

# ELTE LAW JOURNAL



2021/2

ELTE LJ



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# **Symposium**

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## **Legal Dimensions of the COVID-19 Pandemic and the Capacity of Law to Respond to Crisis Situations**

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# All Roads Lead to the Hague? The COVID-19 Pandemic and the No-harm Rule\*\*

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## Abstract

In this article, the author analyses the no-harm rule under customary international law in order to determine how the rule could be applied in the prevention of transboundary harm caused by the COVID-19 pandemic, as well as in the possible adjudication of such harm. First, the author addresses whether the scope of the no-harm rule extends to transboundary harm caused by pandemics. Second, after examining the components of transboundary harm, the author will argue that the COVID-19 pandemic caused significant transboundary harm to most members of the international community. Third, the article will expand upon the obligation of states, under customary international law, to prevent significant transboundary harm. Finally, the author will provide some concluding remarks and address why the no-harm rule is an effective way of preventing as well as adjudicating transboundary harm caused by the COVID-19 pandemic.

Keywords: COVID-19, state responsibility, pandemics, no-harm rule, transboundary harm, due diligence

## I Introduction

The destruction caused by the COVID-19 pandemic has been unprecedented in the 21st century. Besides the soaring death toll,<sup>1</sup> one cannot forget the impact of the pandemic on

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<sup>1</sup> Coronavirus Disease (COVID-19) Dashboard. <[https://covid19.who.int/?gclid=Cj0KCQiAvP6ABhCjARIsAH37rbS5d77QJeH3nymbmPgZqSHfj1P9xynhg61a\\_oofodSpRTsez3QdYeoAglIEALw\\_wcB](https://covid19.who.int/?gclid=Cj0KCQiAvP6ABhCjARIsAH37rbS5d77QJeH3nymbmPgZqSHfj1P9xynhg61a_oofodSpRTsez3QdYeoAglIEALw_wcB)> accessed 7 February 2021.

the global economy, which halted the growth experienced in previous years.<sup>2</sup> While this is the time for solidarity and cooperation, the questions of state responsibility cannot be overlooked.<sup>3</sup> This paper will focus on one of the aspects of state responsibility for the failure to prevent the harm caused by the spread of the virus.

Accordingly, this paper will begin by providing a general overview of the no-harm rule in international law, followed by its specific applicability to the COVID-19 pandemic. It will continue by addressing the criteria for the existence of transboundary harm and the obligation to prevent such harm. Finally, the author will argue that the no-harm rule provides an effective framework for preventing harm caused by pandemics and for adjudicating state responsibility for the violation of preventive obligations.

## II The No-harm Rule and Its Applicability to Transboundary Harm Caused by Pandemics

The rule according to which states cannot violate other states' territorial sovereignty due to events and activities on their own territories has been the focal point of many contentious cases before the International Court of Justice ('ICJ') and various other international tribunals since the 1940s. This rule is generally referred to as the no-harm rule in practice,<sup>4</sup> but is also known as the *sic utere tuo ut alienum non laedas* principle ('*sic utere* principle'),<sup>5</sup> and poses a general obligation to prevent transboundary harm. The exact origins of the no-harm rule are subject to debate. Some commentators trace it back to the prohibition of the abuse of rights, while others point to its close ties with the requirement of good neighbourliness.<sup>6</sup>

One crucial step when examining the no-harm rule in the context of the COVID-19 pandemic is its categorisation as a source of law. The no-harm rule is enshrined in a number of international agreements; however, their scope does not extend to zoonotic viruses, such as COVID-19. Additionally, while the object and purpose of the International Health

<sup>2</sup> 'The Global Economic Outlook During the COVID-19 Pandemic: A Changed World' (2020), <<https://worldbank.org/en/news/feature/2020/06/08/the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world>> accessed 7 February 2021.

<sup>3</sup> António Guterres, 'This is a time for science and solidarity' (2020) <<https://www.un.org/en/un-coronavirus-communications-team/time-science-and-solidarity>> accessed 7 February 2021; Massimo Introvigne, 'Coronavirus: CCP Beware, the Lawyers Are Coming' (2020) Bitter Winter <<https://bitterwinter.org/coronavirus-ccp-beware-the-lawyers-are-coming/>> accessed 7 February 2021.

<sup>4</sup> Attila M. Tanzi, 'The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law' (2020) 20 Int Environ Agreements, 619–629, DOI: 10.1007/s10784-020-09502-7.

<sup>5</sup> See Marte Jervan, 'The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule' 2014/14–17, PluriCourts Research Paper, 1. DOI: 10.1093/law:epil/9780199231690/e1607

<sup>6</sup> Jutta Brunnée, 'Sic utere tuo ut alienum non laedas' (Max Planck Encyclopedia of International Law, OUP 2010) 1.

Regulations ('IHR') is *inter alia* to prevent the spread of infectious diseases, they do not contain a general obligation to prevent harm caused by such diseases.<sup>7</sup> Against this backdrop, these conventions cannot be applied to COVID-19 related harmful events. It follows that, before a detailed analysis of the obligation to prevent transboundary harm, two questions must be addressed; first, whether the no-harm rule is part of customary international law, and second, whether it extends to harm caused by the COVID-19 pandemic.

## 1 The No-harm Rule as a Rule of Customary International Law

The ICJ first applied the *sic utere* principle in the *Corfu Channel* case in 1949,<sup>8</sup> followed by its *Nuclear Weapons* advisory opinion in 1996.<sup>9</sup> Notwithstanding the fact that there was a noticeable pushback in academia against the recognition of the no-harm rule as a part of customary international law,<sup>10</sup> the ICJ declared it as such in the *Pulp Mills* case in 2010.<sup>11</sup> The ICJ relied on its findings in the *Corfu Channel* case and the *Nuclear Weapons* advisory opinion to support the customary nature of the no-harm rule, confirming that such recognition was supported by decades of steady development of international law, hence the no-harm rule is not the child of mere judicial activism.<sup>12</sup>

## 2 The Limits of the No-harm Rule

Some commentators argue that, even though the no-harm rule was a part of customary international law, its application is limited to certain types of harm, specifically environmental harm.<sup>13</sup> This theory is supported by the fact that the ICJ, the court with arguably the biggest influence on the development of international law, has directly pronounced the customary nature of the no-harm rule in environmental disputes exclusively. Both the *Pulp Mills* case and the *San Juan* case revolved around pollution of the environment.

However, this certainly does not *ipso facto* mean that the ICJ rejects the wider application of the no-harm rule. In the *Corfu Channel* case, the ICJ did not restrict its applicability to environmental harm. Instead, it applied it as a general rule that extends

<sup>7</sup> Bazsó Gábor, 'Államfelelősség és a Nemzetközi Egészségügyi Rendszabályok a COVID-19 világvárvány idején' in Kajtár Gábor, Sonnevend Pál (eds), *A nemzetközi jog, az uniós jog és a nemzetközi kapcsolatok szerepe a 21. században: tanulmányok Valki László tiszteletére* (ELTE Eötvös Kiadó 2021, Budapest).

<sup>8</sup> *Corfu Channel (United Kingdom v Albania) (Judgment)* [1949] I.C.J. Reports, 4.

<sup>9</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226, para 29.

<sup>10</sup> See for ex. Greg Lynham, 'The Sic Utere Principle as Customary International Law: A Case of Wishful Thinking?' (1995) 2 James Cook University Law Review, 189.

<sup>11</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment)* [2010] ICJ Reports, 14, para 101.

<sup>12</sup> *Pulp Mills*, para 101.

<sup>13</sup> L-A Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press 2018, Cambridge) 78, DOI: 10.1017/9781108553728.

to various forms of transboundary harm.<sup>14</sup> Since the ICJ has relied on its *Corfu Channel* judgment as a starting point in all subsequent cases where it applied the customary form of the no-harm rule, it stressed that its applicability extends to various fields of international law.<sup>15</sup> However, it must be highlighted that, in accordance with the general principle of *lex specialis derogat legi generali*, the no-harm rule cannot be applied under customary international law if the type of harm is covered by international agreements, such as those for the prevention of terrorism,<sup>16</sup> drug trafficking<sup>17</sup> or nuclear warfare.<sup>18</sup>

The International Law Association ('ILA') goes further, arguing that there is no conflict between the all-encompassing form of the no-harm rule (more specifically the due diligence obligation arising from the no-harm rule) found in the *Corfu Channel* case and its manifestations in different fields of international law, since the broader concept is not operational but only its more specific manifestations.<sup>19</sup> Accordingly, the ILA holds that no conflict of law rules have to be applied in such situations.<sup>20</sup> Even though the ILA acknowledges that the preventive obligation arising from the customary form of the no-harm rule has mostly emerged in environmental disputes thus far, it concurs that its applicability goes beyond international environmental law, even extending to international human rights law.<sup>21</sup>

The Draft Articles on Prevention of Transboundary Harm from Hazardous Activities ('Prevention Draft') adopted by the International Law Commission ('ILC') in 2001 also avoids limiting the applicability of the no-harm rule to the field of international environmental law. The scope of the Prevention Draft extends to '[...] activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences'.<sup>22</sup> Pursuant to the commentary to the Draft Articles, physical harm encompasses any real detrimental effect on, *inter alia*, human health, industry, property, the environment or agriculture.<sup>23</sup>

<sup>14</sup> *Corfu Channel*, 22.

<sup>15</sup> See e.g. *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) (Judgment)* [2015] ICJ Reports 665 (hereinafter: *San Juan*), para 104.

<sup>16</sup> *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, signed 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973); *International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1998, 2149 UNTS 256. (entered into force 23 May 2001).

<sup>17</sup> *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95. (entered into force 11 November 1990).

<sup>18</sup> *Treaty on the Prohibition of Nuclear Weapons*, opened for signature 20 September 2017, UN Doc A/CONF.229/2017/8 (entered into force 22 January 2021).

<sup>19</sup> International Law Association, *Study Group on Due Diligence, Second Report* (2016) 6.

<sup>20</sup> *Ibid.*

<sup>21</sup> International Law Association, *Study Group on Due Diligence, First Report* (2014) 14–22.

<sup>22</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, art 1.

<sup>23</sup> *Ibid* 152, para 4.

The preventive obligation on which the no-harm rule is based plays an increasingly prominent rule in international human rights law as well.<sup>24</sup> Besides the obligation to respect and ensure human rights, states parties to human rights treaties are also under the obligation to protect the human rights of people under their jurisdiction.<sup>25</sup> In other words, human rights conventions contain a clear obligation for states to prevent any harm caused by human rights violations. Consequently, the preventive obligation under international human rights law could be interpreted as a manifestation of the broader concept of the no-harm rule.<sup>26</sup>

This obligation of prevention is not limited to state territory; hence it also applies extraterritorially under certain conditions. In the *Wall* advisory opinion, the ICJ famously stated that the scope of the International Covenant on Economic, Social and Cultural Rights, as well as the International Covenant on Economic, Social and Cultural rights, extend to situations where a state exercises effective jurisdiction extraterritorially, meaning effective control over a territory or persons outside its borders.<sup>27</sup> This interpretation of the extraterritorial applicability of these prominent human rights treaties was reiterated by the European Court of Human Rights in relation to the European Convention on Human Rights.<sup>28</sup>

Due to recent developments in international human rights law, this interpretation of the extraterritorial applicability of human rights treaties may become outdated in the not-too-distant future. Notably, the Covenant of Economic, Social and Cultural Rights does not contain a provision on its scope of application,<sup>29</sup> which may support its broader application outside of member states' territories, according to the Committee on Economic, Social and Cultural Rights.<sup>30</sup> Moreover, the Inter-American Court of Human Rights ('IACtHR') stated that the American Convention of Human Rights applies extraterritorially to situations in which a state exercises control over harmful activity causing harm outside of the state's

<sup>24</sup> International Law Association (n 21) 14–22.

<sup>25</sup> Radu Mares, "'Respect' Human Rights: Concept and Convergence' (2014) SSRN Electronic Journal, 2. <[https://www.researchgate.net/publication/272221718\\_'Respect'\\_Human\\_Rights\\_Concept\\_and\\_Convergence](https://www.researchgate.net/publication/272221718_'Respect'_Human_Rights_Concept_and_Convergence)> accessed 7 February 2021, DOI: 10.2139/ssrn.2387345.

<sup>26</sup> Duvic-Paoli (n 13) 79.

<sup>27</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports, 136, paras 111–112. Contrast with *Sergio Euben Lopez Burgos v. Uruguay*, HRC, Communication No. R.12/52, 1981, para 12.3.; *Lilian Celiberti de Casariego v. Uruguay*, HRC, Communication No. 56/1979, 1984, para 10.3.

<sup>28</sup> See, for example *Bankovic and Others v Belgium and Others* [2001] App. No 52207/99, ECtHR, para 66.; *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, ECtHR, 7 July 2011, para 130.

<sup>29</sup> *Wall* Advisory Opinion, para 112.

<sup>30</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 2; Committee on Economic, Social and Cultural Rights: General Comment 24, paras 26–28; Committee on Economic, Social and Cultural Rights, 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights' (2011) para 5.

territory.<sup>31</sup> This is an important development, as the IACtHR based the applicability of a human rights treaty on control over the activity causing the harm, instead of the injured person or territory where the violation occurred. Therefore, the IACtHR draws a clear connection between the rationale of the no-harm rule, which applies in relation to all harmful activities under a state's jurisdiction, and the extraterritorial applicability of human right conventions. Ecuador put forward a similar argument in the *Aerial Herbicide Spraying* case, stating that Columbia violated the human rights of Ecuadorian citizens by polluting Ecuador's air and soil.<sup>32</sup> However, the proceedings were discontinued after the parties settled their dispute amicably. If this theory were to gain wider recognition in practice, human rights conventions, similar to the no-harm rule, could *mutatis mutandis* be applied to adjudge harm caused as a result of the COVID-19 pandemic.

### III The Substantive Elements of Transboundary Harm in the Context of COVID-19

An activity under a state's jurisdiction and the harm caused thereby must meet certain requirements to classify as transboundary harm, triggering states' preventive obligations. These requirements are conjunctive; therefore, all of them must be fulfilled to meet the criteria of transboundary harm.<sup>33</sup> Xue Hanqin, former vice-president of the ICJ, laid down four basic requirements in her monograph on the no-harm rule based on the work of Oscar Schachter. The four conjunctive requirements are:<sup>34</sup>

1. the harm must be physical,
2. the harm must be transboundary in nature,
3. there must be a causal link between the harmful activity and the harm,
4. the harm must meet a certain severity.

These four requirements will be discussed in turn to determine whether the harm caused by the COVID-19 pandemic can be categorised as transboundary harm in the application of the no-harm rule.

<sup>31</sup> Inter-American Court of Human Rights, *Advisory Opinion OC-23/17* [2017] paras 101–102; See Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 (3) *The European Journal of International Law*, 638, DOI: 10.1093/ejil/chs054.

<sup>32</sup> *Case Concerning Aerial Herbicide Spraying (Ecuador v. Colombia) (Memorial of Ecuador)* [2009] 273, para 8.2.

<sup>33</sup> Xue Hanqin, *Cambridge studies in international and comparative law: Transboundary damage in international law* (Cambridge University Press 2003, Cambridge) 4, DOI: 10.1017/CBO9780511494642.

<sup>34</sup> Hanqin (n 33) 6.

## 1 The Physical Nature of the Harm

The harmful activity must result in material harm, such as degradation of the flora and fauna or loss of human life. It follows that economic loss does not fall into that category. This is also evident from Article 1 of the Prevention Draft, which limits the scope of the draft to events causing harm through their physical consequences. While a serious discussion ensued between states on whether to include both material and immaterial harm to the Prevention Draft, they finally decided on the more limited approach.<sup>35</sup>

Consequently, only the physical effects of the COVID-19 pandemic fall into the category of harm in the application of the no-harm rule, including loss of life, or deleterious health effects. However, the disastrous ramifications of the pandemic on the global economy is outside the purview of transboundary harm, which would certainly have a noticeable effect on the amount of compensation awarded to injured states.<sup>36</sup>

## 2 The Transboundary Nature of Harm

The obligation to prevent transboundary harm only arises if the harm violates the territorial sovereignty of another state.<sup>37</sup> This only occurs, when the harmful effects materialise within that state.<sup>38</sup> *Hanqin* holds that the harmful effects can travel through air, water or soil.<sup>39</sup>

In contrast, in the *Iron Rhine* arbitration, the Permanent Court of Arbitration pronounced that the obligation to prevent transboundary harm also arises in cases where a state causes harm through the exercise of a certain right. In the *Iron Rhine* arbitration, this right was Belgium's right of transit through certain territories of the Netherlands.<sup>40</sup> The tribunal declared the following:

[...] where a state exercises a right under international law within the territory of another state, considerations of environmental protection also apply. The exercise of Belgium's right of transit, as it has formulated its request, thus may well necessitate measures by the Netherlands to protect the environment to which Belgium will have to contribute as an integral element of its request.<sup>41</sup>

<sup>35</sup> Ibid.

<sup>36</sup> 'Which top economies have suffered worst GDP fall due to COVID-19?' <<https://www.businesstoday.in/current/economy-politics/which-top-economies-have-suffered-worst-gdp-fall-due-to-covid-19/story/414683.html>> accessed 7 February 2021.

<sup>37</sup> *Lake Lanoux arbitration (Spain v. France)* [1957] RIAA, vol. XII, 306-310; *Trail Smelter Arbitration (U.S. v. Canada)* [1941] 3 U.N. Rep. Int'l Arb. Awards 1905, 1965; *San Juan*, para 174.

<sup>38</sup> *Hanqin* (n 33) 8.

<sup>39</sup> *Hanqin* (n 33) 9.

<sup>40</sup> *Iron Rhine Railway (Belgium v. Netherlands) (Award)* [2005] 27 RIAA, para 35.

<sup>41</sup> *Iron Rhine Railway*, para 223.

Through this pronouncement, the tribunal extended the definition of transboundary harm, as, in cases factually comparable to the *Iron Rhine* arbitration, the potential harm and the activity causing such harm would both occur within one state. In *Iron Rhine*, it was only the right of transit enshrined within the 1839 Treaty between Belgium and the Netherlands relative to the Separation of their Respective Territories, which rendered the potential harm transboundary.<sup>42</sup> Henceforth, the view that the harmful event and the harm itself must be separated by boundaries in order to qualify as transboundary harm does not hold up, and the harmful effects do not necessarily need to be transmitted via water, air or soil.

SARS-CoV-2, the virus causing COVID-19, does not travel from one state to another through water, air or soil either. It is mainly spread through airborne exposure, when an infected person speaks, coughs or sneezes.<sup>43</sup> Hence it shows certain similarities to air pollution, which was the subject of the famous *Trail Smelter* arbitration. However, people generally contract COVID-19 when they are approximately 1-2 metres apart from an infected person.<sup>44</sup> For this reason, the spread of COVID-19 is not exactly analogous to air pollution, as the virus cannot travel in the air from one state to another. However, this does not rebut the transboundary nature of COVID-19-related harm. The carrier of the virus is simply not the air, water or soil, but the human body itself, when it carries the virus across borders and eventually spreads it to citizens of different states. Neither the ICJ, nor any other international court or tribunal, has ruled this out as a possible way for the transboundary movement of harmful effects. Consequently, the harm caused as a result of the COVID-19 pandemic is transboundary in nature.

### 3 The Causal Link between the Harmful Activity and the Harm; Standard of Proof

A state's responsibility cannot be invoked for the violation of the no-harm rule without a sufficient causal link between the harmful activity and the harm itself. In accordance with the practice of international courts and tribunals, such a causal link must be clear and direct.<sup>45</sup> The ICJ has previously stated that a causal link is clear and direct only if the violation of an international obligation would not have happened but for the injurious

<sup>42</sup> See Duvic-Paoli (n 13) 148.

<sup>43</sup> Pál Tibor (ed), *Az orvosi mikrobiológia tankönyve* (Medicina Könyvkiadó 2013, Budapest) 210–211; 'Coronavirus disease (COVID-19): How is it transmitted?' <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted>> accessed 7 February 2021.

<sup>44</sup> 'Coronavirus disease...' (n 43).

<sup>45</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, 151; *San Juan*, para 119; *Pulp Mills*, para 180; *Corfu Channel*, paras 244 and 265; *South China Sea Arbitration (Philippines v China) (Award)* [2016] PCA Case No 2013-19, ICGJ 495, para 971.

activity.<sup>46</sup> This has been referred to as the but-for causal test or *sine qua non* test in academia and practice. However, fulfilling the but-for test would pose an almost insurmountable challenge when it comes to the application of the no-harm rule to the COVID-19 pandemic. It would be unreasonable to require injured states to prove that the sole reason for COVID-19's havoc within their territories was the omission of the other party or parties to the dispute, which would be expected to meet the but-for test. With regard to the COVID-19 pandemic, this would require injured states to prove that the acts or omissions of any other state not party to the dispute, as well as natural contributors – such as changes in temperature – played no direct or indirect part in the deleterious effects of the pandemic within the injured states. Such a requirement would disregard the unavoidable reality that full scientific certainty can almost never be reached where the facts of the case are as deeply complex as those in disputes concerning transboundary harm.<sup>47</sup>

Instead of the but-for test, the application of the necessary element of a sufficient set test ('NESS test') would lead to more reasonable outcomes. Under the NESS test, a causal connection consists of several elements, which are all necessary to reach the outcome. Thereby, causality exists between the cause and each necessary causal element.<sup>48</sup> The NESS test is the appropriate causal test in cases where the cause is the result of several interdependent factors. Such cases include most transboundary harm-related disputes, in which several causal factors, such as wind direction, precipitation levels or the natural life cycles of animals, can all interact with different human activities to influence the outcome. The harm caused by the COVID-19 pandemic also holds these characteristics, as the harmful effects of the pandemic cannot be traced back to the sole act or omission of one state, since its spread could be altered by the appearance of new mutations or temperature fluctuations.<sup>49</sup> Such a causal test was applied by the ICJ in the *San Juan* case, where the ICJ based its decision on just and reasonable inference in appraising the damage rather than looking for the cause without which the damage would not have happened.<sup>50</sup> A form of the but-for test has also been applied in a number of international arbitrations, too. In the *Naulilaa* case, the tribunal applied this test for Portugal's claim for reparation against

<sup>46</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Hercegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Reports 43, para 462; James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013, Cambridge), 499, DOI: 10.1017/CBO9781139033060; *Factory at Chorzów (Germany v. Poland) (Judgement on Merits)* [1928] P.C.I.J. (ser. A) No. 17, para 68.

<sup>47</sup> Sulyok Katalin, 'A tudományos bizonytalanság forrásai és szerepe a természet- és környezetvédelmi döntések ökológiai megalapozhatóságában' (2013) 19 Természetvédelmi Közlemények, 62–73.

<sup>48</sup> Anthony Maurice Honoré, 'Causation in the Law' (Stanford Encyclopedia of Philosophy 2010, Stanford) 6, DOI: 10.1017/S0008197300010205.

<sup>49</sup> 'Episode#20 – COVID-19 – Variants&Vaccines' <[https://www.who.int/emergencies/diseases/novel-coronavirus-2019/media-resources/science-in-5/episode-20---covid-19---variants-vaccines?gclid=CjwKCAiAjp6BBhAIEiwAkO9WutuS68rvoPaCRVYz4bm9BoY-Qkj\\_\\_O5uiMseWw8Ry4AMZ2\\_pgbqhGxoCrTkQAvD\\_BwE](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/media-resources/science-in-5/episode-20---covid-19---variants-vaccines?gclid=CjwKCAiAjp6BBhAIEiwAkO9WutuS68rvoPaCRVYz4bm9BoY-Qkj__O5uiMseWw8Ry4AMZ2_pgbqhGxoCrTkQAvD_BwE)> accessed 13 February 2021.

<sup>50</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Judgement on Compensation)* [2018] ICJ Reports 15, para 35.

Germany when evaluating the cause of the loss of livestock as a possible result of Germany's acts of aggression.<sup>51</sup> As Ilias Plakokefalos argues, in the *CME* investment arbitration, the tribunal also seems to have applied the NESS test, as it was looking for 'a cause' rather than 'the cause' of the result.<sup>52</sup> Additionally, a form of the NESS test was applied in the *Methanex* case, where the tribunal stated that causality exists if they are able to 'connect the dots' between the different necessary causal elements.<sup>53</sup>

Applying the NESS test to create a causal link between the harm caused as a result of the pandemic and the conduct of certain states would allow international dispute settlement bodies to take into account all possible causal elements without the infeasible task of pinpointing one single cause of a causation that has affected millions so far.

The standard of proof necessary in the application of the no-harm rule to the COVID-19 pandemic is certainly crucial. Such a dispute would most likely be flooded with expert opinions, all drawing completely contradictory conclusions. The standard of proof applied by the ICJ in disputes involving transboundary harm has commonly been 'clear' or 'convincing' evidence or the combination of the two.<sup>54</sup> The court has also asserted that direct evidence is not always necessary to meet the standard of proof.<sup>55</sup> For example, in the *Corfu Channel* case, the ICJ declared that indirect evidence is also accepted if all direct evidence is under the exclusive control of a state other than the state on which the burden of proof lies.<sup>56</sup> In such cases, the ICJ is more lenient and accepts inferences of fact and circumstantial evidence if they leave no room for reasonable doubt and lead to a logical conclusion.<sup>57</sup>

#### 4 The Severity of the Harm

The severity of harm is also a decisive factor in the application of the no-harm rule. Insignificant harmful effects do not meet the criteria of transboundary harm. In case-law,<sup>58</sup> as well as in the Prevention Draft, the accepted term is 'significant' harm to describe

<sup>51</sup> *Responsabilité de l'Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Portugal v. Allemagne)* [1930], UNRIIAA, vol. 2, 1035. See Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 (2) *The European Journal of International Law*, 486–487, DOI: 10.1093/ejil/chv023.

<sup>52</sup> Plakokefalos (n 51) 491.

<sup>53</sup> The subject of the *Methanex* case was harm caused by a chemical, MTBE. See *Methanex Corporation v. United States of America (Final Award of the Tribunal on Jurisdiction and Merits)* [2005] Part III. Chapter B, 2.

<sup>54</sup> *Pulp Mills*, paras 225 and 228; *San Juan*, para 119.

<sup>55</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan Islands (Indonesia v. Malaysia) (Judgment)* [2002] ICJ Reports 625, para 90; *Oil Platforms (Islamic Republic of Iran v. United States of America) (Judgment)* [2003] ICJ Reports 161, para 60; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda) (Judgement)* [2005] ICJ Reports 168, para 159.

<sup>56</sup> *Corfu Channel*, 18.

<sup>57</sup> *Ibid.*

<sup>58</sup> *San Juan*, paras 153 and 187; *Pulp Mills*, para 101.

the required seriousness of the transboundary effects.<sup>59</sup> Pursuant to the Prevention Draft, significant harm is more than ‘detectable’ but does not need to be ‘serious’ or ‘substantial’.<sup>60</sup> It is enough if the activity has a real detrimental effect on people, property or the environment.<sup>61</sup>

With regard to the COVID-19 pandemic, the severity of harm must be assessed in relation to the parties to the potential dispute. While it is beyond the goal of this paper to appraise such severity in relation to each state individually, the ever-growing death toll indicates that the harm caused by the pandemic within the vast majority of the international community greatly surpasses the threshold of ‘detectable’ harm.<sup>62</sup>

#### IV The Obligation to Prevent Significant Transboundary Harm

In accordance with the no-harm rule, states are not required to succeed eventually in preventing significant transboundary harm. Hence, the obligation arising from the no-harm rule is an obligation of conduct, as opposed to an obligation of result.<sup>63</sup> It follows that the preventive obligation of the no-harm rule is an obligation of due diligence.<sup>64</sup> This clearly separates state responsibility for the emergence of COVID-19 and state responsibility for its eventual destruction as a pandemic. Attribution could be a decisive factor for the former in determining whether the responsibility of any state could be invoked for the appearance of COVID-19.<sup>65</sup> However, attribution is not an imperative question for the latter, as states must exercise due diligence to prevent harm, regardless of whether the harmful activity within

<sup>59</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, 152.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> ‘Coronavirus Disease (COVID-19) Dashboard’ <[https://covid19.who.int/?gclid=Cj0KCQiAvP6ABhCjARIsAH37rBS-ppjUwAoIgvVmkj4zxn5CXVEWBEIsFt\\_1CL83yVI3oGQ99-By60YaAr3qEALw\\_wcB](https://covid19.who.int/?gclid=Cj0KCQiAvP6ABhCjARIsAH37rBS-ppjUwAoIgvVmkj4zxn5CXVEWBEIsFt_1CL83yVI3oGQ99-By60YaAr3qEALw_wcB)> accessed 7 February 2021.

<sup>63</sup> Timo Koivurova, ‘Due Diligence’ in Max Planck Encyclopedia of Public International Law (OUP 2010), <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034>> accessed 25 March 2019; *Pulp Mills*, para 101.

<sup>64</sup> Duvic-Paoli (n 13), 199; Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, p. 154, para 10; *Pulp Mills*, paras 101 and 187.

<sup>65</sup> According to experts, the SARS-CoV-2 is a zoonotic virus that was transmitted from an animal to a human, without any human intervention. See Smriti Mallapaty, Amy Maxmen, Ewen Callaway, ‘“Major stones unturned”: COVID origin search must continue after WHO report, say scientists. Investigation team rules out idea that the coronavirus came from a laboratory leak, but offers two hypotheses popular in Chinese media’ (2021) *Nature* <<https://www.nature.com/articles/d41586-021-00375-7>> accessed 13 February 2021. While allegations of a potential lab-leak have recently surfaced, this theory has not been substantiated with sufficient evidence as of the writing of this paper. See Amy Maxmen, Smriti Mallapaty, ‘The COVID lab-leak hypothesis: what scientists do and don’t know’ (2021) *Nature* <<https://www.nature.com/articles/d41586-021-01529-3>> accessed 27 June 2021.

their jurisdiction is imputable to them. Therefore, even if it is proved beyond any doubt that no member of the international community can be held responsible for the emergence of the disease itself, their obligation to prevent harm caused by it would remain unchanged.

According to the ILA, due diligence obligations are objective, which means that states must do what could be reasonably expected from the international community in general.<sup>66</sup> States' individual capabilities could only be taken into consideration if the specific due diligence obligation expressly so allows.<sup>67</sup> In contrast, some publicists believe that there should be a clear differentiation between states, based on their capacity to deal with activities that may cause transboundary harm. They hold that the approach of common but differentiated responsibilities ('CBDR') – which originates in international environmental law – would lead to more equitable outcomes in examining state responsibility for epidemics.<sup>68</sup> Applying CBDR in the context of the COVID-19 pandemic would mean that all affected states would be under a preventive obligation; however, the extent of that obligation and in turn, states' responsibilities would vary based on their capabilities and their role in the global prevention of the pandemic. Nonetheless, CBDR has never so far been applied in disputes that revolved around the customary obligation to prevent transboundary harm.

It is accepted in case-law that it is not the harm itself that triggers states' preventive obligations, but the risk of harm.<sup>69</sup> The degree of tolerable risk can vary based on the seriousness of potential harm.<sup>70</sup> Therefore, a state can violate the no-harm rule even if the harm has not even materialised. For example, in *San Juan*, the ICJ stated that Costa Rica had not complied with its preventive obligation under general international law to conduct an environmental impact assessment, even though it eventually found that transboundary harm had not occurred.<sup>71</sup> Consequently, states' *ex post facto* conduct would result in a violation of their due diligence obligation to prevent any COVID-19-related harm, given that the threat of harm was identified beforehand. Based on the jurisprudence of the ICJ and other international tribunals, the elements of states' obligation to exercise due diligence are the following:

<sup>66</sup> International Law Association (n 19) 13–18.

<sup>67</sup> *Ibid.*

<sup>68</sup> See, for example Matiangai V. S. Sirleaf, 'Responsibility for Epidemics' (2018) 97 Texas Law Review; Abhimav Verma, 'Adapting Common But Differentiated Responsibility to the Global Cooperation for COVID-19 Response' (2020) Columbia Journal of International Affairs <<https://jia.sipa.columbia.edu/online-articles/adapting-common-differentiated-responsibility-global-cooperation-covid-19-response>> accessed 7 February 2021.

<sup>69</sup> *San Juan*, para 227. According to the International Law Commission, this is a manifestation of the precautionary principle, which is also enshrined in art 15 of the Rio Declaration. See Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, 162.

<sup>70</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, Article 2.

<sup>71</sup> *San Juan*, para 161–162.

1. the obligation to conduct an impact assessment or risk assessment,<sup>72</sup>
2. the obligation to establish and enforce an appropriate regulatory framework,<sup>73</sup>
3. the obligation to cooperate.<sup>74</sup>

The obligation to conduct an impact assessment or risk assessment originates from environmental disputes such as the *Pulp Mills* case or the *San Juan* case. As the ILA stated, the specific elements of the obligation to exercise due diligence vary based on the facts of the case at hand.<sup>75</sup> Therefore, a state is only obliged to conduct such an assessment if that contributes at any degree to the identification of risk. Discharging this obligation would also have been quite useful in the context of COVID-19, as through conducting thorough risk assessments, China could potentially have identified imminent health risks within its territory that contributed to the appearance of COVID-19 in Wuhan.<sup>76</sup>

The regulation of activities that have a risk of causing transboundary harm is also a principal element of states' prevention obligation.<sup>77</sup> Even though this obligation was analysed in the *Pulp Mills* case as a treaty-based obligation, the ICJ also declared that the establishment and vigilant enforcement of an appropriate regulatory framework is a part of states' due diligence obligation to prevent transboundary harm in general.<sup>78</sup> As such, it is also a component of states' duty of prevention under general international law.

Whether states have introduced and enforced an appropriate level of protection through their regulatory frameworks could indirectly be ascertained from a similar obligation enshrined in the International Health Regulations ('IHR'), which oblige member states to develop, strengthen and maintain their capacities to respond to public health emergencies such as pandemics.<sup>79</sup> As a part of this obligation, the 196 member states of the IHR must create and enforce a regulatory framework to identify and prevent public health risks promptly.<sup>80</sup> The degree to which such capacities are met is monitored by the WHO's specialised bodies. For instance, China is most behind on its core capacity to implement a national health emergency framework (capacity 8), scoring 80% out of 100%.<sup>81</sup> Interestingly,

<sup>72</sup> *Pulp Mills*, para 204; *San Juan*, para 104.

<sup>73</sup> *South China Sea*, para 944.

<sup>74</sup> *San Juan*, para 106; *Lake Lanoux*, 307-310.; *North Sea Continental Shelf (Federal Republic of Germany/Netherlands) (Judgement)* [1969] ICJ. Reports 3, para 85.

<sup>75</sup> International Law Association (n 19) 6.

<sup>76</sup> Smriti Mallapaty, 'Where did COVID come from? WHO investigation begins but faces challenges' (2020) *Nature* <<https://www.nature.com/articles/d41586-020-03165-9>> accessed 7 February 2021.

<sup>77</sup> See, for example Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, art 5.

<sup>78</sup> *Pulp Mills*, para 197. See also *South China Sea*, para 944.

<sup>79</sup> International Health Regulations, 2005, UNTS 2509 (entered into force 15 June 2007), art 13.

<sup>80</sup> *Ibid*, Annex I.

<sup>81</sup> See <<https://extranet.who.int/e-spar/#capacity-score>> accessed 27 February 2021; <<https://www.euro.who.int/en/health-topics/health-emergencies/international-health-regulations/capacity-building/ihr-core-capacities>> accessed 27 February 2021.

China has received the maximum score for the capacity to monitor zoonotic infections (capacity 3), while the global average is only 68%.<sup>82</sup>

The affected states must also cooperate to discharge their due diligence obligation. In *San Juan*, the ICJ declared that states must cooperate by notification and consultation.<sup>83</sup> States are under an obligation to notify potentially affected states of activities under their jurisdiction that have a risk of causing transboundary harm.<sup>84</sup> Such a risk can be identified through any means available, such as an impact assessment or risk assessment. The obligation to notify must be fulfilled *ex ante*, which follows the rationale of the no-harm rule, aiming at the prevention rather than the mitigation of harm. According to the ICJ, the obligation to notify only extends to the potentially affected states; therefore, the population of such states do not need to be notified directly.<sup>85</sup> Notably, the obligation to consult the potentially affected states of the possible steps necessary to prevent harm does not confer veto powers on those states.<sup>86</sup> However, consultations must be carried out in good faith and with a shared goal of reaching a mutually favourable solution.<sup>87</sup>

Some argue that China has deliberately withheld information about the virus, despite the clear obligation of notification under the IHR and customary international law.<sup>88</sup> Therefore, this obligation would play an important role in a possible dispute on the alleged violation of the no-harm rule.

## V Conclusion

The COVID-19 pandemic has undoubtedly caused significant transboundary harm within most states, resulting in millions of deaths globally.<sup>89</sup> The no-harm rule is not limited to environmental harm; therefore, it is applicable to disease-induced harm to persons. The spread of COVID-19 is transboundary in nature and its severity meets the necessary requirement of 'significant'. The causal test to be applied in disputes on the violation of the no-harm rule within the context of the pandemic should be the NESS test instead of the but-for test. This would aid in dealing with the extraordinarily complicated way within which the

<sup>82</sup> *Ibid.*

<sup>83</sup> *San Juan*, paras 106–111.

<sup>84</sup> *Ibid.*, para 168.

<sup>85</sup> *Pulp Mills*, para 216.

<sup>86</sup> *Railway Traffic between Lithuania and Poland (Advisory Opinion)* [1931] PCIJ (ser A/B) No 42, 116; *Pulp Mills*, para 150.

<sup>87</sup> *North Sea Continental Shelf*, para 85; *Pulp Mills*, paras 145–146; *Lake Lanoux*, 307.

<sup>88</sup> See <<https://www.reuters.com/article/us-health-coronavirus-pompeo/pompeo-says-china-still-withholding-coronavirus-information-idUSKBN21B3IH>> accessed 21 February 2021.

<sup>89</sup> For statistics, see the official WHO COVID-19 dashboard: <[https://covid19.who.int/?gclid=Cj0KCQiAj9iBBhCJARIsAE9qRtCQNqLGZTRRy7gcVvcw9MGGwEJODO0h1qO0BnXfhk6ZZ1C5qfBEKicaAgSDEALw\\_wcB](https://covid19.who.int/?gclid=Cj0KCQiAj9iBBhCJARIsAE9qRtCQNqLGZTRRy7gcVvcw9MGGwEJODO0h1qO0BnXfhk6ZZ1C5qfBEKicaAgSDEALw_wcB)> accessed 24 February 2021.

virus has spread globally. The responsibility of states for the harm caused hinges upon their obligation to exercise due diligence in the prevention of such harm. However, the application of the no-harm rule in inter-state disputes would certainly not be straightforward. One of the biggest obstacles is the question of jurisdiction, since international courts and tribunals would only be able to adjudicate disputes where the internationally wrongful act is based on an obligation under customary international law, if the parties to the dispute would mutually accept the jurisdiction of the particular dispute settlement body.<sup>90</sup>

In conclusion, the application of no-harm rule to COVID-19 related disputes is an effective way to adjudicate the responsibility of states for possible omissions in handling the pandemic, as well as to prevent the global spread of any future viruses. First, as prevention stands at the centre of the no-harm rule, its objective to avert any harm by requiring due diligence is just as important as the *ex post facto* determination of state responsibility.<sup>91</sup> Second, the due diligence obligation to prevent transboundary harm adapts to the case at hand, which leads to flexible solutions in appreciating the risk of harm as well as in preventing harm. Therefore, the no-harm rule does not provide a 'one size fits all' framework, since the specific preventive obligations depend on the risk, seriousness, and form of the harm respectively.<sup>92</sup> Finally, the no-harm rule would allow an international dispute settlement body to rule on whether any state has failed to prevent transboundary harm caused as a result of the COVID-19 pandemic. This is a significant advantage compared to the IHR, which only contain certain procedural rules and lack any clear obligation to prevent transboundary harm caused as a result of pandemics.

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<sup>90</sup> For questions of jurisdiction under the IHR see Peter Tzeng, 'Taking China to the International Court of Justice over COVID-19' <<https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/>> accessed 7 February 2021.

<sup>91</sup> For a more detailed analysis, see Duvic-Paoli (n 13).

<sup>92</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, 2001, UN Doc A/56/10, 151–152.



# **Police Brutality and Human Rights Violations in the COVID-19 Era through the Lens of Selected African Countries**

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## **Abstract**

Global responses to the coronavirus (COVID-19) pandemic since its discovery in Wuhan, China, in December 2019 have been geared towards containing the virus through the adoption of measures such as restrictions on movement and social distancing to reduce physical contact among persons. Countries have also adopted diverse legislation, regulation and policies; and have also exercised emergency powers to facilitate restrictive measures. Various international instruments emphasise the need for restrictive measures to be objective without any attendant violation of individual human rights to dignity and other freedoms. Utilising a mixed methods approach, involving doctrinal, historical, critical and geopolitical perspectives, this paper examines the acts of law enforcement officers in implementing compliance with various COVID-19 measures and their effect on the fundamental rights of citizens in selected African countries. It discusses the trend of human rights violations in these countries and analyses the legality of adopted enforcement measures in line with international human rights law.

**Keywords:** COVID-19, human rights, police brutality, lockdown, restrictions

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## I Introduction

Human security is a critical component of the global political and development agenda.<sup>1</sup> At the heart of this assertion lies two strategic issues. First, the protection of individuals is a deliberate concern for national as well as international security; and second, security conditions for the development of individuals are not bound to traditional matters of national defence, law and order, but rather encompass all political, economic and social issues enabling a life free from risk and fear.<sup>2</sup> The concept of human security as a ‘public good’<sup>3</sup>, which States must establish, has attained new dimensions with the advent of the coronavirus pandemic (COVID-19) emanating from Wuhan, China, in December 2019. As one of the biggest health crises the world has faced in over a century,<sup>4</sup> States were largely unprepared to deal with the spread of the virus. The deployment of containment measures by States was precipitated by the World Health Organisation (WHO)’s call in March 2020 for governments to take urgent and aggressive action to stop the spread of the virus.<sup>5</sup> Thus, in adherence to this call, States began to implement stringent containment measures. The implementation of these measures to curtail the public health threat significantly limited certain rights of citizens, including freedom of movement and association. International human rights law protects, in principle, the right of everyone to leave any country; enter their own country of nationality, and the right of everyone lawfully in a country to move freely in the country’s whole territory. Restrictions on these rights can only be imposed when lawful, for a legitimate purpose and when the restrictions are proportionate, including when considering their impact.<sup>6</sup>

Security operatives in developing African States, entrusted with the responsibility of enforcing compliance with COVID-19 restrictive measures, have been accused of

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<sup>1</sup> Kareen Hussein, Donata Gnisci and Julia Wanjiru ‘Security and Human Security: An Overview of Concepts and Initiatives – What Implications for West Africa?’ (2004) OECD – Sahel and West Africa Club Issue Paper, SAH/D(2004)547, 8 <<https://www.oecd.org/swac/publications/38826090.pdf>> accessed 2 June 2021.

