad, 2021).

At this juncture, it is appropriate to note that even the European Court of Human Rights in Strasbourg could not evade deci-

sions regarding movement restrictions imposed by the COVID-19 pandemic, about which Skubic wrote in his article. In the case of *Terhes v. Romania*, the court addressed an issue, namely whether the fact that almost the entire population was subjected to strict movement restrictions could be considered a deprivation of liberty within the meaning of the European Convention on Human Rights (Skubic, 2021).

The European Court of Human Rights underscored in its assessment the need to initially determine whether the complainant is indeed subjected to measures that can be defined as a deprivation of liberty within the meaning of the first paragraph of Article 5 of the European Convention on Human Rights or merely as a restriction on freedom of movement within the meaning of Article 2, Protocol No. 4 to the European Convention on Human Rights. The difference between deprivation and restriction of individual freedom lies primarily in the degree or intensity of the measure rather than solely in its content (Skubic, 2021).

In the case of *Terhes v. Romania*, the European Court of Human Rights had to consider that the disputed restrictive measure was applied within the framework of the state of emergency declared in Romania for health reasons. It noted that there was no doubt that the COVID-19 pandemic has serious consequences not only for the health but also for the society, the economy and the functioning of the state (Skubic, 2021).

In light of this, the ECHR determined that the complainant was not subjected to an individualised restriction of movement, as it constituted a measure of general applicability. This measure, enacted based on legislation promulgated by various authorities in Romania, applied uniformly to the entire population (Skubic, 2021).

6.2. Decision of the Constitutional Court Regarding the Unconstitutionality and Illegality of the Communicable Diseases Act

The Constitutional Court reviewed, upon a petition submitted by multiple petitioners, points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act, which authorises the Government to ban or restrict the movement and gathering of people to prevent the introduction or spread

of a communicable disease in the state. It also reviewed several ordinances that were adopted by the Government based on the mentioned statutory provisions from April through October 2020 in order to contain and manage the threat of the COVID-19 epidemic (Constitutional Court of Republic of Slovenia, 2021a).

The Constitutional Court decided that the challenged statutory regulation does not fulfil constitutional requirements, as it allows the Government to choose, at its discretion, the types, scope, and duration of restrictions, which means that points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act are inconsistent with the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution. The challenged ordinances adopted by the Government were also inconsistent with the two mentioned provisions of the Constitution, namely, in the part where they were adopted based on an unconstitutional statutory regulation. The established unconstitutionality requires that the challenged statutory regulation be abrogated. Since the rights to health and life are fundamental constitutional values, the abrogation of the challenged statutory regulation could lead to an even worse unconstitutional situation than in the event the unconstitutional regulation remains in force for a certain period. Therefore, the Constitutional Court merely established that the challenged statutory provisions are inconsistent with the Constitution and that the National Assembly shall remedy this inconsistency within two months following the publication of this decision in the Official Gazette of the Republic of Slovenia (Constitutional Court of Republic of Slovenia, 2021a).

Although the Constitutional Court issued several important substantive decisions concerning restrictive measures, decision U-I-79/20 dated May 13, 2021 was the one that crucially defined the constitutional way of dealing with COVID-19 epidemic in Slovenia, which would subsequently predominantly revolve around the principle of legality.

In decision U-I-79/20 dated May 13, 2021, the Constitutional Court determined, namely, that points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act are inconsistent with the Constitution due to violations of the principle of legality , since, in the Constitutional Court's assessment, the

Communicable Diseases Act does not provide sufficient, clear, and specific substantive basis for the adoption of government ordinances that restrict the right to movement and assembly. Nevertheless, even though the Constitutional Court did not annul the provisions, we can assert that it unequivocally established the unconstitutionality of points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act.

It is important to note that in decision U-I-79/20, dated May 13, 2021, the Constitutional Court focused solely on the principle of legality without addressing the substantive adequacy, necessity, and proportionality of the measures prescribed by the challenged ordinances.

6.2.1. Legal Experts' Responses to The Decision

In addition to the aforementioned provisions of the Communicable Diseases Act, the Constitutional Court also ruled on the constitutionality of five ordinances issued by the government, which pertained to prohibitions and restrictions on movement and assembly in public places and areas, as well as the prohibition of crossing between municipalities. Regarding these ordinances, which had all ceased to be in force during the proceedings, the Constitutional Court found them to be inconsistent with the Constitution, specifically in the part where they were adopted based on points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act. It is important to emphasise that the Constitutional Court did not conduct a separate and independent substantive assessment of the constitutionality and legality of the ordinances; rather, their unconstitutionality followed from the finding of unconstitutionality of the law that served as the legal basis for their adoption (Nerad, 2021), which is the subject of Dr Nerad's article, the content of which is presented below. In decision U-I-79/20, dated May 13, 2021, the Constitutional Court focused solely on the principle of legality, which is the subject of Dr Nerad's article, the content of which is presented below. It is important to note that the legality of subordinate regulations is not merely a technical constitutional law issue; rather, it constitutes a significant substantive concern, as legality is crucial for the rule of law and the principle of separation of powers (Nerad, 2021).

Following this, we can say that legality and substantive adequacy, necessity, and proportionality constitute two distinct constitutional considerations, where the issue of legality precedes that of excessiveness. Therefore, only if the measure in our case has a legal basis should its permissibility be assessed in terms of proportionate encroachment on human rights and fundamental freedoms (Nerad, 2021).

As previously mentioned, the decision U-I-79/20, dated May 13, 2021, was declaratory, as the Constitutional Court merely established the unconstitutionality of points 2 and 3 of Article 39 of the Communicable Diseases Act without annulling them. However, such a decision is not without legal consequences. The Constitutional Court Act provides for determination in two cases:

1. if a law or other regulation is unconstitutional or unlawful because it fails to regulate an issue that it should regulate (unconstitutional regulatory gap) or
2. if a law or other regulation is unconstitutional or unlawful because it regulates an issue in a manner that prevents its annulment or correction.

In this regard, the court has interpreted the second option from the outset in a manner that allows for the preservation of the law if there are obstacles to its annulment due to linguistic or nomotechnical reasons and if annulment would result in an even more unconstitutional state (Nerad, 2021).

This is somewhat similar to annulment with a suspensive effect, but there are several significant differences between these types of decisions (Nerad, 2021).

A declaratory decision declaring a law unconstitutional does not automatically invalidate the law itself. Similarly, the expiration of the deadline set for rectifying the identified unconstitutionality does not affect the formal validity of the law. The legislature has a specific timeframe within which it must respond to the identified unconstitutionality and appropriately amend the law. Furthermore, the determination of the unconstitutionality of a law itself does not affect the validity of subordinate regulations, nor do they become unlawful as a result. The deadline for rectifying the identified unconstitutionality is intended for the legislature, which must respond within it and amend the law accordingly. Failure by the legislature to take action or comply with the deadline constitutes a serious violation of the principles of the rule of

law and the principle of separation of powers, as established in the jurisprudence of the Constitutional Court (Nerad, 2021).

Accordingly, the unconstitutionality in the decision U-I-79/20 dated May 13, 2021, does not imply that points 2 and 3 of Article 39 of the Communicable Diseases Act were annulled or ceased to be valid. In this regard, the Constitutional Court conducted a balancing of various options regarding the legality of measures during the COVID-19 epidemic, emphasising the protection of important constitutional values such as life and health, which justified the declaratory decision (Nerad, 2021).

The choice of a declaratory decision is also sensible because the Communicable Diseases Act deals with a legal vacuum, which, according to the first paragraph of Article 48 of the Constitutional Court Act, is the first reason justifying the determination of unconstitutionality. The problem lies not in what points 2 and 3 of Article 39 of the Communicable Diseases Act stipulate but rather in the detailed content that is missing from the law. What is lacking in the law cannot be annulled (Nerad, 2021).

The essence of the declaratory decision in this matter is, therefore, that the unconstitutionality did not cause the content existing in the law, albeit insufficient and indeterminate, to cease to be valid. Therefore, the Communicable Diseases Act will continue to be valid in its incomplete content until legislative intervention by the National Assembly (Nerad, 2021).

On the other hand, Jurič claimed in his article that in the decision U-I-79/20 of May 13, 2021, the legislator was asked to establish a certain legal room for manoeuvre, without clear scientific guidelines. Namely, the Constitutional Court added a supplementary condition to the law. This condition requires that when granting legal powers to the executive authority to issue regulations, the law must define »sufficiently precisely« the permissible methods or types, scope and conditions for restricting freedom of movement and the right to assemble and assemble (Jurič, 2023).

The introduced imperative presents two significant flaws. First, it requires the legislator to adhere to a commitment that presupposes prior knowledge of entirely undetermined circumstances, effectively making the legality of executive acts contingent on this foresight. Second, it renders the issuance of by-laws redundant, as the full consideration of relevant factual bases is already embedded in the statutory provisions (Jurič, 2023).

Nevertheless, Jurič emphasized that Slovenian constitutional jurisprudence clearly establishes a direct correlation between the severity of the intrusion into human rights and the degree of diligence required from the legislator in prescribing statutory guidelines for the issuance of restrictive regulations. Thus, the more significant the imposition by means of an executive act, the more precisely defined the statutory provisions must be to confer the authority for its issuance (Jurič, 2023).

6.3. Decision of the Constitutional Court Regarding the Unconstitutionality and Illegality of Implementing the Condition of Recovery and Vaccination in the State Administration

By decision U-I-210/21, dated 29 November 2021 the Constitutional Court decided on a request for constitutionality and legality of Article 10.a of the Ordinance on the Manners of Complying with the Recovered-Vaccinated-Tested Requirement to Contain the Spread of Infection with the SARS-CoV-2 Virus, which determined that to perform tasks at their workplace on the premises of their employer or the premises of another body of the state administration employees in the bodies of the state administration must fulfil the recovered-vaccinated requirement, with the alternative possibility of fulfilling the tested requirement no longer applying to them (Constitutional Court of Republic of Slovenia, 2021c).

The Constitutional Court emphasised that the determination of the recovered-vaccinated requirement entailed a condition under labour law to perform work in the state administration, and thus, the situation was essentially comparable to situations wherein a vaccination is determined as a condition under labour law to perform various types of work and professions. The legal basis for regulating such vaccination is Article 22, in conjunction with Article 25 of the Communicable Diseases Act, which regulates different types of mandatory vaccinations. However, this law does not prescribe vaccination against COVID-19 as a condition for performing the work of a certain group or groups of employees who are exposed to communicable diseases while performing their work and persons liable to transmit an infection to other persons while working. Therefore, it decided that Article 10.a of

the ordinance was inconsistent with the second paragraph of Article 120 of the Constitution (Constitutional Court of Republic of Slovenia, 2021c).

In Slovenia, there are no issues with mandatory vaccination. The measure of mandatory vaccination is permissible under Slovenian law and the Constitutional Court has always generally supported it. Even though mandatory vaccination constitutes an interference with the individual's right, the Constitutional Court has so far determined that the measure is appropriate as the benefits it brings to the individual and the community outweigh the harm that possible side effects might cause.

With decision U-I-210/21 dated November 29, 2021, the Constitutional Court found that the ordinance on the Manners of Complying with the Recovered-Vaccinated-Tested Requirement to Contain the Spread of Infection with the SARS-CoV-2 Virus was inconsistent with the Constitution due to a violation of the principle of legality. Unlike previous cases, it was not due to an insufficiently specified legal basis but rather because the existing legal basis, which allows for mandatory vaccination for certain professional groups, was not utilised.

It is important to mention that in its decision, the Constitutional Court did not address the question of whether the measure would be constitutionally permissible if it were imposed on an appropriate legal basis and in accordance with the principles of proportionality and equality before the law. The Court also emphasized that the decision does not imply that vaccination of employees as a condition for performing certain activities or professions is a disproportionate measure; rather, the purpose of the decision is to ensure that the measure is regulated in accordance with the Communicable Diseases Act, which already establishes the rules and procedures for vaccination.

6.3.1. Legal Experts' Responses to the Decision

Although the issue of mandatory vaccination has been pertinent for many years, recent years have seen a particular focus on COVID-19 vaccination. In Slovenia, however, mandatory vaccination against COVID-19 was never implemented. Nonetheless, the legal framework, specifically the second paragraph of Article 22 of the Communicable Diseases Act, grants the legislator the au-

thority to mandate vaccination during an epidemic, in line with the annual vaccination program, for communicable diseases that pose a significant threat to human life.

At this juncture, it is relevant to reference Dr. Novak's column, written prior to the Constitutional Court's decision, which addresses the intense anticipation surrounding the COVID-19 vaccine. Dr. Novak's column explores the anticipation surrounding the COVID-19 vaccine, which was viewed as a necessary measure for restoring normalcy. During the height of the pandemic, the vaccine, namely, was widely regarded as the only viable solution for returning to pre-pandemic conditions (Novak, 2020).

Tekavc M.Phil., in his article, pointed out that with the adoption of the ordinance and subsequent decision of the Constitutional Court, the issue of mandatory vaccination was indeed brought into question, as efforts in this direction were quite apparent. In the case of *Vavrička and Others v. Czech Republic*, the European Court of Human Rights ruled that sanctioning the refusal of mandatory vaccination under a child vaccination program does not constitute an interference with individual rights under the European Convention on Human Rights. This is because vaccination is standard and well-known to the medical community and because it protects individuals through so-called herd immunity, safeguarding those who, for health reasons, cannot or should not be vaccinated. Accordingly, it can be argued that in the case under consideration, the European Court of Human Rights emphasised the finding that the subject of assessment is standard and routine childhood vaccination against diseases well known to the medical science. In contrast, we have vaccination against COVID-19, which is not standard vaccination against a disease well known to the medical community. Because COVID-19 is relatively new, vaccines used in the European Union have only conditional marketing authorisations, as their development and approval have been faster and less extensive compared to other vaccines (Tekavc, 2021).

On the other hand, Bauk, in his article, discusses that there is no right not to vaccinate. The main aspects of the article are represented below The Republic of Slovenia, concerning individuals, not only has negative obligations, meaning to refrain from encroaching upon their human rights and fundamental freedoms, but it also has positive obligations toward its citizens, among

which is ensuring health or a healthy living environment, This positive obligation of the state is defined in the Constitution of the Republic of Slovenia, particularly in Article 72. In connection with controlling and preventing the spread of communicable diseases, the constitutionally defined right to a healthy living environment is legislatively derived in the Communicable Diseases Act. The Communicable Diseases Act lists measures for the prevention and control of communicable diseases, known as epidemiological measures, among which vaccination is listed. (Bauk, 2021).

It is a fact that no one from the scientific or medical community has ever claimed that vaccines against coronavirus will not have side effects or adverse reactions, meaning that individuals cannot experience health issues after vaccination. The possibility of health issues in individuals after vaccination is undisputed, and in some cases, it can even lead to death. This possibility is also presupposed at the regulatory level by the Communicable Diseases Act, which in Article 53.a specifies that every individual who suffers serious and permanent impairment of life functions due to mandatory vaccination has the right to compensation (Bauk, 2021).It is not a matter of whether compensation represents sufficient financial compensation for permanent health consequences or death, but it is important to note that the Slovenian legal system, concerning mandatory vaccination, does not pretend and acknowledges that vaccines are not miraculous in the sense that they are absolutely and only beneficial and harmless (Bauk, 2021).

However, it is important to emphasise as constitutional Judge Dr Šugman Štubbs in her concurring opinion regarding decision no. U-I-210/21, dated 29 November 2021, wrote that the consideration of weighing the benefits and risks of individual vaccines, including those against COVID-19, is not left to the individual but to the system and processes of vaccine approval led by competent institutions (Šugman Stubbs, 2021b).

7. Conclusion

The COVID-19 epidemic has brought numerous challenges regarding the realisation of human rights and fundamental freedoms, particularly the right to life and the right to health or healthcare. The right to life was most obviously affected during the epidemic, as COVID-19 claimed the lives of over six million peo-

ple worldwide. In situations of such extraordinary circumstances, countries are obliged to provide adequate protection against the danger posed by communicable diseases, including, undoubtedly, COVID-19. Similarly, it is the duty and responsibility of states to take appropriate measures for the prevention and treatment of communicable diseases and to ensure access to adequate healthcare for all people. Consequently, countries faced the difficult task of striking a balance between fundamental freedoms and the principles of democratic decision-making on one hand and healthcare policy and the positive obligations arising from ensuring the right to life on the other (Spadaro, 2020).

The epidemic has also shown us how interdependent and, at the same time, contradictory human rights and fundamental freedoms can be, which can present a challenge in their realisation, as individual and collective interests may oppose each other. Public health measures, such as social distancing to prevent the spread of infections, primarily restrict freedom of movement, as well as other rights and freedoms of individuals. For instance, the prohibition of international travel and restrictions on movement within national or municipal borders, which may be perceived as an infringement on the right to personal freedom by individuals, clearly illustrates the challenge that countries faced in striking a balance between safeguarding the right to life and the right to health while respecting other constitutionally guaranteed human rights and fundamental freedoms (Spadaro, 2020).

The epidemic has also highlighted the strong connection between the right to life and the right to health or healthcare, as the spread of communicable diseases jeopardises not only the lives of those who become ill with the disease but also affects access to healthcare services for other patients who require treatment for other chronic or acute conditions. Accordingly, promoting the right to health is crucial for safeguarding other human rights and fundamental freedoms (Spadaro, 2020).

The right to life is well protected in both Slovenian and international legal systems. In the Slovenian legal system, it is found in the Constitution of the Republic of Slovenia and the Criminal Code. In connection with the right to health or healthcare, it is also found in the Communicable Diseases Act, the Patients' Rights Act, the Health Services Act and the Health Care and Health Insurance Act. In the international legal system, the right to life as one

of the fundamental human rights is protected in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

While the explicit connection to the right to health or healthcare is not specifically defined in all international legal instruments mentioned, except for the Charter of Fundamental Rights of the European Union and the African Charter on Human and Peoples' Rights, and indirectly in the European Convention on Human Rights due to decisions of the European Court of Human Rights in this field, it can still be argued that the right to life is well established in the international legal order.

As we have seen, countries were not prepared for the epidemic, making the implementation of containment measures a significant challenge, with Slovenia being no exception. The Government of the Republic of Slovenia faced the continuous dilemma of balancing the right to life, human dignity, and protection of health on the one hand and the limitations on freedom of movement, assembly, and association, alongside other human rights, on the other, in adopting measures to prevent the spread of the new virus. Furthermore, it encountered increasing non-compliance with basic preventive measures and significant resistance to vaccination, leading to a low level of vaccination coverage among the adult population (Letnar Černič, 2021).

Similarly, the Constitutional Court faced the task of balancing various human rights and fundamental freedoms when making its decisions regarding the adopted measures. However, in many cases, there was no assessment of the substantive adequacy, necessity, and proportionality because the Government of the Republic of Slovenia violated the principle of legality in adopting measures. Since the question of legality precedes the question of adequacy, necessity, and proportionality, there must be a clear and semantically definable legal basis that is in line with the Constitution if substantive assessment is to take place at all (Nerad, 2021).

In decision U-I-83/20, dated August 27, 2020, the Constitutional Court decided to directly assess the content and consequently ruled that the measures under review were proportional. How-

ever, decision U-I-79/20, dated May 13, 2021, showed that this approach was methodologically flawed because the legal basis for the measures was unconstitutional. The second and third points of the first paragraph of Article 39 of the Communicable Diseases Act were not in line with the Constitution (Mežnar, 2021), and the issue was not what the points specified but rather the problematic lack of detailed content in the law (Nerad, 2021). The Constitutional Court made a similar decision regarding Article 39 of the Communicable Diseases Act in decision U-I-155/20 dated October 7, 2021, but in this case, the fourth point of the first paragraph was inconsistent with the Constitution (Constitutional Court of Republic of Slovenia, 2021b).

Furthermore, the violation of the principle of legality was also addressed by the Constitutional Court in decision U-I-210/20 dated November 29, 2021. However, in this case, it was not due to an inadequately specified legal basis, as in previously assessed cases, but rather due to the incorrect choice of legal basis. The Government of the Republic of Slovenia attempted to introduce the recovered-vaccinated requirement for employees in state administration bodies outside the existing legal framework that regulates various types of mandatory vaccinations, namely, by passing Articles 22 and 25 of the Communicable Diseases Act (Constitutional Court of Republic of Slovenia, 2021c).

