LUDOVIKA
UNIVERSITY PRESS

ACTA HUMANA

HUMAN RIGHTS PUBLICATION

VOLUME XI (2023)
ISSUE 1

ISSN 0866-6628 (print)


ACTA
HUMANA
HUMAN RIGHTS PUBLICATION

IMPRESSUM

ACTA HUMANA • Human Rights Publication
The University of Public Service's peer-reviewed,
human rights journal

The publication of this edition was carried out with the cooperation of Balázs Vizi.

Copy editor: Zsuzsánna Gergely

Published quarterly

Published by the University of Public Service | Ludovika University Press
Address: H-1083 Budapest, 2 Ludovika tér
Responsible for publishing: Gergely Deli, Rector

Cover picture: depositphotos.com

ISSN 0866-6628

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Contents

Editorial note

The present special issue of *Acta Humana* beyond publishing innovative articles from young scholars on minority rights and minority issues, includes also two thought-provoking research article from Melinda Szappanyos and Valéria Horváth. In her article Szappanyos explores the challenges the European Court of Human Rights may face regarding the impact on human rights of new AI technologies. While Horváth sheds light on the challenges and difficulties encountered by international legal scholars in tackling the phenomenon of "environmental refugees" under international law.

The four articles in the main section of this special issue cover a wide range of minority rights issues. The Global Minority Rights Summer School, organised by the University of Public Service – Ludovika and the Tom Lantos Institute, every year gathers talented PhD students, young scholars and civil activists to learn about and address current developments in international minority rights law. Asang Wankhede and Nikola Donev both participated at the 2022 Global Minority Rights Summer School. Wankhede's article offers a critical analysis of international human rights regime examining the shortcomings and failure of international human rights norms in addressing the specific challenges Dalits face in enjoying their fundamental human rights. Donev makes an attempt to shed light on the difficult implementation of the Ohrid Framework Agreement that settled the relations between the minority Albanian community and Macedonian majority in North Macedonia. Other contributions include three articles authored by Fanni Korpics, Ekaterina Kosiuk and Renáta Somogyi, who follow their PhD studies at the Doctoral School in Public Administration Sciences at the University of Public Service – Ludovika. Korpics's article focuses on the effects of regionalisation and decentralisation on smaller minority communities from a comparative perspective in three European countries (France, Italy and Spain). Somogyi writes about the situation of the Polish community in the historical Danzig in the inter-war period. The last article in the section on minority issues discusses the theoretical problems of the principle of self-determination in international law and the applicability of the self-determination argument in the case of Abkhazia. Ekaterina Kosiuk does not only point to the historical contradictions that underlie the Abkhazian independence movement, but also reflects on the present-day consequences of the partial recognition of Abkhazia by a few states after 2014. Sadly, Ekaterina could not see the final edited version of her article, her untimely passing in August 2022 leaves us to dedicate this special issue to her memory.

Balázs Vizi, editor

ACTA HUMANA • 1 (2023) 7–32. • DOI: 10.32566/ah.2023.1.1

Could a *De Facto* State Survive without External Help? The Case of Abkhazia

EKATERINA KOSIUK[1]

After the dissolution of the Soviet Union and the Georgian–Abkhazian war, Abkhazia proclaimed its independence; however, at that time none of the other states recognised its independence. Following the so-called Russo–Georgian war, Abkhazia was recognised by Russia and soon after by some other states. How did Abkhazians live during the period when the territory was not recognised internationally and how did life change after gaining some recognition? The aim of this article is to answer these questions, to trace changes after international recognition of Abkhazia and to consider future prospects for wider global recognition. The article also analyses Russian–Georgian relations that had a direct impact on Abkhazia. The article consists of six parts, which analyse the reasoning behind Abkhazian justifications for independence, the right to self-determination, analyse in detail the period of time when Abkhazia existed as an unrecognised and isolated state, and also consider the changes that occurred after Abkhazia was recognised by several countries. This paper analyses the legal and geopolitical aspects behind recognition of internationally disputed territories. The significant role of international organisations in supporting peace in the region is discussed, as well as humanitarian aid to Abkhazia during its isolation.

Keywords: Abkhazia, Georgia, the right to self-determination, human rights, Russian–Georgian relations

The right to self-determination in international law

The right to self-determination in international law can be interpreted in many ways. Since the moment this right was enshrined in the UN documents, there have been discussions among scholars and international lawyers about what exactly the right to self-determination includes. The point is that the customary rules on the right to self-determination do not specify how this right should be implemented. After the collapse of two multinational states at the end of the 20th century, some peoples who did not agree to live within the borders of the newly formed states began to insist that the right to self-determination

1 PhD student, University of Public Service, Doctoral School of Public Administration Sciences

included secession. For instance, Abkhazia, which seceded from Georgia as a result of hostilities, began to insist that they have the right to secession within the framework of self-determination. Abkhazia has presented several arguments to justify its secession, which is analysed in this article.