<sup>2</sup> Ibid.

<sup>3</sup> All governments consider supplying the public good of national security as their responsibility. Hasan Ersel ‘Putting Human Security at the heart of public policy making’ (10 October 2017) Economic Research Form, <<https://theforum.erf.org/2017/10/08/putting-human-security-heart-public-policy-making/#:~:text=In%20public%20economics%2C%20national%20security,example%20of%20a%20public%20good.&text=Government%20strategies%20that%20overemphasise%20national,as%20a%20composite%20public%20good.>>> accessed 2 June 2021.

<sup>4</sup> ‘COVID-19: Joint Memo by Civil Society Organisations on Response to COVID-19 Pandemic in Nigeria’ (29 April 2020) 4 <<http://www.osiwa.org/wp-content/uploads/2020/05/COVID19-CSOs-Joint-Memo-final.pdf>> accessed 21 May 2021.

<sup>5</sup> Human Rights Watch ‘Human Rights Dimensions of COVID-19 Response’ (19 March 2020) <<https://reliefweb.int/sites/reliefweb.int/files/resources/Human%20Rights%20Dimensions%20of%20COVID-19%20Response.pdf>> accessed 21 May 2021.

<sup>6</sup> Ibid.

extrajudicial killing, abuse of power and broad-based violation of human rights of persons during this pandemic era.

This paper, in seeking to understand the prevalence of such ‘cultures of violation’, examines the characteristic nature of ‘police brutality’ and the human rights implications of deploying security forces in cases of public health threats (COVID-19). Focusing on perspectives from the developing countries of Nigeria, Kenya and Uganda, with international concern about repeated human rights violations, the paper explores trends of incidents of human rights violations during the COVID-19 pandemic, considering national and international legal instruments targeted at facilitating the prevention of such incidents. The paper also explores the sanctions and judicial approaches adopted by the government in these countries as key reflections of the respective governments’ commitment to end these human rights violations or prevent their reoccurrence. The paper finds that alleged violations are intrinsically linked to enforcing the will of the government against citizens who are perceived as in defiance of the measures, sometimes deliberately or because citizens lack the basic protective means and services, which are the responsibility of government to provide. Hence, the measures adopted by government without adequately providing for the needs of its citizens serves as a catalyst to fuel already existing potential for rights violations. Furthermore, pre-existing notions that law enforcement exists to protect the government from the people, resulting in the disconnect between citizens and law enforcement, remains prevalent during the pandemic. The paper therefore recommends possible solutions for the prevention of police brutality and preventing future violations of human rights of citizens while the pandemic persists.

Whilst issues of police brutality and human right violations have been the subject of discourse in various academic circles, these issues occurring during the COVID-19 pandemic provide a basis for further research. As such, this paper adopts a desk research approach, alluding to empirical studies encapsulated in various jurisdictional reports. The choice of Nigeria, Uganda and Kenya is strategic, as these sub-Saharan African countries provide differing perspectives on how the issues of police brutality and HR violations are handled by the government and through judicial means. The paper is divided into five sections. Following the introduction, the paper explores the nature of police brutality and human rights violations in general. Part III discusses the COVID-19 pandemic as a challenge to the promotion and protection of human rights, with Part IV providing an analysis of these issues in the three key jurisdictions analysed above. Part V discusses next steps to ensure the promotion and protection of human rights, concluding with recommendations for the adoption of procedures and strategies using Kenya’s approach. The paper advocates for the adoption of strategies like that of Kenya’s IPOA and how these strategies can be implemented effectively to ensure continued respect for and promotion of the human rights of citizens.

## II Law Enforcement Officials, Nature of ‘Police Brutality’ and Human Rights Violations

The United Nations’ (UN) Code of Conduct for Law Enforcement Officials defines the term ‘law enforcement officials’ as including ‘all officers of the law, whether appointed or elected, who exercise police powers, especially the power of arrest or detention.’<sup>7</sup> However, in countries where police powers are exercised by military authorities, whether uniformed or not, or by state security forces, the definition of law enforcement officials shall be regarded as including officers of such services.<sup>8</sup> Generally, law enforcement is not a traditional core skill of military training. Nevertheless, it has increasingly become common for military personnel to be involved in helping to maintain security in various African countries, in areas where unarmed conflict and tension persists.

Therefore, within the context of this paper, the term ‘law enforcement officials’ includes the police, security operatives, army personnel, paramilitary operatives and other security personnel authorised to carry weapons. In the absence of war and in the context of exercising police powers, the aforementioned groups are held accountable to the same standards.

Law enforcement officials are enjoined to ‘respect and protect human dignity, and ‘maintain and uphold the human rights of all persons’<sup>9</sup> as they are accountable to the community. Despite this requirement, incidents of police brutality still abound worldwide. Whilst a universally acceptable definition of the term is yet to emerge, police brutality can be described as the use of unnecessary and/or excessive violence by police.<sup>10</sup> It may include verbal commands and threats, but physical force must constitute a component of the threat for it to be termed brutality.<sup>11</sup> According to Article 3 of the UN Code of Conduct for Law-Enforcement Officials, the legitimate use of force is only that which is ‘strictly necessary’ to subdue persons under the circumstances confronting officers.<sup>12</sup> Nevertheless, police officers in several jurisdictions continue to display an attitude that gravely contravenes the idea of legitimate use of force. Worden puts forward the perspective that the behaviour of police officers in carrying out their duties is psychological, and largely affected by the

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<sup>7</sup> United Nations General Assembly (UNGA), Code of Conduct for Law Enforcement Officials, Res. 34/169, annex (17 December 1979); United Nations Office for Drug and Crime (UNODC), *Compendium of United Nation Standard and Norms in Crime Prevention and Criminal Justice* (United Nations 2016) 281.

<sup>8</sup> United Nations Office for Drug and Crime (UNODC), *Compendium of United Nation Standard and Norms in Crime Prevention and Criminal Justice* (United Nations 2016) 281.

<sup>9</sup> Ibid, art 2; United Nations Office of the High Commissioner, (UNOHCHR) Centre for Human Rights, *International Human Rights Standards for Law Enforcement – A Pocket Book on Human Rights for the Police* (Centre for Human Rights 1997) 18, <<https://www.ohchr.org/Documents/Publications/training5Add1en.pdf>> accessed 21 May 2021.

<sup>10</sup> Carl Root ‘Police Brutality’ in *Encyclopaedia of Crime and Punishment*, 1 <[https://www.researchgate.net/publication/315406775\\_Police\\_Brutality](https://www.researchgate.net/publication/315406775_Police_Brutality)> accessed 2 June 2021.

<sup>11</sup> Ibid.

<sup>12</sup> UNODC (n 7) 282.

organisational context in which they work.<sup>13</sup> The actions of security forces in the context of rights violation in the African countries examined subsequently are reflective of the notion that these officers work for the government, protecting the government rather than the people.<sup>14</sup> Hence, police officers' behaviour is not a simple extension of attitudes, as organisational and other social forces can attenuate the impact of attitudes on behaviour.<sup>15</sup>

Unfortunately, incidents of police brutality have been rife in 2020. The situation presented by the COVID-19 pandemic has required States to take extraordinary measures to protect the health and well-being of their population. These extraordinary measures, ranging from lockdown measures; declaring a state of emergency; and adoption of emergency legislation on measures such as compulsory use of facemasks and curfews are potentially difficult to implement without the deployment of the police and other security agency personnel as law enforcement officers.<sup>16</sup> The involvement of security operatives to enforce the measures has resulted in accounts of law enforcement officers' use of excessive force on citizens and the violation of human rights.<sup>17</sup> These incidents of police brutality have mostly arisen amongst poor and vulnerable citizens who are violating the State-imposed measures for a variety of reasons, including in a bid to purchase food for survival, seeking access to emergency health services and seeking alternate means of transport to get home from their daily work. In some other instances, citizens flouted directives due to circumstances beyond their immediate control, such as in improvised and overcrowded settlements where adherence to social distancing were practically impossible.<sup>18</sup> These acts of police brutality are in total disregard of the fact that States must enforce COVID-19 exceptional measures humanely, respecting the principle of proportionality (i.e. that the restriction must be proportionate to the interests of citizens at stake) and ensuring that penalties for violations for such exceptional measures are not imposed in an arbitrary or discriminatory way.<sup>19</sup>

<sup>13</sup> R. E. Worden, 'The Causes of Police Brutality: Theory and Evidence on Police Use of Force' (1995) *Police Violence*, 23 at 27.

<sup>14</sup> N. J. Madubuike-Ekwe and O. K. Obayemi, 'Assessment of the Role of the Nigerian Police Force in the Promotion and Protection of Human Rights in Nigeria' (2018) 23 *Annual Survey of International & Comparative Law*, 19 at 48.

<sup>15</sup> Worden (n 13) 27.

<sup>16</sup> Edward P. Richards, Katherine C. Rathbun, Corina Solé Brito and Andrea Luna, *The Role of Law Enforcement in Public Health Emergencies: Special Considerations for an all-Hazards Approach* (Bureau of Justice Assistance 2006) <<https://www.ojp.gov/pdffiles1/bja/214333.pdf>> accessed 24 May 2021.

<sup>17</sup> Amnesty International, *Policing the pandemic: human rights violations in the enforcement of Covid 19 measures in Europe* (Amnesty International Ltd 2020) 4.

<sup>18</sup> Isaac Mugabi, 'COVID-19: Security Forces in Africa brutalizing citizens under lockdown' 20 April, 2020, <<https://www.dw.com/en/covid-19-security-forces-in-africa-brutalizing-civilians-under-lockdown/a-53192163>> accessed 02 June 2021; Amnesty International 'Governments and police must stop using pandemic as pretext for abuse' 17 December 2020, <<https://www.amnesty.org/en/latest/news/2020/12/governments-and-police-must-stop-using-pandemic-as-pretext-for-abuse/>> accessed 2 June 2021.

<sup>19</sup> UNOHCHR, 'Emergency Measures and COVID-19: Policy Guidance' 1, <[https://www.ohchr.org/Documents/Events/EmergencyMeasures\\_COVID19.pdf](https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf)> accessed 2 June 2021.

In April 2020, the United Nations (UN) High Commissioner for Human Rights decried the reports from different regions about the abuse of persons for breaking curfews and detentions for curfew violations. The High Commissioner noted that

[...] police and other security forces have been using excessive, and at times, lethal force to make people abide by lockdowns and curfews. Such violations have often been committed against people belonging to the poorest and most vulnerable segments of the population.<sup>20</sup>

From the international perspective, the International Covenant on Economic, Social and Cultural Rights (ICESCR) obliges governments to ‘take effective steps for the prevention, treatment and control of epidemic, endemic, occupational and other diseases’.<sup>21</sup> This supports governments’ obligation to curtail the virus effectively using necessary measures. However, international law assumes that the measures adopted would be such that, as much as possible, respect for human dignity would be maintained. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,<sup>22</sup> expressly states that restrictions of guaranteed rights should, at a minimum, be characterised as being carried out in accordance with the law; directed towards a legitimate objective of general interest; strictly necessary in a democratic society to achieve the objective; be the least intrusive and restrictive available to reach the objective; based on scientific evidence and neither arbitrary nor discriminatory in application; and of limited duration, respectful of human dignity, and subject to review.<sup>23</sup> Furthermore, Part II of the Siracusa Principles, titled ‘Derogations in a Public Emergency,’ states further that:

(al)though protections against arbitrary arrest and detention and the right to a fair and public hearing in the determination of a criminal charge may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency, and respect for them is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation.<sup>24</sup>

<sup>20</sup> UNOHCHR, ‘COVID-19: Exceptional measures should not be cover for human rights abuses and violations – Bachelet’ (27 April 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25828>> accessed 2 June 2021.

<sup>21</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, art 12.

<sup>22</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, Pt 1.

<sup>23</sup> Ibid; Human Rights Watch, ‘Human Rights Dimensions of COVID-19 Response’ (19 March 2020) <<https://reliefweb.int/sites/reliefweb.int/files/resources/Human%20Rights%20Dimensions%20of%20COVID-19%20Response.pdf>> accessed 23 May 2021.

<sup>24</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, Paragraph 70.

The African regional perspective adopts a similar approach to the above instruments. The African Commission on Human and Peoples' Rights in General Comment No. 3 on the right to life<sup>25</sup> states that the primary duty of law enforcement officials – meaning any actor officially tasked with exercising a law enforcement function, including police, gendarmerie, military or private security personnel – is to protect the safety of the public.<sup>26</sup> Interestingly, the document notes that 'particular attention should be paid to ensuring the availability and use of weapons less likely to cause death or serious injury than are firearms. However, such weapons should not be abused... Special training concerning the use of such weapons should be provided.'<sup>27</sup>

General Comment No. 3 also clearly sets out the responsibility of African States with regards to such human rights violations or deprivations of life:

States must take steps both to prevent arbitrary deprivations of life and to conduct prompt, impartial, thorough and transparent investigations into any such deprivations that may have occurred, holding those responsible to account and providing for an effective remedy and reparation for the victim or victims, including, where appropriate, their immediate family and dependents. States are responsible for violations of this right by all their organs (executive, legislative and judicial), and other public or governmental authorities, at all levels (national, regional or local).<sup>28</sup>

In addition, States are also required to adopt a 'clear legislative framework for the use of force by law enforcement and other actions that complies with international standards, including the principles of necessity and proportionality'.<sup>29</sup> Hence, the combined effects of these soft law instruments provide a sufficient basis for States to ensure the prevention of police brutality and rights violation, even during the pandemic.

As with several other jurisdictions in other continents, incidents of unlawful use of force and violence continues to take place in countries in Africa during the pandemic. The paper subsequently examines the incidents of these violations in Nigeria, Kenya and Uganda, and the basis for the occurrences in these jurisdictions, but first analyses the COVID-19 pandemic as a key challenge to the protection of human rights.

<sup>25</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights – The Right to Life (Article 4), Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia, <<https://policehumanrightsresources.org/content/uploads/2015/01/General-Comment-3-On-The-African-Charter-On-Human-And-Peoples%E2%80%99-Rights-The-Right-To-Life-Article-4.pdf?x96812>> accessed 31 October 2021.

<sup>26</sup> Para 27, *ibid*.

<sup>27</sup> Para 30, *ibid*.

<sup>28</sup> Para 7, *ibid*.

<sup>29</sup> Force may be used in law enforcement only in order to stop an imminent threat. The intentional lethal use of force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life (making it proportionate) and all other means are insufficient to achieve that objective (making it necessary). Para 27, *ibid*.

### III The COVID-19 Pandemic as a Challenge to the Promotion and Protection of Human Rights

Since independence from colonialism, many countries on the African continent have a reputation for human rights violations of their citizens. A significant number of countries in the continent have been subject to longstanding authoritarian single-party or military rule or decades. Consequently, although boasting of independence from colonialism, political liberalisation and democratisation, citizens in reality are repressed by the government.<sup>30</sup> Particularly, citizens suffer from an array of rights violations inflicted by various government agencies that collectively form the security forces, while carrying out their statutory security responsibilities. The most significant human rights issues in this regard include the arbitrary deprivation of life; excessive use of force that may also lead to the deprivation of life; restrictions on freedom of assembly and arbitrary arrest. These violations exist despite provisions in their national laws that prohibit them.<sup>31</sup> Furthermore, a significant number of the states in the continent are parties to various international treaties that highlight the need to respect human rights, including the International Covenant on Civil and Political Rights (ICCPR),<sup>32</sup> the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)<sup>33</sup> and the African Charter on Human and Peoples Rights.<sup>34</sup> The obligations under these international treaties mandate states to adopt a variety of measures against the abuse of human rights.<sup>35</sup> With the outbreak of the COVID-19 pandemic, citizens have continued to experience threats to these guaranteed rights, putting a strain on protecting these rights in several contexts.

The severity of the COVID-19 outbreak placed the global community on high alert regarding the public health safety implications on citizens if the virus were left unchecked. States, including Nigeria, Uganda and Kenya, adopted immediate containment strategies with the knowledge that COVID-19 had permeated their jurisdictions. The adoption of these strategies created a human rights situation that was problematic in two significant ways. In the first instance, the over-arching pandemic further increased the likelihood of violations within the pre-existing antagonistic relationship between the public and security

<sup>30</sup> Human Rights Watch, 'Protectors or Pretenders: Government Human Rights Commissions in Africa' (2001) <<https://www.hrw.org/reports/2001/africa/overview/record.html>> accessed 2 June 2021.

<sup>31</sup> For instance, the Constitution of the Federal Republic of Nigeria, ss 33–35 provide for the right to life, dignity and personal liberty respectively. S. 41 also provides for the freedom of movement which can be curtailed in specific situations. Constitution of the Republic of Uganda 1995 (as amended), arts 22–24 refer to the rights to life, personal liberty and protection from inhumane treatment. Art 20 of the same Constitution provides that the rights shall be respected, upheld and promoted by all organs and agencies of government.

<sup>32</sup> *International Convention on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171 (ICCPR).

<sup>33</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984; 1465 U.N.T.S. 85, 113 (UNCAT).

<sup>34</sup> *African Charter on Human and Peoples' Rights*, June 27, 1981, 1520 U.N.T.S. 217 (Banjul Charter).

<sup>35</sup> UNCAT, art 4(2); Banjul Charter, art 25.

officials involving the excessive use of force, since the latter ordinarily remain strategic to the enforcement of the various measures. For instance, the Independent Police Oversight Authority (IPOA) of Kenya indicated that, of the 87 complaints against the police between the end of March and April 2020, 15 deaths and 31 other incidents where victims sustained injuries are directly linked to the actions of police officers during the curfew enforcement.<sup>36</sup> Notably, these numbers may not be a true reflection of the actual number of victims who have suffered ill-treatment at the hands of law enforcement officers. Some victims never formally voice or delay reporting such abuse. Factors that influence latency in this regard include lack of functional independent structures for disclosing such abuse; and the fear of intimidation or manipulation by the offender. Nevertheless, the existence of reports indicates the existence of a palpable problem

Second, the decisive measures, which were in several instances indefinite, adversely affected various features of existence, tied generally to the standard of living and wellbeing of a significant number of households. Citizens suffered a loss of income and, in some cases, experienced difficulty in accessing medical care due to the quarantine and interstate travel bans. In the absence of sufficient palliatives to cushion the effect of these measures, nationals in several jurisdictions are known to have flouted the measures, creating the opportunity for security officials to engage in various forms of rights violation in a bid to enforce the measures.

In several African states, government failed to provide constantly accurate and up-to-date information about the virus, as well as various processes and responses involved in its curtailment. The absence of open and transparent communication by government affects the level of trust that citizens have with respect to the decisions made by government. For instance, citizens of Nigeria continued to receive conflicting information from the central and subnational government of the states of Kogi and Cross Rivers concerning the presence of the virus in their states.<sup>37</sup> In addition, several persons suspected of having been affected by the virus complained that, although they were isolated for a specific period of time, they were not given access to the results that actually confirmed their positive status to the virus.<sup>38</sup> The inconsistencies as to presence of the virus nationwide and other complaints

<sup>36</sup> Amanda Sperber, 'They have killed us more than Corona: Kenyans protest against police brutality' *The Guardian*, (International edition, June 9, 2020) <<https://www.theguardian.com/global-development/2020/jun/09/they-have-killed-us-more-than-corona-kenyans-protest-against-police-brutality>> accessed 28 May 2021.

<sup>37</sup> 'Kogi govt insist state has no COVID 19 Case' *Premium Times* (June 8, 2020) <<https://www.premiumtimesng.com/coronavirus/396724-kogi-govt-insists-state-has-no-covid-19-case.html>> accessed 28 May 2021; A Akpan, 'Cross River Dismisses COVID-19 claims of Bauchi governor, insists state is virus free' *The Guardian* (June 13, 2020) <<https://guardian.ng/news/cross-river-dismisses-covid-19-claims-of-bauchi-governor-insists-state-is-virus-free/>> accessed 28 May 2021.

<sup>38</sup> T. Omilana, 'Why we don't give COVID-19 test results to Individuals: NCDC' *The Guardian* (May 15, 2020) <<https://guardian.ng/news/why-we-dont-give-covid19-test-results-to-individuals-ncdc/>> accessed 28 June 2020.

relating to the failure of transparent communication and open reporting largely caused citizens to doubt the existence of the virus. The transparency and accountability failures also diluted the effect of government enlightenment about practices to protect oneself and prevent the spread of the virus. A social interaction needs perspective also met with some resistance. Citizens considered the imposition of mobility restrictions as a cultural shock to the communal (as opposed to individualistic) lifestyles typical of Africans.<sup>39</sup> Consequently, citizens continue to flout government directives to maintain social distancing, creating the need for the security forces to enforce government directives. Clearly, the pandemic and the resultant measures adopted in this context, served as a catalyst to fuel the already existing potential for rights violation.

Where caution is not exercised, there is a tendency for States to overlook the pertinent human rights of its citizens in a bid to suppress issues perceived as threatening public health and safety. The examples of Nigeria, Kenya and Uganda provide some perspective on the ways in which these rights have been suppressed in seeking to contain COVID-19 within their respective jurisdictions and the efforts by governments in this jurisdiction to penalise law enforcement officials who seek to suppress these rights.

## **IV COVID-19: Incidents of Police Brutality, Human Rights Violations and Punishment for Law Enforcement Officials in Selected African Countries**

### **1 Nigeria**

Nigeria recognises her primary responsibility for ensuring the safety and protection of her citizens' basic human rights. The 1999 Constitution of the Federal Republic of Nigeria provides that 'the security and welfare of the people shall be the primary purpose of government'.<sup>40</sup> To protect the security and welfare of the citizens, Chapter VI of the Constitution embodies their fundamental rights.<sup>41</sup> In addition, other municipal instruments affirm and contribute to the protection of a variety of citizen's rights.<sup>42</sup> The municipal laws enacted to protect the inherent rights and freedom of citizens in the country echo and draw from pre-existing international and regional laws and standards in the international sphere to which the country is signatory.<sup>43</sup>

<sup>39</sup> Christopher Agulanna, 'Community and Human Well-Being in an African Culture' (2010) 14 (64/59) *Trames Journal of the Humanities and Social Sciences*, 282, 288–289. DOI: 10.3176/tr.2010.3.05

<sup>40</sup> Section 14(2)(b), Constitution of the Federal Republic of Nigeria 1999.

<sup>41</sup> Sections 33–42. Rights protected include the right to life, fair hearing, freedom of association, freedom of movement, freedom from torture, and ill treatment as well as freedom from discrimination.

<sup>42</sup> Administration of Criminal Justice Act (ACJA) 2015, s 8; Anti-Torture Act 2017.

<sup>43</sup> *Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, U.N. Doc A/810, 1 71 (Dec. 10. 1948); ICCPR (n 32). CAB/LEG/24.9/49 (Nov. 29, 1999).

The state's internal security architecture comprises several security agencies required to perform functions that aid in maintaining peace within the borders of the state.<sup>44</sup> The Nigerian police is principally responsible for maintaining law and order.<sup>45</sup> These duties of the Police Force members require them to utilise the powers of arrest, search and detention of person(s) or property and the use of force in certain situations.<sup>46</sup> In some instances, the state armed forces are deployed to aid the protection of internal security when existing police resources are overstretched and unable to cope with a potential or actual breakdown of law and order.<sup>47</sup>

Following the discovery of the first case of the virus in Lagos, Nigeria, on 27 February 2020, the federal government issued the COVID-19 Health Protection Regulation 2020 made pursuant to the Quarantine Act (Cap Q2, LFN 2004), (COVID 19 Regulation) in March 2020. The Regulation provided for a stay-at-home order for specified states and the country's capital.<sup>48</sup> In addition, businesses, offices providing non-essential services and places of worship were closed for as long as the regulation was in force.<sup>49</sup> A significant number of states at sub-national level also imposed similar measures within their territories as the federal government's, to curtail the spread of the virus. The measures at state level included movement and social gathering restrictions and, in some instances, total lockdown.<sup>50</sup> The pandemic and measures established to curtail its spread shook the country's socio-economic landscape and exposed further severe gaps in the social protection systems. Citizens faced challenges arising from diminished trade prospects amidst the uneven distribution and access of the promised palliatives to the vulnerable and the country's poor. Nevertheless, the implementation of the measures was regarded as necessary for the greater public health.

Police and other security officers responsible for ensuring observance of the measures engaged different strategies to ensure compliance. The tactics included physical monitoring in the form of patrols to disperse public gatherings; stop and question tactics applied to people in transit within curfew hours; sealing businesses and closing places of worship that were in violation of extant social distancing, and restrictions on gathering protocols; arrest of persons violating the 'wearing of face mask requirement'; impounding vehicles of violators

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<sup>44</sup> The security agencies include the Nigeria Police and other para-military agencies such as the State Security Services, Nigerian Immigration Services, the Nigerian Customs, Nigerian Civil Security and Civil Defence. See generally M Afolabi, 'Nigeria's Major Internal Security Agencies and their Statutory Roles' in L. N. Asiegbu *Unending Frontiers in Intelligence and Security Studies* (Intelligence and Security Studies Programme, Afe Babalola University 2017) 225–268.

<sup>45</sup> The Police Act (2010) Cap P19, Laws of the Federation of Nigeria (LFN) 2004, Section 4.

<sup>46</sup> For example, the Administration of Criminal Justice Act (ACJA), ss 3, 9 and 143.

<sup>47</sup> 1999 Constitution, s 217.

<sup>48</sup> COVID 19 Regulation, s 1(2).

<sup>49</sup> *Ibid.*

<sup>50</sup> Voluntary total lockdown for specified periods were imposed by the Nigerian Governors of Anambra, Adamawa, Abia, Akwa Ibom, Bauchi, Bayelsa, Borno, Cross Rivers, Ebonyi, Ekiti, Enugu, Delta, Kaduna, Kwara, Rivers, Nasarawa, Niger, Osun Yobe, Jigawa, Plateau, Sokoto and Taraba States respectively.

during the mandatory lockdown, and arraigning defaulters for prosecution in Mobile Courts set up explicitly for this purpose.<sup>51</sup> Aborisade identifies that the law enforcement officers in the process engaged in hostilities, intimidations and extortions of citizens, resulting in violations of human rights.<sup>52</sup> In the wake of the imposition of measures to curtail the spread of the virus, there were more deaths due to brutality by the police force than from the virus itself, in spite of the plethora of laws prohibiting the use of lethal force. The National Human Rights Commission (NHRC) reported 18 extrajudicial killings by security agents enforcing lockdown measures between March 30 and April 4, an alarming trend, especially when compared to the 11 patient deaths from the actual virus during the same period.<sup>53</sup> According to the NHRC, the Nigeria Correctional Service, Nigeria Police Force and Nigerian Army were responsible for 8, 7 and 2 deaths respectively. The Ebonyi State Task Force on COVID-19, Afikpo South LGA, was responsible for 1 death.<sup>54</sup> In the recorded incidents, the security operatives violated the principles of necessity and proportionality while dealing with citizens' violations of the lockdown measures. In 2020, Joseph Pessu, a 28-year-old was accosted by soldiers enforcing the lockdown order while he was driving. He was shot at the Ogonu flyover bridge in Warri for allegedly refusing to stop for a check.<sup>55</sup> An eyewitness account indicates that

one of his tyres was first blasted by one of the army officers. He quickly parked in a nearby street off the NPA Expressway to explain why he refused to stop when flagged down but the temper of one of the soldiers couldn't make him wait for any explanations. He was then shot at close range by the trigger-happy army officer, who refused to listen to any explanation.<sup>56</sup>

<sup>51</sup> See generally Richard Izuora, 'Anambra State Impose N10,000 for Facemask Violation' (2020, June 26) Oriental News <<https://orientalnewsng.com/anambra-state-imposes-n10000-fine-for-face-mask-violations/>> accessed 03 June 2021; Ifeoluwa Adediran, 'Lockdown: 202 street joggers bag community service, fines in Lagos' (9 April 2020) Premium Times <<https://www.premiumtimesng.com/coronavirus/386945-lockdown-202-street-joggers-bag-community-service-fines-in-lagos.html>> accessed 2 June 2021.

<sup>52</sup> Richard Aborisade, 'Accounts of Unlawful Use of Force and Misconduct of the Nigerian Police in the Enforcement of COVID-19 Measures' (2021) *Journal of Police and Criminal Psychology*, DOI: 10.1007/s11896-021-09431-4.

<sup>53</sup> Executive Secretary National Human Rights Commission, 'National Human Rights Commission Press Release on COVID-19 Enforcement so far: Reports of Incidents of Violation of Human Rights' (15 April 2020) <<https://www.nigeriarights.gov.ng/nhrc-media/press-release/100-national-human-rights-commission-press-release-on-covid-19-enforcement-so-far-report-on-incidents-of-violation-of-human-rights.html>> accessed 4 June 2021.

<sup>54</sup> National Human Rights Commission Report on Human Rights Violations Following the Implementation of COVID-19 Regulations 2020 and Directives Issued by Federal and State Governments from 31st March to 13th April 2020' (on file with the authors).

<sup>55</sup> Samuel Oyadongha and others, 'COVID-19 Lockdown: Tension as Soldiers Kill 28 yr Old Man' (3 April 2020) *The Vanguard* <<https://www.vanguardngr.com/2020/04/covid-19-lockdown-tension-as-soldier-kills-28-yr-old-man-in-delta/>> accessed 20 October 2021.

<sup>56</sup> *Ibid.*

In another incident of a raid of a makeshift market set up in contravention of the sit at home lockdown directive imposed by the state governor of Kaduna State, at least five persons were shot dead by police officers in the process of trying to enforce these measures. The government had announced a temporary relaxation of lockdown measures from 3 pm Wednesday, April 1 to Thursday, April 2. However, residents were still carrying on the business of buying and selling in a makeshift market, two days after. Police officers utilised tear gas and live ammunition to disperse the citizens forcefully after they failed to heed the warnings to do so by the Civilian Joint Task Force.

The NHRC also received over 100 complaints of violations by security forces within the same one-week period, across 24 of the 36 states in the federation, with Lagos and Abuja recording the most incidents.<sup>57</sup> In one of such incidents, the video of which went viral, two policemen repeatedly flogged a woman with whips in Odo Ori Market Iwo, Osun State. The victim was on her way to purchase household needs, when she was accosted by the officers.<sup>58</sup> Thus, the abuse of powers conferred on the law enforcement have been a persistent occurrence and a source of concern in Nigeria even prior to the COVID era.<sup>59</sup> Ekwe and Obayemi<sup>60</sup> note that the human rights most violated by members of the enforcement agencies, including the Nigeria Police Force, are the rights to life, dignity of a human person, personal liberty, fair hearing, and privacy.<sup>61</sup> Authors link the persistent excessive use of force by law enforcement to British colonial rule, when the police force was established as a means of solely enforcing the will of the state rather than protecting locals and fostering harmonious community relations.<sup>62</sup> Post-colonial law enforcement has unfortunately sustained the colonial legacy of repressive policing, which has been further compounded by the learned behaviour of a 'warrior mindset' within the years of prolonged military rule in Nigeria. Consequently, a disconnect between the citizens and law enforcement operatives continues to exist, with the latter viewing the former primarily as adversaries.<sup>63</sup>

The culture of rights violation by the Special Anti-Robbery Squad (SARS), a unit of the Nigerian police tasked with tackling crimes of violence and kidnapping deserves special mention. This unit is repeatedly involved in cases of extortion, torture and ill treatment

<sup>57</sup> Ibid.

<sup>58</sup> Nsikak Nseyen, 'Coronavirus: Police Arrest Officers for Flogging Woman in Osun' (video) (19 April 2020) Daily Post <<https://dailypost.ng/2020/04/19/coronavirus-police-arrest-officers-for-flogging-woman-in-osun-video/>> accessed 20 October 2021; Aborisade (n 52) 451.

<sup>59</sup> Aborisade (n 52) 452.

<sup>60</sup> Madubuike-Ekwe & Obayemi (n 14) 28.

<sup>61</sup> Ibid, 28.

<sup>62</sup> Etannibi Alemika, 'Colonialism, state and policing in Nigeria' (1993) 20 *Crime Law and Social Change*, 187, 202–211; Madubuike-Ekwe and Obayemi (n 14) 40–41; Sanya Osha, '#EndSARS: A brief history of police brutality in Nigeria' (25 November 2020) Africa Portal <<https://www.africaportal.org/features/endsars-brief-history-police-brutality-nigeria/>> accessed 20 October 2021; Aborisade (n 52) 3.

<sup>63</sup> Alemika (n 62).

of persons as a routine and systemic part of their investigation.<sup>64</sup> SARS also exhibited the culture of intimidation and extortion whilst enforcing the COVID-19 preventive measures.<sup>65</sup> In October 2020, young Nigerians organised a three-week long nationwide protest, popularly known as the #End SARS protest, in breach of pre-existing COVID-19 safety protocols. The protesters, fuelled principally by incidents of human rights violations by the special unit, called for reforms to end police brutality, abolish SARS and provide justice for victims. While the Nigerian government took some immediate measures, such as disbanding SARS and replacing them with a Special Weapons and Tactics unit (SWAT), there were also incidents of human rights violations by security operatives during this period. Security agencies were alleged to have shot and killed scores of unarmed citizens and injured many others, including peaceful protesters under the pretext of restoring order.

The involvement of the armed forces in restoring law and order in Nigeria is also tainted with human rights abuses.<sup>66</sup> Members of the Nigerian armed forces are known to arrest and detain persons arbitrarily, and torture and engage in the deprivation of life under the pretext of restoring law and order.<sup>67</sup> On 20<sup>th</sup> October 2020, between 6.45 pm and 9.00 pm during the #End SARS protest, the Nigerian army and police reportedly shot and killed over 15 unarmed peaceful protesters at the Lekki Toll Gate, Lagos State, Nigeria. Amnesty International reports that at least 50 people were killed across the country, with several people also injured.<sup>68</sup> The condemnation of this Act by Nigerians and the international community on social media spurred the government to set up Panels of Inquiry in Lagos and the other 35 States in Nigeria to investigate complaints against SARs and the events of 20<sup>th</sup> October 2020 in Lagos State.<sup>69</sup> The proceedings of the Panels of Inquiry are

<sup>64</sup> Amnesty International, 'Time to End Impunity: Torture and Other Violations by Special Anti-Robbery Squad (SARS)' 9, <<https://www.amnesty.org/download/Documents/AFR4495052020ENGLISH.PDF>> accessed 2 June 2021.

<sup>65</sup> Philip Obaji, 'Women Abused by Police enforcing COVID 19 rules in Nigeria' (9 September 2020) Aljazeera <<https://www.aljazeera.com/features/2020/9/9/women-abused-by-police-enforcing-covid-19-rules-in-nigeria>> accessed 28 May 2021.

<sup>66</sup> Human Rights Watch, 'They Didn't Know if I Was Alive or Dead: Military Detention of Children for Suspected Boko Haram Involvement in Northeast Nigeria' (2019) <[https://www.hrw.org/sites/default/files/report\\_pdf/nigeria0919\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/nigeria0919_web.pdf)> accessed 25 May 2021; Amnesty International, 'They Betrayed Us: Women who Survived Boko Haram Raped, Starved and Detained in Nigeria' <<https://www.amnesty.org/download/Documents/AFR4484152018ENGLISH.PDF>> accessed 25 June 2020.

<sup>67</sup> Human Rights Watch (n 66).

<sup>68</sup> Amnesty International, 'Nigeria: Killing of #EndSARS protesters by the military must be investigated' (21 October 2020) <<https://www.amnesty.org/en/latest/news/2020/10/killing-of-endsars-protesters-by-the-military-must-be-investigated/>> accessed 29 October 2021.

<sup>69</sup> Amnesty International, 'Nigeria: Denials and cover up mark 100 days since Lekki shooting' (28 January 2021) <<https://www.amnesty.org/en/latest/news/2021/01/nigeria-denials-and-cover-up-mark-100-days-since-lekki-shooting/>> accessed 31 May 2021; The Native 'An Update on the Nationwide #EndSARS Judicial Panels' (01 February 2021) <<https://thenativemag.com/update-endsars-judicial-panels/>> accessed 31 May 2021. Only 28 out of the 35 other states eventually set up the panels. Seven northern states- Borno, Jigawa, Zamfara, Yobe, Sokoto, Kebbi and Kano ignored the directive and did not set up panels of inquiry.

conducted based on submitted petitions. In Lagos State particularly, the Judicial Panel of Inquiry<sup>70</sup> with a six-month mandate to complete their work, has already recommended the awarded compensation totalling 43.75 million NGN (forty-three million, seven hundred and fifty thousand Nigerian Naira [i.e. the equivalent of \$106,556.58 – one hundred and six thousand, five hundred and fifty-six dollars, fifty-eight cents]) so far, to persons whose family members were subject to extrajudicial killings by the police.<sup>71</sup> Panels of other states have also made recommendations for compensation of SARs victims and their families. As of the first-year anniversary of the #End SARS protest, all states panels except Lagos had concluded their assignments. Eleven states' panels submitted their final reports to the National Economic Council (NEC).<sup>72</sup> Some of them recommend prosecution of some security operatives who were involved in rights violations based on petitions brought before them.<sup>73</sup> As such, these Panels and reparatory measures adopted by the Nigerian government are indicative of ACHPR General Comment No. 3's recommendation to States to facilitate thorough investigations into any deprivations of life, holding those responsible to account and ensuring reparation for victims.

The Lagos panel concluded its proceedings on 18 October 2021. The panel is yet to finalise its report and make public its recommendations regarding punishment of the perpetrators (police officers, Nigerian Army) for the incident of 20 October 2020.<sup>74</sup> Nevertheless, it appears that a reliance on the recommendations of the Panel of Inquiry to obtain punishment and accountability of security operatives for extra-judicial killings, police brutality and human rights violations pre- and during COVID-19 is far-fetched. This assertion is based on the trend of non-implementation of the disciplinary actions against erring security operatives as recommended by concluded panel reports from other states. For instance, the Rivers State government has indicated doubt about the

<sup>70</sup> The Tribunals of Inquiry Law of Lagos State empowers the Lagos State Governor to set up a tribunal to examine disputes and matters relating to public welfare, including allocating a time frame for completion of the work of a designated Panel.

<sup>71</sup> Ifeoluwa Adediran, 'ANALYSIS: #EndSARS: How Lagos Judicial Panel has fared in six months' (30 April 2021) <<https://www.premiumtimesng.com/regional/ssouth-west/458533-analysis-endsars-how-lagos-judicial-panel-has-fared-in-six-months.html>> accessed 31 May 2021.

<sup>72</sup> Yusuf Alli, 'Breaking: Indicted Security Operatives, Civilians in for Trial-FG, *The Nation* (20 October 2021) <<https://thenationonline.net/breaking-indicted-security-operatives-civilians-in-endsars-for-trial-fg/>> accessed 29 October 2021.

<sup>73</sup> 'Panel Recommends SARS Operative's Prosecution over Ekiti Teenager's Killing' (25 February 2021) This Day Newspaper <<https://www.thisdaylive.com/index.php/2021/02/25/panel-recommends-sars-operatives-prosecution-over-ekiti-teenagers-killing/>> accessed 20 October 2021; 'Wike receives EndSARS panel report, urges IGP to implement document indicting disbanded SARS officers' (20 February 2021) *The Guardian (Metro)* <<https://guardian.ng/news/wike-receives-endsars-panel-report-urges-igp-to-implement-document-indicting-disbanded-sars-officers/>> accessed 20 October 2021.

<sup>74</sup> Alexix Akwagyiram, 'Anger over slow progress, size of rewards at Nigeria's police brutality hearings' (19 May 2021) <<https://www.reuters.com/world/africa/anger-over-slow-progress-size-rewards-nigerias-police-brutality-hearings-2021-05-19/>> accessed 31 May 2021.

government's commitment to implementing the recommendations connected to addressing police brutality through criminal channels.<sup>75</sup> The State Governor has further challenged the Inspector General of Police (IGP), and the new state Commissioner of Police (CP), to implement the White Paper to prove that the Nigerian government is serious about ending such police brutality in the country.

The constant show of concern by international organisations and civil society for the abuse of rights in the Nigerian context, even during the COVID-19 era, exposes the deficiencies in the security forces' accountability. The Human Rights Committee in 2019 expressed concern that provisions of the Nigerian Constitution allowed for a broad use of lethal force, including for the defence of property.<sup>76</sup> In addition, provisions of other laws, such as the Code of Criminal Procedure, the Administration of Justice Act, and Police Order permitted the use of force without adequately restricting the nature of the force and setting out the principles of necessity or proportionality.<sup>77</sup> These deficiencies contribute and exacerbate violations, especially as the Nigerian government often becomes complicit in the violations perpetuated by members of the various security forces by not ensuring complaints are investigated and they are held accountable for their actions.<sup>78</sup> More often than not, there is often a lack of information about the outcome of investigations and recommendations, including the punishment of the perpetrators and the reparations granted to the victims.<sup>79</sup>

It is noteworthy that the 1999 Constitution establishes the Nigeria Police Council to be responsible for the organisation and administration of the Nigeria Police Force (NPF) and all other matters relating thereto, excluding disciplinary control.<sup>80</sup> On the other hand, the Police Service Commission (PSC) is responsible for disciplinary control over persons in the Nigerian Police Force,<sup>81</sup> while the National Human Rights Commission (NHRC) investigates violations of individual human rights in Nigeria. In May 2021, the Action Group on Free

<sup>75</sup> '#EndSARS Inquiry, 'Wike receives report indicting SARS officials' (19 February 2021) The Vanguard (online) <<https://www.vanguardngr.com/2021/02/endsars-inquiry-wike-receives-report-indicting-sars-officials/>> accessed 18 October 2021.

<sup>76</sup> United Nations Human Rights Committee, Concluding observations on Nigeria in the absence of its second periodic report CCPR/C/NGA/CO/2 (29 August 2019) para 26.

<sup>77</sup> *Ibid.*

<sup>78</sup> For example, over 20 cases of torture and extrajudicial execution by SARS officers were brought by Rivers State Civil Society Coalition to the attention of police authorities between January 2018 and February 2020. No SARS official was prosecuted but were rather transferred to other States in Nigeria to avoid prosecution. Amnesty International 'Nigeria: Time to End Impunity – Torture and other Violations by Special Anti-Robbery Squad (SARS), June 2020, <[https://www.policinglaw.info/assets/downloads/Amnesty\\_International\\_Report\\_on\\_Special\\_Robbery\\_Squad.pdf](https://www.policinglaw.info/assets/downloads/Amnesty_International_Report_on_Special_Robbery_Squad.pdf)> accessed 31 May 2021; I Onwuazombe 'Human Rights Abuse and Violations in Nigeria: A Case Study of the Oil-Producing Communities in the Niger Delta Region', (2017) 22 (1) Annual Survey of International & Comparative Law, 114.