The Constitutional Court has indeed found, in its decisions, that fourteen ordinances were inconsistent with the Constitution, resulting in their annulment:

÷ Five ordinances were annulled in part, where they were adopted based on the second and third points of the first paragraph of Article 39 of the Communicable Diseases Act (decision U-I-79/20 dated May 13, 2021).

÷ Five ordinances were annulled in part, where they prohibited or restricted gatherings to up to ten participants (decision U-I-50/21 dated June 17, 2022).

÷ One ordinance concerning the temporary prohibition of offering and selling goods and services to consumers in the Republic of Slovenia (decision U-I-155/20 dated October 7, 2021).

÷ Three ordinances were annulled in part, where they regulated the mandatory use of protective masks or other forms of protection for the mouth and nose area, as well as mandatory hand disinfection (decision U-I-132/21 dated June 2, 2022).

Among these, eight ordinances were annulled due to violations of the principle of legality (Ministrstvo za pravosodje, 2022).

Although there were setbacks in the fight against the COVID-19 epidemic, it is crucial that the state, during times of emergencies such as an epidemic, operates in accordance with human rights as much as possible. This is because respecting human rights as a central principle in shaping and implementing measures to control the spread of communicable diseases enables the protection of fundamental rights and freedoms of all individuals (Spadaro, 2020).

The purpose of the article was to analyse the right to life in both Slovenian and international legal frameworks, providing an overview of legislation that protects this hierarchically highest human right in connection with the right to health or healthcare. The analysis of the legal basis presents possible ways in which the state can adopt containment measures in the event of fighting an epidemic, which is particularly important since the Constitutional Court's decisions revealed numerous violations of the principle of legality in the adoption of measures. This meant that the Constitutional Court mostly assessed the legality of the measures without addressing their substance. Therefore, the goal of the article was to raise awareness and highlight critical decisions and dilemmas faced by constitutional judges in decision-making, aiming to prevent similar issues from recurring in future situations.

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Is Freedom of Speech Underrated? The View from a Perspective of Human Rights

*Blaž Marinčič Udvanc**

ABSTRACT

This research paper tackles the human right aspect of the freedom of speech. It examines the background context of a human right, and how it evolves through the use in concrete cases. To determine the limits of legal argumentation in regard to the mentioned context of freedom of speech as a human right, we analyzed cases that revolved around freedom of speech. The analysis provided us with the insight into the conceptual understanding of freedom of speech as a human right through the eyes of a judge. The structure of arguments showed how the background context of a human right of freedom of speech can be determined. Freedom of speech is not only a human right that is separatated from the greater legal framework but is, in fact, a human right that needs to be established again and again through the argumentation of judges and through the applicative use in society. The balancing through legal argumentation shows how far protection and restriction can go. Freedom of speech as a human right is no different in this aspect. It is an universal right that can be observed through the arguments of a court and can be put into a context behind it.

Keywords: Human Rights, Freedom of Speech, Restriction, Protection, Universal Right

* PhD (European Faculty of Law, New University).

Ali je svoboda govora podcenjena? Perspektiva iz vidika človekovih pravic

POVZETEK

Znanstveni prispevek obravnava svobodo govora z vidika človekove pravice. Raziskava je bila usmerjena na osvetlitev ozadja človekove pravice svobode govora in njen razvoj skozi uporabo v konkretnih primerih. Z namenom ugotoviti meje pravne argumentacije v zvezi z omenjenim kontekstom svobode govora kot človekove pravice, smo analizirali primere, katerih skupna rdeča nit je bila svoboda govora. Analiza nam omogoča vpogled v konceptualno razumevanje svobode govora kot človekove pravice skozi oči sodnika. Struktura pravnih argumentov znotraj sodnih odločitev je pokazala, kako je mogoče določiti kontekst v ozadju človekove pravice svobode govora. Svoboda govora ni le človekova pravica, ki bi bila ločena od širšega pravnega okvirja, ampak je v svojem bistvu človekova pravica, ki jo je treba vedno znova interpretirati skozi pravno argumentacijo sodnikov glede na rabo v družbi. Sodniško tehtanje skozi pravno argumentacijo kaže, kako daleč lahko sežeta tako varstvo pravice kot njena omejitev. Pri tem svoboda govora kot človekova pravica ni nič drugačna kot ostale človekove pravice. Gre za univerzalno pravico, ki jo je mogoče opazovati skozi argumente sodišča in postaviti v kontekst, ki stoji za njo.

Ključne besede: Človekove pravice, Svoboda govora, Omejitve, Zaščita, Univerzalna pravica

1. Introduction of the topic

Have you ever felt the need to express something but were discouraged by the thought of backlash that your spoken thoughts would bring? This is not something out of the ordinary, as we come into such dilemmas more often than not. To question oneself what is appropriate to voice out and what is not may prove to be a difficult task; a task that is as meaningless as it is meaningful. If we position ourselves according to the view that every speech is admissible then it is meaningless to burden oneself with the task of sorting the thoughts into those that can be voiced out

loud and those that cannot. A contrasting outcome awaits if we separate valid thoughts worth voicing out from those that would be heedless once spoken out loud. In such an approach it would prove meaningful to choose the thoughts carefully before they are spoken.

Let us put aside the common decency that should be a part of our interactions with others and focus solely on the aspect of speech. Why is this an important factor? When interacting with others, we tend to follow a basic level of politeness; this also varies depending on the individual, as some follow ethical courtesy to a further extent than others. Our communications with the members of society are characterized by a number of factors, but we will not go deeper into this as we are more interested in the legal aspect of the content that such communication contains, rather than the given respectability of the communication itself. Why is this the case? Some communications can come across as harsh and incongruous even though they contain valid information and facts. Same goes for discordant communications which can be perceived as crude while still being completely reasonable in its content. Sayeed points out that we are fierce advocates of unhindered freedom of expression when it comes to literature and works of art, but at the same time, in the cases of ordinary or common speech, we are inclined to be ambivalent (Sayeed, 2017, p. 10).

This is where our research starts. By looking through the prism of legality, we can protect the speech that has purposeful and important ideas behind it. But as we approach the limits of subject matter, we stumble upon another problem: who decides what is an important idea contained in the speech that must be upheld? The easy way out would be to allow all speech no matter the contained idea in it. But at what cost and with what consequences?

To outline the central idea behind the analysis in this research paper, we must first find out how the legal aspects behind speech and communications deal with this breaking point. To find this legal aspect we must focus on freedom of speech. But not only on freedom of speech as an instrument of lawmakers and part of the legal system but freedom of speech as a human right. This research paper is structured in two parts, with each being a research study on its own and not related. Both parts are devoted to the research of case law and finding the relevant patterns in the

argumentation of the decisions made by judges.

The first part analyzes the historical views of freedom of speech and is centered around the caselaw of the United States of America. The second, final part revolves around modern caselaw from the courts in the Caribbean region, more specifically, from the Bahamas and Jamaica. The posed research question tackles the predicament of the background behind freedom of speech as a human right; if it is contingent on the perception or the context.

2. Freedom of speech as a human right

The question of how highly we value freedom of speech as a human right is not as perplexing as it might seem. International law and constitutions of countries all around the world prove that freedom of speech is a fundamental human right that offers protection of the liberties that an individual has. It is an aspect of individual liberty and thus a good unto itself (Stevens, 1993, p. 1312). The aim of this research paper is to enlighten the position of the freedom of speech as a crucial human right for society to function. When we delve deeper into the context of this human right, we can quickly discover that it encompasses all the corners of our waking life. To provide proof of this statement, we can name one clear example: the perpetuation of knowledge and furthering science. If there was a ban on speech or a censorship of sorts that would prohibit sharing knowledge, there would be no advancements in any field or profession. The interest in expressing our thoughts, beliefs and commitments is not solely based on the results that may follow from their articulation as persuading others of our view but also on the very role such expression plays in developing and discovering the content of those thoughts and beliefs (Gilmore, 2011, p. 518). Let us connect this thought with something very important for individuals: the ability to voice concerns, criticism and opinions of issues that cause controversy and doubt. It is a common denominative that doubt was the precursor for some of the most advanced innovations and scientific breakthroughs in human history. Those who doubted the dominant narrative sought answers that would prove their doubts were justified. This is why the right to free speech is seen as essential for the discovery of truth (Dawood, 2013, p. 293).

Even though freedom of speech as a human right can bring positive societal change, it can also bring unrest when it clashes with other human rights. This is even more clear in the digital age where lowering costs of transmitting, distributing, creating and modifying information has important democratising and decentalising effects which have all contributed to the change in social conditions of freedom of speech (Balkin, 2004, p. 3). It is true that freedom of speech is recognized as a human right by several legal documents, but so are other human rights that may come into conflict with it. As was presented beforehand, this research paper tackles the position that freedom of speech has as a human right. This not only means that it is safeguarding the individual's right to speak their mind but also to express oneself and be able to gather new knowledge, new ideas and different points of view from others who also utilize this same human right. This context that we have just provided offers an insight into what this human right really encompasses. It offers one the chance to articulate diverse political, cultural and philosophical views and at the same time be confounded by the same philosophical, cultural and political views that serve the individual as a slightly different reflection of the views they have themselves. This should not be a reason of concern in any democratic society. Even more so, when the legal system encourages such liberties.

We can go back in history to see, that even ancient Athenians boasted how they were unique people as they had freedom of speech (Radin, 1927, p. 215). Furthermore, even children of all ages show high levels of endorsement of freedom of speech, as this greatly refers to societal progress and democratic principles (Helwig, 1998, p. 528). All ideas that might be socially acceptable should be free from any inhibition; same goes for controversial and unpopular ideas, due to the fact that once such ideas are suppressed, they will simmer underground and cause instability (Schlag, 1983, p. 729). For example, political arguments are on the constitutionally protected side of the line (Laycock, 1996, p. 813) and freedom of speech is of great value in the political process (Redish, 1982, p. 592) due to the fact that free speech rights serve an overarching interest in political equality (Sullivan, 2010, p. 144). The remedy for bad speech is said to be more speech and not enforced silence, which also

means that governments are not required to, or more importantly, not permitted to make decisions about what idea may be expressed and what idea may not be expressed (Sedler, 2006, p. 384). Those in society who assert their autonomy through participation, free thought and self-expression are also opposed to the thought of any governmental or community constraint (Powell, 1996, p. 16).

Constitutions and their accompanying national legal systems set out the legal framework for the practise of freedom of speech which means that free speech is directly correlated to the law. This, in term, means that each country decides by law how much autonomy an individual has when it comes to expressing themselves. When governments set up governmental structures, be it a court or an administrative agency, an individual who chooses to become enmeshed must accept the restrictions on autonomy (Baker, 2011, p. 280). Other than that, the regime of autonomy has an agreeable by-product which is the enrichment of public debate (Fiss, 1986, p. 1423). In reality, the autonomous behaviour of an individual is technically bordered by the courts of each country and the judges who determine how the law is applied. Rest assured, this is not solely done how the judges see fit but is built upon many precedent cases that created a foundation upon which every case is adjourned. That is why we should look into the jurisprudence of courts, but not so much for specific doctrinal rules because overarching doctrinal themes are equally as important due to the fact that courts sometimes direct attention to such relevant themes (Coenen, 2017, p. 1605). We can now see that apart from law we need to also know how this law is applied in concrete situations.

The United States Supreme Court was adamant about the fact that freedom of speech was a value so integral to the democratic way of life as to withstand any form of legal balancing. When the law is applied in such a manner the scholarly discourse monitors a number of reccurring observations such as the need for unrestrained speech as a necessary condition of self-development and self-fulfillment, the need for a robust democratic discourse which is essential for achieving political truth and last but not least, that allowing substantive limits on speech even in extreme circumstances would open the door to further restrictions (Mailland, 2001, p. 1183).

3. Democracy and freedom of speech

Through the years, we have become accustomed to the belief that freedom of speech, like many other human rights, is essential for a democratic state. Freedom of speech is one of the cornerstones of democracy (Vance, 1918, p. 239). Not only because it gives a theoretical layout for the ability to ensure political participation but also to cater to the needs and requirements of informed public debate. If one is not informed, they may not provide constructive feedback in a debate. The same goes for misinformation and censorship of targeted minority views. The quote about censorship being paternalistic and counterspeech being empowering finds itself based on the idea that laws that punish hate speech also undermine the equality rights of minority group members by treating them paternalistically as helpless victims who need the intervention of higher authorities on their behalf (Strossen, 2016, p. 218).

3.1 The obstacles

Free speech is beneficial for each individual as their ideas and opinions can be debated openly and without any limitation, offering concise feedback to the individual regarding their ideas, which are tested in such a way. People have the right to accept or reject points of view and only informed people are ultimately best equipped to make decisions concerning their interests (Haskins, 1996, p. 88). In addition to that, people will not be able to develop intellectually and spiritually, unless they are free to formulate their beliefs and political attitudes through public discussion and in response to criticisms that others may express (Yong, 2011, p. 7). We want to protect speech not because it causes no harm, but despite the harm it may cause (Schauer, 1983, p. 1295).

This brings us to the next problem that we can observe through the lens of human rights when we discuss freedom of speech: the discovery of truth. It is difficult to logically argue about the existence of multiple truths as it is commonly accepted that the truth based on available facts is only one. We might add that there can always be more than one perception of truth but that does not impact truth as an observed fact. If a voice is given to a wide variety of views over the long run, true views are more likely to emerge than if the government suppresses what it deems false

(Greenawalt, 1989, p. 131). Factual truth can be, in all senses of logic, only one, and the view that truth means nothing more than consensus is a very inadequate view, which is why it cannot serve as the basis for a coherent theory of free speech (Solum, 1989, p. 72).

This is one of numerous challenges that eat away at the shield that the status of a human right offers to free speech. But is this an imminent threat to the status of a human right? Later on in this research paper, we will see how the court tackles such an obstacle. To further explain this, not only hate speech, but also government-bound restrictions and misinformation all contribute to this erosion. If banning hate speech is morally misguided, counter-speech is the only morally permissible remedy (Howard, 2019, p. 105). Any restriction of access to information or censorship of it can give rise to authoritarian tendencies of a government which should be a red flag on its own. The same goes for suppressing dissenting opinions. The dilemma arises when it comes to misinformation. Through the years, this phenomenon has been colloquially dubbed fake news and it frequently spikes feverous public debates and outrage, which provides a reason for concern. The tedious fact of it all is that it can often lead to tainted social interactions and cohesion as well as provide serious questions in regard to public safety. However, this does not mean that the purpose of the speaker affects the value of the speech to listeners or public debate (Volokh, 2016, p. 1370). For now, the enigma remains unsolved: how far can unrestricted speech go and how much harm does restricted freedom of speech cause? We will look into this later on.

3.2 The solutions

The aforementioned question has, as implied, two reasonable sides to discuss. The first one is to gauge the unrestricted free speech and the consequences that such a lack of control brings. Second is the culpability that follows restrictions bestowed upon freedom of speech. The latter carries with it the implications for society which coincide with the risk of influencing political discourse and wreak havoc on the individuals when it comes to their freedom of expression. Should such a scenario unfold, there is no doubt that it would have a significant effect on society, espe-

cially for the openness of society to diversity. This is actually a logical aftermath as freedom of speech more or less enables the coexistence of diversity in society. Speech constructs social reality (Volokh, 1996, p. 2433) and if one particular group in society is denied the human right of free speech, this means it will not have a voice and will not be heard which eliminates a certain aspect of cultural diversity amongst the members of society. It is easy to speculate whether such a condition would lead to increased intolerance of society to such a group, especially when this group would try to make their voices heard. And this is one of many reasons why freedom of speech is needed. All the individuals in society should at least feel free to express themselves and state their opinions without the threat of backlash. This backlash need not be associated only with coming from other members of society but also from the state, in particular government agencies for example. Expression deserves extensive governmental immunity, which is strongly tied to the relationship between expression and individual autonomy (Wellington, 1979, p. 1106). The suppression of ideas is illegitimate because it is inconsistent with the presupposition that a democratic society bases its decisions on full and open discussion of all points of view and on top of that it is also illegitimate because of the possibility that the government may wrongly decide that something poses an unacceptable danger to the expression of valuable ideas and that is why suppression of ideas is not a legitimate government function (Bogen, 1983, p. 464).

Should we follow this argument, we find ourselves head on with the threat of governmental influence on society through limitations of free speech. This is not something unknown, as there have been multiple historical cases where it was not in the best interest of the government if the individuals revealed certain information that held the government responsible for wrongdoings. To put it in simpler terms, free speech is decisive in keeping the government accountable for its actions. The detrimental limitation of free speech can lead to a loss of the option to hold a government accountable. For example, the constitutional crisis eventuating in the resignation of President Richard Nixon in the United States of America had a profound effect on the degree of valuation of a free communication market as first hand experience shows that attempts by officials to suppress information

only strengthens belief in freedom of speech and press among those who already subscribe to these beliefs and also converts some to a new belief in the value of freedom of speech (Wilson, 1975, p. 75).

4. The limits of free speech

After describing all of this, it is a difficult endeavour to imagine when does limiting free speech causes more good than it does harm. If we try to solicit a clear reply to such an inquiry, we can start by asking ourselves if a human right can be abused. If the answer is yes, then it is the responsibility of the law to prevent abusing freedom of speech in order to protect other human rights. But if the answer is no, it becomes comprehensible that a human right cannot be abused since it can be bordered solely by the rights and dignity of others. If we follow the idea that we have constructed here, it is self-explanatory that freedom of speech provides meaningful standards of communication which can only birth dialogue in a constructive and nonillicit manner circumscribed by candour. Let us give a plain example of this. The lack of mutual understanding cannot be a reason to label something as hate speech but should be treated as a way to express differentiating opinions. Allegedly harmful speech is commonly labeled as hate speech (Strossen, 1996, p. 449). As friends agree to disagree, the freedom of speech provides those who participate in a dialogue a discerning way to be heard. As soon as something is labeled as hate speech and excluded from public debate, the elegance of the dialogue diminishes and gives place to the brute force of dejecting one from the dialogue based on a label. For example, the government cannot prohibit hate speech on the grounds that it expresses a bad idea and is inconsistent with democratic values (Sedler, 2006, p. 383). Of course, it can be said that there needs to be a recourse to act accordingly, for example against those who instigate or opress. But even in this case, a more well-developed test is needed to better distinguish between speech that implies a true threat and speech that, no matter how inflammatory it may be, is not a threat at all (Rothman, 2001, p. 367).

The same goes for decisions made by courts. If the courts are allowed to treat otherwise protected speech as being less valuable than other speech, the more calls there will be for creating new

zones of diminished protection (Volokh, 2004, p. 924). The main point here is not to allow individualistic arbitrariness to enter into the realm of limiting freedom of speech. It is always better to harbour a chance of dialogue than to prevent this dialogue from happening.

The aforementioned perception of hate speech can allow for a non-uniform approach to it. The first approach is to allow hate speech in order to maximize opportunities for individual expression and cultural regeneration while the second approach is highly controversial due to the fact that it represses hate speech through sanctions ranging from official and private reprimands to criminal prosecution (Massaro, 1991, p. 213). A third approach combines the first two. It is also important to note, that people can understand the gravity of hate speech while still supporting freedom of speech because those who defend free speech may recognize the harm of hate speech, but firmly believe that freedom of speech is more essential than censoring speech content (Downs, Cowan, 2012, p. 20). This is why speech is sufficiently distinctive enough to form a basis for a special right of freedom of speech which in turn means that skeptics are incorrect to say that speech cannot be the basis of a special right just because it cannot be distinguished from other phenomena in the world (Kendrick, 2018, p. 703).

5. The values behind a human right

The complexity of this human right far exceeds the speculative objections of the need to diminish its reach. This is confirmed by many constitutions of the countries around the world and by the case law of their courts. The duty of the courts is to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the right to speech (Bogen, 1979, p. 387). Perpetuating an environment in which individuals feel free to speak their minds and protecting their right to express themselves opens the gates of democracy and keeps authoritarianism out at the same time. Upholding the values of freedom strengthens democracy as well since free speech should always be seen through the lens of democracy (Sunstein, 1992, p. 316). Speech that matters is less free if a person must pick their words with exquisite care, not to men-

tion the fact that if communications had to meet strict standards of correct formulation, people would be far more hesitant to speak their minds and what they did say would be less an expression of their personality (Greenawalt, 1989, p. 155).