The right to self-determination appeared as a political concept in the late 19th – early 20th century. However, it was fixed in international law only in 1945 in the UN Charter and then was developed in 1965 in two UN pacts.[2] Many international law scholars analysed the rights of peoples to self-determination, for example, Cassese,[3] Castellino,[4] Knop,[5] Moore,[6] Walter and Abushov,[7] Griffioen.[8] They researched the following issues:

- which groups are entitled to the right to self-determination, in particular, who is this 'people' who is endowed with the right to self-determination
- what the right to self-determination includes: internal self-determination or external
- whether internal self-determination can be applied by the whole population or by minority groups
- whether external self-determination applies only to colonial peoples or to other categories of people as well
- whether the right to self-determination may include secession

Provisions on the right to self-determination can also be found in the Declaration on the Granting of Independence to Colonial Countries and Peoples and Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nation. During the formulation of these documents, delegations from different countries proposed different wording for the right of peoples to self-determination and there were great discussions in the drafting committees. Aspiring to find a compromise, the wording in international documents turned out to be generalised and unclear.

In the modern world in the time of wars of independence, it is important to understand the limits and dangers of the concept of self-determination. Perhaps originally this right served for the good, but after several wars of independence under the pretext of self-determination, it became clear that the right to self-determination can be dangerous. Moreover, secession can lead to the ongoing fragmentation of the territory, and the separation of part of the territory from the 'mother' state, even peacefully, can lead to forcedly displaced peoples.

2 International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.
3 Cassese 1999: 120.
4 Castellino 2008: 503–568.
5 Knop 2002.
6 Moore 1998.
7 Walter et al. 2014.
8 Griffioen 2010.

According to Cassese, "the contention could be made that the Declaration on Friendly Relations links external self-determination in exceptional circumstances". He clarifies that "racial or religious groups may attempt to secession, a form of external self-determination, when it is apparent that internal self-determination is absolutely beyond to reach".[9] At the same time Cassese emphasises that "the possibility to secede under the extreme circumstances has not become customary law".[10] At the end of the 20th century, the concept of remedial secession appeared, according to which the realisation of the right to self-determination through secession is possible if there are gross and massive violations of human rights or/and systematic discrimination, and there are no other ways to change the prevailing reality. The topic of remedial secession came to the fore in connection with the recognition of independence of Kosovo. The International Court of Justice issued a Kosovo advisory opinion, where a most careful wording is selected on the issue of the right to self-determination. Christian Walter in his papers about the Kosovo Advisory Opinion asserts that "even though the Kosovo Advisory Opinion did not expressly say anything on a right to secession, it certainly contributed to the international community's acquiescence to the developments in the specific case of Kosovo; and in that regard, it cannot be excluded that a precedent for other cases was set".[11] It is also important to outline that the ICJ decided not to consider the issue of the limits of the right to self-determination or the possibility of the right to secession as a remedy as being outside the scope of the question posed (§ 83). The ICJ decided that general international law contains no applicable prohibition of declarations of independence (§ 84).[12]

Some authors who were developing the theory of remedial secession are: Buchanan and Levinson (2021),[13] Crawford (2007),[14] Hannum (1990),[15] Hilpold (2009),[16] Raič (2002),[17] Ryngaert and Griffioen (2009),[18] Vidmar (2021),[19] Van den Driest (2013).[20] According to Buchanan and Levinson (2021), the following grounds can be distinguished to justify the remedial secession:

- reclaiming territory over which people were sovereign but which was unjustly taken from them

9 Cassese 1999: 120.
10 Cassese 1999: 121.
11 Mirzayev 2014: 18.
12 International Court of Justice. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010.
13 Buchanan–Levinson 2021.
14 Crawford 2007.
15 Hannum 1990.
16 Hilpold 2009: 47–61.
17 Raič 2002.
18 Ryngaert–Griffioen 2009: 573–587.
19 Vidmar 2021: 779–851.
20 Van den Driest 2013.

- claiming sovereignty over the territory as a result of availing themselves of a last resort remedy against serious and persistent violations of basic human rights
- in some cases, the state's major violations of, or unilateral revocation of intrastate autonomy agreements[21]

Although the main topic of the article is the analysis of whether a de facto state can survive without external help, it is impossible not to consider the topic of the right to self-determination and remedial secession. Abkhazians refer to these provisions of international law, insisting on their own independent state; moreover, these provisions are quoted by other states, which recognised the independence of Abkhazia.

The right of Abkhaz people for self-determination

Most scholars specialising in foreign policy argue that the collapse of the Soviet Union was relatively peaceful and bloodless.[22] Of course, one can agree with this perspective when compared with the collapse of another multinational state which was Yugoslavia. However, could the residents of some parts of the former Soviet Union, usually on the edges of the former country, agree with this statement? For the inhabitants of those territories, the collapse of the USSR was far from bloodless. Almost immediately after the collapse of the union, bloody clashes took place in some territories with disputed sovereignty. Such territories claimed their desire to secede by referring to a long history of their own statehood, combined with an unfair nationalities policy in the USSR and inappropriate use of the principle of uti possidetis during the collapse of the union. They also referred to the internationally recognised right of peoples to self-determination.