<sup>79</sup> United Nations Human Rights Committee (n 76).

<sup>80</sup> 1999 Constitution, s 28(a).

<sup>81</sup> *Ibid.*, s 30.

Civic Space published a comprehensive 80-page report<sup>82</sup> detailing the actions of SARS and police misconduct in Nigeria and detailing recommendations to be considered immediately by the Police Service Commission. One key recommendation in the report is for the federal government and State Judicial Panels of Inquiry to investigate serving and dismissed officers of the disbanded SARS and other units of the NPF who committed atrocities that violated the fundamental human rights of victims. The Report also seeks an express prohibition on police officers from harassing and brutalising citizens who make and publicise video recordings of unlawful police conduct. As laudable as this detailed report is, it behoves the PSC, NPE, NPC, NHRC and Ministry of Police Affairs to swing into action immediately and implement the recommendations proffered to facilitate the immediate prevention of further police brutality and human rights violations in the country.

## 2 Kenya

In Kenya, the State and its organs have the fundamental duty to observe, respect, protect and fulfil the rights and fundamental freedoms expressed in the Bill of Rights of the Kenyan Constitution.<sup>83</sup> The State must also create legislative policy and other measures, including setting standards, to achieve the progressive realisation of these rights.<sup>84</sup> However, the Constitution empowers the State to limit the application of the right to privacy, right of arrested persons, freedom of association, etc. so long as the State can justify such a limitation.<sup>85</sup> Nevertheless, the Kenyan Constitution expressly states that the right to freedom from torture and cruel, inhuman or degrading treatment or punishment and the right to a fair trial, among others, shall not be subject to such limitations.<sup>86</sup>

With regard to the National Police Service (NPS), Part 4 of the Kenyan Constitution of 2010 describes the duties of the NPS as including ‘striv[ing] for the highest standards of professionalism and discipline among its members; complying with constitutional standards of human rights and fundamental freedoms; and training staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity.’<sup>87</sup> In addition, the Kenyan National Police Service Act 2011 (Sixth Schedule) expressly requires police officers to attempt to use non-violent means first always, and employ force only when non-violent means are ineffective or without any promise of achieving the intended result. In terms of police oversight, the Independent Police Oversight Authority (IPOA), an independent authority established to provide civilian oversight of the

<sup>82</sup> Spaces for Change, #EndSARS: Police Brutality, Protests and Shrinking Civic Space in Nigeria (2021) <<https://spacesforchange.org/action-group-on-free-civic-space-launches-joint-research-report/>> accessed 2 June 2021.

<sup>83</sup> Constitution of the Republic of Kenya, 2010, s 21(1).

<sup>84</sup> *Ibid*, s 21(2). These rights are set out in Section 43 of the Kenyan Constitution.

<sup>85</sup> S 24(3) and (5).

<sup>86</sup> S 25.

<sup>87</sup> Article 244(a), (c) and (d).

work of the police in Kenya, is authorised to investigate any death or serious injury that has occurred or suspected to have occurred as a result of police action. Police officers are also required to report all deaths resulting from police action to the IPOA.<sup>88</sup>

On April 6, 2020, the Kenyan government imposed absolute restrictions on movement in four key counties (Nairobi, Kilifi and Kwale counties) as they accounted for 96% of infections in the country. The government stated that it derived its authority for these restrictions from the Constitution, the Public Health Act Cap (242), the Health Act No. 21 of 2017 and the Public Order Act.<sup>89</sup> In enforcing these restrictions, the Kenyan police shot and beat people in markets or returning home from work, broke into homes and shops, extorted money from residents and arrested people on the streets, whipping, kicking and herding them together, thus increasing the risks of spreading the virus.<sup>90</sup> Reports of the police teargassing crowds lined up to board a ferry back home from work, beating them with batons and gun butts, and the shooting of 13-year-old Yassin Hussein Moyo, who was standing on the third-floor balcony of his home at midnight, are evidence of the several police abuses in Kenyan communities.<sup>91</sup>

However, the Kenyan courts have upheld justice with regards to cases of police brutality and violations of fundamental human rights during the pandemic era. In the case of *Law Society of Kenya v Hilary Mutyambai Inspector General National Police Service (2020) & 4 Ors; Kenya National Commission on Human Rights & 3 others (Interested Parties)*,<sup>92</sup> the petitioner sought a declaration that unreasonable use of force (teargassing, beating, etc.) in enforcing the Public Order (State Curfew) 2020 imposed by the authorities is unconstitutional. The petitioner argued that these actions were a violation of the right to dignity and freedom from cruel and degrading treatment under Articles 28 and 29 of the Kenyan Constitution. Whilst the first respondent (IGP) sought a dismissal of the petitioner's claim on the basis of hearsay evidence and media reports, the High Court rejected that argument, noting that there was recorded evidence that the people of Mombasa were attacked by law enforcement officers before the time of the commencement of the curfew. The Court issued a declaration stating that the Respondents' use of force in enforcing the curfew was unconstitutional, observing that:

<sup>88</sup> Analysis of Domestic Rules on Use of Force by Law Enforcement. 'The Law on Police Use of Force Worldwide: Kenya' <<https://www.policinglaw.info/country/kenya>> accessed 24 May 2021.

<sup>89</sup> Stephen Arthur Lamoney, 'A Comparative Analysis of COVID-19 Responses and their Effects on Human Rights Protections in East Africa' (9 June 2020) <<http://opiniojuris.org/2020/06/09/a-comparative-analysis-of-covid-19-responses-and-their-effects-on-human-rights-protections-in-east-africa/>> accessed 2 June 2021.

<sup>90</sup> Human Rights Watch, 'Kenya: Police Brutality during Curfew,' (22 April 2020) <<https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew>> accessed 29 May 2020.

<sup>91</sup> Ibid.

<sup>92</sup> [2020] eKLR, Petition 120 of 2020 (Covid 025), <<http://kenyalaw.org/caselaw/cases/view/193192/>> accessed 2 June 2021; 'The Law on Police Use of Force Worldwide: Kenya' (n 88).

Diseases are not contained by visiting violence on members of the public. One cannot suppress or contain a virus by beating up people. The National Police Service must be held responsible and accountable for violating the rights to life and dignity among other rights.<sup>93</sup>

The IPOA have also been proactive in ensuring that Kenyan police officers are prosecuted for police impunity, excessive force or arbitrary killings pre- and during the COVID-19 era. For example, in the case of *Republic v Nahashon Mutua*,<sup>94</sup> following investigations by the IPOA, and the Kenyan High Court receiving evidence from 14 prosecution witnesses under Witness Protection,<sup>95</sup> Nahashon Mutua, a former senior police officer, was convicted and sentenced to death by a Kenyan High Court on 14<sup>th</sup> February 2019 for the murder of Martin Koone, who was found dead in a cell at a Nairobi policed station in 2013. Mutua was in charge of the police station in which Koone was being detained at the time before his death. However, other officers in the station were not investigated by the IPOA.<sup>96</sup> Wambui reports that delay tactics, cover-ups, witness murders and intimidation of victims' families have made it increasingly difficult to prosecute rogue police officers successfully.<sup>97</sup> Between January and June 2021, the IPOA recorded 1, 324 complaints against the police, with allegations of 105 deaths (21 deaths in custody, 55 from police action, 15 from shooting causing serious injuries, 12 on enforced disappearances and two of unlawful discharge of firearms).<sup>98</sup> However, while Mutua's conviction is laudable the efforts of the Kenya's IPOA still leave much to be desired. Whilst its mandate to eliminate all forms of police brutality pre- and during COVID-19 and facilitate police reform in Kenya is in progress, the Kenyan judicial system must also ensure that dispensation of justice is achieved by ensuring that dozens of murder cases involving police officers that have been stuck in courts for more than a year are swiftly adjudicated to ensure justice is served to the victims and their families.

Whilst it can be argued that the powers of the police to act in such a manner were legalised by government and the provisions of the Constitution which empower the Kenyan government to limit certain fundamental human rights, it cannot be overemphasised that upholding human rights of individuals must be proportionate and non-discriminatory alongside the

<sup>93</sup> Law Society of Kenya v Hilary Mutyambai Inspector General National Police Service (2020) & 4 Ors; Kenya National Commission on Human Rights & 3 others (Interested Parties). [2020] eKLR, Petition 120 of 2020 (Covid 025) Per Justice W. Korir, para 137.

<sup>94</sup> [2019] eKLR, Criminal Case 84 of 2015, <<http://kenyalaw.org/caselaw/cases/view/169489/>> accessed 2 June 2021.

<sup>95</sup> *Republic v Nahashon Mutua* [2016] eKLR, Criminal Case 84 of 2015 <<http://kenyalaw.org/caselaw/cases/view/131193/>> accessed 2 June 2021.

<sup>96</sup> Reuters, 'Kenyan Court sentences police officer to death for killing detainee' Reuters (14 February 2019) <<https://www.reuters.com/article/uk-kenya-justice/kenyan-court-sentences-police-officer-to-death-for-killing-detainee-idUKKCN1Q31G3?edition-redirect=uk>> accessed 2 June 2021.

<sup>97</sup> Mary Wambui, 'Kenya: Why Rogue Police Officers are Getting Away with Murder' (29 October 2021) AllAfrica <<https://allafrica.com/stories/202110290320.html>> accessed 31 October 2021.

<sup>98</sup> Ibid.

public health measures imposed by a State – an ideal which is consistently being upheld by the Kenyan IPOA. Such police brutality serves to undermine government’s efforts in containing the virus, undermines the rule of law and promotes distrust and fear among citizens who are already mentally and psychologically affected by the outbreak of the pandemic.

### 3 Uganda

Uganda reported its first COVID-19 case on 21 March 2020, which set a new paradigm in motion.<sup>99</sup> Bearing in mind that the Ugandan Constitution requires the State to respect, uphold and promote the rights of individuals and groups in the country,<sup>100</sup> and in view of the provisions of international instruments on human rights, stringent measures were immediately issued by government to contain the spread of the virus.<sup>101</sup> As part of the phases of measures, the Ugandan government on 31 March, 2020, further ordered a nationwide lockdown to curb the spread of COVID-19, banning private vehicles, public transport and non-food markets and the closure of all public places except for places supplying essential items for food and health.<sup>102</sup> The Ugandan Government’s security forces, comprising the police, army, and an armed community-policing paramilitary group called the Local Defence Unit [LDU], coordinated by the Ugandan Army, engaged in enforcing pandemic procedures. Ordinary citizens, especially those in improvised housing, became targets of the enforcement, suffering human rights violations by the security forces.<sup>103</sup> According to a recent study, law enforcement officers in Uganda perpetrated more than one-third of the reported violence and discrimination in the country in the pandemic era.<sup>104</sup> Media reports

<sup>99</sup> Justice Henry Peter Adonyo, ‘COVID-19 and the Administration of Justice: A Reflection on Ethical Judicial Conduct’ <[https://www.unodc.org/dohadeclaration/en/news/2020/04/covid-19-and-the-administration-of-justice\\_-a-reflection-on-ethical-judicial-conduct.html](https://www.unodc.org/dohadeclaration/en/news/2020/04/covid-19-and-the-administration-of-justice_-a-reflection-on-ethical-judicial-conduct.html)> accessed 20 May 2021

<sup>100</sup> Constitution of the Republic of Uganda, 1995, s 20 <<https://ulii.org/ug/legislation/consolidated-act/0>> accessed 29 June 2020.

<sup>101</sup> These measures include the Public Health (Prevention of COVID-19) Requirements and Conditions of Entry into Uganda Order 2020 which restricts entry into Uganda. It also mandates that a medical officer examiner for COVID-19 persons arriving in Uganda (March 13, 2020); the Public Health (Prohibition of Entry into Uganda) Order, 2020 which prohibits the ‘entry into Uganda by any person and the introduction into Uganda of any animal, article or thing through any of the border posts of Uganda (March 21, 2020); and Public Health (Control of COVID-19) Rules, 2020 which imposes restriction on gatherings and specifies closure of certain venues of public gathering for specific periods.

<sup>102</sup> Hamza Kyeyune, ‘Uganda declares curfew to curb spread of COVID-19’ 31 March 2020, <<https://www.aa.com.tr/en/africa/uganda-declares-curfew-to-curb-spread-of-covid-19/1785775>> accessed 2 June 2021; The Public Health (Control of COVID-19) (No. 2) Rules 2020, <<https://ulii.org/ug/legislation/statutory-instrument/2020/55>> accessed 2 June 2021.

<sup>103</sup> Human Rights Watch, ‘Uganda: Respect Rights in COVID-19 Response, Ensure Security Forces Refrain from Violence, Abuse’ 02 April 2020, <<https://www.hrw.org/news/2020/04/02/uganda-respect-rights-covid-19-response>> accessed 30 April 2021; Elizabeth Katana and others, ‘Violence and discrimination among Ugandan residents during the COVID-19 lockdown’ (2021) 21 BMC Public Health, 467.

<sup>104</sup> Katana and others (n 103).

identify incidences of excessive force by these security forces as including beating, shooting and arbitrarily detaining persons.<sup>105</sup> During the first wave of the pandemic, several citizens were arrested for allegedly violating COVID-19 measures that had not yet legally become an offence.<sup>106</sup> These premature enforcements amounted to a violation of human rights protected under the Constitution.

With the legal instruments firmly in place, reports of arbitrary practices by law enforcement enforcing measures were still rife. On March 26, 2020, police shot two construction workers who were riding a motorcycle taxi outside of Kampala, despite the ban on motorcycle transport with multiple passengers.<sup>107</sup> This shooting was a direct violation of the provisions of the Ugandan Constitution's protection of citizens from arbitrary use of lethal force. Furthermore, the act of law enforcement in this context contravenes international human rights law standards that emphasise the need for States to be humane in ensuring the safety and security of its citizens, and to ensure that the basic human rights of people, especially those who are most vulnerable, should be at the centre of government's response to the pandemic.<sup>108</sup> In an extreme but not exceptional incident, law enforcement officials rounded up and brutalised the whole village of Lorokwo West.<sup>109</sup> The police, in admitting the act, argued that the 'patrollers targeted the area due to much congestion and an uncontrolled setting of makeshift structures'.<sup>110</sup> Similarly, on 29 March 2020 community residents and police raided a shelter for homeless lesbian, gay, bisexual and transgender (LGBT) youth in Wasiko, outside of Kampala, beating and arresting 23 persons.<sup>111</sup> The police charged the arrested persons with a negligent act likely to spread infection of disease and disobedience of lawful orders and for allegedly disobeying the government's directives

<sup>105</sup> Human Rights Watch (n 103).

<sup>106</sup> These incidents of abuse against the right to free movement and liberty were connected to the gaps between the announcements by the President and the publication of the legal instruments a few days later by the Minister of Health, pursuant to s 11 of the Public Health Act. See Phillip Karugaba, Rehema Nakiryra Ssemyalo and Tracy Kakongi, 'Uganda: An Assessment Of Uganda's Legal Response To The Coronavirus (COVID-19)' (9 May 2020) *Ensafrica* <[https://www.ensafrika.com/news/detail/2469/uganda-an-assessment-of-ugandas-legal-respons?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=LinkedIn-integration](https://www.ensafrika.com/news/detail/2469/uganda-an-assessment-of-ugandas-legal-respons?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration)> accessed 1 June 2021.

<sup>107</sup> Human Rights Watch (n 103).

<sup>108</sup> United Nations, 'COVID-19 and Human Rights: We are all in this Together' (2020) 12, <[https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un\\_-\\_human\\_rights\\_and\\_covid\\_april\\_2020.pdf](https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf)> accessed 27 October 2021; Human Rights Watch, 'Human Rights Dimension of COVID 19' <[https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#\\_Toc35446576](https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#_Toc35446576)> accessed 27 October 2021.

<sup>109</sup> Adventino Banjwa, 'When 'a People's War' Turns Against Them: Reflections on Uganda's 'War of the Wananchi' against COVID-19' (29 March 2021) <[http://somatosphere.net/2021/peoples-war-uganda-covid-19.html/#\\_edn21](http://somatosphere.net/2021/peoples-war-uganda-covid-19.html/#_edn21)> accessed 27 October 2021; Uganda Police Force, '14 security officers arrested for excessive use of force' (6 April 2020) <<https://www.upf.go.ug/14-security-officers-arrested-for-excessive-use-of-force/>> accessed 27 October 2021.

<sup>110</sup> Uganda Police Force, *ibid*.

<sup>111</sup> Human Rights Watch (n 103).

by residing in the shelter.<sup>112</sup> The arrest of the persons from the homeless shelter for LGBT appeared to be a direct attack on a vulnerable group of people who are already stigmatised by the everyday actions of other citizens.

Notably, the government appeared to be complicit in violations by law enforcement officers through the politicisation of the already securitised pandemic measures. In particular, several opposition politicians and their followers under a repressive strategy were arrested and assaulted under the pretence of violating COVID regulations while holding rallies, while the ruling National Resistance Movement (NRM) party was able to continue undisrupted.<sup>113</sup> Furthermore, the incumbent president at the time directed the police to arrest several politicians providing (food) relief on the grounds that the food donations did not go through the government organised taskforce. The absence of appropriate reaction by the government of the day to the recorded violations of the opposition as well as the directive on relief was arguably a repressive strategy targeted at influencing the outcome of the January 2021 election. The chain of events in the context of enforcing compliance so far supports assertions that the interests of the government are prioritised above the protection of Uganda's people.<sup>114</sup>

Widespread allegations of human rights violation by the state security forces, regardless of the existence of the provisions in the Constitution and other stop-gaps<sup>115</sup> prohibiting them precedes the COVID pandemic.<sup>116</sup> Security services in Uganda, including the police (which ought to be under civil authority control) have been highly militarised since colonial times. These agencies remain firmly under the ruling government. The Ugandan Parliament Committee on Human Rights' finding that authorities using security agencies continue to detain people in several unacknowledged and ungazetted places of detention across the country, often referred to as 'safe houses, and to subject detainees to torture and abuse with near-total impunity' support this position.<sup>117</sup> Consequently, perpetrators are often not investigated or punished as the existing mechanisms to investigate and punish abuse are ineffective. In spite of the Uganda Human Rights Commission (UHRC) recommendations to the Director of Prosecution to prosecute enforcement officers violating citizen's rights, there

<sup>112</sup> Ibid.

<sup>113</sup> Banjwa (n 109).

<sup>114</sup> Michelle Kagari and Evelyn Edroma, *The Police, The People, The Politics: Police Accountability in Uganda* (Matrix 2006) 1; Banjwa (n 109).

<sup>115</sup> Constitution of the Federal Republic of Uganda, ss 22–24; Prevention and Prohibition of Torture Act (2012).

<sup>116</sup> Reports of local and international civil society organisations as well as the media are replete with incidences of arbitrary deprivation of life, disappearances, torture and other cruel and inhuman treatment perpetuated by the country's security forces. See United State Department of State, Country Report on human rights in Uganda (2018) <<https://www.justice.gov/eoir/page/file/1146646/download>> accessed 30 May 2021; Human Rights Watch, 'Uganda: Events of 2020' in World Report 2021 <<https://www.hrw.org/world-report/2021/country-chapters/uganda>> accessed 30 May 2021; 'UPPA calls for an end to police brutality' (2 November 2019) The Independent (online) <<https://www.independent.co.ug/uppa-calls-for-an-end-to-police-brutality/>> accessed 29 May 2021.

<sup>117</sup> Human Rights Watch (n 103).

is no reported incident in which any of the perpetrators has been prosecuted. The United States' Report on Human Rights in Uganda interprets the ineffectiveness as the 'reluctance of government to investigate, prosecute or punish officials who committed human rights violations, ...in the security services due to corruption'.<sup>118</sup>

A continuation of this blueprint undermines civilian structures and standards<sup>119</sup> during this pandemic. This may lead to public protests from citizens, a situation which provides an avenue for gatherings of persons and a further spread of the virus.

## **V Towards the Effective Protection and Promotion of Human Rights: The Way Forward**

The responsibility of the government of every country globally for protecting its citizens includes the adoption of public health safety standards. However, the adoption of such standards should not be utilised as an excuse for infringing the fundamental human rights of its citizens. A country's constitution remains the *Grundnorm* over all legislations or measures imposed by States and should continually be used as a blueprint to ensure that such COVID-19 measures are not in express violation of the Constitution. This means that constitutional provisions pertaining to the right to life, right to human dignity and other fundamental human rights must be upheld and protected by the government, with citizens having the right to seek redress in national courts for the violation of such rights. Flowing from this and the analysis of the various jurisdictions above, the following suggestions are proffered to facilitate the protection and promotion of human rights in COVID-19 era in a developing Africa.

First, while national legislation establishing specific law enforcement agencies allude to the use of firearms/weapons, it is imperative that law enforcement officers utilise their weapons in a manner that does not cause death or serious injuries to persons who may be in direct violation of an imposed curfew. Law enforcement officers should also be re-trained in use of such weapons/firearms or in the use of alternative weapons such as batons rather than firearms on persons who appear to engage in altercations with them without excessive use of force. Adopting de-escalation strategies, including utilising batons instead of weapons, and training the law enforcement agents in utilising these strategies is very necessary to avoid incidents of police brutality or death of persons. This measure, which is in consonance with the ACHPR General Comment No. 3 and other global human rights instruments discussed

<sup>118</sup> United State Department of State, Country Report on human rights in Uganda (2018) <<https://www.justice.gov/eoir/page/file/1146646/download>> accessed 27 October 2021.

<sup>119</sup> 'Uganda's army and violence: how COVID-19 is offering hints of change' (12 May 2020) The Conversation <<https://theconversation.com/ugandas-army-and-violence-how-covid-19-is-offering-hints-of-change-138331>> accessed 29 May 2021.

in Part II of this paper will curb the incidents of use of lethal force, disrespect for citizens and prevent rising cases of human rights abuses in States.

Second, there is a need for urgent training of persons in the education, immigration, transportation, public health and other sectors to facilitate their understanding of fundamental human rights under State legislation. This will also enable them to carry out enforcement measures as civilians within their own community and thus dissuade persons from violating curfews and end attendant abuses by States. The human rights institutions established in various jurisdictions, such as the National Human Rights Commission (NHRC) in Nigeria, for example, are best placed to facilitate such training at the national level.

Third, the establishment of an independent special tribunal in Nigeria and Uganda, similar to the Independent Police Oversight Authority (IPOA) in Kenya, is imperative to investigate complaints and petitions on human rights violations by law enforcement officials periodically. Whilst bearing in mind that the IPOA is still fraught with criticisms and lapses, its establishment provides a model for establishing a similar body in Nigeria and Uganda, bearing in mind the need to prevent the lapses that have been observed with the IPOA. Where possible, the power of such tribunals must be so extended to include recommendations for swift prosecution of investigated police officers by the judiciary, and imposition of huge financial penalties on such officers who are responsible for arbitrary arrest, detention, death, brutality or human rights violation on a citizen, to deter other officers from doing so.

Fourth, in adopting any COVID-19 directive, States without appropriate sanctions, must include punishment provisions relating to the conduct of law enforcement officers, emphasising that the human rights of citizens must be of paramount importance in enforcing compliance with the directives. Sanctions within COVID-19 directives should not only be imposed on violators who publicly disobey them but should also be imposed on law enforcement officials who abuse citizens. In addition, it is important that, where appropriate sanction mechanisms exist, investigation and arrests for violations should also be made public. This would help to assure citizens that the government is committed to addressing the problem of violations by security operatives. For instance, the Nigeria Police Force, made public the arrest of the two police officers involved in assaulting a woman in Osun for violating the lockdown measure. However, the government has remained silent on the actual prosecution of these offenders. Publicising the investigation and prosecution of offenders would also serve as a deterrent to security operatives.

Fifth, the imposition of lockdown measures by States must not be done in such a manner as to make life difficult for their citizens. Reasons for disobeying movement restriction measures are linked to the absence of certain amenities and adequate social protection systems. Therefore, the government working with private organisations should where necessary create amenities such as availability of transportation for persons who are permitted to work during the pandemic, to avoid severe human rights abuses meted out on them.

## **VI Conclusion**

The COVID-19 pandemic presents a unique opportunity for States to facilitate stronger legal reforms within their jurisdictions relating to entrenching the fundamental human rights of citizens. The selected countries discussed in this paper have a history of civil strife and so, their governments' responses prior to and during the COVID-19 pandemic must, as a necessity, consider the effects of such measures and restrictions on protecting the fundamental human rights of its citizens, particularly vulnerable groups such as the LGBT community, women and children and the elderly. However, such protection of fundamental human rights in these jurisdictions must be in tandem with the appropriate investigations, penalties and punishments for retired or law enforcement officers in active service who have been involved in forms of police impunity, police brutality, arbitrary arrests and violations of citizens' fundamental human rights. Hence, States and law enforcement officials must not serve as a 'virus' themselves while working hard to control an existing one.



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Ennio Piovesani\*

# **The Response to the Impact of the COVID-19 Pandemic on Contracts for the Carriage of Passengers by Air and Package Travel in the German and Italian Law Systems**

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## Abstract

This article investigates the response to the impact of the COVID-19 pandemic on contracts for the carriage of passengers by air and package travel in the German and Italian law systems, by presenting the relevant rules of positive law and their application by German and Italian courts. In fact, the courts of the two Member States have rendered several decisions on the cancellation of flights by carriers and the withdrawal from package travel due to the COVID-19 pandemic, as well as the issuance of vouchers following the termination of the related contracts. What emerges from this article is that, unlike the German law system, the Italian one has adopted a response to the impact of the COVID-19 pandemic which is not fully consistent with the indications coming from the EU level. In particular, an element of disruption with respect to the relevant EU guidelines is the adoption by the Italian legislature of art 88-bis D-L 18/2020, which addresses (residual) cases of so-called mandatory vouchers.

Keywords: contract, COVID-19, flight cancellation, overriding mandatory provision, package travel, passenger rights, voucher

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## I Introduction

This article investigates the response to the impact of the COVID-19 pandemic on contracts for the carriage of passengers by air and on package travel in the German and Italian law systems,<sup>1</sup> by presenting the relevant rules of positive law (see below II) and their application by German and Italian courts (see below III). In fact, the courts of the two Member States have rendered several decisions on the cancellation of flights by carriers and the withdrawal from package travel due to the COVID-19 pandemic, as well as the issuance of vouchers following the termination of the related contracts.<sup>2</sup>

<sup>1</sup> In order to grasp the practical impact of the COVID-19 pandemic on tourism contracts, I have conducted a small survey through Google Modules. The survey consisted of multiple-choice questions which were answered by 50 respondents who had concluded transport, accommodation and package travel contracts to be performed during the period running from February to July 2020 and which were cancelled due to the COVID-19 pandemic. The results of the survey can be summarised as follows. Most respondents (98%) resided in Italy. 60% of the respondents had concluded a contract for the carriage of passengers, 20% an accommodation contract and 20% a package travel. The contracts often (72%) had a significant link with a foreign country (that is to say, the carrier/organiser/hotelier was from a foreign country and/or the place of departure or arrival/the accommodation was abroad). The value of most contracts (56%) was less than 500,00 EUR. In about half (56%) of the cases, the respondents cancelled the travel/accommodation on their own motion. In most cases, the same respondents applied for price reimbursement (94%). In half of the cases (50%), reimbursement was granted. In almost half (52%) of the cases vouchers were offered in place of reimbursement. In a relatively high number of cases (46%), vouchers were accepted. Some of the respondents (26%) remained empty handed: they were not reimbursed nor accepted a voucher. Other respondents (8%; that is to say, 4 respondents) proved to be more combative: They appointed a lawyer in order to seek reimbursement. One respondent (2%) even instituted court proceedings to that aim. In addition to the results of the survey, I have examined the 76 enquiries made by consumers, from March 2020 to March 2021, to the Consumers Desk at the Turin Chamber of Commerce and kindly reported by Avv. Susanna Scapellato, to whom I am grateful. All the enquires concerned the termination of transport, accommodation and package travel contracts due to the COVID-19 pandemic. In particular, in 64 enquires, the consumers informed that their counterparty had withheld (cash) reimbursement of payments made under the relevant transport, accommodation or package travel contract, and had offered a voucher instead. The latter consumers thus enquired to know whether they could refuse the voucher and seek reimbursement instead.

<sup>2</sup> On the cancellation of flights due to the COVID-19 pandemic, see Amtsgericht (District Court) Nürtingen, judgment of 9 June 2020 – 10 C 1810/20, BeckRS 2020, 13376; Giudice di pace di (Justice of the Peace of) Foligno, Avv. Mauro Vergine, judgment of 1 October 2020, filed on 12 October 2020, n 97, RG [Ruolo Generale (General Docket)] n 255/20 <<https://www.edotto.com/articolo/volo-spostato-e-poi-cancellato-per-coronavirus-biglietti-rimborsati>> accessed 23 November 2021; Giudice di pace di Palermo, Dott.ssa [Dottoressa (Doctor)] Donata di Chiara, judgment of 26 October 2020, filed on 23 October 2020, n 1999, RG n 5929/2020; Giudice di pace di Rovereto, judgment of 15 October 2020, filed on 29 October 2020, n 46, RG n 187/2020; Amtsgericht Köln, 159th Division, judgment of 30 October 2020 – 159 C 182/20, NRWE-Datenbank = BeckRS 2020, 3334; Giudice di pace di Busto Arsizio, Avv. Giovanni Masala, decree of 23 November 2020, n 4456, RG n 3342/2020; Giudice di pace di Bologna, Dott. [Dottore (Doctor)] Antonio Pederzoli, judgment of 4 December 2020, filed on 18 January 2021, n 70, RG n 6472/2020; Giudice di Pace di Palermo, 2nd Division, Dott.ssa Daniela Liggio, judgment of 18 February 2021, filed on 22 February 2021, n 460, RG n 9874/2000; Giudice di Pace di Bologna, 1st Division, Dott. Antonio Pederzoli, judgment of 26 February 2021, n 792, RG 7660/2020; Oberlandesgerichtshof (Higher Regional Court) Köln, 6th Civil Chamber, judgment of 26 February 2021 – 6 U 127/20, BeckRS 2021, 2976; Amtsgericht Frankfurt a. M., judgment of 12 March 2021 – 29 C 3204/20, BeckRS 2021, 692; Giudice

## II Positive Law

Cancellation of flights, withdrawal from package travel and vouchers are governed by EU and national law (see below respectively II 1, 2).

### 1 EU Law

Cancellation of flights and withdrawal from package travel are respectively governed by the Air Passenger Rights Regulation<sup>3</sup> and the Package Travel Directive<sup>4</sup> (see below respectively II 1 a, b). As a response to the impact of the COVID-19 pandemic on contracts

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di pace di Palermo, Dott.ssa Raffaella Pira, judgment of 25 March 2021, filed on 31 March 2021, n 858, RG n 11786/2020, Leggi d'Italia; Giudice di Pace di Campobasso, Dott. Luigi Amoroso, judgment of 29 June 2021, n 261, RG n 365/2021, Leggi d'Italia = Smart24 Lex – Il Sole 24 ORE; on withdrawal from package travel due to the COVID-19 pandemic, see Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20, COVID-19 und Recht 2020, 470; Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (18), Verbraucher und Recht 2006, 391; Tribunale di (Tribunal of) Trento, Dott. Benedetto Sief, decreto ingiuntivo (ex parte decree) of 11 August 2020, filed on 13 August 2020, n 711, RG n 2106/2020; Landgericht (Regional Court) Rostock, 1st Civil Chamber, judgment of 21 August 2020 – 1 O 211/20, BeckRS 2020, 22398; Amtsgericht Wiesbaden, 92nd Division, judgment of 9 September 2020 – 92 C 1682/20, BeckRS 2020, 27073; Amtsgericht Köln, judgment of 14 September 2020 – 133 C 213/20, BeckRS 2020, 23502; Amtsgericht Hannover, 410th Division, judgment of 25 September 2020 – 410 C 5123/20, BeckRS 2020, 27698; Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20, BeckRS 2020, 28268; Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20, BeckRS 2020, 31180; Amtsgericht Duisburg, 53rd Division, judgment of 1 December 2020 – 53 C 1811/20, BeckRS 2020, 37712; Amtsgericht Duisburg, 51th Division, judgment of 7 December 2020 – 51 C 1394/20, BeckRS 2020, 37776; Amtsgericht München, final judgment of 8 December 2020 – 283 C 4769/20, BeckRS 2020, 36268; Amtsgericht Duisburg, judgment of 14 December 2020 – 506 C 2377/20, BeckRS 2020, 37777; Landgericht Frankfurt a. M., 24th Civil Chamber, judgment of 14 January 2021 – 2-24 O 315/20, BeckRS 2021, 311; Tribunale di Verona, 1st Division, Dott.ssa Eleonora Da Cortà Fumei, order of 18 January, filed on 19 January 2021, Smart24 Lex – Il Sole 24 ORE; Oberlandesgerichtshof Schleswig, 17th Civil Chamber, judgment of 26 March 2021 – 17 U 166/20, BeckRS 2021, 24247; Landgericht Hannover, 5th Civil Chamber, final judgment of 26 March 2021 – 5 O 104/2, BeckRS 2021, 134; Amtsgericht Hannover, 502nd Division, judgment of 9 April 2021 – 502 C 12946/20, BeckRS 2021, 7683; Tribunale di Benevento, 2nd Division, judgment of 5 August 2021, Leggi d'Italia; on withdrawal from package travel due to the SARS-CoV-1 epidemic, see Amtsgericht Augsburg, final judgment of 9 November 2004 – 14 C 4608/03, BeckRS 2004, 16212; Oberlandesgerichtshof [(Austrian) Supreme Court], decision of 14 June 2005 – 4 Ob 103/05h, RIS-Justiz RS0032187; on withdrawal from package travel due to the dengue epidemic, see Corte di Cassazione [(Italian) Court of Cassation], 3rd Division, judgment of 22 March 2007, filed on 24 July 2007, n 16315, RG n 1105/2000, *Atrenum s.a.s. c. Bismanturist 2 s.r.l.*, *Giurisprudenza italiana* 2008, 857.

<sup>3</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) – Commission Statement [2004] OJ L46/1 (Air Passenger Rights Regulation).

<sup>4</sup> Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1 (Package Travel Directive).

for the carriage of passengers and package travel, the Commission adopted the Voucher Recommendation (see below II 1 c).<sup>5</sup>

### a) Air passenger rights regulation

In the event of cancellation of a flight by the carrier, pursuant to art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation, the passenger has the right to reimbursement of the price which, with the signed agreement of the passenger, may also be paid in 'travel vouchers'. Pursuant to art 5 para 1 lit c) Air Passenger Regulation, the passenger may also have the right to compensation. The Commission confirmed the existence of the right to reimbursement in the event of cancellation in the Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with COVID-19.<sup>6</sup> On the other hand, as concerns the right to compensation, the Interpretative Guidelines specify that, pursuant to art 5 para 3 Air Passenger Rights Regulation, the carrier is exempted from paying compensation where cancellation is due to exceptional circumstances such as the COVID-19 pandemic.<sup>7</sup>

### b) Package travel directive

Withdrawal by the traveller or by the organiser before the beginning of the package travel is governed by art 12 Package Travel Directive, which is transposed in Germany in sec 651h BGB<sup>8</sup> and in Italy in art 41 Cod. tur.<sup>9</sup> Pursuant to the mentioned provisions, in the event of termination of package travel due to 'unavoidable and extraordinary circumstances', travellers have the right to the reimbursement of the price paid for the package.<sup>10</sup>

<sup>5</sup> Commission Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic, C/2020/3125 [2020] OJ L151/10 (Voucher Recommendation).

<sup>6</sup> Commission, Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19 [2020] OJ C89I/1 (Interpretative Guidelines).

<sup>7</sup> Compare with Interpretative Guidelines, point 3.4.

<sup>8</sup> Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 10 des Gesetzes vom 30. März 2021 (BGBl. I S. 607) geändert worden ist [Civil code in the version promulgated on 2 January 2002 (Federal Law Gazette I p 42, 2909; 2003 I p 738), last amended by art 10 Law of 30 March 2021 (Federal Law Gazette I p 607)] (BGB).

<sup>9</sup> Decreto Legislativo (Legislative Decree) 23 May 2011, n 79, Codice della normativa statale in tema di ordinamento e mercato del turismo, a norma dell'articolo 14 della legge 28 novembre 2005, n. 246, nonché attuazione della direttiva 2008/122/CE, relativa ai contratti di multiproprietà, contratti relativi ai prodotti per le vacanze di lungo termine, contratti di rivendita e di scambio (Code of State legislation on the regulation and market of tourism, in accordance with art 14 Law 28 November 2005, n 246, and implementation of Directive 2008/122/EC on timeshare, long-term holiday product, resale and exchange contracts), Gazz. Uff. [Gazzetta Ufficiale (Official Gazette)] n 129 of 6 June 2011 – S.O. [Supplemento Ordinario (Ordinary Supplement)] n 139 (Cod. tur.).

<sup>10</sup> See art 12 para 2 Package Travel Directive, sec 651h para 3 BGB, art 41 para 3 Cod. tur.

The Commission confirmed the existence of the latter right, in the Information on the Package Travel Directive in connection with the COVID-19.<sup>11</sup>

### c) Voucher recommendation

As a response to the impact of the COVID-19 pandemic on contracts for the carriage of passengers and package travel, the Commission adopted the Voucher Recommendation. In essence, by that Recommendation, the legislatures of the Member States were authorised to adopt provisions on

vouchers which carriers or organisers may offer to passengers and travellers, subject to their voluntary acceptance, as an alternative to cash reimbursement [...] in the event of cancellation [...] by the carrier or organiser [...] for reasons linked to the COVID-19 pandemic [...] [and] in the event of changes to the contract or terminations [...] for reasons linked to the COVID-19 pandemic [...].<sup>12</sup>

As results from the reference to ‘voluntary acceptance’, the Voucher Recommendation moves from the premise that passengers and travellers may refuse to accept vouchers and seek (cash) reimbursement instead.<sup>13</sup>

## 2 National Law

The German and Italian legislatures have adopted provisions on vouchers (see below respectively II 2 a, b). The Italian provision on vouchers conflicts with EU law (see below II 2 c).

### a) German law: Art 240 para 6 EGBGB

Following the Voucher Recommendation, the German legislature adopted art 240 para 6 EGBGB<sup>14</sup> on vouchers offered by organisers in the event of termination of package travel

<sup>11</sup> Commission, Information on the Package Travel Directive in connection with the COVID-19, 19 March 2020 (revised version, replaces the version of 5 March 2020), <[https://ec.europa.eu/info/sites/info/files/coronavirus\\_info\\_ptd\\_19.3.2020.pdf](https://ec.europa.eu/info/sites/info/files/coronavirus_info_ptd_19.3.2020.pdf)> accessed 23 November 2021.

<sup>12</sup> See Voucher Recommendation, point 1.

<sup>13</sup> See Recitals (11), (12) Voucher Recommendation.

<sup>14</sup> Art 240 para 6 EGBGB {Einführungsgesetz zum Bürgerlichen Gesetzbuche in der Fassung der Bekanntmachung vom 21. September 1994 [BGBl. I S. 2494; 1997 I S. 1061], das zuletzt durch Artikel 2 des Gesetzes vom 10. August 2021 [BGBl. I S. 3515] geändert worden ist [Introductory Act to the Civil Code in the version promulgated on 21 September 1994 (Federal Law Gazette I p 2494), last amended by art 2 Law of 19 March 2020 (Federal Law Gazette I p 540)]} was introduced by the Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Pauschalreisevertragsrecht und zur Sicherstellung der Funktionsfähigkeit der Kammern im Bereich der Bundesrechtsanwaltschaft, der Bundesnotarordnung, der Wirtschaftsprüferordnung und des Steuerberatungsgesetzes während der COVID-19-Pandemie (BGBl. 2020 I 1643) [Law to mitigate the consequences of the COVID-19 pandemic in package travel contract law and to ensure the functioning of

due to the COVID-19 pandemic.<sup>15</sup> As noted by the AG Frankfurt,<sup>16</sup> the German legislature had no choice but to adopt a so-called ‘voluntary voucher solution’,<sup>17</sup> that is to say a solution whereby travellers retain the choice of accepting or refusing the offered voucher.<sup>18</sup> In fact, as also noted by the AG, by the Voucher Recommendation the EU ruled out a so-called ‘mandatory voucher solution’,<sup>19</sup> namely the simple issuance of vouchers releases the carrier or organiser (either permanently or only temporarily) from the reimbursement obligation, irrespective of the traveller’s acceptance of the issued voucher.

### b) Italian law: Art 88-bis D-L 18/2020

Prior to the Voucher Recommendation, the Italian legislature adopted art 28 D-L 9/2020<sup>20</sup> on vouchers issued following the termination of contracts for the transport of passengers and package travel due to the COVID-19 pandemic.<sup>21</sup> Art 28 D-L 9/2020 was replaced by art 88-bis D-L 18/2020.<sup>22</sup> In turn, art 88-bis D-L 18/2020 was amended in order to conform

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the chambers in the area of the Federal Lawyers’ Code, the Federal Notaries’ Code, the Auditors’ Code, and the Tax Consulting Law during the COVID-19 pandemic (Federal Law Gazette 2020 I p 1643)]. On art 240 para 6 EGBGB, see Ansgar Staudinger, Charlotte Achilles-Pujol, ‘Reiserecht’ in Schmidt Hubert (ed), *COVID-19* (2nd edn, CH Beck 2020, München, 181–242) 188–192, para 18a; Ernst Führich, ‘Rücktritt vom Pauschalreisevertrag vor Reisebeginn wegen Covid-19-Pandemie’ (2020) *Neue Juristische Wochenschrift* 2137–2208, 2140–2141, paras 21, 22; Klaus Tonner, ‘COVID 19 und Reisegutscheine’ (2020) *Monatsschrift für Deutsches Recht* 1032–1037; Stefan A. Geib, ‘EGBGB Art. 240 § 6’ in Wolfgang Hau, Roman Poseck (eds), *BeckOK BGB* (57th edn, CH Beck 2021, München); Klaus Tonner, ‘EGBGB Art. 240 § 6’ in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker, Bettina Limperg (eds), *MiKoBGB* (Band 13, 8th edn, CH Beck 2021, München).

<sup>15</sup> See Geib (n 14) para 3; Tonner, ‘EGBGB Art. 240 § 6’ (n 14) para 14.

<sup>16</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2).

<sup>17</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 14.

<sup>18</sup> See also Landgericht Frankfurt a. M., judgment of 14 January 2021 – 2-24 O 315/20 (n 2) para 26; Oberlandesgerichtshof Schleswig, 17th Civil Chamber, judgment of 26 March 2021 – 17 U 166/20 (n 2) para 72.