There have been many works where there was an attempt to explain freedom of speech through the legal documents that frame it. There is no shame in such a venture, but to try and elicit the meaning of the human right part in the freedom of speech it is best to turn to the application of law and not only the documents that frame it. We could go on about the legislation which defines freedom of speech as a human right, but it would be far more pragmatic to look at it from the perspective of the judge who uses such law in an actual court case. This is the reason why the methodology behind this research paper focuses on analyzing the court verdicts that give us a glimpse of how the freedom of speech fragments itself into a human right as we know it today. By doing so we will aspire to crystalize freedom of speech as a human right with a particular background that characterizes it as a fundamental human right in a democratic society.

Getting to know the deliberation of the court before coming to a definitive conclusion, we set out to firstly analyze the legal argumentation on top of which the judge reached a decision. By knowing how the argument is structured we get an insight into how the freedom of speech is properly exercized in accordance with the human right principles. Each human right has a background context into which it is set. Freedom of speech is no different. This is the main research question of this paper.

6. Historical analysis from the perspective of the United States

Let's start with the cradle of freedoms, the United States of America. The Supreme Court of the United States has a rich history when it comes to defining the freedom of speech as a human right and we will begin right at the start, in 1919. On March 3rd of that year the Supreme Court of the United States reached a verdict in Schenk v. United States in a case of a conspiracy to circulate among men who were called and accepted for military service a circular which intended to influence them to obstruct the draft. The Court decided that words that would be ordinarily

and in many places within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent and the character of every act should depend on the circumstances in which it is done (Schenk v. United States, 249 U.S. 47, 1919, p. 48.). In this legal argumentation, we can see that the Court emphasized the condition of clear and present danger. This means that it needs to be proven beforehand that the act registers a danger that is both clear and present. Acts that are not set forth to become such danger cannot be subject to the limitations of free speech. Such materialized danger can then serve as a prerequisite that free speech can be limited. This limitation that we found and presented here brings us to another standard which was created by the Supreme Court of the United States in the case Abrams v. United States.

The Abrams v. United States case was decided on November 10th, 1919, by the Court, explaining the standard set forth in the Schenk v. United States even further. It stated that only present danger of immediate evil or intent to bring it about warrants Congress to set a limit to the expression of opinion where private rights are not concerned and that Congress cannot forbid all efforts to change the mind of the country (Abrams v. United States, 250 U.S. 616, 1919, p. 628.). Here we can see that the Court gave to the Congress the option to set a limit to free speech if this limit prevents present danger of immediate evil. We emphasize the wording of immediate evil as this shows how serious the danger needs to be to have free speech limited as a fundamental freedom and human right. To understand this, we need to look deeper into the case and what it was about. The facts of the case which were undisputed were of a conspiracy to violate the Espionage Act by uttering the circulars that were intended to provoke and encourage resistance to the United States in the war with Germany, especially by inciting and advocating through such circulars a resort to a general strike of workers in ammunition factories for the purpose of curtailing production of ammunition essential for the war (Abrams v. United States, 250 U.S. 616, 1919, p. 616.). One might ask what was in these circulars or pamphlets that was so dangerous as to cause immediate evil. It contained war propaganda aimed at destabilizing the efforts of the United States. A lot of

five thousand pamphlets were distributed in one day, on the 22nd of August 1918. Let's explain that further; the pamphlets which circulated in the New York City stated: »The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine! Yes! Friends, there is only one enemy of the workers of the world and that is Capitalism. Workers, Russian emigrants, you who had the least belief in the honesty of our Government must throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help to the prosecution of the war.« (Abrams v. United States, 250 U.S. 616, 1919, p. 620.). One might see how this would provoke a hasty response from society, not the least from those who were not at ease with the Government. This is more so true when we realize that the conclusion of the pamphlet included a direct call to action: »With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia, and are fighting for freedom.« (Abrams v. United States, 250 U.S. 616, 1919, p. 621.). The Court decided that the spirit becomes even more bitter as the pamphlet declares that America and her Allies have betrayed the workers and that the reply of all workers to the barbaric intervention has to be a general strike.

Judge Oliver Wendell Holmes Jr. Dissented. His argument was that when words are used exactly, a deed is not done with the intent to produce a consequence unless that consequence is the aim of the deed (Abrams v. United States, 250 U.S. 616, 1919, p. 627.). His creative take on free trade ideas is summed up in his explanation of the best truth which is in the power of the thought to get itself accepted in the competition of the market and that truth is according to Judge Oliver Wendell Holmes Jr. the only ground upon which wishes can be safely carried out to which he adds that we have to wager our salvation upon some prophecy based upon imperfect knowledge and for that reason, we should, as Judge Oliver Wendell Holmes Jr. puts it, be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless so imminently threaten immediate interference with the lawful (Abrams v. United States,

250 U.S. 616, 1919, p. 630.). What makes his dissenting opinion so persuasive is not only the grace of his legal writing but also the articulate thought that he expressed in regard to opinions that some consider grisly and frightful to their own. We may speculate that this is the reason why Judge Louis Dembitz Brandeis concurred with this opinion. Judge Louis Dembitz Brandeis also authored the concurrence in the Whitney v. California case which we are going to present next.

The Whitney v. California case was decided on May 16th 1927. This case revolved around the question of whether joining and assisting in the organization of a Communist Labor Party contravened the California Criminal Syndicalism Act. The opinion of the Court was delivered by Judge Edward Terry Sanford. The opinion of the Court was that freedom of speech does not confer an absolute right to speak, without responsibility whatever one may choose, neither does it give an unrestricted and unbridled license of immunity for every possible language, neither does it prevent the punishment of those who abuse this freedom, which coincides with the fact that State can in the exercise of its police power punish those who abuse this freedom by utterances inimical to the public welfare, which incite to crime, disturb the public peace or endanger the foundations of organized government if it is threatened of being overthrown by unlawful means (Whitney v. California, 274 U.S. 357, 1927, p. 357.). Judge Louis Dembitz Brandeis stated in his concurrence that the »Court has not yet fixed the standard by which to determine when a danger shall be deemed clear, how remote the danger may be and yet be deemed present and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection (Whitney v. California, 274 U.S. 357, 1927, p. 374.).

Nonetheless, the background of this case remains clear; Miss Anita Whitney was convicted of the felony of assisting in organizing the Communist Labor Party of California, by being a member of it and assembling with it. The mentioned acts were enough to constitute a crime, which was based on a prerequisite that the Communist Labor Party of California was formed to teach criminal syndicalism. The statute that made these acts a crime restricted the right of free speech and of assembly theretofore existing (Whitney v. California, 274 U.S. 357, 1927, p. 374.). Should this be

a reasonable ground for concern? While the majority of justices on the Supreme Court of the United States upheld the verdict against Anita Whitney, this also had a fairly negative impact on the freedom of speech. Let us now explain this effect which was a residual aftermath of the verdict. Anita Whitney was arrested in November of 1919 after giving a speech in Oakland, which was part of a fundraiser for the Communist Labor Party of California. Although she denied that the speech she gave was meant to incite violence, she was found guilty of criminal syndicalism and sentenced accordingly. When she turned to the Supreme Court of the United States she claimed that her speech was treated differently than the speech of others and that this discrepancy in equality stemmed from the fact that the subject matter was parlous to some. This might as well be the reason that Judge Louis Dembitz Brandeis possibly had in his mind when he wrote that the prohibition which was newly introduced means that the statute no longer solely aims at the practise of criminal syndicalism but now also at associating with those who propose to preach it, although he still sees the right of free speech, the right to teach and the right of assembly as fundamental rights even though they are not absolute and subject to restrictions in order to protect the State (Whitney v. California, 274 U.S. 357, 1927, p. 373).

What constitutes a serious threat to the State and where does free speech wander into the territory from which it can cause irreparable damage to the State? Judge Louis Dembitz Brandeis gave us an insight into how to answer this question when he wrote that fear of serious injury cannot alone justify suppression of free speech and assembly by using the historical anecdote of men who feared witches and burnt women, to which he added the description of the function of free speech to free men from the bondage of irrational fears. In addition to this, he pointed out how there must be reasonable ground to fear that serious evil will result if free speech is practiced in order for it to be justifiably suppressed. In his opinion, there must also be reasonable ground to believe that the evil which needs to be prevented is a serious one. It can be logically believed that this point of view garnered his opinion of the fact that even advocacy of violation, however morally reprehensible, is not automatically a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be

immediately acted on, to which he added the dilemma of wide differences between advocacy and incitement, analog to preparation and attempt, similarly to the difference of assembling and conspiracy (Whitney v. California, 274 U.S. 357, 1927, p. 373.).

How to act upon clear and present danger depends on the notion of finding it in the first place. Surely one can quote the famous Judge Potter Stewart and say that they will know it when they see it but this approach seems to fall short of the gravitas that comes with immediate serious violence that is expected upon being advocated for. Should there be any prior reason extending out to past behaviour which would lead us to believe things would stir up, we might think things through or maybe not. According to the position that Judge Louis Dembitz Brandeis took in this case only an emergency can justify repression. He grandiosely wrote that those who won the independence by revolution were not cowards and did not fear political change, which meant that no danger from flowing speech could be deemed clear and present unless the incidence of evil apprehended was so imminent that, according to his opinion, may befall before there is an opportunity for full discussion, leading to the fact that evil can be averted by the process of education (Whitney v. California, 274 U.S. 357, 1927, p. 377.) and this means more speech, which is a remedy needed to be applied in accordance to the fact that enforced silence cannot do as much as education and speech.

From this analysis which we made, the reader can further understand why imminent danger does not automatically justify a legislator's ban or prohibition just to cater to the functions of an effective democracy. Unless, of course, the apprehended evil causes serious problems. We saw that Judge Louis Dembitz Brandeis feels how stringent the measure of prohibiting free speech is. He even structured his argument on the Founding Fathers and their courage to act freely. This position can be attributed to the fact that he held a view on how it is not enough to justify suppression of free speech if it is likely to result in some violence or in the destruction of property, but there needs to be a probability of serious injury to the State instead (Whitney v. California, 274 U.S. 357, 1927, p. 378.). His remarks were observed in the next case that we are going to analyze and that is the Terminiello v. Chicago case.

The aforementioned case of Terminiello v. Chicago was decided on the 16th of May 1949. To give a time perspective to the

reader, more than two decades later the doctrine of clear and present danger was again further elaborated. The undisputed facts of the case and its background are as follows: »In a meeting which attracted considerable public attention, petitioner addressed a large audience in an auditorium outside of which was an angry and turbulent crowd protesting against the meeting. The petitioner condemned the conduct of the crowd outside but also at the same time started to vigourously criticize various political and racial groups. Notwithstanding efforts of a cordon of police to maintain the order, there were several disturbances in the crowd. Petitioner was charged with violation of an ordinance forbidding any breach of peace and the trial court instructed the jury that any misbehaviour which stirs the public to anger, invites dispute, brings a condition of unrest or creates a disturbance, violates the ordinance (Terminiello v. Chicago, 337 U.S. 1, 1949, p. 1).

Reverend Father Arthur Terminiello delivered a crude and harsh speech that fired up the crowd of protestors who were held at bay by the police. There was an estimate of 800 people at the event. The number of people at the spot later on was 1500 (Terminiello v. Chicago, 337 U.S. 1, 1949, p. 16). It was clear to all that the speech would invite dispute and stir the emotions of all who were involved. People were not at ease and many became angry. But does unrest and dissatisfaction with what someone says cause the suppression of free speech? Do such circumstances allow for the prohibition of freedom of speech? We will present to the reader whether this situation constituted a clear and present danger or was it just a seldom invective occasion which brought slight public annoyance and inconvenience for the individuals involved.

With no intention of spoiling the final outcome to the reader we must explain that Father Arthur Terminiello was convicted, the Illinois Appellate Court and the Supreme Court of Illinois affirmed but the Supreme Court of the United States granted certiorari and reversed. Continuing on we will explain why through the analysis of the argumentation that was delivered by Judge William Orville Douglas, a successor of Judge Louis Dembitz Brandeis.

The Court decided that the vitality of civil and political institutions in society depends on free discussion and accordingly the function of free speech is to invite dispute as it may only serve

its high purpose when it induces a condition of unrest, creates dissatisfaction with present conditions and also stirs people to anger, because speech is often provocative and challenging, so it may strike at prejudices and preconceptions with profound unsettling effects as it presses for an acceptance of an idea (Terminiello v. Chicago, 337 U.S. 1, 1949, p. 4.). This is why the trial court failed as it permitted the conviction of Father Arthur Terminiello on the grounds of his speech inviting public dispute, making people angry and at unrest. That is why free speech is protected as a human right in the first place. It should not be decreased just so we can achieve the absence of anger and public dispute. If we lessen the reach of free speech due to the fact it may unsettle people we at the same time deny the ability to discuss any issue freely without the angst of making someone angry with your personal views. We need not bind free speech with subjective emotions which can be stirred by opposing views. Such an approach is flawed. Let's explain in detail the reasons for this by analyzing the case at hand. The Court had tremendous candor when delivering this decision as is shown in the fact that it noticed how Illinois courts convicted Rev. Fr. Arthur Terminiello based on the fact of inviting dispute and bringing about a condition of unrest. The Court explained that those courts merely measured Rev. Fr. Arthur W. Terminiello´s conduct and not the ordinance against the Constitution, which is worrisome as the petitioner raised both points, that his speech was protected by the Constitution and that the inclusion of his speech within the ordinance was a violation of the Constitution (Terminiello v. Chicago, 337 U.S. 1, 1949, p. 6.). This should not be a nuisance to any court as they are the ones applying the law so they should be able to check the aforementioned points.

A similar case to the one we presented before was the Cantwell et al v. Connecticut which was decided on May 20th 1940. In that case, the Court stated that when a clear and present danger of riot, disorder, interference with traffic upon the public street or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious, as is equally obvious that the State may not unduly suppress free communication of views, religious or others, under the guise of conserving desirable conditions (Cantwell v. Connecticut, 310 U.S. 296, 1940, p. 308.).

The question bestowed upon us is how to draw the line between a speech that is meant to provoke certain feelings and force the individuals to peruse thought-provoking facts and on the other hand speech that is only meant to incite violence and cause unrest amongst the public.

We can find the answer in the Feiner v. New York case. The facts of the case are rather concerning but also extremely straightforward. The Supreme Court of the United States stated the following facts of the case: »Petitioner made an inflammatory speech to a mixed crowd of 75 or 80 Negroes and white people on a city street. He made derogatory remarks about President Truman, the American Legion, and local political officials; endeavoured to arouse the Negroes against the whites and urged that Negroes rise up in arms and fight for equal rights. The crowd, which blocked the sidewalk and overflowed into the street, became restless, its feelings for and against the speaker were rising and there was at least one threat of violence. After observing the situation for some time without interference, police officers, in order to prevent a fight, thrice requested the petitioner to get off the box and stop speaking. After his third refusal, and after he had been speaking for over 30 minutes, they arrested him and he was convicted of violating section 722 of the Penal Code of New York, which in effect, forbids incitement of a breach of peace« (Feiner v. New York, 340 U.S. 315, 1951, p. 315.).

The Court reached a decision on the 15th of January 1951. The opinion was delivered by Judge Frederick Moore Vinson. Petitioner was convicted of the offense of disorderly conduct and the conviction was affirmed by the Onondaga County Court and the New York Court of Appeals. The Court held the conviction, while petitioner Irving Feiner claimed that the conviction was in violation of his right of free speech. Let's explain the reason behind it. The court noticed that the exercise of the discretionary power that police officers had was used to prevent the breach of the peace and that the same notion was approved by the trial court and two courts on review. Those same courts also recognized the right of the petitioner to hold a street meeting, to make use of loud speakers and to make derogatory remarks concerning public officials. This was not contested as it was within the realm of legality. When making the arrest, the police officers were solely motivated by a concern for the preservation of order and protec-

tion of the general welfare and not by the suppression of political views that Irving Feiner had (Feiner v. New York , 340 U.S. 315, 1951, p. 319).

In reaching the decision, the Court stated that it was mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings and that it is aware that the ordinary objections of a hostile audience cannot be allowed to silence a speaker (Feiner v. New York, 340 U.S. 315, 1951, p. 320). It, therefore, decided that police officials are not powerless to prevent a breach of peace when the speaker passes the bounds of argumentative persuasion and starts to incite a riot. In the case we presented, this was exactly what happened and, as such, could not be protected as free speech.

Judge Hugo Lafayette Black dissented and wrote that such a conviction is a mockery of the free speech guarantees as it subjects all similar speeches to the supervision and censorship of the local police and views it as a long step toward totalitarian authority (Feiner v. New York, 340 U.S. 315, 1951, p. 323). Due to this legal argument that he presented he made clear in his dissent that he does not want to take part in such a thing. His staunch approach to free speech would definitely go more in line with what we have presented so far. He concluded with a remark that he understands that people in authoritarian countries must obey arbitrary orders but hoped that there was no such duty in the United States because due to this minority speakers in every city can be silenced (Feiner v. New York, 340 U.S. 315, 1951, p. 328). We can see the reasoning in the background of all of this. The erosion of free speech as a human right can happen slowly but when these incremental steps surmount to a large enough chunk the entire intent of the human right erodes. The gradual slide that can happen to human rights of this type need not happen through years it can happen in decades before it becomes perspicuous that the right is almost gone. We have shown to the reader how free speech functions in the light of the intent that this human right has. Free speech is one of those human rights that can potentially be in danger by the perilous erosion that takes place through many years before one even becomes moderately aware of it.

The analyzed case can raise some worries especially due to the fact that judge William Orville Douglas wrote in his dissenting opinion, with whom judge Sherman Minton concurred, that

there were no fights and no disorder even by the standards of the police, no one was even heckling the speaker, there was only the testimony of the police that there was some pushing and shoving in the crowd (Feiner v. New York, 340 U.S. 315, 1951, p. 330). Sure enough, the topic was ill-mannered and in bad taste, especially due to the fact that unpopular opinions often gather heckling from the crowd if not just cause unrest to the individuals present there. But the police should, according to judge William Orville Douglas, protect these lawful gatherings so that speakers may exercise their constitutional rights as long as there is no incitement of riots.

In the same year, there was another similar case in front of the Supreme Court of the United States. The Dennis et al vs. United States case was about petitioners who were leaders of the Communist Party in the United States. They were indicted in a federal district court for willfuly and knowingly conspiring to organize as the Communist Party a group of people to teach and advocate the overthrow and destruction of the government by force and violence. They were convicted.

The Court, through the delivered opinion by Judge Fred Moore Vinson, stated that it has adopted as a rule the statement made by Judge Billings Learned Hand who phrased that courts must in each case ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger (Feiner v. New York, 341 U.S. 494, 1951, p. 510). Here, we can see why the petitioners were denied the right to exercise free speech, as such exercise would mean the creation of a plot to overthrow the government. The gravity of evil in this case is an overthrown government and the suppression of free speech would prevent this from happening. This is the reason why the right to exercise free speech was denied. Later on, as time passed, both Schenk v. United States and Abrams v. United States were overturned and also Dennis et al v. United States was overturned as well, while Whitney v. California was overruled as later decisions set up a newer standard to guarantee free speech. By the end of the sixties the clear and present danger doctrine was replaced by the imminent lawless action test brought by the Brandenburg v. Ohio case (Brandenburg v. Ohio, 395 U.S. 444, 1969, p. 447). To this day the caselaw in the United States seems to use the imminence of a targeted threat as one of the most impor-

tant thresholds to decide whether a restriction must be imposed on a given statement or act, although more recently the Court has moved away from this doctrine, if you threaten violence against a specific target, you might find your right to speech restricted, but in the same light, religious practices and speech that has hateful content may not be regulated, however, if the victim can prove targeted intent to intimidate, the Court will not intervene in a restriction (Lamson, de Souza Lehfeld, Martinez Perez Filho, 2022, p. 50).