Abkhazia is one of those territories that wished to secede from their parent state after the fall of the Soviet regime. After the 1992–1993 war, this republic had almost no relations with its parent state and most of the global community considers Abkhazia exclusively a part of Georgia. In order to understand the right of the Abkhaz people to self-determination, it is necessary to mention some significant events in the history of both the Abkhaz people and the territory they claim. In the context of the present article, the history of Abkhazia can be divided into three parts, which are: before the formation of Soviet regime, during the USSR and after its dissolution.

Going deeper into the history of the formation of the Abkhaz ethnos, it is worth noting that this ethnos began to form on the territory of modern Abkhazia around the 3rd millennium B.C. It formed as a result of the interaction of the local Caucasian population, who had lived in this territory since the Stone Age with the newcomer Asia Minor superstratum, who migrated to the Caucasus and shared their language

21 Buchanan–Levinson 2021.

22 For example *Subversive Institutions. The Design and the Destruction of Socialism and the State* by Valerie Bunce or *Armageddon Averted. The Soviet Collapse* by Stephen Kotkin.

and at the same time adopted the local material culture.[23] At the end of the 8th century, under Leon II, Abkhazia achieved independence from Byzantium and the Kingdom of Abkhazia (778–1008) was established, whose territory covered the whole of Western Georgia. The population of this kingdom consisted of Abkhazians and Kartvelian tribes (Georgians), who according to Anchabadze, constituted a significant majority.[24] It is interesting to note that Anchabadze also claims that in the 10th century the Georgian language was dominant in the territory of the Kingdom of Abkhazia.

After the fall of the Kingdom of Abkhazia, Abkhazia became part of the unified Kingdom of Georgia. And then, after the collapse of the Kingdom of Georgia in the 15th century, the Principality of Abkhazia (1462–1864) was founded. Until 1810, Abkhazia was under the protectorate of the Ottoman Empire. However, from the end of the 18th century, the Abkhaz princes began to look for salvation from Ottoman oppression and found it in the form of the patronage of the Russian Empire. In 1809, Safarbey (Georgy) appealed to the Russian Government for patronage. The request was granted, and in 1810, the manifest of the Russian Emperor Alexander I on the Abkhazian principality joining the Russian Empire was issued.

The Principality of Abkhazia was relatively independent under Russian patronage until 1864, when it was replaced by direct Russian military administration in accordance with which the Sukhum military district was formed. The introduction of the military administration and the annexation of Abkhazia to the Russian system of administrative territorial division caused massive unrest. The largest uprising was in 1866 and was called the Lykhny uprising. The protest movement also grew as a result of the significant resettlement of Abkhazians to the Ottoman Empire. The outflow of population was especially strong after the Russian–Turkish war of 1877–1878. Within 15 years, about 60% of its population had left Abkhazia,[25] entire regions were emptied and the territory was mainly inhabited by Russians, Georgians, Armenians, Greeks and Estonians. The Russian Empire encouraged the resettlement of Christians to Abkhazia instead of the Abkhaz Muslims who left the land and mostly settled in the Ottoman Empire. Moreover, at that time neighbouring Georgia had a shortage of arable land, so Georgian peasants began to move in large numbers to the territory of Abkhazia.

During Soviet time, until 1931 the SSR of Abkhazia and the SSR of Georgia were equal subjects bound by a union treaty. However, in 1931 Stalin ordered that Abkhazia should become an autonomous republic (Abkhaz ASSR) within the Georgian SSR. This administrative division took place without considering the will of the Abkhaz people and it was made only on the order of the central government. Autonomous republics within the USSR had a higher status than the autonomous regions and autonomous okrugs. At the same time, the autonomous republics had a lower rank than the union republics. They were not officially considered subjects of the USSR as

23 Anchabadze–Argun 2012: 94.
24 Anchabadze 1959: 106–108.
25 Anchabadze–Argun 2012: 116.

a federation, did not have the characteristics of a sovereign state (like a union republic). Furthermore, they did not have the right to secede from the USSR or the right to be transferred from one union republic to another. The level of political, administrative and cultural autonomy they enjoyed varied with time, and it was most substantial in the 1950s after the death of Joseph Stalin and in the Brezhnev Era.

During the Stalin years, the government of the Georgian SSR pursued a discriminatory policy towards the Abkhaz population. Political positions in the autonomous republic were predominantly occupied by Georgians, ethnic Georgians moved to the territory of the Abkhaz ASSR, and the names of settlements were changed in accordance with Georgian pronunciation. For example, the name of the city of Sukhum was given a Georgian ending and began to be called Sukhumi. This policy was known as Georgianisation. Until 1950, the Abkhaz language was excluded from the secondary school curriculum and replaced by compulsory study of the Georgian language. The Abkhaz script was replaced by the Georgian graphic basis until 1954, when the Cyrillic script was adopted. In addition, for a certain period of time, the Abkhazians could not study in Russian schools.[26] This problem was urgent since a large number of Russian-speaking population lived in Abkhazia.[27]

The local intelligentsia had repeatedly appealed to the central leadership with a request to grant Abkhazia the status of a fully-fledged union republic, but they were invariably refused. Interethnic tensions in Abkhazia continued to intensify. Mass unrest among the Abkhaz population demanding the withdrawal of Abkhazia from the Georgian SSR took place in April 1957, in April 1967 and the largest took place in May and September 1978. Only after that did Moscow begin to pursue a more inclusive policy towards the Abkhaz. For instance, various quotas appeared for them and ethnic Abkhaz were moved up the career ladder to administrative posts. The Georgians perceived such policy as interference by Moscow in the internal affairs of the union republic.

