ELTE LAW JOURNAL

ELTE LJ | 2025/2

ELTE
LAW

ELTE

LAW JOURNAL

2025/2

ELTE LJ

ELTE

EÖTVÖS
UNIVERSITY
PRESS

Budapest, 2025

ELTE Law Journal is a peer-reviewed periodical published twice a year under the auspices of the ELTE Faculty of Law since 2013.
The publication of this issue was supported by the ELTE Journal Development Fund (ELTE Folyóirat-fejlesztési Alap).

Project no. K 132712 has been implemented with the support provided by the Ministry of Culture and Innovation of Hungary from the National Research, Development and Innovation Fund of Hungary, financed under the K_19 funding scheme.

PROGRAM FINANCED FROM THE NRDI FUND

Contact • eltelawjournal@ajk.elte.hu
Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1–3, Hungary
For submission check out our submission guide at ojs.elte.hu/eltelj

Recommended abbreviation for citations: ELTE LJ

DOI: 10.54148/ELTELJ.2025.2

ISSN 2064 4965

Editorial work • ELTE Eötvös University Press
H-1088 Budapest, Múzeum krt. 4.

ELTE | EÖTVÖS UNIVERSITY PRESS

ELTE EÖTVÖS LORÁND UNIVERSITY

eltebook.hu

Executive Publisher: the Executive Director of ELTE Eötvös University Press
Layout: Katalin Balogh
Printed by: Multiszolg Ltd

Contents

Introduction to the Special Issue on Individual Autonomy

The special issue of the *ELTE Law Journal* is dedicated to the concept of individual autonomy, which served as the key theme of the international conference of the International Society of Public Law (ICON-S) Central and Eastern European Chapter, held in Budapest and hosted by Eötvös Loránd University in May 2025. The conference was also an important dissemination event for the results of the *#FULCAP* research project conducted at the ELTE Department of Constitutional Law, focusing on legal capacity to fundamental rights.

The *#FULCAP* research project explores a specific aspect of individual autonomy, namely its reflection in law through the doctrinal concept of legal capacity to fundamental rights. The robustness and practical relevance of this doctrinal concept can only be assessed if placed within broader theoretical, interdisciplinary, and methodological frameworks. The conference also highlighted that individual autonomy has numerous other dimensions that merit detailed examination from the perspective of different branches of law, other disciplines, theory and practice, as well as through a plurality of methodological approaches.

The present special issue offers a selection of diverse approaches to the concept of individual autonomy, drawing on the conference presentations and illustrating the broader context of the key findings of the *#FULCAP* research project. These contextual dimensions range from personal decision-making, to institutional and procedural frameworks, to the obligations and policy choices of the state, to concepts of international law.

Ioana-Adelina Tudor examines approaches to abortion within the European legal order. Her analysis reflects on the tension between, on the one hand, the requirement to protect the right to self-determination and decisions affecting private life – recognized by the European supranational courts – and, on the other hand, the protection of national identity, closely linked to social context and cultural tradition, and primarily reflected in the doctrine of the margin of appreciation. The study explores this tension through a detailed analysis of the relevant case law of the European Court of Human Rights and the Court of Justice of the European Union, while also taking into account recent developments in American jurisprudence. With a strong emphasis on national legislation that can be seen as an expression of national or constitutional identity, the article offers a comprehensive overview of the dilemmas surrounding bodily autonomy in the European context.

Anna Chamráthová Richterová provides a detailed analysis of the Czech ombudsman institution, focusing on its legal basis, activities, and social recognition. The article also

DOI: 10.54148/ELTELJ.2025.2.5

traces the gradual shifts over time in the key aspects of the ombudsman's work, with particular emphasis on the institution's role in protecting individual rights and autonomy. While changes in the role of such institutions are natural – especially in the case of human rights bodies – these developments must also comply with international standards, as the ombudsman's status, powers, and general approach are significantly shaped by them. Taking these requirements into account, the article offers a comprehensive account of how this key national institution has evolved while consistently maintaining its role in safeguarding individual autonomy.

In their study, Polonca Kovač and Klavdija Košec provide a detailed analysis of the functioning of the constitutional complaint mechanism in Slovenia. As a classic legal remedy designed to safeguard fundamental rights in individual judicial cases, the constitutional complaint also serves as an important tool for the effective protection of individual autonomy. The article focuses on constitutional complaints arising from administrative procedures between 2014 and 2024, as reflected in the practice of the Slovenian Constitutional Court. The authors pay particular attention to cases from the tax and social domains, where findings of constitutional non-conformity occur most frequently. Special emphasis is placed on procedural safeguards in these cases, such as the right to be heard and the right to appeal. The empirical analysis also serves as a model for assessing the effectiveness, protection, and enforcement of individual rights and individual autonomy within a specific legal field.

Clara Chapdelaine-Feliciati provides a detailed analysis of the principle of the best interests of the child, the central guiding principle and standard of the UN Convention on the Rights of the Child. Despite its general significance, the meaning of the principle remains ambiguous, as it may vary depending on the context of the specific case. Moreover, as the article demonstrates, its interpretation differs across jurisdictions, social classes, and cultures. To address these ambiguities, the author draws on semiotics and its application in various scientific disciplines, including law. The article argues that legal semiotics can serve as a useful tool for exploring the reasons behind international law's silence on the precise meaning of the best interests of the child. As a result, it contributes to a deeper understanding of the role and responsibility of stakeholders when interpreting this principle.

Aneta Fraser focuses on a specific situation in which individual autonomy may be restricted: the initiation of criminal proceedings against individuals whose actions raise doubts about their criminal nature. *Crimmigration* – the use of criminal law as a means of enforcing immigration policy – has become increasingly relevant in many jurisdictions. As the author argues, such actions by state authorities require strong justification. This challenge and the related dilemmas are examined through a detailed case study of the Polish criminal proceedings initiated against individuals who provided assistance to migrants at the Belarusian–Polish border in 2022. The author concludes that the fusion of criminal law and immigration policy fails to meet the requirement of proportionality, as it restricts the core of individual autonomy in cases where providing help to those in need constitutes an integral part of one's identity.

The context of Vivien Köböl-Benda's analysis is the planetary crisis, which – beyond pollution and climate change – also severely affects biodiversity. Focusing on the international legal regime, and in particular on the Convention on Biological Diversity, the author examines whether recognizing the intrinsic value of nature can enhance the Convention's implementation. From this perspective, the effectiveness of the related Protocols, Agendas, and Decisions is also analysed in detail. As the study demonstrates, the ecocentric approach – embodied in the recognition of the concept of 'Mother Earth' – has the potential to strengthen the effectiveness of the international legal regime governing the protection of biodiversity. As the author concludes, the ecocentric approach is closely linked to the concept of *living well*; in this sense, it can be understood as a broader contextual element of individual autonomy.

The Guest Editors

Ioana-Adelina Tudor*

The Right to Abortion – Between the Need for Protection at the European Level and Respect for the Constitutional Traditions of the Member States

Abstract

This article examines the regulation of abortion within the European legal order, highlighting the interaction between the jurisprudence of the European Court of Human Rights (ECHR), the Court of Justice of the European Union (CJEU), and the concept of national constitutional identity. While no explicit right to abortion is enshrined at the EU level, the ECHR has developed an extensive jurisprudence based on Article 8 of the Convention (right to private life), granting states a wide margin of appreciation. At the same time, constitutional identity allows Member States to preserve national traditions, creating tensions with the EU's common values enshrined in Article 2 TEU. This study analyses relevant case law and doctrinal perspectives, illustrating how abortion regulation exemplifies the dialectic between the preservation of constitutional traditions and the need for uniform protection at the EU level.

Keywords: abortion, EU law, constitutional identity, margin of appreciation, Court of Justice of the European Union, European Court of Human Rights

I Introduction

The issue of the right to abortion, beyond its moral considerations, has long constituted one of the most sensitive and controversial topics at the European level from the legal perspective of bodily autonomy. In the absence of explicit recognition at the level of the European Union, the regulation of abortion remains within the competence of the Member States, influenced

* Ioana Adelina Tudor is a doctoral researcher at the Faculty of Law, University of Bucharest, and serves as a judge at the Bucharest Tribunal.

by respect for their own constitutional identity, the fundamental values of the Union, as well as by the case law developed by the European Court of Human Rights.

In recent decades, two apparently contradictory trends have emerged. At one level, we may note the case law of the European Court of Human Rights, which although it does not enshrine an absolute right to abortion, guarantees, through Article 8 of the Convention, a woman's right to private life, thereby imposing on States positive obligations to ensure effective access to abortion when it is permitted by national legislation.

At another level, given that it remains a sensitive issue within the legal order of the European Union, this regulatory competence continues to rest at the national level, falling potentially under the umbrella of constitutional identity.

Nevertheless, the conservative position of the Constitutional Court of Poland of 22 October 2020,[1] which considerably restricted the circumstances in which women could resort to abortion, followed by the judgment of the Supreme Court of the United States of 24 June 2022,[2] which abandoned the federal guarantee of the right to abortion, together with the restrictive legislative approaches adopted in Malta and Hungary, underscores the fragility and precariousness of the protection of this right at the global level.

In this context, the ongoing initiatives within the European Union aimed at the explicit recognition of the right to abortion in the Charter of Fundamental Rights represent a significant step towards strengthening a high and uniform level of protection at the European level.

This study explores how a coherent European normative framework for safeguarding the right to abortion can coexist with the Member States' prerogative to define, in line with their constitutional identities, the scope and substance of this protection.

From a methodological point of view, the study aligns the case law of the Court of Justice of the European Union and the relevant legal doctrine with constitutional practice in the field of fundamental rights protection concerning bodily autonomy, while also seeking to highlight and give value to the concept of constitutional identity. At the same time, the study employs comparative elements of legislation and constitutional orientation from various Member States.

II A historic success marked by a dramatic setback

The preservation and protection of bodily integrity is a principle frequently invoked in both law and morality. It is a normative principle that seeks to constrain what we are allowed to do to human bodies or their constituent parts.

1 Constitutional Tribunal of Poland, case K 1/20, 16 October (2020).

2 Case *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022).

Bodily autonomy, as an expression of personal freedom and dignity, derives from the Kantian philosophy of natural rights,[3] being subsequently enshrined in positive law as an integral part of the right to private life and physical integrity.

A contemporary view of this philosophical conception shows us that the respect for a liberal constitutional democracy requires respect for individual liberty and, implicitly, protection of women's bodily freedom, being associated with the idea that dignity and personal freedom cannot be guaranteed in the absence of the recognition of the right to self-determination over one's own body.

The right to abortion has a complex history, marked by major changes over the centuries, depending on the cultural, religious, and political context of each society. In Europe, the evolution of this right is closely connected to the feminist movements and social reforms of the 19th and 20th centuries, which culminated in the progressive recognition of reproductive rights as an essential part of women's fundamental rights.[4]

In the United States, the evolution of this right was marked by the decision *Roe v. Wade,*[5] which established that the right to abortion forms part of the right to privacy deriving from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

Recently, the situation in the United States was marked by a significant legal setback generated by the case *Dobbs v. Jackson Women's Health Organization.*[6] This decision was a dramatic shock concerning the federal protection of the right to abortion, abandoning the precedent set in *Roe v. Wade*. Basing itself on the lack of an explicit historical tradition regarding the right to abortion, the Supreme Court of the United States examined whether the right to obtain an abortion was deeply rooted in the nation's history and tradition. However, given that the U.S. Constitution did not expressly regulate the right to abortion, although this had previously been implied by reference to its inclusion within the category of liberties protected by the Fourteenth Amendment, the Court held that this right is not protected at the federal level and requires distinct protection within each individual state of the federation.

With regard to the European framework, we note not only a lack of unitary legislation, but also some unfavourable perspectives in some EU countries. At the same time, the ECtHR has not seemed very willing to indirectly recognise abortion as a fundamental right.

---

3 Helga Varden, 'A Feminist, Kantian Conception of the Right to Bodily Integrity: The Cases of Abortion and Homosexuality' in A.M. Viens, *The right to bodily integrity* (Routledge 2014, London).

4 Reva B. Siegel, 'Abortion and the "Woman Question": Forty Years of Debate' (2014) 89 (4) Indiana Law Journal Article 1, 1365–1980, available at: <https://www.repository.law.indiana.edu/ilj/vol89/iss4/1> accessed 31 October 2025.

5 *Roe v. Wade*, 410 U.S. 113 (1973).

6 Case *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022).

III The perspective of the European Court of Human Rights on the right to abortion

Except for in France (the situation which will be detailed below), no other national constitution from the EU space guarantees women's freedom to have an abortion. Although the European Convention on Human Rights does not expressly enshrine the right to abortion, the case law of the European Court of Human Rights has, over time, outlined a complex interpretative framework in which this liberty was placed at the intersection of several conventional provisions.

First of all, the question of the applicability of Article 2 of the European Convention on Human Rights,[7] which protects the right to life, has been raised, with numerous cases invoking the hypothesis of extending this guarantee also to prenatal life. However, the Court has consistently refused to grant the foetus the status of a 'person' in the strict sense of the Convention, preferring instead to leave to the States a margin of appreciation in defining the beginning of life, while emphasising that the legitimate interests of protecting prenatal life must be balanced with the respect for a woman's right to private life, as enshrined in Article 8 of the European Convention on Human Rights.[8] According to this logic, the right to reproductive self-determination is subsumed under the broader sphere of private life, encompassing essential dimensions of bodily autonomy and physical and psychological integrity.

Moreover, the Court has also analysed the issue of abortion from the perspective of Article 3 of the European Convention on Human Rights[9] concerning the prohibition of inhuman or degrading treatment, especially in cases where administrative or legislative obstacles have caused women physical or psychological suffering of particular intensity. At the same time, in certain cases, Article 10 of the European Convention on Human Rights[10] has been used to protect freedom of expression and information in relation to access to information regarding abortion procedures, while Article 9 of the European Convention on Human Rights[11] has opened the way to analysis from the perspective of freedom of thought, conscience, and religion, taking into account the conscientious objection of doctors and the conflict of values between individual moral beliefs and the national legislative framework.

As we shall see in what follows, throughout its case law, the Court has not contested that national authorities enjoy a broad margin of appreciation when it comes to moral issues, especially in sensitive areas such as the one examined here, which involve fundamental views about the essence of human life. The Court has repeatedly emphasised that no single, uniform conception of morality can be identified at the level of the Member States, and

7 *Vo v. France*, Application no. 53924/00, ECtHR, 8 July 2004.
8 *A, B and C v. IRELAND*, Application no. 25579/05, ECtHR, 16 December 2010.
9 *R.R. v. POLAND*, Application no. 27617/04, ECtHR, 26 May 2011.
10 *Open Door and Dublin Well Woman v. IRELAND*, Application no. 14235/88, ECtHR, 29 October 1992.
11 *Grimmark v. Sweden*, Application no. 43726/17, ECtHR, 11 February 2020.

that national authorities are, in general, better placed than an international court to assess the content of moral requirements and the 'necessity' of imposing restrictions or sanctions intended to ensure their observance.[12]

Among the first cases examined by the European Commission of Human Rights,[13] we find a refusal of the European Court of Human Rights to extend the protection of Article 2 of the European Convention on Human Rights to the foetus, establishing that it is not a 'person' within the meaning of the Convention.[14] This restrictive and conservative interpretation relied on the absence of a European consensus regarding the date from which the foetus requires legal protection and left to the States the freedom to decide about this moment. At the same time, it raised the issue of balancing the interests of the State in protecting prenatal life and the rights of the woman. Later, in the case *Vo v. France*, the Court confirmed this approach, highlighting the lack of a European consensus on the legal status of the foetus and, consequently, the necessity of leaving a margin of appreciation to the States.

The dimension of private life was analysed as early as 1977,[15] when the Court recognised that pregnancy does not belong exclusively to the private sphere, since a woman's private life is closely linked to the development of the foetus. Nevertheless, any restriction on abortion constitutes an interference with private life and must satisfy the proportionality test. In case *A., B. and C. v. Ireland*,[16] the Court sanctioned the absence of a clear normative framework enabling a woman suffering from cancer to establish whether the pregnancy endangered her life. Thus, Article 8 was interpreted not only from the perspective of abstaining from interfering with a right, but also as a source of positive obligations incumbent upon States.

As regards the applicability of Article 10 of the European Convention on Human Rights, the Court held that a prohibition imposed on NGOs preventing them from providing information about abortion procedures carried out abroad, even in the context of protecting public morals, constituted an unjustified interference with the right to freedom of expression.[17]

In a significant number of cases against Poland, the Court identified serious gaps in the normative and procedural framework. In the case *Tysiąc v. Poland*,[18] the lack of clear domestic procedures for authorising a therapeutic abortion led to the irreversible deterioration of the applicant's eyesight, as she had no possibility to terminate the pregnancy. Also worth mentioning is the case of *P. and S. v. Poland*,[19] in which the Court found a violation of Article 8 of the European Convention on Human Rights, given that the

---

[12] *Open Door and Dublin Well Woman v. IRELAND*, Application no. 14235/88, ECtHR, 29 October 1992.
[13] *X v. Norway*, Application no. 867/60, ECtHR, 3 April 1967.
[14] *Paton v. United Kingdom*, Application no. 8416/78, ECtHR, 13 May 1980.
[15] *Bruggemann and Scheuten v. Federal Republic of Germany*, Application no. 6959/75, ECtHR, 12 July 1977.
[16] *A, B and C v. Ireland*, Application 25579/05, ECtHR, 16 December 2010.
[17] *Open Door and Dublin Well Woman v. IRELAND*, Application no. 14235/88, ECtHR, 29 October 1992.
[18] *Tysiąc v. Poland*, Application no. 5410/03, ECtHR, 20 March 2007.
[19] *P. and S. v. POLAND*, Application no. 57375/08. ECtHR, 30 October 2012.

bureaucratic obstacles and psychological pressure exerted on a 15-year-old rape victim made it extremely difficult for her to obtain an abortion. Likewise, in case *R.R. v. Poland*,[20] the hindrance of access to genetic testing and, consequently, the determination that the legal time limit for abortion had been exceeded, amounted to degrading treatment within the meaning of Article 3 of the European Convention on Human Rights.

The case of Poland, in particular, underscores States' obligation to ensure an effective procedural framework and genuine access to reproductive rights, beyond mere legislative statements.

Nevertheless, by the decision of the Polish Constitutional Tribunal (K 1/20),[21] cases in which access to abortion was possible were restricted only to situations of rape, incest, or danger to the life or health of the mother; the legal provision allowing abortion in cases of foetal malformations was declared unconstitutional. Unfortunately, in the judgment *M.L. v. Poland*,[22] delivered after this decision, the ECtHR found a violation of Article 8 on the grounds of the lack of an independent and impartial tribunal due to the irregularity in the appointment of certain judges to the Constitutional Tribunal, avoiding a more detailed analysis of the proportionality of the restriction of this right from the perspective of Article 8 ECHR.

Moving further in the analysis of the ECtHR case law, we note another interesting issue, namely the matter of the freedom of conscience of medical personnel in the context of refusing to perform an abortion. In the cases of *Grimmark v. Sweden*[23] and *Steen v. Sweden*,[24] the Court did not consider that the refusal of hospitals to employ nurses who were unwilling to participate in abortion procedures amounted to a violation of Article 9 of the Convention, taking into account that the absence of a conscience clause in Swedish legislation pursued a legitimate aim, namely, ensuring women's effective access to medical services.

Following the analysis of the ECtHR judgments, it is observed that the right to abortion does not enjoy direct recognition in the text of the Convention; however, the European Court of Human Rights has progressively developed a set of indirect guarantees concerning the exercise of this right, based on Articles 3, 8, 9, and 10. Even though States continue to enjoy a wide margin of appreciation, this power is increasingly conditioned by the existence of transparent procedures, effective access to medical information, and the provision of efficient mechanisms to protect women's integrity, both physical and psychological. Over time, an evolving case law has emerged that gradually consolidates reproductive autonomy as an integral part of private life and personal dignity. And although there is no formal recognition of the right to abortion, the Court operates with a minimal European standard, implicitly recognised in the field of reproductive rights, namely the existence of minimum

[20] *R.R. v. POLAND*, Application no. 27617/04, ECtHR, 26 May 2011.
[21] Judgement of the Polish Constitutional Tribunal of 22 October 2020 (K 1/20).
[22] *M.L. v. Poland*, Application no. 40119/21, ECtHR, 14 December 2023.
[23] *Grimmark v Sweden*, Application no. 43726/17, ECtHR, 14 June 2017.
[24] *Sten v Sweden*, Application no. 62309/17, ECtHR, 11 February 2020.

procedural guarantees and a clear normative framework that entails the transformation of negative obligations into positive duties of regulation and effective protection of these rights.

As we can see from the aforementioned case law, the ECtHR does not guarantee a right to abortion. However, certain nuances must be noted to illustrate the manner in which the Court approaches national legislation: once a Member State's legal framework allows women access to abortion, that framework must also ensure the effective exercise of this right, rather than leaving it as a merely illusory component.[25] Moreover, an analysis of the Court's case law allows us to conclude that the question of access to and the right to abortion must be examined in light of the various interests at stake: firstly, there is the interest of the pregnant woman – which carries the greatest weight – albeit it finds its limits in other competing interests, such as those of the foetus or of society as a whole.

IV The right to abortion between Member State competence, EU law, and the protection offered by the Court of Justice of the European Union

Liberal constitutional systems are characterised, among other things, by the enshrinement and guarantee of fundamental rights and, implicitly, by the respect for the principle of individual autonomy, the respect for human dignity, and the guarantee of personal freedom.

In Europe, in theory, the majority of the Member States of the European Union allow abortion. In practice, however, there are divergent approaches among the Member States, which impose conditions of varying levels of strictness on the exercise of this right. Such restrictions can be explained by the European Union's lack of competence in the field of abortion, meaning that no legal recognition of this freedom can be found within the EU framework.

In the Charter of Fundamental Rights of the European Union, although we do not find explicit reflection of the protection of the right to abortion, several articles may nevertheless serve as an indirect foundation for the protection of reproductive autonomy, namely Article 1, which enshrines the inviolability of human dignity, Article 3, which enshrines the right to physical and mental integrity, and Article 7, which enshrines the right to respect for private and family life.

The interpretation of these provisions remains reserved for the CJEU, but the Court has been cautious not to be drawn into direct case law on abortion, precisely because of its sensitive nature and the diversity of national constitutional traditions.

Nevertheless, the CJEU has sporadically addressed the issue of abortion, leaving the regulation of access to termination of pregnancy to national competence.

---

25 See, for example, the cases *Tysiąc v. Poland*; *R.R. v. Poland*; *A, B and C v. Ireland*.

In Case C-159/90,[26] the CJEU classified legal abortion as a service within the meaning of the Treaties, but since this component does not fall within its field of competence, it emphasised that the Member States are solely responsible for regulating this matter.

The case *Brüstle v. Greenpeace*,[27] although it does not concern the right to abortion but rather the legal protection of embryos in the context of biotechnological patents, it is worth mentioning as the first recognition of legal protection afforded to the embryo from the stage of fertilisation. Nevertheless, the judgment was marked by the Court's reluctance to enter an area traditionally left to the Member States.