7. Synthesis of the results for the historical analysis

We chose the historical caselaw of the United States for a reason; the United States of America has always been a cornerstone for liberties and human rights. It was clear that in order to find applicable elucidation it was unavoidable to include such a stronghold. Especially from the historical view point of how it all began. The main point was to show the changing dynamics of the freedom of speech as a human right. We feel that a time period of 50 years from 1919 up to 1969 was enough to showcase the relevant approaches and how they change with time. The background of each human right can be traced in the same manner that we presented so it would not be pivotal for this research to extend it to a broader timeframe. Free speech and the interpretation of what constitutes it can sometimes heavily depend on the circumstances that are taken into account by the court before issuing a verdict. It was shown that no case is really identical to other cases, yet we can undoubtedly find similarities in precedent that help. It was demonstrated that a human right such as free speech can be as fragile as it can be strong. The constant development around it means that it can go from overwhelmingly perceptible to almost non-existent. It was also apparent that free speech as a right on its own is always subject to judicial evaluation.

Most importantly, it was evident that even from a historical point of view, there was a sense of context put into this evaluation, rather than just the sheer perception of judges when it comes to each case. The context of free speech was always put into consideration, rather than just considering the perception of such speech. Be it in regards to communism or religion, or even

espionage and racial topics, the speech was assessed from the context in which the ideas were shared or promoted. The judges were conscientious of the implications that a judgment based on perceived implication would have; that is why they put the whole situation in perspective. They looked at the bigger picture.

Why was this important? The importance of evaluating the context in matters of limiting free speech gives an additional safeguard to help uphold this human right. To put it plainly, would the situation be different if Rev. Fr. Arthur W. Terminiello gave the heated speech in a church rather than at the meeting in an auditorium or if Irving Feiner tried to commove a non-hostile and non-mixed crowd? The answer is simple, the context in which the speech is given and the context in which the idea is conveyed matters. The same goes for Anita Whitney and her speech she gave at the fundraiser for the Communist Labor Party of California in Oakland. The context in which the judges would ponder the case is without a doubt different if it was not given at a fundraiser for a communist party. This shows the importance of context behind free speech.

8. Modern developments from a Caribbean legal perspective

To further elaborate the research question of this research paper regarding the background context into which freedom of speech as a human right is set, we need to provide additional balance to this research, since it is needed to provide us with the insight into how courts structure the arguments around the common human rights and principles surrounding them. In our case, we are researching the context of free speech.

Additional balance to this research comes in the form of judicial decisions from two of the highest courts in the Caribbean region. We chose the Supreme Court of the Bahamas and the Supreme Court of Jamaica. The standards of legal argumentation in the verdicts of the mentioned courts are on the same level of quality as any other court in the world and often exceed it. Oftentimes this fact is wrongfully overlooked as it can provide valuable insight into the perception of free speech as a human right.

Let's start in the Bahamas. The first case we are going to analyze is between Coalition to protect Clifton Bay as the first appli-

cant and the second applicant Zachary Hampton Bacon III versus the Hon. Frederick A. Mitchell as the first respondent and Minister of Foreign Affairs and immigration and second respondent the Hon. Jerome Fitzgerald as the Minister of Education, Science and Technology. Before we go into details, let's present the relevant context of the case. The first applicant is a non-profit environmental group popularly called Save the Bays and the second applicant is affiliated with them. They brought a constitutional motion challenging the disclosure of private and confidential emails said to belong to them. They sued the first and second respondent but also sued the third respondent which was the Attorney General in her capacity. The emails were disclosed in Parliamentary Proceedings by the second respondent and refered to the financial information of the Coalition to Protect Clifton Bay. The source of emails was never disclosed or fully explained. The Applicants claimed that the disclosure of the emails violated their Constitutional rights, including Article 23 which is Freedom of Expression (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 3).

The Respondents on the other hand challenged the constitutional motion on number of grounds. For our research paper the most relevant claim seems to be the fact that they stated that Court does not have jurisdiction to adjudicate on matters within the sacred walls of Parliament or to make orders purporting to impinge on the conduct or speech of Members of Parliament. (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 7). The Court decided that it will decide in the issue whether or not this is a case in which the Court will adjudicate on matters occurring within Parliament or make orders affecting the conduct of Members of Parliament or controlling the speech of Members of Parliament inside the Parliament and on top of that the Court decided to resolve the issue of the question should the Court make any order which places further restrictions on the constitutional rights and the freedom of speech (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The

Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 19).

There was a restriction that the Court addressed immediately. We shall explain it in detail; there exists a statutory basis of parliamentary privilege which states that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of parliament. The privileges enjoyed included freedom of speech in parliament. The Court presented a limitation to this doctrine which included the Buchanan v. Jennings case which held that the need to protect freedom of speech in parliament and the right of parliament to govern its own proceedings did not preclude a claimant from relying on such a record as evidence in support of an action against a Member of the Parliament based on what was said outside the House (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 32). Regarding this, the Court decided that it is well established that parliamentary privilege even in its absolute form cannot apply to what a Member of Parliament says outside of Parliament.

The Court found that the Government, through one of its Cabinet Ministers, breached the Constitution and the Applicants were therefore entitled to vindicatory damages (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 88). What persuaded the Court? The answer lies in the argumentation that the Court used. It said that it is axiomatic that a man's private and confidential correspondence, precious to his heart, should not be the subject of public discussion and scrutiny. The second respondent made unsubstantiated allegations about the first applicant which he portrayed as a money-laundering organization. According to the Court these statements are regrettable since it had nothing to do with the Mid-term Budget debates (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 90). This ruling showed us that there are limits to free speech even when it comes to parliamentary privi-

lege. Freedom of speech as the constraint on the Government in this case constitutes an exception to parliamentary privilege. The verdict was presented by the honourable Madam Senior Justice Indra H. Charles on 2nd of August in 2016.

The second and final case we are going to analyze from the Supreme Court of the Bahamas is monumental in its own right. The case of Omar Archer, Senior as the plaintiff versus Commissioner of Police and the Attorney-General of the Commonwealth of the Bahamas as the defendants brings us another interesting take on the freedom of speech. Before we dig into the fundamentals of freedom of speech let's present to the reader some facts of the case first; over the course of several days in April of 2015 the plaintiff became embroiled in an acrimonious exchange on Facebook with a female, who is referred to as the virtual complainant. She first called the plaintiff amongst other things, a »pathetic turd«, said that a »cockroach could beat you in an election«, and that his mother may have tried to induce abortion which made him »retarded instead«. The plaintiff responded back personal and offensive allegations, the most stinging of which were that she had »had a baby in a bucket in a Rasta camp and left it to die« and that she had HIV/AIDS and was spreading it. She complained to the police and the plaintiff was subsequently arrested, charged with intentional libel and summarily tried before a magistrate. Midstream that trial, he asserted that the law under which he was charged was unconstitutional and that is how the whole thing ended up in the Supreme Court (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 2). Justice Loren Klein made sure to point out the fact that this was the first time that the constitutionality of criminal libel is being questioned in this jurisdiction as this offence is considered anachronistic in many Western democracies and in a handful of Caribbean countries. To this he added, that any opportunity for reform through courts comes up firmly against the savings clause which paradoxically preserves laws that pre-date the Constitution even if repugnant to constitutional guarantees.

The plaintiff in his affidavit from 20.2.2018 states that he is a political activist and an advocate for freedom of expression and his lead counsel described him as a well-known publicly outspoken figure with a big political profile. The plaintiff alleged in the

aforementioned affidavit that his prosecution was politically motivated. The woman with whom he had a virtual altercation is a newspaper reporter and according to the plaintiff a ghost writer for a tabloid; she and the plaintiff were Facebook friends until the unfortunate exchange when he unfriended her but are otherwise not socially acquainted. She inboxed the plaintiff on 16.4.2015 (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 5). She became aware of his public post which said she had Human Immunodeficiency Virus on the 16.4.2015 and made the screenshots on 19.4.2015 and made the complaint to police on that same day (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 7).

The main issue that arose later was the alleged violation of Article 23 of the Constitution which protects the rights to freedom of expression. Not only that but the plaintiff argued that criminal libel law was unconstitutional, and even if it is saved by the clause of existing law it is not reasonably required to protect private reputation for any public policy interests (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 17). When deciding whether criminal libel is an interference with freedom of expression Justice Loren Klein pointed out that the right to freedom of expression is interfered with by the offence of intentional libel but the law equally pursues a legitimate aim in protecting the rights, reputations and freedoms of others (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 24). So this means that the question actually comes down to whether the interference is proportionate. Is it necessary and proportionate to have the means to criminally punish people for publishing intentionally libelous material? Justice Loren Klein hinted that he would be prepared to hold that criminal libel was a *prima facie* interference with the right of free speech. He based this thought on the fact that there has been universal acceptance that freedom of speech is a *sine qua non* in a democratic society. In doing so he reminded of the Guyanese case Jagan v. Burham where it was said that the facets of freedom of expression were cherished rights and that the article of the Guyanese constitu-

tion protecting freedom of expression seeks to preserve what is vital in a free society wherein the right to speak, to propagate and to circulate ideas belong to everyone and will be protected for everyone. This means that the chief commodity of freedom of expression lies in its role in fostering free political discussion (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 25).

In this aspect Justice Loren Klein built his argumentation on European jurisprudence where the courts developed the concept that defamation laws, civil and especially criminal, can have a chilling effect on freedom of expression and the free flow of ideas. His perception was that civil remedy ought to be the first port of call to redress defamation, but this does not necessarily mean that the criminal law has no role in defamation as there are cases where a civil claim may not be feasible and may not punish, which is in the case where the defendant is a person of straw and unable to pay damages, or the defamer might be very wealthy and takes the calculated risk of paying damages. That is why they coexist (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 28).

On the question whether the legislative objective is sufficiently important to justify limiting freedom of speech the Court decided after performing the first element of the proportionality test, that the provision which penalizes defamation and limits the right to free speech with the objective of protecting reputation is a sufficiently laudable goal in a democratic society to warrant a limitation of freedom of expression. The Court ruled that this condition is not only satisfied because of the inherent value and dignity attached to personal reputation but also because the core substance of the right to freedom of expression is not necessarily impaired by such restrictions (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 34). Counsel for the plaintiff argued that the comment in the context in which it was made was not really likely to have caused significant or serious harm which is why it was unnecessary and disproportionate for the state to intervene. The Court did not follow this. The words of the plaintiff were public, while she on the other hand messaged

him privately. His statement had the potential to cause significant harm as it was posted on Facebook where it can reach millions of people. The seriousness of his action is confirmed by the fact that the plaintiff committed several serious crimes against her, from concealing the body of a child and infanticide to knowingly spreading HIV. Challenged provisions were not unconstitutional on the grounds of proportionality (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 41). The Court did not find the act of prosecuting the plaintiff unconstitutional (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 49). The verdict is dated to 29.6.2020.

The main point we can observe from the analyzed decisions from the Court is how the limitations of free speech are argued by the judges. There is an implied border where free speech cannot overflow and as we saw the two examples given, free speech as a human right is contested by other human rights. Parliamentary privilege for one does not provide full grounds for unlimited upkeep of the freedom of speech, same goes for the aspects of serious defamation. The second case showed that free speech can be potentially limited by another person´s reputation and protection of it. We saw how there is an intricate line of balancing the decision, which is usually tightly linked with the facts of the case.

Final case analysis comes from the decisions made by The Supreme Court of Jamaica. The cases were chosen according to the subject matter of free speech.

The first case is between Roy K. Anderson as the claimant and Dwight Clacken as the defendant. Before digging into the legal arguments behind the case we must provide the background of it: Dwight Clacken authored the book titled »No Justice in Jamaica – How the Jamaican Judicial System Destroyed My Life and My Business and How It Can Happen to You«, Roy K. Anderson alleged that certain statements in the book were defamatory in reference to him as a judicial officer and his actions in the capacity as a judicial officer. Roy K. Anderson is an Arbitrator and and Associate tutor in the Faculty of law, University of West Indies as well as a retired judge of the Supreme Court of Jamaica (Roy K. Anderson v. Dwight Clacken, 2016 HCV 05224, 2023 JMSC Civ 42, p. 3).

The statutory framework for this case was The Defamation Act of 2013 whose one of the principles is to ensure that the law relating to the tort of defamation does not place unreasonable limits on freedom of expression (Roy K. Anderson v. Dwight Clacken, 2016 HCV 05224, 2023 JMSC Civ 42, p. 17). The Court in this decision looked into case-law and cited The Jamaican Observer Ltd v. Orville Mattis where the Court of Appeal stated the position that it takes years to build a good name and reputation but it takes only a few reckless lines in a newspaper to destroy or seriously damage that name or reputation; Section 22 of the Constitution gives a right to free speech but it does not permit defamation of one´s good character (Roy K. Anderson v. Dwight Clacken, 2016 HCV 05224, 2023 JMSC Civ 42, p. 38). The Court found that the claimant successfully proved malice on the part of the defendant for the reasons that the defamatory statements were published with an indirect motive, which is other than a duty to publish material of public interest regarding the administration of justice and that the evidence of intrinsic malice can be detected in the words and statements themselves as according to the Court, the language used by the defendant was disproportionate to the facts (Roy K. Anderson v. Dwight Clacken, 2016 HCV 05224, 2023 JMSC Civ 42, p. 36). The Court also found that the defendant did not establish his defence of fair comment because the statements in the book were not honestly made and were not based on true representation of the facts but were actuated by malice (Roy K. Anderson v. Dwight Clacken, 2016 HCV 05224, 2023 JMSC Civ 42, p. 37).

The problem of such viewing of free speech lies in the context of applying this human right. We saw that the Court structured a position in which it decided firstly that statements were published with an indirect motive. Malice intent was a presupposition to build an argument around it. Without this, it would be impossible to hold a limitation to free speech. To understand the words in a certain way, especially in intrinsic malice, it depends on how the Court views each case by the claims made by both parties. This means that, regrettably, even if the defendant did not have such an outcome in mind, but the affected claimant perceived it as such, it constitutes a limit of freedom of speech with the goal of protecting the good name and reputation. This approach can be problematic if left unmonitored.

We can see the same issue in the next case that we are going to analyse. The case of Michael Troupe as the claimant versus Leon Clunis as the first defendant, Owen Wellington as the second defendant, Television Jamaica Ltd as the third defendant, CVM Television Ltd as the fourth defendant and Attorney General for Jamaica as the fifth defendant is an interesting one when it comes to assessing the protection of good name and reputation in the relation to freedom of expression and free speech in particular.

To understand the case more thoroughly we need to present the facts of it: On July 18th of 2012 at 5:30 in the morning a search and seizure operation was carried out by the Jamaica Constabulary Force and its Anti-Lottery Scam Task Force of the Major Organised Crime and Anti-Corruption Agency and the Jamaica Defence Force under the command of Superintendant Leon Clunis. It took place in the parish of Saint James at the residence of Michael Troupe, a businessman, Justice of Peace, Parish Councillor and Deputy Mayor for Montego Bay who resided at Pitfour, Granville in the parish. Troupe and his son were arrested. An illegal pistol was found at the residence. His son pleaded guilty to the offences of illegal possession of firearm and illegal possession of ammunition. The charges against Michael Troupe were dropped (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 3).

The operation conducted at the residence was video recorded by Television Jamaica and CVM television and broadcast on the day the operation took place. Statements relating to the operation were made by Superintendant Clunis and Commissioner of Police Owen Ellington during the course of police operations which were broadcast by the same television stations during Midday news (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 4). Michael Troupe claimed that he suffered severe embarrasment and sustained damage by defamatory words of the defendants. The first two defendants stated that the publication of the statements was not defamatory as the published words were true and substantially true or in the alternative they were fair comments on matters of public interest and the circumstances of publication were protected by qualified privilege while the fourth defendant admitted that

its videographer was alerted to the raid, attended it and learned of the operation at Pitfour where the recording of the arrest was made (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240,p. 6). The Court stated that if it decides that words are capable of defamatory meaning, it must determine whether an ordinary intelligent and unbiased person would understand them as words of disparagement and as an allegation of dishonest and dishonourable conduct (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 18). The Court found the words given their plain and ordinary meaning, are imputing criminal action on the part of the claimant (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 20). The words »key actors« and »top-tier actors within the scamming operations« connote involvement in criminality, when considered in the ordinary sense according to the Court, which means that the average Jamaican would infer guilt upon the claimant (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 22).

Comments made by the reporters would show, to a reasonable person viewing the newscasts, that the claimant is involved in lottery scamming and was arrested because there was a strong case against him. That is why the Court found the words in their natural and ordinary meaning to be defamatory of the claimant as it had an effect of lowering the esteem that the claimant had in public due to the fact that the statements ascribe to the claimant criminal conduct (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 25).

For the argument of fair comment that the defendants used, the Court stated that such words must be stated as a comment on some fact, which means that there must beforehand be a statement with foundation of fact which is a basis for the comment given on this fact. If the facts on which the comments purport to be made are not proven to be true or published on an occasion of privilege, the defence of fair comment is not available (Michael

Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 27). The Court made it clear that fair comment does not extend to misstatements of facts however bona fide they may be. In regard to the argument of qualified privilege, the Court stated that a proper balance must be struck between freedom of expression and the right of an individual to protect his reputation, which is relevant for freedom of speech (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 31). The reasonable television viewer would understand the serious allegations when the reporter stated that the claimant was caught in the lotto scam dragnet. The Court concluded that the tone of publications was not investigative and thus fell below the threshold of responsible journalism as the reasonable man would be convinced from the reports that the claimant was involved in lottery scamming activities (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 32).

It was the opinion of the Court that no public interest is served by publishing misinformation as the public was clearly misinformed as the claimant was not charged for any offences related to lottery scamming. The claimant was an elected representative which means that any allegation of criminal conduct on the part of such person is serious (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 34). The Court concluded that although the subject matter was of public interest, there was no need to hastily broadcast it without first verifying the accuracy (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 36). On top of that, the excuse that the claimant was in custody is not sufficient but only shows, according to the Court, that there was no real effort made to get his side of the story. The Defendants failed to show any justification for the words spoken or broadcast (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 54).

This case that we have analyzed showed how the relation between publishing information in public interest and the right of a person to protect their reputation and good name can have an impact on free speech. The argument of responsible journalism when it comes to investigating matters in public interest still holds a high threshold for eliminating any misinformation before a certain broadcast reaches the audience. In this case the free speech aspect of journalism only comes to play when the information does not base on something that is not true. It is debatable what can be proven to be true as investigative journalism often relies on information that is only the tip of the iceberg. In the case mentioned above this was not such an occasion as the broadcast was made of statements by officials who took part in the operation. The reporters added their own connotation to the story which breached the human right aspect of free speech. We must distinguish between hard facts and embellished facts that can sometimes not even resemble the facts that they were based on.

The final case we are going to analyze from Jamaica also touches the subject of free speech in the media. The case between Maurice Arnold Tomlinson as the claimant and Television Jamaica Ltd as the first defendant, CVM Television Ltd as the second defendant and The Public Broadcasting Corporation of Jamaica as the third defendant is an interesting legal issue. Let us start, as we do, with the facts of the case: the claimant Maurice Arnold Tomlinson, sought to have his message aired at a time and in a manner of his choosing. His inability to achieve this has led him to allege that there has been a breach of his rights (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 3). The claimant is an attorney-at-law and a homosexual man. He is a citizen of Jamaica but became a landed immigrant of Canada in 2012, he was at the time of commencing the quest to have his message aired, employed as legal advisor for the international NGO Aids-Free World. He describes himself as an activist and as such he has organized several public events in an attempt to bring about changes in the attitude towards homosexuals in Jamaica and further to draw attention to the need for tolerance of minority groups as an effective tool to counter the spread of HIV and AIDS. The message he had sought to be aired was presented in what he describes as the »Love and Respect PA« video,

a 30 second video which was produced as a part of his advocacy campaign. He acts in it, portraying a homosexual man whose aunt reassures him when he complains of trying to get Jamaicans to respect his human rights as a gay man, that she respects and loves him (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 5). The refusal to air occurred in Jamaica (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 12).