Georgian–Abkhaz relations continued to deteriorate in the late 1980s. On 18 March 1989, 30,000 Abkhaz people gathered in the village of Lykhny and declared a proposal to withdraw Abkhazia from Georgia and restore it to the status of a union republic. A few months later in July 1989, bloody clashes broke out between Georgians and Abkhazians in Sukhumi.

A new aggravation of tension in Abkhazia occurred in connection with the announcement by the Georgian authorities of the abolition of the Constitution of the Georgian SSR of 1978 and the restoration of the constitution of the Georgian Democratic Republic of 1918. In that constitution Georgia was proclaimed as a unitary state and territorial autonomies were excluded. In Abkhazia, this was perceived as the beginning of complete assimilation of the small Abkhaz ethnos, which by that time constituted a minority of the population of the Abkhaz SSR.

26 Hewitt 1996: 201.

27 Anchabadze–Argun 2012: 116.

During the period of the so-called parade of sovereignties, the tension in Georgia continued to escalate. In Tbilisi, protests were held not only with demands to secede from the USSR but also to abolish the national autonomies within Georgia and to consolidate the leading role of the Georgian people in governing the republic. Most of the rallies were held by students, and such actions were held peacefully.

In February 1989, the rallies resumed with renewed vigour. The slogans remained the same – "Georgia for Georgians". The leaders of the protest demanded the elimination of the autonomy for Abkhazia, South Ossetia and Adjara, as well as the complete transformation of the education system into the Georgian language. The statement of the future President of Georgia Zviad Gamsakhurdia was particularly vivid when he said: "The Abkhazian nation historically never existed." He also declared that "if those tribes will realise it, we can stand next to them, but only with the condition that they restore historical justice and cede our land to us".[28] In a few days 8,000–10,000 people gathered[29] and on the night of 9 April 1989, the Central Soviet Government gave an order to disperse the rally. As a result of that decision, 21 people died and 290 were injured.[30]

The referendum on the preservation of the USSR is important to mention since the Abkhazians often refer to this referendum to justify their right to secede from Georgia. The referendum was held in March 1991 and the main question was "do you consider necessary the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics in which the rights and freedom of an individual of any ethnicity will be fully guaranteed". Georgia refused to participate in the referendum because they had already decided to separate from the USSR. In Abkhazia, however, this referendum took place, and 52.3% of voters participated in it; 98.6% of them voted for the preservation of the USSR.[31] Instead of a referendum on the preservation of the USSR a few weeks later, a different referendum was held in Georgia. The referendum was held to restore the independence of Georgia, which in turn was boycotted by the non-Georgian population. The overwhelming majority of those who participated in the referendum voted for the independence of Georgia, and a few days later on 9 April, the Supreme Council of the Republic of Georgia adopted a declaration of independence. Five days later, Gamsakhurdia was elected President.

After the collapse of the USSR, Abkhazia became a part of independent Georgia according to the principle of uti possidetis. It should be mentioned that by the early 1990s, the share of the Abkhaz population in Abkhazia was only 17%. In July 1992, the Supreme Soviet of Abkhazia[32] annulled the Constitution of the Abkhaz ASSR of 1978 and restored the Constitution of the SSR of Abkhazia of 1925, which raised the

28 Murinson 2004: 5–26.
29 Conclusions of the Commission of the USSR Congress of People's Deputies to Investigate the Events which Occurred in the City of Tbilisi on 9 April 1989.
30 Murinson 2004.
31 The USSR Central Referendum Commission 1991.
32 The supreme body of legislative power.

status of the Abkhazian republic within Georgia from autonomous to contractual. In July 1992, the State Council of Georgia cancelled this resolution of the Abkhazian authorities on the restoration of the 1925 Constitution. Sukhumi declared that the cancellation document had no legal force.

Against this background, on 10 August 1992 the State Council in Tbilisi decided to send troops to the Abkhaz territory to restore order. The official reason given for using the army was the need to protect the railway, which was the only route for transporting necessary goods from Russia to Armenia. Thus, the war began which lasted from 14 August 1992 to 30 September 1993. According to the Human Rights Watch report, during the fighting on the Abkhaz side about 4,040 people (2,220 military, 1,820 civilians) were killed, as well as 8,000 wounded and 122 were reported missing. On the Georgian side, there were 4,000 dead (including military and civilians), about 10,000 wounded, as well as 1,000 reported missing.[33] The Georgian and Abkhaz sides give other figures on the number of deaths during the conflict. The war led to the almost complete devastation of vast areas and massive population displacement. As a result of the hostilities, hundreds of thousands of civilians, mostly Georgians, became refugees and were forced to flee their homes.