Examining the legislation on abortion in the EU Member States, we encounter a mosaic that reveals the different conceptions of the States regarding, on the one hand, the protection of the foetus and, on the other hand, the mother's right to bodily integrity.

Poland provides an illustrative example. The restriction of access to abortion following the aforementioned decision of the Constitutional Court[28] was perceived as an infringement of women's autonomy. However, the Polish government justified the measure by reference to its own constitutional values, invoking the principle of the protection of life from conception.[29] At present, debates continue regarding the necessity of legalising abortion.

Equally, recent legislation in Hungary deserves to be mentioned, namely Decree 29/2022. (IX. 12.), known as the 'foetal heartbeat' law, which introduced a requirement for the termination of pregnancy: specifically, the pregnant woman must be shown 'foetal vital signs', meaning that she must listen to the heartbeat of the foetus.[30]

Last but not least, Malta is a case worth discussing, given the fact that it has recently allowed some relaxation regarding the freedom to have an abortion,[31] thus positioning itself – in terms of the approach taken – in the opposite direction of that observed in the United States or Hungary.[32]

At the opposite pole, in France, a remarkable legislative development can be observed, materialised through the explicit inclusion of the right to abortion in the Constitution. In March 2024, France adopted a significant constitutional reform that guarantees the protection of the right to voluntary termination of pregnancy, thus expressing a firm response to international trends towards the restriction of reproductive rights. This

---

26 C.J.C.E., Judgment of the Court of 4 October 1991, Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, ECLI:EU: C:1991:378.

27 C.J.U.E., Judgment of the Court (Grand Chamber) of 18 October 2011, Case C-34/10 *Oliver Brüstle v Greenpeace eV.*, ECLI:EU: C:2011:669.

28 Judgement of the Polish Constitutional Tribunal of 22 October 2020 (K 1/20).

29 Anna Śledzińska-Simon, 'Abortion and abuses of constitutional review in the trajectory of Polish constitutionalism' [2025] International Journal of Constitutional Law 1–24; DOI: https://doi.org/10.1093/icon/moaf027

30 Ivett Szalma, Alexandra Sipos, A comparative analysis across reproduction policy fields in Hungary (2024), In book: *Reproduction Policy in the Twenty-First Century*, DOI: https://doi.org/10.4337/9781035324163.00017

31 Bill Application no. 28, Criminal Code of Malta (Amendment Application no. 3) Bill.

32 Decree 29/2022. (IX. 12.) Minister of Interior Affairs.

incorporation becomes part of France's constitutional identity and confers upon this right enhanced legal value, since any modification thereof would require revision of the fundamental text of the State.

All these aspects draw our attention to the urgent need to establish legislative uniformity, at least at the level of the EU, in order to effectively ensure consistent protection of this fundamental right. A common abortion policy may take on new dimensions given the growing interest in this subject, particularly from the European Parliament.

V Potential conflict between the common values of European Union law and the constitutional identity of the Member States

Recognising the importance of protecting this right, at the level of the European Parliament we observe timid yet necessary attempts to deepen its recognition. Among the first steps in this regard, we recall Resolution 1607 of the Parliamentary Assembly of the Council of Europe, which expresses concern regarding the numerous restrictions limiting real access to safe, financially accessible, acceptable, and women-oriented abortion services in many European States. Within this document, the fundamental right of every person, especially of women, to respect for physical integrity and to the freedom to decide over one's own body is reaffirmed. The Resolution also emphasises that the pregnant woman must have the final say in decisions relating to abortion.[33]

The Resolution of the European Parliament of 26 November 2020 on the de facto ban on the right to abortion in Poland states that women's rights are fundamental rights and that EU institutions and Member States have a legal obligation to uphold and protect them in accordance with the Treaties, the Charter of Fundamental Rights, and international law. The Resolution notes that the excessive and unjustified restrictions imposed on access to abortion generated by the judgment of the Polish Constitutional Court violate the inherent and inalienable dignity of women and run counter to the Charter.[34]

In reaction to the worrying trend that emerged after the decision of the Supreme Court of the United States to overturn *Roe v. Wade*, the European Parliament adopted the Resolution of 7 July 2022[35] that highlights the need to ensure the right to abortion and women's health in the EU and calls on the EU and its Member States to legally recognise

[33] Resolution 1607 (2008) of the Parliamentary Assembly available at <https://pace.coe.int/fr/files/17638/html> accessed 31 October 2025.

[34] European Parliament resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland (2020/2876(RSP)) available at <https://www.europarl.europa.eu/doceo/document/TA-9-2020-11-26_RO.html#sdocta13> accessed 31 October 2025.

[35] European Parliament resolution of 7 July 2022 on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's health in the EU, available at <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0302_EN.html> accessed 31 October 2025.

abortion. At the same time, it emphasised the necessity of including this right in the Universal Declaration of Human Rights.

Recently, following the situation in Poland and the favourable enshrinement of this right in France, the European Parliament adopted the Resolution of 11 April 2024,[36] by which the European Council was urged to launch a Convention for the revision of the Treaties and to adopt the proposal included in its Resolution of 22 November 2023 to add to the Charter of Fundamental Rights of the European Union the right to legal and safe abortion, the proposed amendment to Article 3 being as follows: 'Everyone has the right to bodily autonomy, to free, informed, full and universal access to sexual and reproductive health and related rights, as well as to all related healthcare services, without discrimination, including access to legal and safe abortion.'

Until the adoption of a specific legislative act, the aforementioned resolutions do not directly influence the national legislation of the Member States of the European Union due to their non-binding character. These resolutions instead represent a political stance and a symbolic message, without the power to constitute a legal instrument usable in combating restrictive or abusive policies regarding the right to abortion. They express the will and orientation of the European Parliament but clearly require implementation.

At the same time, it is worth mentioning Resolution 2439 (2022) of the Parliamentary Assembly of the Council of Europe[37] which condemns the intensification of anti-abortion harassment in Member States – a phenomenon targeting both women seeking termination of pregnancy and medical personnel, pro-choice activists, and organisations defending reproductive rights. The document underlines that such actions – including intimidation, disinformation, verbal and physical violence, judicial pressure, and stigmatising campaigns – constitute a violation of fundamental rights and impair effective access to safe and legal abortion.

The Assembly warns that anti-abortion harassment erodes the rule of law, infringes freedoms protected by international law (such as the right to respect for private life and freedom of expression), and may, in certain circumstances, amount to inhuman or degrading treatment.

The resolution calls on Member States to adopt concrete measures, such as penalising the obstruction of access to abortion, creating 'safe zones' around medical facilities, combating disinformation, ensuring comprehensive sexuality education, and protecting healthcare workers and defenders of women's rights. The document also reaffirms the importance of real and safe access to reproductive healthcare services as part of States' human rights obligations.

---

36 European Parliament resolution of 11 April 2024 on including the right to abortion in the EU Fundamental Rights Charter (2024/2655(RSP)) available at <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0286_EN.html> accessed 31 October 2025.

37 Resolution 2439 (2022), text adopted by the Standing Committee, acting on behalf of the Assembly, on 31 May 2022 (see Doc. 15459, report of the Committee on Equality and Non-Discrimination).

It is worth mentioning that, correlatively with women's freedom to resort to terminating a pregnancy, certain states have introduced the legal possibility of raising a conscientious objection to performing the respective procedures.[38]

In the analysed context, conscientious objection is reflected in various national regulations. Thus, in Sweden, Finland, and Iceland, health professionals are generally not permitted to invoke conscientious objection in order to refuse to provide medical services that fall within their duties. On the other hand, Norway allows medical staff to refuse to participate in abortions, while family doctors do not formally benefit from this right. Nevertheless, there are cases where some family doctors have indirectly avoided issuing referrals for the termination of pregnancy.[39]

Although it is unlikely that the Parliamentary initiative will attract a similarly unanimous stance from the Member States, the moment is of historical significance. We cannot deny that debates in the European Parliament may shape the European Union's lines of action, at times placing the Union in the uncomfortable position of a mere passive observer *vis-à-vis* the highly diverse national policies of the Member States. At the same time, although debates within the European Parliament can serve as a reliable barometer of the dynamics of European values, it should be noted that the Member States are unlikely to receive with unanimous openness any proposal to amend the Charter of Fundamental Rights of the European Union so as to include a right to abortion.

In this regard, one should recall the case of Ireland, which sought to resist the influence of European law in the domain of bodily autonomy both during the Maastricht Treaty negotiations – by securing a protocol specifically designed to protect its prohibition on abortion – and again in 2008, when, at Ireland's request, the European Council approved a declaration confirming that the Treaty would not affect Ireland's ban on abortion.[40]

In the current context of the European Union, where legislative harmonisation concerning the protection of reproductive rights is conceivable, it is foreseeable that some Member States will invoke the protection of their constitutional identity to justify restrictive regulations on abortion. Such positions may clash with the Union's fundamental values – such as gender equality and respect for human dignity – thereby generating tensions between national competences and EU legislation.

Julian Scholtes argues that a state's constitutional identity should be understood through two dimensions: first, the unamendability of certain constitutional provisions – namely, the 'hard core' of the constitution that precludes revisions infringing upon those provisions deemed most important to the nation; and second, constitutional culture, that is,

---

[38] J. Gašperin Wischhoff, *National Constitutional Identity* (Nomos 2025, Baden-Baden), DOI: https://doi.org/10.5771/9783748949701

[39] Ibid 388.

[40] Federico Fabbrini, 'How EU Membership Transformed Ireland's Socio-Legal Norms: The Case of Abortion' VerfBlog (29 March 2023), DOI: https://doi.org/10.17176/20230329-195110-0

the reflection through a local, national lens of a people's common sense and shared values within the concept of national identity, which thereby acquires normative force.[41]

However, how far can Member States press the invocation of constitutional identity? Authors such as Federico Fabbrini and András Sajó warn against the arbitrary use of this notion – one they regard as vague – in light of the absence of a reliable source for identifying constitutional identity, which currently varies with the jurisprudence of each constitutional court and may contribute to the erosion of the European project.[42] Nor should we overlook the contentious identity-based claims of Poland and Hungary that have involved deploying constitutional identity as a defensive instrument against the European legal order and the rule of law.[43]

In this context, it should not be overlooked that, although Member States have frequently invoked the need to protect their own constitutional identities, the Court of Justice of the European Union has recently indicated that the EU itself possesses an identity whose core lies in Article 2 T.E.U.[44] Article 2 refers to respect for human rights, and the European Parliament has underscored the need to enshrine a right to abortion in the Charter of Fundamental Rights precisely in view of the threats to human rights, including sexual and reproductive rights. The European Parliament has opened the way to this approach by reframing the issue of abortion through the lens of fundamental rights and anchoring its argumentation both in Article 2 TEU and in the provisions of the Charter of Fundamental Rights of the European Union.[45]

Lastly, it is worth highlighting the European Citizens' Initiative 'My Voice, My Choice – For Safe and Accessible Abortion', launched in 2024, which represents a firm plea for the fundamental right to reproductive health and the bodily autonomy of women. The initiative conveys a collective call for the elimination of legislative and social barriers that restrict access to safe and affordable abortion services. This initiative promotes a common standard for the protection of women's lives and health, affirming that access to abortion is not merely a medical matter, but also an expression of individual freedom and self-determination. Its concrete objective is to obtain financial support for Member States willing to provide legal and safe abortion services for any person in Europe who does not yet have access to them.[46]

---

41 J. Scholtes, 'Abusing Constitutional Identity' (2021) 22 (4) German Law Journal 534–556.

42 Federico Fabbrini, András Sajó, 'The dangers of constitutional identity' (2019) 25 (4) European Law Journal 457, DOI: https://doi.org/10.1111/eulj.12332

43 T. Drinóczi, A. Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20 (8) German Law Journal 1140–1166, DOI: https://doi.org/10.1017/glj.2019.83

44 Judgment – 05/06/2023 – Case C-204/21 *Commission v Poland (Indépendance et vie privée des juges),* ECLI:EU:C:2023:442.

45 L. Peroni, M. Bucholc, 'Towards a common EU-abortion policy? The European Parliament's resolutions on abortion as a human rights issue' (2025) 31 (1–2) European Law Journal 63–80, DOI: https://doi.org/10.1111/eulj.70005

46 Initiative available at <https://citizens-initiative.europa.eu/initiatives/details/2024/000004_en> accessed 31 October 2025.

The ‘My Voice, My Choice: For Safe and Accessible Abortion’ initiative was submitted to the European Commission on 1 September 2025, and on 1 October 2025, the organisers presented the objectives of their initiative during a meeting with European Commission officials.[47]

Yet how far can the argument of invoking constitutional identity be taken before the Court of Justice of the European Union, when the reduction of the protection of this right collides with the fundamental values of the Union, such as human dignity? We consider that the integration of the right to abortion into the Charter of Fundamental Rights of the Union and its clear and direct protection by the CJEU should not be hindered by potential claims based on national constitutional identity. This fundamental right, anchored in the essential values of the Union, must prevail over such exceptions invoked on identity-based grounds, following the remarkable model of France in constitutionalising the right to abortion.

[47] Information available at <https://commission.europa.eu/european-citizens-initiative/meeting-organisers-european-citizens-initiative-my-voice-my-choice-safe-and-accessible-abortion-2025-10-01_en> accessed 31 October 2025.

Anna Chamráthová Richterová*

New Challenges for the Ombudsman Institution in the Czech Republic**

Abstract

The paper introduces some new challenges that await the Czech Ombudsman concerning protecting individual rights. They have recently been transformed into a human rights institution, and a new ombudsman institution, the Children's Ombudsman, has been established, with whom the Ombudsman will have to cooperate.

In the first part of the paper, I describe what competences have been entrusted to the Ombudsman in the past and how they have changed the view of the institution, with an emphasis on those that are relevant for the protection of individual rights. In the second part, the paper analyses what it means for the ombudsman institution to shift its focus from protection against maladministration to the protection of human rights, and what impact the establishment of the Children's Ombudsman may have on its activities.

Keywords: Ombudsman, Children's Ombudsman, national human rights institution, equality body, national preventive mechanisms, protection of individual rights

* Anna Chamráthová Richterová (JUDr., Ph.D.) is an assistant professor at Masaryk University, Faculty of Law, Department of Administrative Law and Administrative Science. The presentation of the paper was funded by a grant from Masaryk University, Faculty of Law, which supports the internationalisation of academics. ORCID 0009-0001-2037-5227.

** The paper is based on the research of the author presented at the conference Individual Autonomy, Fundamental Rights and Institutional Safeguards in Budapest, 29–30 May 2025. Participation at the conference was funded by a grant from Masaryk University, Faculty of Law, which supports the internationalisation of academics.

I Introduction

The Czech ombudsman institution is called the Public Defender of Rights and was established 25 years ago, not by the Constitution but by an ordinary act of Parliament.[1] It is important to mention that its role and purpose were thus defined solely by the Ombudsman Act. There is, therefore, no clear, difficult-to-change constitutional regulation. The Public Defender of Rights was conceived as a body providing rapid, inexpensive, and informal assistance to individuals who lack legal training in cases where public administration acts in a manner that violates not only the law but also the principles of good governance and the democratic rule of law.[2]

However, in the 25 years of their existence, the institution has undergone a fundamental transformation, with new competences gradually being entrusted to them.[3] The final important change happened in the spring of 2025.[4] They were transformed into a human rights institution, and a new ombudsman institution was established, the Public Defender of Children's Rights (Children's Ombudsman), with whom the Public Defender of Rights will have to cooperate.[5]

1 Act no. 349/1999 Coll., the Act on the Public Defender of Rights, currently named the Act on Public Defender of Rights and the Public Defender of Children's Rights (hereinafter 'the Ombudsman Act').

2 Explanatory notes to the Ombudsman Act 14, Sec 1 (1) of the Ombudsman Act in the Original version.

3 Anna Chamráthová Richterová, 'Postupná proměna instituce veřejného ochránce práv' [*The Gradual Transformation of the Public Defender of Rights Institution*] in Anna Chamráthová Richterová, Jiří Valdhans, Eva Lásková (eds), *Dny práva 2019. 20 let zákona o veřejném ochránci práv* [*Days of Law 2019. 20 years of the Ombudsman Act*] (Masaryova univerzita 2020, Brno, 64–78) 64–71 and Vladimír Sládeček, 'Nad návrhem novely zákona o Veřejném ochránci práv' [*On the draft of an amendment to the Public Defender of Rights Act*] (2024) 57 (8) Správní právo 542–549, 543–544.

4 At the time of writing this article, further changes to the institution are happening. The Public Defender of Rights should undertake the tasks of a monitoring mechanism in connection with the initial screening of foreigners and asylum procedures at the borders in accordance with the European Union legislation, and that from June 2026 (Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 and Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU).
The institution also became a body protecting fundamental rights in relation to the use of high-risk AI systems in August 2025 ('Akt o umělé inteligenci a jeho přínosy' [*The Artificial Intelligence Act and its benefits*] (2024) The Government Office of the Czech Republic <https://digitalnicesko.gov.cz/ai-akt/> accessed 31 October 2025) and its role as an equality body will undergo some changes (Personal correspondence with Jaroslav Švoma from 22 August 2025).
The first-mentioned task slightly expands and further refines the pre-existing task of monitoring the detention of foreign nationals, which the paper mentions later. The two other tasks lack a more precise definition, so it is difficult to provide any substantive analysis of them. Therefore, the paper does not deal with them in further detail.

5 The Ombudsman Act, as amended by the Act no. 77/2025 Coll.

The definition of the role of the Czech ombudsman institution is thus changing and evolving. The paper aims to analyse new challenges that await the institution, focusing on the protection of individual rights. The first part will describe what competences have been entrusted to the Public Defender of Rights in the past and how they have changed the view of the institution, with an emphasis on those that are relevant for the protection of individual rights. Specifically, this will include the Public Defender of Rights' role as a national preventive mechanism, an equality body, and the protection of the rights of persons with disabilities. In the second part, the paper will analyse what it means for the ombudsman institution to be a national human rights institution[6] and what impact the establishment of the Public Defender of Children's Rights is likely to have on the institution's activities. The presentation will also explore the involvement of vulnerable groups of people in the activities of the ombudsman institution.

II From the beginning to the current changes

1 Original mandate

As I have already mentioned, the original main task of the ombudsman institution was to protect people against maladministration conducted by official authorities.[7] The Ombudsman Act also suggested that the institution should contribute to the defence of fundamental rights and freedoms by doing so. The Public Defender of Rights was intended to provide general recommendations to public administration and to investigate individual cases on their own initiative or on the basis of complaints lodged by members of the public. Thus, the institution complied with the Venice Principles on the Protection and Promotion of the Ombudsman Institution, which demand that it play an important role in strengthening democracy, the rule of law, good administration, and the protection and promotion of human rights and fundamental freedoms.[8] The importance of this task was also expressed by the United Nations in 2020[9] and by the International Ombudsman Institute in 2021.[10]

6 Hereinafter, 'NHRI'.
7 Cf. Sec 1 of the Ombudsman Act.
8 Council of Europe, 'Principles on the protection and promotion of the ombudsman institution' opinion no. 897/2017, 3 May 2019.
9 The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law, GA Res 75/186, 72nd sess, UN DOC A/RES/75/186 (16 December 2020).
10 International Ombudsman Institute, 'By-Laws', 25 May 2021.

The aforementioned remained the main task of the body for several years,[11] and the institution became immensely popular.[12] This was partly because of the person holding the office, Otakar Motejl, who was distinguished and admired by the general public, public administration and experts.[13]

2 Entrusting new competences[14]

Five years later, the institution became a national preventive mechanism, whose task was the protection of people restricted in their freedom by public authorities, or as a result of their dependence on care provided to them. The Public Defender of Rights should systemically visit places where such people are or may be confined[15] to strengthen the protection of the latter against torture, or cruel, inhuman and degrading treatment, or punishment and other forms of ill-treatment. Although it may not seem so at first, this represented a considerable change in the concept of the Ombudsman's activities and in the paradigm that its sole purpose is to protect members of the public against public administration.

This new task was not only concerned with investigating the conduct of official authorities but also with investigating anybody operating a detention facility, even private individuals.[16]

Four years later (2009), the institution became the equality body tasked with protecting against discrimination, a broad competence concerned with conduct in the public and private spheres.[17] In 2011, the Ombudsman also started to monitor the detention of foreign nationals and the enforcement of administrative expulsion, transfer or transit of detained foreign nationals, as well as the punishment of expulsion imposed on foreign nationals placed in expulsion custody or serving prison sentences.[18]

Another problem arose in 2010 when O. Motejl died and P. Varvařovský took over the position. The expert community saw him as likely to continue O. Motejl's legacy since he 'took over the office as it was and did not interfere too much in management processes'.[19]

---

11 Eg, interview with Anna Šabatová for the journal Státní zastupitelství (2014) 12 (3) 6–9, 7.

12 They were also entrusted with several special competences regarding the legislation, complementing their potential to influence public administration. For further details, see, eg the original text of the Ombudsman Act or Chamráthová Richterová, 'Postupná proměna instituce' 64–71.

13 Šabatová, 'Interview' 7, Lucie Šimáčková, 'Činnost Veřejného ochránce práv při ochraně před diskriminací a jeho úspěchy v této oblasti' [*The Activity of the Public Defender of Rights in Protection against Discrimination and Their Successes in this Area*] (MA thesis, Masaryk University 2025) 79.

14 Apart from the competences mentioned in the paper, a few other ones were entrusted to the institution. However, as these competences are not directly relevant, I decided not to cover them due to the length and content of the paper. For further details, see Chamráthová Richterová, 'Postupná proměna instituce' 64–71.

15 Hereinafter, 'detention facilities'.

16 The Ombudsman Act, as amended by the Act no. 381/2006 Coll.

17 The Ombudsman Act, as amended by the Act no. 198/2009 Coll., the Antidiscrimination Act.

18 The Ombudsman Act, as amended by the Act no. 427/2010 Coll.

19 Šabatová, 'Interview' 7.

His personal situation may have contributed to this, as he resigned three years later, citing unspecified personal and work-related reasons.[20] However, the opinion of the expert community differed from that of the general public, as trust in the office plummeted.[21]

In 2014, a new Public Defender of Rights was elected, A. Šabatová. As a human rights expert, she welcomed the new role of the institution as an equality body. She proposed a shift in its concept from purely protection against maladministration to a greater emphasis on the general protection of human rights.[22] Her concept and the practical steps she took provoked media outrage, as it was inferred that the ombudsman institution was interfering with individuals' private businesses rather than protecting them against maladministration, thereby deviating from the perceived ideal role of this office.[23] What is noteworthy is that, despite the media image, trust in the office gradually rose again; at the end of her mandate, the level was comparable to that during O. Motejl's tenure.[24]

Four years later (2018), the Public Defender of Rights was entrusted with two new competences in matters related to the freedom of movement of citizens of the European Union and the implementation of the international treaty on the rights of persons with disabilities. The latter signified another change in performance, as they were obliged to establish an advisory body composed of persons with disabilities and persons defending their rights and interests, and to cooperate with this body.[25]

I conclude that in 2020, another Public Defender of Rights, S. Křeček, a former Deputy of the Public Defender of Rights, was elected to succeed A. Šabatová, whose mandate had ended. He may be considered a controversial figure due to his disputes with A. Šabatová over the concept of the institution during his time as Deputy, and due to his disputes with his own Deputy, M. Šimůnková, from whom he withdrew all of her workload in 2022.[26] Although his election and the withdrawal of his Deputy's workload attracted substantial negative media attention,[27] trust in the institution during his term remained stable at a level similar to that in A. Šabatová's term.[28]

---

20 Interview with Pavel Varvařovský in ČT24 on 20 December 2013 <https://ct24.ceskatelevize.cz/clanek/archiv/ombudsman-o-sve-rezignaci-bylo-to-takove-skladani-stripku-322557> accessed 31 October 2025.