The Court, when structuring the arguments, used the reasoning from a 1989 case of Trieger versus Canadian Broadcasting Corp: As to free speech, the right to speak does not necessarily carry with it the right to make someone listen or the right to make someone else carry that message to the public (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 18) and the reasoning from a 1985 case of Re New Brunswick Broadcasting Co. Ltd. versus Canadian Radio Television and Telecommunications Commission: The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter or use a public building for such purposes. And it gives no right to anyone to use the radio frequencies (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 19). The Court added the reasoning from a 1983 case of Haider versus Austria that in Europe under the Article 10 of the European Convention on Human Rights the freedom of expression guarantee does not confer an unfettered right on any citizen to have access to radio or television to air his views except under exceptional circumstances (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 98). The Court also addressed editorial discretion, which it described in the context of licensed broadcasters, which does

not mean the editor can exclude views he does not like or does not agree with as the grant of licenses is not about the privatization of censorship but rather about regulating a public resource such as airwaves so that citizens derive the greatest benefit in order for them to play an effective role in democracy due to the fact that access to reliable and accurate information is vital to the functioning of a democratic state (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 109). Through such argumentation the Court found that licensed broadcasters are under an obligation to use the public domain in the public interest which is stated in their licence, furthermore this coincides with the duty of the broadcaster to provide information on important public issues for the benefit of the public having accurate and reliable information about the matter. This argumentation leads the Court to accept the approach that no person can dictate to a private broadcaster that he should accept a particular advertisement advocating any particular position because the issue is not whether or not to accept the advertisement but rather whether the private broadcaster has carried out his obligation in the public interest, which is to inform the public on the particular issue (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 112). In the light of the mentioned legal position, the Court decided that were it to accept the proposition of the claimant, it would mean the Court would now be getting into the business of telling editors what advertisements or events to broadcast but the regulation of broadcasters has not been given to the courts and it is not a job that any court would even contemplate accepting as that job is in Jamaica given to the Broadcasting Commission (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 113). On the contrary, it was not even suggested that the defendants would fail to give a full, fair and adequate coverage of the issue of Homosexuality in Jamaica. The Court decided that the defendants have the editorial rights to decide how an issue is to be covered, which logically means that such an approach constitutes that it cannot be said that all who wish to speak on the issue must be allowed to do so by the defend-

ants (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 115).

We can see in this decision that a part of the right to free speech is also the editorial power to decide how they will deal with a specific issue in the society that needs to be informed on the issue of public interest. The Court dismissed in its entirety the claim because the freedom of expression and freedom to receive and disseminate information or ideas includes the right not to speak and not to receive or disseminate information, or as the Court put it, why should Mr Tomlinson's wish to exercise his right be more important than TVJ's or CVM's desire to exercise their right not to broadcast (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 123). This was not the only insightful legal argument that we could find in this verdict as the Court also used a comparison in its legal argumentation: One cannot shift the stumps while the bowler is running in and the batsman has assumed his batting stance in order to give the bowler a greater opportunity at dismissing the batsman (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 121).

9. Findings and key notion

We proposed a reasearch question at the beginning of this paper, regarding the background of freedom of speech as a human right, whether it is contingent on the perception or on the context. The cases analyzed both in the historical part of this paper and the modern part of this paper showed that context is more important than perception of speech, when it comes to the argumentation of a judge. This research paper, according to its findings, advocates the importance of the context in which certain speech was made. We should avoid the use of perception to limit free speech as it may prove to be a wrong thing to do, especially given the nature of this human right. If we were to deem some speech as off limits in advance, based on the perception of it, we would find ourselves denying core democratic values and drifting towards authoritarian ideas.

To put it more bluntly, if someone perceives a certain fact to be offensive to them, their perception cannot be a valid reason to limit free speech as a human right. The fact exists no matter the perception of it in society, this is why our research paper proposes a solution in the way of a safeguard in the form of context. Courts have been proven to resort to context but more in a practical course of action. We believe it is time for a more doctrinal method to theoretically strenghten this practical approach. Advocating for the context behind speech as a human right gives us an additional safeguard that can help determine how far can free speech reach and what can be encapsulated in it.

Furthermore, context is already the reason why the majority of speech is observed as protected in the form of a human right. Facts should remain under the protection of this human right, no matter the perception they cause. For example, public statements made by Superintendant Clunis and Commisioner of Police Owen Ellington to Jamaican news stations during and after a police operation were not a fact, as the charges against Michael Troupe were dropped. But after the broadcast had aired all the viewers perceived Michael Troupe as a part of the scamming operation ring and a person of criminal conduct. Jamaican court put into consideration the context in which the statement was made, it was during and after the police operation in the early hours of the morning. Public has the right to know the facts about political figures but in this case the context was such that no public interest was served by publishing misinformation as the public was clearly misinformed. Suffice to say, it would be ample enough to inform the public that a house was searched at half past five in the morning regarding the lottery scamming operation. The perception differs widely from the background context of the speech. Superintendant and the Commisioner of Police both had their own perception that was different from the fact. The only fact was that the charges were dropped.

This brings us to another important conclusion; if something is a fact, it should be stated as such, but if something is perceived as a sagacity of certain reality, it should be stated as an opinion. Opinions differ, but a fact is a fact. To put it in simpler terms, the prospect of living in a modern democratic society is to hear speech that one might find inappropriate, offensive or disparag-

ing. That does not mean one must isolate oneself to avoid situations which cause unrest upon hearing unsettling opinions. Speech should not be viewed according to its perception and how it is perceived by each individual but instead should be put into context of all relevant circumstances. For what is perceived by some as offensive, can be perceived as complimentary by others. This is a crucial disposition for opinions. Predilection for inclusion of opinions in speech is a completely conventional way of communication.

Opinions are protected by freedom of speech as a human right and should be protected in the same manner as stating the facts. The only difference is the background context, which would in this case be stating whether it is a personal opinion or a fact. The difference between the two opted recognitions was clear in the case of Maurice Arnold Tomlinson as the claimant against Television Jamaica Ltd as the first defendant, CVM Television Ltd as the second defendant and The Public Broadcasting Corporation of Jamaica. Maurice Arnold Tomlinson had a perception that as a homosexual man and a gay rights activist he has a right to air his message with private broadcasters to advocate for the respect of gay rights in Jamaica. Jamaican court looked for the context and found that the background to assessing this practise of the mentioned human right was tied to the fact that there is no such thing as the freedom to use someone else's property to do so and it gives no right to anyone to use someone's land or platform to make a speech, or someone else's printing press to publish their own ideas. In the end it all came down to balancing two interests and it was decided that there is no valid reason why Mr. Tomlinson's wish to exercise his right was more important than TVJ's or CVM's desire to exercise their right not to broadcast it. This case also reflected why relying solely on perception of something is not enough to safeguard a human right.

The whole presented analysis of the verdicts also showed that free speech as a human right is much more nuanced than it strikes at first glance. We were able to go through the insides of the meaning of this human right as it is not straightwforward but it should, as we have proven, be put into a context. It is clear that we only touched the surface on the matter but more importantly we demonstrated that even a human right has its own context in which it strives or thrives.

Each of the analyzed cases showed to the reader that the context in which the human right of free speech is put determines whether it will thrive or strive. Even if the context behind each case shows that free speech is not an absolute human right we should not dissuade ourselves from losing the standards to which free speech is measured and compared. We need this human right for the normal functioning of a democratic society and should look after it accordingly.

10. Conclusion

In conclusion, we observed how the context behind the human right of freedom of speech develops through the argumentation of a judge in a certain case. The main research question of this paper on the background context of the freedom of speech as a human right was answered through the analysis of judicial arguments in an array of different cases that all tackled the same theme; the limits of free speech. The background context was heavily depended on the case and also on the arguments that the judge used to solve the legal question. There was no difference observed whether it was a court in the Caribbean or in the United States. There was always a process of balancing in accordance to the facts of the case. Are these facts the backbone of the background context for a human right? The research paper affirms this. We have shown that a human right such as freedom of speech is conditioned not only by the facts of the case but also by the structure of the arguments that a judge makes.

The distinction whether a human right such as freedom of speech strives or thrives is not only dependant on the way a judge sees the case but also about the context of the human right, the setting it is put into and the factors that influence it. These things are outside the realm of legal provisions and can be found in social structures of the relationships in society. The background context is a framework far more outflanked than we can imagine. This is due to the fact that each case brings something new into contest. Sure enough, some cases share a striking resemblance but none are alike in a way that would enable a judge to mirror their arguments. Arguments can be structured similarly, but not mirrored. We saw this clearly when we analyzed five decades worth of cases brought forth in the United States. Approaches

change but the background context of a human right remains the same. This was affirmed by the cases analyzed which were brought forth in the Bahamas and in Jamaica. The main research purpose was to add the element of context into the doctrinal approach of evaluating freedom of speech as a human right. In this sense, the paper succeeded to show how there is an existant practical framework already in place where courts implement the deliberation of context into which a certain speech was said and put into. Such continued practise prompted this research paper to commend the addition of context into the evaluation of legality of limits to freedom of speech. Freedom of speech should be upheld by all means in a democratic society and there is a firm belief that evaluating the context is a better safeguard than relying on personal perception of speech. There should not be less free speech but more free speech and puting things into context enables us to differentiate between facts and opinions with greater results by not imposing authoritarian approaches at the same time.

The circumstances of the cases around which the argumentation of the court revolved were distinctive but the background context of a human right was unchanged throughout. Be it through the use of case law approach or through the use of specific legal argumentation approach it was observed that a common theme can be established. Freedom of speech is contextual and not perceived. We have shown in this research paper that speech cannot have its freedom depend on perception but rather on the context of it. The perception of speech and how the judge sees it in each case is not bound by the apprehension of the idea or the notion of it but by the context in which this idea is set down.

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Svoboda govora, nadzor, akademska svoboda

*Andras L. Pap**

POVZETEK

Članek je namenjen prepoznavanju kontekstualnih razsežnosti akademske svobode kot dozorelega pravnega koncepta. Projekt je sprožilo dejstvo, da kljub široki uporabi v mednarodnih dokumentih in domačih ustavah ostaja akademska svoboda premalo razvita v smislu konceptualnih orodij, operacionalizacijskih mehanizmov, metod spremljanja in primerjalnih shem. Obstajajo tudi različna stališča o tem, kako jo najbolje konceptualizirati: kot individualno pravico, niz zahtev za avtonomno institucionalno zasnovo, področje, ki ga je treba urediti za ponudnike tržnih storitev ali javnih dobrin, orodje za oblikovanje mednarodne politike ali akademsko rangiranje – da ne omenjamo izziva, kako vključiti izzive, ki jih prinašajo gibanja za socialno pravičnost. Vsi ti pomisleki zahtevajo drugačna orodja politike in pripadajoče pravne ukrepe.

Ključne besede: akademska svoboda, avtoritarizem, podjetniške in človekove pravice, korporativna univerza, iliberalizem, identitetne politike, nacionalna varnost, vohunstvo

* Profesor raziskovalec in vodja oddelka za ustavno in upravno pravo (prej Madžarska akademija znanosti) Center za družbene vede Inštitut za pravne študije; Profesor prava, Eötvös University Institute for Business Economic/Ludovika University of Public Service Faculty of Law Forcement, Budimpešta, Madžarska; Dodatni (ponavljajoči se gostujoči) profesor, Central European University, Dunaj, Avstrija. Prispevek je nastal pod okriljem naslednjih štipendij in projektov: Svoboda izražanja v digitalni dobi, NKFIHTÉT-2020-00243, ter Urada Ministrstva za inovacije in tehnologijo NRDI v okviru programa odličnosti mladih raziskovalcev FK_21 (138965) in Programa nacionalnega laboratorija za umetno inteligenco. Deli tega prispevka so bili objavljeni v Pap, A. L., 2021, 105–126.

Freedom of speech, surveillance, academic freedom

ABSTRACT

The paper is aimed at identifying contextual dimensions for academic freedom as a matured legal concept in the ongoing process of codifying it in a binding international instrument. The project is triggered by the fact that despite its widespread usage in international documents and domestic constitutions, academic freedom remains underdeveloped in terms of conceptual tools, operationalizing mechanisms, monitoring methods and benchmarking schemes. There are also competing notions on how to best conceptualize it: as an individual right, a set of requirements for autonomous institutional design, a field to be regulated for market service providers or public commodities, a tool for international policy making, or academic ranking – not to mention the challenge of how to incorporate challenges brought by social justice movements. These considerations all require different policy tools and adjacent legal targeting.

***Keywords**:* academic freedom, authoritarianism, business and human rights, corporate university, illiberalism, identity politics, national security, espionage

1. Uvod

S posebnim poudarkom na svobodi govora, je ta članek namenjen prepoznavanju kontekstualnih razsežnosti, ki so pomembne in so lahko koristne pri konceptualizaciji akademske svobode: nastajajoče svoboščine (očitno na dobri poti za kodifikacijo kot zavezujoč instrument) v skladu z mednarodnim pravom in ustavnimi določbami, ki se običajno pojavljajo. Resolucija parlamentarne skupščine o „grožnjah akademskemu svetu svobode in avtonomije visokošolskih ustanov v Evropi“, ki jo je novembra 2020 sprejel Svet Evrope (Coe), na primer poziva k sprejetju „Evropske konvencije o zaščiti akademske svobode in institucionalne avtonomije“. Poročilo, ki podpira resolucijo, poudarja, da je na primer v večini držav članic (SE) zagotovljena neka oblika ustavne ali pravne zaščite akademske svobode.

Ustave številnih držav EU poleg varstva svobode govora zagotavljajo tudi neposredno zaščito akademske svobode: 11 jih varuje poučevanje, 15 raziskovanje, osem pa varuje institucionalno avtonomijo. Med drugimi državami članicami Sveta Evrope: pet zagotavlja zaščito poučevanja in avtonomije, štiri pa splošno akademsko svobodo. Vendar, kot bomo videli, akademska svoboda ostaja kljub splošni značilnosti pravne kodifikacije, da brez truda definira zapletene koncepte (kot je na primer ‚začetek ali konec življenja' v kontekstu splava ali dednega prava), precej dvoumna in nerazvita v smislu konceptualnih orodij, mehanizmov operacionalizacije, metod spremljanja in shem primerjalne analize. Obstajajo nasprotujoče si predstave o tem, kako najbolje konceptualizirati akademsko svobodo, ali je: pravica posameznika (predavateljev in osebja ter/ali študentov); nabor zahtev za avtonomno institucionalno zasnovo; področje, ki ga je treba urediti za ponudnike tržnih storitev ali javnih dobrin; ali orodje za primerjalno analizo za oblikovanje mednarodne politike ali akademsko razvrščanje – da ne omenjamo izziva, kako vključiti »Zeitgeist« gibanj za socialno pravičnost. Projekt, predstavljen v članku, je torej sprožen zaradi dejstva, da lahko vsi ti premisleki zahtevajo in zahtevajo različna orodja politike in sosednje pravne cilje. Zato je treba vsebino svobode *sui generis* (po mednarodnem in ustavnem pravu) šele razviti.

Pomembna značilnost akademske svobode je, da se nahaja med Scilo in Karibdo neoliberalizma in neliberalizma, saj so analitiki in deležniki zadržani ne zgolj do posegov neliberalnih vlad, temveč tudi glede trženja visokošolskega in raziskovalnega sektorja. Kot pravi zgoraj omenjeno poročilo Coe, je v »vzponu neoliberalne globalne ekonomije znanja ... visoko šolstvo [...] monetizirana zasebna dobrina (kjer) [...] univerzo bolj skrbi maksimiranje denarja kot zagotavljanje učenja.« Vprašanje (na katerega ni mogoče odgovoriti na splošno) je torej: kdo je na splošno bolj vreden zaupanja: država ali podjetniški sektor? Madžarski primer kaže, da se lahko (neo)liberalne in neliberalne grožnje celo kombinirajo in kumulirajo.

Članek povezuje in triangulira tri koncepte in vprašanja: svobodo govora, nadzor in akademsko svobodo. Slednja je v središču pozornosti, prva dva pa bosta obravnavana kot poudarjeni referenčni točki. Akademska svoboda je pogosto konceptualizirana kot del ali element svobode govora. Ta ocena se zavzema

za drugačen pogled, pri čemer ga obravnava kot koncept *sui generis*, ki se pojavlja v skladu z mednarodnim pravom, hkrati pa priznava, da je vsebina akademske svobode neločljivo povezana s svobodo izražanja profesorjev in študentov. Pri ocenjevanju konceptualnih in praktičnih razsežnosti akademske svobode je običajen pristop pregled potencialnih forumov in razsežnosti za omejitve in infiltracije. Kot bo prikazano, nadzor postane medsektorska značilnost, ne glede na to, ali gre za prizadevanja za nadzor nad študenti ali fakulteto s strani avtokracije (kot tudi za spremljanje in profiliranje njihove morebitne infiltracije), ali pregledovanje politično občutljive akademske vsebine in govora. Poleg takšnih neposrednih učinkov so nedavni dogodki, ki prinašajo širjenje tehnologij nadzora v obdobju Covida za spremljanje zdravstvenega stanja in gostote množice ali sledenje stikom, ter redefiniranje oblike (spletnega in na videu temelječega) poučevanja in izpitov, poslabšali krčenje akademske svobode in svobode govora na kampusih. Pokazalo se bo, da bo imela svoboda govora različne posledice za fakultete in študente, in da so si ti lahko celo v nasprotju, ko si študenti prizadevajo izpodbijati prevladujoče doktrine ali podajajo zahteve po varnem in socialno pravičnem kampusu, pri čemer dejansko pozivajo k cenzuri, očiščenju, skladno s kulturo prepovedi (ang. cancel culture). Vendar sta oba (in zlasti iskanje zapletenega ravnovesja med obema) bistvena elementa akademske svobode. Tudi če je cilj ocene pretežno pravni, morajo biti razprave o akademski svobodi interdisciplinarne in se ne morejo izogniti filozofiji v smislu, da je treba konceptualizirati ali vsaj opredeliti samo bistvo akademskega sveta, vlogo visokega šolstva in raziskovanja (naj bo to humanistika, življenje oz. družbene vede). Na primer, svoboda govora zahteva posebno in specifično razumevanje v kontekstu akademskega sveta (kjer so njene omejitve in meje lahko drugačne od tistih v zunanjem svetu): poslanstvo univerz je zagotoviti forum za študente, da raziskujejo in uveljavljajo svojo politično identiteto, med drugim v obliki organiziranja protestov. Po drugi strani pa mora biti pravica akademskih delavcev do svobode govora v zadevah, ki se nanašajo na njihovo delo, očitno na nekaterih področjih veliko širša kot v drugih poklicih. Sama narava izobraževanja in raziskovanja kot javne službe ter prispevek akademikov k javnemu dobremu v tej funkciji zato zahteva drugačne standarde (čeprav večina akademi-

kov ni javnih intelektualcev ali medijskih zvezdnikov). Čeprav obstaja očitna razlika med tem, kako akademska svoboda (in njen demon) prihaja na površje v družbenih, humanističnih in naravoslovnih vedah, je prav tako pomembno, da poskušamo uporabiti, kot to počne ta članek, vseobsegajoč koncept svobode in groženj njej.

Osrednji problem in raziskovalno vprašanje je, kako konceptualizirati akademsko svobodo, glede na njeno večplastno naravo. Ta raziskava je nujna zaradi dejstva, da bodo pravni in politični instrumenti, ki operacionalizirajo koncept, morali odražati in ustrezati tej konceptualizaciji. Kratka ocena ne more dati normativnega, celovitega odgovora, temveč bo opozorila na kompleksnost izzivov in varnostnih mehanizmov, ki morajo biti v igri. Razprava je strukturirana na naslednji način: prvi del podaja pregled tega, kako je akademska svoboda konceptualizirana v ustavnem in mednarodnem pravnem prostoru. Naslednji odseki drugega dela članka pojasnjujejo nekatere najpomembnejše kontekstualne in politične dimenzije akademske svobode, in sicer to, kako na akademsko svobodo vplivajo (i) prizadevanja za neliberalni avtoritarizem, (ii) korporativni interesi, (iii) nacionalna varnost in mednarodno industrijsko vohunjenje, (iv) identitetna politika in razprave o socialni pravičnosti. Zaključni, sklepni odsek ponavlja omejitve analize in nakaže na smernice za nadaljnje raziskave, analize in zakonodajno urejanje.

2. Akademska svoboda in pravo (in politika)

Čeprav je akademska svoboda že del kanona človekovih pravic/ustavnih svoboščin, so njeni obrisi večinoma nejasni in se pogosto prepleta s svobodo izražanja oziroma pravico do izobraževanja. Občasno najdemo tudi izjave, ki se nanašajo na avtonomijo določenih institucij, čeprav je pojem le redko podrobno definiran (Združenje evropskih univerz na primer razlikuje med organizacijsko, finančno, kadrovsko in akademsko avtonomijo), (Orosz, 2018, 639–618).