After the end of hostilities, the Collective Peacekeeping Forces of the Commonwealth of Independent States (CIS), fully staffed by Russian troops, were deployed in the conflict zone. Their task was to maintain the regime of non-renewal of fire. At the same time, the UN Observer Mission in Georgia (UNOMIG) was deployed on the territory of Abkhazia. The mission was established by the UN Security Council Resolution to verify compliance with a July 1993 ceasefire agreement between the Republic of Georgia and forces in Abkhazia. UNOMIG was subsequently given an interim mandate to maintain contacts with the parties involved and to monitor and report on the situation. It aimed to work towards achieving a comprehensive political settlement. They were also to verify, through observation and patrolling, that troops from either side did not remain in or re-enter the security zone, and that heavy military equipment did not remain or be re-introduced.[34] UNOMIG operated until Russia vetoed an extension of the mission in June 2009.

In December 1996, in accordance with the Security Council Resolution the head of mission of the UNOMIG and Deputy Special Envoy of the Secretary-General for Georgia, opened the human rights office in Sukhumi. The aims of the mission were to protect the human rights of the Abkhazian population, to contribute to a safe and dignified return of refugees and internally displaced persons through improvement of the human rights situation, and to report on human rights developments in conformity with United Nations practices.[35] The office was closed in 2009 due to the termination of the UNOMIG.

33 Human Rights Watch 1995.
34 United Nations 2006.
35 United Nations 1996.

Abkhazians often refer to history in order to justify their right to secession. Many books devoted to the history of the Abkhaz people and Abkhaz statehood exist, therefore it would be impossible to mention all the facts in the present article, the purpose of which is not an analysis of the formation of the nation and state. However, even from the limited data presented here, it can be concluded that the Abkhaz people have a very long and arguably ambiguous history. The people historically lived side by side with the Georgians, and in some periods were included in the Georgian state. However, one cannot fail to note the claim of the Abkhaz for their own state, independent of any others. For example, as mentioned above, the Abkhazian population perceived their annexation to Russia in the middle of the 19th century extremely negatively, and it is also worth noting the repeated demands for withdrawal from the autonomous republic of Georgia in the Soviet period. Moreover, there was no referendum on the inclusion of Abkhazia into Georgia as an autonomous republic. Abkhazia and Georgia signed the agreement on the creation of the USSR on equal terms since both were parts of the Transcaucasian Socialist Federal Soviet Republic (TSFSR) at that time.

By the time of the collapse of the Soviet Union, ethnic conflicts in Georgia were already intensifying. It is significant that the Abkhaz supported the preservation of the USSR, as evidenced by their participation in the referendum on the future of the Soviet Union. These people saw that by the beginning of the 1990s, anti-Abkhaz sentiments were strong in the territory of Georgia, and the desire to abolish all autonomous regions on the territory of the country prevailed. Perhaps the small nation feared for its existence and assimilation with the Georgians. The risks increased with the collapse of such a huge state as the USSR, when the international community was immersed in other emerging problems. Nevertheless, this cannot justify military action, since violence can never be encouraged even for the sake of seemingly honourable aims such as protecting their nation as the Abkhaz claimed. Furthermore, the principle of territorial integrity should not be forgotten, as it is a fundamental principle of international law today.

At the moment, it remains unknown which side was to blame for an outbreak of hostilities, since both sides blame each other. According to the UN fact-finding mission to investigate human rights violations in Abkhazia, both Georgian government troops and Abkhaz forces, as well as irregulars and civilians who collaborated with them, were responsible for violations of the outbreak of the armed conflict on 14 August 1992.[36]

Essential provision of the European Community's Declaration of Guidelines on the Recognition of New States in Eastern Europe and in the Former Soviet Union states that countries will not be recognised if they are the result of aggression.[37] Furthermore, the UN International Law Commission limited the principle of non-

36 Report of the Secretary-General's fact-finding mission to investigate human rights violations in Abkhazia, Republic of Georgia, art. 48–51.

37 EC 1991.

recognition of territorial acquisition by illegal force to acquisition 'by another State', but did not consider it a valid principle in case of secession.[38] Such an approach to the recognition of new states and the complete denial of aggression is reasonable. Peaceful negotiations must always take place, and the parties involved should try to reach an agreement through diplomatic channels.

Abkhazians have their own history and are able to call themselves a nation. Moreover, it should be noted that this nation (genetically) has more in common with the Abazins, Adygs and Ubykhs than with the Georgians.[39] However, it is worth noting here the words of the well-known specialist on nationalism issues Ernest Gellner. He wrote "to put in the simplest possible terms: there is a very large number of potential nations on earth […] our planet also contains room for a certain number of independent or autonomous political units. On any reasonable calculation, the former number (of potential nations) is probably much, much larger than that of possible viable states".[40]

Abkhazia from 1993 to 2008

After the end of the war, Abkhazia became a de facto independent country, even though it was not recognised internationally by any member state of the UN. It has become a de facto state with state symbols, as well as with its own system of government, including legislative, executive and judicial branches. How did this state function before it was recognised by at least several other countries?