21 Due to official public opinion surveys, it fell from 68% during the time of O. Motejl to 5-11%. See Šimáčková 77. However, I dare to argue that the issue was not the performance of Pavel Varvařovský himself but rather a natural, gradual process of promoting the institution in the eyes of the public, as I analyse further later.

22 Šabatová, 'Interview' 7–8 and Anna Šabatová, *Ombudsman a lidská práva* [*The Ombudsman and Human Rights*] (Doplněk 2008, Brno) 81–85 and 95.

23 Anna Chamráthová, *Veřejný ochránce práv – jeho úloha, postavení a perspektiva* [*Ombudsman – his function, position and perspective*] (Ph.D. thesis, Masaryk University 2020) 77 and the literature cited therein.

24 Šimáčková 77.

25 The Ombudsman Act, as amended by the Acts no. 198/2007 Coll. and no. 365/2017 Coll.

26 See Anna Chamráthová Richterová, 'Rozvrat ve vztahu veřejného ochránce práv a jeho zástupce – ohlédnutí po dvou letech' [*The Breakdown in the Relationship Between the Ombudsman and His Representative – Two Years Later*] (2024) 32 (9) Právní rozhledy 275–284, 276–278.

27 Ibid 278.

28 Šimáčková 79.

III The NHRI and the Public Defender of Children's Rights

1 Legal background

As I have already stated, the spring of 2025 signified a huge change in the role and the concept of the Czech ombudsman institution. First, its main task shifted from protection against maladministration to the role of a national human rights institution (NHRI). NHRIs are independent bodies with a constitutional and or legislative mandate to protect and promote human rights. They monitor and report on the human rights situation in their countries, provide advice and investigate human rights violations. They are defined by the UN's Paris Principles.[29] The current tasks of the Public Defender of Rights remain the same. However, their main and defining tasks should primarily be defending human rights and maintaining good administration, with the scope of the activity not only concerned with public administration, but also with private individuals.[30] From now on, the institution's focus should be on the general protection of fundamental rights, and this competence should encompass all of its other competences.[31]

Instead of investigating of individual cases, the Ombudsman's role as an NHRI comprises several tasks. They should systematically monitor and evaluate the fulfilment of fundamental rights and freedoms, conduct research and analysis in the field, issue reports, opinions, and recommendations, recommend measures to improve their protection, support raising awareness in society, including education, as well as cooperate and ensure the exchange of information with relevant international, domestic and foreign bodies.

Second, a new Ombudsman has been established within the ombudsman institution, the Public Defender of Children's Rights. They will have the function of an NHRI when fundamental rights of children are concerned and be a 'typical' Ombudsman that carries on inquiries and investigations of a conduct of authorities in individual cases when children are concerned when such conduct is at variance with the law or does not comply with the principles of a democratic state governed by the rule of law and good administration, as well as against their inaction.

Therefore, two equal Ombudsmen will fulfil the roles of two NHRIs within one ombudsman institution, sharing its supporting body (the Office of the Public Defender of Rights and the Public Defender of Children's Rights) and one Deputy, obliged to cooperate.[32]

---

[29] The Paris Principles, GA Res 134, 48th sess, UN doc A/RES/48/134 (20 December 1993). See also Pavel Doubek, 'Ombudsman jako národní lidskoprávní instituce: Jak sladit rozličné lidskoprávní působnosti a naplnit požadavek plurality?' [*Ombudsman as a National Human Rights Institution: How to Harmonize Different Human Rights Competences and Meet the Requirement of Pluralism?*] (2023) 31 (2) Časopis pro právní vědu a praxi 353–379, 354-355, DOI: https://doi.org/10.5817/CPVP2023-2-4

[30] Sládeček 543–544.

[31] Explanatory notes to the Act no. 77/2025 Coll.; Doubek 376–378.

[32] The legal regulation of the issue is deeply problematic and raises many concerns. Due to the extent and scope of the article, for the detail I refer the reader to Anna Chamráthová Richterová, 'Zřízení ochránce práv dětí

The position of the Public Defender of Children's Rights has not yet been filled, so the current Deputy has been acting in this office.

Another noteworthy change is an increased focus on the role of vulnerable groups in the ombudsman institution's activities. Apart from the current advisory body for monitoring the rights of people with disabilities, there are three new situations in which vulnerable groups play a specific role, in particular, the election of Ombudsmen and their performance as NHRIs.

During the election process, candidates are evaluated by a committee composed of representatives from the expert and academic sphere, national minorities, civil society and other social groups (and children in the case of the Public Defender of Children's Rights), taking into account the fair representation of men and women. As an NHRI, the Public Defender of Rights appoints an advisory body comprised of representatives from the expert, academic and spiritual spheres, national minorities, civil society, and other social groups, taking into account that the resulting composition of the advisory body reflects the social, ethnic, cultural, and regional diversity of the population of the Czech Republic, including the fair representation of men and women. The Public Defender of Children's Rights' role as an NHRI has the same duty to appoint an advisory body – in their case, composed of children from 12 to 18 years old.[33]

The increased role of evaluating committee and advisory bodies corresponds with the demands of the Paris Principles that the selection of the person holding the office should be a transparent process that ensures their expertise and that NHRIs are based on plurality.[34]

2 New challenges

The described changes to the ombudsman institution are also associated with some challenges. Instead of one main task, the institution now carries out many separate tasks with different goals, often performed by different means. Its main task and goal is not just protection against maladministration and the activities of official authorities, but supporting the general welfare of people, focusing especially on vulnerable groups.[35] As I have

v ČR' [*The Establishment of a Public Defender of Children's Rights in the Czech Republic*] in Viera Jakušová, Šimon Bleho, Veronika Ťažká (eds), *Bratislavské právnické fórum 2023. Garancia uplatňovania princípov právneho štátu vo verejnej správe* [*Bratislava Legal Forum 2023. Guaranteeing the application of the principles of the rule of law in public administration*] (Právnická fakulta Univerzity Komenského v Bratislave 2023, Bratislava, 178–189) 184–186; Chamráthová Richterová, 'Rozvrat' 281 and 283; and Sládeček 545–546.

33 For further details, see Chamráthová Richterová, 'Zřízení ochránce práv dětí v ČR' 184–186.

34 The Paris Principles, GA Res 134, 48th sess, UN doc A/RES/48/134 (20 December 1993).

35 Cf. Olga Rosenkranzová, 'Chvála neurčitosti orgánu ochránce, kompetencí agend a principů dobré správy jakož dobrých emocí a ostudná absence ústavního zakotvení ochránce' *[Praise for the uncertainty of the ombudsman's authority, the competences of the agendas and the principles of good governance as good emotions, and the shameful absence of constitutional anchoring of the ombudsman*] in Kateřina Frumarová, Petra Melotíková (eds), *Pocta Vladimíru Sládečkovi* [*In Honour of Vladimír Sládeček*] (Leges 2024, Prague, 373–386) 373–374.

demonstrated above, its roles and goals within different competences may be perceived as colliding, and the question arises whether the institution can fulfil all its tasks and roles fully and simultaneously.[36] P. Doubek even argues that several of the institution's competences may not be fully compatible with the role of an NHRI and may even complicate it.[37]

I see three possible solutions. The first one depends on the activity of the ombudsman institution. This means that the institution finds a way to undertake its activities within the current legislative framework in a complex manner, thus creating a truly complex body concerned with the general welfare of individuals. This may seem improbable because, as I already stated, the competences of the office are carried out using different means and have different goals. However, they are based on a similar approach and were entrusted to the Ombudsman on the grounds that they do resemble activities already undertaken, are often entrusted to Ombudsmen in other countries, and do not contradict the nature of the institution.[38]

I disagree with the latter claim, however, because even though the competences may not contradict the nature of the institution individually, we see that together, they have changed its nature. Nevertheless, I agree that they are based on a similar approach, and it is noteworthy that all of them contain at least an element of the protection of fundamental rights, even the primary and original one concerned with protection against maladministration. We may also argue that the new competences added over the years did not introduce anything completely new; they simply emphasised aspects of the existing protection of fundamental rights. The embodiment of an NHRI into the ombudsman institution, from this perspective, thus does not mean a fundamental change in its concept but an acknowledgement that this role has become an integral part of it.[39]

This idea is supported by the Public Defender of Rights themselves, who often emphasise that 'they have already been doing this'.[40] The same then may be applied to the Public Defender of Children's Rights' activity.[41] G. Kucsko-Stadlmayer's research on ombudsmen institutions throughout Europe also supports this statement. She reveals that even though ombudsmen institutions may not be explicitly entrusted with the protection of human

---

36 Terezie Boková, 'Nelidskoprávní ombudsman? K debatě o lidskoprávním rozměru jedné instituce' [*Human rights ombudsman? A debate on the human rights dimension of one institution*] [2020] Právo21 <https://pravo21.cz/spolecnost/nelidskopravni-ombudsman-k-debate-o-lidskopravnim-rozmeru-jedne-instituce> accessed 31 October 2025. The idea was also raised by David Slováček at the conference 25 let činnosti veřejného ochránce práv [*25 Years of Existence of the Public Defender of Rights*] held on 21 May 2025 in Brno.

37 Doubek 358. He further analyses in detail the differences with a NHRI's activity and the monitoring of detention facilities.

38 Chamráthová, 'Veřejný ochránce práv' 163.

39 Doubek 357; Rosenkranzová 381 and 384; Boková.

40 Cf. Doubek 357. The issue was also discussed at length at the conference '25 let činnosti veřejného ochránce práv' [25 Years of Existence of the Public Defender of Rights] held on 21 May 2025 in Brno.

41 Soňa Pospíšilová, 'Veřejný ochránce práv jako ochránce práv dětí' [*The Public Defender of Rights as a Defender of Children's Rights*] in Kateřina Frumarová, Petra Melotíková (eds), *Pocta Vladimíru Sládečkovi* [*In Honour of Vladimír Sládeček*] (Leges 2024, Prague, 309–319) 310.

rights, this activity is encompassed within their activities due to the fact that human rights treaties are often part of the legal order or are incorporated within the concept of good administration. She states that, according to this perspective, ombudsmen institutions that are not entrusted with the protection of human rights explicitly do not differ from ones that are.[42] L. Reif makes a similar observation and explores how human rights may be applied by ombudsmen institutions.[43]

It has been confirmed even at the United Nations that the role of the ombudsman institutions is the protection of human rights as a separate and additional function, but also as an integral part of all other aspects of their work.[44]

Two other solutions rely on a change in the legislation. The first one is a constitutional change whereby the ombudsman institution is incorporated into the Constitution, thus clearly defining its primary goal. Nevertheless, in its 25 years of existence, no serious attempt has ever been made to do this, and it cannot be assumed that any change will occur in the foreseeable future. Therefore, I consider this solution improbable and purely hypothetical.

The second one is the creation of a system of multiple ombudsmen (a multi-ombudsman institution) with a clear division of competences. Such a model is used in Sweden, the origin of the Ombudsmen institution that has now spread worldwide.[45] My colleague T. Svoboda and I put forward such a solution several years ago, arguing its advantages and disadvantages in detail.[46] My original opinion was that the model is not typical of the Czech environment, where the institution is embodied in one well-known person, and was partly based on D. Rowat's argument that individual ombudsmen may not coordinate their activities completely and may reach different conclusions, which can hinder the office from forming a uniform opinion.[47] L. Majerčík expressed a similar concern.[48]

However, I have since leaned towards a multi-ombudsman institution, as I have come to believe it would address potential collisions and conflicts arising from the new competences

[42] Gabrielle Kucsko-Stadlmayer, 'Part One: The Legal Structures of Ombudsman-Institutions in Europe – Legal Comparative Analysis' in Gabrielle Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea* (Springer 2008, Wien, 1–67) 39.

[43] Linda Reif, *The Ombudsman, Good Governance and International Human Rights System* (Martinus Nijhoff Publishers 2008, Leiden/Boston) 83, 100, 103–112.

[44] The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law, GA Res 75/186, 72nd sess, UN DOC A/RES/75/186 (16 December 2020).

[45] Donald Cameron Rowat, *The ombudsman plan: the worldwide spread of an idea* (University Press of America 1985, Lanham) 147.

[46] Anna Chamráthová, Tomáš Svoboda, 'Veřejný ochránce práv jako monokratický orgán' [*The Public Defender of Rights as a Single Person Body*] (2018) 27 (4) Jurisprudence 20–32, 30–32.

[47] Rowat 147.

[48] Ľubomír Majerčík, 'Veřejný ochránce práv – kam po 15 letech dál na mezinárodní a vnitrostátní úrovni?' [*The Public Defender of Rights – where to go next after 15 years at the international and national levels?*] in Petra Zdražilová, Dagmar Krišová (eds), *15 let činnosti veřejného ochránce práv* [*15 years of activity of the Public Defender of Rights*] (Kancelář veřejného ochránce práv 2015, Brno, 50–55) 51–52, <https://www.ochrance.cz/dokument/ochrance_sbornik_iii_2015_sazba_cz__07/ochrance_sbornik_iii_2015_sazba_cz__07.pdf> accessed 31 October 2025.

of the Public Defender of Rights. It is also a highly probable development, as the new legislation creating the Public Defender of Children's Rights is a clear and intentional step in this direction.[49] Other experts have also confirmed that, under current conditions, a division of the tasks among institutions among several persons seems desirable.[50]

Nevertheless, to create a fully-fledged multi-ombudsman institution, several issues regarding the relationship among more Ombudsmen would have to be resolved. It would be necessary to determine whether the institution should consist of several independent Defenders with clear rules of cooperation or one central Defender to whom several other Defenders would be subordinate, with clear elements of subordination.[51]

The current state of the Ombudsman Act, unfortunately, severely lacks any such solution; on the contrary, it raises many questions regarding the relationship between the Public Defender of Children's Rights, the Public Defender of Rights and their Deputy.[52] Another challenge awaiting the ombudsman institution is thus to manage the cooperation among these institution representatives without conflict and unnecessary overlaps in activities.

Another concern, especially regarding the early stages of creating the multi-ombudsman institution, is the perception of the office's representatives. As I have described, a highly personal concept of this office is typical of the Czech environment; changes in this regard may create instability. Interestingly, this is not always the case everywhere in the world. For example, D. Rowat declares that the office's representative personally does not matter, and if the institution's performance is satisfactory, people trust the institution, not the representative. He even went as far as to call discussions on the personal concept of the office 'sentimental twaddle'.[53] Even though this sounds like heresy in the Czech environment, I must note that the results of the above-mentioned official surveys do seem to partially confirm his opinion, although the public continues to care about the individual holding the office.

In my opinion, the Czech situation corresponds with experiences in other countries where the ombudsman institutions have been established fairly recently. If the first representative of the institution was popular, the second one was criticised.[54] Based on this, I have come to the conclusion that it takes a longer period after the establishment of the ombudsman institution for people to gradually stop identifying it with its personal representative. In this light, we may expect that the popularity of the institution will eventually cease to depend solely on the performance of the specific representative.[55]

49 Explanatory notes to the Act no. 77/2025 Coll.

50 Doubek 374–375; and the literature cited therein, Sládeček 547–548.

51 Chamráthová Richterová, 'Rozvrat' 284.

52 Chamráthová Richterová, 'Rozvrat' 282–284; Chamráthová Richterová, 'Zřízení ochránce práv dětí v ČR' 184–186; Sládeček 546; Doubek 373.

53 Rowat 57.

54 Chamráthová, 'Veřejný ochránce práv' 24.

55 Ibid 24.

IV Conclusion

Gradual changes in the concept of the Czech ombudsman institution have occurred during its existence. From a protector against maladministration, it has evolved into an institution concerned with general welfare and the fundamental rights of individuals, regardless of the perpetrator's identity – whether public body or private person. The process was cemented by creating another Ombudsman within the institution, the Public Defender of Children's Rights, and entrusting both Defenders with the role of an NHRI.

The change signifies possible challenges for the institution, as the process, as well as personal changes within the institution, have been met with anxiety by the public. It is necessary to clarify the institution's role and goals to avoid confusion. I see two likely solutions. The first may be implemented by the institution itself, meaning it would find a way to merge all its tasks and roles into a single complex operation, while the second solution would involve changes by the legislator that lead to the creation of a multi-ombudsman institution.

The latter would create further challenges concerning cooperation within such an institution and the necessity of overcoming the wider perception of the institution among Czechs as a single person holding the office.

To end on a positive note, there is no reason to assume that the ombudsman institution will not deal with these issues as successfully as it has overcome challenges in the past.

Polonca Kovač,* Klavdija Košec**

The Constitutionality of Tax and Social Legislation: An Analysis of Recent Slovenian Empirical Data***

Abstract

The concept of the rule of law encompasses the regulation of rights and obligations, as well as their enforcement as *materia legis*. This is particularly relevant in administrative relations, where public and private legal interests often come into conflict. Laws create legal norms, which are constitutionally consistent only if they do not infringe upon human rights and fundamental freedoms. In the Republic of Slovenia, the Constitutional Court, acting as a negative legislator, is responsible for assessing the constitutionality of laws, particularly in the administrative field, most often through a combination of constitutional review and constitutional complaints in administrative cases. This study analyses cases of constitutional complaints arising from original administrative procedures over a ten-year period, from 2014 to 2024, in Slovenian constitutional case law. The research addresses especially the tax and social field, as constitutional unconformity is established most frequently in these areas. Special emphasis is dedicated to procedural safeguards that tackle constitutional rights, such as the right to be heard and the right to appeal. The main findings endorse the role of the Constitutional Court as a negative legislator, being crucial in limiting the tendency of the Executive to conduct administrative proceedings efficiently at the expense of constitutional guarantees. The findings aim to provide lessons not only for Slovenian

* Polonca Kovač (PhD) is a Professor at University of Ljubljana, Faculty of Public Administration, Ljubljana, Slovenia, ORCID iD: 0000-0002-7743-0514 (e-mail: polonca.kovac@fu.uni-lj.si).

** Klavdija Košec (MSc) is a Researcher at Institute of Public-Private Partnership, Ljubljana, Slovenia (e-mail: kosecklavdija0@gmail.com).

*** This contribution is based on the analysis presented at the ICON-S Central and Eastern European Chapter conference held at ELTE, Faculty of Law, Budapest, 29–30 May 2025, titled 'Individual Autonomy, Fundamental Rights, and Institutional Safeguards'. This article is a result of the basic research programme 'Development of an Efficient and Effective Public Administration System' (P5-0093). The authors acknowledge the financial support of the Slovenian Research and Innovation Agency.

regulators but also for those in other countries and comparative analyses across the region.

Keywords: rule of law, constitutionality of tax and social legislation, administrative procedures, constitutional guarantees, Slovenian Constitutional Court

I Introduction

In Europe and beyond, social relations are necessarily shaped and structured by legal frameworks. This is particularly true of administrative relations, which imply authorities' intervention in the private sphere – or legal rules enabling such intervention – at various levels of public governance, defining relations and resolving societal challenges. Central to this are the relations between the state and other social subsystems, such as the economy and civil society.

Since its foundation in 1991, the Republic of Slovenia has evolved into an increasingly regulatory state,[1] a trend that has continued since its accession to the European Union (EU) in 2004. In 1991, laws accounted for 41 per cent of all regulations, while in 2024 they accounted for only around 4 per cent, which means approximately 770 laws compared to some 22,000 implementing regulations. Nevertheless, laws continue to play a critical role: they protect the rights of individuals under the principle of the rule of law,[2] enable the effectiveness and efficiency of the policies they regulate and foster the progress of society. This is achieved through elements such as the alignment of policies with the actual needs of society, stakeholder involvement in the law-making process, policy coherence, a justified balance between benefits and burdens, and maintaining equilibrium between legal flexibility and predictability.

Administrative matters are especially important because rights and obligations *vis-à-vis* public authorities are regulated through a vast and heterogeneous body of administrative procedures – spanning areas such as tax assessment, social assistance, construction, the environment, agriculture, and internal affairs. In Slovenia, a country with a population of just two million, up to ten million administrative procedures are conducted annually at the first instance[3] alone. Administrative procedures thus represent a core mechanism of public governance and play a crucial role in upholding and implementing the protection

1 Ulrich Karpen, Helen Xanthaki (eds), *Legislation in Europe: A Country by Country Guide* (Hart 2020, Oxford, Portland, Oregon) 437.

2 Christopher May, Adam Winchester, *Handbook on the Rule of Law* (Edward Elgar 2018, Cheltenham, Northampton).

3 Polonca Kovač, Tone Jerovšek, *Upravni postopek in upravni spor* [*Administrative Procedure and Administrative Dispute*] (Faculty of Public Administration 2023, Ljubljana).

of fundamental human rights, constitutional guarantees, and international standards.[4] Where these are not upheld, the legal system must provide adequate judicial review to prevent – through the system of checks and balances – the excessive power of the executive and legislative branches, both in rule-making and enforcement.[5] This oversight is provided through a structured system of judicial protection in individual administrative cases.

Although in continental legal systems – including in Slovenia – the classical regulators are the legislative and executive branches, the context described above also includes the involvement of the Judiciary.[6] If the Executive and Parliament are the 'positive legislators', directly and indirectly generating general legal norms with the force of law, the courts also play a regulatory role by interpreting such. In particular, the Constitutional Court, with its power to abrogate a law, declare it unconstitutional, or provisionally regulate a situation by itself, functions both as a negative and a positive legislator simultaneously.[7] This leads to the research question about the Constitutional Court's impact on better regulations, particularly regarding the system of checks and balances among state authorities and the enhanced protection of constitutional guarantees in administrative matters. Expectedly, the tax and social fields are thus those most subject to the tendency of the Executive to pursue administrative efficiency, sometimes also at the expense of constitutional guarantees, such as rights to be heard and to appeal.

In this context, the paper analyses the legal and empirical aspects of the work of the Constitutional Court over the period 2014–2024, seeking to demonstrate its impact on better regulations in the administrative field. The analysis focuses on procedural rules that safeguard constitutional guarantees or the rights of good administration. This is especially pertinent to the area of taxes and social rights, which appear in Slovenian case law to be the most problematic across all administrative domains. Thus, the article creates new insights about the importance of checks-and-balances principles intended to ensure the rule of law in administrative matters, particularly through procedural guarantees.

The paper is structured as follows: the second section presents the theoretical and general societal framework of the legal regulation of administrative relations, while the third section sets out the results of the analysis of Constitutional Court case law over the past ten years, employing both statistical analysis and selected case highlights. This is followed by a discussion and final conclusions.