<sup>19</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 14.

<sup>20</sup> Decreto-Legge (Decree-Law) 2 March 2020, n 9, Misure urgenti di sostegno per famiglie, lavoratori e imprese connesse all’emergenza epidemiologica da COVID-19 (Urgent measures on support for families, workers and businesses in relation to the COVID-19 epidemiological emergency), Gazz. Uff. n 53 of 2 March 2020.

<sup>21</sup> On art 28 D-L 9/2020, see Carmine Criscione, ‘Natura giuridica e vicende del voucher introdotto dalla decretazione d’urgenza (2020)’ <<https://www.diritto.it/natura-giuridica-e-vicende-del-voucher-introdotto-dalla-decretazione-durgenza/>> accessed 23 November 2021; Renato Santagata, ‘Gli effetti del Coronavirus sui contratti turistici. Primi appunti’ in Giuseppe Conte, Fabrizio Di Marzio (directors), *Giustiziacivile.com, Emergenza COVID-19, Speciale n. 2* (Giuffrè 2020, Milano, 225-234) <[https://giustiziacivile.com/system/files/allegati/covid19-2\\_2020.pdf](https://giustiziacivile.com/system/files/allegati/covid19-2_2020.pdf)> accessed 4 May 2021; Giorgia Vulpiani, ‘Emergenza epidemiologiche e contratti del turismo: il caso del Coronavirus’ (2020) <<http://www.judicium.it/wp-content/uploads/2020/04/G.-Vulpiani.pdf>> accessed 23 November 2021; Susanne Gössl, ‘In- und ausländische Corona-Regelungen im grenzüberschreitenden Handel’ (2021) *Zeitschrift für Vergleichende Rechtswissenschaft*, 23-47, 27-29.

<sup>22</sup> Art 88-bis D-L 18/2020 [Decreto-Legge 17 March 2020, n 18, Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all’emergenza epidemiologica da COVID-19 (Measures to strengthen the National Health Service and to provide economic support for families, workers and businesses in relation to the COVID-19 epidemiological emergency), Gazz. Uff. n 70 of 17 March

2021] was introduced by L 27/2020 [Legge (Law) 24 April 2020, n 27, Conversione in legge, con modificazioni, del decreto-legge 17 marzo 2020, n. 18, recante misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19. Proroga dei termini per l'adozione di decreti legislativi (Conversion into law, with amendments, of Decree-Law 17 March 2020, n 18, containing measures to strengthen the National Health Service and on economic support for families, workers, and businesses in relation to the COVID-19 epidemiological emergency. Extension of deadlines for the adoption of legislative decrees), Gazz. Uff. n 110 of 29 April 2020 – S.O. n 16] and amended by art 182 para 8 lits a)-d) D-L 34/2020 [Decreto-Legge 19 May 2020, n 34, Misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da COVID-19 (Urgent measures on health, support to work and economy, and on social policies in relation to the COVID-19 epidemiological emergency), Gazz. Uff. n 128 of 19 May 2020 – S.O. n 21]. In turn, art 182 para 8 lits a)-d) were introduced by L 77/2020 [Legge 17 July 2020, n 77, Conversione in legge, con modificazioni, del decreto-legge 19 maggio 2020, n. 34, recante misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da COVID-19 (Conversion into law, with amendments, of Decree-Law 19 May 2020, n 34, containing urgent measures on health, support to work and economy, and on social policies in relation to the COVID-19 epidemiological emergency), Gazz. Uff. n 180 of 18 July 2020 – S.O. n 25]. For sake of completeness, art 88-bis D-L 18/2020 was further amended by art 30 para 4-bis D-L 41/2021 [Decreto-Legge 22 March 2021, n 41, Misure urgenti in materia di sostegno alle imprese e agli operatori economici, di lavoro, salute e servizi territoriali, connesse all'emergenza da COVID-19 (Urgent measures in matters of support to companies and economic operators, of work, health and territorial services, connected with the COVID-19 emergency), Gazz. Uff. n 70 of 22 March 2021], converted into law, with amendments by L 69/2021 [Legge 21 Maggio 2021, n 69, Conversione in legge, con modificazioni, del decreto-legge 22 marzo 2021, n. 41, recante misure urgenti in materia di sostegno alle imprese e agli operatori economici, di lavoro, salute e servizi territoriali, connesse all'emergenza da COVID-19 (Conversion into law, with amendments of decree-law 22 March 2021, n 41, on urgent measures in matters of support to companies and economic operators, of work, health and territorial services, connected with the COVID-19 emergency), Gazz. Uff. n 120 of 21 May 2021 – S.O.]. On art 88-bis D-L 18/2020, see, above all, Renato Santagata, 'Crisi sistemica da emergenza sanitaria ed effetti sui contratti turistici e di trasporto' (2020) *Le nuove leggi civili commentate*, 85–105; see also Marco Badagliacca, 'Impedimenti alla partenza nel trasporto aereo di persone e COVID-19' (2020) *Rivista italiana di diritto del turismo* (Special issue), 260–284, 278–284; Luca Guerrini, 'Coronavirus, legislazione emergenziale, e contratto: una fotografia' in Giuseppe Conte, Fabrizio Di Marzio (directors), *Giustiziacivile.com, Emergenza COVID-19, Speciale n. 3* (Giuffrè 2020, Milano, 345–358) <[https://giustiziacivile.com/system/files/allegati/speciale\\_covid19\\_-\\_n.\\_3.pdf](https://giustiziacivile.com/system/files/allegati/speciale_covid19_-_n._3.pdf)> accessed 23 November 2021, 350–352; Alessandro Pepe, 'L'emergenza sanitaria da Coronavirus tra impossibilità sopravvenuta e impossibilità di utilizzazione della prestazione nei contratti di trasporto, di viaggio e del tempo libero (artt. 88 e 88 bis, D.L. 17 marzo 2020, n. 18, conv. con mod. dalla L 24 aprile 2020, n. 27)' (2020) *Le nuove leggi civili commentate*, 596–629; Fabrizio Piraino, 'La normativa emergenziale in materia di obbligazioni e di contratti' (2020) *I Contratti*, 508–513; Monica Pucci, 'Pacchetti turistici e diritti dei viaggiatori nell'ordinamento giuridico italiano ai tempi del Coronavirus' (2020) <<https://idibe.org/tribuna/pacchetti-turistici-e-diritti-dei-viaggiatori-nellordinamento-giuridico-italiano-ai-tempi-del-coronavirus/>> accessed 23 November 2021; Francesco Rossi dal Pozzo, 'Trasporti e turismo in epoca di emergenza sanitaria Covid-19. Il caso dei vouchers in alternativa ai rimborsi in denaro di titoli di viaggio, di soggiorno e di pacchetti turistici' in Eurojus, *L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive*, Numero speciale, (2020) 52–62 <[http://www.eurojus.it/pdf/-emergenza-sanitaria-Covid-19-e-il%20diritto-dell-Unione-europea-la%20crisi-la-cura-le-prospettive\\_2.pdf](http://www.eurojus.it/pdf/-emergenza-sanitaria-Covid-19-e-il%20diritto-dell-Unione-europea-la%20crisi-la-cura-le-prospettive_2.pdf)> accessed 23 November 2021; Renato Santagata, 'Gli effetti dell'emergenza sanitaria sui contratti turistici e di trasporto' in Gianmaria Palmieri (ed), *Oltre la pandemia* (Vol. I, Editoriale Scientifica 2020, Napoli, 309–326); Emanuele Tuccari, 'Sopravvenienze e rimedi al tempo del COVID-19' (2020) *Jus Civile*, 465–514 <[http://www.juscivile.it/contributi/2020/2\\_2020/08\\_Tuccari.pdf](http://www.juscivile.it/contributi/2020/2_2020/08_Tuccari.pdf)> accessed 23 November 2021, 490–491, n 71–73; Valeria Villanova, 'I viaggi e gli spostamenti al tempo del Covid-19: qualche riflessione sullo scioglimento del contratto e sulla tutela di passeggeri e viaggiatori' in Emanuele Lucchini

with the Voucher Recommendation.<sup>23</sup> This notwithstanding, the applicable version of art 88-bis D-L 18/2020 still conflicts with EU law, considering that the first sentence of para 12 of that article<sup>24</sup> envisages cases of mandatory vouchers.<sup>25</sup> Indeed these cases are residual: according to art 88-bis para 12 first sentence D-L 18/2020, mandatory vouchers can be issued by carriers and organisers with reference to contracts terminated by 31 July 2020.

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Guastalla (ed), *Emergenza Covid-19 e questioni di diritto civile* (Giappichelli 2020, Torino, 71–89); Salvo Leuzzi, ‘Contratti di trasporto marittimo e forza maggiore al tempo del COVID-19’ (2021) *Il Caso.it*, II, 1370 (citation proposed on the homepage) <<https://blog.ilcaso.it/libreriaFile/1370.pdf>> accessed 23 November 2021, 30ff.

<sup>23</sup> The tormented legislative history of art 88-bis D-L 18/2020 was summarised by the GdP Palermo as follows: ‘[I]n the event of cancellation of [travel or accommodation] due to [...] the sanitary emergency, [L 27/2020] has authorised the reimbursement of the sums paid [...] by means of vouchers. [L 27/2020] then clarified in [art 88-bis D-L 18/2020] that “the issue of vouchers [...] releases the issuer from the related reimbursement obligation and does not require any form of acceptance by the addressee” (para 12). Finally, it also expressly provided for the overriding mandatory character of the provision (para 13). Following the entry into force of [L 27/2020], the EU Commissioners sent a letter of complaint, asking for the law to be amended and allow travellers to choose between full reimbursement and [...] a voucher, threatening to open [...] an infringement procedure. The [Italian] Competition Authority also intervened on the issue [...]. [L 77/2020], converting [D-L 34/2020], was thus published. During approval, the Parliament also amended [art 88-bis D-L 18/2020]. The decision to amend the [...] [provision] stemmed from the infringement procedure opened by the European Commission against Italy [see Commission, July infringements package: key decisions, Press corner (2020), <[https://ec.europa.eu/commission/presscorner/detail/en/inf\\_20\\_1212](https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1212)> accessed 23 November 2021]. The provisions in question in fact derogate (to the detriment of the consumer, according to the Commission) from those established in the relevant Community Regulations and Directives. Consequently, [...] to avoid the continuation of the infringement procedure, the Parliament decided to amend the provisions in a more favourable way for consumers [...]. This resulted in [L 77/2020] which, as already mentioned, has introduced some amendments to [art 88-bis D-L 18/2020] [...] [An] important innovation is the possibility of issuing vouchers without acceptance by the addressee only in the event of withdrawal exercised by 31 July 2020. On this point, it should be said that [art 88-bis D-L 18/2020] provided that the issue of the voucher did not require any form of acceptance by the addressee. This provision was confirmed but limited (by the “new” para 12) only to the case of withdrawal (by the traveller, the travel organiser or the carrier) exercised by 31 July 2020’ (Author’s translation). Giudice di pace di Palermo, judgment of 23 October 2020, n 1999 (n 2); see also Giudice di Pace di Campobasso, judgment of 29 June 2021, n 261 (n 2).

<sup>24</sup> Art 88-bis paras 12, 12-bis D-L 18/2020 read: ‘12. The issuance of vouchers following withdrawal by 31 July 2020 does not require any form of acceptance by the addressee. The voucher may be issued and also used for services provided by another organiser belonging to the same corporate group. It may be used also for the use of services beyond the term of expiry, insofar as the respective bookings are made within the term provided for in the first sentence. 12-bis. The period of validity of the 24 months-vouchers provided for by this article shall also apply to the vouchers already issued at the date of entry into force of this provision. In any event, once 24 months have elapsed since their issuance, vouchers that are neither used nor used to book the services referred to in this art shall be reimbursed, within 14 days from their expiry, for the amount paid. Limited to vouchers issued, in implementation of this article, in relation to air, rail, sea, inland waterway or land transport contracts, the reimbursement referred to in the second sentence may be requested after 12 months from issuance and shall be paid within 14 days from the request’ (Author’s translation).

<sup>25</sup> See Santagata, ‘Crisi sistemica da emergenza sanitaria ed effetti sui contratti turistici e di trasporto’ (n 22) 97–98; see also Villanova (n 22) 87–88.

That said, in what appears to be an attempt to make art 88-*bis* para 12 first sentence D-L 18/2020 prevail over EU law,<sup>26</sup> the Italian legislature even qualified the provisions of that article as overriding mandatory provisions within the meaning of art 17 L 218/1995,<sup>27</sup> 9 para 1 Rome I Regulation.<sup>28,29</sup>

<sup>26</sup> Compare with Tuccari (n 22) 495.

<sup>27</sup> Art 17 L 218/1995 [Legge 31 May 1995, n 218, Riforma del Sistema italiano di diritto internazionale privato (Reform of the Italian System of private international law), Gazz. Uff. n 128 of 3 June 1995 – S.O. n 68] is the Italian autonomous provision on overriding mandatory provisions. The article in question is headed 'Norms of necessary application' and reads: 'Italian norms which, considering their object and purpose, must be applied notwithstanding the reference to foreign law, prevail over the following provisions' (Author's translation). On art 17 L 218/1995, see, among others, Giorgio Conetti, Sara Tonolo, Fabrizio Vismara, *Manuale di diritto internazionale privato* (4th edn, Giappichelli 2020, Torino) 63ff; Franco Mosconi, Cristina Campiglio, *Diritto internazionale privato e processuale* (Vol. I, 9th edn, UTET 2020, Milano) 307ff; Marco Torsello (ed), 'Legge di riforma del Sistema italiano di diritto internazionale privato' in Massimo Franzosi, Rita Riotti (eds), *Codice civile commentato con dottrina e giurisprudenza* (1st edn, Giappichelli 2018, Torino) 27ff; Giorgio Conetti, Sara Tonolo, Fabrizio Vismara, *Commento alla riforma del diritto internazionale privato italiano* (2nd edn, Giappichelli 2009, Torino) 53ff; Nerina Boschiero, 'Art. 17' in Stefania Bariatti (ed), *Legge 31 maggio 199, n. 218, Riforma del Sistema italiano di diritto internazionale privato* (Le nuove leggi civili commentate, CEDAM 2006, Padova) 1062ff; see also Tamás Szabados, 'Overriding Mandatory Provisions in the Autonomous Private International Law of the EU Member States – General Report' (2021) 1 ELTE LJ, 9–35.

<sup>28</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (Rome I Regulation).

<sup>29</sup> See art 88-*bis* para 13 L 27/2020, 28 para 8 D-L 9/2020; Zeno Crespi Reghizzi, 'Effetti sui contratti delle misure normative di contenimento dell'epidemia di COVID-19: profili di diritto internazionale privato' (2020) *Diritto del commercio internazionale* 923–939, 936ff; Pedro Alberto de Miguel Asensio, 'Medidas de emergencia y contratos internacionales' (2020) 81 *La Ley Unión Europea*, 1–14, 11–12; Gössli (n 21) 36–37; Fabrizio Marongiu Buonaiuti, 'Le disposizioni adottate per fronteggiare l'emergenza coronavirus come norme di applicazione necessaria', in Ermanno Calzolaio, Massimo Meccarelli, Stefano Pollastrelli (eds), *Il diritto nella pandemia* (eum 2020, Macerata) 235–256; Dieter Martiny, 'Rom I-VO Art. 9', in Jan v. Hein (director), *MüKoBGB* [Band 13, 8th edn, CH Beck Franz Jürgen Sacker, Roland Rixecker, Hartmut Oetker, Bettina Limperg (eds), *MüKoBGB*, vol 13, 8. Aufl. 2021, München] para 58c; Mosconi, Campiglio (n 27), 308; Ennio Piovesani, 'Italian Self-Proclaimed Overriding Mandatory Provisions to Fight Coronavirus' (2020) <<https://conflictflaws.net/2020/italian-self-proclaimed-overriding-mandatory-provisions-to-fight-coronavirus/>> accessed 23 November 2021; Ennio Piovesani, 'Overriding Mandatory Provisions in the Context of the COVID-19 Pandemic', in *Il Caso.it*, II, 1013 (citation proposed on the homepage) <[https://blog.ilcaso.it/news\\_1013/18-11-20/Overriding\\_mandatory\\_provisions\\_in\\_the\\_context\\_of\\_the\\_COVID-19\\_pandemic](https://blog.ilcaso.it/news_1013/18-11-20/Overriding_mandatory_provisions_in_the_context_of_the_COVID-19_pandemic)> accessed 23 November 2021; Francesco Rossi dal Pozzo (n 22) 60ff; Santagata, 'Gli effetti dell'emergenza sanitaria sui contratti turistici e di trasporto' (n 22) 219; Tuccari (n 22) 498 n 82; Giovanni Zarra, 'Alla riscoperta delle norme di applicazione necessaria brevi note sull'art. 28 co. 8 del DL 9/2020 in tema di emergenza COVID-19' (2020) <<http://www.sidiblog.org/2020/03/30/alla-riscoperta-delle-norme-di-applicazione-necessaria-brevi-note-sullart-28-co-8-del-dl-92020-in-tema-di-emergenza-covid-19/>> accessed 23 November 2021; Pietro Franzina, *Introduzione al diritto internazionale privato* (1st edn, Giappichelli 2021, Torino) 188–189; Ennio Piovesani, 'Ex Lege Qualified Overriding Mandatory Provisions as a Response to the "COVID-19 Epidemiological Emergency"' (2021) *Praxis des Internationalen Privat- und Verkehrsrechts*, 401ff; Elena Rodríguez Pineau, 'Leyes de policía: el impacto de la pandemia en el derecho internacional privado' in Beatriz Gregoraci Frenandez, Francisco Velasco Caballero (eds), *Derecho y política ante la pandemia: reacciones y transformaciones* (Tomo II, UAM – BOE 2021, Madrid, 253–270) 259ff; Santagata, 'Crisi sistemica da emergenza sanitaria ed effetti sui contratti turistici e di trasporto' (n 22) 97ff.

### c) Conflict with EU law

To the extent that it provides for mandatory vouchers, art 88-*bis* para 12 first sentence D-L 18/2020 conflicts with EU law, namely with art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation, art 12 para 2 Package Travel Directive and the Voucher Recommendation. It is submitted that the conflict in question cannot be settled through consistent interpretation.<sup>30</sup> That said, the Air Passenger Rights Regulation (as well as the other Regulations protecting passenger rights)<sup>31</sup> can be enforced horizontally in claims between private parties.<sup>32</sup> As such, Italian courts must set aside art 88-*bis* para 12 first sentence D-L 18/2020 in favour of art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation.<sup>33</sup> On the contrary, the Package Travel Directive lacks direct horizontal effects.<sup>34</sup> Accordingly, Italian courts are not conferred with the power to set aside art 88-*bis* para 12 first sentence D-L 18/2020 in favour of art 12 para 2 Package Travel Directive.<sup>35</sup> Instead, in the latter case, Italian courts have the power and the duty to refer a question on the constitutional legitimacy of art 88-*bis* para 12 first sentence D-L 18/2020 to the Italian Constitutional Court. The Constitutional Court could thus ascertain the conflict between art 88-*bis* para 12 first sentence D-L 18/2020 and art 12 para 2 Package Travel Directive, declare that the Italian provision is contrary to the Constitution and consequently abrogated.<sup>36</sup> In any case, in the event of doubt as to the compatibility of art 88-*bis* para 12 first sentence D-L 18/2020 with EU law, Italian courts may – or even must, if the latter are courts of last resort – seek guidance from the ECJ, by submitting a preliminary

<sup>30</sup> Compare with Rossi dal Pozzo (n 22) 60; but see, with reference to the Package Travel Directive, Pepe (n 22) 620.

<sup>31</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) – Commission Statement [2004] OJ L46/1; Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [2007] OJ L315/14; Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 Text with EEA relevance [2010] OJ L 334/1; Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 Text with EEA relevance [2011] OJ L55/1.

<sup>32</sup> Compare with C-509/11 *ÖBB-Personenverkehr AG*, Opinion of AG Jääskinen, ECLI:EU:C:2013:167, para 65.

<sup>33</sup> See Rossi dal Pozzo (n 22) 60; Pepe (n 22) 616.

<sup>34</sup> Instead, the Package Travel Directive may unfold direct vertical effects. Compare with joined cases C-178/94, C-179/94, C-189/94 and C-190/94 *Dillenkofer et al. v Bundesrepublik Deutschland*, ECLI:EU:C:1996:375, para 42.

<sup>35</sup> See Corte costituzionale [(Italian) Constitutional Court], judgment of 24 June 2010, n 227, *Giurisprudenza italiana* 2011, 531; compare with Liesbet Van Acker, Hannes Claes 'Covid-19 and Consumer Law – The Belgian Response' (2021) *Journal of European Consumer and Market Law* 215–218, 216.

<sup>36</sup> Compare with Corte costituzionale, judgment of 22 February 2012, n 75, *Foro italiano* 2013, 3397.

reference under art 267 TFEU.<sup>37</sup> The findings reached above should not be affected by the legislative qualification of the provisions contained in art 88-*bis* D-L 18/2020 as overriding mandatory.<sup>38</sup>

### III Case Law

German and Italian courts have rendered several decisions on the application of the rules of positive law examined above. In particular, those decisions concern the cancellation of flights by carriers and the withdrawal from package travel due to the COVID-19 pandemic, as well as vouchers issued following the termination of the related contracts (see below respectively III 1, 2, 3).

<sup>37</sup> See Pucci (n 22); Santagata, 'Gli effetti del Coronavirus sui contratti turistici. Primi appunti' (n 21) 231; Santagata, 'Gli effetti dell'emergenza sanitaria sui contratti turistici e di trasporto' (n 22) 319–320; Santagata, 'Crisi sistemica da emergenza sanitaria ed effetti sui contratti turistici e di trasporto' (n 22) 97–98.

<sup>38</sup> The fact that domestic provisions qualify as overriding mandatory provisions under art 17 L 218/1995, 9 para 1 Rome I Regulation does not exclude that the same provisions must be compatible with EU law; if this were not the case, the principles of primacy and of uniform application of EU law would be undermined [compare with Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, para 46]. In particular, as concerns compatibility with secondary EU law, it is submitted that domestic overriding mandatory provisions cannot be applied if they derogate from or adversely affect Regulations (e.g. the Air Passenger Rights Regulation), the latter being directly applicable instruments of EU law [see Ulrich Magnus, in Julius von Staudinger, *Internationales Vertragsrecht 1* (De Gruyter 2016, Berlin), Art 9 Rom I-VO para 35]. Instead, in the case of Directives, a distinction should be drawn depending on whether the latter establish minimum or full harmonisation (see Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, Opinion of AG Wahl, ECLI:EU:C:2013:301, para 41). Domestic overriding mandatory provisions can be applied where Directives establish minimum harmonisation, insofar as the former strengthen the level of protection granted by the latter [see Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, para 46; Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, Opinion of AG Wahl, ECLI:EU:C:2013:301, para 41]. Instead, it is argued that domestic overriding mandatory provisions should not be applied in areas governed by full harmonisation Directives [see Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, Opinion of AG Wahl, ECLI:EU:C:2013:301, para 42; see also Jan D. Lüttringhaus, 'Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar' (2014) *Praxis des Internationalen Privat- und Verfahrensrechts*, 146–152, 150 and n 62 therein, citing Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner, 'Europäisches Kollisionsrecht 2013: Atempause im status quo' (2014) *Praxis des Internationalen Privat- und Verfahrensrechts*, 1–27, 25], such as the Package Travel Directive. In fact, in the case of maximum harmonisation Directives, the Member States cannot deviate from, not even strengthen, the level of protection set by the EU. Indeed, in the areas covered by said Directives it is no longer for the Member States, but exclusively for the EU, the task of determining how and which interests should be safeguarded [compare with Case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, Opinion of AG Wahl, ECLI:EU:C:2013:301, para 42]. Arguably, in those areas, the Member States are not entitled to unilaterally determine which public interests must be safeguarded within the meaning of art 9 para 1 Rome I Regulation, [Lüttringhaus (n 38) 150 n 63] and thus should not be allowed to maintain or establish domestic overriding mandatory provisions in the same areas.

## 1 Flight Cancellation by the Carrier

The decisions on the cancellation of flights by carriers concern, more specifically, the right to reimbursement and to compensation under the Air Passenger Rights Regulation (see below respectively III 1 a, b).

### a) Right to reimbursement

In a case concerning the cancellation of a flight (likely) due to the COVID-19,<sup>39</sup> the AG Nürtingen<sup>40</sup> held that the passenger has the right to reimbursement under art 5 para 1 lit a), 8 para 1, lit a) Air Passenger Rights Regulation and to interest for late payment.<sup>41</sup> Similar conclusions were drawn in a decision by the GdP Rovereto,<sup>42</sup> where, however, the Air Passenger Rights Regulation was not expressly referred to. The GdP further concluded that, in the case of late payment of the reimbursement after several requests and the commencement of legal proceedings by the passenger, the carrier must pay compensation for delay and reimburse legal costs (including out-of-court costs).<sup>43</sup> However, the Italian court added that compensation must be limited where cancellation is due to exceptional circumstances such as the COVID-19 pandemic.<sup>44</sup> On the other hand, rather than applying the Air Passenger Rights Regulation, the GdP Foligno<sup>45</sup> applied art 28 D-L 9/2020 (today art 88-*bis* D-L 18/2020) and held that the subtraction of travel days which result from the cancellation (and subsequent postponement) of a flight due to the COVID-19 pandemic may objectively frustrate or seriously undermine the purpose of the trip, giving rise to the passenger's right to reimbursement pursuant to the combined reading of art 28 D-L 9/2020 and art 1463 C.c.<sup>46</sup>

### b) Right to compensation

The AG Köln held that generic reference to the pandemic is not sufficient to establish a causal link between the cancellation and the extraordinary circumstances referred to in

<sup>39</sup> The cancelled flight was flight EW2784 of 6 April 2020, from Stuttgart to Budapest.

<sup>40</sup> See Amtsgericht Nürtingen, judgment of 24 June 2020 – 10 C 1810/20 (n 2).

<sup>41</sup> See Amtsgericht Nürtingen, judgment of 24 June 2020 – 10 C 1810/20 (n 2).

<sup>42</sup> See Giudice di pace di Rovereto, judgment of 29 October 2020, n 46 (n 2).

<sup>43</sup> See Giudice di pace di Rovereto, judgment of 29 October 2020, n 46 (n 2).

<sup>44</sup> See Giudice di pace di Rovereto, judgment of 15 October 2020, n 46 (n 2).

<sup>45</sup> See Giudice di pace di Foligno, judgment of 12 October 2020, n 97 (n 2).

<sup>46</sup> Regio Decreto (Royal Decree) 16 March 1942, n 262, Approvazione del Codice civile (Approval of the Civil code), Gazz. Uff. n 79 of 4 April 1942 (C.c.). Art 1463 C.c., headed 'Total impossibility', reads: 'In contracts for consideration, the party released due to the supervening impossibility of the performance owed cannot ask for the counter-performance, and must return that which it has already received, according to the rules relating to the recovery of undue payment' (Author's translation).

art 5 para 3 Air Passenger Rights Regulation, and therefore to exempt the carrier from the obligation to pay compensation under art 7 of that Regulation. In particular, the AG cited the ECJ and confirmed that:

The carrier must establish that, even if it had deployed all its resources in terms of staff and the financial means at his disposal, it would clearly not have been able, unless it had made intolerable sacrifices in the light of its undertaking at the relevant time, to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight or its delay equal to or in excess of three hours in arrival.<sup>47</sup>

In that case, the German court held that the existence of the causal link mentioned had not been proved by the carrier and the latter was thus ordered to pay compensation.<sup>48</sup> Similar findings were reached in a case brought before the AG Frankfurt.<sup>49</sup>

## 2 Withdrawal before the Beginning of the Package

German courts have rendered several decisions on the impact of the COVID-19 pandemic on package travel contracts.<sup>50</sup> Instead, at the time of writing, there are few known Italian decisions on the point.<sup>51</sup>

<sup>47</sup> Case C-315/15 *Marcela Pešková and Jiří Peška v Travel Service a.s.*, ECLI:EU:C:2017:342, ECLI:EU:C:2017:342, paras 29, 34.

<sup>48</sup> The court's decision was later upheld by the Oberlandesgerichtshof Köln [6th Civil Chamber, judgment of 26 February 2021 – 6 U 127/20 (n 2)].

<sup>49</sup> See Amtsgericht Frankfurt a. M., judgment of 12 March 2021 – 29 C 3204/20 (n 2) para 13.

<sup>50</sup> For a summary of German court decisions on the impact of the COVID-19 pandemic on package travel contracts, see Stefanie Bergmann, 'Rechtsprechungsübersicht zum Pauschalreiserecht 2019 bis 2020' (2020) *Verbraucher und Recht*, 443–448, 446–447.

<sup>51</sup> The first known Italian decision on the impact of the COVID-19 pandemic on package travel is a judgment rendered by the Tribunale di Torino [judgment of 29 December 2020, n 4786 (n 2)]. In the case underlying that judgment, two travellers had concluded by phone a package travel scheduled for 16 August 2020. On 16 March 2020, due to the worsening COVID-19 epidemiological emergency, the travellers withdrew from the package. Thereafter, the travellers sued the organiser before the Tribunale, seeking reimbursement of the advance payment they had made. Considering that the contract had been concluded off-premises and that withdrawal had been made after only 3 days from the contract's conclusion, the Italian court upheld the travellers' claim under art 41 para 7 Cod. tur. (compare with art 12 para 5 Package Travel Directive). The second known decision is an ex parte decree rendered by the Tribunale di Trento [decreto ingiuntivo of 13 August 2020, n 711 (n 2)] and kindly reported by Avv. Andrea Antolini of the Trento Bar to whom I am grateful. In the case underlying that decree, according to the claimants, the latter had concluded (in the name and behalf of their daughter) a package travel contract with destination the United States and scheduled departure on 1 July 2020. On 13 August 2020, the organiser withdrew from the package and issued a voucher. Thereafter, the claimants asked the Tribunale to issue an ex parte decree ordering the organiser to reimburse the price. The claimants relied on EU law and also on an exception to the issuance of mandatory vouchers envisaged in the same art 88-bis D-L 18/2020, namely in para 8 thereof. The Italian court ultimately issued the requested ex parte decree [on art 88-bis para 8 D-L 18/2020, see also Tribunale di Benevento, judgment of 5 August 2021 (n 2)]. The third

a) Conditions: ‘unavoidable and extraordinary circumstances’

German courts held that the COVID-19 pandemic may qualify as an ‘unavoidable and extraordinary’ circumstance within the meaning of sec 651h paras 3, 4 n 2 BGB,<sup>52</sup> and may thus justify withdrawal (by the traveller or by the organiser) before the beginning of the package travel,<sup>53</sup> insofar as the following ‘space-time’ conditions be fulfilled: 1) at the time of conclusion of the package travel, the spread of the pandemic in the place of destination or in its immediate vicinity must not have been foreseeable;<sup>54</sup> 2) at the time of withdrawal, that spread must have been foreseeable.<sup>55</sup> With respect to the latter condition, the lack of travel notices does not exclude that the spread of the COVID-pandemic in the relevant areas was foreseeable.<sup>56</sup> Rather, foreseeability of the spread at the time of withdrawal may be assessed

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decision is an order rendered by the Tribunale di Verona [order of 19 January 2021 (n 2)]. In the case underlying that order, the package travel concerned a trip to Bhutan scheduled for April 2020. The package travel was terminated before the beginning, due to the COVID-19 pandemic. The travellers asked price reimbursement, but the travel agency (on 3 March 2020) only issued a voucher. The travellers thus claimed reimbursement under art 41 Cod. tur. before the Tribunale. The travel agency challenged that claim, arguing that it had issued an art 88-*bis* D-L 18/2020-mandatory voucher. The Italian court ultimately dismissed the travellers’ claim, stating that the choice between reimbursement and the issuance of a voucher ‘both under D-L 9/2020 and under the following D-L 18/2020 converted into L 27/2020 is up to the organiser, without the need of acceptance by the addressee. [Art 88-*bis* para 13 D-L 18/2020] provides that the [...] provisions [of that article] are overriding mandatory provisions and thus [...] derogate from community legislation and international law. [...] The issuance of the voucher in place of the reimbursement [...] must thus be deemed correct’ (Author’s translation). Finally, it is worth mentioning a fourth decision, even though the latter does not concern the COVID-19 pandemic: a judgment rendered by the Giudice di pace di Avellino (judgment of 7 January 2021, filed on 15 January 2021, n 124, RG n 2713/2020). The case underlying the decision by the GdP concerned a package travel contract concluded on January 2020, with scheduled departure to Amsterdam on 29 February 2020. In that case, the travellers were both diagnosed with a flu on 27 February 2020 and thus withdrew from the package. The Italian court thus ordered the organiser to reimburse the travellers under art 1463 C.c. (n 46).

<sup>52</sup> Compare with art 12 para 2, 3 lit b) Package Travel Directive.

<sup>53</sup> See Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2) para 15; Landgericht Rostock, judgment of 21 August 2020 – 1 O 211/20 (n 2) paras 10, 11; Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2) para 17; Amtsgericht München, final judgment of 8 December 2020 – 283 C 4769/20 (n 2) para 10.

<sup>54</sup> See Amtsgericht Augsburg, final judgment of 9 November 2004 –14 C 4608/03 (n 2) para 16; see also Oberlandesgerichtshof, decision of 14 June 2005 – 4 Ob 103/05h (n 2).

<sup>55</sup> See Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2); Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (18) (n 2); Amtsgericht Köln, judgment of 14 September 2020 – 133 C 213/20 (n 2) para 13; Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2) para 19; Amtsgericht Duisburg, judgment of 1 December 2020 – 53 C 1811/20 (n 2) para 17; Amtsgericht Duisburg, judgment of 7 December 2020 – 51 C 1394/20 (n 2) para 17; Amtsgericht Duisburg, judgment of 14 December 2020 – 506 C 2377/20 (n 2); Amtsgericht Hannover, judgment of 9 April 2021 – 502 C 12946/20 (n 2) paras 13, 14; see also Amtsgericht Augsburg, final judgment of 9 November 2004 –14 C 4608/03 (n 2) para 17.

<sup>56</sup> See Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2) para 23; Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2) paras 4ff; Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (18) (n 2); Amtsgericht Wiesbaden, judgment of 9 September 2020 – 92 C 1682/20 (n 2) para 9; Amtsgericht Köln, judgment of 14 September 2020 – 133 C 213/20 (n 2) paras 17, 18; Amtsgericht Duisburg,

by taking journal articles, communications by the WHO and travel notices by German or foreign authorities into account.<sup>57</sup>

In all the cases settled by the known German decisions, the COVID-19 pandemic qualified as an extraordinary and unavoidable circumstance within the meaning of sec 651h BGB.<sup>58</sup> There is only one known exception: a decision rendered by the AG München,<sup>59</sup> where the court held that, at the time of the traveller's withdrawal on 1 April 2020<sup>60</sup> from a cruise package planned to begin on 28 June 2020 and with scheduled stops in Stockholm, Tallin, St. Petersburg and Copenhagen,<sup>61</sup> the spread of the pandemic in those areas was not foreseeable. In particular, the AG's decision reads:

The plaintiff withdrew from the trip nearly 3 months before the start of the trip. On 1 April 2020 there was a worldwide travel warning. However, this was initially limited until the end of April 2020. The entry restrictions from Denmark were also initially limited to 13 April 2020 [...]. The same applies to the entry restrictions for Russia, which were initially valid until 1 May 2020. Thus, at the time of the withdrawal, there was no travel warning for the travel period from 28 June 2020 to 5 July 2020 [...]. Europe was still at the start of the pandemic at the beginning of April 2020 [...]. Therefore, in the opinion of this court, it was in no way foreseeable at that time [that is to say, that of withdrawal] how the pandemic would develop further in Europe. However, reports on COVID-19 outbreaks on cruise ships were already available at that time. Nevertheless, in the opinion of this court, it could not have been ruled out at the beginning of April 2020 that the cruise could have been carried out three months later with hygiene measures and testing of passengers [...]. Taking these aspects into account, this court assumes that, when viewed *ex ante*, on 1 April 2020 it could not be assumed with the necessary certainty that circumstances would arise during the travel period that would significantly impair the trip. Finally, it is also

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judgment of 1 December 2020 – 53 C 1811/20 (n 2) para 18; Amtsgericht Duisburg, judgment of 7 December 2020 – 51 C 1394/20 (n 2) para 18; Amtsgericht München, final judgment of 8 December 2020 – 283 C 4769/20 (n 2) para 11; Amtsgericht Duisburg, judgment of 14 December 2020 – 506 C 2377/20 (n 2) para 6.

<sup>57</sup> Compare with Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (18) (n 2). Information on the spread may even constitute common knowledge with the court under sec 291 ZPO {Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005 [BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781], die zuletzt durch Artikel 3 des Gesetzes vom 5. Oktober 2021 [BGBl. I S. 4607] geändert worden ist [Code of Civil Procedure as promulgated on 5 December 2005 (Federal Law Gazette I p 3202; 2006 I p 431; 2007 I p 1781), last amended by art 1 Law of 10 October 2013 (Federal Law Gazette I p 3786)]} and thus need not to be substantiated by evidence. See Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2) paras 17–18; Amtsgericht München, final judgment of 8 December 2020 – 283 C 4769/20 (n 2) para 13; Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (18) (n 2).

<sup>58</sup> This notwithstanding, according to the AG Hannover: 'A large number of actions are pending before the courts concerning the question of whether the requirements of sec 651h para 3 BGB are met in the event of a withdrawal in connection with the pandemic. The case law is inconsistent' (Author's translation). See Amtsgericht Hannover, judgment of 9 April 2021 – 502 C 12946/20 (n 2) para 21.

<sup>59</sup> See Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2).

<sup>60</sup> See Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2) para 4.

<sup>61</sup> See Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2) para 2.

not apparent why the plaintiff withdrew from the contract on its own initiative and did not wait for the situation to develop [...].<sup>62</sup>

### b) Withdrawal by the traveller

German courts specified that, in the case of withdrawal by the traveller due to the COVID-19 pandemic pursuant to sec 651h paras 1, 3 BGB,<sup>63</sup> the same traveller has the right to reimbursement of the price,<sup>64</sup> whereas the organiser does not have the right to a lump sum pursuant to sec 651 para 2 BGB (that is to say, termination fees).<sup>65,66</sup>

### c) Withdrawal by the organiser

German courts also specified that, in the case of withdrawal by the organiser due to the COVID-19 pandemic pursuant to sec 651h para 4 n 2 BGB,<sup>67</sup> the traveller has the right to reimbursement of the price but not to compensation pursuant to sec 651n para 2 BGB (that is to say, compensation for damages for a ruined holiday).<sup>68</sup> In particular, the AG Frankfurt held that the period of 14 days for reimbursement under sec 651h para 5 BGB,<sup>69</sup> which starts from the date of withdrawal, also applies in the event of withdrawal by the organiser.<sup>70</sup> The AG also held that, where the organiser does not fulfil the reimbursement obligation in a timely manner, the traveller has the right to compensation for the damage caused by the delay,<sup>71</sup> as well as the right to reimbursement of the out-of-court costs for requesting that reimbursement.<sup>72</sup> Furthermore, the German court held that the delay in making the reimbursement cannot be justified by the difficulty in obtaining liquidity (in view of the large number of reimbursement requests received), nor by organisational difficulties.<sup>73</sup>

<sup>62</sup> See Amtsgericht München, final judgment of 27 October 2020 – 159 C 13380/20 (n 2) paras 24–29 (Author's translation).

<sup>63</sup> Compare with art 12 paras 1, 2 Package Travel Directive.

<sup>64</sup> See Amtsgericht Frankfurt a. M., judgment of 11 August 2020 – 32 C 2136/20 (n 2); Landgericht Rostock, judgment of 21 August 2020 – 1 O 211/20 (n 2); Amtsgericht Köln, judgment of 14 September 2020 – 133 C 213/20 (n 2).

<sup>65</sup> Compare with art 12 para 1 Package Travel Directive.

<sup>66</sup> See Landgericht Rostock, judgment of 21 August 2020 – 1 O 211/20 (n 2).

<sup>67</sup> Compare with art 12 para 3 lit b) Package Travel Directive.

<sup>68</sup> See Amtsgericht Rostock, judgment of 15 July 2020 – 47 C 59/20 (n 2); Amtsgericht Wiesebad, judgment of 9 September 2020 – 92 C 1682/20 (n 2).

<sup>69</sup> Compare with art 12 para 5 Package Travel Directive.

<sup>70</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 13.

<sup>71</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 15.

<sup>72</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 16.

<sup>73</sup> See Amtsgericht Frankfurt a. M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 15.

### 3 Vouchers

Attempts by carriers and organisers to impose mandatory vouchers on passengers and travellers are at the heart of the German and Italian decisions summarised below.

#### a) German case law

As mentioned above (II 2 a), the AG Frankfurt a. M. correctly noted that ‘mandatory vouchers’ were ruled out by the EU.<sup>74</sup> Accordingly, the AG held that, pursuant to the Voucher Recommendation and art 240 para 6 EGBGB, the organiser cannot limit himself to offering a voucher where the latter is refused by the traveller.<sup>75</sup> Similar conclusions were drawn in a reported decision by the AG Berlin-Wedding, in a case concerning the cancellation of a flight by a Portuguese carrier.<sup>76</sup> In that case, the carrier had issued a voucher and had withheld (cash) reimbursement relying on Portuguese law, which (apparently) envisaged mandatory vouchers in cases of cancellation of flights due to the COVID-19 pandemic.<sup>77</sup>

#### b) Italian case law

Italian courts have taken three conflicting positions on the issue of art 88-*bis* D-L 18/2020-mandatory vouchers: 1) the first position is that taken by the GdP Busto Arsizio and the Tribunale di Verona, whereby art 88-*bis* para 12 first sentence D-L 18/2020 prevails over EU law (see below III 3 b aa); 2) the second position is that taken by the GdP Foligno, Palermo and Rovereto, which simply acknowledged the possibility of issuing mandatory vouchers under the Italian provision (see below III 3 b bb); 3) the third position is that taken by the GdP Bologna, whereby that provision must be set aside in favour of EU law (see below III 3 b cc).

##### ba) First position

In the case brought before the GdP Busto Arsizio, the carrier had cancelled a flight due to the COVID-19 pandemic.<sup>78</sup> In that case, the carrier had offered an art 88-*bis* D-L 18/2020-mandatory voucher, which, however, was not accepted by the Italian passenger.

<sup>74</sup> See Amtsgericht Frankfurt a.M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) para 14.