After the end of hostilities in September 1993, numerous negotiations began involving both representatives of the conflicting parties and third parties. The attention to Georgian–Abkhaz relations was connected primarily with the fear of a resumption of hostilities, since the peace treaties concluded between Georgia and Abkhazia had already been violated before.

In December 1993, peace talks were held in Geneva under the auspices of the UN, mediated by the Conference on Security and Co-operation in Europe (CSCE) and Russia. As a result, a memorandum of understanding was signed, and the parties pledged not to use force during the negotiations and most importantly to create the conditions for the return of refugees and to exchange prisoners of war. The negotiations came to a standstill in December 1993, when it finally became impossible to deal with the contradictory positions. The Abkhaz side proposed to resolve these contradictions through a referendum and to present three options: the autonomy of Abkhazia within Georgia; a confederation of Abkhazia and Georgia or complete independence of Abkhazia from Georgia. The Georgian side refused to hold such a referendum for its own internal reasons. The Georgian–Abkhaz negotiations continued from January to February 1994 in Geneva, where the question of Russia's

38 Crawford 2007: 267.
39 Anchabadze–Argun 2012: 112.
40 Gellner 1983: 2.

possible implementation of a peacekeeping operation under a UN mandate was discussed. However, Russia did not receive such a mandate.

A significant breakthrough in Georgian–Abkhaz relations was the Statement on Measures for a Political Settlement of the Georgian–Abkhaz Conflict, signed by the parties in Moscow in April 1994.[41] This involved UN mediation and the presence of the Secretary-General of the UN, as well as representatives from the CSCE and Russia. The Statement noted that Abkhazia has its own legislation, constitution and parliament, as well as other state symbols. Moreover, the parties agreed on the powers of joint activities in foreign policy, in particular related to customs and border management. It is important to note that an agreement was reached on the voluntary return of displaced persons to the territory of Abkhazia. However, the agreement was not fully implemented. In 1994, only 311 families out of approximately 240,000 affected people received permission to return.[42] This was mainly due to the provision contained in the agreement that the Abkhaz side had the right to check the returnees on the grounds of security.

According to Stanislav Lakoba, the aforementioned statement called for the restoration of direct channels for negotiation, outlined the contours of the future union state and was regarded by Sukhumi as a confederation.[43] Abkhazian representative Anri Dzhergenia stressed in his speech that "Georgia has recognized the sovereignty of Abkhazia".[44] However, the Georgian side did not consider the statement in the same way as the Abkhaz did.

According to researcher Viacheslav Chirikba, Georgia "tried to solve the problem of Abkhazia through separate military agreements with Russia and increased political pressure on Abkhazia".[45] Indeed, a thaw in relations between Russia and Georgia can be noted. That was demonstrated by Georgia's accession to the CIS, and Russia's solidarity with Georgia concerning Abkhazia. The escalation of Russian–Abkhaz relations peaked in August 1994, when Russian forces disarmed the police and temporarily took control of the city of Gadauta. According to Stanislav Lakoba, the country's leadership and parliament perceived such actions as "open betrayal and a stab in the back".[46]

The Russian authorities hoped that if they supported Georgia in solving the Abkhaz problem, then in its turn Georgia would support Russia with its operations in Chechnya. In November 1994, while fierce fighting was going on in the centre of Grozny and Russia was busy solving its territorial problems, a new constitution was adopted in Abkhazia which proclaimed Abkhazia as a sovereign democratic state. Moscow perceived such actions of Sukhumi negatively, as expressed by the

41 Lakoba 2001: 88.
42 MacFarlane 1999: 36–41.
43 Lakoba 2001: 90.
44 Lakoba 2001: 90.
45 Chirikba 2008.
46 Lakoba 2001: 92.

personal representative of the President of the Russian Federation for the settlement of the Georgian–Abkhaz conflict, Pastukhov.[47] At the same time, Georgian President Shevardnadze, in an attempt to put pressure on Russia, declared that "Georgia will grant Abkhazia the same status as Russia grants to Chechnya".[48]

Russia continued its course towards rapprochement with Georgia by supporting it by supporting its claims in relation to Abkhazia. In December 1994, Russia closed the border with the Republic of Abkhazia along the Psou River, and later Russia stopped recognising Abkhaz passports and cut off all telephone lines connecting Abkhazia with the rest of the world. In January 1996 at the Council of the Heads of State of the CIS a decision was made on the political isolation of Abkhazia. The resolution "on the political settlement of the conflict in Abkhazia, Georgia" was supported by all CIS countries with the exception of Belarus and Turkmenistan. In addition to the economic and transport blockade, the countries pledged not to enter into official contacts with representatives or officials of structures existing on the territory of Abkhazia. Moreover, the member states of the CIS appealed to the UN Security Council with a suggestion to recommend for all member states of the organisation to join the measures listed in the document.