4 Diana-Urania Galetta, Jacques Ziller, *EU Administrative Law* (Edward Elgar 2024, Cheltenham, Northampton) 205.

5 Albin Igličar, *Zakonodajna politika* [*Legislative Policy*] (GV Publishing House 2021, Ljubljana).

6 Jacob J. Meagher, 'Common Law Courts: The Judiciary as a Regulatory Mechanism' (2017) 12 (1) Journal of Comparative Law 108–147.

7 Sebastian Nerad, 'Ustavno sodišče kot (pozitivni) normodajalec' ['Constitutional Court as a (Positive) Rules Maker'] in Ciril Ribičič (ed), *Izzivi ustavnega prava v 21. stoletju* [*Challenges of Constitutional Law in 21. Century*] (Faculty of Law 2017, Ljubljana).

II Conceptualisation of the legal regulation of administrative relations

1 Legal regulation of administrative relations and the separation of powers

The rule of law is a foundational concept of modern democratic states, built on the principles of human rights, social justice, and economic freedom. It is grounded in non-arbitrary decision-making by public authorities, respect for the principle of legal equality, and the provision of legal certainty.[8] For example, within political theory, the rule of law primarily concerns the separation and balance among the various branches of state power.[9]

Regulation, like any form of public intervention in society or the market, encompasses a variety of mechanisms designed to steer the relations within a system towards specific goals and according to defined procedures; in the public sphere, this occurs primarily through the law.[10] Legislation is the principal form of regulation in administrative relations, whereby competent rule-makers at various levels of public administration regulate interactions among community stakeholders through legally binding measures.

Certain substantive matters are reserved to specific types of regulations as general legal acts; thus, for example, individual rights and obligations are determined by laws and constitute *materia legis*.[11] Laws are thus intended to regulate existentially important and potentially conflicting relations, where human behaviour can be controlled and, consequently, the rights and obligations of legal entities must be precisely defined.[12] As stipulated in Article 15 of the Slovenian Constitution, the manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom. Moreover, hierarchically lower regulations must conform to higher ones: for instance, decrees or rules must comply with the law, and laws must comply with the national constitution and applicable EU regulations. These elements are also subject to constitutional review, even though the regulation of legal relations typically begins in the administrative sphere. This holds especially true with administrative matters, where ensuring a proper balance between the Executive and the Judiciary within a system of checks and balances is essential.

8 More in Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1885, London); Jeremy Waldron, 'The Rule of Law' in Edvard N. Zalta, Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University 2023, Stanford CA).

9 May, Winchester.

10 Claudio M. Radaelli, Fabrizio De Francesco, *Regulatory Quality in Europe* (Manchester University Press 2007, Manchester).

11 Karpen, Xanthaki. Cf. Matej Avbelj (ed), *Komentar Ustave Republike Slovenije* [*Commentary of the Constitution of the RS*] (New University, European Faculty of Law 2019, Ljubljana).

12 More in Igličar.

In democratic republics such as Slovenia, laws are enacted by Parliament, which represents the legislative branch of power.[13] Hence, although law-making is fundamentally a legal activity, it is carried out by Parliament, which is composed not of legal experts but of elected deputies who pursue specific political interests.[14] It is therefore crucial that power be divided among the three branches: the legislative, the executive, and the judiciary. While these branches are separate, they operate according to a system of mutual checks and balances, with each branch influencing and constraining the others. The legislative branch adopts substantive and procedural laws, which are then applied in administrative procedures. These are implemented by administrative authorities, which belong to the executive branch. The Executive collects feedback from practice and proposes amendments or improvements to the law. The third branch, the Judiciary, plays a particularly important role through the work of the Constitutional Court. This court makes a decisive contribution to the implementation and maintenance of the rule of law, acting as a corrective complement to the legislative procedure – for example, by addressing and rectifying constitutional errors arising from adopted laws.

Therefore, upholding the rule of law goes beyond the mere democratic process of law-making and centres instead on the content of the law, which must adhere to recognised legal values and principles. When a law is adopted that may potentially conflict with other laws or even the Constitution, it not only jeopardises the rights of individuals and organisations but also undermines the effectiveness and efficiency of the policies it regulates and the progress of society as a whole. To safeguard societal progress, the very process of adopting regulations is crucial. At the same time, mechanisms and institutions must be in place to ensure that the implementation of policies, procedures, and objectives is properly monitored, thereby promoting the quality of regulations.[15] Inevitably, anomalies arise within the legal order that must be detected and corrected, and laws must be amended or supplemented to genuinely serve society and its legal system. However, such changes should not be rapid or overly frequent, as they may compromise the stability of the law and the legal system and erode legal predictability and certainty. Laws should be stable and predictable; otherwise, they risk hindering individuals and organisations in the exercise of their rights and obligations.[16]

---

13 Franc Grad, Igor Kaučič, Saša Zagorc, *Ustavno pravo* [*Constitutional Law*] (Faculty of Law 2018, Ljubljana).

14 Igličar.

15 OECD, *Regulatory Policy in Slovenia: Oversight Matters, OECD Reviews of Regulatory Reform* (OECD Publishing 2018, Paris).

16 See Stefanie A. Lindquist, Frank C. Cross, ‘Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm’ in Charles Gardner Geyh, *What’s Law Got to Do With It?* (Stanford University Press 2020, Stanford CA) 173–192.

2 Legal regulation of the protection of rights in administrative matters in Slovenia

Rights, obligations, and legal benefits can be acquired by or imposed on individuals and organisations through administrative procedures. On the one hand, individuals and organisations enter administrative procedures through the operation of the law; on the other hand, their rights, obligations, and legal benefits are determined by designated (administrative) authorities. This creates an administrative relation, which differs from other legal relations in that the rights, obligations, and legal benefits of individuals and organisations are decided unilaterally and authoritatively by public (administrative) authorities to protect the public interest.[17]

Given the significant impact of authorities on the legal status of the parties involved, the administrative procedure is highly formalised and complex. Despite being regulated differently across countries, a common feature of administrative law is that it aims to protect the public interest while establishing regulatory procedural principles and rules.[18] Most European countries, including Slovenia, have an umbrella or general law on administrative procedure that applies subsidiarily to sector-specific laws. Within the EU, a comparable framework applies across Member States thanks to the adoption of the Law of Administrative Procedure in 2023, covering all countries except Belgium and Ireland.[19] In Slovenia, this purpose is served by the General Administrative Procedure Act (GAPA) adopted in 1999.[20]

The GAPA, particularly through its fundamental principles, contains a set of procedural guarantees and standards already enshrined in the Slovenian Constitution or the EU Charter of Fundamental Rights[21] – for example, the right to be heard (Articles 9, 82, 146 and related), the language of procedure (Article 62 and related), the duty to state the reasons for a decision (Article 214), the right to legal remedies (Article 237 and related). Thus, for example, the right to appeal or its non-suspensive effect – as set out in the GAPA in light of

[17] Council of Europe, *The administration and you: Principles of administrative law concerning the relations between administrative authorities and private persons* (Council of Europe Publishing 1996, Germany). Cf. Jean Bernard Auby (ed), *Codification of Administrative Procedure* (Bruylant 2013, Brussels).

[18] Benedict Kingsbury, ´The Concept of Law' (2009) 20 (1) The European Journal of International Law 23–57.

[19] Giacinto Della Cananea, Leonardo Parona. 'Administrative procedure acts in Europe: An emerging "common core"?' (2024) 16 (20) The American Journal of Comparative Law 1–56.

[20] Official Gazette of RS, No. 80/99. The GAPA has been amended multiple times. On these amendments and their critical consideration, see Polonca Kovač, 'Changing the general administrative procedure codification in Slovenia: between Austrian tradition, EU convergence and future social challenges' in Paolo Duret, Giovanna Ligugnana (eds), *New Challenges for Administrative Procedure in Europe: A comparative Perspective* (Edizioni Scientifiche Italiane 2021, Napoli) 175–208.

[21] Diana-Urania Galetta et al., *The General Principles of EU Administrative Procedural Law* (European Parliament 2015, Brussels).

Article 25 of the Constitution on the right to an effective remedy – may be limited only by a special act and only in exceptional cases, if so permitted by law.

In addition to its instrumental role in achieving the objectives of substantive law in administrative procedures, the GAPA also serves as a guarantee of constitutional rights, allowing for flexible special regulation where appropriate. Thus, constitutional provisions on the rule of law, legal protection, dignity, and related rights are undeniably implemented through the application of the GAPA and relevant sector-specific legislation. Administrative procedural law, therefore, also encompasses special procedural provisions found in sector-specific (primarily substantive) laws. Systemic laws typically do not allow for deviations, particularly from the GAPA's fundamental principles. However, where the particularities of a field require specific regulation – such as in cases concerning taxes or social security – a special law may supersede, modify, or complement the provisions of the GAPA, based on reasonable grounds.[22] Moreover, in specialised areas, the procedure can only be regulated by law, not by subordinate regulations, and any deviations can only address specific procedural issues, not the entire framework of a procedural institution.[23]

22 See, for example, Constitutional Court Decision U-I-6/13, Up-24/13 of 11. 2. 2016.

23 See Kovač, Jerovšek; Avbelj.

Table 1: Protection of core administrative procedural guarantees by legal source

International guarantees and sources	*Guarantees under the Slovenian Constitution*	*Protection under the Slovenian GAPA*	*Protection under special laws*
Art. 2 of the Treaty on European Union: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, etc.	Rule of law – Art. 2: Slovenia is a state governed by the rule of law and a social state.	Basic principles (Art. 6–14): legality, protection of the rights of parties and public benefits, right to be heard, right to appeal, etc. Procedural grounds of appeal – Art. 237, violations concerning, eg, the right to be heard.	For example, the Tax Procedure Act regulates certain GAPA principles slightly differently, such as making tax assessment contingent not only on regulations but also on advance agreements or guarantee deeds.
Art. 1 of the Universal Declaration of Human Rights: All human beings are born free and equal in dignity and rights.	Protection of human personality and dignity – Art. 21; Equal protection of rights – Art. 22: Everyone shall be guaranteed equal protection of rights in any proceeding.	Principle of hearing the party – Art. 9: Before a decision is issued, the party shall be given the possibility to be heard on all facts and circumstances relevant to the decision, except in summary procedure (Art. 144).	Sector-specific laws often provide for summary administrative procedures that exempt the authority from the obligation to give a party the right to be heard (eg in cases concerning taxes or social security).[24]
Art. 8 of the EU Charter on Fundamental Rights – Protection of personal data.	According to Art. 38 on the protection of personal data, the processing of personal data is provided by law.	Access to file and participation in procedure is allowed only to persons with legal interest (Art. 34, 82, 142 and related).	According to the Constitution, a special law must determine which data can be processed and for what purpose.

[24] In this context, case law suggests that although sector-specific laws may not explicitly include the provisions and guarantees derived from Articles 138–146 of the GAPA, the GAPA nevertheless applies subsidiarily by virtue of the fundamental principles set out in Articles 8 and 9. For example, in its judgment X Ips 17/2023 of 30 November 2023, the Supreme Court of the Republic of Slovenia held that, under a constitutionally consistent interpretation, *lex specialis* – which provides that the competent authority shall decide in a summary procedure without hearing the parties – only regulates the extended procedural possibility for the authority to decide in a summary fact-finding procedure and does not prohibit the authority from conducting a special fact-finding procedure and hearing the parties. Accordingly, even in such cases, the authority is obliged to carry out a special fact-finding procedure under the GAPA and to hear the parties on the established facts if, within the context of summary fact-finding, omitting the hearing would result in an impermissible interference with the constitutionally guaranteed right under Article 22 of the Constitution.

International guarantees and sources	*Guarantees under the Slovenian Constitution*	*Protection under the Slovenian GAPA*	*Protection under special laws*
Art. 41 and 47 of the EU Charter on Fundamental Rights on the rights to good administration (eg, the right to be heard, to have access to one's file, to be given reasons for decisions) and the right to an effective remedy and to a fair trial.	Right to judicial protection and constitutional review – Art. 23, 156 and 157; Right to legal remedies – Art. 25; Art. 158: final decisions may be challenged only through legally provided extraordinary remedies.	Right to appeal – Art. 13, 229, etc.: A party has the right to appeal against a first-instance decision, normally with suspensive effect, within 15 days of being served the decision. Only a law may provide that no appeal is permitted in certain individual administrative cases. The GAPA also provides five extraordinary remedies, Art. 260–279.	In tax and inspection cases, appeals are non-suspensive; appeal periods may be shorter or longer (30 days under the Tax Procedure Act). Special laws may also regulate as special remedy or adjust the grounds for its application: eg, the Tax Procedure Act (Art. 88–90).

Source: author's construction based on the cited literature.

In this context, it is crucial that the administrative procedure also provides for adequate remedies. This offers an additional safeguard, ensuring that lawful and sound decisions are reached during administrative procedures.

In Slovenia, a party has the right to appeal against a decision issued at the first instance (Art. 229 of the GAPA). An appeal may be lodged if, in issuing the decision, a substantive regulation has been incorrectly applied or not applied at all; if the facts of the case have been incompletely or incorrectly established; or if violations of procedural provisions have occurred (Art. 237 of the GAPA). Extraordinary legal remedies may also be sought against final and administratively final decisions in cases of serious violations. Judicial review of administrative actions in Slovenia is conducted through administrative disputes under the Administrative Dispute Act,[25] followed by constitutional complaints under the Constitutional Court Act.[26] Judicial review in administrative matters thus aligns with the protection of international legal guarantees, the EU Charter of Fundamental Rights, and the Slovenian Constitution.[27]

An individual administrative act that has become final may also be challenged through a constitutional complaint to the Constitutional Court, provided the party has previously exhausted all available legal remedies. A constitutional complaint may be lodged when

[25] Official Gazette of RS, No. 105/06 et seq., adopted based on Art. 157 of the Constitution.

[26] Official Gazette of RS, No. 15/94 et seq., adopted based on Art. 153–156 of the Constitution.

[27] Kovač.

a party believes that their human rights or fundamental freedoms have been violated by a specific administrative act issued by a state body, a bearer of public authority, or a local community authority (Art. 50 of the Constitutional Court Act). Although violations of human rights or fundamental freedoms could have occurred through administrative decisions or lower court rulings, the Constitutional Court assesses whether these violations have been remedied.[28] If the Court establishes a serious violation of human rights or fundamental freedoms in an individual act based on a regulation or a general act issued to exercise public authority, it may initiate the proceedings to assess the constitutionality or legality of such general act or regulation (Art. 59 of the Constitutional Court Act).

In the process of reviewing constitutionality, the Constitutional Court may abrogate, in part or in whole, a law that has been found unconstitutional. In this case, the abrogated provisions may no longer be applied after the expiration of the specified time limit, which creates a legal gap that must be filled. The parliament must thus adopt a new law or amend the original law to provide an alternative regulatory solution for the social issue at hand, ensuring respect for constitutional guarantees.[29]

III Analysis of Slovenian Constitutional Court case law

1 Methodological Outline

Given the theoretical and normative framework outlined above, the case law of the Slovenian Constitutional Court over the past decade was examined to address the research problem identified in the introduction – namely, the impact of the Court on the improvement of laws on procedural safeguards in administrative cases. The research employed a combination of normative, doctrinal, historical, statistical, case study, and axiological-deontological evaluation methods. Based on a preliminary analysis of cases drawn from the Court's annual reports and data available on its official website,[30] it became evident that the greatest concentration of cases concerning the determination of rights and obligations in administrative relations is found in taxes and social security. Accordingly, these two areas were selected for focused examination. Two central research questions were formulated:

[28] Sebastian Nerad, 'Nepristojnost za presojo medsebojne skladnosti predpisov enakega ranga' [*'Lack of competence to assess the mutual consistency of regulations of equal rank'*] in Komentar Ustave RS (2011), <https://e-kurs.si/komentar/nepristojnost-za-presojo-medsebojne-skladnosti-predpisov-enakega-ranga/> accessed 31 October 2025; cf. Avbelj.

[29] See more in Grad et al.; Nerad.

[30] See 'Republika Slovenija, Ustavno sodišče' <https://www.us-rs.si/sl> accessed 31 October 2025.

1. How does the identification of violations by the Constitutional Court influence the amendment of laws concerning taxes and social security?
2. According to the recent Constitutional Court case law, which constitutional guarantees are most frequently violated in special laws concerning taxes and social security?

First, a comprehensive review of the changes affecting all laws governing administration in Slovenia during the period 2014–2024 was conducted. This initial step allowed us to identify which laws underwent the most frequent amendments over the past decade and to further examine whether, and to what extent, the Constitutional Court influenced these changes, as well as what the underlying reasons for such were.

The period of the last decade was chosen for the exploration of the most recent empirical data in the field, but this still represents a rather long period regarding the goal of achieving the most legitimate results possible. Namely, the Constitutional Court of the Republic of Slovenia has acted in the manner described since 1991, when Slovenia gained its independence, but its activities in the first decades were more dedicated to the new societal system and harmonisation with EU law. On the other hand, examination of the recent period allows for an analysis of various dimensions in a more stable environment and subject not only to the national constitution but also to EU legal requirements. The analysis of the laws concerning social security and taxes amended in 2014–2024 was carried out using the Legislative Supervisor[31] – a specialised tool that, inter alia, provides data on the dynamics and frequency of legislative changes in Slovenia on a monthly basis. Also, the official website of the National Assembly of the Republic of Slovenia was consulted,[32] which offers public access to records of all amendments to national legislation. The analysis involved identifying all legislative acts titled 'Act Amending the Act on …', 'Act Amending and Supplementing the Act on …', or 'Act Supplementing the Act on …'. When doing so, the official publication date of each amendment was considered, as – in accordance with established legal theory – a law acquires legal force upon its publication in the Official Gazette.

Then, the advanced search engine for case law available on the official website of the Constitutional Court[33] was used to identify relevant decisions issued between 1 January 2014 and 31 December 2024. Given the broad scope of administrative law, only constitutional complaints were taken into account. This focus enabled the examination of cases arising directly from administrative procedures, where all ordinary legal remedies had been exhausted, but where the complainant claimed a violation of human rights protected under the Constitution or relevant international treaties. The survey included cases in which individuals or organisations alleged that the violation stemmed from sector-specific laws governing rights, obligations, or legal benefits. Additionally, a shorter analysis of cases

[31] See portal Tax-Fin-Lex, <https://www.tax-fin-lex.si/Supervizor/Arhiv> accessed 31 October 2025.

[32] National Assembly, Republic of Slovenia, <https://www.dz-rs.si/> accessed 31 October 2025.

[33] Searching by Constitutional Court case law may be undertaken at <https://www.us-rs.si/sl/zadeve-in-odlocitve/odlocitve> accessed 31 October 2025.

involving requests for constitutional review submitted alongside a constitutional complaint was conducted. In such cases, a lower court identifies a potential inconsistency between a legal provision and the Constitution, suspends its decision-making process, and submits a request for constitutional review to the Constitutional Court. This provides important control data to validate the previously obtained results.

To gain deeper insight into the specific legal provisions that were contested in terms of individual procedural rights, a case study approach was employed as well. Through the detailed analysis of selected Constitutional Court decisions, it was examined how particular constitutional guarantees or party rights were addressed during constitutional review.

2 Results of the Analysis of Amendments to Administrative Laws, 2014–2024

Taking into account the dimensions and criteria outlined above, the analysis shows that over the past decades, laws pertaining to the administrative field were amended 182 times. This figure does not include certain laws – isolated cases concerning organisation rather than constitutional guarantees or procedural rights – which were excluded because of their limited representativeness. When these excluded laws are taken into account, the total number of amendments across all administrative areas exceeds 200, averaging roughly 20 amendments per year (see Chart 1). An overview reveals that the most frequently amended laws concerned social security, taxes, and customs. Over the examined period, social security laws were amended 44 times, while taxes and customs laws were amended 34 times. The highest number of amendments to social security laws occurred in 2015 and 2017, and in taxes in 2019.

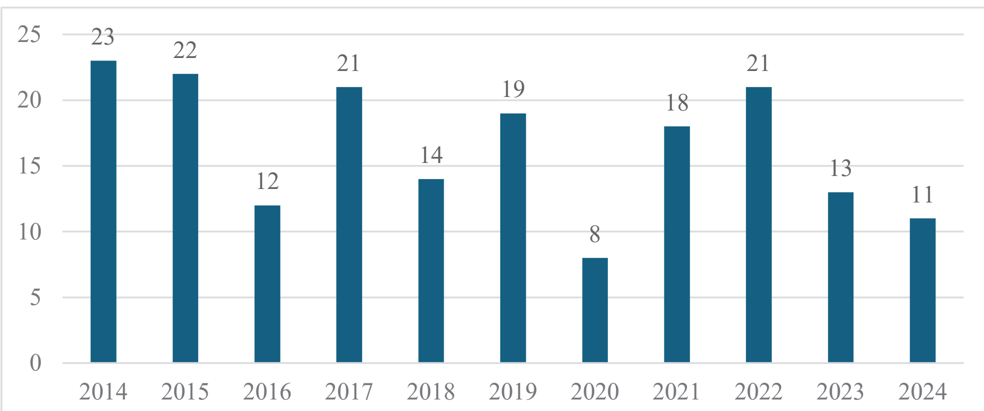

Chart 1: Amendments to administrative laws per year (2014–2024)
Source: author's construction

The most frequently amended law in the administrative areas under consideration is the Pension and Disability Insurance Act,[34] which was amended 13 times during the review period, with the peak in 2017 when it was amended three times in a single year. The Parental Protection and Family Benefits Act[35] and the Health Care and Health Insurance Act[36] were each amended six times. Taxation is also represented prominently. The following laws were adopted in 2006[37] and amended repeatedly over the period 2014–2024: the Personal Income Tax Act (amended ten times), the Corporate Income Tax Act (nine times), and the Value Added Tax Act and the Tax Procedure Act (seven times each).

These are not just random cases. The above laws concern key public budget inflows and outflows, reflecting significant macroeconomic issues at the national, EU, and even global competitiveness levels. However, a detailed examination of all amendments to the Pension and Disability Insurance Act and the Tax Procedure Act, the two most frequently amended administrative laws, shows that the reasons behind these changes vary. The Pension and Disability Insurance Act was amended multiple times to align minimum and guaranteed pensions with evolving EU-level economic conditions, to remove unconstitutional provisions, to improve the status of insured persons, and to transpose EU directives into Slovenian law. On the other hand, the Tax Procedure Act was most frequently amended to transpose EU directives, aiming to streamline tax procedures and enhance the enforcement of taxpayers' rights.

One notable example is the 2021 amendment[38] to the Pension and Disability Insurance Act, which aimed to eliminate inequality between insured persons eligible for disability benefits due to occupational diseases or injuries and those who, after 1 January 2008, were no longer eligible for disability benefits because their disability or disease had occurred outside work. Equality before the law is, in fact, a fundamental constitutional guarantee (Article 14), while Article 50 of the Constitution further ensures the right to social security. The said amendment also addressed disparities between those injured before and after 1 January 2013. Interestingly, this inequality had been the subject of a constitutional review petition, but the Constitutional Court rejected it by Decision U-I-129/17 (9 October 2017) because the petitioner had not exhausted all legal remedies. Thus, the legislator acted preventively to eliminate potential discriminatory provisions and prevent unconstitutionality. This example demonstrates that the role of the Constitutional Court as a 'negative legislator' can also have a deterrent effect.