<sup>75</sup> See Amtsgericht Frankfurt a.M., final judgment of 15 October 2020 – 32 C 2620/20 (n 2) paras 13, 14; see also Landgericht Frankfurt a. M., judgment of 14 January 2021 – 2-24 O 315/20 (n 2) para 26; Oberlandesgerichtshof Schleswig, 17th Civil Chamber, judgment of 26 March 2021 – 17 U 166/20 (n 2) para 72.

<sup>76</sup> See Ernst Führich, ‘TAP muss auszahlen – trotz Gutscheinschutzes’ (2020) <<https://reiserecht.fuehrich.com/2020/07/15/urteil-zu-corona-flugabsagen-tap-muss-auszahlen-trotz-gutscheinschutzes/>> accessed 23 November 2021.

<sup>77</sup> See Führich (n 76).

<sup>78</sup> See Giudice di pace di Busto Arsizio, decreto ingiuntivo of 23 November 2020, n 4456 (n 2). The decision in question was kindly reported by the claimant-passenger himself, Avv. Andrea Ponte from the Turin Bar Association, to whom I am grateful.

The passenger asked the GdP to set aside art 88-*bis* para 2 first sentence D-L 18/2020 and order the carrier to provide (cash) reimbursement under art 7 para 3 Air Passenger Rights Regulation. The Italian court refused to do this, arguing that: ‘[...] the domestic norm [that is to say, art 88-*bis* D-L 18/2020], may well be included among those that prevail over any law under art 9 [Rome I Regulation]’<sup>79</sup>. In a similar vein, in a case concerning a package travel, the Tribunale di Verona<sup>80</sup> held:

[Art 88-*bis* para 13 D-L 18/2020] provides that the [...] provisions [of that article] are overriding mandatory provisions and thus derogate from community legislation and international law. Overriding mandatory provisions are envisaged in art 17 L 218/1995 whereby, Italian norms which, in the light of their object and purpose, must be applied regardless of the reference to foreign law, prevail over private international law rules.<sup>81</sup>

These are extraordinary provisions, adopted in situations of emergency, which prevail over other norms applicable in normal situations. What follows is that the same prevail both over national legislation and foreign laws, since their application is deemed necessary to safeguard the country. ‘The issuance of the voucher in place of the reimbursement of the purchased package [travel] must thus be deemed correct’. The two courts thus erred in concluding that, in the light of the legislative qualification of the provisions contained in art 88-*bis* D-L 18/2020 as overriding mandatory provisions, the former article may prevail over ‘any law’, including art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation and art 41 para 3 Cod. tur. (transposing art 12 para 2 Package Travel Directive). This erroneous conclusion confirms that the autonomous-legislative qualification of overriding mandatory provisions is indeed a ‘controversial’<sup>82</sup> legislative practice, insofar as it ‘might have the practical effect of misleading national courts into considering themselves bound by that qualification’<sup>83</sup> and it might even prejudice a proper reconstruction by those courts of the relationship between national and EU (uniform substantive) law.

### **bb) Second position**

In a case brought before the GdP Foligno,<sup>84</sup> the court acknowledged the possibility of issuing mandatory vouchers under art 28 D-L 9/2020 (today art 88-*bis* D-L 18/2020). However, in that case, the GdP noted that the carrier had failed to appear in court and had not notified its willingness to issue such mandatory vouchers. The, Italian court therefore ordered

<sup>79</sup> Author’s translation.

<sup>80</sup> See Tribunale di Verona, order of 19 January 2021 (n 2); see above n 51.

<sup>81</sup> See above n 27.

<sup>82</sup> See Ennio Piovesani, ‘Italian Self-Proclaimed Overriding Mandatory Provisions to Fight Coronavirus’ (n 29).

<sup>83</sup> See Ennio Piovesani, ‘Ex Lege Qualified Overriding Mandatory Provisions as a Response to the “COVID-19 Empidemiological Emergency”’ (n 29) 401, 405.

<sup>84</sup> See Giudice di pace di Foligno, judgment of 12 October 2020, n 97 (n 2).

the carrier to reimburse the price. In another case brought before the GdP Palermo,<sup>85</sup> the carrier had appeared but had only ‘offered, timidly, the voucher instead of reimbursement’<sup>86</sup> without issuing the offered voucher. The GdP thus ordered the carrier to reimburse the price. In an earlier case, the same GdP Palermo<sup>87</sup> noted that the carrier had issued an art 88-*bis* D-L 18/2020-mandatory voucher. However, in that case, the GdP further noted that, after the commencement of court proceedings by the passenger, the carrier had offered reimbursement. In the light of that offer, the Italian court ordered the carrier to reimburse the price. The same conclusions were reached, in a similar case, by the GdP Rovereto.<sup>88</sup>

### *bc)* Third position

In a case brought before the GdP Bologna,<sup>89</sup> notwithstanding an art 88-*bis* D-L 18/2020-mandatory voucher having been issued, the carrier was ordered to reimburse the price, considering that the latter had not proved that the issued voucher had been accepted by the passenger. Therefore, in so doing, the GdP correctly, yet impliedly, set aside art 88-*bis* para 2 first sentence D-L 18/2020 in order to uphold the passenger’s claim for (cash) reimbursement under art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation.

## **V Summary**

1. Cancellation of flights and withdrawal from package travel are respectively governed by the Air Passenger Rights Regulation and by the Package Travel Directive. As a response to the impact of the COVID-19 pandemic on contracts for the carriage of passengers and package travel, the Commission adopted the Voucher Recommendation. The mentioned Recommendation envisages ‘voluntary’ vouchers offered following the termination of the mentioned contracts due to the COVID-19 pandemic as an alternative to (cash) reimbursements. On the other hand, the Recommendation rules out the possibility of issuing ‘mandatory’ vouchers. Accordingly, the German legislature adopted art 240 para 6 EGBGB on voluntary vouchers offered by organisers in the case of termination of package travel due to the COVID-19 pandemic. On the contrary, the Italian legislature adopted art 88-*bis* D-L 18/2020, which provides for residual cases of mandatory vouchers in para 12 first sentence thereof. Art 88-*bis* para 12 first sentence D-L 18/2020 thus conflicts, in particular, with art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation, art 12 para 2 Package Travel Directive and the Voucher Recommendation. In the case of conflicts between art 88-*bis* para 12 first sentence D-L 18/2020 and the Air Passenger Rights Regulation, Italian

<sup>85</sup> See Giudice di pace di Palermo, judgment of 31 March 2021, n 858 (n 2).

<sup>86</sup> Author’s translation.

<sup>87</sup> See Giudice di pace di Palermo, judgment of 23 October 2020, n 1999 (n 2).

<sup>88</sup> See Giudice di pace di Rovereto, judgment of 29 October 2020, n 46 (n 2).

<sup>89</sup> See Giudice di pace di Bologna, judgment of 18 January 2020, n 70 (n 2).

courts must set aside the Italian provision. Instead, in the case of conflict between the provision in question and the Package Travel Directive, Italian courts must refer a question on the constitutional legitimacy of that provision to the Italian Constitutional Court. The Constitutional Court could thus ascertain the conflict between art 88-*bis* para 12 first sentence D-L 18/2020 and the Package Travel Directive, declare that the Italian provision is contrary to the Constitution and consequently abrogated. In any case, in the event of doubt as to the compatibility of the provision in question with EU law, Italian courts may – or even must, if the latter are courts of last resort – seek guidance from the ECJ, by submitting a preliminary reference under art 267 TFEU.

2. German and Italian courts concluded that, where a flight is cancelled by the carrier due to the COVID-19 pandemic, the passenger has the right to reimbursement under art 5 para 1 lit a), 8 para 1 lit a) Air Passenger Rights Regulation. In truth, in most cases, Italian courts have come to this conclusion without expressly referring to the Air Passenger Regulation. German courts further concluded that the COVID-19 pandemic qualifies as an ‘extraordinary’ circumstance and may thus exempt the carrier from its obligation to pay compensation in the event of cancellation under art 5 para 3 Air Passenger Rights Regulation, insofar as the existence of a causal link between the cancellation and the pandemic is established.

3. With respect to the withdrawal before the beginning of package travel, German courts concluded that the COVID-19 pandemic qualifies as an ‘unavoidable and extraordinary’ circumstance within the meaning of sec 651h paras 3, 4 n 2 BGB, insofar as: 1) at the time of conclusion of the package travel, the spread of the pandemic in the place of destination or in its immediate vicinity was not foreseeable; 2) at the time of withdrawal, that spread was foreseeable. In the case of withdrawal by the traveller due to pandemic, pursuant to sec 651h paras 1, 3 BGB, the same traveller has the right to reimbursement, whereas the organiser does not have the right to termination fees pursuant to sec 651 para 2 BGB. On the other hand, in the case of withdrawal by the organiser due to the COVID-19 pandemic pursuant to sec 651h para 4 n 2 BGB, the traveller has the right to price reimbursement but not to compensation for damages for a ruined holiday pursuant to sec 651n para 2 BGB.

4. In the light of the Voucher Recommendation and of sec 640 para 6 BGB, the AG Frankfurt correctly ruled out the possibility of issuing mandatory vouchers. On the contrary, Italian courts have taken conflicting positions on the (residual) cases of mandatory vouchers envisaged in art 88-*bis* para 12 first sentence D-L 18/2020. In fact, in the cases brought before the GdP Busto Arsizio and the Tribunale di Verona, the legislative qualification of the provisions contained in art 88-*bis* D-L 18/2020 as overriding mandatory provisions has led to an incorrect reconstruction of the relationship between the Italian provision, on the one side, and the Air Passenger Rights Regulation and Package Travel Directive, on the other side. On the contrary, that relationship was correctly reconstructed by the GdP Bologna, which (impliedly) set aside art 88-*bis* para 12 first sentence D-L 18/2020 in order to uphold the passenger’s claim for (cash) reimbursement under art 5 para 1 lit a), 7 para 3, 8 para 1 lit a) Air Passenger Rights Regulation.

# **Justifiable Defence: A Comparison of Polish and Hungarian Solutions with an Outlook on the COVID-19 Pandemic**

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## **Abstract**

The main question which this article seeks to answer is what justifies justifiable defence in substantive criminal law; what is the main reason for the existence of this exclusion of criminal liability? The focal notion of this paper is a presumption, according to which the justifications for the existence of justifiable defence are mostly self-preservation and natural law. We choose to compare the Polish and Hungarian solutions because of the historical and social similarities between Poland and Hungary (particularly in terms of the post-socialist characters of these countries) and the fact that, at least according to the present authors, the question of the justification of this legal institution was, arguably partially, resolved in Hungarian law. Finally, according to the COVID-19 pandemic that arose in 2020, we will observe in a separate chapter whether criminal liability would be excluded by justifiable defence in any cases of transmission of coronavirus.

**Keywords:** comparative criminal law, coronavirus, justifiable defence, obstacles of criminal liability, pandemic

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## I Introduction

The subject of this article is a comparison of Polish and Hungarian solutions concerning the institution of justifiable defence (defence against an assault on a legally protected interest also known widely as self-defence). The main question which this article seeks to answer is what justifies justifiable defence in substantive criminal law; what is the main reason for the existence of this obstacle to criminal liability? The focal notion of this paper is a presumption that the justifications for the existence of justifiable defence are mostly self-preservation, and natural law.

The lateral propositions of this article are the following: 1) the institution of justifiable defence has been regulated in a very similar manner in the Polish and Hungarian legal orders; 2) the justification for the existence of justifiable defence is identical in Poland and Hungary; 3) the question of the justification for the existence of justifiable defence has been, at least partially, explicitly resolved in the Hungarian law; although the expansion of this legal institution has been uninterrupted in Hungary in the last decade; 4) in Poland, there is no explicit answer to the question of what is the justification of justifiable defence.

We choose to compare the Polish and Hungarian solutions because of the historical and social similarities between Poland and Hungary (particularly in terms of the post-socialist characters of these countries) and the fact that, at least according to the present authors, the question of the justification of this legal institution was, arguably partially, resolved in Hungarian law. Therefore, the comparison of Polish and Hungarian legal resolutions may be an additional argument in favour of particular views for Polish authors, and perhaps even a model for adopting new legal methods. For Hungarian academics and lawmakers, in turn, this analysis might be a valuable and synthetised source of information on legal answers used in Poland.

Finally, according to the COVID-19 pandemic that arose in 2020, we will observe in a separate chapter whether criminal liability would be excluded by justifiable defence in any cases of transmission of coronavirus.

## II Research Method

In this article, the authors first made a comparison of legal regulations in Poland and Hungary concerning justifiable defence, and second showed the similarities and differences between them.

As part of the project, the authors decided to use a model of the comparative process developed for the use of comparative legal literature by Zweigert and Kötz. As a consequence, the process of comparing Polish and Hungarian solutions will be divided into five stages: 1) formulating the problem; 2) choosing material for the comparison; 3) proper comparison (an objective description of selected legal concepts and their comparison, using

assessments of them in the categories of variability, similarity and identity); 4) building a system that takes due account of the comparison's results (creation of a new legal institution or modification of an existing one); 5) a critical assessment of the results obtained by means of comparison.<sup>1</sup>

The main research method used in this work is a legal-dogmatic approach. Thus, the comparison of Polish and Hungarian legal solutions concerning justifiable defence was made (primarily) through a comprehensive analysis of the normative material which refers to all the questions mentioned, particularly through the analysis of legal sources as 1) the Polish Penal Code (the Act of 6 June 1997 the Penal Code, Journal of Laws from 2019, item 1950, as amended, hereinafter 'the Polish Penal Code'); 2) the Constitution of the Republic of Poland dated 2 April 1997 (Journal of Laws No. 78, item 483, as amended, hereinafter 'the Polish Constitution'); 3) the Hungarian Penal Code; and 4) the Hungarian Fundamental Law.

It is worth mentioning that such a textual approach (formal-dogmatic or legal-dogmatic approach) is distinguished from and opposed to the contextual approach, because it is limited to the given text (textualism), whereas the contextual approach also considers the surrounding conditions and environment of the text (contextualism).<sup>2</sup> There may be doubt whether this approach is justified. It should be noted that, as Kozak correctly indicates, 'It is said that its [the textual approach's – KB] characteristic feature is textualism (limiting the analysis to the text itself) while the basis for a "typical" interpretation usually is contextualism, therefore grasping the interpreted text through a complex structure of social factors related to its creation and reading – so at different moments of the existence of the text'.<sup>3</sup> This is particularly visible on the ground of the derivative concept of legal interpretation by Zieliński.<sup>4</sup> This concept assumes that the functional (and systemic; the latter only if the legal text is not explicit) interpretation directives should always be considered (regardless of whether the legal text is explicit or not). Therefore, this concept was used to conduct the research. Naturally, it is not the only concept of legal text interpretation, not even in Polish legal science (see *inter alia* the traditional concept of interpretation by Waśkowski; the constructive concept of interpretation by Frydman; the semantic intensional concept of interpretation by Wróblewski; the semantic extensional concept of interpretation by Hertrich-Woleński; the juridical concept of humanistic interpretation by Nowak; the computational concept of interpretation by Studnicki; the LEVEL concept of interpretation by Sarkowicz or the argumentative concept of interpretation by Morawski). Nevertheless, the derivative concept of legal interpretation, according to the present authors, describes

<sup>1</sup> See Roman Tokarczyk, *Komparatystyka prawnicza* (Wolters Kluwer 2008, Warsaw) 70–71. For more, see Konrad Zweigert, Heinz Kötz, *Introduction to Comparative Law* (Oxford University Press 1998, New York).

<sup>2</sup> See Tokarczyk (n 1) 74.

<sup>3</sup> Artur Kozak in Andrzej Bator (ed), *Wprowadzenie do nauk prawnych. Leksykon tematyczny* (Wolters Kluwer 2012, Warsaw) 15–16.

<sup>4</sup> For more, see Maciej Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki* (Wolters Kluwer 2012, Warsaw).

the course of interpretation of a legal text most comprehensively and accurately, and is integrated with other concepts of interpretation, which was an important argument in favour of using it.<sup>5</sup>

### III Justifiable Defence in Polish Law

According to Article 25 section 1 of the Polish Penal Code, anyone who, in justifiable defence, repels a direct illegal attack on any legally protected interest is not deemed to have committed an offence. Thus, Article 25 section 1 of the Polish Penal Code indicates that if a person commits an act punishable under the law (thus demonstrates behaviour displaying the characteristics specified under criminal law as unlawful; see Article 115 section 1 of the Polish Penal Code), that person shall not face criminal liability due to the commonly accepted thesis that such situations are considered excluded from (or impossible to assign as) unlawful behaviour.

Concurrently, the analysed regulation shows that, for exclusion of the criminal liability of the perpetrator to be possible on the grounds of the institution of justifiable defence, several conditions must be met. More specifically 1) there has to be an assault on a legally protected interest, thus an attack directed at that interest; 2) the assault must be factual, meaning that the assault has to take place in reality and not be the result of a mistaken impression of a person (although in the latter case, it is possible to exclude criminal liability of the perpetrator but only on the grounds of circumstances in which liability cannot be attributed); 3) the assault must be an unlawful assault, meaning that the person's behaviour that led to the assault constituted a violation of a norm sanctioned in criminal law or other sanctioned norms provided for in the legal system; 4) the assault must be direct (unfortunately, the term 'direct' used by the legislator was not properly defined);<sup>6</sup> the

<sup>5</sup> See Maciej Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki* (Wolters Kluwer 2012, Warsaw) 67 ff.; Maciej Zieliński, 'Derywacyjna koncepcja wykładni jako koncepcja integrowana' (2006) 3 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 93 ff.; Olgierd Bogucki, 'The Derivational Theory of Legal Interpretation in Polish Legal Theory' (2020) 33 *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique*, 617–636, DOI: 10.1007/s11196-019-09628-1; Konrad Burdziak, *Prowokacja. Analiza prawnokarna* (Ars Boni et aequi 2018, Poznań) 35. For more on the statutory interpretation, see Frank Cross, *The Theory and Practice of Statutory Interpretation* (Stanford Law Books 2009, Stanford, California); Rupert Cross, John Bell, George Engle, *Cross: Statutory Interpretation* (LexisNexis UK 1995, London); Douglas Walton, Fabrizio Macagno, Giovanni Sartor, *Statutory Interpretation: Pragmatics and Argumentation* (Cambridge University Press 2020, Cambridge) DOI: 10.1017/9781108554572; Kim Yule, *Statutory Interpretation: General Principles and Recent Trends* (Nova Science Publishers 2009, New York).

<sup>6</sup> For individual authors, the phrase 'direct' may mean: 1) the proximity of the time of violation of a legal interest / putting a legal interest at risk; or 2) the immediate violation of a legal interest / putting the legal interest in danger; or 3) the inevitability of violating a legal interest / putting a legal interest at risk; or 4) lack of intermediate elements between human behaviour and violation of a legal interest / putting a legal interest at risk; or 5) the existence of a real danger of violating a legal interest / putting a legal interest at risk; or 6) entering

defence must be proportionate to the performed action, meaning that it cannot be based on failing to perform a specified action because the subject of interest of criminal law cannot be actions such as *a*) dodging blows, *b*) running away, *c*) hiding, *d*) calling for help, etc. (these are actions that criminal law considers irrelevant); 6) the defence must be directed solely at the perpetrator; it cannot interfere with the legally protected interests of a third party not involved in the assault (the defence should consist only of repelling the perpetrator's assault; in the event of the involvement of a third party, the exclusion of criminal liability is possible only on the grounds of so-called protective force); 7) the defence must be commensurate with the danger of the assault, and thus necessary to maintain the proper balance between the behaviour and effects of the behaviour of the defending party, and the behaviour and the effects of the behaviour of the perpetrator;<sup>7</sup> 8) the defence must be necessary, meaning the justifiable defence can include only actions that are necessary to repel the assault. In connection with this condition, the question arises as to whether justifiable defence is an independent institution (meaning the defending party can repel the assault at the expense of the legally protected interest of the perpetrator, even if the assault could be avoided in another rational way), a subsidiary institution (meaning the defending party can repel the assault at the expense of the legally protected interest of the perpetrator only if the assault could not be avoided in another rational way) or a relatively subsidiary institution (meaning the defending party can repel the assault at the expense of the legally protected interest of the perpetrator only if the assault could not be avoided in another rational way; yet this does not mean that, for example, the defending party always has an obligation to flee if possible; the defending party can always defend his or her freedom from being obliged to act in a specific way, provided that it does not blatantly violate the balance between the attacked interest and the sacrificed interest). Without going into more details of this particular problem, it has to be stated that, in Polish criminal law doctrine and in Polish jurisprudence, there is a dominant conviction of the independent nature of the institution in question; 9) it is necessary for the perpetrator to be aware of the existence of the assault and

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by the perpetrator into the attempted phase of a prohibited act (which is also not explicitly defined); 7) or entering a phase of the assault where it would be necessary to defend against it, the only option to save a legal interest.

<sup>7</sup> It is correctly pointed out in the literature that the danger of an assault is a complex and dynamic concept. It is determined by a number of circumstances, in particular: 1) the value and nature of the assaulted interest; 2) strength and means of assault; 3) aggressiveness of the perpetrator; 4) threats made by the attacker; 5) features of the perpetrator and the victim; 6) time and place of the assault; 7) element of surprise – see Andrzej Marek, 'Komentarz do art. 25 Kodeksu karnego' in Andrzej Marek, *Kodeks karny. Komentarz* (Wolters Kluwer 2005, Warsaw) 164; and also 8) elements of subjective character: intent, lack of intent, purpose, motivation – see A. Wąsek, 'Komentarz do art. 25 Kodeksu karnego' in Oktawia Górniok et al. (eds), *Kodeks karny. Komentarz I* (Arche 2005, Gdańsk) 331. It should also be that the expectation that the method of defence is commensurate with the danger of assault indirectly introduces the need to maintain a certain proportionality between the defended interest and the interest violated as a result of the defence, not articulated directly in Article 25 of the Polish Penal Code [see Jacek Giezek, 'Komentarz do art. 25 Kodeksu karnego' in Jacek Giezek (ed), *Kodeks karny. Część ogólna. Komentarz* (2nd edn, Wolters Kluwer 2012, Warsaw) 210].

to act to protect a legally protected interest (in principle, it is not possible for the action to be considered justifiable defence if we provoked a person to assault us in order to violate his or her legally protected interest under the guise of justifiable defence). Without going into the broader description of the problem outlined here, it should be stated that, in Polish criminal law doctrine and in Polish jurisprudence, the conviction regarding the self-contained nature of the institution in question prevails; 9) it is necessary for the perpetrator to be aware of the existence of the assault and act to protect an interest protected by law (as a rule, invocation of justifiable defence is excluded in a situation in which we have provoked the person to assault us, so that under the guise of justifiable defence to violate his or her rights protected by law).

It does not matter whether the assault is intentional (meaning whether the perpetrator intends to violate a legally protected interest, meaning whether he or she considers the possibility of violating a legally protected interest / exposing a legally protected interest to danger and wants this or agrees to this) or not. Similarly, the sanity of the perpetrator is not relevant; a relevant assault can be made by both a sane person (who considers the significance of the act while performing it and is able to control his or her conduct) and an insane person. The age of the perpetrator is also irrelevant; a relevant assault may be committed by both a juvenile perpetrator (a perpetrator who was less than 17 years of age at the time of the act) and an adult perpetrator. The legislator does not impose any restrictions on this matter.

However, the question of justification for distinguishing between the institution of justifiable defence and the effects of its application remains unresolved in the Polish literature in an explicit manner. Naturally, it was indicated above that Article 25 section 1 of the Polish Criminal Code indicates that, if a person commits an act punishable under the law (thus demonstrates behaviour displaying the characteristics specified under criminal law as unlawful; see Article 115 section 1 of the Polish Penal Code) in defence of a legal good, that person shall not face criminal liability due to the commonly accepted thesis that such situations (situations of acting in defence of one's own or another's goods) are considered to be excluded from (or impossible to assign as) unlawful behaviour. It should be stressed, however, that in Poland some authors claim that justifiable defence is a formally unlawful and materially lawful action, and some authors claim that it is a lawful action from the beginning. To be precise 1) according to some authors, in the case of justifiable defence, fulfilment of the features of an act prohibited under the law is only apparent (performing no acts in justifiable defence is, according to these authors, a feature of individual types of particular acts prohibited under the law); 2) according to some authors, in the case of justifiable defence, the perpetrator fulfils all the features of the act prohibited under the law but at the same time, there is the situation in which the norm sanctioned in the criminal law cannot be updated (the norm which orders the court to impose a penalty for unlawful conduct); 3) according to some authors, in the case of justifiable defence, the perpetrator fulfils all the features of an act prohibited under the law but the perpetrator does not

violate the norm sanctioned in criminal law (prohibiting a particular entity in particular circumstances of a particular behaviour).

The only way to resolve the above difference in views would be to determine (resolve explicitly) the question of justification for the existence of the institution of justifiable defence. In the Polish literature – as mentioned above – this issue is not clearly resolved.

The question is also not explained by the justification of the Polish Penal Code, which only indicates that the chapter on circumstances excluding criminal liability includes provisions regulating the circumstances that exclude criminal liability and their legal nature varies; more specifically, it regulates the circumstances that exclude the unlawfulness of an act (justifiable defence, the protective force provided for in Article 26 section 1, acceptable novelty risk<sup>8</sup>), circumstances that exclude liability and circumstances causing the perpetration of the prohibited act to be incomplete.<sup>9</sup>

Some authors claim that the justification of performing acts within justifiable defence may be influenced by the following circumstances: 1) the necessity to sacrifice one of the conflicting interests; 2) confirmation, by acting in justifiable defence, of the rule that the law cannot give way to unlawfulness; 3) contributing to maintaining the legal order by acting in justifiable defence; 4) contributing to developing a sense of solidarity in society by acting in justifiable defence; 5) supplementing the activities of relevant state bodies by acting in justifiable defence; 6) social benefit of the perpetrator's behaviour; 7) self-preservation.<sup>10</sup>

It would be valuable to refer to the solutions of other legal orders, particularly to the Hungarian legal order, in which, in the present authors' view, the question of justifying the existence of the institution of justifiable defence resulting in the exclusion of criminal liability of the perpetrator of the prohibited act has been, at least partly, explicitly resolved. The comparison of Polish and Hungarian solutions may be an additional argument in favour of particular views of Polish authors, and perhaps even a model for adopting new solutions in Poland.

<sup>8</sup> An acceptable novelty risk is the situation referred to in Article 27 of the Polish Criminal Code, according to which: 'One does not commit an offence who acts for the purpose of conducting a cognitive, medical, technical or economic experiment which is presumed to yield results of significant cognitive, medical or economic value, and the expectation of achieving them, the purpose and manner of conducting the experiment are well-founded in the light of contemporary knowledge'.

<sup>9</sup> See Irena Fredrich-Michalska, Barbara Stachurska-Marcińczak (eds), *Kodeks karny, Kodeks postępowania karnego, kodeks karny wykonawczy – Nowe kodeksy karne – z 1997 r. z uzasadnieniami* (Wydawnictwo Prawnicze 1998, Warsaw), 130.

<sup>10</sup> For more, see Łukasz Pohl, Konrad Burdziak, *Judicial Interpretation of the 1997 Criminal Code Provisions on Self-Defence* (Peter Lang 2019, Berlin) 136, DOI: 10.3726/b14857; Konrad Burdziak, 'Bezpośredniość zamachu, czyli kilka słów na temat obrony koniecznej w polskim prawie karnym' (2018) 1 *Przegląd Sądowy*, 55–61.

## IV Justifiable Defence in Hungarian Law

In Hungarian law, the source of regulations concerning justifiable defence<sup>11</sup> which is the basis for excluding criminal liability for a perpetrator of a criminal offence are two legal acts: the Hungarian Fundamental Law<sup>12</sup> and the Hungarian Penal Code (Act C of 2012). In the context of the Hungarian Fundamental Law, which is the basis of the Hungarian legal system (see Article R of the Fundamental Law), it should be noted that the Hungarian constitutional legislator decided to include it in the indicated legal act, more specifically in its Article 5 (located just after the preamble and regulations concerning the fundamentals of the Hungarian state, and at the same time as part of the chapter entitled 'Freedom and responsibility' just after the regulations on human dignity), the provision according to which everyone shall have the right to repel any unlawful attack against his or her person or property, or one that poses a direct threat to the same, as provided for by the Act. Therefore, the constitutional legislator indicates that: 1) every person (the constitutional legislator does not make any distinction in this respect) has the right to defend his or her interest against an assault; 2) this right only applies to defence against an assault on the defender's own personal interest or property; 3) the assault has to be factual (it has to take place in reality), unlawful and direct (which, of course, is not saying much). At the same time, the constitutional legislator refers to the Act, which seems to be the Hungarian Penal Code, in Section 22 of which the legislator indicates that 'A person's act shall not be punishable if it is necessary to avert an actual or imminent illegal attack against his own person or property or that of another person or persons, or against the interest of the public.'

According to the Explanatory Memorandum of Hungarian Penal Code, in case of this legal institution, a justifiable defence is possible against an unlawful attack. An attack is usually violent behaviour, mostly directed against a person, but can also be directed against property or the public good. The attacked person acts lawfully if his/her act is necessary to avert the attack. The consequences of the unlawful act must be borne by the attacker, i.e. the person who commits the unlawful conduct. This means that if the attacker is harmed, the defender cannot be held responsible for the consequences.

Although, above the before-mentioned 'classical' type of justifiable defence, the Hungarian legislature also regulates two special types of the legal institution. The first of these is the so-called preventive justifiable defence (Section 21 of Hungarian Penal Code): Any person who causes injury to an unlawfully attacking person with a protective device, which was preventively installed and is not capable of taking the life of anybody, shall not be punishable by the law, if he/she takes every expectable measure to avoid injury.

<sup>11</sup> For a recent overview of Hungarian legislation and practice see Gellér Balázs, Ambrus István, 'A jogos védelmi helyzetben kifejtett elhárító cselekmény szükségessége, valamint a szituációs jogos védelem a legújabb bírói gyakorlat tükrében' (2018) (2) Magyar Jog, 119–128.

<sup>12</sup> For more, see László Trócsányi, *Wokół prac nad ustawą zasadniczą Węgier. Tożsamość konstytucyjna a integracja europejska* (Paweł Króliczek tr., Wydawnictwo Sejmowe 2017, Warsaw) 122.

This form of justifiable defence was introduced into the Hungarian Criminal Law in 2009. However, preventive justifiable defence rarely occurs in practice but, according to scholarly opinion, it could be stated in the case of running electricity, or a black-dog, etc.<sup>13</sup>

Finally, the Hungarian legislator introduced a brand-new type of justifiable defence in the recent Penal Code, which is called situational justifiable defence. As Section 22 (2) states: The unlawful attack shall be considered as an attack against life if committed against a person at night, with a weapon, with an instrument capable of causing death, or by a group. Also if it is committed by way of intrusion into the victim's house: at night, by displaying a deadly weapon, by carrying a deadly weapon, in a gang. Finally, if the unlawful attack is committed by way of illegal and armed intrusion into the fenced area of a home.

As Ádám Mészáros states in literature, in the case of situational justifiable defence, cases of unlawful attack should also be considered as if they were aimed at extinguishing the assaulted person's life when in reality the attack was not directed against life. In these cases, it is also not a criterion that the attack is directed against a person at all [Section 22, paragraph 2 (b) (c)].<sup>14</sup> Therefore, it follows from the text that 'considering an unlawful attack as an attack on life makes lawful the defence which may cause death even if in the concrete situation the taking of life was not necessary'.<sup>15</sup>

In the cited regulation (Section 21 and 22 of the Hungarian Penal Code) the legislator indicates that the act within the limits of justifiable defence (a person defending legal interest against a factual, unlawful, direct attack on the interest) is not punishable as a principle. Therefore, the question arises as to whether we should treat justifiable defence, as in Poland, as a circumstance preventing the commission of a criminal offence and facing criminal liability, or as a circumstance preventing the person from committing a criminal offence. Considering the views that appear in the literature, it should probably be considered that the first of these solutions is appropriate, and thus, that Hungarian solutions are similar to the Polish ones.

If a person acting within the limits of justifiable defence only apparently fulfils the features of the act prohibited under the law or fulfils the features of the act but does not exceed the norm sanctioned in criminal law; these solutions appear to be justified also because justifiable defence results in the same as the permission of law and, in the context of the permission of law, the legislator claims that an act that is authorised by law or that is exempted from punishment by law shall not be criminalised (see Section 24), and the content of Section 15, according to which the perpetrator may be totally or partially exempted from criminal responsibility, or an act may be fully or partly exempted from criminalization on the following grounds: *a*) being under the age of criminal responsibility;

<sup>13</sup> See Mészáros Ádám, *A jogos védelem elvi és gyakorlati problémái* (OKRI 2015, Budapest) 90–103; Gál Andor, *A jogos védelem teleologikus megközelítésben* (Iurisperitus 2019, Szeged) 131–140.

<sup>14</sup> Mészáros Ádám, 'Constitutional Questions of the Situational Legitimate Defence' (2019) 8 (1) *Acta Univ. Sapientia, Legal Studies*, 67, DOI: 10.47745/AUSLEG.2019.8.1.04.

<sup>15</sup> Belovics Ervin, *Büntetőjog I. Általános Rész* (HVG-ORAC 2017, Budapest) 253.

*b)* insanity; *c)* coercion and threat; *d)* mistake; *e)* justifiable defence; *f)* means of last resort; *g)* statutory authorization; *h)* other grounds defined by law. This position corresponds in its entirety to the view presented in Poland, *inter alia* by Wolter, according to which,

If [...] for example, based on the provision of the Article 148 of the Polish Penal Code, it is prohibited as a socially harmful act to (intentionally) kill a person, and killing a person in justifiable defence [...] is not a socially harmful act, although it is an (intentional) killing of a person, from a logical point of view in the provision of the Article 148 of the Polish Penal Code it is prohibited to kill a person 'not in justifiable defence'. The case is analogical when it comes to other circumstances, recognised as exceptions to the rule [...]. These negated circumstances constituting exceptions are called 'negative features of a prohibited act', in contrast to features falling within the scope of the rule which (in this sense) constitute positive features of a prohibited act. This is the picture of the logical and theoretical construction.<sup>16</sup>

Simultaneously, the legislator repeats the conditions of defence provided for in the Hungarian Fundamental Law (adding the condition of necessity, and consequently the proportionality of defence), and at the same time extends the scope of application of the necessary institution of self-defence to situations in which the factual, unlawful, direct attack concerns the personal interest or property of other persons, or public interest. In this context, naturally, the question arises as to why justifiable defence was partly regulated in the Hungarian Fundamental Law and partly in the Penal Code? Considering the assumption that the legislator is a rational legislator (and this assumption appears to be necessary; after all, any interpretation of provisions of criminal law would otherwise be impossible), it should be considered that there is a difference between situations in which the defence concerns a factual, unlawful, direct assault against one's own personal interest or property, and situations in which the factual, unlawful, direct attack concerns the personal interest or property of other persons, possibly the public interest, and in principle that there is a difference between, at the very least, the justifications for excluding criminal liability in the indicated situations. Answering the above question, it is worth noting that the Hungarian Fundamental Law defines only the defence of one's own personal interest and property and that such defence is defined as one of human rights. This may suggest that the justification for the existence of justifiable defence provided for in the Hungarian Fundamental Law is somewhat clear and commonly accepted by all members of society, and at the same time not a human creation, but discovered by people by observing themselves and the objective reality, and thus is related to natural law. The justification for the existence of justifiable defence should therefore in the proper not only be for humans but also for animals' primary and natural self-preservation (in natural law). In the face of an assault on our own legally

<sup>16</sup> Władysław Wolter, *Nauka o przestępstwie. Analiza prawnicza na podstawie części ogólnej kodeksu karnego z 1969 r.* (PWN 1973, Warsaw) 106.

protected interest, each of us would do the same. Each of us would try to repel the assault and thus save the endangered interest, even at the expense of the rights of the perpetrator. This is typical behaviour for every member of the human race. Perhaps, thus, by grasping this regularity and acknowledging the correctness of the indicated conduct, each of us, in a natural way, asserts the right to defend our own interest in situations of danger to them, while recognizing the existence of this type of law on the part of other members of society.<sup>17</sup> As Balázs Gellér and István Ambrus state:

There are two points of view in jurisprudence regarding the origin of this legal institution. According to the first, the suppression of private revenge, blood revenge, necessarily brought with it a restriction of self-government. By renouncing these rights, however, subjects of the *ius puniendi* were rightly expected by the citizens to protect them from unlawful attacks. However, the holder of sovereignty, the state, cannot meet this expectation in all life situations, as its representatives cannot be present in all unlawful attacks. A person defending against an unlawful attack is authorised by the state to defend himself. According to the other approach, the institution of legitimate protection evolved from the justifiable defence guaranteed by natural law. The Roman legal principle of the reporter of *vim vi* states that it arises from nature for all living beings, including man, to use force in order to sustain his life in the broadest sense against attack.<sup>18</sup>

In the context of solutions in Poland, Cieślak claimed similarly that ‘even if criminal law did not mention justifiable defence, it would be difficult to justify responsibility for an act committed in self-defence against an unlawful attack. There are [...] probably grounds for recognising the individual’s right to justifiable defence as one of the elementary human rights’.<sup>19</sup> In Poland, however, it was not decided to regulate the institution indicated in the Polish Constitution (at most, they can be derived from the principle of a democratic state ruled by law or the principle of respect for human dignity), and thus, it has not been explicitly confirmed that justifiable defence is a fundamental human right.

The justification for defending the legal rights of other persons and public order must be connected (by force of necessity; it is necessary to maintain the postulate of the legislator’s rationality) with another circumstance, meaning 1) with the need to sacrifice one of the conflicting interests; 2) confirmation, by acting in justifiable defence, of the rule that the law cannot give way to unlawfulness; 3) contributing to maintaining legal order by acting in

<sup>17</sup> There is no doubt that the justification of acting in necessary self-defence is also affected by circumstances such as: 1) with the need to sacrifice one of the conflicting interests; 2) confirmation, by acting in necessary self-defence, of the rule that the law cannot give way to unlawfulness; 3) contributing to the maintenance of the legal order by acting in necessary self-defence; 4) to contribute to developing a sense of solidarity in society by acting in necessary self-defence; 5) supplementing the activities of relevant state bodies by acting in necessary self-defence. However, these circumstances are, I believe, only secondary.

<sup>18</sup> Gellér Balázs, Ambrus István, *A magyar büntetőjog általános tanai I.* (ELTE Eötvös Kiadó 2019, Budapest) 262.

<sup>19</sup> Marian Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia* (PWN 1990, Warsaw) 241.

justifiable defence; 4) contributing to developing a sense of solidarity in society by acting in justifiable defence; 5) supplementing the activities of relevant state bodies by acting in justifiable defence; 6) the social benefit of the perpetrator's behaviour. However, this issue is not explicit.

## V The COVID-19 Pandemic and Justifiable Defence

It can be stated without exaggeration that the COVID-19 pandemic completely turned the whole world upside down in 2020. Of course, the extraordinary situation required extraordinary legislation, which has not left the Hungarian Penal Code untouched. For instance, Act XII of 2020 on the containment of coronavirus introduced, with effect from 31 March 2020, the criminal offence of obstructing epidemic containment into section 322/A of the Penal Code, which, as a *sui generis* criminal offence, can be understood as a quasi-qualified case of violation of epidemic control regulations (which criminal offence will be discussed later in this article). According to the related Explanatory Memorandum,<sup>20</sup>

the new statutory definition of obstructing epidemic containment shall punish the active obstruction of the measures initiated in the event of the legally and officially identified danger of the epidemic from being implemented. The reason for the increased dangerousness and, therefore, the more severe punishment (in contrast to the mere violation of epidemic control regulations) is that, in this case, the commission manifests itself not only in a formal violation of regulations but also in the obstruction of the concrete official control. The statutory definition does not evaluate the result, hence, to establish the crime, the failure or any disruption of control is not required. Neither using violence nor threatening it are statutory elements, which leads to the consequence that a real concurrence with the offence of violence against a public official occurs due to any violent or threatening action against public officers involved in civil defence. The social dangerousness of the act is significantly enhanced when committed by a group, which significantly increases the likely effectiveness of obstruction. Death, as a result, contained in the statutory definition as a qualifying circumstance essentially means unity between obstructive conduct of any type and homicide by negligence; the dogmatic distinguishing criteria in this regard are settled in case law. The legislator can achieve the earliest possible protection against such a crime by penalising preparation for it, and it intends to make use of this means in the present situation as well.

The Explanatory Memorandum added to the new statutory definition is particularly reassuring from the viewpoint that it underlines that criminal proceedings for this criminal offence may only take place due to active, positive conduct. According to Article 28 of the

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<sup>20</sup> Or in other words: Explanatory Notes to the Bill.

Fundamental Law, interpretation of a statutory definition shall take place in legal practice subject to an Explanatory Memorandum. It would be worth emphasising this circumstance in the statutory definition itself in which, conceptually, it is also possible to obstruct by an act of omission. For instance, if an apparently asymptomatic person in quarantine refuses to assist the procedure upon the call of the authority (to go with them voluntarily for testing).

Several questions also arose related to 'old' criminal law during the first three waves of the pandemic. For example, we can mention criminal offences against life and human health. In a case of allegedly causing bodily harm, it is quite a hard task to prove causation, since the coronavirus mostly spreads by droplets. However, the situation is different in relation to an attempted criminal offence, when criminal liability can be established; if for example, an infected perpetrator coughs on the victim with an intent to cause illness.

In the context of both causing bodily harm and homicide, the question of whether there is a place for justifiable defence against the commission of these crimes through the transfer of disease. As far as if an infected person coughs on the victim with an intent to infect him/her, this movement should be considered as an unlawful attack based on Hungarian criminal law, thus the victim has the right to protect himself/herself as it is necessary (e.g. pushing the perpetrator away or even hitting him/her with slight force).

We also have to deal with those offenders who fail to wear their masks where it is mandatory, for example on public transportation. According to Government Decree 484/2020. (XI. 10.), in Hungary, the operator of a public transport vehicle is entitled and obliged to order those passengers not wearing a mask (or not covering their nose and mouth) to put it on. There is a question over whether an individual is entitled to do the same. Section 22 paragraph 1 of Hungarian Penal Code, as we already saw, states, that 'The act he act which is necessary to prevent an unlawful attack on [...] the public interest [...] shall not be punished'. Thus, justifiable defence may also have a place to protect the public interest. And for example, on a crowded bus, it is undeniable that a person not wearing a mask is a potential danger to all other passengers. Consequently, the conduct necessary to prevent it – forcing them to wear a mask, verbally, possibly committing defamation – may be permissible against such a person.