Kar zadeva zavezujoče mednarodne zaveze (trdo pravo): Listina EU o temeljnih pravicah (Listina je bila vključena v 2008 EU Revision Treaty) v 13. členu določa, da sta »umetnost in znanstveno raziskovanje brez omejitev. Akademsko svobodo je treba spoštovati.« 13. in 15. člen Mednarodnega pakta o ekonomskih, socialnih

in kulturnih pravicah iz leta 1966 določata, da države pogodbenice tega pakta »priznavajo vsakomur pravico do izobraževanja« in »se zavezujejo, da bodo spoštovale svobodo, ki je nepogrešljiva za znanstveno raziskovanje in ustvarjalnost. dejavnost.« Pogodba ima 170 držav pogodbenic, Odbor ZN za ekonomske, socialne in kulturne pravice pa pripravlja splošni komentar na 15. člen, ki bo verjetno podrobneje opredelil posebne obveznosti držav po tem členu. Ta je že v prejšnjem splošnem komentarju o pravici do izobraževanja (13. člen) določala upravičenost izobraževalnih delavcev in študentov do akademske svobode in avtonomije visokošolskih zavodov. Navaja:

»Avtonomija je tista stopnja samoupravljanja, ki je potrebna za učinkovito odločanje visokošolskih institucij v zvezi z njihovim akademskim delom, standardi, upravljanjem in povezanimi dejavnostmi. Samoupravljanje pa mora biti skladno s sistemi javne odgovornosti, zlasti v zvezi s financiranjem, ki ga zagotavlja država ... institucionalne ureditve bi morale biti poštene, pravične in enakopravne ter čim bolj pregledne in participativne ... člani akademske skupnosti, posamično ali kolektivno, svobodno sledijo, razvijajo in prenašajo znanje in ideje z raziskavami, poučevanjem, študijem, razpravami, dokumentiranjem, produkcijo, ustvarjanjem ali pisanjem. Akademska svoboda vključuje svobodo posameznikov, da svobodno izražajo mnenja o instituciji ali sistemu, v katerem delajo, da opravljajo svoje funkcije brez diskriminacije ali strahu pred represijo s strani države ali katerega koli drugega akterja, da sodelujejo v strokovnih ali predstavniških akademskih telesih in da uživajo vse mednarodno priznane človekove pravice, ki veljajo za druge posameznike v isti jurisdikciji«. (Spannagel, 2020).[1]

Pravico do izobraževanja zagotavlja tudi 2. člen Protokola št. 1 k Evropski konvenciji o človekovih pravicah (EKČP), akademska svoboda pa v njem ni izrecno opredeljena. Vendar pa je Evropsko sodišče za človekove pravice zadeve, povezane z akademsko svobodo, že večkrat spravilo v kontekst Evropske konvencije, večinoma v okviru 10. člena, ki zagotavlja pravico do svobode izražanja.[2]

[1] Glej European Commission for Democracy Through Law (Venice Commission) Hungary Preliminary Opinion on Act XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education, Opinion 891/2017 CDL-PI(2017)005, Strasbourg, 11 August 2017 (Venice Commission on Lex CEU) Para 39.

[2] Glej the Venice Commission Report, ki se nanaša na Evropsko sodišče za človekove pravice, Hertel v. Švica, št. 25181/94, 25. avgust 1998; Evropsko sodišče za človekove pravice, Wille v. Liechtenstein, št.

Sodišče Evropskih skupnosti je v nedavni odločitvi o zadevi CEU razglasilo, da odvzem avtonomne organizacijske strukture univerzam krši Listino EU o temeljnih pravicah, vendar je svojo sodbo o dejanju Madžarske opredelilo kot kršitev Splošnega sporazuma o trgovini in storitvah (GATS), ker CEU ni zagotovil nacionalne obravnave. (Nagy, 2020).[3]

Obstajajo tudi številni dokumenti mehkega prava. Verjetno najobsežnejše je Unescovo priporočilo o statusu visokošolskega pedagoškega osebja,[4] ki zagotavlja smernice na širokem področju akademskega življenja, vključno z etiko, strokovnim pregledom, intelektualno lastnino in izjavami (UNESCO Recommendation, par. 19 and 22), da so države članice dolžne varovati visokošolske ustanove pred grožnjami njihovi avtonomiji iz katerega koli vira, države članice in visokošolske ustanove pa bi morale biti odgovorne za učinkovito podporo akademske svobode in temeljnih človekovih pravic.[5] UNESCO je izdal tudi Priporočilo o znanosti in znanstvenih raziskovalcih (nazadnje posodobljeno leta 2017) in je vključen v proces oblikovanja novega mehanizma poročanja, ki naj bi bil vključen v postopek univerzalnega rednega pregleda (UPR) v Svetu ZN za človekove pravice (Kinzelbach et al., 2020). EU[6] in Svet Evrope[7] imata številne izjave in nezavezujoče instrumente.

Obstajajo tudi številne pobude poklicnih mrež (in vse proizvajajo nešteto zavez in izjav o akademski svobodi). Na primer Svetovna univerzitetna služba (aktivna od leta 1920), Mednarodno

28396/95, 28. oktober 1999; Evropsko sodišče za človekove pravice, Stambuk v. Nemčija, št. 37928/97, 17. oktober 2002; Evropsko sodišče za človekove pravice, Lombardi Vallauri v. Italija, št. 39128/05, 20. oktober 2009; Evropsko sodišče za človekove pravice, Sorguç v. Turčija, št. 17089/03, 23. junij 2009; Evropsko sodišče za človekove pravice, Sapan v. Turčija, št. 44102/04, 6. julij 2010; Evropsko sodišče za človekove pravice, Mustafa Erdoğan v. Turčija, št. 346/04 and 39779/04, 27. maj 2014.

[3] Sodišče Evropske unije, Evropska komisija proti Madžarski, št. C-286/12, 6. november 2012.

[4] Sprejeto 11. novembra 1997.

[5] V odstavkih 27-28 je zapisano: "Visokošolsko pedagoško osebje je upravičeno do ohranjanja akademske svobode ... pravic, brez omejitev s predpisano doktrino, do svobode poučevanja in razpravljanja, svobode pri izvajanju raziskav ter razširjanja in objavljanja svojih rezultatov, svobode svobodnega izražanja svojega mnenja o instituciji ali sistemu, v katerem delajo, svobodo institucionalne cenzure in svobodo sodelovanja v strokovnih ali predstavniških akademskih telesih. Vse visokošolsko pedagoško osebje bi moralo imeti pravico opravljati svoje funkcije brez ... strahu pred represijo s strani države ali katerega koli drugega vira. ... Visokošolsko učiteljsko osebje ne bi smelo biti prisiljeno poučevati proti svojemu najboljšemu znanju in vesti ali biti prisiljeno uporabljati učne načrte in metode, ki so v nasprotju z nacionalnimi in mednarodnimi standardi človekovih pravic."

[6] Glej na primer omenjeno 2018/2117(INI) priporočilo.

[7] Glej na primer Parliamentary Assembly Recommendation 1762 (2006) o "Academic freedom and university autonomy, Recommendation Rec(2007)6 of the Committee of Ministers to member states on the public responsibility for higher education and research, Recommendation CM/Rec(2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy."

združenje univerz (nevladna organizacija, ustanovljena leta 1950 na pobudo Unesca, deluje od leta 1950, trenutno ima predstavnike iz 130 držav), Svet za razvoj družboslovja Raziskave v Afriki (CODESRIA, ustanovljena leta 1973), Mednarodni konzorcij za visoko šolstvo, državljansko odgovornost in demokracijo (aktiven od leta 1999) itd.

Konkretno v Evropi se je leta 1955 pod predsedovanjem vojvode Edinburškega v Cambridgeu zbralo več kot sto voditeljev univerz iz 15 evropskih držav, ki so ustanovili Stalno konferenco rektorjev, predsednikov in prorektorjev evropskih univerz. Leta 1960 je Svet Evrope ustanovil Odbor za visoko šolstvo in raziskave (CHER), ki je združeval univerzitetne in politične voditelje. Leta 1988, ob 900. obletnici Univerze v Bologni, je 388 rektorjev in predstojnikov univerz iz vse Evrope in širše podpisalo Magna Charta Universitatum, ki je kot ključna filozofska koncepta univerze opredelila akademsko svobodo in institucionalno avtonomijo, leta 1999 29 držav je s tako imenovano Bolonjsko deklaracijo izrazilo pripravljenost, da se zavežejo k povečanju konkurenčnosti Evropskega visokošolskega prostora (EHEA), pri čemer so poudarili potrebo po nadaljnjem krepitvi neodvisnosti in avtonomije vseh visokošolskih ustanov. Ob tem je bil leta 2000 podpisan Observatorij temeljnih univerzitetnih vrednot in pravic, leta 2003 pa je Evropska kulturna konvencija Sveta Evrope (ki ne omenja akademske svobode) postala okvir bolonjskega procesa, ki se je s tem geografsko razširil.

Kar zadeva vsebino zavez, večina mednarodnih dokumentov vključuje izjave o bistveni in neločljivi povezavi med demokracijo in akademsko svobodo. Omenjena resolucija Sveta Evrope iz leta 2020 poudarja, da »akademska svoboda in institucionalna avtonomija visokošolskih zavodov nista ključni le za kakovost izobraževanja in raziskovanja; sta bistvena sestavna dela demokratičnih družb.« Opominja (Council of Europe Parliamentary Assembly Res. 2352, 2020, par. 3), da je »pandemija Covid-19 pokazala, v kolikšni meri akademska svoboda pomaga raziskovanju in širjenju zanesljivih informacij v svetovni zdravstveni krizi,« in opozarja na prejšnja priporočila, ki določajo, da so javni organi dolžni zaščititi akademsko svobodo in institucionalno avtonomijo ter da morajo vzdržati kakršnih koli dejanj, ki bi jih ogrozila ali posegla vanje (poudarja pa tudi, da se v odsotnosti redno spremljanih podatkov in pravno zavezujoče mednarodne po-

godbe različne oblike zlorab dogajajo neovirano in nesankcionirano). Omenjeno Poročilo, ki je v ozadju resolucije, poudarja, da (čeprav to ni privilegij, temveč nujen pogoj, ki izhaja iz pravice do izobraževanja in je tesno povezan s svobodo misli, svobodo mnenja in svobodo izražanja, da lahko visokošolske ustanove opravljati svojo javno funkcijo (Council of Europe Parliamentary Assembly Report 15167, 2020, par. 8)) akademska svoboda in institucionalna avtonomija ostajata večinoma neopredeljena pojma, kar ima za posledico nizko ozaveščenost akademskega osebja o njihovih pravicah in otežuje možnost sankcioniranja kršitev. Poudarja tudi, da so (Council of Europe Parliamentary Assembly Report 15167, 2020, par. 15) pohvalne definicije v teh izjavah le redko dovolj podrobne, da bi omogočile operacionalizacijo merila uspešnosti, s katerim bi lahko merili raven (in spremembe) akademske svobode.

To kaže na vprašanje, kaj je vsebina akademske svobode. Akademska svoboda vključuje poučevanje, raziskovanje in razširjanje idej ter se lahko izvaja v raziskovalnih inštitutih in izobraževalnih ustanovah. Številne mednarodne izjave in poročilo Sveta Evrope 2020 (Council of Europa Parliamentary Assembly Report 15167, 2020, par 17-21 in 27) opredeljujejo naslednje bistvene elemente: akademska svoboda je poklicna svoboda, podeljena posameznim akademikom, vključno s svobodo poučevanja in raziskovanja (prosto določiti, kaj se bo poučevalo; kako se bo poučevalo; komu bo dovoljeno študirati; kdo bo poučeval; kako je delo študentov ocenjeno ter kdo bo prejel akademske nagrade; pravica brez prisile določiti, kaj se bo raziskovalo ali ne; kako se bo raziskovalo; kdo bo raziskoval, s kom in za kakšen namen bo raziskoval; svobodna izbira metod in poti, po katerih se razširjajo izsledki raziskav). Podporni elementi so: habilitacija, deljeno upravljanje in avtonomija (tako posameznik kot institucija, slednja pa vključuje akademsko osebje, ki ima enako pravico izraziti svoje mnenje o izobraževalni politiki in prednostnih nalogah ustanove brez vsiljevanja ali grožnje s kaznovanjem), akademska svoboda pa mora vključevati svobodo študentov in svobodo učenjakov. Ameriško združenje univerzitetnih profesorjev (aktivno od leta 1915) z nekoliko bolj pragmatičnim pristopom (zaradi prostorskih omejitev ne navajamo dolgega seznama definicij iz tega dokumenta) med drugim zagotavlja seznam, kaj sodi in kaj ne sodi v okvir akademske svobode:

»akademska svoboda pomeni, da lahko tako člani akademskega zbora kot tudi študenti sodelujejo v intelektualni razpravi brez strahu pred cenzuro ali maščevanjem; vključuje pravico člana fakultete, da ostane zvest svoji pedagoški filozofiji in intelektualnim zavezam.« (Nelson, 2010). Ohranja intelektualno celovitost izobraževalnega sistema in tako služi javnemu dobremu ter daje tako študentom kot učiteljem pravico do izražanja svojih stališč – v govoru, pisni obliki in prek elektronske komunikacije, tako v kampusu kot zunaj njega – brez strahu pred sankcijami, razen če način izražanja bistveno škodi pravicam drugih ali, v primeru članov fakultete, ti pogledi dokazujejo, da so poklicno nevedni, nesposobni ali nepošteni glede svoje discipline ali strokovnih področij. Akademska svoboda tudi pomeni, da političnih, verskih ali filozofskih prepričanj politikov, administratorjev in članov javnosti ni mogoče vsiliti študentom ali fakultetam in univerzam, da se te uprejo prizadevanjem sponzorjev podjetij ali vlade, da bi preprečili širjenje kakršnih koli raziskovalnih ugotovitev. Akademska svoboda daje članom fakultete in študentom pravico, da zahtevajo odškodnino ali zahtevajo zaslišanje, če menijo, da so bile njihove pravice kršene, in daje članom fakultete in študentom pravico, da izpodbijajo stališča drug drugega, ne pa tudi, da jih kaznujejo, ker jih imajo. Akademska svoboda ščiti pooblastilo člana fakultete za dodeljevanje ocen študentom, dokler ocene niso muhaste ali neupravičeno kaznovalne. Akademska svoboda na drugi strani ne pomeni, da lahko član fakultete nadleguje, grozi, ustrahuje, zasmehuje ali vsiljuje svoja stališča študentom. Prav tako akademska svoboda (ali habilitacija) ne ščiti nesposobnega učitelja pred izgubo službe ali ščiti člane fakultete pred izzivi kolegov ali študentov ali pred nestrinjanjem z njihovo izobraževalno filozofijo in praksami. Vendar pa je opredelitev akademske svobode, zlasti s pogledom na oblikovanje mehanizmov spremljanja in učinkovitih pravnih sredstev, precejšnja težava, saj so konceptualna orodja, operacionalizacijski mehanizmi, metode spremljanja in sheme primerjalne analize dvoumni in predmet razprave.“

Razlog, zakaj je konceptualizacija akademske svobode problematična, je v tem, da morata biti oblikovanje politik in zakonodaja (domača ali mednarodna) prilagojena zahtevam, saj sta zgolj pot do cilja. Da bi lahko umerili meje in morfologijo akademske svobode, je treba obravnavati več perečih vprašanj, na primer, kaj je

izobraževanje (in tudi: znanost), osrednji in nasprotujoči koncept, na katerega se nanaša akademska svoboda, kot niz operacionalizirajočih in večinoma postopkovnih jamstev? Je izobraževanje (in znanost) javno ali zasebno blago? Globalna ali nacionalna/-istična vrednota?

Zgoraj omenjeno Unescovo priporočilo o statusu visokošolskega pedagoškega osebja na primer razglaša (UNESCO Recommendation, par. 10), da je visoko šolstvo usmerjeno v človeški razvoj in napredek družbe ter da se financiranje visokega šolstva obravnava kot oblika javne naložbe, katere donosi so večinoma nujno dolgoročni, odvisno od prioritet vlade in javnosti. Kljub temu Magna Charta Universitatum 2020 določa, da so univerze (ki imajo državljansko vlogo in odgovornost) »del globalnih, kolegialnih mrež znanstvenih raziskav in štipendij, ki gradijo na skupnih telesih znanja in prispevajo k njihovemu nadaljnjemu razvoju [...] potopljene v in povezane z globalnim razvojem,« čeprav dodajajo, da so »prav tako vgrajene v lokalne kulture in so ključnega pomena za njihovo prihodnost in obogatitev [...] (in) v celoti sodelujejo in prevzemajo vodilne vloge v lokalnih skupnostih in ekosistemih.« Resolucija Sveta Evrope 2020 (Council of Europe Parliamentary Assembly Res. 2352, 2020, par. 6) »izraža zaskrbljenost zaradi naraščajočega zunanjega financiranja in komodifikacije visokošolskega izobraževanja, ki spodkopava zamisel o visokem šolstvu kot javni dobrini in javni odgovornosti,« ker »lahko komercialni in politični interesi zunanjih financerjev spodkopajo osredotočenost raziskav na povečanje dobička in prihodkov« za podjetja, ki sponzorirajo takšne raziskave [...] Univerze so ikone intelektualnih dosežkov držav [...] in imajo pomembno vlogo pri ohranjanju kulturne in jezikovne dediščine.« Pripadajoče priporočilo (Council of Europe Parliamentary Assembly Rec. 2189, 2020, par. 1) poudarja, da morajo »visokošolske ustanove ponovno okrepiti svojo funkcijo družbenih akterjev za javno dobro«.

Ko smo prikazali stanje pravnih in političnih zavez do podpiranja akademske svobode in skicirali porozne obrise njene vsebine, se zdaj posvetimo razpravi o nekaterih kontekstualnih razsežnostih, ki so osrednjega pomena pri konceptualizaciji (in kodifikaciji ustreznih jamstev in shem spremljanja za) akademsko svobodo.

3. Kontekstualna razsežnost I.: Akademska svoboda kot prepovedano območje za neliberalno avtokracijo

Prva, najbolj očitna razsežnost akademske svobode se nanaša na prepoved in zaščito posegov v različne oblike akademskega delovanja s strani vlad – tako rekoč neliberalnih avtokracij, ki običajno cementirajo in utrjujejo neliberalizem, ko je končano zajetje ustavnih institucij (ali včasih hkrati s tem). Napadi na akademsko svobodo so lahko usmerjeni na poučevanje, raziskovanje in razširjanje ter so usmerjeni tako na raziskovalne inštitute kot tudi na univerze. Če vlade prepovedujejo ali zavračajo sodelovanje ali posredovanje informacij nevladnim organizacijam (»NVO«) in zagovornikom človekovih pravic, ki so dragoceni viri za raziskave (Toplak & Boštjan, 2019, str. 1–8) lahko prav tako negativno vplivajo na akademsko svobodo.

Madžarska (Pap, 2021) ponuja živahen primer več načinov, kako lahko vlada omeji akademsko svobodo, ne da bi zaprla ali zavrnila izstopne vizume za akademike: Omejitve akademske svobode na področju raziskovanja so lahko v obliki postavitve neodvisnih javnih raziskovalnih ustanov pod bolj neposreden vladni nadzor (Halmai, 2019; Vass, 2020), prerazporeditev sredstev v alternativno mrežo od vlade odvisnih in vladi prijaznih raziskovalnih inštitutov, možganskih trustov in GONGO-jev; ali sprejetje zakonodaje, na podlagi katere lahko vladne agencije zavrnejo posredovanje informacij nevladnim organizacijam ali previsoko zaračunajo zahteve po javnih podatkih (Glej na primer Hungarian NGOs, 2013).