---

34 Official Gazette of RS, No. 96/12 et seq.
35 Official Gazette of RS, No. 26/14 et seq.
36 Official Gazette of RS, No. 9/92 et seq.
37 Official Gazette of RS, No. 117/06 et seq.
38 Official Gazette of RS, No. 121/21.

3 Study of violations based on constitutional complaints 2014–2024

To identify administrative laws that were recently found inconsistent with the Constitution, a review of Constitutional Court decisions using the advanced search engine available on the Court's website regarding constitutional complaints was conducted. All cases with the following outcomes in constitutional complaints proceedings were included: rejection; establishment of a human rights violation; annulment or annulment *ab initio*; annulment with a suspensive time limit; establishment of invalidity of a regulation; establishment – not inconsistent with the Constitution/statute; establishment – inconsistent with the Constitution/statute; and other resolutions. Applying these parameters, the advanced search retrieved 101 decisions.[39] Of these, cases concerning purely organisational laws or ancillary administrative relations, such as the payment of administrative fees, were excluded. After this refinement, 84 relevant cases remained, all concerning laws amended as a result of the Constitutional Court's establishment of interference with constitutional guarantees, either primarily or including the procedural rights of the parties. Focusing on social security and taxes, a detailed case study analysis of twenty-one constitutional complaints specifically regarding these areas was conducted. The majority were taxation cases, with the highest concentration of cases concerning the Tax Procedure Act. In most constitutional complaints, complainants also submitted a parallel petition for review of the constitutionality of specific legal provisions.

The analysis revealed that the majority of cases resulted only in a review of the constitutional complaint, with relatively few accepted on the grounds of minor importance or a clear absence of constitutional rights violations. Likewise, most petitions for review of constitutionality were dismissed because they failed to raise significant legal issues or were rejected because the petitioner lacked legal standing. Ultimately, the Court established violations of constitutional guarantees in only three cases in the fields of social security and taxes/customs: two involved the Pension and Disability Insurance Act, and one involved the Tax Procedure Act, as examined in detail below.

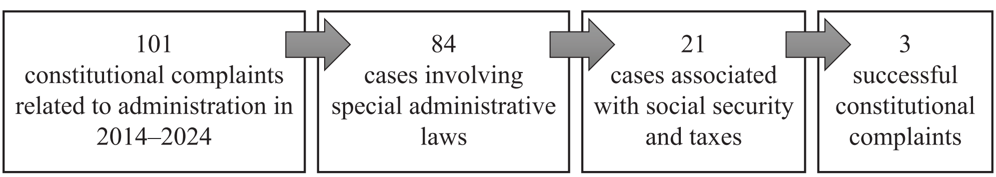

Figure 1: Overview of constitutional cases considered in the study
Source: author's construction.

[39] This total also includes multiple cases relating to the same law, eg the rights of war disabled persons; notably, 41 of the identified violations stem from the same year and revolve around the same issue, specifically the rights claimed by disabled beneficiaries who filed constitutional complaints.

An analysis of case U-I-239/14, Up-1169/12 (26 March 2015) shows that the Pension and Disability Insurance Act was found inconsistent with Article 14 of the Constitution, which guarantees equality before the law, particularly in connection with the absence of legal protection. In this case, the applicant was denied a request to have her pension reassessed by including part of her salary that had been used to purchase internal shares in 1992. The Pension and Disability Insurance Institute rejected her application, arguing that the special law did not provide for pension reassessment under such circumstances, and that the applicant's right had already been decided with finality under Article 129 of the GAPA. The central issue here was the lack of a procedural rule – specifically, the absence of an extraordinary legal remedy within the Pension and Disability Insurance Act itself. With this decision, the Constitutional Court made it clear that the absence of extraordinary remedies in a law can lead to inconsistency with the Constitution, as it undermines equal treatment for all affected individuals. This decision has broader implications, highlighting the importance of ensuring that all administrative laws – not just the pension law – adequately regulate extraordinary remedies.

A similar finding arose in Up-195/13, U-I-67/16 (26 January 2017), where the Constitutional Court again identified the Pension and Disability Insurance Act as inconsistent with the Constitution due to the absence of extraordinary remedies. During the review, the Court pointed out that the procedure for pension assessments – and thus the determination of the facts of the case underpinning pension rights under the Pension and Disability Insurance Act (version in force from 1 January 2000 to 31 December 2012) – was governed by the provisions of the GAPA. The procedure and application of extraordinary remedies were not adapted to the specific requirements of pension assessment, meaning that the Act lacked a mechanism to correct potential errors that might affect pension entitlements. The Court questioned why the legislator assumed the general administrative framework was sufficient to protect pension rights.

The final case that was analysed, U-I-106/19, Up-190/17 (10 March 2022), involved the Tax Procedure Act and its inconsistency with Article 38 of the Constitution on personal data protection. The inconsistency lay in Article 20(5) of the Act, which defined the actual owner to be 'a natural person that is indirectly or directly a holder of shares which represent more than 25% in the initial capital of the legal person'. Although the National Assembly argued that this was a proportionate measure serving a legitimate public interest, the Constitutional Court abrogated the provision, reasoning that the public disclosure of such personal data could result in the stigmatisation of individuals as tax evaders.

In addition, cases of constitutional complaints dating back to 2004 were reviewed to compare findings over the years. In this period, the Constitutional Court identified a violation in only one case concerning social security. Case U-I-214/09, Up-2988/08 of 8 July 2010 shows that Article 3(3) of the Social Security Contributions Act[40] was inconsistent

[40] Official Gazette of RS, No. 5/96, 34/96, 3/98, 81/2000 in 97/01.

with Article 14 of the Constitution. Article 3 of the Act, in fact, provided that severance payments paid upon termination of employment due to incompetence were subject to social security contributions, whereas this was not the case for severance payments paid upon termination of employment due to business reasons. The Court found a violation of Article 14 of the Constitution, as the provision in question led to the unequal treatment of workers, and no reasonable grounds were shown for the different treatments.

IV Discussion

Law – particularly its constitutional and administrative aspects – and public administration as the set of actors carrying out public tasks most frequently intersect at the national level, where administrative relations are defined by law and implemented through individual administrative procedures. It is therefore essential that laws governing administrative relations include adequate constitutional guarantees to ensure good administration, including rights such as the right to be heard, to have access to one's own file, reasoning, and legal protection.[41] Regulations play a critical role in reinforcing confidence in the legal order and thereby ensuring the protection and respect of human rights and freedoms – but only if they are of high quality, enforceable, and durable. The process by which regulations are adopted is thus crucial, and it must be complemented by mechanisms and institutions that monitor policies, procedures, and objectives to promote the quality of regulation. This includes identifying and correcting anomalies in the legal order and amending or supplementing laws in ways that serve society and its institutional system.[42]

Analyses show that over the past decade, Slovenia has seen approximately 200 amendments to laws regulating administrative relations or providing the basis for administrative procedures. Laws were most frequently amended in areas such as social security (44 amendments) and taxes and customs (34 amendments). Contrary to expectations, there were no cases in which the Constitutional Court directly intervened and triggered an amendment solely on the grounds that a law was unconstitutional in terms of constitutional guarantees, particularly procedural rights, requiring correction by the executive or legislative branches. The present analysis shows that in most cases, the Constitutional Court dismisses constitutional complaints at the preparatory stage, often because the matter is deemed minor or no apparent violation of constitutional rights is found. However, violations of constitutional guarantees primarily appear in substantive rules, relating to specific conditions and rights or obligations within each administrative domain, as revealed through the Court's practice.[43]

---

41 Galetta; Ziller.

42 Karpen, Xanthaki; Grad et al.

43 Cases worth mentioning include asylum – see Decisions U-I-309/13, Up-981/13, of 14 January 2015, U-I-189/14-13, Up-663/14, of 15 October 2015, and U-I-68/16-8, Up-213/15, of 16 June 2016.

This leads to an assumption that the level of awareness regarding the importance of constitutional rights in Slovenia is high. This can be attributed to several factors, including the country's longstanding tradition of the rule of law and administrative procedural rights,[44] as well as the established and proactive role of the Judiciary, particularly the Constitutional Court.[45] The Court's preventive function is especially evident in the law on pension and disability insurance, where legislative amendments are often motivated by presumed unconstitutionality of certain norms identified by the Court in other, analogous cases.[46]

Furthermore, the number of constitutional complaints lodged specifically in the administrative field – approximately ten per year – suggests that this avenue of judicial review is already effective *per se*, even though complainants only gain access to the Constitutional Court after first exhausting the available remedies, namely administrative appeal and administrative dispute. While the total number of constitutional complaints, particularly those challenging the constitutionality of laws underlying administrative decisions, is not insignificant, the number of successful complaints is extremely low. Over the past decade, only three cases were upheld by the Constitutional Court in the two administrative areas most commonly at issue (tax assessment and social transfers/insurance). Of the three cases, two concerned the same law on pension and disability insurance, where procedural shortcomings were identified, particularly the lack of available legal remedies, raising concerns under the principle of equality outlined in Articles 14 and 22 of the Constitution and the provisions of the GAPA.

The GAPA is a key regulation in Slovenia that establishes minimum standards of procedural safeguards, thereby operationalising the principle of good administration. It applies universally, regardless of the administrative area or type of administrative authority involved, functioning as an anti-fragmentation mechanism that gives concrete effect to Article 22 of the Constitution on the equal protection of rights.[47] In provisions where the GAPA directly establishes rights already defined by the Constitution – particularly within its fundamental principles – the principle of *lex specialis derogat legi generali* does not apply, as the Constitution always takes precedence over special laws. The Constitutional Court has consistently held that where special regulations exist, the legislature must ensure that any derogation from the GAPA is supported by a reasonable ground for deviation from the

44 In the territory of today's Slovenia, the codification of administrative procedure has been in force for over a century. What is known as the *Steskov postupnik* was introduced in 1923, followed in 1925 by the application of the Austrian GAPA. This was replaced by the Yugoslav GAPA in 1956 and the Slovenian GAPA in 1999. See Kovač 180ff.

45 Nerad; Grad et al.; Avbelj.

46 Beyond the analysis presented here, many additional examples from the legislative practice of the Republic of Slovenia can be cited – for instance, issues under the Construction Act concerning the determination of parties to procedures; the Enforcement of Criminal Sanctions Act, addressing the limits of *ex lege* determination in the summary fact-finding procedure; and the Real Estate Tax Act, raising constitutional concerns regarding the exclusion of the right to appeal.

47 More in Avbelj.

general framework. This is especially important in matters related to participation rights, privacy, and legal protection.[48]

Respective analysis further revealed that the Pension and Disability Insurance Act, as a sector-specific law, failed to adequately regulate procedural rules. The mere reference to the application of GAPA provisions was insufficient to guarantee effective social protection, especially in cases involving the unsuccessful or delayed exercise of rights to public funds through extraordinary legal remedies. Here, the Constitutional Court played a significant role in shaping the interpretation of procedural rules across the broader administrative field, emphasising that the specificities of sector-specific laws must be implemented fully, not only through the partial application of general rules. The Constitutional Court also stressed the prohibition on using personal data contrary to the purpose of their collection, which has had a substantial influence on the legislator. The Court made it clear that the legislator cannot pursue its objectives – such as reducing tax debt – if doing so infringes upon privacy and information security. This decision is relevant not only for the Tax Procedure Act but also for all other sector-specific laws where the conflict between public and private interests is particularly pronounced, as is often the case in administrative relations.

Despite the fact that very few constitutional complaints succeed – both in absolute and percentage terms – it is notable that in recent years the Constitutional Court has repeatedly recognised the inconsistency of specific administrative laws with the Constitution. All such violations critically affect constitutional guarantees – concerning the legal protection and protection of personal data – that are also provided under international law and instruments such as the EU Charter of Fundamental Rights and the doctrine of good administration reflected in the case law of the Court of Justice of the EU.[49] The review of requests for constitutional review filed by the Administrative Court and the Supreme Court further shows that the most frequently challenged and infringed laws pertain to social security and taxes.

While it cannot be established that there is a systematic trend whereby laws are consistently amended as a direct result of the Constitutional Court's decisions, it is undeniable that the Court does exert influence on legislative changes. Notably, there is no higher body that can review or amend the Constitutional Court's decisions, and the legislator is obliged to follow and implement them. However, a persistent challenge remains: the legislator often does not immediately comply with the Court's decisions, and the Court has no sanctioning power or enforcement mechanism to compel the parliament to act more swiftly. Nevertheless, the Court can define a date for the implementation of its decisions, and its decisions carry the force of law, underscoring the significant authority of the Court's decision-making. In this respect, the Constitutional Court can rightfully be described as the guardian of fundamental human rights, striking down unconstitutional legal norms

48 Galetta; Ziller.

49 Galetta.

and effectively shaping new legal standards. Its role in the system of checks and balances among the branches of power is crucial. As a negative legislator, it corrects constitutional deficiencies arising from the adoption of laws.[50]

In sum, replies to the initial research questions can be provided. Regarding the impact of the Constitutional Court's identification of constitutional violations on amendments to administrative law – particularly in the areas of social security and taxes – the survey results indicate that this impact is crucial for the rule of law, regardless of the rather rare breaches established in the given period. Nevertheless, a higher number of constitutional complaints, even in cases where proceedings are not initiated on the merits or end with the Court's rejection (ie, unconstitutionality is not established), influences the adaptation of the legal framework in line with the Court's decisions. This analysis of selected cases involving constitutional review – including constitutional complaints and petitions and requests for constitutional review – shows that violations of constitutional guarantees in administrative laws do indeed occur. Although successful constitutional complaints remain rare, occurring only approximately once every three years over the past decade, these cases consistently highlight recurring guarantees at risk, in particular, the equal protection of rights, the right to be heard, personal data protection, and the use of legal remedies. These findings address the second research question, identifying which constitutional guarantees – according to the Court's case law – are most frequently violated in special laws.

The study of the situation in Slovenia reveals the existence of a feedback loop between the adoption of legislation, its enforcement, and the subsequent need to improve or adjust the originally adopted laws. Similar studies conducted in comparable countries – such as Croatia or Hungary – would also be highly valuable, as they could help identify good practices, problematic patterns, and lessons learned within a region that is closely connected in terms of legal tradition, historical development, and EU membership. Such comparative insights would provide a stronger foundation for making better-informed decisions, both at the legislative level and within public administration, particularly regarding the implementation of laws and judicial review.

In conclusion, it is difficult to pinpoint exactly what improvements could be made to the legislative process itself to reduce the need for frequent amendments or abrogation. These are required by societal changes at the EU level and beyond, while mistakes are inevitable, and a corrective mechanism should always be in place. However, the legislator could enhance the quality of law-making by improving the process of drafting laws and amendments, ensuring the higher quality of regulations and reducing the need for constant revisions.

[50] Igličar; cf. Karpen, Xanthaki.

V Conclusions

Law plays a crucial role in (administrative) legal systems belonging to the Germanic *Rechtsstaat* tradition, as is historically the case in Slovenia. Whenever public authorities exercise supremacy in intervening in the affairs of individuals (citizens, companies, etc.), even when granting rights or delivering public services, if this is done in an authoritarian manner, the legal structuring of administrative relations becomes a fundamental postulate of the rule of law, grounded in principles of equality and legal certainty or predictability.

In public administration, law – or normative rules and regulations – is often seen merely as an obstacle or as bureaucracy. However, under certain assumptions of better or smarter regulation, these norms are usually essential not only for ensuring legal certainty and coexistence within society but also for fostering administrative development. Legal aspects are relevant both at the methodological-procedural level – in the adoption, harmonisation, and re-regulation of regulations – as well as in their substantive orientation according to the field being regulated. Importantly, law should not be an end in itself; rather, it should contribute, through its certainty and its orientation towards justice, to predictable and aligned interests within a participatory democracy, thereby supporting better relations and reducing conflict in society. This dynamic explains why laws are constantly changing.

According to the study, Slovenian laws in general – and particularly in the fields of taxes and social security – have been evolving mainly due to recent societal changes. However, no systematic trend of amending laws specifically as a result of decisions of the Constitutional Court, as was initially assumed, was established. Still, it is undeniable that the Constitutional Court does influence legislative amendments. The study also shows that the Court's decisions have a significant preventive effect, by analogy to previous or related cases. On the other hand, ministries, as drafters and law-makers, often fail to comply with the decisions of the Court, or do not do so within the given time limits, and there is no instrument for the Court to exert more direct influence on parliament. This reflects the characteristics of a balanced system of separation of powers.

Clara Chapdelaine-Feliciati*

Legal Semiotics of Silence: The Best Interests of the Child in International Law**

Silence is often a most significant declaration, and a most misleading one.[1]

Abstract

The best interests of the child (BIC) principle is the centrepiece of the UN Convention on the Rights of the Child (CRC 1989): all decisions concerning children should be made according to this standard. However, the provision enshrining the BIC in the CRC is characterized by its silence concerning the actual content of this principle: what actually constitutes the best interests of the child in a given situation? Who decides what is best for the child, and according to which standards and guidelines? The meaning of the BIC has been interpreted differently across nations and according to different situations, even within the same jurisdiction, social class, and culture. This article applies legal semiotics theory to explore the meaning of silence in the formulation of the BIC as a significant sign under international law. For this purpose, it refers to Victoria Welby, the British foremother of modern semiotics, and her significs theory, as well as to renowned Hungarian-American semiotician Sebők Tamás' global semiotics theory, to uncover the many ramifications of the BIC principle for the implementation of children's autonomy rights at the domestic level.

Keywords: best interests of the child, legal semiotics, UN Convention on the Rights of the Child, Victoria Welby, Sebők Tamás, meaning, international law

* PhD (University of Oxford), Associate Professor at Xi'an Jiaotong-Liverpool University, International child rights lawyer (Law Society of Upper Canada), ORCID: 0000-0002-6654-1630.

** The research was supported by the Canada Social Sciences and Humanities Research Council-SSHRC Insight Development and Explore Grants.

1 Victoria Lady Welby, *Significs and Language: The Articulate Form of Our Expressive and Interpretative Resources* (MacMillan 1911, London) 41.

DOI: 10.54148/ELTELJ.2025.2.55

I Introduction

The UN Convention on the Rights of the Child (CRC 1989), the main treaty promoting child rights under international law, offers special safeguards to ensure that states parties shall protect the fundamental rights and freedoms of children in both the public and private spheres.[2] The Convention enshrines 'the Best Interests of the Child' principle under Article 3, which stipulates that in all decisions concerning children, the best interests of the child shall be a primary consideration. The best interests of the child constitutes a principle of interpretation of the CRC, along with the evolving capacities of the child (Article 5), whereby each provision of the Convention must be interpreted in light of these twin principles.[3] The best interests of the child is also one of the four guiding principles of the CRC, along with the principle of non-discrimination (Article 2) and the rights to life (Article 6) and participation of the child (Article 12).[4] It is also repeated in several provisions pertaining to the child's upbringing and development,[5] adoption,[6] children separated from their family,[7] and children deprived of liberty.[8] The UN Committee on the Rights of the Child emphasized the important role of the BIC in its General Comment No. 5 on measures of implementation, and mentions this principle in all its general comments – a unique feature compared to other principles and rights enshrined in the Convention. The CRC drafters chose to place this principle at the very beginning of the Convention, immediately after the definition of child (Article 1) and the principle of non-discrimination (Article 2), and before the listed child rights and fundamental freedoms, therefore underscoring its significance. Since the CRC is the most widely ratified human rights treaty worldwide, with 196 member states, this principle is recognized internationally.[9] The BIC is also mentioned by the committees monitoring the implementation of other human rights treaties, such as the ICCPR and the ICESCR, thereby going beyond the scope of the CRC.[10] This principle has been implemented

---

[2] Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (hereinafter: CRC) (entered into Force 2 September 1990).

[3] Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1998, The Hague) 45.

[4] CRC Committee, 'General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child' (27 November 2003) UN Doc CRC/GC/2003/5, para 12.

[5] CRC art 18(1).

[6] Ibid art 21.

[7] Ibid arts 9(1), 9(3) and 20(1).

[8] Ibid art 37(c).

[9] Ibid.

[10] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (hereinafter: ICCPR) (entered into Force 23 March 1976); International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (hereinafter: ICESCR) (entered into Force 3 January 1976); CESCR Committee, 'General Comment No.14: The Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/CN.12/2000/4, para 24; HR Committee, 'General Comment No.32: Right to Equality before Courts and Tribunals and to a Fair Trial' (23 August 2007) UN Doc CCPR/C/

into domestic law in many countries for decisions bearing on adoption, child protection, divorce and custody, and youth criminal justice.[11] The BIC is arguably a uniquely non-contentious principle internationally. Indeed, regardless of the many different cultural, social, economic and religious circumstances within societies globally, most individuals, institutions, and communities agree that decisions concerning children should be made in their best interests. The BIC is, however, characterized by a unique feature: its actual substance appears to be missing. The Convention does not specify *how* decisions shall be made in children's best interests: ie, what criteria and which guidelines, if any, shall be employed, and *who* should make the ultimate decision. Hence, while the BIC is practically universally approved globally, it is simultaneously devoid of clear content. This article applies legal semiotics theory to explore the meaning of silence in the formulation of the BIC as a significant sign under international law. For this purpose, it refers to Victoria Welby, the British foremother of modern semiotics, and her significs theory, as well as renowned Hungarian-American semiotician Sebők Tamás' global semiotics theory, to uncover the ramifications of the BIC principle for the implementation of children's autonomy rights at the domestic level.

II Legal semiotics as a method of investigating international law

The science of semiotics examines signs and symbols in all forms of human expression. While the application of semiotics as a theory and method of decoding signs was originally very broad, from theology and philosophy to mathematics and medicine – including the medical symptomology found in the *Corpus Hippocraticum* – in the last century, semiotics theory was mostly associated with fields such as linguistics and translation studies.[12] Yet the last decades have been characterized by a 'Renaissance' of semiotic studies, and several semioticians are presently examining the meaning of signs in new disciplines, from architecture to digital media and law.[13] Sebők Tamás, a Hungarian-American semiotician,

GC/32, para 42; HR Committee, 'General Comment No.35: Liberty and Security of the Person' (16 December 2014) UN Doc CCPR/C/GC/35, paras 18, 44, 62; HR Committee, 'General Comment No.36: Right to Life (3 September 2019) UN Doc CCPR/C/GC/36' para 60.

11 See Elaine Sutherland and Lesley-Anne Barnes (eds), *Implementing Article 3 of the UN Convention on the Rights of the Child* (Cambridge University Press 2016, Cambridge); Shabnam Ishaque, Muhammad Mustafa Khan, 'The Best Interests of the Child: A Prevailing Consideration within Islamic Principles and a Governing Principle in Child Custody Cases in Pakistan' (2015) 29 (1) International Journal of Law, Policy and the Family 78–96, DOI: https://doi.org/10.1093/lawfam/ebu015; Nadjma Yassari and others (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (Springer 2017, The Hague).

12 Giovanni Manetti, 'Ancient Semiotics' in Paul Cobley (ed), *The Routledge Companion to Semiotics* (Routledge 2010, London, 13–28).