In the Polish Criminal Law, this situation is similar. All cases of intentional direct exposure of another person to be infected with COVID-19 fulfill features of one of the prohibited acts punishable under the law specified in Article 161 of the Polish Criminal Code. It relates to types of the prohibited acts punishable under the law where: 1) anyone who, knowing that he or she is afflicted with a venereal or contagious disease, a serious incurable disease or a potentially fatal disease, directly exposes another person to infection from that disease (and thus, is liable to imprisonment for a period from 3 months to 5 years); 2) anyone who, knowing that he or she is afflicted with a venereal or contagious disease, a serious incurable disease or a potentially fatal disease, directly exposes a large number of people to infection from that disease (and thus, is liable to imprisonment for a period from one to 10 years). Of course, criminal liability for intentional or unintentional damage to

health or even death of another person is not excluded. The Polish legislator simply uses the wording ‘anyone who causes, is liable to’ in the legal regulations concerning these effects, which may suggest that the features of the types of prohibited acts punishable under the law and characterised by these effects can be caused with any behaviour that remains in such cause-and-effect relationship. Naturally – in this context, there may be evidence problems, as well as problems with the objective attribution of the effect, but this does not exclude the possibility of the perpetrator (a person who exposes other people to COVID-19 infection) exceeding the relevant sanctioned criminal law norms.

The perpetrator commits the prohibited act even if they try to infect a person already infected with the COVID-19 virus. In that case, it would be a matter of the qualification of his behaviour as an ineffective attempt to expose another person to infection, and thus, the qualification under Article 13 section 2 of the Polish Criminal Code, in relation to Article 161 section 2/3 of the Polish Criminal Code.

A prohibited act could also be malicious coughing on another person after removing a face mask. This is because it seems that this kind of behaviour could be treated analogously to spitting on another person, and thus, as a behaviour fulfilling not only the features of the prohibited act punishable under the law specified in Article 216 section 1 of the Polish Criminal Code, i.e. an insult, but also the features of the prohibited act punishable under the law specified in Article 217 section 1 of the Polish Criminal Code, i.e. a violation of personal inviolability.

Not wearing a face mask despite the order to do so is also considered a prohibited act punishable under the law which, in Poland, was specified in section 25 point 1 of May 6 2021 of the Regulation of the Council of Ministers on establishing certain restrictions, orders and prohibitions in the occurrence of an epidemic (Journal of Laws of 2021, item 861), according to which, until June 5 2021, covering the mouth and nose with a face mask is ordered: 1) in means of public collective transport, on passenger ships in domestic maritime transport intended or used for transporting passengers; 2) in generally accessible places; 3) while performing religious practices. It is true that the violation of this order is a minor offence, yet it remains a prohibited act, and therefore also an unlawful act.

Considering the above, in the situations related to the issue of this text, it is possible to violate the legal interest of the perpetrator in order to establish a lawful status (a state in which the legal interest is not threatened), with reference to acting within the limits of justifiable defence. In each of these cases, there is an attack by the perpetrator on a specific legally protected interest (individual or group), and above all, on an interest in the form of human or public health, and in each of these cases the attack is illegal and direct. Thus, if the remaining of the mentioned conditions of defence are met, including in particular the condition of its proportionality to the danger of an attack, there is no reason not to exclude the criminal liability of the behaviour of a man defending a given interest. Using the examples mentioned earlier, it can be said that, in Poland, is also possible to force a person obliged to wear a face mask (because they are, for example, in a crowded bus) to

put it on by using physical coercion, for example, and referring to acting within the limits of justifiable defence. Similarly, in Poland, it is possible to counter an attack in the form of coughing on a victim with the intention of infecting them, referring to acting within the limits of justifiable defence. This type of behaviour should be considered an unlawful act, and thus the victim has the right to protect themselves and others if necessary (for example, by pushing the perpetrator or even hitting them using slight force).

Considering the above, it is also worth noting that, under Article 231b section 1 of the Polish Criminal Code, anyone who, in justifiable defence, prevents an attack on another person's well-being, protected by law, or to maintain safety or public order, benefits from the legal protection provided to public officials (but the provision does not apply if the offender's attack against the person driving back the attack is directed exclusively at this person's honour or dignity). It should be stressed that the above regulation is not a characterisation of a justifiable defence. It only strengthens the protection of persons indicated in this regulation.

Simultaneously, it should be emphasised that, even in a situation where the person defending a given interest against an attack on it is wrong about the fact that the attack actually takes place or that the attack is illegal, it is not necessary to prosecute them. In this case, it is possible for such a person to refer to the regulation of Article 29 of the Polish Criminal Code, i.e. a mistake over the exclusion of unlawfulness. Then, 'only' the guilt, and not unlawfulness of their behaviour, is excluded. The effect, however, is the same – no crime and no criminal liability.

## VI Summary

To conclude the above considerations, it must be stated that there are many similarities between justifiable defence solutions in Polish and Hungarian law. In both cases it is necessary 1) that the defence is related to a factual, direct and unlawful assault; 2) that the defence was necessary and proportional. Also, in both legal systems, there is a solution according to which any person who exceeds the reasonable force of self-defence due to shock or justifiable aggravation shall not be prosecuted.

Naturally, there is some variance, namely 1) in Hungarian criminal law (as opposed to Polish law) it is assumed that the unlawful attack shall be construed as posing an imminent danger of death if committed: *a)* against a person, *aa)* at night, *ab)* by displaying a deadly weapon, *ac)* by carrying something that could be used as a deadly weapon, or *ad)* in a gang; *b)* by way of intrusion into the victim's home *ba)* at night, *bb)* by displaying a deadly weapon, *bc)* by carrying something that could be used as a deadly weapon, or *bd)* in a gang; or *c)* by way of illegal and armed intrusion into the fenced area of a home; 2) in Polish law (as opposed to Hungarian law), it is indicated that anyone who exceeds the limits of justifiable defence by repelling an assault consisting of entering a flat, apartment, house

or adjacent fenced area or repelling an assault preceded by trespassing on these places is not subject to punishment, unless exceeding the limits of self-defence was blatant;<sup>21</sup> 3) in Polish law (as opposed to Hungarian law), it is indicated that, in the event of exceeding the limits of justifiable defence, in particular when the perpetrator used a method of defence disproportionate to the danger of an assault, the court may apply extraordinary mitigation of punishment, and even issue an absolute discharge; 4) in Hungarian criminal law (as opposed to Polish law), it is clearly stated that justifiable defence is independent (it is specifically indicated that the person assaulted shall not be liable to take evasive action so as to avoid the unlawful attack).

The fundamental difference between the Polish and Hungarian legal orders is the distinct emphasis of the Hungarian Constitution that justifiable defence (at least to some extent) is one of the basic human rights, a right which, it must be emphasised, was not created by people, but discovered by them and results from natural law. The present authors accept this in its entirety and suggests considering the possibility of amending the Polish Constitution by introducing the following regulation: ‘Everyone has the right to resist a direct, unlawful attack directed against his or her personal interest or property’. In this way, the justification for distinguishing the institution of justifiable defence in the Polish legal order would be emphasised and, as a consequence, current doubts in this respect would be removed.

Additionally, it should be proposed to introduce to the Polish legal order a regulation worded as follows: ‘A person under attack shall not be required to escape from the illegal attack’.

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<sup>21</sup> After all, Section 21 indicates that ‘Any person who uses such means of defence, which are not recognized as a deadly weapon, installed for his own protection and/or for the protection of others against the peril with which he is threatened in the event of an unlawful attack shall not be prosecuted for the injury the aggressor sustained in consequence, provided that the person on the defensive has done everything within his power to avoid the injury.’

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# Articles

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Gergely Gosztanyi\*

## **Special Models of Internet and Content Regulation in China and Russia**

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### **Abstract**

According to the so-called 'cyber sovereignty', every country has the right to choose how to develop and regulate the Internet. The Golden Shield system, operated by the People's Republic of China is surrounded by a complex and ever-changing legal, technological and human background, can achieve cyber sovereignty. In the summer of 2021 Russia caught up. The question that Chinese leaders, while running the Golden Shield, and Russian leaders, while cutting down the country from the world's internet infrastructure, are trying to find the answer to is whether the 21st century can provide a solution that can simultaneously ensure economic opening and advancement and also informational isolationism.

**Keywords:** Golden Shield, censorship, internet, China, content control, cyber sovereignty, Russia

### **I Content Regulation Models in the World**

The 2010s will be remembered for a new era in the development of capitalism, one of mind-boggling scale. Apple, Amazon and Microsoft are closing the decade as the world's first trillion-dollar companies. In 2018, Apple's revenue was larger than Vietnam's GDP, while Amazon's research and development spending alone is almost as much as Iceland's GDP. Facebook boasts 2.4 billion users, a population larger than that of every continent except Asia.<sup>1</sup>

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<sup>1</sup> Jay Owens, 'The tech giants dominated the decade. But there's still time to rein them in' (25 December 2019) The Guardian <<https://www.theguardian.com/commentisfree/2019/dec/25/2010s-tech-giants-google-amazon-facebook-regulators>> accessed 10 July 2021.

Jay Owens' late-2019 newspaper article accurately describes the change we have seen in the 2010s: growing gigantic tech companies that states are trying to bring under the umbrella of state law in some way – by fine words, begging, or even the use of force. However, new media and regulation are not always easily brought onto one platform.

In the US, the CDA230(c)(2)<sup>2</sup> regulates the liability of online content providers and these twenty-six short words in English have completely rewritten the history of the Internet:<sup>3</sup>

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

With this provision, the State actually 'privatised' the issue of free speech and decisions to remove illegal or harmful content. To simplify, we can say that, in good faith, all the tools needed to remove content are in the hands of service providers without them having to bear any kind of liability. It gave internet startups and their investors the confidence that 'they could fill their platforms with content from ordinary users, without attracting any legal liability for anything those users might write'.<sup>4</sup> That is why this model is called the 'immunity model'.

The European Union has set up a system unlike the CDA230 rules on one of the key issues regarding the Internet, which is that it can also be held responsible for infringing content.<sup>5</sup> The central element is Section 4 of the Directive on Electronic Commerce,<sup>6</sup> which deals with the liability of intermediary service providers. The set of rules works with a threefold system of concepts, the first two of which ('mere conduit' and 'caching') give service providers immunity from liability, just like in the US system. Hosting is the third possibility and Article 14 rules that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

*a)* the provider does not have actual knowledge of illegal activity or information and as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

*b)* the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

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<sup>2</sup> Communications Decency Act of 1996, 47 U.S. Code.

<sup>3</sup> Jeff Kosseff, *The 26 Words That Created the Internet* (Cornell University Press 2019, New York).

<sup>4</sup> Matt Reynolds, 'The strange story of Section 230, the obscure law that created our flawed, broken internet' (24 March 2019) Wired <<https://www.wired.co.uk/article/section-230-communications-decency-act>> accessed 10 July 2021.

<sup>5</sup> Christiane Wendehorst, 'Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive' (2016) 5 (1) *Journal of European Consumer and Market Law*, 30–33.

<sup>6</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. OJ L 178, 17.7.2000, 1–16.

The (relative)<sup>7</sup> novelty of the European system is therefore the so-called notice-and-takedown system (NTDS)<sup>8</sup> that has put in place a multi-stage system of conditions and procedures: on the one hand, the intermediary service provider must be aware of content that is manifestly illegal and, on the other hand, take steps to remove the content within a specified period of time. Thus, it can be concluded that in contrast to the American regulation, the European Union voted in favour of another model (also called the ‘safe harbour model’<sup>9</sup>), which focused on a non-automatic but possible exemption from liability.

Although it is less often discussed, and many politely turn a blind eye, there is a third option besides the American ‘immunity model’ and the European ‘safe harbour model’ of regulating the internet, moderating content and censorship: the Chinese (and Russian or Asian) model. This model opted for a much stricter route in handling responsibility issues regarding internet and content regulations than those in Europe or the United States. In order to observe and understand this process we have to travel back in time a few years.

## II The Beginnings of Chinese Internet Regulation

Without diving deep into the history of Chinese media regulation,<sup>10</sup> it is worth pointing out that the Kuomintang, the leadership of the Chinese Communist Party has, since the very beginning, known that influencing people’s thinking and public opinion will have a vital role in gaining and keeping their power.

Having ruled China for more than half a century by means of political violence, ideological education and propaganda, the Communist regime has succeeded in making many Chinese people reject universal human values such as human rights, freedom, democracy, and respect for life as bourgeois principles.<sup>11</sup>

<sup>7</sup> The procedure already appears in the US Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998), but there it applies only to copyright infringement. For a comparison, see: Miquel Peguera, ‘The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems’ (2009) 32 (4) *Columbia Journal of Law & the Arts*, 481–512.

<sup>8</sup> Alexandre De Streel, Elise Defreyne, Hervé Jacquemin, Michèle Ledger, Alejandra Michel, ‘Online Platforms Moderation of Illegal Content Online. Law, Practices and Options for Reform. Study for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies’ (European Parliament 2020, Luxembourg) 10.

<sup>9</sup> Tambiama Madiega, ‘Reform of the EU liability regime for online intermediaries. Background on the forthcoming Digital Services Act’ (2020, May) European Parliamentary Research Service <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRSIDA\(2020\)649404EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRSIDA(2020)649404EN.pdf)> accessed 10 July 2021, 1–2.

<sup>10</sup> For further details see: Qinglian He, *The Fog of Censorship: Media Control in China* (Human Rights in China 2008, New York) 2–41.

<sup>11</sup> He (n 11) 4–5.

Consequently, up until 1978, the Chinese press was characterised by strict political oppression, including the censorship of content for various (prior restraint or subsequent) political reasons.<sup>12</sup>

In the early 1980s, changes in the international political and economic environment forced the Chinese state to make certain concessions in the field of media regulation.<sup>13</sup> These concessions, however, were revoked in the wake of the events of 1989 (the protests in Tiananmen Square, and the dissolution of the Soviet Union and subsequently that of the Soviet bloc).<sup>14</sup> The Central Committee’s Propaganda Department and General Office sent a 48-article set of top-secret instructions to lower-level officials, explaining which issues could be discussed and under what specifications. Anyone who failed to follow these secret instructions risked various legal sanctions.<sup>15</sup> In the early 2000s, it seemed that general reforms would be introduced not only in economic, but also in political areas. However, these hopes proved to be in vain, as a list of detailed regulations, issued in August 2003<sup>16</sup> implemented measures such as:

- instructing all media to follow the ‘proper political orientation’;
- setting up an integrated national news agency providing news to all other media;
- the political inspection and control of the news media.<sup>17</sup>

### III The Internet in China

These facts became of paramount importance after the internet was publicly introduced in China in 1995 and, as elsewhere, the number of users began to grow exponentially in the 2000s.

Table 1.

	Population	Number of users (June 2000)	Number of users (June 2021)	% of China’s population (June 2021)	% of Asian users (June 2021)
China <sup>19</sup>	1,444,216,107	22,500,000	989,080,566	68.5%	35.7%

<sup>12</sup> Qiuqing Tai, ‘China’s Media Censorship: A Dynamic and Diversified Regime’ (2014) 14 (2) *Journal of East Asian Studies*, 185–209. DOI: 10.1017/S1598240800008900

<sup>13</sup> Margaret E. Roberts, *Censored. Distraction and Diversion Inside China’s Great Firewall* (Princeton University Press 2018, Princeton) 98–101.

<sup>14</sup> Gosztonyi Gergely, ‘A parlamentarizmus helyreállítása’ [The reconstruction of parliamentarism] in Mezey Barna, Gosztonyi Gergely (eds), *Magyar alkotmánytörténet. [The history of the Hungarian constitution]* (Osiris Kiadó 2020, Budapest) 505–507.

<sup>15</sup> He (n 11) 14.

<sup>16</sup> A detailed plan of execution can be found in the 2003 August communiqué by the Central Committee and the State Council ‘On the improvement of control of Party and Government declarations distribution and on the use of jurisdiction for increasing productivity and alleviating local agriculture’.

<sup>17</sup> He (n 11) 18–20.

<sup>18</sup> Not including the population and number of users in special administrative territories (Hong Kong, Macao, Taiwan etc.) <<https://www.internetworldstats.com/stats3.htm>> accessed 10 July 2021.

We can clearly see that while in 2000 approximately 1.7% of the Chinese population (1,267,430,000<sup>19</sup>) used the internet, as of today, twenty years later, this number has risen to nearly 70%.<sup>20</sup> This huge number of people were not allowed freedom of speech by the Communist Party; therefore, in 1998, before the number of internet users started a steep ascent, a new Cyber Police Force was established,<sup>21</sup> which performed the ‘traditional’ tasks of blocking and controlling online discussion via various means of content regulation and censorship.<sup>22</sup> The measures (to be further developed later) were diverse: controlling domestic content ranged from using intimidation to bans, while foreign content was altogether blocked from Chinese users as a rule. The first signs of an ‘isolationist’ internet were thus already apparent in the late 1990s when ‘only’ 22 million – privileged, we could say – Chinese citizens had the chance to use this new means of communication.

Legal regulations have become more prominent since 2000: that year’s decree no. 292 by the State Council of the People’s Republic of China,<sup>23</sup> which ordered that certain domains and IP-addresses be recorded by internet providers, was issued. Two years later, in 2002 the Chinese government issued the Provisional Regulations on the Administration of Internet Publications,<sup>24</sup> which primarily – but not exclusively – targeted websites containing political content. The decrees stated, among others, the following provisions:

- any internet provider must obtain official approval (commercial goals) or registration (non-commercial goals);
- internet service providers must report all instances of topics involving national security or social unrest;
- they must make a copy of and retain content uploaded by third parties;
- they must adopt a system of editorial responsibility, whereby special editorial staff review all content submitted for publication on the internet for compliance with the law.

So it is evident that the Chinese model has, from the very beginning, opted for editorial responsibility, complemented by sanctions (such as a warning, an order to halt operations, confiscation of the equipment or a fine).<sup>25</sup> The annual cost of the system is huge: according to some calculations, in 2020 alone, USD 6.6 billion was spent to maintain the system.<sup>26</sup>

<sup>19</sup> See <<https://www.statista.com/statistics/263765/total-population-of-china>> accessed 10 July 2021.

<sup>20</sup> A huge rise in the number of users occurred between 2006 and 2012, rising from 10% to 40% of the population.

<sup>21</sup> However, according to Harwit and Duncan, it was not until the end of 2000 that the organisation really began to operate, first in Anhui province and then in 20 others. Eric Harwit, Duncan Clark, ‘Shaping the Internet in China: Evolution of Political Control over Network Infrastructure and Content’ (2001) 41 (3) *Asian Survey*, 394. DOI: 10.1525/as.2001.41.3.377

<sup>22</sup> He (n 11) 168.

<sup>23</sup> Premier Zhu Rongji, ‘Measures for the Management of Internet Information Services’ (2010) 43 (5) *Chinese Law & Government*, 30–35. DOI: 10.2753/CLG0009-4609430504

<sup>24</sup> Taylor C. Boas, ‘Weaving the Authoritarian Web’ (2004) 103 (677) *Current History*, 438–443.

<sup>25</sup> He (n 11) 170.

<sup>26</sup> Reporters Without Borders, ‘China’s Cyber Censorship Figures’ (rsf.org, March 2021) <<https://rsf.org/en/news/chinas-cyber-censorship-figures>> accessed 10 July 2021.

#### IV ‘Old style censorship is being replaced with a massive, ubiquitous architecture of surveillance: the Golden Shield’<sup>27</sup>

‘What is better? Big Brother Internet? Or no Internet at all?’<sup>28</sup> asked Michael Robinson, a young American computer engineer, who participated in developing the Chinese internet from 1996, but eventually became disillusioned of Chinese practices. The Golden Shield Project provided an answer to the dilemma: internet use for millions of Chinese people, albeit on condition that they are being continuously watched.<sup>29</sup> Following the Great Wall of China, we have witnessed the construction of the Great Firewall of China,<sup>30</sup> which is part of the Golden Shield Project. According to Greg Walton,<sup>31</sup> the main idea behind its construction was a paradox. On the one hand, the Chinese government understood that information technologies and the internet are the engines driving the global economy, and if China wants to be a part of it, the use of information technologies is inevitable. On the other hand, China is an authoritarian single-party state, which cannot allow anyone to question or undermine its authority.

The Great Firewall, as it is called by foreigners, is a system of limiting access to foreign websites, which started in the late 1990s,<sup>32</sup> and the Golden Shield is a system for domestic surveillance (*providing full national surveillance*<sup>33</sup>) set up in 1998 by the Ministry of Public Security.<sup>34</sup>

At the time of their creation, although the cyber police had already been actively supervising editorial responsibilities and blocking undesired content from Chinese users, it was

<sup>27</sup> Greg Walton, *China’s Golden Shield: Corporations and the Development of Surveillance Technology in the People’s Republic of China* (Rights & Democracy 2001, Montreal) <<https://numerique.banq.qc.ca/patrimoine/details/52327/2160163>> accessed 10 July 2021, 5.

<sup>28</sup> Quoted by: Ethan Gutmann, ‘Who Lost China’s Internet?’ (15 February 2002) *The Weekly Standard* <<https://ethan-gutmann.com/who-lost-chinas-internet>> accessed 10 July 2021.

<sup>29</sup> Ironically, the introduction of Chinese Internet censorship was abetted by major US tech companies, most notably Cisco, ‘which began supplying filtering and monitoring equipment to Chinese censors in the early 1990s’. James Griffiths, *The Great Firewall of China: How to Build and Control an Alternative Version of the Internet* (Zed Books 2019, London) 33. DOI: 10.5040/9781350225497

<sup>30</sup> Harsh Taneja, Angela Xiao Wu, ‘Does the Great Firewall Really Isolate the Chinese? Integrating Access Blockage with Cultural Factors to Explain Web User Behavior’ (2014) 30 (5) *The Information Society*, 297–309. DOI: 10.1080/01972243.2014.944728

<sup>31</sup> Walton (n 28) 5.

<sup>32</sup> Unsurprisingly, there is some disagreement about when exactly the project started: Sonali Chandel et al. mark 1996 as year zero, adding that (after various further stages) only in 2008 was it fully realised. Sonali Chandel, Zang Jingji, Yu Yunnan, Sun Jingyao, Zhang Zhipeng, ‘The Golden Shield Project of China: A Decade Later – An in-Depth Study of the Great Firewall’ (International Conference on Cyber-Enabled Distributed Computing and Knowledge Discovery, 2019) <<https://www.researchgate.net/profile/Sonali-Chandel/publication/338361425TheGoldenShieldProjectofChinaADecadeLater-Anin-DepthStudyoftheGreatFirewall/links/5e136bce299bf10bc392fc09/The-Golden-Shield-Project-of-China-A-Decade-Later-An-in-Depth-Study-of-the-Great-Firewall.pdf>> accessed 10 July 2021, 112.

<sup>33</sup> Author’s note.

<sup>34</sup> E.H., ‘How does China censor the internet?’ (22 April 2013) *The Economist* <<https://www.economist.com/the-economist-explains/2013/04/21/how-does-china-censor-the-internet>> accessed 10 July 2021.

technically possible to hide from the watching eyes of Big Brother. There was no need for a hidden corner in a room, as Winston Smith was hiding from the telescreen in George Orwell's *1984*, it was enough to install a Virtual Private Network (VPN).<sup>35</sup> The construction and utilisation of the Golden Shield,<sup>36</sup> however, brought about the total control of online communication, which few would have thought possible before.<sup>37</sup> Its main objective is naturally a political one: to block the online spread of ideas that might lead to actual political resistance. The surveillance system's main characteristics are its uncertainty and unpredictability:<sup>38</sup> it is unknown what kind of content is restricted and what is not and why some content is available in certain parts of the country but not in others, as well as which social group is denied access to what type of content. Bobbie Johnson calls this system hit-and-miss technology,<sup>39</sup> Séverine Arsène<sup>40</sup> and Margaret E. Roberts<sup>41</sup> use the term 'porous censorship', while János Boris uses the phrase 'adaptive authority',<sup>42</sup> referring to the consciously implemented 'safety valves', errors and omissions. It is also worth pointing out that the Golden Shield is continuously learning and improving with the help of people (the police and moderators) as well as artificial intelligence.<sup>43</sup>

<sup>35</sup> In 2017 controversial reports appeared about the use of VPN applications in China. According to The Guardian the Chinese government ordered the country's three greatest state-owned broadcasting providers (China Mobile, China Unicom, China Telecom) to completely block all VPNs. The Diplomat, however, quoted official statements saying only illegal VPNs would be banned in China from 2018. There is an irony behind this notion, as it is the Chinese government that has the right to decide what constitutes an illegal use of VPN. Benjamin Haas, 'China moves to block internet VPNs from 2018' (11 July 2017) The Guardian <<https://www.theguardian.com/world/2017/jul/11/china-moves-to-block-internet-vpns-from-2018>> accessed 10 July 2021; Charlotte Gao, 'China Clarifies Reports of VPN Ban' (13 July 2017) The Diplomat <<https://thediplomat.com/2017/07/china-clarifies-reports-of-vpn-ban>> accessed 10 July 2021.

<sup>36</sup> Chandel, Jingji, Yunnan, Jingyao, Zhipeng (n 33) 114.

<sup>37</sup> Valentin Weber, 'The Worldwide Web of Chinese and Russian Information Controls' (2019) 11 University of Oxford Centre for Technology and Global Affairs Working Paper Series <<https://www.ctga.ox.ac.uk/files/theworldwidewebofchineseandrussianinformationcontrols.pdf>> accessed 10 July 2021.

<sup>38</sup> Many compares Project Golden Shield to Jeremy Bentham's Panopticon concept, where prison inmates do not know who among them are being observed, and whether anyone is observed at all. As Barna Mezey put it: 'This construction made any kind of conspiracy or cooperation, thus any kind of rebellion or breakout impossible.' Mezey Barna, *A börtönügy a 17–19. században. A börtön európai útja [The state of prisons in the 17th-19th centuries. Prisons in Europe]* (Gondolat Kiadó 2018, Budapest) 337.

<sup>39</sup> Bobbie Johnson, 'How Google censors its results in China' (The Guardian, 13 January 2010) <<https://www.theguardian.com/technology/2010/jan/13/how-google-censors-china>> accessed 10 July 2021.

<sup>40</sup> Séverine Arsène, 'La Chine et le contrôle d'Internet. Une cybersouveraineté ambivalente' (2019) 20 *Annuaire Français de Relations Internationales* <<https://www.afri-ct.org/wp-content/uploads/2020/06/Article-Arsene.pdf>> accessed 10 July 2021, 961.

<sup>41</sup> Roberts (n 14) 2.

<sup>42</sup> Boris János, 'A Nagy tűzfal és a SZORM, avagy a zárt internet orwelli világa' [The Great Firewall and SZORM, or the Orwellian world of the closed internet] (2016) 2 (1) *Athenaeum*, 62.

<sup>43</sup> Chen Qiufan, 'The Reunion: a new science-fiction story about surveillance in China' (2019) 122 (1) *MIT Technology Review*, 89–95.

Freedom House, in its 2020 report on the internet, stated that ‘China’s surveillance systems remain the most advanced and pervasive in the world’.<sup>44</sup> The reason for this is that various elements of the Golden Shield not only monitor and restrict, if necessary, online activities, but form an interlinked system which makes political and social profiling<sup>45</sup> possible using the following:

- ‘monitoring of information space;
- Big Data analysis;
- monitoring of public spaces;
- cameras in and around homes;
- health status apps;
- thermal detection technology;
- contact tracing apps;
- detentions for online activities;
- facial recognition technology<sup>46</sup>.

The report makes this statement even more shocking by illustrating all of the above possibilities in one picture:



Figure 1.

<sup>44</sup> Freedom House, ‘Freedom on the Net 2020. The Pandemic’s Digital Shadow’ (21 October 2020) <[https://freedomhouse.org/sites/default/files/2020-10/10122020\\_FOTN2020\\_Complete\\_Report\\_FINAL.pdf](https://freedomhouse.org/sites/default/files/2020-10/10122020_FOTN2020_Complete_Report_FINAL.pdf)> accessed 10 July 2021, 21.

<sup>45</sup> Asbóth Emma, Tamás Bianka, ‘Szezám tárulj – a kínai szociális kreditrendszer’ [Open Sesame – the Chinese social credit system] (9 January 2019) [arsboni](https://arsboni.hu/a-kinai-szocialis-kreditrendszer-sesame-credit) <<https://arsboni.hu/a-kinai-szocialis-kreditrendszer-sesame-credit>> accessed 10 July 2021.

<sup>46</sup> Roberts (n 14) 21.

This has led from the early times characterised by ‘traditional’ dangers threatening the freedom of the press to an era of total national surveillance by traditional online technologies. The People’s Republic of China, however, approaches the question with a different attitude. For them, it is a question of ‘internet sovereignty’,<sup>47</sup> demonstrated by the president of China, Xi Jinping, in his 2015 speech at the second World Internet Conference,<sup>48</sup> where he called on all countries to respect each other’s ‘cyber sovereignty’ and various methods of internet control. He pointed out that all countries have the right to develop and control their own internet, and, clearly referring to the United States, rejected the idea that any country should acquire hegemony in cyberspace, which is not a space without its own laws. All this leads to the question whether a ‘Chinese internet’, ‘American internet’, ‘Egyptian internet’ or even a ‘Hungarian internet’ are concepts that do or may exist. If so, the process of internet regulation should be similar to the early days of media and broadcasting regulation, where countries formulate their own rules, then – ideally, but not necessarily – harmonise them with those of neighbouring, similarly affected countries.<sup>49</sup> As we all know, this was the original method of media regulation, later totally transformed by the improvement of technology, first by TV and radio signals, then by the internet.

Apart from the restriction of civic and political rights, there are also economic aspects. In 2008, YouTube became unavailable due to the Tibet situation, and the same happened to Facebook (2008), Twitter (2009) and Wikipedia (2019) because of events in the Xinjiang Uyghur Autonomous Region. What options can companies have in this situation? Sacrifice hundreds of millions of users for their democratic principles? Or toe the line, imposing a form of economic censorship on themselves? Google has opted for the latter,<sup>50</sup> making certain content unavailable in China when searching on google.cn ever since it appeared on the Chinese internet market in 2006.<sup>51</sup> American politicians and the general public, however, found these practices unacceptable, and the objections eventually led to Google discontinuing its services in China.<sup>52</sup> However, as Ryan Gallagher uncovered in 2018,<sup>53</sup>

<sup>47</sup> Simon Denyer, ‘China’s scary lesson to the world: Censoring the Internet works’ (23 May 2016) The Washington Post <<https://www.washingtonpost.com/world/asiapacific/chinas-scary-lesson-to-the-world-censoring-the-internet-works/2016/05/23/413afe78-fff3-11e5-8bb1-f124a43f84dcstory.html>> accessed 10 July 2021.

<sup>48</sup> N/A, ‘China internet: Xi Jinping calls for ‘cyber sovereignty’’ (16 December 2015) BBC <<https://www.bbc.com/news/world-asia-china-35109453>> accessed 10 July 2021.

<sup>49</sup> Jack L. Goldsmith, Timothy Wu, ‘Digital Borders: National Boundaries Have Survived in the Virtual World and Allowed National Laws to Exert Control Over the Internet’ (2006) 40 Legal Affairs <<https://www.legalaffairs.org/issues/January-February-2006/featuregoldsmithjanfeb06.msp>> accessed 10 July 2021; Jack L. Goldsmith, Timothy Wu, *Who controls the Internet? Illusions of a borderless world* (Oxford University Press 2006, Oxford).

<sup>50</sup> Christopher Stevenson, ‘Breaching the Great Firewall: China’s Internet Censorship and the Quest for Freedom of Expression in a Connected World’ (2007) 30 (2) Boston College International and Comparative Law Review, 543.

<sup>51</sup> The same route was taken by Microsoft as well. Stevenson (n 51) 544.

<sup>52</sup> Officially due to Chinese hacker attacks. Stevenson (n 51) 137–138.

<sup>53</sup> Ryan Gallagher, ‘Google Plans to Launch Censored Search Engine in China’ (1 August 2018) The Intercept <<https://theintercept.com/2018/08/01/google-china-search-engine-censorship/>> accessed 10 July 2021.

as an attempt to get back into the Chinese market, Google was planning to develop a search engine blacklisting all websites and search results pertaining to human rights, democracy, religion or peaceful resistance. The project (Project Dragonfly, as it was dubbed) was officially closed down in 2019.<sup>54</sup>

## V Russia is Catching Up

In the 2020s, the blocking of online content for political reasons is an everyday phenomenon in numerous countries. China's internet sovereignty is the most comprehensive system, but in the summer of 2021 Russia has caught up: after having perfected the technology for a few years, between 15 June 2021 and 15 July 2021, in a test run, Russia successfully<sup>55</sup> disconnected itself from the World Wide Web.<sup>56</sup> The basis of this act was the amendment of the 2013 federal law on telecommunications:<sup>57</sup> the Sovereign Internet Law of 2019,<sup>58</sup> which:

- obliged Russian internet providers to install Deep Packet Inspection (DPI) and enabled providers and authorities to find the original source of threatening content and block it if necessary;

- obliged providers to route online traffic and information through state-controlled checkpoints;<sup>59</sup>

- entitled the government to disconnect the Russian internet physically from the World Wide Web in case of an emergency.<sup>60</sup>

<sup>54</sup> Dippold Ádám, 'A Google beszüntette gyanúsán cenzúrabarát projektjét' [Google shut down allegedly censorship-friendly project] (19 June 2019) Qubit <<https://qubit.hu/2019/07/19/a-google-beszuntette-gyanusan-cenzurabarát-projektjét>> accessed 25 July 2021.

<sup>55</sup> Ashley Collman, 'Russia disconnected itself from the rest of the internet, a test of its new defense from cyber warfare, report says' (23 July 2021) Insider <<https://www.businessinsider.com/russia-cuts-self-off-from-global-internet-tests-defenses-rbc-2021-7>> accessed 25 July 2021.

<sup>56</sup> It should be noted that Insider was not able to have this information confirmed by two independent sources.

<sup>57</sup> On the process leading to passing the law and on its details see: Tölgyesi Beatrix, 'Az orosz 'szuverén internet' törvényről' [On the Russian 'sovereign internet' law] (2020) 13 (2) *Nemzet és Biztonság: Biztonságpolitikai Szemle*, 113–132; Human Rights Watch, 'Russia: Growing Internet Isolation, Control, Censorship. Authorities Regulate Infrastructure, Block Content' (18 June 2020) <<https://www.hrw.org/news/2020/06/18/russia-growing-internet-isolation-control-censorship>> accessed 25 July 2021. DOI: 10.32576/nb.2020.2.8

<sup>58</sup> Federal Law No. 90-FZ of 01. 05. 2019 'On Amendments to the Federal Law "On Communications" and the Federal Law "On Information, Information Technology and Information Protection"', <<http://publication.pravo.gov.ru/Document/View/0001201905010025>> accessed 25 July 2021.

<sup>59</sup> Moreover, similarly to China, there are extremely high fines for using VPNs. N/A, 'State Duma introduces fines for violating anonymiser law' (5 June 2018) Meduza <<https://meduza.io/news/2018/06/05/gosduma-vvela-shtrafy-za-naruszenie-zakona-ob-anonimayzerah>> accessed 25 July 2021.

<sup>60</sup> Alexandra Ma, 'Russia officially introduced a 'sovereign internet' law to let Putin cut off the entire country from the rest of the web' (1 November 2019) Insider <<https://www.businessinsider.com/russia-sovereign-internet-law-cut-web-access-censorship-2019-11>> accessed 25 July 2021.

The vague definition of security threats leaves it to the authorities to decide which situation requires tracking, rerouting, or blocking. The process is not transparent and opens the door to abuse, Human Rights Watch said, adding that passing the law ‘is bad news for Russia and creates a dangerous precedent for other countries’.<sup>61</sup> However, there were signs: in its 2019 report, Reporters Without Borders puts the number of Russian laws restricting press freedom or freedom of expression at 27.<sup>62</sup> The report’s addendum also shows that, in a short period of two years (2020-2021), another 16 similar laws were adopted in Russia.<sup>63</sup> The European Audiovisual Observatory 2021 highlighted that, as a result of some European Court of Human Rights’ decisions,<sup>64</sup> Russia has moved away from blocking content in favour of imposing substantial fines to the internet platforms and providers.<sup>65</sup>

## VI Conclusion

The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression highlighted in his 2020’s report that ‘Internet shutdowns (or restrictions)<sup>66</sup> are an affront to the freedom of expression that every person is guaranteed under human rights law’.<sup>67</sup> In contrast, one could see similar techniques and legal solutions in the most populated (China) and the 9th most populated (Russia) countries in the world: immense surveillance systems capable of learning and evolving, the restricting or banning of the use of VPN, hybrid actions,<sup>68</sup> enormous fines, unpredictable legal or judicial actions for ‘threatening content’ – i.e. having (almost) direct control over 20% of the world’s population.

<sup>61</sup> Human Rights Watch, ‘Russia: New Law Expands Government Control Online. Wider Internet Surveillance’ (31 October 2019) <<https://www.hrw.org/news/2019/10/31/russia-new-law-expands-government-control-online>> accessed 25 July 2021.

<sup>62</sup> Reporters Without Borders, ‘Taking Control? Internet Censorship and Surveillance in Russia’ (rsf.org, 27 Nov 2019) <[https://www.reporter-ohne-grenzen.de/fileadmin/Redaktion/Downloads/Berichte/2019/russiareport\\_web\\_updated.pdf](https://www.reporter-ohne-grenzen.de/fileadmin/Redaktion/Downloads/Berichte/2019/russiareport_web_updated.pdf)> accessed 25 July 2021, 10–20.

<sup>63</sup> Reporters Without Borders, ‘Taking Control? Internet Censorship and Surveillance in Russia. Updated’ (31 Aug 2021) <<https://www.reporter-ohne-grenzen.de/fileadmin/Redaktion/Downloads/Berichte/2021/russiareport-update.pdf>> accessed 4 Sep 2021, 9–18.

<sup>64</sup> *Bulgakov v. Russia* App no. 20159/15 (ECtHR, 23 June 2020); *Engels v. Russia* App no. 61919/16 (ECtHR, 23 June 2020); *OOO Flavus and Others v. Russia* App nos 12468/15, 23489/15, and 19074/16 (ECtHR, 23 June 2020); *Vladimir Kharitonov v. Russia* App no. 10795/14 (ECtHR, 23 June 2020).

<sup>65</sup> Andrei Richter, *Regulation of social media in Russia* (European Audiovisual Observatory 2021, Strasbourg) 10.

<sup>66</sup> Author’s note.

<sup>67</sup> UNHRC: Disease pandemics and the freedom of opinion and expression. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. 2020, UN Doc A/HRC/44/49, 28.

<sup>68</sup> Kelemen Roland, ‘Radikalizálás, dezinformálás és tömegpszichózis modern köntösben: a hibrid konfliktus kibertérben’ [Radicalisation, disinformation and mass psychosis in a modern guise: the hybrid conflict in cyberspace] (2021) 13 (3) *Jog–Állam–Politika*, 82.

The question to which the Chinese leaders, while running the Golden Shield, and Russian leaders, while cutting down the country from the world's internet infrastructure, are trying to find the answer to is the same: can the 21st century's media provide a solution that can simultaneously ensure economic opening and advancement, and also informational isolationism? We will most likely have to wait quite a few years to get the answer, but it is evident that, for both conditions to apply, it needs 'the largest and most sophisticated online censorship operation in the world'.<sup>69</sup> Besides the American immunity-based system and Europe's 'safe harbour' method, there is a third route, based on nationwide surveillance, which does not allow for mistakes on the part of users, as it prevents them from accessing information. If any undesired information does get through to the user, via the consciously implemented 'safety valves' or other channels, the internet service providers are held directly responsible, with no immunity or acquittance.<sup>70</sup> Internet providers are also obliged to perform constant monitoring, which means that free opinions have to go through three barriers before they can reach the public:

- self-imposed user censorship;
- economic censorship (monitoring by providers);
- state censorship.

Is this the way of the future? Systems such as Golden Shield, with a complex and ever-changing, constantly evolving legal, technological and personal background, ensuring 'cyber sovereignty'? Moreover, as Bennett and Naim note, the alarming wave that 'China has advised Iran on how to build a self-contained "Halal" Internet and Beijing has also been sharing know-how with Zambia to block critical Web content'.<sup>71</sup> Similar technologies, situations and explanations could be seen worldwide only in the first half of 2021:

- mobile internet disruptions in Iran amid water protests in Khuzestan;<sup>72</sup>
- social media restrictions amid widespread anti-government protests in Cuba;<sup>73</sup>
- restriction of Twitter in Nigeria after deleting a tweet by the Nigerian president;<sup>74</sup>

<sup>69</sup> Elizabeth C. Economy, 'The great firewall of China: Xi Jinping's internet shutdown' (29 June 2018) *The Guardian* <<https://www.theguardian.com/news/2018/jun/29/the-great-firewall-of-china-xi-jinpings-internet-shutdown>> accessed 25 July 2021.

<sup>70</sup> On different cases of copyright and trademark breaches see: Danny Friedmann, 'Oscillating from Safe Harbor to Liability: China's IP Regulation and Omniscient Intermediaries' in Giancarlo Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020, Oxford) 277–294.

<sup>71</sup> Philip Bennett, Moises Naim, '21st-century censorship' (2015) 14 (1) *Columbia Journalism Review* <[https://archives.cjr.org/cover\\_story/21st\\_century\\_censorship.php](https://archives.cjr.org/cover_story/21st_century_censorship.php)> accessed 25 July 2021.

<sup>72</sup> John Gambrell, 'Mobile internet disruptions seen in Iran amid water protests' (22 July 2021) *AP* <<https://apnews.com/article/technology-middle-east-business-health-iran-98b973da755a3ccf80428570bfdd3fb6>> accessed 25 July 2021.

<sup>73</sup> Sarah Marsh, Elizabeth Culliford, 'Faced with rare protests, Cuba curbs social media access, watchdog says' (14 July 2021) *Reuters* <<https://www.reuters.com/world/americas/cuba-curbs-access-facebook-messaging-apps-amid-protests-internet-watchdog-2021-07-13>> accessed 25 July 2021.

<sup>74</sup> John Campbell, 'Nigerian President Buhari Clashes With Twitter Chief Executive Dorsey' (8 July 2021) *Council on Foreign Relations Blog* <<https://www.cfr.org/blog/nigerian-president-buhari-clashes-twitter-chief-executive-dorsey>> accessed 25 July 2021.