Posegi v akademsko svobodo na pedagoškem področju imajo še več možnosti. Avtonomijo univerz je mogoče omejiti z zakonodajo, ki reorganizira finančno upravljanje z rektorji, ki jih imenuje vlada (Ziegler, 2019, str 4–33); krčenjem in dezinvestiranjem nekaterih izdvojenih programov iz državnih ustanov; zavračanjem akreditacij za določene programe na javnih univerzah (Bajomi, 2020, str. 30–31); zavrnitvijo in odvzemom akreditacije določeni, izbrani instituciji; prevzemom nacionalne akreditacijske komisije; privatizacijo javnih univerz v fundacije, ki jih nadzorujejo vladni pajdaši (Szirtes, 2020); nacionalizacijo javnega šolstva; centralizacijo in prevzemom nadzora nad učnimi načrti javnega izobraževanja; izkrivljanjem akademskega trga dela s preusmerjanjem

financiranja v neposredno upravljane ali favorizirane ustanove; in seveda odpuščanjem profesorjev.

Na področju razširjanja in objavljanja raziskovalnih izsledkov je akademsko svobodo mogoče omejiti z očitnimi ali zelo subtilnimi oblikami cenzure; blokiranjem akademskih dogodkov, ki bi vključevali nevladne organizacije za človekove pravice s črnega seznama ali disidentske akademike; gostovanjem političnih ali propagandnih dogodkov v prostorih univerze (spodbujanje študentov k udeležbi); sprožitvijo medijskih kampanj za ustrahovanje kritičnih akademikov (Körtvélyesi, 2020; Enyedi, 2018; Búrca et al., 2019); ali maščevanjem ustanovam, kjer profesorji ali študenti protestirajo proti vladi.

Če povzamemo, ima kršitev akademske svobode veliko obrazov: cenzuro, zavrnitev financiranja ali prepoved akademskih programov, nadlegovanje, ustrahovanje, davčne napade, eksistenčne grožnje (prenehanje ali zavrnitev napredovanja ali preprosto izguba dostopa do diskrecijskih potnih štipendij in drugih subvencij) in zapiranje ustanov ali njihovih enot. Samocenzura je naravna posledica: preudarno in logično je, da vodstvo univerze novači samo konformiste. Tako se lahko akademiki soočajo z najrazličnejšimi zunanjimi in notranjimi pritiski: psihološkimi, eksistencialnimi in institucionalnimi. Učinek teh pritiskov je lahko raznovrsten: nadlegovanje in ustrahovanje vzameta neverjetno veliko energije in časa, podobno kot odgovarjanje na ciljane poizvedbe davčnih organov. Institucionalna negotovost (v zvezi z univerzitetnimi programi ali celotnimi institucijami) ohromi strateško načrtovanje, prošnje za nepovratna sredstva in zaposlovanje študentov. Povečana stopnja stresa in utrujenosti močno zmanjša uspešnost, pa naj gre za raziskovanje ali poučevanje. Razpad raziskovalnih centrov, akademskih programov ali institucij povzroča nepopravljivo škodo: te skupnosti je težko obnoviti, tudi če bi se politični režim nenadoma spremenil. Poleg tega so omejitve akademske svobode nesorazmerno usmerjene na mlajše učitelje, saj so starejši akademiki z delovnim časom, vzpostavljenimi mednarodnimi mrežami, potencialnim dostopom do štipendij in z nevladnimi viri manj prizadeti.

Kot odziv so se pred kratkim pojavile pobude za vključitev akademske svobode v akademsko razvrščanje, s čimer so zainteresirane strani prisiljene, da kršitve jemljejo resno. Resolucija

Sveta Evrope iz leta 2020 poudarja, da »akademska svoboda in avtonomija danes nista ustrezno upoštevani na nobeni lestvici univerz, zaradi česar se nekatere visokošolske ustanove v državah z najnižjimi ocenami AFI zdijo odlične,« (Council of Europe Parliamentary Assembly Res. 2352, 2020, par. 7) in skupščina »poziva ustrezne deležnike, vključno z mednarodnimi organizacijami, nacionalnimi organi, akademskimi strokovnimi združenji, univerzami in financerji, da vključijo oceno akademske svobode v svoje postopke pregleda, institucionalna partnerstva ter mehanizme razvrščanja in finančne podpore« (Council of Europe Parliamentary Assembly Res. 2352, 2020, par. 11).

Poročilo, na podlagi katerega je resolucija temeljila, posebej omenja (Council of Europe Parliamentary Assembly Report 15167, 2020, par. 74) predstavljen nov indeks akademske svobode in globalni nabor podatkov o časovni vrsti, ki so ju razvili Inštitut za globalno javno politiko (GPPi), Univerza Friedrich-Alexander-Universität Erlangen-Nürnberg (FAU), mreža Scholars at Risk in Inštitut V-Dem marca 2020, ki je sestavljen iz petih strokovno kodiranih indikatorjev, ki zajemajo ključne elemente dejanskega uresničevanja akademske svobode (svoboda raziskovanja in poučevanja; akademska izmenjava in razširjanje; institucionalna avtonomija; celovitost kampusa (Kinzelbach et al., 2020);[8] in svoboda akademskega in kulturnega izražanja.) Indeks dopolnjujejo dodatni, dejanski kazalniki, ki ocenjujejo *de jure* zaveze držav akademski svobodi na ustavni in mednarodni ravni, ki vključujejo podatke o dogodkih (Kinzelbach et al, 2020),[9] podatki o samoprijavi, podatki anket, pravne analize in podatki, kodirani s strani strokovnjakov. Avtorji poudarjajo, da formalna pravna analiza verjetno ne bo zgrešila bistva, leta 2019 je imela na primer skoraj ena tretjina držav z najslabšimi rezultati na področju akademske svobode vzpostavljeno ustavno zaščito akademske svobode (Kinzelbach et al., 2020).

[8] Integriteta kampusa pomeni ohranjanje odprtega učnega in raziskovalnega okolja, ki ga zaznamuje odsotnost namerno, od zunaj povzročene klime negotovosti ali ustrahovanja v kampusu. Primeri kršitev integritete kampusa so politično motiviran (fizični ali digitalni) nadzor, prisotnost obveščevalnih ali varnostnih sil ali študentskih milic, napadi tretjih oseb z namenom zatiranja akademskega življenja.
[9] Podatke o napadih na akademike in študente na podlagi dogodkov je zbiral Scholars at Risk's Academic Freedom Monitoring Project že od 2013.

4. Kontekstualna razsežnost II.: Akademska svoboda kot omejitev korporativnih interesov

Kot je navedeno zgoraj, akademska svoboda v politiki in političnih razpravah pogosto služi kot orodje za globalizacijo in nadnacionalno povezovanje, pa tudi kot instrument za komercialne vidike. V zadnjih desetletjih je visoko šolstvo, starodavna in prožna tvorba, doživela pomembne spremembe. Kot pravijo Aderbach et al. (Aberbach & Christensen, 2018, str. 487–506) kažejo, da je akademsko vodstvo tako kot pri administraciji vedno bolj profesionalizirano in menedžersko usmerjeno. Študenti so prav tako prešli iz podrejenih v dragocene stranke na svetovnem trgu, ki lahko vedno »svoj posel prenesejo drugam.« Še posebej, ker je izobraževanje postalo robustna dejavnost z raznolikim portfeljem storitev, vključno s stanovanji, programi otroškega varstva, zdravstvene oskrbe in svetovanja, boljšo in bolj raznoliko prehrano v dijaških lokalih. Raziskovalne dejavnosti prav tako niso več »povezane z dejavnostmi posameznih profesorjev, ampak so kolektivna prizadevanja, pri katerih ima uprava vlogo pri zagotavljanju informacij in podpore za akademsko osebje, ki se prijavlja za raziskovalne štipendije, poroča in objavlja rezultate raziskav. Zato so univerze vse pogosteje dobivale status podjetij, zaradi česar so formalno bolj avtonomne od vlad, delno zato, da bi bile bolj konkurenčne na svetovnem izobraževalnem trgu, skupaj z večjimi zahtevami vlade v skladu z idealom „tržnega financiranja raziskav“, za pridobivanje virov iz zunanjih virov - javnih in zasebnih. To vodi do paradoksalne dinamike: več institucionalne avtonomije pomeni večjo odvisnost od zunanjih virov. Večja formalna svoboda pomeni manj dejanske avtonomije.« (Aberbach & Christensen, 2018,str. 487–506).

Obrazložitev poročila (sestavil jo je poročevalec madžarske skrajno desničarske stranke Jobbik), na katerem temeljijo omenjeni dokumenti SE 2020, opozarja (Council of Europe Parliamentary Assembly Report 15167, 2020, par. 2)na »tveganja, da se odločitve o financiranju uporabijo kot orodje za dušenje nasprotujočih si glasov«, in hkrati priznava(Council of Europe Parliamentary Assembly Report 15167, 2020, par. 30)da »zunanje financiranje pomaga povečati raziskovalne zmogljivosti in daje

[...] institucijam priložnost za opravljanje večjih in bolj zapletenih raziskovalnih nalog.« Trdi tudi, da „politično“ sprožene raziskave in komercialni interesi tvegajo, da se daje prednost raziskavam, ki zadovoljujejo potrebe financerja, in ogroža integriteto raziskovalcev ter neodvisnost, veljavnost in zanesljivost rezultatov raziskave. Pravzaprav poziva k povečanju »državnega financiranja, namenjenega visokemu šolstvu, da bi zmanjšali tveganja, ki izhajajo iz vključevanja zunanjih sponzorjev.« Poročilo trdi, da ima Splošni sporazum o trgovini in storitvah (GATS) možnost, da »spodkopava lokalne univerze in visoke šole z ustvarjanjem določb za tujo ponudbo, ki ne zadovoljuje lokalnih potreb, (in) sistem bi lahko ... bil preobremenjen in spodkopan s postopno liberalizacijo in dotokom tujih ponudnikov.«

5. Kontekstualna razsežnost III.: Akademska svoboda kot orodje za infiltracijo tujih agentov

Akademska svoboda ima tudi razsežnost mednarodnih zadev/varnosti. Kinzelbach et al poudarjajo (2020), kako lahko indeks akademske svobode pomaga diplomatom izraziti zaskrbljenost zaradi kršitev ali celo zagotoviti hitre izdaje vizumov za ogrožene učenjake ali proaktivno razširjati informacije o razpoložljivih štipendijah za preganjane akademike. Drugi izpostavljajo različne pomisleke, ki jih lahko vključuje akademsko sodelovanje z nedemokratičnimi režimi. Obstajata dva pristopa: zagovarjanje »ideala spremembe z izmenjavo«, ki temelji na predpostavki, da »sodelovanje prispeva k političnemu in družbenemu napredku« ter da bodo dvostranske izmenjave med ljudmi o izobraževanju, uveljavile mehko moč v avtokracijah. Drugi argument zahteva umik in ogibanje, ker demokratične spremembe z angažiranjem niso delovale po pričakovanjih, sodelovanje pa prinaša celo tveganja, kot so neprostovoljni prenos tehnologije, kraje intelektualne lastnine, vohunjenje, tehnologija z dvojno rabo (kar pomeni raziskave, namenjene civilistom, lahko pa imajo tudi vojaške namene). Baykal in Benner (Baykal & Benner, 2020) sta pripravila podrobno poročilo o morebitnih tveganjih, ki jih prinašajo nedemokratične države, ki ponujajo možnosti financiranja univerzam in možganskim trustom v demokraci-

jah (kot so Konfucijevi inštituti, Kitajsko-ameriška fundacija za izmenjavo, prokremeljski raziskovalni Inštitut za dialog o civilizacijah ali Nemško-ruski forum), financirane katedre ali financiranje projektov, delno usmerjeno preko državnih ali nominalno zasebnih podjetij, pa tudi posameznih učenjakov iz demokracij (kot so donosna mesta gostujočih znanstvenikov v raziskovalnih ustanovah v nedemokratičnih državah). Skupaj z univerzitetnimi programi izmenjave, ki se uporabljajo za »izobraževalno diplomacijo«, so te institucije in projekti tako instrumentalizirani za popularizacijo ali legitimizacijo avtokratskih pripovedi. Baykal in Benner poudarjata, da je več nacionalnih univerzitetnih sistemov (zlasti v Združenem kraljestvu, Avstraliji in ZDA) vedno bolj odvisnih od šolnin, ki jih plačujejo študenti iz nedemokratičnih držav. Vse to ustvarja kanale vpliva iz nedemokracije v odprte družbe, medtem ko doma nedemokratične države pritiskajo na tuje nevladne organizacije, fundacije, think tanke in univerze tako, da jim omejujejo zmožnost izvajanja lastnih programov in celo lokalni sodelavci zahodnega projekta so lahko izpostavljeni nevarnosti vladne represije. Baykal in Benner trdita, da so velika sredstva, ki se iz Kitajske, Turčije in Rusije usmerjajo v think tanke, kot je Atlantic Council, namenjena oblikovanju zunanjepolitičnih razprav. Sklicujoč se na preiskavo Freedom House, opozarjajo na vodilne univerze na Zahodu, ki sprejemajo sponzorstva avtoritarnih režimov v višini sto milijonov za vzpostavitev raziskovalnih centrov in drugih vrst partnerstev.

Vpliv se lahko zlahka spremeni tudi v odvisnost. Baykal in Benner poudarjata, da je v Nemčiji Kitajska država izvora številka ena za mednarodne študente (42.676 od vseh 394.665 študentov v semestru 2018/2019 je prišlo iz Kitajske), ki ji je tesno sledila Turčija (39.634 študentov). Rusija se je s 13.968 študenti uvrstila na peto mesto, kitajski študenti pa so tudi največja skupina tujih študentov v EU, saj so leta 2017 predstavljali 11,2-odstotni delež (ali 1,71 milijona študentov). V Avstraliji je bilo kitajskih študentov 38,3 odstotka (oz. 152.591 študentov) vseh študentov v letu 2018. To je še posebej pomembno v sistemih, ki temeljijo na šolninah: leta 2017 je šolnina kitajskih študentov predstavljala med 13 in 23 odstotki celotnega prihodka sedmih ključnih avstralskih univerz, ki »postajajo vse bolj zaskrbljene, da ne dražijo uradne Kitajske.« Tudi (Baykal & Benner, 2020) ZDA, Združeno kraljestvo, Francija in Avstralija (poleg Rusije) so največji izvozniki podružničnih kampusov, pr-

venstveno na Kitajsko in ZAE: ni treba posebej poudarjati, da je stanje akademske svobode v podružničnih kampusih zaskrbljujoče.

Tveganja odvisnosti niso nujno omejena na financiranje: številni raziskovalni inštituti se upirajo opustitvi sodelovanja s partnerji v nedemokratičnih državah, ker lahko v nekaterih okoliščinah raziskava zahteva posebne naravne ali demografske pogoje, ki so prisotni le v nekaj državah, zaradi česar se replikacija izvaja zunaj teh kontekstov. Taka odvisnost pogosto povzroči samocenzuro. To ne vpliva samo na študente, ki prihajajo iz nedemokratičnih držav. Na primer, Združenje kitajskih študentov in učenjakov naj bi delno z zagotavljanjem sredstev poskrbelo, da študenti ohranjajo tesne vezi s kitajskimi veleposlaništvi, in poskuša vplivati na razprave v kampusu (Baykal & Benner, 2020). Samocenzura je razširjena tudi pri regionalnih učenjakih, ki ne morejo tvegati zavrnjenih prošenj za vizum za delo na terenu (Baykal & Benner, 2020). Thorsten Benner v Washington Postu (Benner, 2019) neposredno nagovori Harvard, MIT, Georgetown in druge vrhunske univerze ter možganske truste, naj »sprejmejo obljubo demokraciji«, saj njihovo delo temelji na neodvisnosti, integriteti in iskanju resnice ter »zagovarjajo vse, kar avtoritarci prezirajo: odprto razpravo, neodvisnost.« Za smernice je Human Rights Watch objavil kodeks ravnanja za fakultete, univerze in akademske ustanove po vsem svetu (Human Rights Watch, 2020).

Dodati je treba, da sum deluje v obe smeri: Univerza v Arizoni je za FBI praktično ujela kasneje preverjenega učenjaka in (Fischer, 2021) Univerza v Arizoni, ki je anketirala 2000 profesorjev, podoktorjev in podiplomskih študentov na več kot 80 raziskovalno intenzivnih univerzah, je odkrila »dosleden vzorec« rasnega profiliranja med znanstveniki kitajskega porekla, od katerih jih je več kot 40 odstotkov poročalo, da se počutijo profilirane s strani vlade ZDA (Kotkamp, 2022).

6. Kontekstualna razsežnost IV.: Akademska svoboda: izziv za politiko identitete in razprave o socialni pravičnosti

Akademska svoboda je v središču kulturnih vojn tudi onkraj neliberalnih avtokracij. Neločljivo je vpletena v trenutne razprave o socialni pravičnosti in kulturni vojni na področju humanistike

in družboslovja. Tu se razprave pogosto obrnejo na karierno nevarne bitke med tabori, ki disidente označujejo kot „prebujene bojevnike socialne pravičnosti za študije pritožb, ki se ukvarjajo z »mesearch« na eni strani, in privilegiranimi paternalističnimi konservativci, ki nasprotujejo politiki identitete, na drugi strani. V tem svetu je populacija rednih profesorjev vse manjša in celo tistim, ki so ostali, grozijo nove oblike samocenzure, pri čemer se za vsako ceno izogibajo obtožbam »kulturnega prisvajanja«. Izogibanje trenju v učilnici z nepriljubljenimi mnenji je eksistencialna nuja za pomočnike, inštruktorje in honorarne profesorje z možnostjo podaljšanja pogodb, ki sestavljajo večino učiteljskega osebja (Kipnis, 2015a).

Občasna kontroverzna uporaba ali celo, kot trdijo nekateri, zloraba postopkov nadlegovanja v obdobju #MeToo (Pap, 2019) je resen vir zaskrbljenosti, čeprav jo lahko razumemo kot nujen stranski učinek dolgo potrebnega premika v tem, kako so se enakost spolov, spolne vloge in obrisi družbenih interakcij spremenili v zahodnih družbah.

Omenjeno UNESCO-vo priporočilo o statusu visokošolskega pedagoškega osebja poudarja (UNESCO Recommendation , par. 33) obveznost spoštovanja akademske svobode drugih članov akademske skupnosti in zagotavljanje poštene razprave o nasprotnih pogledih. Kljub temu omenjeno poročilo v ozadju resolucije Sveta Evrope 2020 (Council of Europe Parliamentary Assembly Res. 2352, par. 37 and 41) navaja, da je, glede na študijo, ki je potekala po vsej EU, 21 % vprašanih izvajalo samocenzuro, 15,5 % pa je poročalo, da jih ustrahujejo drugi člani akademskega osebja.

Kot pravi Michael Poliakoff, predsednik Ameriškega sveta skrbnikov in alumnijev (Paliakoff, 2022), »številne univerzitetne kampuse danes upravljajo orwellovske »skupine za odzivanje na pristranskost«, pri čemer lahko študenti prijavijo vrstnike ali profesorje upravi fakultete zaradi »žaljivih« izjav, ki so ohlapno definirane. [...] z digitalnim zapisom razprav v razredu bi lahko bile ekipe za odzivanje na pristranskost še toliko bolj prodorne. [...] Zdaj, ko so skoraj vsi visokošolski predmeti objavljeni na spletu, kjer si jih je mogoče v celoti ogledati, lahko politični oportunisti, levi in desni, izkoristijo ta trajni, dekontekstualizirani zapis proti svojim nasprotnikom ... Tako študenti kot profesorji potrebujejo konkretna, verodostojna jamstva da virtualna učilnica ne postane

podobna Twitterju, kjer lahko izjava postane viralna, uniči kariero in obstaja v trajni evidenci.«

Študija, ki je temeljila na osmih raziskavah akademskega in podiplomskega študentskega mnenja v anglo-ameriškem svetu, je preučevala pripravljenost fakultete, da odpove pogodbe kontroverznim akademikom in diskriminira politične manjšine (v ZDA velja, da je levo usmerjenih akademikov na univerzah bistveno več, in sicer v razmerju več kot 10 proti ena), (Kaufmann, 2021a; Kaufmann, 2021b). V ZDA je eden od treh konservativnih podiplomskih študentov in akademikov poročal, da je bil zaradi svojih stališč disciplinsko kaznovan ali so mu grozili z disciplino, 75 odstotkov konservativnih akademikov v družboslovju in humanistiki v ZDA in Veliki Britaniji pa je dejalo, da so njihovi oddelki sovražna okolja za njihova prepričanja (Council of Europe Parliamentary Assembly Res. 2352, par. 37 and 41). V ZDA je sedem od 10 konservativnih akademikov v družboslovju ali humanistiki izjavilo, da se samocenzurirajo (Council of Europe Parliamentary Assembly Res. 2352, par. 37 and 41). Raziskava iz avgusta 2020 je pokazala, da štirje od 10 ameriških akademikov ne bi zaposlili znanega Trumpovega podpornika in eden od treh britanskih akademikov bi diskriminiral znanega zagovornika brexita pri zaposlovanju (kjer je 52 odstotkov prebivalstva glasovalo za izstop iz Evropske unije) (Council of Europe Parliamentary Assembly Res. 2352, par. 37 and 41). Polovica anketiranih akademikov ni bila prepričana, ali nasprotujejo ali podpirajo ukinitvi konservativcev, vendar je pri mlajših dvakrat večja verjetnost, da bodo podprli odpuščanje kot akademiki, starejši od 50 let, doktorski študenti pa izkazujejo trikrat večjo verjetnost. Učenci družbenih ved in humanistike, stari 30 let in manj, so socialno pravičnost in akademsko svobodo razvrstili enako, akademiki, starejši od 50 let, so podprli akademsko svobodo pred socialno pravičnostjo z več kot tri proti ena (Council of Europe Parliamentary Assembly Res. 2352, par. 37 and 41). Študija je pokazala, da se etos politične monokulture seli tudi iz kampusa v druge poklicne organizacije, kot so tehnološka podjetja in uredništva (Council of Europe Parliamentary Assembly Res. 2352, par. 37 and 41). Pojav sicer ni nov: že leta 2006 je 40 % akademikov izrazilo zaskrbljenost zaradi naraščajočih groženj njihovi svobodi izražanja spornih ali nepriljubljenih mnenj, skoraj 25 % pa jih je poročalo o samocenzuri zaradi skrbi zaradi neodobravanja institucij ali kolegov (Davies, 2015).