13 See for example Jamin Pelkey (ed), *Bloomsbury Semiotics* (Bloomsbury 2023, London); Gabriele Aroni, *The Semiotics of Architecture in Videogames* (Bloomsbury 2022, London); Anne Wagner, Sarah Marusek, *Research Handbook on Legal Semiotics* (Elgar 2023, Cheltenham).

linguist and polymath, is recognized as a pioneer of this important dissemination and broadening of the semiotic sphere with his theory of global semiotics: the notion that semiotics constitutes an 'all-encompassing, comprehensive, international, limitless [...] universal' network or web, for it has transmuted from a glotto-centric (language-centric) science to encompassing other fields and semioticians on all continents.[14] He is one of the modern founders of biosemiotics, which comprises his own investigations into animal communication, coined 'zoosemiotics'.[15] Sebők Tamás, internationally known under his English name, 'Thomas Sebeok', initially worked as a linguist, and was appointed to design 'semiotic warning signs' or more specifically 'a mixture of iconic, indexical and symbolic elements' for USA military nuclear waste disposal sites, with the hope that these universal signs would last the duration of the radiation.[16] However, Sebők also conducted research in anthropology, specifically on the meaning of folksongs and poems, and even the supernatural, thereby leaving a rich corpus in the field of semiotics.[17] He explained the meaning of semiotics, and distinguished it from linguistics, noting that 'Semiotics is both a *science*, with its own corpus of findings and its theories, and a *technique* for studying anything that produces signs'.[18] As for Victoria Lady Welby, she is known as the 'foremother of modern semiotics' and although her work in semiotics was obscured for almost a century, a special issue was dedicated to the centennial anniversary of her passing (1912) in Semiotica (2013), covering her significs theory in various disciplines, from philosophy to law.[19] Welby's theory aimed to examine the significance of terms and conceptions,[20] and her Threefold Laws of Meaning to interpret the 1) sense of signs; 2) the meaning-intention, that is, the intention of the master signifiers who choose specific signs, and 3) the significance of signs and symbols, have been applied in fields such as architecture and law.[21]

---

14 Thomas Sebeok, *Global Semiotics* (Indiana University Press 2001, Bloomington) 1–7.

15 Ibid; Thomas Sebeok, *A Sign is Just a Sign* (Indiana University Press 1991, Bloomington); Paul Cobley, 'Introduction: The Pursuit of Signs' in Paul Cobley (ed), *The Routledge Companion to Semiotics and Linguistics* (Routledge 2001, London, 1–13) 6.

16 Thomas Sebeok, 'Communication Measures to Bridge Ten Millenia: Technical Report' (1984) iv.

17 Thomas Sebeok, 'Semiotics: A Survey of the State of the Art' in *Current Trends in Linguistics* (vol 12, Mouton 1974, The Hague) 213–264; Thomas Sebeok, *Signs: An Introduction to Semiotics* (2nd edn, University of Toronto Press 1999, Toronto); Donald Favareau, *Essential Readings in Biosemiotics: Anthology and Commentary* (Springer 2010, Dordrecht).

18 Sebeok, *Signs...* 5.

19 Marcel Danesi, 'Semiotica Special Issue: On and Beyond Significs: Centennial Issue for Victoria Lady Welby (1837–1912)' (2013) 196 Semiotica, Special Issue.

20 Victoria Welby, 'Meaning and Metaphor' (1893) 3 (4) The Monist 510–525; Victoria Welby, *What is Meaning? Studies in the Development of Significance* (MacMillan 1903, London); Oxford English Dictionary (1911).

21 Victoria Welby, *Significs and Language: The Articulate Form of Our Expressive and Interpretative Resources* (Foundations of Semiotics, John Benjamins 1985, Macmillan, 1911, London); Gabriele Aroni, 'Semiotic Analysis of the Corinthian Order in the Basilica of San Lorenzo in Florence 1420–1490' (2014) 4 Southern Semiotic Review <https://www.southernsemioticreview.net/semiotic-analysis-of-the-corinthian-order-in-the-basilica-of-san-lorenzo-in-florence-1420-1490-by-gabriele-aroni/> accessed 31 October 2025; Jacob de Haan, 'Rechtskundige significa en hare toepassing op de begrippen: 'aansprakelijk, verantwoordelijk,

Semiotics is especially relevant in the legal field because law encompasses legisigns and icons that shape relationships between individuals, communities, and institutions. While some may confuse legal semiotics with linguistics or legal theory, legal semioticians have recently emphasized its unique features.[22] Semiotics of law encompasses both textual semiotics, which relates to the terminology employed in legal documents, and visual legal semiotics – for instance, the many visual icons present during court hearings and international treaty body meetings; how judges, lawyers, and diplomats will behave, interact, present arguments and thereby what their impact will be on decision-making.[23] Semiotics comprises 'legisigns', defined by Kevelson as 'provisional judgments, held and acted on as if they were truths, although they are in fact the product of an ad hoc community that comes together out of a common purpose'.[24] This definition notably refers to the doctrine of precedent in the common law system, whereby court decisions influence future judgments, especially those of upper courts. Moreover, legal semiotics comprises semiotics of law and semiotics in law. Semiotics of law examines legal information exchanges via the study of sign systems, whereas semiotics in law considers law as a system of signs.[25] Most importantly, semiotics studies the legal realm as an infinite sign system. In short, legal semiotics is a different way of perceiving and interpreting the legal space. Legal semiotics offers methods for interpreting textual and visual semiotics – their sense, meaning, and significance – and, moreover, provides a common language for scholars, lawyers, diplomats, and the general public.[26]

The international legal realm epitomizes the importance of legal semiotics, and especially the significance of words as signs and symbols in the formulation of human rights in treaties. Indeed, State representatives spend decades negotiating the wording of each treaty provision. For example, the drafting of the Convention on the Rights of the

---

toerekeningsvatbaar' [Legal significance and its application to the concepts of 'liable, responsible, accountable'] translated by Susan Petrilli as 'responsible in the legal sense (liable), responsible in the sense of accountability, responsible for one's actions, said of a person' (Jacob de Haan, dissertation, University of Amsterdam 1916); Susan Petrilli, *Signifying and Understanding* (De Gruyter Mouton 2009, The Hague) 757; Clara Chapdelaine-Feliciati, *The Status of the Girl Child under International Law: A Semioethic Analysis* (Cambridge University Press 2025, Cambridge).

22 Roberta Kevelson, *The Law as a System of Signs* (Plenum Press 1988, New York); Anne Wagner, Jan M Broekman, *Prospects of Legal Semiotics* (Springer 2010, Dordrecht); Susan Tiefenbrun, *Decoding International Law* (Oxford University Press 2010, Oxford); Clara Chapdelaine-Feliciati, 'Semiotics in Law and Jurisprudence' in Jamin Pelkey (ed), *Bloomsbury Semiotics* (Bloomsbury 2023, London, 259–276); Gabriele Aroni, 'Games as Authorial Platforms? An Exploration of the Legal Status of Use-Created Content from Digital Games' (2023) 36 International Journal for the Semiotics of Law 2021–2036.

23 Jan M Broekman and Francis J Mootz III (eds), *The Semiotics of Law in Legal Education* (Springer 2011, Dordrecht); Jan M Broekman and Larry Catà Backer, *Lawyers Making Meaning: The Semiotics of Law in Legal Education II* (Springer 2013, Dordrecht); Clara Chapdelaine-Feliciati, 'Students Making Meaning: Teaching Legal Semiotics in the Context of International Law' in Frank Fleerackers (ed), *The Rearguard of Subjectivity* (Springer 2023, Cham, 63–78).

24 Roberta Kevelson, *Peirce, Science, Signs* (Peter Lang 1996, New York) 51.

25 Chapdelaine-Feliciati, *Status Girl Child Intl Law…* ch 1.

26 Ibid.

Child lasted ten years, and the twin international covenants (on civil and political rights, the ICCPR, and on economic, social and cultural rights, the ICESCR), took over twenty years to be adopted.[27] The *travaux préparatoires* of these treaties, that is, the transcription of the official discussions that occurred between state delegations during the preparation of these instruments, reveal that certain terms and concepts caused significant debate. The drafters were aware that the terminology employed would impact the scope of States parties' obligations under these treaties and carefully reviewed how provisions would be formulated.[28] Yet while research has examined the negotiations leading to the words enshrined in those treaties, limited attention has been paid to the words that are missing and the concepts and values that are made invisible. The next section shall therefore examine the role of silence in the BIC under the Convention on the Rights of the Child.

III Silence as a sign in international law

As previously noted, Sebők's theory of global semiotics emphasizes that the science of semiotics encompasses several fields, such as biosemiotics, which comprise sound, and also its opposite, silence. Sebők noted the importance of all forms of human expression, both verbal and non-verbal signs, and the presence or absence of signs in various environments, and within various species.[29] Welby also recognized the importance of silence as a semiotic sign, noting that 'silence […] often is not less significant than words themselves […] for whether positive or negative, excessive or deficient, present or absent even, our words are of moment always'.[30] Indeed, the words enshrined in a treaty are as important as those that are missing. The absence of a word or concept in a treaty could indicate, for instance, that State delegations disregarded or neglected to address a specific topic. Silence could simultaneously signify that the drafters wished not to address an issue, or at least, not in strong terms. Article 3(1) of the CRC is characterized by its silence, as it stipulates that:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child* shall be a primary consideration.[31]

---

27 CRC; ICCPR; ICESCR.

28 See for example Sharon Detrick, *The United Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Martinus Nijhoff Publishers 1992, Dordrecht).

29 Thomas Sebeok, 'Nonverbal Communication' in Paul Cobley (ed), *The Routledge Companion to Semiotics and Linguistics* (Routledge 2001, London, 14–27); Thomas Sebeok, 'Zoosemiotics' (1968) 43 American Speech 142–144.

30 Welby, *Significs and Language…* 39–40.

31 CRC, art 3 (emphasis added).

Although the BIC principle is clearly stated under paragraph one, the actual content appears to be missing. The provision, as formulated, does not specify how one should go about making a decision in the best interests of a child. It does not offer guidelines or criteria. It moreover fails to explain how much the child shall be involved in decisions concerning her or him, if at all, in this context. From a semiotic viewpoint, silence constitutes a 'signifier' or 'representamen' that the overall concept or object intended to be 'signified', in the case at hand, the BIC, shall remain ambiguous or undefined.[32] This provision moreover refers to the BIC as 'a primary' consideration rather than 'the paramount consideration' under all circumstances, allowing States parties to give precedence to other priorities, such as national security, when the latter clash with a child's best interests – a decision made by the drafters to offer more leeway for government practices.[33]

Another general principle of the Convention, enshrined under Article 12, stipulates that children should have the right to be heard:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to *express those views* freely in all matters affecting the child, *the views of the child being given due weight in accordance with the age and maturity of the child*.
> 2. For this purpose, the child shall in particular be provided with the *opportunity to be heard* in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[34]

One can observe that the child has the right to express his or her views and will have the opportunity to be heard in legal proceedings. This, however, does not equate with making actual decisions concerning several individual rights. The provision goes slightly further by specifying that the views of the child shall be given due weight in accordance with the age and maturity of the child. The Convention nevertheless does not clarify what is meant by 'due weight', nor does it provide a specific age after which the child's views will be considered more seriously. It also does not provide a definition of maturity: how and when a child is deemed mature. These two provisions, Articles 3 and 12, are especially important concerning decisions pertaining to the autonomy rights of children, from medical decisions to reproductive care, education, religious upbringing, civil and political rights and economic decisions such as controlling one's finances. Hence, the silence in both articles concerning respectively how decisions will be made in children's best interests, and to what extent children shall be involved in decision-making, constitutes an important semiotic sign.

[32] See Charles Sanders Peirce, *The Collected Papers of Charles Sanders Peirce* (Arthur Burks ed, Harvard University Press 1931–58, Cambridge); Simon Bouquet and Rudolph Engler (eds), *Ferdinand de Saussure: Writings in General Linguistics* (Oxford University Press 2006, Oxford).

[33] Detrick 131–40; OHCHR, *Legislative History of the Convention on the Rights of the Child* (vol 1, United Nations 2007, New York) 335–348.

[34] CRC art 12 (emphasis added).

The wording of Article 3 was inspired by Principle 7 of the UN Declaration on the Rights of the Child (1959), which stipulates that 'The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents', as proposed by France,[35] and Principle 7 of the same Declaration:

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, *the best interests of the child shall be the paramount consideration*.[36]

The *travaux préparatoires* of the CRC reveal that the drafters did not debate the actual substance of the BIC, for instance, how it would be assessed at the domestic level for each child or groups of children. The discussions centred on other issues, such as whether the BIC should be 'the primordial', 'paramount' or 'a primary' consideration, and where it should be located in the Convention, with the Dominican Republic proposing to place it as a final clause attached tothe overall operative part of the treaty, while the working group decided instead to place it at the beginning.[37] Some drafters nevertheless emphasized their concern regarding the silence in the formulation of Article 3. Venezuela famously noted that:

> [a]lthough her delegation was not opposed to the phrase 'best interests of the child' being included in the final text, *she however wished to draw attention to the subjectivity of the term*, especially if the Convention contained no prior stipulation that the 'best interests of the child' were his all-round – in other words, physical, mental, spiritual, moral and social – development. That would mean leaving the interpretation of the 'best interests of the child' to the judgement of the person, institution or organization applying the rule.[38]

New Zealand also stated that the BIC:

> will be open, through the general terms in which they are couched, to varied interpretations and will in fact be defined nationally in terms of the laws and the child-rearing practices which are adopted and acceptable in that nation.[39]

---

35 OHCHR 1:14.

36 United Nations, 'Declaration on the Rights of the Child' (1959) General Assembly Resolution 1386 (XIV) of 20 November 1959.

37 OHCHR 1:335.

38 Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Text of the draft Convention as adopted by the working group at second reading' (2 March 1989) UN Doc E/CN.4/1989/48, 22, para 120 (emphasis added).

39 OHCHR 1:336.

Almost 40 years after the adoption of the CRC, the silence concerning the substance of the BIC in the CRC still causes significant issues in terms of implementation globally. Several scholars hailing from distinct legal systems, such as civil law, common law, sharia, hybrid and customary law, and many from the Global South, have been very critical of the subjectivity of the BIC as applied by domestic courts and legislatures.[40] The CRC Committee adopted a general comment clarifying the content of the BIC in 2013, in which it explains that the BIC constitutes a substantive right, a fundamental interpretative legal principle and a rule of procedure, and suggests procedural safeguards such as child legal representation and ensuring that assessments are carried out by qualified professionals, to attempt to clarify its content.[41] The Committee further notes that decisions that would violate another right enshrined in the CRC would appear to contradict the BIC.[42] The decision of the Committee to adopt this general comment constitutes a semiotic sign in itself, as it could indicate that States parties had interpreted its substance differently, or perhaps even that they had chosen to interpret the BIC to fit their own agenda. Indeed, the Committee notes that:

> The flexibility of the concept of the child's best interests allows it to be responsive to the situation of individual children and to evolve knowledge about child development. However, it may also leave room for manipulation; the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant.[43]

Legal practitioners proposed to clarify the content of the BIC, and suggested checklists and clear criteria for determining how the BIC judgment is made, and by whom; for example, to examine what assumptions are made by those who make the judgment; how are the views of the child sought and do the same people who judge what is best for the child also make a judgement of the child's maturity; and how exactly are the commitments honoured.[44] It

40 Ishaque, Khan; Yassari and others; Erica Salter, 'Deciding for a Child: A Comprehensive Analysis of the Best Interest Standard' (2012) 33 (3) Theoretical Medicine and Bioethics 179–198, DOI: https://doi.org/10.1007/s11017-012-9219-z; Erin Bajackson, 'Best Interest of the Child – A Legislative Journey Still in Motion' (2013) 25 Journal of the American Academy of Matrimonial Lawyers 311–355; Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press 2009, Cambridge); Emily Keddell, 'Interpreting children's best interests: Needs, attachment and decision-making' (2017) 17 (3) Journal of Social Work 324–342, DOI: https://doi.org/10.1177/1468017316644694

41 CRC Committee, 'General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para 1.)' (29 May 2013) UN Doc CRC/C/GC/14.

42 Ibid 14.

43 Ibid para 34.

44 David Archard, Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 International Journal of Children's Rights 1–21, 20–21.

is thus notable that the Committee on the Rights of the Child has chosen to remain silent on the matter of checklists and criteria, even in its general comment dedicated to the best interests of the child, thereby extending and prolonging the silence already present in the Convention.[45] Also, while the Committee adopted a general comment to clarify the meaning of Article 12, it failed to provide a specific age at which a child's view will be given due weight.[46] Moreover, general comments of the CRC are not legally binding, and states parties are therefore not required to apply them domestically. Hence, from a legal standpoint, the CRC does not clarify how the law shall distribute the decisional power between the child, the family, and the State.

IV Conclusion

Children's individual rights, although recognized to a certain extent under the Convention, are limited under both the subjective phrasing of the BIC in Article 3 and that of Article 12 on the participation of the child which requires one to give 'due weight' to a child's views according to her or his 'age and maturity', with all these concepts – due weight, age and maturity – undefined. Silence is thus omnipresent in the BIC, the main principle of interpretation of the CRC, and the general principle of child participation in the very Convention dedicated to child rights. While several provisions of the CRC clearly offer protection to children against violations such as sexual and economic exploitation, it does not appear to empower the latter to exercise autonomy rights under the treaty. The silence enshrined in the Convention creates a semiotic space within which varied interpretations of the best interests of the child can proliferate globally. It leaves several questions unanswered. Is it best for the child to be placed with the more dedicated parent, the wealthier or the stricter parent after a divorce? Does the best interests of the child support granting children economic independence and emancipation from their parents? Is it in a child's best interests to work as an 'influencer'? Can a boy consent to or refuse medical treatment? Should a girl be allowed to run for public office? Who decides, and according to which criteria? The silence concerning the substance of the BIC under the CRC constitutes a significant semiotic sign that generates a never-ending sequence of uncertainty in the lives of children worldwide.

[45] CRC Committee, 'General Comment No 14…'.

[46] CRC Committee, 'General Comment No.12: The Right of the Child to Be Heard' (20 July 2009) UN Doc CRC/C/GC/12.

Aneta Fraser*

Crimmigration and Individual Autonomy. Reflections on the Polish 'Trial of the Five' Case**

Abstract

The analysis of 'crimmigration' and individual autonomy concepts can be conducted from beginning to end *in abstracto*, or as demonstrated in this article, primarily within the framework of a specific case study; however, with the postulate that the conclusions may apply equally to future cases arising in similar circumstances. The main research objective of this paper is to determine whether the state authorities were justified in initiating proceedings and, at the same time, in interfering with the individual autonomy of those who provided assistance to migrants at the Polish-Belarusian border in March 2022. The study's initial hypothesis, emphasised through the perspective of individual autonomy, is that acts of this nature, under the established circumstances, should neither be regarded as crimes nor prosecuted, and if charges are brought, they should be discontinued by the court.

Keywords: immigration, humanitarian aid, the Polish-Belarusian border crisis, individual autonomy, individual freedom, moral philosophy, human dignity, constitutional law, crimmigration, criminal law, enabling or facilitating illegal stay, organising illegal border crossing

* Aneta Fraser, M.A., is a PhD candidate in the discipline of legal sciences at Eötvös Loránd University (ELTE) in Budapest and Adam Mickiewicz University (AMU) in Poznan. ORCID ID: 0009-0006-6846-062X.

** This paper was prepared as part of the author's active participation in the annual conference of the International Society of Public Law (ICON-S) held in Budapest on May 29–30, 2025, entitled: 'Individual Autonomy, Fundamental Rights, and Institutional Safeguards'.

I Introduction

The concept of *crimmigration*, as included in the first part of the title of this paper, emerged from the fusion of criminal law and immigration law and – as the very name suggests – at its core lies the assumption that criminal law serves as one of the instruments of immigration policy. The described phenomenon has become more relevant in the last decades of the 20th century, particularly in the United States, as a result of a change in the perception of the proper place of criminal law in society.[1] In essence, when immigration became the subject of political debate in the aftermath of the civil rights movement, policymakers turned to criminal law. Not only has immigration law started to adopt measures typically associated with criminal law, but it has also introduced severe penalties for behaviour such as organising illegal border crossings and enabling or facilitating illegal stays.[2]

It appears, however, that the concept of crimmigration also has significance for volunteers and activists assisting migrants at the Polish-Belarusian border. Regardless of the state system in question, it seems rather evident that any statutory restriction on *individual autonomy* in providing assistance to foreign nationals must be necessary and proportionate.[3] In other words, it must always be established whether state authorities are justified in interfering with the individual autonomy of persons who offer support to migrants on the grounds that such interference is intended to protect the autonomy of other citizens of the state and safeguard the integrity of the country's territory into which the migrants are entering.[4] Considerations of this kind may, of course, be conducted from the beginning to the end *in abstracto*, or as demonstrated in this article, primarily within the framework of a specific case study; however, with the postulate that they apply to further cases arising in similar circumstances.[5]

1 See César Cuahtémoc García Hernández, 'Creating Crimmigration' (2013) (6) Brigham Young University Law Review 1457–1516, 1459.

2 Włodzimierz Wróbel, 'Criminalisation of Immigration Law' (2023) 100 Studia Iuridica 301–319, 302 et seq, DOI: https://doi.org/10.31338/2544-3135.si.2024-100.19. It should be clarified in this regard, as the author of the quoted paper also notes on the following pages that the mere illegal stay of a foreign national in the territory of Poland does not constitute a criminal offence, although it may, in some cases, amount to a misdemeanour.

3 See Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Constitution of the Republic of Poland of 2 April 1997) (Dz.U. nr 78, poz. 483, z późń. zm.) ('Constitution of Poland' or 'Polish Constitution'), Article 31(3).

4 It must be noted that some might argue that the autonomy of other citizens should be protected, since the border may be crossed by individuals engaged in criminal activity. See the considerations in Subsection II concerning the criminalisation of enabling or facilitating illegal stay and illegal border crossing.

5 Further considerations do not contradict the *nullum crimen sine lege stricta* principle, which refers to the prohibition of analogy to the detriment of the perpetrators.

In March 2022, five people at the Polish-Belarusian border provided assistance to an Iraqi family with small children, and an Egyptian citizen.[6] The activists' actions, which included offering aid to foreign nationals who had crossed the border from Belarus into Poland in search of shelter, food, and water, were deemed by the Polish prosecutor's office to constitute a criminal offence.[7] After the indictment was filed and the first trial began, protests broke out in support of the defendants. On 28 January 2025, the first trial was held at the District Court in Hajnówka. None of the defendants who were present admitted to the alleged crime of enabling or facilitating illegal stay in the territory of the Republic of Poland.

One of the defendants emphasised that providing assistance to persons in need constitutes an integral part of his identity, and that his actions were neither politically motivated nor undertaken in search of recognition. Another defendant explained that at that time, in 2022, people living near the border began encountering numerous refugees, and that even on ordinary walks, they would come across migrants in need of humanitarian aid. Many people provided assistance; however, no one spoke openly about it, as they regarded themselves as witnesses to a humanitarian crisis. According to the defendant's explanation, the responsibility for the health of migrants rested entirely on the local community.