- internet shutdown amid anti-government protests in Colombia;<sup>75</sup>
- restriction of Facebook in Bangladesh amid protests against the visit of Indian Prime Minister Narendra Modi;<sup>76</sup>
- total internet shutdown on election day in the Republic of the Congo;<sup>77</sup>
- social media and messaging apps disabled amid political riots in Senegal;<sup>78</sup>
- internet shutdown amid deadly standoff at opposition candidate’s house in Chad;<sup>79</sup>
- internet shutdown amid riots and alleged coup attempt in Armenia;<sup>80</sup>
- internet disruption amid military coup in Myanmar.<sup>81</sup>

The ‘progress’ of these countries is not the same, but their direction is. Tim Berners-Lee, often called ‘one of the fathers of the internet’,<sup>82</sup> in a 2013 interview<sup>83</sup> said ‘The Berlin Wall tumbled down, the great firewall of China – I don’t think it will tumble down, I think it (*i.e. total surveillance*)<sup>84</sup> will be released’. It has been eight years since the interview, and it turned out that he was wrong. Moreover, thanks to the ever-evolving technologies,<sup>85</sup> the Golden Shield is bigger, smarter and more precise than ever before. Cyberpaternalism,<sup>86</sup> that is, internet regulation within a country’s geographical and legal boundaries, seems infeasible, but not impossible. Chinese ‘cyber sovereignty’ since 2015, as well as Russia’s measures since the late 2010s, have all been steps in this dark direction.

<sup>75</sup> Jon Jackson, ‘Internet Disrupted in Colombia as Protesters Killed During Rally Against Iván Duque Márquez’ (5 May 2021) Newsweek <<https://www.newsweek.com/internet-problems-colombia-protests-1588991>> accessed 25 July 2021.

<sup>76</sup> N/A, ‘Amid anti-Modi protests, Facebook says services restricted in Bangladesh’ (27 March 2021) CAN <<https://www.channelnewsasia.com/news/asia/anti-modi-protests-bangladesh-facebook-restricted-14505020>> accessed 25 July 2021.

<sup>77</sup> N/A, ‘Internet shutdown in the Republic of the Congo on election day’ (21 March 2021) Digital Watch <<https://dig.watch/updates/internet-shutdown-republic-congo-election-day>> accessed 25 July 2021.

<sup>78</sup> Lawrence Agbo, ‘#FreeSenegal: Senegal Disables Facebook, Other Social Media Apps’ (6 March 2021) Allnews Nigeria <<https://allnews.ng/news/freesenegal-senegal-disables-facebook-other-social-media-apps>> accessed 25 July 2021.

<sup>79</sup> N/A, ‘Chad: Internet shutdowns impeding freedom of expression’ (9 April 2021) Amnesty International <<https://www.amnesty.org/en/latest/news/2021/04/tchad-les-coupures-internet-une-entrave-la-liberte-expression>> accessed 25 July 2021.

<sup>80</sup> N/A, ‘Internet disrupted in Armenia amid political turmoil and alleged coup attempt’ (25 Febr 2021) Digital Watch, <<https://dig.watch/updates/internet-disrupted-armenia-amid-political-turmoil-and-alleged-coup-attempt>> accessed 25 July 2021.

<sup>81</sup> AccessNow, ‘Update: internet access, censorship, and the Myanmar coup’ (15 February 2021 – updated 30 May 2021), <<https://www.accessnow.org/update-internet-access-censorship-myanmar>> accessed 25 July 2021

<sup>82</sup> N/A, ‘The Fathers of the Internet’ (16 March 2014) Inmesol <<http://www.inmesol.com/blog/fathers-internet>> accessed 25 July 2021.

<sup>83</sup> Guy Faulconbridge, ‘Father of Web says China will dismantle ‘great firewall’’ (22 November 2013) Reuters <<https://www.reuters.com/article/uk-china-internet-berners-lee-idUKBRE9AL00120131122>> accessed 25 July 2021.

<sup>84</sup> Author’s note.

<sup>85</sup> Sorbán Kinga, ‘Ethical and legal implications of using AI-powered recommendation systems in streaming services’ (2021) 21 (2) Információs Társadalom, 63–82. DOI: 10.22503/infars.XX1.2021.2.5

<sup>86</sup> Andrew D. Murray, ‘Nodes and Gravity in Virtual Space’ (2011) 5 (2) *Legisprudence*, 195–221. DOI: 10.5235/175214611797885684



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# **The Role of Digitisation in Employment and Its New Challenges for Labour Law Regulation The Hungarian, Italian and Spanish Solutions, Comparison, and Criticism\*\*\*\*\***

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## Abstract

The study comprehensively presents the main effects of digitisation. Due to its complexity, digitisation affects the employment and labour markets in different ways. It partially changes working conditions, brings to life new forms of employment and, as a result of the development of technology, professions disappear. Thus, all this necessarily poses different challenges to the legislation. The forms of work in the gig economy – which was brought to life by the online space – cannot be classified as a traditional legal framework. Teleworking has been absolutely valorised by the coronavirus pandemic. Looking to the near future, after the end of the pandemic, teleworking is expected to play a much more significant role in the labour market. The study presents the marked forms of digitisation that have emerged in employment and summarises its supranational legal issues. It also presents the digitisation characteristics of Hungary, Italy and Spain. It examines how legislation and the judiciary have provided answers to the issues of digitisation. Consequently, the study

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analyses three main trends: the impact of digitalisation in general, telework, and the gig economy, with special regard to the categorisation of workers (employees, self-employed and possible third categories in between). The study argues that the concept of ‘employment relationship’ has to be interpreted in a much broader way; general guarantees must be valid for all forms of work performed by people in economic dependence and in a state of economic weakness.

Keywords: digitisation, telework, crowdwork, application-based work, automation, robotics, classification of employment

## I Overall Context: Manifestations of Digitisation in Labour Matters

*Digitisation* is the process of converting information from a physical format into a digital one.<sup>1</sup> Digitisation is not just about using digital devices. This is even more complex, with a change in mindset behind it. We achieve new results with new tools and new procedures.

*Digitised information* has become a *strategic resource*, with the network becoming the main organising principle, both in the economy and in society. In the spring of 2020, the *epidemic* also boosted corporate digitisation a lot. This could be perceived during everyday administration or work. More and more processes had to be carried out using digital tools. Experts also say that digitisation could be a big winner of the coronavirus.<sup>2</sup>

According to our assessment, to summarise the impact of digitisation:

- a) it partially changes the *working conditions* in the *employment relationship* (e.g. widespread use of telework),
- b) it makes certain jobs redundant due to *automation* and *robotics*, and
- c) there are forms of *dependent employment*, which do not form part of the employment relationship.

The study focuses on the labour law aspects of the phenomena of digitisation listed above and analyses them at both international and national legal levels. The article presents – among other things – the legislative achievements and the loopholes.

<sup>1</sup> David Burkett, ‘Digitisation and Digitalisation: What Means What?’ <<https://workingmouse.com.au/innovation/digitisation-digitalisation-digital-transformation/>> accessed 10 November 2021.

<sup>2</sup> ‘A digitalizáció lehet a koronavírus nagy nyertese a pénzintézeteknél’ [Digitization could be the big winner of the coronavirus in financial institutions] Portfolio. <<https://www.portfolio.hu/bank/20200506/a-digitalizacio-lehet-a-koronavirus-nagy-nyertese-a-penzintezeteknel-430266#>> accessed 10 August 2021.

## 1 Forms and Conditions of Employment

The European economy, in addition to well-known problems such as aging, depopulation, migration and the declining number of newly established, dynamic businesses are increasingly exposed to the adverse effects of digitisation, automation and robotisation on employment. Previously, employment problems accompanying the introduction of new technologies were temporary, short-term adaptation difficulties. However, after the turn of the millennium, with the spread of digitisation, we can witness again – in general terms – the so-called resurrection of views representing *automation anxiety*. According to some literature, this is a comprehensive transformation which may affect all occupations to a greater or lesser extent, depending on the content of the task.<sup>3</sup>

Volumes could be written about the employment consequences of digitisation. The study – subject to the nature of such a publication – summarises the forms of digitisation to which at least one of the ‘country reports’ or parts of international law (Supranational Context) is linked.

### a) The impact of telecommunications – changes over three generations

We are witnessing and participating in the rapid expansion and interconnection of *computing* and *telecommunications*. In the case of an employment relationship – if the work tool is only a computer – a work organisation solution offers an alternative: the *traditional workplace* (e.g. the company office) or *teleworking*. Or a hybrid version of the two: the home office. These work organisation methods quickly became popular. On the one hand, they are favourable for employers. The basic premise is that if the parties can *reduce costs* by choosing the type of contract, it is the normal and rational behaviour of labour market actors to orient themselves towards the cheapest type of contract. This aspect is perhaps the most obvious in the case of telework.<sup>4</sup> On the other hand, those who are otherwise unable to find employment due to a *health problem* may have access to employment.

There are *three generations of telework*. The first is its appearance in the 1970s. The place of work is *separated from the employer’s area of operation* but is still fixed for work due to the limitations of the available IT technology.

The second generation is the era of the *mobile office*. IT devices spread rapidly, a technological feature of the era: new devices (mobile phones, tablets, laptops) made it possible to work without being tied to a place. However, communication technology can still be separated from information storage. The storage of information is tied to the

<sup>3</sup> Erik Brynjolfsson, Andrew McAfee, *The Second Machine Age. Work, Progress, and Prosperity in a Time of Brilliant Technologies* (W.W. Norton & Company 2016, New York, London) 8.

<sup>4</sup> Gyulavári Tamás, *A szürke állomány. A gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán [The grey matter. Economically dependent work on the border of employment and self-employment]* (Pázmány Press 2014, Budapest) 110.

device carrying it; there is no permanent connection between the device for work and the employer's information storage system. Telework is so widespread that the social partners in the EU consider it necessary to regulate. The *European Telework Framework Agreement* (abbreviated ETFA) is concluded (signed and entered into force 16 July 2002).

The third generation is the *virtual office*, which is technologically linked to the permanent networking of the computing device. Mobile Internet allows continuous connectivity, resulting in 'cloud-based' data storage for real-time access to data. The work can be done from anywhere and anytime; the results of the work are available to the employer without delay. A virtual office means that the workplace in practice becomes virtual.<sup>5</sup>

## b) Definition of telework

Although there are several definitions of telework, we use the definition of the ETFA in our paper. According to this, telework is a form of *organising and/or performing work*, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis. There are *three essential content elements* in the definition that can be used to describe all forms of telework:

- the *regular form* of work organisation,
- *separation* of the place of work from the employer's premises,
- use of *computer equipment* in the course of work.<sup>6</sup>

## 2 Impact of Automation and Robotics – Change Working Conditions or Eliminate Jobs?

*Automation* is fundamentally transforming the world economy and the labour market, because almost 49% of work tasks can already be *automated technically*. According to forecasts, automation is projected to transform rather than replace human work. As a first step in automation, the employer usually needs to invest in education about the new technology. This is essential to remain competitive and to ensure a workforce that adapts to change. One example of automation is building automation, the area of providing a comfortable built environment for people and optimising operating expenses (Building

<sup>5</sup> Jon C. Messenger, *Telework in the 21st century: An evolutionary perspective* (The ILO Future of Work series, International Labour Organization 2019, Geneva) 5–8. DOI: 10.4337/9781789903751.00005

<sup>6</sup> Bankó Zoltán, *A távmunka szabályozásának dilemmái, Ünnepi tanulmányok Lőrincz György 70. születésnapja tiszteletére [Dilemmas in the regulation of telework, Festive studies in honor of György Lőrincz's 70th birthday]* (HVG-ORAC 2019, Budapest) 20–23.

Management System – BMS). Their task is to control and automatically control mechanical, safety, fire and flood protection and lighting equipment with digital devices.<sup>7</sup>

Robotics – partly unlike automation, but not necessarily – can *replace human labour*. A good example is *Robotic Process Automation* (RPA). This means implementing standardisable processes with software robots. These *software robots* replace people in *administrative jobs*. As more and more repetitive, monotonous activities are performed by physical robots in the industry, software robots take over such routine tasks in office work. In the United States and Europe, 1.7 million banking jobs were expected to be lost in the 2020s due to the rise of software robots. At the same time, the RPA does not only eliminate but *transforms jobs*. It does not act by terminating the work of 40 out of 100 employees, but by taking over 40% of the tasks of each employee. Undoubtedly, this will ultimately lead to the elimination of jobs, offering individuals the opportunity to take on more creative, more value-added tasks instead of their previously tedious, monotonous tasks.

The RPA is expected to halt or reverse the process by which multinational companies outsource standardisable, administrative work to low-cost countries. Instead, they set up software robots close to the company headquarters. Over the past decade the proportion of *'Taylor workers'* has increased significantly in Central and Eastern Europe countries. These are the jobs that are most easily triggered with machines and robots. Today, it is perhaps even cheaper to carry out these activities in the *low-labour-cost countries* of this region. However, it is a realistic scenario that, with technological advances, they will be taken back to the parent company, where computers or robots will do this work instead of Eastern European workers.<sup>8</sup> At the same time, the more developed a country is in terms of digitalisation (e.g. use of broadband technologies, IT skills of employees, e-government), the less exposed it is to similarly drastic changes.<sup>9</sup> According to experts, the spread of RPA solves the problem of advanced economies in having more people exit the labour market than in those societies.<sup>10</sup>

<sup>7</sup> Fine, David, Havas András, Hieronimus, Solveigh, Jánoskúti Levente, Kadocsa András Péter, *Átalakuló munkahelyek: az automatizálás hatása Magyarországon [Transforming jobs: the impact of automation in Hungary]*. (McKinsey & Company 2018) 7–8, <<https://www.mckinsey.com/~media/McKinsey/Locations/Europe%20and%20Middle%20East/Hungary/Our%20Insights/Transforming%20our%20jobs%20automation%20in%20Hungary/Automation-report-on-Hungary-HU-May24.ashx>> accessed 10 August 2021.

<sup>8</sup> Makó Csaba, Illéssy Miklós, Borbély András, 'A digitalizáció és a munkavégzési formák' [Digitalization and types of work] (2018) 179 (1) Magyar Tudomány, 61–68. DOI: 10.1556/2065.179.2018.1.7.

<sup>9</sup> Chrystophe Degryse, 'Digitalisation of the economy and its impact on labour markets' (European Trade Union Institute, ETUI Research Paper, Working Paper, 2016) 18, DOI: 10.2139/ssrn.2730550; About the topic see I. Daugareilh, C. Degryse, P. Pochet (eds), 'The platform economy and social law: Key issues in comparative perspective' (ETUI Working Paper, 2019/10) DOI: 10.2139/ssrn.3432441; A. Piasna, J. Drahoukoupil, 'Digital Labour in Central and Eastern Europe: Evidence from the ETUI Internet and Platform Work' (ETUI Working Paper, 2019/12) DOI: 10.2139/ssrn.3500717; Janine Berg, Uma Rani, Marianne Furrer, Ellie Harmon, M. Six Silberman, *Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World* (Geneva 2018, ILO).

<sup>10</sup> 'The impact of RPA on the Changing Global Labour Market' (2018) <<https://www.cigen.com.au/cigenblog/impact-of-rpa-on-changing-global-labour-market>> accessed 10 August 2021.

During the 2008–2009 global economic crisis, the digital age emerged as a breakthrough point among developed European countries. Based on the *European Working Conditions Survey*, we highlight two key factors for automation. Neither work tasks that require complex *cognitive skills* are suitable for automation, nor those in which employees have a high degree of autonomy. At the end of the cluster analysis, three major groups of workers could be distinguished:

- *creative employees*, who have to use their cognitive skills to a large extent in their work and enjoy a high degree of autonomy,
- *jobs organised according to Taylor principles* represented the other end of the scale, the use of cognitive abilities and autonomy being the least characteristic,
- between the two groups, but closer to the creative workers, there is a group of so-called *constrained problem solvers* who do creative work but have significantly less autonomy in their work.<sup>11</sup>

### 3 The Gig Economy

A steady increase experienced in employment segments related to digitisation. In the changed environment, the conditions of classical work cannot be enforced. In its most important characteristics, it *differentiates the so-called gig economy* from classic labour market solutions. There are mostly differences in the equipment used, working hours and regularity. The term gig economy focuses on *innovative forms of work*, expressing that they are in most cases short-lived, but several times, alternating consist of repetitive work, for example, *self-employed freelancer contracts* for a specific task. Many times, they are specialists who take jobs in these ways. The product of the gig economy is work, and its basic promise is *providing services* rapidly at *low cost* based on a large number of available standing staff. The central question of the gig economy is *(re)making work a commodity*.<sup>12</sup>

The gig economy has both advantages and downsides. On the one hand, there are some *positive aspects*. Employers have a *wider range of applicants* to choose from because they do not have to hire someone based on their proximity. Additionally, computers have developed to the point that they can either take *the place of the jobs* people previously had or allow people to work just as efficiently from home as they could in person. However, people who do not use *technological services* such as the Internet may be *left behind by the benefits* of the gig economy.

Some features of the *downsides*: a gig economy undermines the *traditional economy of full-time employees* who often focus on their career development. The gig economy trend

<sup>11</sup> Makó, Illéssy, Borbély (n 8) 61–68.

<sup>12</sup> Valerio de Stefano, *The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the «gig-economy»* (Conditions of Work and Employment Series No. 71, ILO 2016, Geneva) 8. DOI: 10.2139/ssrn.2682602

can make it *harder* for full-time employees to *develop in their careers*, since temporary employees are often cheaper to hire and more flexible in their availability. Employees who prefer a traditional career path and the stability and security that come with it are being crowded out in some industries. For some workers, the flexibility of working gigs can actually disrupt the *work-life balance*. Flexibility in a gig economy often means that workers have to make themselves available any time gigs come up. In effect, workers in a gig economy are more like *entrepreneurs* than traditional employees. While this may mean *greater freedom* of choice, it also means that the workers lose security, especially of a steady job with regular pay and benefits.<sup>13</sup>

Overall, the *disadvantages* – on the employee side – are *more significant* than the positives. As technical progress is unstoppable, *legislation must respond* to this trend.

The gig economy is giving new answers to the challenges of the labour market. These forms of employment are primarily amongst the members of *Generation Y* become very popular. They spend a significant part of their days online. One of the key moments of the gig economy is *sharing*. The point is that unused resources need to be used in a new way, and this new way is realised through the provision of a service that is sold in the *online marketplace*. The services of the gig economy consist on the one hand of so-called *crowd work*, and the other hand *application-based work*.<sup>14</sup>

#### a) Crowdwork – digital outsourcing

‘Crowdwork’ means the work that is done in the context of *crowdsourcing*. What does crowdsource mean? The activity of an enterprise outsourcing a function previously performed by its employees to a pre-defined (typically large) group in the form of an open call. In this form, there is no obstacle to individual work either, but *group work* is much more common. In this solution, the work processes take place online throughout, including the transfer of the result. In this case, sharing means *sharing workflows* with people the customer will never meet, but the established system of relations does not even justify this. The goal is to perform the tasks quickly and efficiently. In addition, the parties will move out of their own local zone into the virtual space, thus *expanding the labour market* in front

<sup>13</sup> Ben Gitis, Douglas Holtz-Eakin, Will Rinehart, *‘The Gig Economy’ – Research and Policy Implications of Regional, Economic, and Demographic Trends* (The Aspen Institute Future of Work Initiative 2017) 2–4. About the topic see Sarah Kaine, Emmanuel Jossierand ‘The organisation and experience of work in the gig economy’ (20 August 2019) *Journal of Industrial Relations*, DOI: 10.1177/0022185619865480#; Jamie Woodcock, Mark Graham, ‘The Gig Economy: A Critical Introduction’ (January 2020) *Polity*, DOI: 10.1080/00130095.2020.1831908; Joshua Healy, Icon, Daniel Nicholson, Andreas Pekarek, ‘Should we take the gig economy seriously?’ (2017) 27 (3) *Labour & Industry: a journal of the social and economic relations of work*, DOI: 10.1080/10301763.2017.1377048.

<sup>14</sup> Rácz Ildikó, ‘Munkavállaló vagy nem munkavállaló? A gig-economy főbb munkajogi dilemmái’ [Employee or non-employee? The main labour law dilemmas of the gig-economy] (2017) 10 (1) *Pécsi Munkajogi Közlemények*, 31.

of them and as necessary to exceed the local level. Typically, jobs can be performed in the context of crowdwork that involve intellectual and creative activities.<sup>15</sup>

#### b) Application-based work – the digital platform

Another major employment platform in the gig economy is application-based work. In this case, the work is usually done in the *traditional sense*. The *digital marketplace* plays a significant role in the conduct of the business between the customer and the service provider. Numerous services can be ordered through the applications (e.g. Uber taxi, food delivery). The novelty is that *online platforms* on the application-based work connect supply and demand. It brings market players closer together. Application-based work helps integrate into the labour market people who might not otherwise get a job. The downside is that wages are very low, in most cases not even reaching the minimum wage.<sup>16</sup>

### 4 The Impact of the Pandemic on the Spread of Digitisation in the World of Work

Right now, it is clear that, observing the predictions so far, only scenarios exist; no one can provide an *accurate forecast*. One of the key lessons of COVID-19 – even before the end of the epidemic is that, without the ongoing *digital revolution*, COVID-19 would have made life impossible. The whole economy, production, education, everything that requires a physical presence would have stopped, if there was no digital alternative to the activity. In many places, COVID-19 has either accelerated or forced digitisation. This emergency created an opportunity for as many things and processes as possible to have a digital alternative or solution. Changes in *information and communication technology* have made it possible for employers who already have sufficient training and experience in this field. These employers were able to respond relatively easily to overcoming the difficulties. Where work organisation allowed, direct face-to-face contact with the employer and with clients was eliminated.<sup>17</sup>

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<sup>15</sup> Mélypataki Gábor, 'Az új foglalkoztatási formák és a társadalmi innováció hatása a szociális biztonságra' [The impact of new forms of employment and social innovation on social security] (2019) 6 (1) Magyar Munkajog E-folyóirat, 17–18. <hllj.hu/letolt/2019\_1/M\_02\_MelypatakiG\_hllj\_2019\_1.pdf> accessed 10 August 2021.

<sup>16</sup> Ibid 18–19.

<sup>17</sup> Géro Imre, Polacsik Gabriella, 'Karantén tanulságok: Hogyan alakítja át a felgyorsuló digitális forradalom gazdaságainkat' [Quarantine Lessons: How to Transform the Accelerating Digital Revolution Economies] (2020) 21 Acta Periodica; Journal of the University of Eduus, 4–28. DOI: 10.47273/AP.2020.21.4-28

The outside world could only be maintained by information and communication techniques a relationship. Therefore, companies in the economy that were already technically and humanly prepared were given an advantage. The impact of COVID-19 on the world is that *digitisation has changed as much in five months as it had in five years*.<sup>18</sup>

According to a survey of post-epidemic plans for digitisation among employers:

- 64% are transforming their organisation to *support telecommuting*;
- 55% define the roles required for *telework*;
- 47% believe that *automation* needs to be accelerated and new ways of working developed;
- 46% reorganise shifts and develop *alternative solutions* to operate customer services;
- It reduces the number of its existing properties, such as offices and retail space, by 44%;
- 22% use *digital devices* to communicate;
- 21% provide other *non-financial support* (such as childcare or transport) for staff working in vulnerable areas;
- 7% agree to provide *financial support* to staff working in the endangered area.<sup>19</sup>

## II The Supranational Context – The ILO and EU Perspective of Employment and Self-employment

The problem of the '*platformisation of the economy*'<sup>20</sup> affects the qualification of the labour relationship.

The comparison between Italy, Spain and Hungary shows a tendency to extend the protection of subordinate labour to an intermediate area of workers, formally independent, but characterised by a state of economic weakness and by degree of integration into the contractors' organisation.

Our peculiar focus is to examine how this element emerges as a symptomatic subordination index.

<sup>18</sup> 'A koronavírus 10 fontos világgazdasági hatása' [Coronavirus has 10 important global economic impacts] Növekedés.hu, online journal <<https://novekedes.hu/elemezsek/a-koronavirus-10-fontos-vilaggazdasagi-hatasa>> accessed 10 August 2021.

<sup>19</sup> 'A COVID-19 vírus hatása a digitalizációra' [Effect of COVID-19 virus on digitization] PwC COVID-19 CFO Pulse Survey, 20.04.2020. <<http://hirek.prim.hu/cikk/139491/>> accessed 10 August 2021.

<sup>20</sup> Antonio Casilli, *En attendant les robots* (Seuil 2019, Paris); M. Arfaoui, N. Losada, *Nouvelles formes d'emploi et syndicalisme: quels moyens d'actions et quelles protections pour les travailleurs de plateforme?* (CFTC 2020); A. Donini, *Il lavoro attraverso le piattaforme digitali* (BUP 2019, Bologna); E. Dagnino, *Dalla fisica all'algoritmo: una prospettiva di analisi giuslavoristica* (AdaptUP 2019).

## 1 The ILO: Criteria to Ensure Decent Work on Digital Work Platforms

Starting with the ILO perspective, it is necessary to consider that the ILO Recommendation R198 (abbreviated Recommendation) adopted on June 15, 2006,<sup>21</sup> points out a series of subordination indicators, and a particular relevance is attributed to the integration of workers in the contractors' organisation (para 13, letter a).

The essential question, of course, concerns the boundary between the employment contract and the enterprise and the legal concept of enterprise.

The Recommendation's annotated guide states that it is increasingly complex in most countries to establish whether or not a working relationship exists where:

1. the rights and obligations of the parties concerned are unclear, or
2. when there is an attempt to mask the relationship of work, or
3. when the legislation, its interpretation or its application are insufficient or limited (ILO, 2008).

The Recommendation sets out, in paragraph 13, a series of specific clues on the existence of an employment relationship.

However, the ILO instruments do not claim that the traditional categorisation should be overcome, or that it is necessary or advisable to introduce intermediate types of employment and self-employment.

Moreover, according to the Recommendation, an intervention of the Member States is not always required. Labour protection should be guaranteed for workers, including those nominally self-employed, against subcontracting and exploitation. With reference to the platforms, the 2018 ILO Survey (conducted between 2015 and 2017) shows that most platform workers are financially dependent on the income they earn from their microactivities.

The point is that some platforms decide when and where to work, penalise workers if they refuse a task, and set non-negotiable prices and quality standards.

The Report identifies eighteen criteria to ensure decent work on digital work platforms. We can point out just three of them:

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<sup>21</sup> About this complex topic see J.M. Thouvenin, A. Trebilcock, *Droit international social* (Tome 2, Bruylant 2013, Bruxelles) 903–913; J.M. Servais, *International Labour Law* (Kluwer 2020); A. Perulli, 'The legal and jurisprudential evolution of the notion of employee' (2020) 11 (2) *European Labour Law Journal*, 1, DOI: 10.1177/2031952520905145; B. Waas, G. Heerma van Voss (dir.), *Restatement of Labour Law in Europe* (Vol. I, The Concept of Employee, Bloomsbury 2017, Oxford). The Preamble of the Recommendation emphasises (considering the scope of the employment relationship) that « protection should be accessible to all, particularly vulnerable workers ». Particular attention to these issues can be found in the Analytical document of the Commission Staff Working Document on a possible action addressing the challenges related to working conditions in platform work, European Commission, Brussels, 15 June 2021, SWD(2021)143 final, especially on pages 35 and ff., where the document points out the risk of misclassification of the employment status.

1. Counteract the misclassification of work;
2. Apply the minimum wage current in the region where the workers are located;
3. Ensure transparency of payments and tariffs set by the platform.

Clearly, the first point is the key one.

The question of the criteria for qualifying and establishing subordination is taken up also by the 2021 ILO Report,<sup>22</sup> and the same 2019 ILO Centenary Declaration highlights the importance of the employment relationship (and its qualification) as a gateway to employment, labour and social protection.

It shows that the organisation and management of digital labour platforms is generally unilateral.

Moreover, the term ‘worker’ has different legal meanings in different jurisdictions. The 2021 Report schematically catalogues the approaches of the different national legislations regarding the employment relationship in four cases:

- i)* classification as employees, often on the basis of the control exerted by the platform,
- ii)* adoption of an intermediate category,
- iii)* setting of a *de facto* intermediate category,
- iv)* categorisation as freelancers on the basis of flexibility and autonomy.

The ILO also notes that some countries have introduced presumptions of subordination related to limited factual clues.

## 2 The EU: The Message of the CJEU Case Law

The integration of workers into the contractors’ organisation gains particular attention in the European Union Law perspective as well.

A 2017 European Parliament Resolution [2016/2221 (INI)] on working conditions and precarious employment, in particular, expressly calls on the Member States to take into account the ILO indicators for determining the existence of an employment relationship.

The European Parliament emphasises the idea that (subordinate) employment implies workers’ integration into the organisation of the undertaking.

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<sup>22</sup> ILO, 2021, ‘The role of digital labour platforms in transforming the world of work’ <[https://www.ilo.org/global/research/global-reports/weso/2021/WCMS\\_771749/lang--en/index.htm](https://www.ilo.org/global/research/global-reports/weso/2021/WCMS_771749/lang--en/index.htm)> accessed 10 August 2021. See also V. De Stefano, I. Durri, C. Stylogiannis, M. Wouters, ‘Platform work and the employment relationship’ (ILO Working Paper, 27, March 2021); N. Countouris, *Defining and regulating work relations for the future of work* (ILO 2019, Geneva); ILO, *Non-standard employment around the world: Understanding challenges, shaping prospects* (2016 Geneva).

The regulatory outcome of this conceptual development is Directive 2019/1152/EU<sup>23</sup> on transparent and predictable working conditions applicable

to all workers in the Union who have a contract of employment or an employment relationship within the meaning of the law, collective agreements or practice in force in each Member State, taking account of the case law of the Court of Justice [art 1(2)].

In this 2019 Directive, the binary perspective (subordination and independent contract) is reiterated: ‘genuine self-employed workers should not fall within the scope of this Directive, as they do not satisfy’ the criteria established by the case law of the Court of Justice for determining worker status.

The framework of rights set by the Directive is limited to subordinate workers only, but the broader scope follows the development of the Court of Justice case law about the integration of the ‘employed’ worker into the undertaking of the others.

The seminal 1986 *Lawrie-Blum* judgment identifies as structural elements of the employment relationship ‘the circumstance that a person provides, for a certain period of time, services for and under the direction of another person in return for which he receives remuneration’ (CJEU, 3 July 1986, C-66/85, *Lawrie-Blum*, § 17).<sup>24</sup>

There are therefore three objective criteria to qualify the employment relationship:

1. the real and effective nature of the service personally provided by the worker;
2. the existence of a directive power;
3. the onerous nature of the service.

However, crucial differences emerge with respect to the dogma commonly accepted in national legal systems.

First of all, the Court reconstructs the structural elements of ‘hetero-dependence’ in a much more flexible manner (CJEU, 10 September 2014, C-270/13, *Haralambidis v. Casilli*).

In European case law, the notion of hierarchical ‘direction’ has been blurred by the less stringent concept of ‘hetero-organisation’, and therefore the assessment of the ‘non-marginal’, ‘non-significant’ and ‘non-useless’ economic nature of the service that plays a decisive qualifying role.

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<sup>23</sup> Also V. De Stefano, I. Durri, C. Styliogiannis, M. Wouters, *Platform work and the employment relationship*, quoted, 27, recognise that the EU Directive 2019/1152 ‘is a step forward in ensuring some minimum predictability for workers with unpredictable work schedules’.

<sup>24</sup> See, for all, Martin Risak, Thomas Dullinger, *The concept of ‘worker’ in EU law* (Report 140, European Trade Union Institute 2018) <<https://www.etui.org/sites/default/files/18%20Concept%20of%20worker%20Risak%20Dullinger%20R140%20web%20version.pdf>> accessed 10 August 2021; C. Barnard, *EU Employment Law* (2012 Oxford); T. Jaspers, F. Pennings, S. Peters (eds), *European Labour Law* (2019 Intersentia); E. Menegatti, ‘The Evolving Concept of “worker” in EU law’ (2019) 12 (1) Italian Labour Law e-Journal, DOI: 10.6092/issn.1561-8048/9699; Jeremias Prassl, *The Concept of the Employer* (Oxford University Press 2015, New York). DOI: 10.1093/acprof:oso/9780198735533.001.0001

Second, in the European perspective, the element of direction, once integrated, assumes a substantially recessive character.

It is thanks to this lighter notion of subordination, together with the appreciation of its economic utility, that the CJEU has included within the uniform concept of workers a heterogeneous group of flexible, atypical and nonstandard jobs.

In the framework briefly outlined above, the introduction of the Charter of Fundamental Rights of the European Union plays a decisive historical role, sanctioning the recognition of new rights, many of which have direct relevance to employment (arts 15, 27, 28, 30, 31, 32, 34).

In line with the case law of the CJEU, there has been a recent tendency to extend the uniform concept of workers to all areas where a fundamental right of the Union is involved, and thus beyond the field of anti-discrimination protection.<sup>25</sup>

This is a large area of EU Law, the teleological orientation of which is aimed at the constitution, in a cohesive form, of a protective statute of individual worker's rights. In any case, as the European Commission points out in the 2021 Analytical document on a possible action addressing the challenges related to working conditions in platform work [SWD(2021)143final], 'only an EU initiative can set common minimum standards that apply to all platforms operating in the EU' (page 77 of the document).

### 3 Teleworking, Valued by the Pandemic

Two decades ago, the EU did not consider it necessary to adopt a directive on telework. The ETFA – concluded by the European social partners – has provided adequate guarantees. Telework, which has become the focus of the pandemic, already requires a different level and content of European legislation. On 21 January 2021, the European Parliament adopted a Resolution inviting the European Commission to suggest a Directive guaranteeing workers the right to disconnect from the information technology tools used to carry out their work. The Directive should be addressed to private or public workers, regardless of the working method and employment sector. The draft Directive defines the right to disconnect, as the 'right of workers not to engage in work-related tasks or communications outside working hours by means of digital media, such as phone calls, emails or other messages'.

## III Hungary: Widespread Digitalisation Loophole in Labour Law Regulations

As in several other Central and Eastern European countries, Hungary has a unified Labour Code, the *2012. évi I. törvény a munka törvénykönyvéről* (Act I of 2012 on the Labour Code, abbreviated LC) as a *post-socialist codification legacy*. In this respect, it does not carry

<sup>25</sup> See, for example, CJEU, 12 October 2004, C-313/02, *Wippel*; CJEU, 26 March 2015, C-316/13, *Fenoll*.

a pejorative meaning. On the contrary! In terms of the structure of the regulation, this is positive because, with a few exceptions all institutions of *individual and collective labour law* are regulated by one act. This is also important because labour law is that branch of law which many non-lawyers must apply in their work.

The Hungarian codification follows the *trend of traditional labour law* – but with many *concessions* and *flexibility*.<sup>26</sup> The LC defines the main qualifying criteria of the employment relationship in the regulation of the *employment contract*. Under this contract:

a) the *employee* is required to *work as instructed by the employer*,

b) the *employer* is required to *provide work* for the employee and to *pay wages* [LC pt II ch VII. s para 42 (2)].

Flexibility within the employment relationship means that the LC regulates a number of *atypical employment relationships*, such as the fixed-term employment relationships, call for work, job sharing, employee sharing, teleworking, outworkers and temporary agency work.

## 1 Labour Protection in Digitisation – Only for Telework

The provisions of the ETFA were introduced into the former Code, into *1992. évi XXII. törvény a Munka Törvénykönyvéről* (Act XXII. of 1992 on the Labour Code) and apply since 2004. The Hungarian regulations comply with the requirements of the ETFA. The teleworker's employment relationship is usually governed by the rules of the LC. The special rules relate only to the specifics of telework (e.g. the workplace is usually the employee's home, but the teleworker can enter the employer's territory at any time). The LC – in line with a number of national regulations – is also not in line with the legislative initiative voted by the European Parliament in January 2021. Hungarian law does not contain the right to disconnect a teleworker.

## 2 The Role of Teleworking in the Labour Market

The *pandemic* is a sharp dividing line in the spread of teleworking in Hungary. In 2018, *3.7 percent of employees* in Hungary, 144.000 employees, worked as teleworkers. At that time, the number of teleworkers was lower in only four other Member States compared to Hungary.<sup>27</sup> The epidemic and the restrictions imposed as a result forced employers to react quickly in the spring of 2020. In order for economic processes to function normally, more and more employers have made it possible to work from home. In May 2020, nearly 760,000

<sup>26</sup> Kiss György, *A foglalkoztatás rugalmassága és a munkavállalói jogállás védelme [Flexibility of employment and protection of the status of employee]* (Wolters Kluwer Hungary 2020, Budapest) 37.

<sup>27</sup> 'Telework in the EU before and after the COVID-19: where we were' Science for policy brief (European Commission, 2020) <[https://ec.europa.eu/jrc/sites/default/files/jrc120945\\_policy\\_brief\\_-\\_covid\\_and\\_telework\\_final.pdf](https://ec.europa.eu/jrc/sites/default/files/jrc120945_policy_brief_-_covid_and_telework_final.pdf)> accessed on 10 August 2021.

people, 17% of all employees worked as teleworkers or in home offices.<sup>28</sup> That number had dropped by February 2021. Telework and home office affected 482,000 people, 11% of employees, in February 2021, approximately 3.5 times more than in 2018.

Teleworkers are *over-represented* among those aged 25-44 and those living in the cities. The vast majority (77%) are *graduates*. The main activity of the employer basically limits the possibility of teleworking. There are big differences between *sectors*. For 2020 as a whole, the share of teleworkers in the fields of *information, communication* (39%), *scientific and technical activities* (33%), *financial services* (30%) and *education* (21%) was outstanding. In contrast, due to the nature of these areas, it has hardly occurred in *agriculture, health and social care*.

Teleworking has become one of the most commonly used methods of dealing with the changed labour market situation during an epidemic. Therefore, its wider spread is likely to have an impact on future labour market processes.<sup>29</sup>

### 3 In the Wake of a Lost Legislative Opportunity – A Person with a Similar Legal Status to the Employee

The Bill of the LC (hereinafter Bill) – as an absolute novelty – included a *rule for a person with a similar legal status to an employee* (person similar to the employee). This was consistent with the *Green Paper – Modernising labour law to meet the challenges of the 21st century COM (2006) 708 final*. Labour law focusing on the requirements of *modernisation* in the 21st century: the task of legislation is to *create flexible employment* – with *social security* for workers. According to the Bill, a person similar to the employee would normally have been the same as an *economically dependent self-employed worker* (*trabajador autónomo económicamente dependiente – TRADE*) under Spanish law. Under German law, this is the *‘arbeitnehmerähnliche Person’*, under English law, this is a *‘worker’*. This person is not a fictitious entrepreneur. Mostly he/she works under a contract of services or business. And he or she is as economically dependent on the recipient of their service as the employee. The Bill was similar to Spanish regulation.

One of the legislative goals was to provide the same *social protection* to curb illegal employment. According to the Bill, a person similar to an employee, in view of all the circumstances of the case, who does not perform work for another part on the basis of an employment contract, if

a) he/she *carries out work* for the same person in person, for *remuneration*, on a *regular and continuous basis*, and

b) no other regular *gainful activity* is expected in addition to the performance of the contract.

<sup>28</sup> Nagy Attila, ‘Táv munkában Magyarország’ [Hungary in teleworking] (2020) <<https://epale.ec.europa.eu/hu/blog/tavmunkaban-magyarorszag-0>> accessed on 10 August 2021.

<sup>29</sup> Központi Statisztikai Hivatal (Hungarian Central Statistical Office), 2021 <<https://www.ksh.hu/docs/hun/xftp/idoszaki/munkerohelyz/tavmunka/index.html>> accessed on 10 August 2021.

An additional condition was that the amount of regular monthly *income* from this contract should not exceed five times the mandatory minimum wage. According to the Bill, the provisions of the LC on *leave, notice, severance pay* and *employees' liability for damages* should have been applied in this case. Furthermore, the monthly income of a person similar to the employee could not have been lower than the minimum wage. Finally, this rule was omitted from the text of the law passed by Parliament. In the last decade, the legislation has not repaid this debt.<sup>30</sup>

According to the authors' assessment, the Hungarian legislation must act. The lack of legislation could be a particular problem in *application-based work* (platform-based work). There is usually no reliable data on its size. Together, the lack of accurate statistics and the diversity of digital platforms make it significantly more difficult for legislation to respond appropriately to this phenomenon.<sup>31</sup> Although internet work websites are mostly not in *Eastern and Central Europe* (except Estonia), legislation should prevent problems in Hungary, and not to react when the problem – in the absence of legislation – becomes huge.

The existence of the following of the indicators of the existence of an employment relationship in the Recommendation may form the basis of a person with a *similar legal status to the employee's legal regulation*:

a) the work

aa) is *performed solely* or mainly for the *benefit* of another person,

ab) must be carried out *personally* by the worker,

b) periodic payment of *remuneration* to the worker, and

c) the fact that such remuneration constitutes the worker's sole or principal source of *income* (see point 13.).

These are such decisive qualifying criteria for the status of employee that their existence justifies the *creation of a third status* between the *employee* of the labour law and the *contractor/agent* of civil law. The introduction of such a status would be justified if, for example, the conditions of the platform-based work and the situation of the person performing the work correspond to the conditions quoted in the Recommendation.

Moreover, it is quite interesting that disputes over the issue of qualification in the context of platform work avoid the Hungarian courts. The Hungarian labour law is not fully prepared to accept forms of work via apps.

<sup>30</sup> See also György Kiss, 'The Concept of 'Employee': The Position in Hungary' in Waas, van Voss (ed), *Restatement of Labour Law in Europe* (Vol. I, The Concept of Employee, Bloomsbury, Hart 2017) 306–307.

<sup>31</sup> Gyulavári Tamás, 'Hakni gazdaság a láthatáron: az internetes munka fogalma és sajátosságai' [Gig economy on the horizon: the concept and peculiarities of Internet work]; (2019) 15 (1) *Iustum Aequum Salutare*, 42–43. <ias.jak.ppke.hu/hir/ias/20191sz/02\_Gyulavari\_IAS\_2019\_1.pdf> accessed 10 August 2021.

#### 4 Automation and Robotics – Proposal to Rescue Workers

According to the Digital Economy and Society Index of the European Commission Hungary's DESI index was 47.5 in 2020.<sup>32</sup> Hungary was one of the worst performing EU countries in the Integration of digital technology in businesses (e.g. the use of enterprise resource planning software packages). Fifty-seven percent of companies in Hungary have a very low level of digitisation (the average 39% in the EU) and only 15% are highly digitised (26% in the EU).<sup>33</sup>

There are approximately 730,000 employees in Hungary whose work could be performed entirely or predominantly by robots. That's about a fifth of all employees. Occupations that do not require *skills* can easily be automated. At least two-thirds of the jobs in this group can be performed by robots. More than half of the industrial and construction professions, mechanical engineering occupations, and office, mainly administrative, tasks can be fully or predominantly automated. The *automation potential* in Hungary even exceeds that of Western European countries. Presumably, because most companies moved production from Western European states abroad due to expensive labour force. Labour is relatively cheap in Hungary. Still, it would be worthwhile for companies to automate because robots, especially their types that work with humans, are the so-called *cobots (collaborative robot)* that increase corporate productivity. Therefore, the role of *re-education training* is particularly important. The *digital generation of employees* will only replace the entire workforce in decades.<sup>34</sup>

Legislation must also respond to this process. The LC does not contain a rule at all on the *employer's training task*. Automation and robotisation can result in *termination of employment relationship* by the employer. According to the LC, an employee may be dismissed – among other reasons – in *connection with the employer's operations* [LC pt II ch X. s para 62 (2)] The reason for robotisation is the employer's operations. In addition, the reason for termination in the case of automation may also be the employee's professional ability, precisely its absence.