Kultura deplatformiranja in odpovedi tudi ni omejena na humanistiko in družboslovje. Temelj trans-gibanja je, da so spolno kritični pristopi, ki dvomijo o družbeni konstrukciji tako družbenega spola kot spola, (če uporabimo analogijo zanikanja holokavsta) po definiciji transfobni in kažejo sovražno vedenje, ki bi ga bilo treba sankcionirati (in ki gre onkraj pravnih definicij sovražnega govora), (Stajnko, Kičin & Tomažič, 2020, str. 31–41; Letnar Černič, 2015), ki ga znotraj univerz ne bi smeli tolerirati. Nekateri medicinski in biološki strokovnjaki so pred kratkim izrazili zaskrbljenost glede tega, kako je komercialnim in korporativnim interesom založnikov, ki se zavedajo politike identitete, dovoljeno neupravičeno vplivati na intelektualni diskurz v zvezi z biološkim spolom (Hilton, 2021), celo zamolčati medicinske ocene različnih moških in ženskih telesnih lastnosti, ki imajo lahko pomembne posledice za zdravljenje številnih različnih stanj, in zamolčati pomembnost teh fizioloških razlik v klinični praksi, raziskavah in politiki (Marinov, 2020; glej tudi Gender Ideology, 2021).

7. Nadzor in akademska svoboda

Kot je navedeno zgoraj, je nadzor horizontalna značilnost, ki je očitna v vseh kontekstualnih razsežnostih akademske svobode. Dve donosni poslovni področji (izobraževanje na »korporacijski univerzi« in industrija nadzora) sta naravni zaveznici – z dobičkom in širjenjem pod pandemijo Covida. V ZDA je bila leta 2018 izobraževalno-tehnološka industrija ocenjena na 8 milijard dolarjev (Rosen & Santesso, 2018), in velikost svetovnega trga izobraževalne tehnologije je bila leta 2020 ocenjena na 89,49 milijarde USD ter pričakuje se, da bomo od leta 2021 do 2028 priča skupni letni stopnji rasti 19,9 % (Education Technology Market Size).

Primeri so številni. Razmislite o programski opremi tehnologije »svetilnik« Bluetooth, ki je bila uporabljena že pred Covid-19 za sledenje obiskovanja pouka študentov s športnimi štipendijami v kampusu, da bi lahko trenerji in akademski nadzorniki spremljali njihove dejavnosti (Jenkins, 2019). Kar zadeva novejšo različico, je Univerza v Oaklandu od študentov, ki živijo v kampusu, poleg nošenja mask in socialnega distanciranja pričakovala, da bodo nosili »BioButton« v velikosti kovanca, pritrjen na prsi z medicinskim lepilom, ki je nenehno meril njihovo temperaturo, dihanje in srčni utrip ter spremljal, ali so bili v tesnem stiku z uporabni-

kom gumba, ki je bil pozitiven na Covid-19. Tu je študente poleg splošnih skrbi glede zasebnosti skrbelo, kaj bi se zgodilo, če bi šli na protest (recimo Black Lives Matters), kjer bi lahko izbruhnilo nasilje in bi jih lahko izsledili in disciplinirali. Aplikacija lahko signalizira tudi, če spijo na nasprotni strani tanke stene študentskega doma od okuženega študenta (Mangan, 2021a).

Ekonomska logika kaže, da bodo tehnologija in prakse, ko bodo vzpostavljene, verjetno ostale še naprej v uporabi, kljub potencialnim tveganjem, sporom in ranljivostim. Verjetno najbolj očiten primer se nanaša na t.i. proctoring programe, ki prevzamejo nadzor nad študentskimi računalniki, zahtevajo pogled na študentske delovne prostore (ali sobe v študentskih domovih) in celo sledijo gibanju oči, da odkrijejo morebitno goljufanje. Za kandidate na strokovnih ali podiplomskih šolah je lahko zelo koristen, saj omogoča opravljanje izpitov brez čakanja na zdravniške preglede ali celo potovanja (Kafka, 2020). Tehnologija je bila v uporabi že pred pandemijo, vendar se je med pandemijo razširila z množičnim prehodom na spletna predavanja. Nekateri akademski založniki so s svojim digitalnim učbenikom hitro združili zmožnosti nadzora na daljavo in zaklepanja brskalnika (Mangan, 2021a). Kljub temu so se pomisleki glede diskriminacije povečali: študije so pokazale, da ima programska oprema za prepoznavanje obrazov včasih težave pri prepoznavanju obrazov temnopoltih študentov, študenti s posebnimi potrebami pa so se pritoževali, da bi lahko zaradi obraznega tika ali drugih nepričakovanih gibov bili označeni, glede brskalnika pa je bilo ugotovljeno, da lahko funkcija zaklepanja omeji uporabo orodij, ki pretvorijo besedilo v govor (Mangan, 2021a). Škandal prestižne medicinske šole Dartmouth, kjer so bili številni študenti lažno obtoženi, je dobil precejšen medijski odmev (Mangan, 2021b). Na številnih univerzah so študenti razširjali peticije, v katerih so zahtevali opustitev spletnih sistemov nadzora (Mangan, 2021a). Kar zadeva tveganja, je treba upoštevati tudi kibernetske napade na programsko opremo Proctorio za spletno skrbništvo, ki jo uporablja tri milijone ljudi in več kot 2400 ameriških fakultet (plačajo do pol milijona dolarjev na leto za program).

Po podatkih Microsoft Security Intelligence je bilo »izobraževanje« panoga, ki jo je zlonamerna programska oprema najbolj ogrožala, saj je leta 2022 predstavljala 82,3 odstotka prijavljenih primerov (Swaak, 2022). Avgusta 2020 je Univerza v Utahu v na-

sprotju z nasvetom FBI plačala več kot 450.000 dolarjev, da bi preprečila objavo občutljivih informacij na internetu. Zavarovalne premije za zavarovanje kibernetske varnosti so od začetka pandemije namreč skokovito narasle in v nekaterih primerih bo zavarovalnica povezala kampus s pogajalcem za odkupnino (Mangan, 2021c).

Posledice nadzora za akademsko svobodo pa so bolj daljnosežne. Prisotnost kamere očitno spremeni vedenje opazovanih (Villasenor, 2020). Srhljiv potencial posnetih ur je bil prisoten že pred poukom na daljavo (kjer so študenti lahko in so snemali predavanja na črno), vendar je postal še bolj neizbežen. Medtem ko divja kulturna vojna, na primer, ameriški profesorji poročajo o strahu, da bodo za nekaj, kar bodo povedali pri pouku, odgovarjali tako levičarskim radikalcem socialne pravičnosti kot desničarskim vigilantom, ki želijo izkoreniniti kritično rasno teorijo (McMurtrie, 2021). Takšno ozračje izloča spontanost in strast iz predavanj in previdni profesorji si bodo prizadevali tudi snemati ure, da bi lahko odgovorili na obtožbe glede izjav, uporabljenih izven konteksta (Kafka, 2020).

Presečišče potenciala nadzora v digitalno izboljšanem ali povsem oddaljenem izobraževanju z neliberalnimi režimi predstavlja nove izzive za akademsko svobodo. Poročila ameriških univerzitetnih programov, ki delujejo na Kitajskem, v Rusiji ali Savdski Arabiji ali preprosto vključujejo študente iz teh držav, ki do pouka dostopajo na daljavo od doma, kažejo na težave pri zagotavljanju ameriškega izobraževanja, ki temelji na razpravah in debatah, brez koristi (akademske) svobode (Fischer, 2020). Ko se dotaknejo širokega nabora politično občutljivih vprašanj, se študenti umaknejo iz pogovora, ker se bojijo, da bi jim njihova vlada prisluškovala. Poleg tega, če takšno število „zajetih“ študentov doseže določeno kritično razmerje, lahko spodkoplje prav ta načela. Poleg tega so na Kitajskem prepovedana spletna mesta, ki se pogosto uporabljajo v učilnicah, kot so Google, YouTube in The New York Times (Fischer, 2020). »Člani fakultete se pri poučevanju v novih globalnih virtualnih učilnicah soočajo s težkimi izbirami: ali spremenijo svoje predemete, da bi odstranili potencialno sporne teme, ali ustvarijo dva sklopa gradiva, enega za študente v Združenih državah, drugega za tiste v tujini? Ali pa se držijo svojih prvotnih učnih načrtov, s čimer potencialno ogrožajo svoje učence? Ali študentom rečejo: Oprostite, ta tečaj

je prepovedan, če študirate na Kitajskem? [...] Države, vključno z Rusijo, Turčijo in Savdsko Arabijo, imajo prav tako stroge zakone o cenzuri in nadzorujejo internet.« (Fischer, 2020). V študijskem letu 2018/19 je bilo na ameriške univerze vpisanih 370.000 kitajskih študentov, vsak tretji mednarodni študent. Leta 2000 je bil za Hongkong sprejet zakon o nacionalni varnosti, po katerem je govor, za katerega meni, da je kritičen do hongkonške ali kitajske vlade, nezakonit – ne glede na državljanstvo ali lokacijo storilca (Fischer, 2020). »Ne samo, da so učenci na Kitajskem potencialno bolj pravno ogroženi, ampak so videokonferenčne aplikacije, kot je Zoom, ki se uporabljajo pri pouku na daljavo, ranljive za nadzor kitajske vlade in zbiranje podatkov. Zoom je bil spomladi na udaru kritik, ker je na ukaz kitajske vlade začasno zaprl uporabniške račune zunaj Kitajske.« (Fischer, 2020). Združenje za azijske študije je na primer objavilo izjavo in niz priporočil za poučevanje na daljavo o Kitajski in študentih, ki tam študirajo,[10] opozorilo o tveganjih, če se od učencev zahteva, da prenesejo odčitke, ki so lahko lokalno prepovedani, in o snemanju razprav v razredu, v katerih je študente zlahka prepoznati.

Ena od rešitev bi lahko bila uporaba navideznega zasebnega omrežja ali VPN, ki uporabnikom omogoča navigacijo po internetnih požarnih zidovih za pridobitev blokirane vsebine, vendar so nepooblaščene internetne povezave zdaj nezakonite tako na Kitajskem kot v Rusiji: »Čeprav se prepoved ne uveljavlja redno, bi lahko imeli študenti, ki bi bili ujeti pri uporabi VPN-ja, kršitev v svojih evidencah vse življenje, kar bi lahko imelo posledice za njihove družine. ... Študentov ne bi smeli spodbujati, naj storijo kaznivo dejanje.” (Fischer, 2020). Vendar, kot lahko vidimo, izziv in problem presegata tehnološki vidik.

8. Sklepno

Več pomembnih vprašanj je ostalo zunaj obsega te analize. Prispevek nikoli ni nameraval dati odgovora na to, kako naj se prihodnja (mednarodna) zakonodaja loti konceptualne in kodifikacijske naloge, ali dati prednost akademski svobodi kot individualni pravici (akademikov in študentov); ali kot pravici tretje generacije (akademske ali nacionalne skupnosti); ali ciljati na

[10] Glej: URL: https://www.asianstudies.org/aas-statement-regarding-remote-teaching-online-scholarship-safety-and-academic-freedom/, 12. 9. 2024.

jamstva institucionalne avtonomije; ali se raje osredotočiti na poudarjanje in odpravo groženj, med drugim od cenzure, preko trženja do digitalnega nadzora – ali celo na zagotovitev seznama, česa akademska svoboda ne bi smela zajemati. Prispevek bi lahko bil tudi natančnejši pri poudarjanju posebnosti javnega izobraževanja in visokega šolstva ter različnega fokusa, potrebnega za „izobraževanje“ in „znanost“. Razlog za te pomanjkljivosti so prostorske in konceptualne omejitve. Prav tako obstaja očitna, opažena razlika med družboslovjem in humanistiko ter naravoslovjem v smislu izzivov in kršitev na številnih ravneh. Kot poudarja poročilo Sveta Evrope 2020 (Council of Europe Parliamentary Assembly Report 15167, par. 73), je družboslovje pod strožjim nadzorom države, medtem ko je naravoslovje lažje izpostavljeno vplivu korporativnega denarja. Uveljavljena področja in sporna področja, oziroma ekonomsko dobičkonosni in neprofitni sektorji, se soočajo z različnimi izzivi, vendar, skladno z mednarodnimi zavezami, se je v tem članku zdelo pomembno oceniti integriteto akademske skupnosti kot celote, saj »bi bilo nevarno opravičevati ali relativizirati kršitve nekaterih tem s svobodo drugih«. (Spannagel et al., 2020).

Ne glede na zakonodajne, politične ali intelektualne odzive je nekaj gotovo: akademska sfera in izobraževanje sta skupna dejavnost. Če je »za vzgojo otroka potreben angažma celotne vasi«, je za doktorat, ki ga je treba pridobiti, ali kakršen koli akademski članek, ki bo objavljen, podobno nujna vključenost celotne akademske skupnosti. Ko gre za univerze, kot pravi Kellerman, je »izobraževanje izkušnja v raziskovalni skupnosti ... [kar] zahteva kognitivno prisotnost (učenec), družbeno prisotnost (učeča se skupnost) in prisotnost poučevanja (profesor) in študenti ... [so] del potrebne skupnosti po posredniku.« (Kellermann, 2021).

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DIGNITAS
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NOVA UNIVERZA

KOMENTAR USTAVE REPUBLIKE SLOVENIJE
KURS 2019

Komentar ustave Republike Slovenije - KURS 2019

1. DEL
Človekove pravice in temeljne svoboščine, 720 str.

2. DEL
Državna ureditev, 516 str.

Elektronska izdaja: e-kurs.si

Komentar ustave Republike Slovenije je prvič izšel leta 2002. S tem dejanjem se je ob sodelovanju najbolj uglednih slovenskih ustavnopravnih strokovnjakov naša država uvrstila ob bok tistih, ki s komentarji ustave v obliki znanstvene monografije skrbijo za to, da vrhovni pravni dokument njihove države živi skozi sodno prakso in interpretacijo pravne stroke, tako da ustava ne o(b)staja le na papirju, temveč učinkuje tudi v praksi. Leta 2011 je sledila dopolnitev KURS A. V obdobju osmih let je v evropskem ustavnem prostoru, ki ga ob boku Evropskega sodišča za človekove pravice in Sodišča Evropske unije tvori tudi slovensko Ustavno sodišče, prišlo do znatnega razvoja sodne prakse, ki jo novi KURS 2019 upošteva.

Odgovorni urednik:
izr. prof. dr. Matej Avbelj

Uredniški svet:
izr. prof. dr. Janez Čebulj
prof. dr. Peter Jambrek
prof. dr. Lovro Šturm

Leto izdaje:
2019

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Redakcija in lektura: doc. dr. Katarina Vatovec

Naročila sprejemamo na: knjiznica@nova-uni.si

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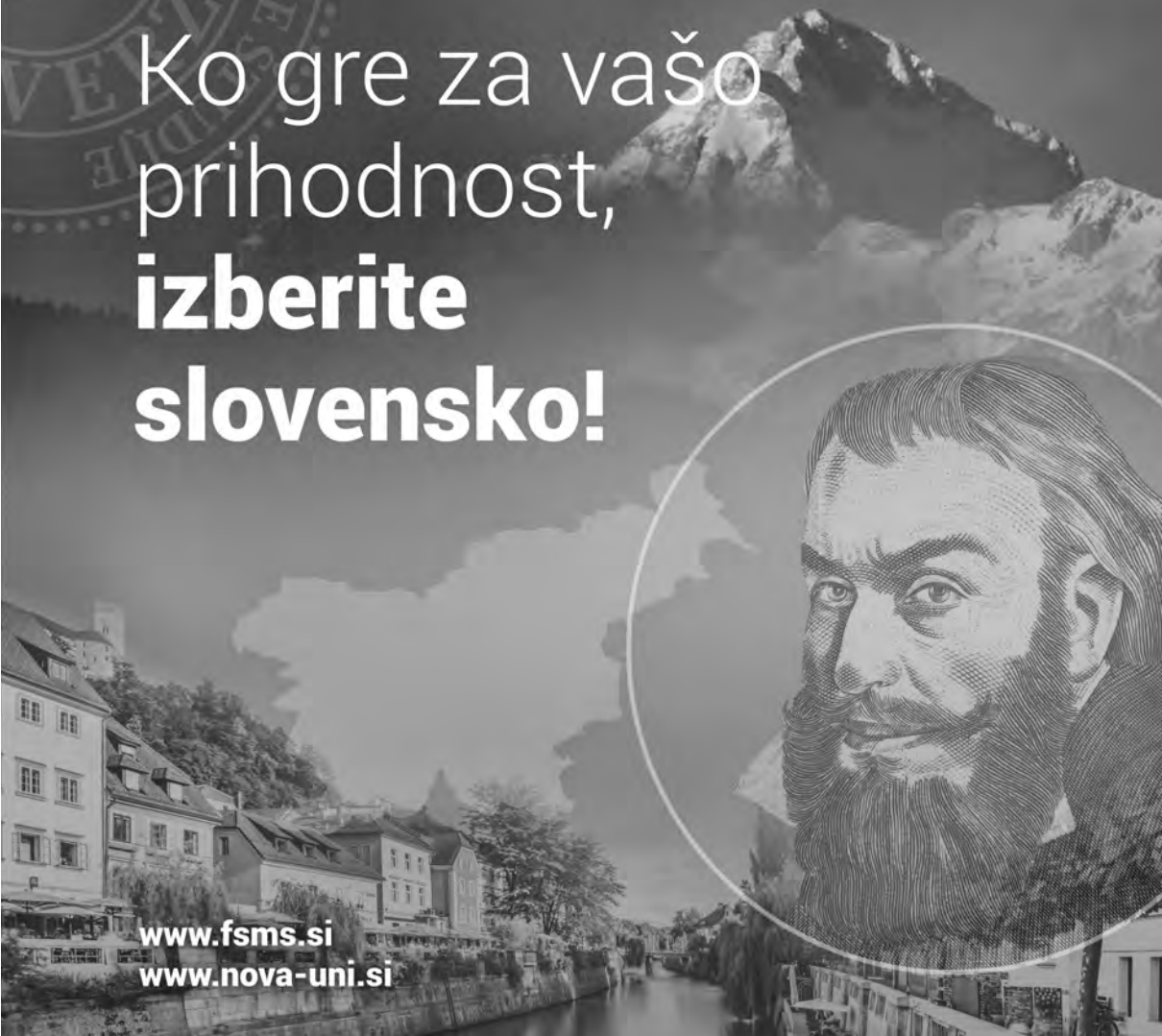

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