The strict blockade of Abkhazia by Moscow lasted from 1995 to 1997. Abkhazia found itself in a difficult situation, and humanitarian aid was frequently provided by international non-governmental organisations (NGOs). This can be explained by the fact that NGOs were more trusted by Abkhazians since they were not strongly connected with politics. For example, the International Committee of the Red Cross (ICRC) and Médecins Sans Frontières were of particular importance. In the ICRC, the following programs supported the population of Abkhazia during its isolation:

- Canteen Assistance Programme. This project was delegated to the Finnish Red Cross after 1996, providing 6,800 mostly elderly and isolated people with two hot meals, bread and milk daily from 27 community canteens and 7 mobile canteens. One canteen in Sukhumi also served daily meals to children under 15 years of age, either orphaned or belonging to large destitute families.
- Destitute Assistance Programme. According to this program, poor people in rural areas living too far from any of the 27 community kitchens were entitled to receive monthly dry food rations (oil, wheat flour, sugar, canned meat, etc.).[49]

According to some scholars, in addition to the help of NGOs, informal trade and economic relations with Turkey helped Abkhazia to withstand almost total isolation.[50]

Gradually, the interests of Russia and Georgia on the Abkhazian issue began to diverge. According to Coppiters, Moscow was satisfied with the status quo in the

47 Chirikba 2008.
48 Coppieters et al. 1998: 155.
49 ICRC Special Report 2001: 11–12.
50 Burcu et al. 2016.

Georgian–Abkhaz conflict, in which both sides depended on Russia.[51] Therefore, Russia began to build a more thought-out policy towards Abkhazia. Georgia in turn became disillusioned with Russia and increasingly looked towards the Western countries and NATO. That can be illustrated by the fact that in 1996, under Eduard Shevardnadze's presidency, Georgia submitted their first Individual Partnership Plan and in 1997 ratified the Status of Forces Agreement. Georgia opened official relations with NATO in 1998 by establishing a diplomatic mission and presenting an ambassador.

In the fall of 1999, Russia toughened its position concerning Georgia, while relations with Abkhazia thawed. Such a turn may be associated with the arrival of Vladimir Putin in government. Russia lifted the blockade of Abkhazia and also supported the presidential elections in Abkhazia. Moreover, Russia recognised the Act of State Independence adopted by Abkhazia in October 1999. In November of the same year, Putin raised the issue of implementing a visa regime between Russia and Georgia.[52]

During this period, the role of Russia as a mediator in the Georgian–Abkhaz conflict was weakening, but at the same time the UN attempts to maintain peace and return refugees to the territories they had left were of great importance. UNOMIG continued to operate, although it was modified. Every six months, the UN Security Council considered the most recent report of the Secretary-General on the situation in Abkhazia and extended the mandate of UNOMIG for the next six months. It should be noted that both the Georgian and Abkhaz sides created difficulties for the work of the UN missions. For example, in July 1998, a UN employee who had previously worked in Sukhumi was killed in Tbilisi. In the fall, UNOMIG headquarters in Sukhumi was repeatedly bombarded with grenades and three contingent personnel were injured in an attack on a UNOMIG car.[53]

A group of countries called Friends of Georgia also played an important role in the negotiation process. It was an initiative that consisted of France, Great Britain, the United States, Germany and Russia, and was founded to assist the UN Secretary-General in the peacekeeping process. However, according to the Abkhaz leadership, the Western members of the Group of Friends of Georgia were critical of Abkhazia and were guided by economic and geostrategic interests, so the group could not be viewed as impartial.[54] In 1997, the Group of Friends of Georgia adopted a more neutral name, the Group of Friends of Secretary-General on Georgia, as an informal group of states formed to support the peacemaking of the United Nations.[55]

The Abkhaz side has often shown its distrust of the UN. The fact is that in the opinion of Abkhazia, the UN uncritically condoned the use of force by Georgia

51 Coppieters 2000: 51.
52 Filippov 2009: 1832.
53 MacFarlane 1999: 36–41.
54 Cohen 1999: 93.
55 Deutch 2020.

in Abkhazia in August 1992. The reason was that according to Western interpretations this interference did not violate international law, since Georgia as a sovereign state had the right to establish order on its territory and protect its territorial integrity. The Abkhaz side could not agree with this position.[56]

During the period of isolation, Abkhazia took part in international life through participation in the Community for Democracy and Rights of Nations. This Organisation was founded in 1992, however, only established a permanent coordinating body in November 2000, which was called the Conference of Foreign Ministers. Currently, the organisation includes Abkhazia, South Ossetia, the Nagorno-Karabakh Republic and the Pridnestrovian Moldavian Republic. In the 2000s, this organisation was of great importance for Abkhazia, since the organisation gave an opportunity for the unrecognised countries to communicate on equal terms and participate in international relations, even though this cooperation concerned only these *de facto* states. In addition, they were able to discuss the problems of non-recognition, which affected all members of the organisation almost equally.