On 15 April 2025, the second trial took place before the District Court in Bielsk Podlaski, Seventh Criminal Division, located in Hajnówka. During the trial, the prosecutor filed an evidentiary motion to admit a disc containing screenshots of messages and voice recordings, intended to show that the defendants, acting jointly and in concert, had organised illegal border crossings and further transport to other states.[8] The Court stated that the motion would be addressed at a later stage after reviewing the materials, and then proceeded to the evidentiary phase, during which witnesses were heard. The procedure

6 The circumstances of the case discussed in this paper were established on the basis of anonymised trial transcripts dated 28 January 2025, 15 April 2025, and 14 May 2025. The anonymised records were obtained pursuant to a public information request submitted by the author to the District Court in Bielsk Podlaski, 7th External Criminal Division in Hajnówka. For a non-governmental organisation's perspective on this case, see the Helsinki Foundation for Human Rights, 'I didn't think there was a law punishing the donation of food, drink, clothes and medicine to a person in need' – indictment against activists delivering humanitarian aid on the border' (Helsinki Foundation for Human Rights, 14 May 2024) <https://hfhr.pl/en/news/-i-didn-t-think-there-was-a-law-punishing-the-donation-of-food-drink-clothes-and-medicine-to-a> accessed 31 October 2025.

7 Ustawa z dnia 6 czerwca 1997 r. Kodeks karny (Act of 6 June 1997 Criminal Code) (Dz.U. 2025, poz. 383) ('Criminal Code' or 'Polish Criminal Code'). The main charge against the five concerned Article 264(a)(1) of the Polish Criminal Code. According to that provision, anyone who, for financial or personal gain, enables or facilitates another person's stay in the territory of the Republic of Poland in violation of the law shall be subject to imprisonment for a term of between three months and five years. However, during the trial on 15 April 2025, the prosecutor filed a motion for the admission of new evidence and asserted that the defendants should be found guilty of organising unlawful border crossing jointly and in concert with each other and with other unidentified persons, according to 264(3) of the Polish Criminal Code.

8 As indicated above, the prosecution sought a conviction under Article 264(3) of the Criminal Code, which provides that anyone who organises for other persons the crossing of the border of the Republic of Poland in violation of the law shall be subject to imprisonment for a term of six months to eight years.

of hearing the witnesses continued at the subsequent trial on 14 May 2025. At the most recent trial in September 2025, a judgment of acquittal was delivered in respect of the five defendants.[9]

The main research objective of this paper is to determine whether the state authorities were justified in initiating proceedings and, at the same time, in interfering with the individual autonomy of those who provided assistance to migrants at the Polish-Belarusian border in March 2022. As can easily be inferred from the emphasis on the individual autonomy perspective, the initial hypothesis of the study is that conduct of this kind, in the circumstances as established, cannot and should not be criminalised under the Polish Criminal Code. In other words, charges based on quoted provisions, in the circumstances as described below, should not be brought by the prosecution; if they are, they should be discontinued by the court on the grounds of the absence of a component of criminality.[10] The primary research method employed in the analysis is the doctrinal method, which involves the exegesis of legal texts.

Without yet turning to the specific provisions, a first general conclusion may be that cases such as the one briefly described above reveal a collision between the legal rules *(lex)* and the overall principles and body of law *(ius)*.[11] At first, an external observer may discern a tension between, on the one hand, the prosecution's alleged grounds for bringing charges, and, on the other, the individuals' exercise of their autonomy in providing humanitarian assistance to persons in need. In this context, this paper does not refer to the autonomy of migrants or the state, but rather to the autonomy of individuals who have decided to offer humanitarian assistance, as it is their conduct that is assessed for the purpose of this analysis. The concept of individual autonomy, therefore, encompasses not only the issue of free will and individual sovereignty but also constitutes an essential and indispensable element of individual freedom.

II Individual autonomy and crimmigration

As the very etymology of the word suggests, autonomy may be understood as self-government or self-determination, ie, the capacity to establish one's own rules of conduct (*autos* – self; *nomos* – rule, law). Without delving into the detailed discussions taking place in the foreign

9 The information on the acquittal does not originate from the official transcript, as the judgment of acquittal was delivered in September 2025, whereas the public information request had been submitted earlier. This information is current as of the date of drafting this article. The author has no knowledge of any further actions taken by the prosecutor's office.

10 See Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego (Act of 6 June 1997 Code of Criminal Procedure) (Dz. U.2025 poz. 46 z późń zm.) ('Polish Code of Criminal Procedure' or 'Code of Criminal Procedure'), Article 339(3)(1) and Article 17(1)(2).

11 However, as will be shown below, this assertion is incorrect, as the law does not criminalise such conduct; the acts under consideration cannot be regarded as criminal offences.

and Polish-language literature, the concepts may be systematised by stating that individual autonomy refers, in the aspect of *external independence*, to the independence of the human will or conscience from external factors that originate from organs of authority or other forms of power. Furthermore, this understanding implies that individual autonomy, as it concerns *internal independence*, is associated with the freedom to shape one's own path.[12]

It is also impossible to speak of individual autonomy without referring to Immanuel Kant's philosophy.[13] In fact, the author's widely known categorical imperative, ***to some extent,*** reflects the essence of the actions of the five individuals who decided to provide humanitarian aid in March 2022 at the Polish-Belarusian border. Indeed, the categorical imperative 'act as though the maxim of your action were to become, through your will, a universal law of nature'[14] could be applied to the altruistic actions of the five activists. The acquitted provided humanitarian aid because they held the belief that, if confronted with a similarly difficult situation, they themselves would wish for someone to offer them help. Furthermore, as can be inferred from their explanations during the trial in January 2025, they acted in the belief that providing such humanitarian assistance should be required by law.

It also seems that the formulation 'act in such a way as to treat humanity, whether in your own person or in that of anyone else, always as an end and never merely as a means'[15] equally applies to the behaviour of those who offered help. As they themselves stated, they did not act in order to be recognised as heroes, but out of noble intentions and inner conviction. In other words, they did not rely on mere feelings or the satisfaction that might have arisen from believing themselves to be virtuous, as is clearly reflected in the explanations they gave during the first trial.[16] Moral norms stood above all else, even if a certain satisfaction from providing assistance followed. They did not act out of a 'good

---

12 The aspects of the external and internal independence of individual autonomy constitute the author's own proposal for organising various concepts of individual autonomy found in the literature. All of them cannot be fully presented because of the limited scope of this work. Referring to foreign literature, attention is drawn to Stephen Darwall, 'The Value of Autonomy and Autonomy of the Will' (2006) 116 (2) Ethics 263–284, 265 DOI: https://doi.org/10.1086/498461 and Mark Piper, 'Achieving Autonomy' (2018) 42 (4) Social Theory and Practice 767–792, 768. Among Polish scholarship, attention is drawn to Jolanta Blicharz's paper. The author aptly notes that under Polish law, the foundations of individual autonomy may be derived from Articles 31(1) and 47 of the Constitution of Poland. The former provides that human freedom shall receive legal protection, while the latter states that everyone shall have the right to legal protection of their private and family life, of their honour and good reputation, and to make decisions concerning their personal life. Jolanta Blicharz, 'Dyskusje na temat znaczenia autonomii jednostki (osoby) jako wartości aksjologicznej' (2011) 87 Przegląd Prawa i Administracji 11–19, 11.

13 Stanford Encyclopedia of Philosophy, 'Kant's Moral Philosophy' (Stanford Encyclopedia of Philosophy, 23 February 2004) <https://plato.stanford.edu/entries/kant/> accessed 31 October 2025.

14 Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Jonathan Bennett tr, Early Modern Texts 2017) 24.

15 Kant 29.

16 As previously stated, access to the full explanations of the defendants was obtained as a result of a request submitted by the author under the public information procedure.

mood' or fleeting emotions, but from duty, and therefore, according to Kant's philosophy, they performed genuinely moral acts.[17]

It should be noted, however, that according to Kant's philosophy, norms should be formulated *a priori*, not *a posteriori* through empirical means. This somehow corresponds to the described situation, as at the moment when the five individuals undertook their actions, the imperative could have guided them *a priori*, without any reference to prior experience.

Yet, an attentive reader of the foregoing considerations might observe that to act morally does not necessarily imply acting in accordance with the law. Elaborating on this observation, according to Herbert L.A. Hart's philosophy, even though there are many different contingent connections between law and morality, there are no necessary conceptual connections between the content of the former and the latter. The validity of a legal norm is not grounded in morality, but rather in social, recognised criteria; hence, morally iniquitous provisions may be valid as legal rules or principles.[18] In this sense, it could be claimed that morality 'waits about' for some positive law to be recognised in order to critique it or to endorse it.[19]

Considering the above, it should be noted that individual autonomy does not have an absolute character. In fact, constitutionally protected human dignity and autonomy do not stand on the same hierarchical level.[20] Nevertheless, the interference with the activists' autonomy was not connected with the protection of human dignity; on the contrary, the interference with their autonomy and the initiation of criminal proceedings resulted precisely from the fact that the persons involved acted with respect for the personal dignity of other migrants. This leads to the already indirectly formulated conclusion that, in this case, the recognised content of law coincides with the content of morality, and that the charges brought by the prosecution were indeed unfounded.

---

17 Kant's ethics is described as deontological.

18 Herbert Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994, Oxford) 268.

19 Accordingly, morality may be understood as the potential content, whereas law is the form. The form of law is sufficiently flexible to encompass any content, moral or not. See also David Gray Carlson, 'Hart avec Kant: on the Inseparability of Law and Morality' (2009) 1 (1) Washington University Jurisprudence Review 21–95, 29 et seq. As a side note, it should be added that Hart's positivism was contested by Dworkin's interpretivism. According to the latter author: 'The act of a legislature is not, as these descriptions suggest, an event whose force we can in some way measure so as to say it has run out at a particular point; it is rather an event whose content is contested in the way in which the content of an agreement to play a game is contested'. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977, Cambridge) 109. Because of the work's length limitations, the issue under analysis is not fully explored from a Dworkinian perspective.

20 The significance of human dignity is determined, first and foremost, by its explicit emphasis in the Preamble to the Polish Constitution. It is also noteworthy that Article 30 is located as the first provision in Chapter II of the Constitution of Poland. Furthermore, pursuant to Article 233(1) of the Constitution of the Republic of Poland, a statute defining the scope of restrictions on the freedoms and rights of persons and citizens during martial law, or a state of emergency, may not limit the freedoms and rights specified in Article 30 of the Constitution.

While different schools of legal thought define the notion of a crime in various ways, for the purposes of analysing the conduct of the five activists, it is reasonable to assume that a crime constitutes human behaviour which: (1) must constitute an act undertaken in circumstances that allow for an alternative course of action; (2) violates a sanctioned norm,[21] in the absence of circumstances excluding the unlawfulness of the act; (3) corresponds to the statutory description of an offence punishable under criminal law; (4) demonstrates a higher than insignificant degree of social harmfulness; (5) is committed in circumstances in which a person capable of criminal responsibility, mature and sane, could be expected to act in accordance with the command or prohibition arising from the legal norm.[22]

The acts in question may, and indeed should be examined in light of all the aforementioned elements. Although certain doubts may also arise regarding, for instance, the degree of social harmfulness, because of the limited scope of this work, the following legal analysis will be limited to the issues of (2) unlawfulness and (3) punishability.

In the context of the unlawfulness of the individuals' acts, it should be noted that the norm prohibiting enabling or facilitating another person's illegal stay within the territory of the Republic of Poland protects a legal good in the form of the internal security of the state and its citizens – as it is assumed that the illegal stay of other persons in Poland may give rise to threats associated with international crimes and terrorism.[23] Similarly, in the case of criminal law provisions on organising illegal border crossing, the focus is placed on protecting the security and inviolability of the borders of the Republic of Poland against unlawful entry, which, in turn, also indirectly serves to safeguard the security of the state.[24]

What may seem obvious, but in this context appears necessary to restate, is that for an act to be deemed unlawful, it must be recognised that the perpetrators' conduct was contrary to a sanctioned norm, and furthermore, that no circumstances excluding unlawfulness were present. It should certainly be argued that the acts committed by the five individuals were not unlawful, and such a statement, in turn, could be justified in two ways. First, it may be argued that there was no violation of a sanctioned norm and that providing humanitarian aid is an inherently lawful act, which does not even require reference to any excluding circumstances. Thus, one may claim that the legality of the conduct did not stem from a state of necessity, but simply from the fact that no sanctioned norm was violated, even

[21] A 'sanctioned norm' is a norm of conduct that prescribes certain behaviour to a specific entity under specific circumstances and is linked (coupled) with another norm, namely, the sanctioning norm. See Sławomira Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa* (3 edn, Ars Boni et Aequi 2005, Poznań) 19.

[22] In this regard, see Piotr Kardas, 'O relacjach między strukturą przestępstwa a dekodowanymi z przepisów prawa karnego strukturami normatywnymi' (2012) 4 (4) Czasopismo Prawa Karnego i Nauk Penalnych 5–63, 27 et seq.

[23] While the mere stay of a foreign national in Poland may only constitute a misdemeanour, enabling or facilitating illegal stay under Article 264(a)(1) of the Polish Criminal Code is considered a crime. The offence under Article 264(a)(1) is a crime of abstract danger. See Wróbel 309 et seq.

[24] See Wróbel 308.

if the *prima facie* linguistic interpretation of the norms could lead to different conclusions.[25] Second, it may be argued that the sanctioned norm was indeed violated, yet under a state of necessity.[26] In view of the considerations put forward in this study, I am inclined toward the former assumption – namely, that the individuals' actions did not entail a violation of the sanctioned norm in the first place.

This assumption is grounded in the constitutional protection of human dignity, as already quoted, which applies to every person, not only Polish citizens. In fact, the constitutional principle of human dignity serves as an interpretative directive, according to which all doubts arising associated with the present considerations should be resolved *in dubio pro vita humana*.[27] Furthermore, the argument that the absence of unlawfulness is evident even at the level of the non-violation of the sanctioned norm may also be derived from Article 40 of the Polish Constitution, which prohibits inhuman or degrading treatment.[28] Such inhuman or degrading treatment could occur if a prohibition were introduced against providing food, water, or other essentials to persons in need. As one of the defendants rightly pointed out during the trial, Article 162(1) of the Polish Criminal Code establishes an obligation to render effective assistance to a person in immediate danger of losing their life.[29]

However, it is important to note that the groundlessness of the charges brought by the prosecution also stems from the conduct being inconsistent with the statutory description of the offence set out in Article 264(a)(1) of the Polish Criminal Code, according to which, anyone who, for financial or personal gain, enables or facilitates another person's stay in the territory of the Republic of Poland in violation of the law shall be subject to imprisonment.[30] This provision entered into force in 2004 as a result of the implementation of European directives.[31] Pursuant to Article 1(1)(b) of the Council Directive 2002/90/EC, each Member State shall adopt appropriate sanctions against any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.[32]

---

25 See Agnieszka Barczak-Oplustil, Włodzimierz Wróbel, 'Udzielanie pomocy humanitarnej jako zachowanie (pierwotnie) legalne' (2022) 47 (1) Iustitia 14–20, 16.

26 See Article 26(1) of the Polish Criminal Code.

27 Barczak-Oplustil, Wróbel 17.

28 See Article 40 of the Polish Constitution.

29 However, it must be noted that Article 162(1) of the Criminal Code is not the source of the primary legality of providing humanitarian aid. The right to provide humanitarian aid is rooted in the Polish Constitution. See Barczak-Oplustil, Wróbel 18 et seq.

30 See Article 264(a)(1) of the Polish Criminal Code.

31 Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1 ('Council Framework Decision 2002/946/JHA'). Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17 ('Council Directive 2002/90/EC').

32 It is *prima facie* apparent that the normative content of Council Directive 2002/90/EC refers exclusively to financial gain, and not to personal gain, which also raises doubts as to the compatibility of the Polish provision with what is stipulated in the quoted European act.

In the present case, the prosecution took the position that the 'benefit' referred to in Article 264(a)(1) of the Polish Criminal Code must be interpreted by reference to Article 115(4), that is, as a financial or personal benefit, obtained either for oneself or for another person.[33] Proceeding from that assumption, the prosecution asserted that the defendants acted with direct intent aimed at 'obtaining a personal benefit for the migrants'.

This line of reasoning is, however, untenable. It is beyond dispute that any act of assistance, by its very nature, results in the recipient obtaining some form of personal benefit. Issuing a conviction on the grounds presented by the prosecution would lead to the erroneous conclusion that the prerequisites for criminal liability under Article 264(a)(1) of the Polish Criminal Code arise every time a person in need of assistance receives help, and that anyone providing humanitarian aid to another person could be subject to punishment.

Moreover, the perpetrator's act described in this provision relates to 'enabling' or 'facilitating' another person's stay in the territory of Poland 'in violation of the law'. This means that the stay must be contrary to the provisions under which another person has no legal right to remain within the territory of Poland. Recognising that the objective components of the offence have been fulfilled therefore requires establishing whether the stay in the territory of Poland actually takes place in violation of the law, by reference, for example, to the Act on Foreigners[34] and the legal grounds for lawful residence in Poland specified therein.

However, it should be remembered that according to the international refugee protection system, a person without formal authorisation to enter a state may submit an application for international protection. When it is not possible to submit such an application at an official border crossing, it appears that the application may be lodged after crossing the border.[35] The assessment of whether an illegal entry has occurred cannot be made without considering the specific circumstances and must include whether, in a given case, there were real and practical possibilities to apply for international protection.[36]

The conduct of the five individuals did not fall within the scope of Article 264(a)(1) nor Article 264(3) of the Polish Criminal Code.[37] The latter prohibits organising for other persons crossing the border of the Republic of Poland in violation of the law. It is generally considered that Article 264(3) of the Polish Criminal Code is directed against migrant smugglers,

---

33 See Article 115(4) of the Polish Criminal Code.

34 Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach (Act of 12 December 2013 on foreigners) (Dz.U. 2025, poz. 1079).

35 See Wróbel 310 et seq.

36 Ibid.

37 See Article 264(3) of the Polish Criminal Code. This offence also contains the normative clause 'in violation of the law', which should likewise be assessed in light of the specific circumstances, *in concreto*, particularly whether, in a given case, there were real and practical possibilities to apply for international protection. As a side note, it could be noted that the act of illegal crossing itself does not constitute a crime but rather a misdemeanour.

especially those who treat the state as a 'transit stage', enabling passage to other countries.[38] Nevertheless, it is crucial to establish, in each instance, the precise circumstances under which cooperation in organising border crossings was undertaken. In other words, the involvement in the organisation of illegal border crossings, ie, in smuggling operations, requires conscious action and knowledge of the entire process. Meanwhile, in the case at hand, there was no evidence that the defendants had any direct contact with smugglers.

While the current wording of Article 264(3) stems primarily from the adoption of the Protocol supplementing the United Nations Convention against Transnational Organised Crime,[39] it may be important to consider Article 1(1)(a) of the Council Directive 2002/90/EC in the analysis. According to that provision, each Member State shall adopt appropriate sanctions against any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens. In fact, the discussion on assisting in illegal border crossings often overlooks the clause specified in Article 1(2) of the Council Directive 2002/90/EC, which states that any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice in cases when the aim of the behaviour is to provide humanitarian assistance to the person concerned. This is the so-called humanitarian clause, which, although not *expressis verbis* reflected in the statutory provision, should be transposed and applied in practice.

III Conclusions

Immanuel Kant articulates a conception of a world society composed of world citizens *(Weltbürgerrecht)*, whose law is derived from a universal and interculturally recognised human dignity. Pursuant to the statement 'the law of world citizenship is to be united to conditions of universal hospitality', a visiting foreigner has the right not to be treated as an enemy *(Recht der Hospitalität)*.[40] Denying entry is permissible only if such refusal does not entail fatal consequences for that person, and as long as they conduct themselves peacefully, they must not be treated with hostility.[41] The cosmopolitan vision of world society focuses on persons, rather than on states, as the subjects of the international order, and presupposes the intrinsic value of its norms, even in the absence of a 'central legislator'.

38 It may be stated that it shifts criminal liability to a much earlier stage than the actual border crossing, in fact, to the stage of preparation.

39 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507.

40 Immanuel Kant, *Toward Perpetual Peace: A Philosophical Sketch* (Jonathan Bennett tr, Early Modern Texts 2017) 11.

41 Ibid.

In line with the author's well-known concept, the migrants assisted by the five activists come under the protection of universally recognisable human dignity and ought to be treated in accordance with the right of hospitality. By providing humanitarian aid, the five activists exercised their individual autonomy, and their actions should be regarded as moral.

Furthermore, the analysis concluded that the Trial of the Five case is an example of unjustified interference by state authorities in the autonomy of activists providing humanitarian assistance to migrants. It would not be an exaggeration to state that such charges, in similar circumstances, should not be brought by the prosecution; otherwise, if pursued, they should be discontinued by the court on the grounds of the absence of a component of criminality. The acquittal delivered in September 2025 must be regarded as correct, although it should be questioned whether there were not already sufficient grounds, even at an earlier stage, to refer the case to a hearing and discontinue the proceedings. Indeed, it seems that even at the very beginning of the procedure, it was evident that the conduct of the five individuals was not unlawful, that is, it did not violate a sanctioned norm, nor did it correspond to the statutory descriptions of the acts prescribed by the Polish Criminal Code.

Vivien Köböl-Benda*

Mother Earth-Centric Actions within the International Biodiversity Protection Regime

Abstract

The loss of biodiversity is one of the three components of our age's triple planetary crisis, besides climate change and pollution. The valorisation of nature can open new pathways to address pressing challenges and may be considered a foundation of ecocentric approaches. The paper examines the international biodiversity regime, in which recognition of nature's intrinsic value is limited initially to a few preambular acknowledgements. However, the 2022 adoption of the Kunming-Montreal Global Biodiversity Framework may change the tendency to disregard nature's own worth, as it introduces the concept of Mother Earth-centred actions within its resource mobilisation and financial goals. The paper analyses the occurrence of this concept and its impact on policy areas due to COP16 in 2024. Finally, it proposes the areas in which this concept can further strengthen the implementation of the Kunming-Montreal Global Biodiversity Framework.

Keywords: Mother Earth-centric actions, Kunming-Montreal Global Biodiversity Framework, Convention on Biological Diversity, Rights of Nature, biodiversity protection

I Introduction

The Convention on Biological Diversity[1] (hereinafter: CBD) serves as a fundamental international legal act intended to protect the Earth's ecosystem.[2] The adoption promotes the protection and improvement of biodiversity, but questions arise about the real motivation

* Vivien Köböl-Benda visiting lecturer, Pázmány Péter Catholic University (Budapest); Analyst, Institute for Energy Strategy.

1 Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 1.

2 CBD Article 2 defines the term 'ecosystem' as 'a dynamic complex of plant, animal, and micro-organism communities and their non-living environment interacting as a functional unit'.

behind this goal. International law – as with law generally[3] – can recognise the values that drive the implementation of certain acts. The UN Charter[4] identifies several values, like peace, justice, human rights, tolerance, solidarity, and the sovereign equality of nations. In international environmental law, the selection of values can determine whether the legal act serves human purposes or also recognises the worth of nature and its elements. This is particularly relevant regarding the biodiversity regime, where the protected subject is nature itself.