According to the authors, the *proposed amendment* to the LC would *prevent redundancies* in two ways, at least in part. On the one hand, by introducing the *employer's obligation to provide re-education* in jobs related to automation and robotics; on the other hand, the employment relationship may be terminated in connection with the employees' professional ability or for reasons in connection with the employer's operations if the employer has *no vacant position available*, which is suitable for the employee or if the employee refuses the offer made for his/her employment in that job. This amendment would provide a *protection function* for labour law in the light of current technological changes. All this should be considered even at the level of *international regulation*.

<sup>32</sup> Digital Economy and Society Index (DESI) 2020 – Hungary 3.

<sup>33</sup> Ibid 10.

<sup>34</sup> Zsuzsanna Balázs, 'A hazai munkavállalók ötödétől már most elvehetnék a munkát a robotok' [Robots can already take the jobs from one-fifth of domestic workers] (2019) Qubit <<https://qubit.hu/2019/12/04/gvi-a-hazai-munkavallalok-otodetol-mar-most-elvehetnek-a-munkat-a-robotok>> accessed 11 August 2021.

## IV Italy: Moving Away from Binary Code

### 1 Juridical Subordination and Symptomatic Indices

The Italian labour law can be defined as a ‘*binary system*’<sup>35</sup>, in the sense that it contains only two types of reference labour contracts: subordination and autonomy. The distinction between these two legal types is quite clear. Tele-work, home-work and the new type of *agile-work*,<sup>36</sup> are all subordinate contracts.

According to the Italian Civil Code, the worker is self-employed if he/she works ‘*without any relationship of subordination*’.

Among these two different legal types, there is a large grey slice of workers whom common sentiment considers worthy of protection anyway.

In the absence of a normative formalisation of an intermediary type of contractual relationship, legislators and domestic case law tend to qualify labour relations using symptomatic clues.

In this scenario, digital platforms challenge labour law, mainly because they represent a ‘deconstruction factor outside the traditional jurisprudential indexes’<sup>37</sup> on the qualification of employment relationships. Within digital platforms, the relationships established between operator and platform can be traced back to a multiplicity of legal contracts. It has been emphasised that this new form of economic organisation leads to the establishment of relationships that are difficult to classify as subordinate or self-employed work, and that work on the platform actually has characteristics that can be classified as both of these categories.<sup>38</sup> Among these clues, economic dependence, as well as the integration of the service into the company, is becoming increasingly important.

<sup>35</sup> See also, in English, Pierluigi Digennaro, ‘Subordination or subjection? A study about the dividing line between subordinate work and self-employment in six European legal system’ (2020) 6 (1) LaBoUR&Law, DOI: 10.6092/issn.2421-2695/11254, and in particular pages 31–36, related to the Italian legal system.

<sup>36</sup> According to the law (art 18–24, Law n. 81 of 2017), *agile-work* is a particular method of execution of the subordinate employment relationship, performed partly inside the company premises and partly outside without a fixed location. See, in literature, Luigi Fiorillo, Adalberto Perulli (a cura di), *Jobs Act del lavoro autonomo e del lavoro agile* (Giappichelli 2018, Torino); Adalberto Perulli, *Oltre la subordinazione: la nuova tendenza espansiva del diritto del lavoro* (Giappichelli 2021, Torino). The literature on the concept of ‘subordination’ in the Italian legal framework is very extensive. For an effective general analysis see Pietro Ichino, *Il lavoro subordinato: definizione e inquadramento* (Giuffrè 1992, Milano); in English see Tiziano Treu, *Labour Law in Italy* (6th edn, Wolters Kluwer 2020, Milano); Franco Carinci, Emanuele Menegatti, *Labour Law and Industrial Relations in Italy* (Wolters Kluwer 2015, Milano).

<sup>37</sup> Francesco Bano, ‘Il lavoro povero nell’economia digitale’ (2019) 1 Lavoro e Diritto, 129 ss.

<sup>38</sup> Eurofound, Employment and working conditions of selected types of platform work, 2018, <<https://www.eurofound.europa.eu/it/publications/report/2018>> accessed 10 August 2021. The European Commission itself, moreover, considers that the collaborative economy is bringing about a structural change, characterised, among other things, by the fact that the boundaries between self-employed and subordinate workers are increasingly blurred. It also states that for the subordination requirement to be met, the service provider must act under the direction of the collaborative platform, which determines the choice of activity, remuneration

The use of this index achieves an expansive trend in the protection of subordinate labour.

In the Italian legal system, this approach is today particularly revitalised, in view of the need to distinguish the traditional concept of subordination from the new normative subtypes, progressively introduced or revised by the legislators such as ‘*coordinated collaboration*’ (art 409, § 1, n. 3 of the *codice di procedura civile*, modified by art 15, § 1, a) of Law 81/2017), the ‘*organised collaboration [...] also by a digital platform*’ (art 2 of Legislative Decree n° 81/2015, modified by art 1, §1, lett. a) of the Law decree n° 101/2019, converted in Law n° 128/2019) and the contract of the ‘*worker by bike*’ for the delivery of goods in urban areas (art 47 bis of Legislative Decree n° 81/2015,<sup>39</sup> introduced by the art 1, § 2 of the Law Decree n° 101/2019, converted in Law n° 128/2019).

However, the legislator has introduced rules that identify median concepts situated between subordination and independence (autonomy): Art. 2 of the Legislative Decree no. 81 of 2015 provides that in the presence of ‘*hetero-organisation*’, the autonomous worker benefits from the extension of the protection regime typical of subordinate work.

It must be specified that this effect is excluded by the rule when

national collective agreements entered into by comparatively more representative trade union associations at national level provide for specific disciplines concerning economic and regulatory treatment, due to the particular production and organisational needs of the relevant sector [Article 2(2) of the cited 2015 Legislative Decree].

This aspect is particularly relevant because, with this rule, the Italian legal system opens up collective bargaining for parasubordinate self-employed workers (who are not false self-employed people). It should be remembered that many legal systems do not allow workers who do not have a (subordinate) employment relationship to benefit from collective bargaining.<sup>40</sup> The explicit recognition of the relevance of ad hoc collective bargaining, including self-employed persons under the scope of collective bargaining agreements, is therefore particularly interesting. However, the problem of the subjective effectiveness of these collective agreements remains unresolved in the Italian legal system, as well as the problem of measuring the representativeness of the stipulating collective actors. In Italy,

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and working conditions. See European Commission, *A European agenda for the collaborative economy*, 2 June 2016, COM(2016) 356 final.

<sup>39</sup> About this point see, in English, A. Aloisi, V. De Stefano, *Delivering employment rights to platform workers* (Il Mulino 2020, Bologna) <<https://www.rivistailmulino.it/a/delivering-employment-rights-to-platform-workers>> accessed 10 August 2021. See also the Analytical document of the Commission Staff Working Document, European Commission, Brussels, 15 June 2021, SWD(2021)143 final, page 62.

<sup>40</sup> Xavier Beaudonnet, *Le droit de négociation collective des travailleurs considérés comme indépendants au regard des norms de l'organisation internationale du travail*, in *Le droit de négociation collective des travailleurs indépendants: Cadrages théoriques et études de cas*, edited by Daniel Dumont, Auriane Lamine and Jean Benoit Maisin, 2020, 55–79, Droit Social, Larcier.

there have been spontaneous non-union forms of rider aggregation (e.g. the case of Riders Union Bologna, defined as a new form of informal metropolitan trade unionism and the «Bologna Charter»<sup>41</sup>).

Italian legislation also includes a particular option, highlighted by the European Commission document of 2021, of voluntary ‘certification’ of the authenticity of employment contracts, which produces a sort of presumption for labour, social protection and tax authorities, which only a court could reverse.<sup>42</sup>

The resulting system is difficult to understand. The actual model can be described as follows.

Table 1.

Definitions	Subordinazione (dependent workers)	Autonomia (independent workers)	‘Para-subordinazione’ (semi-dependent workers)	‘Etero-organizzazione’ (quasi-dependant workers)	Riders
Law references	Art 2094 c.c.	Art 2222 c.c.	Art 409 c.p.c.	Art 2 d.lgs. 81/2015	Art 47-bis d.lgs. 81/2015 (introduced by art 1, co. 1, lett. c) d.l. 101/2019, conv. in l. 128/2019
Essential points	Employers’ directive power	Absence of directive power	Coordination and continuity	Etero-organisation	Absence of directive power, particular types of means of transports’, delivery of goods in urban areas
Rules and guaranties	Entire labour law	Outside labour law	Some guarantees, very general (law 81/2017)	Entire labour law	Some specific guarantees

The point is that ‘*subordination*’ characterises *only* the first legal kind (art 2094), while the other forms remain structurally autonomous.

<sup>41</sup> See here: <<http://www.comune.bologna.it/archivio-notizie/firmata-bologna-la-carta-dei-diritti-fondamentali-dei-lavoratori-digitali-nel-contesto-urbano>> accessed 10 August 2021. About Riders Union Bologna cf. Riccardo Mancuso, *La voce di Riders Union Bologna*, (2021) Lavoro Diritti Europa <<https://www.lavorodirittieuropa.it/dottrina/lavori-atipici/616-la-voce-di-riders-union-bologna>> accessed 10 August 2021.

<sup>42</sup> See the Analytical document of the Commission Staff Working Document, European Commission, Brussels, 15 June 2021, SWD(2021)143 final, page 82.

That is, technically, not a question of contract types in their own right, but of sub-categories of autonomous work, to whom the law recognises some or all guarantees of the ‘subordinate’ (employment) work in different ways.<sup>43</sup>

The first judgment of the Italian Supreme Court on the concept of ‘hetero-organisation’ (*Corte di Cassazione*, 24 January 2020, n° 1663) concerns the qualification of the employment relationship of modern platform deliverers.<sup>44</sup>

Therefore, the Italian model shows a tendency to extend the protective network of labour law to forms of collaboration that do not have the rigorous characteristics of legal subordination.

Such a perspective seems to be consistent with the teleological approach put forward by the European Commission in the Agenda for a Collaborative Economy of 2 June 2016 [Com (2016) 356 Final], which calls on Member States to ensure fair work and adequate and sustainable social protection.

The Italian Supreme Court recognises ‘*equivalent protection and, consequently, recourse to the full application of the discipline of subordinate labour*’.

This extension of the gateway to labour law protection finds its parallel in the tendency of the case law of the Court of Justice of the European Union to reconstruct the concept of ‘worker’ to achieve the objective of ‘*EU employment protection*’.

The most emblematic passage of the 2020 judgment is where the Italian Court states, regarding ‘hetero-organised’ collaboration, that

it makes no sense to ask whether these forms of collaboration, so characteristic and time to time offered by the rapidly and constantly changing economic reality can be placed in the realm of subordination or autonomy, because what matters for them is that, for them, in a common ground with fleeting borders, the legal system has expressly established the application of the rules on subordinate work, by establishing a disciplinary rule.<sup>45</sup>

<sup>43</sup> The Analytical document of the Commission Staff Working Document, European Commission, Brussels, 15 June 2021, SWD(2021)143 final, affirms that the Italian legal system ‘have created a third/intermediate category of employment, usually for self-employed individuals depicting a degree of economic dependency towards a quasi-employer’ (page 38 of the document). This statement is not entirely accurate from a technical legal point of view.

<sup>44</sup> The judgment cited in the text has been the subject of numerous analyses in doctrine. For a series of open-access comments, see the dedicated issue of the journal *Lavoro Diritti Europa* on the web site <<https://www.lavorodirittieuropa.it/archivio-rivista-lavoro-diritti-europa/419-indice-del-numero-1-2020-della-rivista>> accessed 10 August 2021. Something about this judgment in V. De Stefano, I. Durri, C. Stylogiannis, M. Wouters (n 23) 22.

<sup>45</sup> About this topic see F. Perrone, A. Sitzia, ‘Lavoro autonomo e indicatori di subordinazione nel diritto europeo: l’integrazione del lavoratore nell’organizzazione dell’impresa’ in F. Basenghi, L. Di Stefano, A. Russo, I Senatori (a cura di), *Le politiche del lavoro della XVIII Legislatura: dal Decreto Dignità alla gestione dell’emergenza Covid-19*, (Giappichelli 2020, Torino) 147 ff.

The Court attempts to identify a systemic key to the Italian model, which is based on a *choice of a legislative policy which aims to ensure the same protection for the worker as for subordinate labour, to protect riders who are clearly considered in a state of economic weakness, operating in a grey area between autonomy and subordination.*

The ‘*economic weakness*’, is related to ‘*hetero-organisation*’ which is characterised as an ‘*element of a functional relationship of collaboration with the contractors’ organisation*’.

It remains to be defined what ‘*functional integration into the contractors’ organisation*’ consists of. The ‘*Foodora*’ case provides a clear example: the ‘*rider*’ is inserted in a very widespread computer system, which allows him or her to be subjected not only to organisational indications regarding delivery time and location, but also to their communication in real time, delivery by delivery, as well as their constant control by the ‘*App*’ and the fundamental relevance of the working activity set in the contract for the needs of the contractors’ activity.

## 2 Telework in the Framework of Agile-work

In Italy there is no official statistics which provide the total number of teleworkers in the private sector. It is also worth noting that telework is more widespread in large companies.<sup>46</sup>

Regarding private employment relationships, there is no legal regulation of telework.<sup>47</sup> The legislator merely encourages the use of this method of working, without giving it a general definition. ETFA was transposed by the ‘*interconfederale*’ agreement of 9 June 2004 within Confindustria (this is, however, a collective agreement, not binding *erga omnes*).

There is another intermediate mode, the so-called *agile-work* (smart working),<sup>48</sup> which is not a new type of employment contract, but a special way of performing work within a normal employment relationship: in particular, it allows workers to organise their work activities with greater flexibility, as there are no specific constraints on working time or place of performance.

In fact, art 18 of Law no. 81 of 2017 clarified that *agile-work* is characterised by the following peculiarities: work can be carried out in phases, cycles and objectives; there are no constraints on working hours or place of work; it is possible to use technological tools to carry out the work activity and, in this case, it is the employer him/herself who is responsible for their proper functioning and safety; work can be carried out inside or outside

<sup>46</sup> Michele Tiraboschi, ‘Telework in Italy: The Legal Framework and the Reality’ ADAPT – DEAL, University of Modena and Reggio Emilia (Italy) <[www.bollettinoadapt.it/wp-content/uploads/2016/02/TELELAVORO-tiraboschi.pdf](http://www.bollettinoadapt.it/wp-content/uploads/2016/02/TELELAVORO-tiraboschi.pdf)> accessed 12 August 2021. See also L. Gaeta, P. Pascucci (a cura di), *Telelavoro e diritto* (Giappichelli 1998, Torino).

<sup>47</sup> Telework (or, more precisely, ‘remote working’) in public administrations is regulated by the Presidential Decree no. 70 of 1999. In literature see L. Gaeta, P. Pascucci, U. Poti (a cura di), *Il telelavoro nelle pubbliche amministrazioni* (Il Sole 24 Ore ed, 1999, Milano).

<sup>48</sup> For an overall perspective see, for all, G. Zilio Grandi, M. Biasi (a cura di), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile* (Cedam 2018, Milano, Padova).

company premises. Until the outbreak of the pandemic, *agile-work* had been limited mostly to multinational companies, but it has undergone significant changes with the impact of the emergency legislation.<sup>49</sup>

### 3 Automation and Robotisation: Risk of Manual Tasks

According to the Digital Economy and Society Index of the European Commission, Italy's DESI index was 43.6 in 2020.<sup>50</sup> In 2019, it dropped two places and ranked last in 2020 in the EU on the Human Capital dimension: only 42% of people aged 16–74 years have at least basic digital skills (58% in the EU) and 22% have above basic digital skills (33% in the EU).<sup>51</sup> The percentage of enterprises using social media increased to 22% (close to the EU average of 25%).<sup>52</sup>

According to the OECD skills Outlook 2019, 13.8% of Italian workers are in occupations at high risk of automation and would need moderate training (up to one year) to move to safer jobs, with a low or medium risk of automation, while another 4.2% would need an intensive training course (up to 3 years). About 4 million workers who mainly carry out manual tasks may appear more at risk than those who perform cognitive tasks.<sup>53</sup>

## V Spain: Pioneering out of the Binary System

### 1 A Third Status or the Classical Solution – Academic and Judicial Debate

As in other countries, in Spain the debate on platform work has been focused on transport platforms and, more specifically, on delivery services and the possible existence of an employment relationship as the door to entry under the protection of labour law. Aside from the legal changes which are right now being developed, the first impact of the platform economy has been taken by both the academia and the courts.

<sup>49</sup> See Arianna Castelli, Caterina Camposano, 'Lavoro agile – Smart working' <<https://www.wikilabour.it/dizionario/tipologie-contrattuali/lavoro-agile-smart-working/>> accessed on 12 August 2021.

<sup>50</sup> 'Digital Economy and Society Index (DESI) 2020 – Italy' 3.

<sup>51</sup> Ibid 7.

<sup>52</sup> Ibid 10.

<sup>53</sup> OECD, 'OECD Skills Outlook 2019. Thriving in a Digital World' 2021 <<https://www.oecd-ilibrary.org/sites/df80bc12-en/index.html?itemId=/content/publication/df80bc12-en>> accessed 13 August 2021; 'Lavori a rischio automazione dopo la crisi Covid-19: il punto' [Jobs at risk of automation after the Covid-19 crisis: the point] Network Digital 360 <<https://www.agendadigitale.eu/industry-4-0/lavori-a-rischio-automazione-dopo-la-crisi-covid-19-previsioni-e-contromisure/>> accessed 13 August 2021.

Regarding the first one, the debate has been highly intense and could be summarised from three different perspectives:<sup>54</sup>

First, the position of the companies, supported by some economists and lawyers, which requires specific regulation for platform work, which would be outside the archetypical confrontation between employment and self-employment and suggests the existence of a *tertium genus* which needs its own regulatory framework. In other words, from this point of view, the solution would crystallise in the creation of a fourth new category to be added to the three (employee, self-employee or TRADE).<sup>55</sup>

Second, the perspective close to trade unions' point of view, supported by most of academia, which highlights that the business model of platforms would be based on a strategy focused on saving costs by avoiding (fraudulently) the application of labour and social security law. From this perspective, the solution would be the same, revealing the abuse and applying the correct legal framework; that is, labour law.<sup>56</sup>

<sup>54</sup> Diego Álvarez Alonso, 'Plataformas Digitales y Relación de Trabajo' [Digital Platforms and Employment Relationship] in Joaquín García Murcia (ed), *Nuevas tecnologías y protección de datos de carácter personal en las relaciones de trabajo* (Gobierno de Asturias – Universidad de Oviedo 2019).

<sup>55</sup> Jesús Rafael Mercader Uguina, 'La prestación de servicios en plataformas digitales: nuevos indicios para una nueva realidad' [Delivering service by platforms: new evidences for a new reality] in Adrián Todolí Signes and Macarena Hernández-Bejarano (eds), *Trabajo en plataformas digitales: innovación, derecho y mercado* [Working at digital platforms: innovation, law and market] (Aranzadi 2018); Alfonso Martínez Escribano, '¿Nuevos trabajadores? Economía colaborativa y Derecho del Trabajo. Repensando el Derecho del Trabajo: el impacto de la economía colaborativa' [New Workers? Collaborative Economy and Labour Law. Rethinking Labour Law] [2018] *Derecho de las relaciones laborales*, 48; César Otero Gurruchaga, 'El complicado encaje de los trabajadores de la economía colaborativa en el Derecho Laboral: Nuevos retos para las fronteras de la laboralidad' [The complicated fit of collaborative economy workers in Labor Law: New challenges for the borders of employment] [2018] *Derecho de las relaciones laborales*, 61; Francisco Pérez de los Cobos y Orihuel, 'CEI trabajo en plataformas digitales' [Work at digital platforms] in Yolanda Sánchez-Urán Azaña, and María Amparo Grau Ruiz (eds), *Nuevas tecnologías y derecho: retos y oportunidades planteadas por la inteligencia artificial y la robótica* [New technologies and law: challenges and opportunities posed by artificial intelligence and robotics] (Juruá Editorial 2019); María Luz Rodríguez Fernández (ed), *Plataformas digitales y mercado de trabajo* [Digital Platforms and Labour Market] (Ministerio del Trabajo, Migraciones y Seguridad Social, Subdirección General de Información Administrativa y Publicaciones 2019).

<sup>56</sup> Cristóbal Molina Navarrete, 'Derecho y trabajo en la era digital: ¿"revolución industrial 4.0" o "economía sumergida 3.0"?' [Law and work in the digital age: "industrial revolution 4.0" or "underground economy 3.0"?], *El futuro del trabajo que queremos* [The Future of Work that We Want], (vol II, OIT 2017); Adrián Todolí Signes, *El Trabajo En La Era de La Economía Colaborativa* [Work in the Age of the Sharing Economy] (Tirant lo Blanch 2017); Anna Ginès Fabrellas, 'Diez retos del trabajo en plataformas digitales para el ordenamiento jurídico-laboral español' [Ten challenges of working on digital platforms for the Spanish legal-labour system] [2018] *Estudios financieros. Revista de trabajo y seguridad social: Comentarios, casos prácticos: recursos humanos*, 89; Francisco Trillo Párraga, 'El trabajo en plataformas virtuales: a propósito del caso Uber' [Work on virtual platforms: about the Uber Case] in Adrián Todolí Signes and Hernández-Bejarano, Macarena (eds), *Trabajo en plataformas digitales: innovación, derecho y mercado* [Working at digital platforms: innovation, law and market] (Aranzadi 2018); Antonio Pedro Baylos Grau, 'Los derechos digitales y la negociación colectiva' [Digital rights and collective bargaining] [2019] *Diario La Ley*, 2.

Finally, there is still room for a third intermediate position, which is based on the idea that it is not new categories that are needed, but simply the adaptation of the three that already exist. This point of view does not prejudice the classification as employee, self-employee or economically dependent self-employee but suggests that, depending on the final accommodation according to the particular circumstances of the case, specific rules should be considered.<sup>57</sup> This would be the option chosen by the 'Riders' Law' (see below) but keeping in mind that this proposal selects one alternative, the employment relationship, as the most appropriate one to regulate the professional activities concerning delivering platforms, setting adaptations in different areas and keeping aside any other alternatives. It must be warned that this Law is applicable to this type of platform exclusively, so cases placed on other platform sectors should be analysed, as is being done so far. However, the introduction of this new element in the debate is not without risk. There is a possibility of creating another friction point if courts extend its application to other sectors, by analogy, even when the rule is circumscribed to delivery.

The courts have been the precise pillar of debate in Spain. Since 2018, several rulings analysed Deliveroo's, Take Eat Easy's and Glovo's models, to determine if riders who work for them (and who had usually been terminated previously) should be considered as employees, as self-employees or as TRADEs. According to the courts' resolutions, delivered from 2018 to October 2020, the following elements must be highlighted: *i*) the discussion is monopolised by delivery platforms, *ii*) despite the Supreme Court having the final word before its resolution, the debate was clearly inclined in favour of the existence of an employment relationship, and *iii*) this would not preclude other solutions for other types of platforms.<sup>58</sup>

If focused on the details, the discussion was more open at the first instance level, despite most of the resolutions pointing to the employment relationship direction, than upon appeal, where the discussion clearly drove to this solution. The only judgement in favour of the existence of self-employment, Judgment of the Supreme Court of the Region of Madrid 19–9–2019, was corrected by the following ones delivered by the same court and this position has been kept since then. Accordingly, it is possible to say that the appellate level's opinion is practically unanimous.

The reasons provided by the courts for mostly adopting this option can be summarised according to the main factors that support the notion of an employment relationship.<sup>59</sup> On the one hand, the existence of subordination is justified, because the company obtains the profits of the riders' activity and assumes the risks of that task. Additionally, the rider cannot

<sup>57</sup> Alonso (n 54).

<sup>58</sup> A summary of these judgments can be found: <<https://ignasibeltran.com/employment-status-of-platform-workers-national-courts-decisions-overview-argentina-australia-belgium-brazil-canada-chile-france-germany-italy-nederland-new-zealand-panama-spain-switzer/>> accessed 10 August 2021.

<sup>59</sup> COGENS Project, *Collective Bargaining in the Gig Economy – Who and for Whom* (COGENS – Collective Bargaining and Gig Economy: New Perspective 2020) Spain's preliminary results of the project. More info: [www.cogens2019.eu](http://www.cogens2019.eu).

lend his activity disconnected from the platform, owing to the platform being the essential intermediary between the rider and the client. Furthermore, the ownership of the vehicle and mobile phone cannot be considered as an evidence of non-subordination.

The rider could not lend his work outside the digital platform in which it is integrated. If he/she decided to undertake this type of activity by himself as a true self-employed person, he/she would be doomed to fail and his chances of growing as an entrepreneur would be non-existent, because ‘the success of these platforms is due to the technical support provided by ICT, which they use for their development and exploitation of a brand’ [Judgment of the Court of Madrid (n° 33) 11/02/2019]. In other words, the platforms business model uses the app as a technological tool, to interconnect subjects, so whoever is its owner determines the relationship, and, as a consequence, can be considered as evidence in favour of the existence of an employment relationship.

On the other hand, the existence of dependence can be affirmed on the base of several factors. It is true that, as companies usually highlight, riders enjoy a considerable margin of flexibility. For example, regarding working time, riders can choose the schedules and days on which they want to work, as well as the route or the number of orders they want to deliver, without the company being able to impose any of these requirements. Nevertheless, riders do not have absolute freedom when rejecting or accepting the service. The rider enjoys some flexibility, but this is the obvious result of the platforms’ business model.

As the Judgment of the Court of Madrid (n° 33) 11/02/2019 explains, ‘the assertive faculty in the choice of each microtask is the logical consequence of the atomisation of working time, because if the employer could always avail of the dealer at his will, this would place him in a situation of permanent availability, which would constitute a state of personal servitude, which would be contrary to the constitutional and EU conceptualisation of work as a right’. Furthermore, these rooms of freedom do not provide any power to negotiate their working conditions, since companies have an enormous number of distributors willing to work.

Consequently, when any rider refuses to undertake an assignment, he/she can automatically be substituted by another one.

The result is that the basic elements of the relationship, such as remuneration, are entirely determined according to parameters that the company establishes for each service.

Regarding judgments excluding the existence of an employment relationship, it is interesting to highlight that five 5 out of eight rulings established that these riders are TRADEs because they would not have the two main features of an employment relationship and, additionally, they would incorporate the main elements of an economic dependent self-employee.

Hence, according to this minority position, there is no employment relationship for two main reasons. On the one hand, there is no subordination because the rider would have almost absolute freedom to choose their working time, place, and route tasks, the rider has a direct relationship with the final clients if he or she accepts the task, and the rider provides their own bike and phone as the worker’s tools. On the other hand, there would

not be dependence, because the company does not have any disciplinary tools to force riders to work if one of them refuses tasks, besides being the only case in which the rider doesn't perform his duty.

Nevertheless, once the employment relationship has been excluded, the most common situation is being under the TRADE's coverage. It must be kept in mind that TRADEs develop economic or professional activities for one client, from whom they receive at least 75% of their income and that, in Spain, around half of the platform employees work in this sector as a main or secondary activity.

Within these two positions, Spain's Supreme Court has inclined toward the existence of an employment relationship for the platform called Glovo. In its Resolution of 25 September 2020 (ECLI: ES:TS:2020:2924), it sets that a rider is not completely free to decide when she/he works owing to the point system conditions of his activity; it is controlled by geolocation; his activity is determined by precise instruction on how to do the tasks, waiting time is paid; and the most important tool to develop the activity, the platform, belongs to the company. As was mentioned above, this resolution closes the judicial debate for the delivery sector, but not for others, nor even for other platforms.

## 2 The Emergence of 'Riders' Law'

Spain passed the first European law on platform work. The so-called 'Riders' Law' (Law no 12 of 2021<sup>60</sup>), which was agreed with social partners, focused on two main issues. On the one hand, it sets a rebuttable presumption on the existence of an employment relationship for this type of workers.<sup>61</sup> On the other hand, it regulates the use of algorithms for all kinds of workers. This is another type of protection which emerges in the platform work debate but extends its influence over all employees.

According to the text of the legislation, the new law includes the following reforms.

First of all, it presumes, unless proven otherwise, the existence of an employment relationship for those who provide services, in exchange for remuneration for delivering and distributing products for employers who exercise the business powers of the organisation, direction and control, indirectly or implicitly, through a digital platform, or through the algorithmic management of the service or conditions of work. This means the explicit translation of the general presumption of Spanish Employment Law to this activity.

Secondly, art 64 of the Workers' Statute (Spanish Employment Law) establishes that employees' representatives have the right, among others, 'to issue a report, prior to the implementation by the employer of the decisions adopted by him, on [...] the implementation

<sup>60</sup> Pérez del Prado, D., 'The Legal Framework of Platform Work in Spain: The New Spanish "Riders" Law' [2021] *Comparative Labor Law & Policy Journal*.

<sup>61</sup> Before this law, only one collective agreement tried to regulate the employment relationship by introducing riders in its subjective scope. It was the collective agreement of the sector of hospitality (*convenio colectivo del sector de al hostelería*).

and review of work organisation and control systems, time studies, establishment of bonus and incentive systems and job evaluation'. The new proposed wording adds a brief paragraph of special relevance at the end, which is 'included when they derive from mathematical calculations or algorithms'. Therefore, workers' representatives will have the right not only to be informed, but consulted concerning this issue, as they can deliver a report on it.

This was a quite controversial issue, which was included and excluded from the negotiations owing to the strong opposition of employer's representatives to regulating it.

Although the Trade Unions' proposals were more detailed, it is a great advance, as it not only extends information and consultation on this issue but establishes collective bargaining to negotiate the details. In other words, it puts the algorithm into the object of negotiation.<sup>62</sup>

### 3 Telework: A New Law Improving the Regulatory Framework

Before COVID-19, teleworking had been scarcely developed in Spain. According to Bank of Spain's calculations, only 7,5% of workers were involved in telework, 6 percentage points below the European average (13.5%) and clearly some way off from the figures of other large countries, such as France (20.8%) or Germany (11.6%).<sup>63</sup>

The pandemic has triggered the use of telework and some new legislative proposals. The emerging of the pandemic and the confinement obliged companies to adopt telework without having a complete regulatory framework, what has been a source of disputes. In order to prevent it and support telework, the government has launched Law no. 10 of 2021 on telework.<sup>64</sup> Compared to previous reforms, the current one is much deeper. It is a complete law, separated from the Workers' Statute and regulating the most important aspects concerning the practical application of telework, such as minimum working conditions, data protection, cost coverage, health and safety, learning and training, and the right to disconnect outside working hours.

### 4 Automation and Robotization: Top Performer in the Roll-out of Very-high-capacity Networks

Spain addresses the challenge of digitalisation and robotization with very good data in some crucial points. In this regard, according to the European Economy and Society Index (DESI), Spain ranks 11<sup>th</sup> out of 28 EU Member States, obtaining a position better than Germany, Austria or France, and being above the European average in most analysed factors. The country ranks 2<sup>nd</sup> in the EU on digital public services, thanks to its well-timed implementation of a digital-by-default strategy throughout its central public administration.

<sup>62</sup> Mercader Uguina, J. R., 'Algoritmos y Derecho Del Trabajo' (2019) 52 Actualidad Jurídica Uría, 63; Pérez del Prado, D., 'Representación de los trabajadores y protección de datos de carácter personal como fuente de poder' [2020] Documentación Laboral, 57.

<sup>63</sup> Banco de España, 'El Teletrabajo En España' [Telework in Spain] [2020] Boletín Económico.

<sup>64</sup> M. Godino Reyes, *La nueva regulación del trabajo a distancia y el teletrabajo* (Francis Lefebvre 2020).

Additionally, it achieves 5<sup>th</sup> position in the area of connectivity, because it is one of the top performers in the roll-out of very-high-capacity networks, as well as the take-up of ultrafast broadband connections. Spain is one of the first countries in deploying a 5G network which covered 75% of the population at the end of 2020. Finally, the country's score is in line with the EU average regarding digital integration. Whereas, generally speaking, Spanish businesses take advantage of the opportunities presented by digital technologies, SMEs have yet to fully unlock the potential of e-commerce.<sup>65</sup>

## VI Conclusions

### 1 The Gig Economy and the Changing World of Work

It is a commonplace that virtual, internet-based, digitised forms of work are less stable than traditional employment relationships. A fairly thin segment of the gig workers earn a regular income from working on the internet. Platform workers in several cases do not earn all their income through a single platform.<sup>66</sup> A few make a living from these kind of jobs, despite the relatively high proportion of people trying to work online.<sup>67</sup> More interestingly, the status of platform workers in most cases remains unclear.<sup>68</sup>

Richard Sennett explains that in our globalised world, people's lives have become increasingly fragmented. The new 'icon' has become perpetual 'wandering', and the need to move, and to 'move on'. Today's workers have increasingly few stable and secure social relations and therefore they are in a perpetual struggle with time; how to manage short-term relationships while moving from one task, job or place of residence to another. Most people, however, are not like that by nature. The new cultural ideal is therefore harmful to the majority of people, because it demands standards that are contrary to basic human nature. Most of the people find it difficult to cope in the absence of lasting relationships

<sup>65</sup> 'Digital Economy and Society Index (DESI) 2020 – Spain' 3.

<sup>66</sup> Janine Berg, *Income security in the on-demand economy: findings and policy lessons from a survey of crowdworkers* (Conditions of work and employment series, No. 74 International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, 2016, Geneva) 10, <[https://www.ilo.org/wcmsp5/groups/public/--ed\\_protect/--protrav/--travail/documents/publication/wcms\\_479693.pdf](https://www.ilo.org/wcmsp5/groups/public/--ed_protect/--protrav/--travail/documents/publication/wcms_479693.pdf)> accessed 10 August 2021.

<sup>67</sup> Agnieszka Piasna, Jan Drahokoupil, 'Digital labour in central and eastern Europe: evidence from the ETUI Internet and Platform Work Survey' (Working Paper 2019/12, European Trade Union Institute 2019, Brussels) 25, 32. <<https://www.etui.org/sites/default/files/WP%202019%2012%20Digital%20Labour%20Web%20version.pdf>> accessed 10 August 2021. See to the contrary Mariya Aleksynska, 'Digital Work in Eastern Europe: Overview of Trends, Outcomes and Policy Responses' (ILO Working Paper 32, 2021, Geneva) 26. <[https://www.ilo.org/wcmsp5/groups/public/--dgreports/--inst/documents/publication/wcms\\_794543.pdf](https://www.ilo.org/wcmsp5/groups/public/--dgreports/--inst/documents/publication/wcms_794543.pdf)> accessed on 13 August 2021.

<sup>68</sup> Annarosa Pesole, Maria Cesira Urzì Brancati, Enrique Fernández-Macías, Federico Biagi, Ignacio González Vázquez, *Platform Workers in Europe Evidence from the COLLEEM Survey* (EUR 29275 EN, Publications Office of the European Union 2018, Luxembourg) 4.

and stability, as they have *an inherent need for relative security and stability*.<sup>69</sup> A very fine example for these thoughts the platformisation of the economy. As our study pointed out, the problem of the ‘platformisation of the economy’ raises the issue of the classification of the employment relationship.

## 2 Personal Scope of Legal Protection – Change in the Traditional Concept of Subordination

The analysis of the three countries shows a clear tendency to extend the protection of subordinate labour to an intermediate zone, to those workers whose lives are fragmented, characterised on the one hand by a state of economic weakness compared to the contractual counterpart, on the other hand by a certain degree of integration into the organisation of the company.

Both the Hungarian and the Italian labour law systems can be defined as *binary*, in the sense that they contain only two types of reference contracts: subordination and autonomy. However, in reality, among these two different legal types, there is a large grey territory of workers who deserve protection anyway. In the absence of an intermediary type of contractual relationship, legislators and domestic case law tend to qualify labour relations using symptomatic cues or qualifying marks.

The Italian solution is a kind of hybrid system: it does not let go the code of binarity of the classic labour law, but at the same time it opens up new ‘*intermediate solutions*’. The Spanish courts made several rulings in order to determine the status of riders and the vast majority of these decisions pointed out that these legal relationships are actually employment relationships.

### a) Italian and Spanish regulations – ‘One Step Ahead’ of the Hungarian

Based on all this, it can be stated that the Italian and Spanish regulations are more ‘modern’ or ahead of the Hungarian counterpart. This is not surprising, as the necessities of economic life expose the legislature to more powerful effects in these countries. The attempt to introduce the economically dependent workers in the 2011 Draft of the Hungarian Labour Code was not successful; however, this could have been the solution regarding the platform-based work.

### b) Moving away from binary code – the Italian judiciary and the pioneering Spanish legislation

The three legal systems are located on *three different points on a linear scale*. While the Hungarian uses a purely binary code, the Italian is also on this path, but at the same time

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<sup>69</sup> Richard Sennet, *The Culture of the New Capitalism* (Yale University Press 2006, New Haven and London) 3–5.

the legislature and the judiciary have advanced and moved from a stalemate to make several efforts to recognise the third category of workers.

This shows that the extension of labour law protection tends towards any person who, for a certain period of time, provides services ‘for and under the direction of another person’, ‘in return for which he receives remuneration’, and is engaged in ‘effective and genuine activities’. The Italian approach focuses on economic dependence and economic weakness as a distinctive gateway in order to protect people who perform work, but it is still an *ad hoc* protection without the notion of universality. Spanish law has already pioneered out of the binary system with the notion of trichotomy and is just passed the Rider’s Law, which is a great step forward.

However, the creation of new legal relationships with certain levels of protection raises new demarcation issues. The states may recognise different legal relationships and this kind of diversity only complicates the situation and obscures the very essence: certain protection must be available to all workers. While it is a forward-looking development to recognise new legal relationships as worthy of labour law or ‘kind of’ protection, the ultimate solution may be to protect all the situations of subordinate labour by provisions on *fundamental labour guarantees* (e.g. prohibition of forced labour, ensuring equal treatment, employment protection, fair working conditions, protection against arbitrary termination of employment).

### c) A broader interpretation of the employment relationship – guaranteeing ‘decent working conditions’

It is often difficult to define accurately what an employment relationship is. However, the question is not ‘what constitutes an employment relationship?’ but ‘Who needs protection?’ In our view, there is no need to reinterpret the notion of work performed in subordination, but it is necessary to *rethink the distribution of guarantees of protection*.<sup>70</sup> This can be achieved by agreeing on the recognition of universal labour law safeguards and guarantees. The general guarantees must be valid for all forms of work performed by people in economic dependence and in a state of economic weakness, regardless of any other qualification or classification.

A significant need for core labour law protection for a loose unity of relationships of personal work is needed. The concept of ‘employment relationship’ has to be interpreted in a much broader way than in the past – any form of human income-generating activity (even in the gig economy) means work. It is high of importance: *guaranteeing ‘decent working conditions’* – regardless of the type of employment relationship, and a person cannot be deprived of basic human rights, for example those in the ILO Declaration of 1998.<sup>71</sup>

<sup>70</sup> Emanuele Menegatti, ‘On-demand Workers by Application – Autonomia o Subordinazione?’ in Gaetano Zilio Grandi, Marco Biasi (eds), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile [Short Commentary on the statute of self-employment and mart working]* (Wolters Kluwer Italia 2018, Milano) 109.

<sup>71</sup> Kun Attila, ‘Munkajogviszony és a digitalizáció – rendszerszintű kihívások és a kezdetleges európai uniós reakciók’ [Employment relationship and digitalisation – systemic challenges and rudimentary responses of

However, the problem of platform workers is not only a major challenge for the present, either in the context of qualification marks of the employment relationship or in the context of extending labour law protection. Given that these relationships are typically short, occasional, irregular and low-paid, this raises the question of the viability of pay-as-you-go pension systems. In a few decades, not only population ageing but also income security could become a serious problem among a significant portion of society.

### 3 COVID-19 – New Era in Teleworking and the Impact of Automation and Robotisation

Telework has become one of the most commonly used methods of dealing with the changed labour market situation during the COVID-19 crisis. Therefore, its wider spread is likely to have an impact on future labour market processes. In all countries, the COVID-19 pandemic has been a sharp dividing line in the spread of teleworking and home office. These institutions could prevent employees from becoming infected with the coronavirus in the workplace and can be a successful tool for employees to manage their personal obligations.

However, it must be noted that telework, which bloomed on the battlefield of the pandemic, has increased teleworkers' domestic expenses. Although, in theory, teleworkers can also be protected by trade unions, the distance may keep them far away from the sight and protection of the union. The *'Big Brother effect'* can also be a real danger: a closely guarded part of the employee's private life becomes visible to the employer, and data protection issues can test the interests of both parties.

The pandemic has accelerated the structural trends in the world of work.<sup>72</sup> Digital platforms are being massively deployed to ensure that businesses remain continuous. To this end, the automation of production processes has also accelerated. In the midst of digital switchovers, low-skilled workers and those who perform routine tasks are at risk the most. The solution therefore lies in the need to change training and retraining structures in order to train workers who are capable of filling the jobs of the future. That is why it is so important to introduce active labour policies, especially in Italy and Hungary, of up-skilling and re-skilling the workforce, in order to protect employment levels,<sup>73</sup> with the resources for training them to be supported through fiscal leverage.

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the European Union] in Pál Lajos, Petrovics Zoltán (eds), *Visegrád 15.0. A XV. Magyar Munkajogi Konferencia szerkesztett előadásai [Visegrád 15.0. Edited presentations of the 15th Hungarian Labour Law Conference]* (Wolters Kluwer 2018, Budapest, 389–416) 405–406.

<sup>72</sup> Jan Maarten de Vet, Daniel Nigohosyan, Jorge Núñez Ferrer, Ann-KristinGross, Silvia Kuehl, Michael Flickenschild, *Impacts of the COVID-19 pandemic on EU industries*, Publication for the committee on Industry, Research and Energy, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament (2021, Luxembourg) 8. <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662903/IPOL\\_STU\(2021\)662903\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662903/IPOL_STU(2021)662903_EN.pdf)> accessed 13 August 2021.

<sup>73</sup> 'Lavori a rischio automazione...' (n 53).

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