This paper's central hypothesis is that recognising the intrinsic value of nature can improve the CBD's implementation, as the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) also affirmed.[5] First, it should be explored which values are identified in the CBD, its Protocols, and the legally non-binding but influential decisions of the Conference of the Parties. It can be preliminarily stated that the CBD serves human-centred – economic, political, health, safety, recreational, etc. – goals, but adopting the Kunming-Montreal Global Biodiversity Framework[6] can open the pathway for promoting ecocentric action. However, this approach is limited to a specific area involving financial issues, as it is only applied to decisions related to resource mobilisation and the Convention's financial mechanism, which will be discussed in a later section of this paper. Therefore, the main area that is examined in this paper will be the decisions made by the CBD COP15 in 2022 and COP16 in 2024 and 2025, where this aspect emerged in the resource mobilisation and financial mechanism agenda items.

II Nature as a value associated with the context of the CBD

The CBD's Preamble recognises the intrinsic value of biological diversity.[7] It also acknowledges its ecological, genetic, social, economic, scientific, cultural, recreational, and aesthetic significance. It is not unfamiliar from the point of view of international

---

3 For further information on the relationship between law and moral values, see Jerome E. Bickenbach, 'Law and Morality' (1989) 8 (3) Law and Philosophy 291.

4 United Nations, *Charter of the United Nations*, signed 26 June 1945, 1 UNTS XVI.

5 P Balvanera, U Pascual, M Christie, B Baptiste and D González-Jiménez (eds), *Methodological Assessment Report on the Diverse Values and Valuation of Nature of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES secretariat 2022, Bonn) DOI: https://doi.org/10.5281/zenodo.6522522. Hereinafter: IPBES Values Assessment.

6 Conference of the Parties to the Convention on Biological Diversity, Fifteenth Meeting – Part II, Montreal, Canada, 7–19 December 2022, Decision adopted by the Conference of the Parties to the Convention on Biological Diversity – 15/4 Kunming-Montreal Global Biodiversity Framework, UN Doc CBD/COP/DEC/15/4 (19 December 2022). Hereinafter: KM-GBF.

7 CBD Article 2 defines the term 'biological diversity' in the following way: 'means the variability among living organisms from all sources, including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'.

environmental law that various sets of values are recognised that can serve ecological, economic, political, or social goals that may also be intertwined. Anna Deplazes-Zemp highlights the two determining aspects of environmental values in the empirical conservation and environmental policy literature: intrinsic and instrumental. While the first concept acknowledges nature's value in its own right, the latter positions this as a means of achieving other goals, for example, financial or social. The two concepts can be interpreted as ecocentric and anthropocentric, respectively. Later, a third concept of value emerged in the context of the international biodiversity protection regime: 'relational value', which focuses on the relationship between humankind and the environment from which humans' responsibility for nature can also be derived.[8]

The difference between anthropocentric and non-anthropocentric, or ecocentric, approaches can be traced to the two corresponding concepts of preservationalism and conservationalism. According to the first, nature should remain untouched by humans, while the second aims to balance environmental protection with the human need to use natural resources.[9] The CBD applies the latter, which is a more realistic concept and poses no problem as long as nature is utilised sustainably. Moreover, economic and social gain can be a source of motivation for protecting nature. Further, addressing the intrinsic value of the environment can align with this concept as it is.

The Dasgupta Review – an independent evaluation of the economics of biodiversity – identifies the root of nature's intrinsic value in the culture of humanity, because perhaps all societies have respected nature as sacred at some point in their history. However, this transcendence is being challenged today in both developed and developing countries, where economic justifications and development needs can override ecological interests. Recognising the intrinsic value of nature can support more environmentally friendly economic practices, as economic goals are not entirely invalid in this respect.[10]

Despite the Preamble's declarative principle, the operational paragraphs refrain from further elaboration of the practical aspects and content of such intrinsic value. For example, Article 2 defines 'biological resources' as organisms or parts thereof, populations or any other biotic components of ecosystems that have a use or value *for humanity*. Genetic resources are also considered biological resources, thus similarly serving humankind's needs. Other references to the value of biological diversity in the operative part[11] cannot be found. However, Article 7(a) obliges the Parties to identify the components of biodiversity essential for its protection or sustainable use, as set out in the indicative list in Annexe I. The

[8] Anna Deplazes-Zemp, 'Beyond Intrinsic and Instrumental: Third-Category Value in Environmental Ethics and Environmental Policy' (2023) 27 (2) Ethics, Policy & Environment 166–188, DOI: https://doi.org/10.1080/21550085.2023.2166341

[9] Ben A. Minteer, Elizabeth A. Corley, 'Conservation or preservation? A qualitative study of the conceptual foundations of natural resource management' (2007) 20 Journal of Agricultural and Environmental Ethics 307–308, DOI: https://doi.org/10.1007/s10806-007-9040-2

[10] Parta Dasgupta, *The Economics of Biodiversity: The Dasgupta Review* (HM Treasury 2021, London) 307–308.

[11] The operative part is the section of a decision that follows the Preamble.

appendix lists the factors that should be identified and monitored: ecosystems and habitats; species and communities; and genomes and genes. There is a restrictive formulation in para 2, as it can be read as those species and communities should come under this indicative list that are threatened, wild or domesticated or cultivated, have *medical, agricultural* or *other economic* value or *social, scientific* or *cultural* importance, or *serve research purposes* such as being indicator species.

Two Protocols complement the CBD. The Cartagena Protocol on Biosafety[12] is grounded by the precautionary principle and intended to protect humans and the environment from living modified organisms. Directly, it only refers to values in the socioeconomic context related to the sustainable use of biodiversity, considering its value to indigenous peoples and local communities.[13] The Nagoya Protocol[14] regulates access to genetic resources and creates a framework for fair and equitable benefit-sharing associated with their utilisation. Its Preamble recognises the economic value of biodiversity and ecosystems related to benefit-sharing.

The CBD recognises the intrinsic value of biological diversity, but its Protocols do not contain such a reference. The Convention does not elaborate on how this recognition can influence further policy actions, help realise goals, or which provisions are the most relevant in this context. Without these further details, the reference can be considered merely symbolic, not a fundamental guiding principle that will have a real influence on implementation. I share the view of Joanna Miller Smallwood and Jérémie Gilbert: according to them, this represents an anthropocentric approach whereby nature's worth to humans is at the centre, not its intrinsic value. The authors point out that this approach can be seen in subsequent documents, as no COP decision made before 2022 goes into detail on nature's intrinsic value.[15] After examining global assessments concerning the recognition of values related to biodiversity and nature, the paper continues with an analysis of 2022 and post-2022 CBD documents.

---

12 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, opened for signature 29 January 2000, 2226 UNTS 208 (entered into force 11 September 2003).

13 Ibid, Art. 26(1).

14 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity, opened for signature 29 October 2010, 3008 UNTS 3 (entered into force: 12 October 2014).

15 Joanna Miller Smallwood, Jérémie Gilbert, Can the global framework on biodiversity truly deliver on respecting nature's intrinsic value? A call for COP 16 to implement non-market approaches to the global biodiversity targets, EJIL:Talk! Blog of the European Journal of International Law <https://www.ejiltalk.org/can-the-global-framework-on-biodiversity-truly-deliver-on-respecting-natures-intrinsic-value-a-call-for-cop-16-to-implement-non-market-approaches-to-the-global-biodiversity-targets/> accessed 31 October 2025.

III About the IPBES Diverse Values Assessment

The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES)[16] published a comprehensive assessment of the diverse values of nature, concluding that the loss of biodiversity is strongly driven by the undervaluation of nature in political and economic decision-making. The assessment highlights the underrepresentation of indigenous peoples' and local communities'[17] value systems in decision-making processes and finds that the current system often prioritises market-based values over those that acknowledge nature's contribution to our lives.[18] There are more than fifty valuation methods based on the analysis of nature's proportions and contribution to our lives (nature-based valuation), stated preference methods about nature (statement-based valuation), assessments of how people value nature (behaviour-based valuation) and various syntheses of these methods (integrated valuation). However, the IPBES states that fewer than 5% of existing scientific assessments are integrated into any public policy decisions – based on the scientific literature on this topic between 1990 and 2020.[19] This tendency is liable to reinforce the unsustainable use and unequal distribution of nature's benefits, and achieving the global biodiversity goals requires transformative change that reflects such diverse values.[20]

The assessment categorises the policy instruments into three groups based on how strongly they can contribute to this transformative change:

– more transformative: co-management regimes, eliminating harmful subsidies, payments for ecosystem services, and other effective area-based conservation measures that acknowledge the 'Rights of Nature';

– less transformative: certification schemes, environmental accounting, and legally protected areas;

– business as usual: biodiversity offsets, trade bans.[21]

---

16 The IPBES was established by 94 governments in 2012, Resolution on the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, Adopted by the second session of the plenary meeting to determine the modalities and institutional arrangements for IPBES (16–21 April 2012). It is an independent scientific intergovernmental organisation that assesses and determines factors related to the protection and restoration of biodiversity and ecosystem services administered by the UN Environment Programme (UNEP). The IPBES is formally independent from the CBD but supports its decision-making process with scientific advice. The CBD COP provides guidance for this process.

17 The term 'indigenous peoples and local communities' aligns with the agreed language of the latest relevant COP decision. Conference of the Parties to the Convention on Biological Diversity, Sixteenth Meeting, Cali, Colombia, 21 October – 1 November 2024, decision adopted by the Conference of the Parties to the Convention on Biological Diversity on 30 October 2024 – 16/4 Programme of Work on Article 8(j) and Other Provisions of the Convention on Biological Diversity Related to Indigenous Peoples and Local Communities to 2030, UN Doc CBD/COP/DEC/16/4 (30 October 2024).

18 IPBES Values Assessment, Summary for policymakers, XIV.

19 IPBES Values Assessment, Chapter 4, 254.

20 Ibid, 255.

21 Ibid, XLIV.

One of these policy instruments is the Rights of Nature, a globally growing rights-based concept that also recognises nature's intrinsic value.[22] According to the IPBES, this approach represents living in harmony with nature and often builds on the worldview of indigenous peoples and local communities. It can also be used to empower these communities and support them in operationalising their values regarding nature.[23] The paper aims to identify recognition of this concept or something similar in the context of the CBD. The IPBES report provides a comprehensive review of various value systems, identifying the most determining concepts. The report distinguishes the diverse concepts and their incorporation into policy instruments. This is significant because, while the concepts often share a similar core – respect for nature – they also differ in terms of their origins, efficiency, and scope. However, the report does not explicitly use the term 'Mother-Earth-centric actions' but identifies the basis of the concept in the form of living in harmony with nature. It also helps to distinguish the concept of Rights of Nature. Regarding the paper's analysis, these distinctions are determining, while the report also demonstrates that examining these concepts is crucial for biodiversity protection instruments.

IV The representation of nature's value within the Kunming-Montreal Global Biodiversity Framework

In 2022, the CBD COP15 adopted an ambitious agenda – the Kunming-Montreal Global Biodiversity Framework (KM-GBF) – with four goals to 2050, to be achieved through 23 action-oriented targets by 2030. The instrument states that biodiversity is an essential element of human well-being, is fundamental to a healthy planet, and contributes to the economic prosperity of all people. This can be connected to the concept of living well in balance and harmony with Mother Earth, as our food, medicine, and energy, as well as clean air and water, and security from natural disasters, depend on the state of nature, which also has recreational and cultural value.[24] The KM-GBF aspires to catalyse transformative actions by governments and other authorities, with the involvement of all relevant actors in society, to end biodiversity loss and promote the three goals of the CBD – the protection and sustainable use of biodiversity, and fair and equitable benefit-sharing for the use of genetic resources. To this end, the KM-GBF has a long-term vision for 2050, by which time we will be living in harmony with nature. To achieve this, it identifies four goals. Goal A is to substantially maintain, enhance, and restore all ecosystems, halt the human-

22 For a further comprehensive analysis of the concept of Rights of Nature and examples of its legal recognition at the domestic and international level, see: Ágnes Tahyné Kovács, 'On the Phenomenon of the Rights of Nature' (2024) 12 (1) Hungarian Yearbook of International Law and European Law 305, DOI: https://doi.org/10.5771/9783748946526-305

23 IPBES Values Assessment, 40.

24 KM-GBF Annex para 1.

driven extinction of threatened species, and safeguard genetic diversity. Goal B promotes the sustainable use and management of nature. Goal C aims to create a fair and equitable benefit-sharing mechanism for the use and benefit of digital sequence information (DSI). Finally, Goal D considers the appropriate means of implementation, including financial resources, capacity-building, cooperation, and technology transfer. It also states that the biodiversity finance gap of 700 billion USD per year should be progressively closed by 2050.[25]

The framework references the Rights of Nature concept and the diverse value systems, identifying nature's intrinsic values in the context of those countries that recognise them. For these countries, it can facilitate the implementation of the KM-GBF, but it does not consider nature's intrinsic value in a broader context.[26] The KM-GBF also introduces the concept of 'Mother Earth-centric actions', which can be regarded as progress compared to the previous approach within the CBD, its protocols and COP decisions. These are ecocentric and rights-based actions that strive to promote a harmonious, complementary relationship between people and nature, grounded in the continuity of all living beings and their communities, while safeguarding the non-commodification of Mother Earth's environmental functions.[27] This reference is placed within the context of the agenda's resource mobilisation target (T19), which aims to mobilise 200 billion USD per year for the protection and restoration of biodiversity from all sources. This includes promoting collective action, including this concept and other non-market-based approaches. Target 16 on sustainable consumption does not mention this concept but aims to significantly reduce overconsumption and waste generation to ensure living well in harmony with Mother Earth.[28]

The COP15 also adopted decision 15/7, dedicated to the resource mobilisation target, with a strategy for resource mobilisation for the intermediate phase (2023-2024), which aims – among other objectives – to significantly increase domestic resources from all sources, including collective actions such as Mother Earth-centric actions.[29] The other finance-related decision concerning the financial mechanism[30] does not include such a reference, which is relevant because Decision 15/7 is intended only for a specific time period (by 2030), while Decision 15/15 is the general – though still interim – financial mechanism of the CBD under the Global Environment Facility (GEF).

It should be stressed that Mother Earth-centric actions are not equivalent to the recognition of the Rights of Nature, which concept considers nature a rights-holder and entails stronger obligations for states and, sometimes, procedural rights as well. Mother Earth-

[25] Ibid, Annex, para 12.
[26] KM-GBF, Annex, para 7.
[27] Ibid, Annex, para 13, target 19 subpara (f).
[28] Ibid, Annex, para 13, target 16.
[29] Ibid, Annex I, para 4 (f).
[30] Conference of the Parties to the Convention on Biological Diversity, Fifteenth Meeting – Part II, Montreal, Canada, 7–19 December 2022, Decision adopted by the Conference of the Parties to the Convention on Biological Diversity – 15/15 Financial mechanism, UN Doc CBD/COP/DEC/15/15 (19 December 2022). Hereinafter: Decision 15/15.

centric actions, by contrast, are a strategic concept, a guiding tool intended to help realise the financial commitments under the KM-GBF. It would be beneficial if other CBD agenda items also integrated the concept. For example, this could involve enhancing cooperation among the Rio Conventions, providing a new direction for updated national targets, national biodiversity strategies and plans, and offering alternative ways to implement conservation targets, while strengthening the representation of relevant worldviews and the valuation of traditional knowledge. This is particularly important as the IPBES Transformative Change Assessment (2024)[31] emphasised that the recognition of human-nature interconnectedness and nature's contribution to our lives can be strengthened by promoting views and values that emphasise living in harmony with nature, such as Mother Earth-centric actions.

Marlene Payva Almonte praises the 'explicit adoption of an ecocentric approach', which may be a step towards broader recognition, but future decision-making and the KM-GBF's implementation will determine whether it is a symbolic declaration or a driver of actual change.[32] The following section reviews how this concept appeared in the COP16 decision-making process.

V The related outcomes of CBD COP16 negotiations

The CBD COP16 took place between October 21 and November 1 in Cali, Colombia, where delegates did not reach consensus on a couple of crucial issues, such as resource mobilisation and the financial mechanism, and the final plenary was suspended. Therefore, an additional meeting (COP16.2) was held in Rome between 25 and 27 February 2025.[33] During the resource mobilisation and related financial mechanism negotiations in Cali, Bolivia issued a proposal to recognise Mother Earth as a legal subject and integrate the concept of living well in harmony with nature into other policy areas while promoting dialogue between modern and ancestral knowledge systems to strengthen fair distribution, the role of indigenous peoples and local communities, and climate justice.[34]

---

31 K O'Brien, L Garibaldi, A Agrawal, E Bennett, R Biggs, R Calderón Contreras, E Carr, N Frantzeskaki, H Gosnell, J Gurung, S Lambertucci, J Leventon, C Liao, V Reyes García, L Shannon, S Villasante, F Wickson, Y Zinngrebe and L Perianin (eds), *Summary for Policymakers of the Thematic Assessment Report on the Underlying Causes of Biodiversity Loss and the Determinants of Transformative Change and Options for Achieving the 2050 Vision for Biodiversity of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES secretariat 2024, Bonn) DOI: https://doi.org/10.5281/zenodo.11382230

32 Marlene Payva Almonte, 'Interrogating International Environmental Law's Approach to Nature. An Arctic Indigenous model?' (2025) 17 (1) Journal of Northern Studies 7, DOI: https://doi.org/10.36368/jns.v17i1.1233

33 Conference of the Parties to the Convention on Biological Diversity, Sixteenth meeting, Cali, Colombia, 21 October – 1 November 2024, Online, 3–6 December 2024, Rome, 25–27 February 2025, Report of the Conference of the Parties to the Convention on Biological Diversity on its sixteenth meeting, UN doc CBD/COP/16/13 (27 February 2025).

34 Conference of the Parties to the Convention on Biological Diversity, Sixteenth meeting, Cali, Colombia, 21 October – 1 November 2024, Submission from the Plurinational State of Bolivia regarding target 19, paragraph (f), of the Kunming-Montreal Global Biodiversity Framework.

The final resource mobilisation decision[35] updated the strategy for resource mobilisation for 2025–2030, and broadened the scope of Mother Earth-centric actions, which become part of other aspirations than domestic resource mobilisation.[36] This includes increasing international biodiversity-related financial flows from all sources to provide new and additional resources.[37] It is also considered a concept that can ensure community engagement by enhancing the accessibility, effectiveness, efficiency, and transparency of international financial resources.[38] It also refers to the concept in a broader sense in relation to the improvement of domestic resources, explicitly naming the goal of enhancing different value systems, including the living well concept and the Rights of Nature and Mother Earth, for the signatory countries.[39]

The 15/7 decision established a new dedicated fund to mobilise the desired resources. The Kunming-Montreal Global Biodiversity Framework Fund (GBFF) started to operate under the GEF, but several countries – predominantly from the Global South – plan to establish a new dedicated global fund independent from the GEF.[40] As a compromise, the decision includes provisions for a potentially new financial instrument, one of the criteria for which is the promotion of collective action, such as Mother Earth-centric actions.[41]

Compared to the outcome of the COP15, the financial mechanism decision adopted at COP16.2 refers to the living well principle in its Preamble. It requests that the GEF and its Council consider how to integrate Mother Earth-centric actions into the programming directions of the GEF and the new GBFF.[42]

[35] Conference of the Parties to the Convention on Biological Diversity, Sixteenth meeting, Cali, Colombia, 21 October – 1 November 2024, Online, 3–6 December 2024, Rome, 25–27 February 2025, Report of the Conference of the Parties to the Convention on Biological Diversity on its sixteenth meeting, decision adopted by the Conference of the Parties to the Convention on Biological Diversity – 16/34 Resource mobilisation, UN doc CBD/COP/DEC/16/34 (27 February 2025). Hereinafter: Decision 16/34.

[36] Ibid, Annex I, III. Objectives and actions, Section B, para 1 subpara (e).

[37] Ibid, Annex I, III. Objectives and actions, Section A, para 1, subpara 2(e).

[38] Ibid, Annex I, III. Objectives and actions, Section A, para 3, subpara 9(e).

[39] Ibid, Annex I, III. Objectives and actions, Section B, para 1 subpara (e) (iii), (iv).

[40] Earth Negotiations Bulletin (2024) 9 (855) 5–6, <https://enb.iisd.org/sites/default/files/2024-11/enb09855e.pdf> accessed 31 October 2025.

[41] Decision 16/34, Annex II, para 19.

[42] Conference of the Parties to the Convention on Biological Diversity, Sixteenth meeting, Cali, Colombia, 21 October – 1 November 2024, Online, 3–6 December 2024, Rome, 25–27 February 2025, Report of the Conference of the Parties to the Convention on Biological Diversity on its sixteenth meeting, Decision adopted by the Conference of the Parties to the Convention on Biological Diversity – 16/33 Financial mechanism, UN doc CBD/COP/DEC/16/33 (27 February 2025), para 10. Hereinafter: Decision 16/33.

VI Conclusions

The Convention on Biological Diversity initially recognises the intrinsic value of biodiversity, but no operative provision provides further detail on these statements. Neither its two Protocols nor the COP decisions prior to 2022 elaborate on this issue, but COP decision 15/7 introduces a new concept: Mother Earth-centric action. It also defines the approach's main features, like an ecocentric, rights-based, and non-market-based approach, but the language allows too much room for interpretation. For example, there is no agreed CBD language on what ecocentric means, which is particularly relevant as the relational value of nature is still emerging. It does not specify the exact actions that can be considered within this category. For this purpose, establishing a working group or a subsidiary body within the CBD would be beneficial. This could be designed similarly to the Glasgow Committee on Non-market Approaches, interpreting Article 6(8) of the Paris Agreement.[43]

Mother Earth-centric actions and the concept of living well in harmony with nature have a strong economic emphasis, as references are made to resource mobilisation, financial mechanisms, and sustainable consumption decisions. According to the agreed definition, Mother Earth-centric action represents a rights-based approach. However, the relevant decisions do not include provisions connecting the concept to specific human rights. Nevertheless, the specific reference to its ecocentric nature can be regarded as a beginning of a new, non-anthropocentric interpretation of the CBD. Its actual realisation depends on further actions defined by the COP and their implementation. As we can see, the application of Mother Earth-centric action has been widened, but only in terms of financial decisions. It is welcome that the general financial mechanism decision proposed that the GEF reconsider the concept during the design of the programming directions, as this could facilitate access for vulnerable groups, such as indigenous peoples and local communities. However, other policy areas are silent about this concept, and Bolivia's proposal to strengthen the ecocentric approach within the CBD was not regarded as meritorious. The COP also missed the opportunity to take a step toward elaborating on the concept's further content – for example, by establishing a specialised working group on the issue. A partially positive sign in this regard is that some strengthening can be observed in the financial goals, especially considering the specialised programme window under the GEF, which may lead to actual financial support for the projects implementing this concept. However, whether the GEF and its Council will go beyond mere consideration and decide to integrate Mother Earth-centric actions into upcoming programming directions – the GEF's fundamental strategic document – is a question for the future. This may be groundbreaking because such a decision could simplify indigenous peoples' and local communities' access to funding.

43 Paris Agreement, Paris, 12 December 2015, 3156 UNTS 79 (entered into force 4 November 2016).

ELTE LAW JOURNAL

CONTENTS