In summary, it should be noted that during the years following the end of the war, no international actors supported Abkhazia and it found itself internationally isolated. Nevertheless, the negotiation process did not stop and that is to the credit of international organisations, in particular the UN. Until the 2000s, the Abkhaz were suspicious of both Russia and the UN. Trade restrictions created great difficulties in Abkhazia, however, they could not force the Abkhaz to make concessions and only gave rise to a siege mentality which forced the people to rally. It is important to note that with the beginning of the Putin era, Russian–Abkhaz relations warmed and the gradual passportisation of the Abkhaz population began.

The events of 2008 and Abkhazian recognition

In 2002, the law on 'Citizenship of the Russian Federation' was adopted in Russia, according to which former Soviet citizens could obtain Russian citizenship through a simplified procedure. Residents of Abkhazia took this opportunity with enthusiasm, since with a Russian passport it became possible to travel to other countries as well as to receive education in Russia. Soon after the law came into force, a mass collection of Russian passport applications was organised on the territory of Abkhazia, and a special office was opened in the largest Russian city close to Abkhazia, Sochi. It is difficult to say what really motivated Russia at that time to pursue such a policy. Was it really a gesture of goodwill and a desire to help the Abkhaz population, who have been living practically under blockade for many years, or was it a political move thought out for years to come? Some researchers boldly state that passportisation in a breakaway region by a third country dramatically violates the traditional state's territorial sovereignty and Georgia is a case in point.[57]

56 MacFarlane 1999: 39.
57 Gerrits–Bader 2015: 297–313.

Indeed, the large number of Russian citizens in the Georgian breakaway regions gave Russia a pretext for violating the principle of non-interference in the affairs of sovereign states in 2008. The author of the article "Russia Resurgent? Moscow's Campaign to 'Coerce Georgia to Peace'" argues that Moscow's use of the passportisation instrument was entirely successful in allowing them to justify applying the Responsibility to Protect mechanism to intervene in Georgia.[58]

The conflict in Georgia in 2008, also known as the Five-Day War or the Russo–Georgian War, was a dramatic escalation of tensions that had been growing in the previous years. Relations between Russia and Georgia had started to deteriorate rapidly in the 2000s after Putin came to power and deteriorated further after Saakashvili became President of Georgia. Nevertheless, from the very beginning of Saakashvili's presidency the relationship between Russia and Georgia did not suggest such a sharp deterioration. Saakashvili came to power as a result of the Rose Revolution in November 2003, with Russia reacting calmly to Shevardnadze's departure. This may be evidenced by the fact that the negotiations between Shevardnadze and Saakashvili's coalition took place with Russian mediation. The Russian Foreign Minister Igor Ivanov was instrumental in breaking the impasse. The negotiations ended with Shevardnadze's announcement of his resignation. However, it soon became clear that Saakashvili did not live up to Moscow's expectations, and Russia's relations with the unrecognised republic of Abkhazia continued to warm.

Further events developed rapidly. Saakashvili announced that Georgia would like to join NATO. In 2007, Saakashvili demanded the withdrawal of Russian troops from Georgia in spite of the previous agreements that Russian military bases would continue to operate until the end of 2008. The troops were withdrawn ahead of schedule with the exception of the Russian peacekeeping units which operated under a CIS mandate in Abkhazia and South Ossetia. In January 2008, 77% of Georgian voters were in favour of joining NATO according to the referendum. In response, Russia announced the lifting of economic sanctions against Abkhazia. By lifting sanctions, Russia was sending a warning to Georgia and its western allies that Moscow would not tolerate the presence of NATO on its southern borders.

During that period, Kosovo declared its independence and was recognised by most of the EU countries and the United States. Russia, on the one hand, perceived the declaration of Kosovo's independence negatively. It stated that a legal precedent had been created which could be applied in other similar situations with self-proclaimed states.

On 10 August 2008, Georgia brought its troops into the conflict zone of South Ossetia, in response to which Russia also deployed its military units. Ten days after the conflict started, the parliament of Abkhazia appealed to Russia with a request to recognise the independence of the republic. On 26 August, Russia officially recognised the independence of Abkhazia and South Ossetia, after which Georgia cut all

58 Allison 2008: 1145–1171.

diplomatic ties with Russia. The act of recognising the independence of Abkhazia and South Ossetia by Russia was viewed as unacceptable by a majority of leading states. Leaders of international organisations expressed concern over Russia's decision and supported Georgia's territorial integrity.[59]

In legal terms, Russia violated several obligations arising from international law through its recognition of Abkhazia. In the opinion of Farhad Mirzayev, by signing without any reservation the UN Charter, the CIS Foundation Agreement, the Almaty Declaration, the CIS Charter, and a number of other relevant legal instruments, Russia had recognised the territorial integrity and inviolability of the boundaries of the Republic of Georgia. This certainly implied that Abkhazia was a part of Georgia's territory.[60] Moreover, in 1994 the CIS members signed the new Declaration on Respect of Sovereignty, Territorial Integrity and Inviolability of Boundaries of Member States, which reinforced the application of the principle of uti possidetis to the territory and boundaries of the former USSR republics. That document remains in force until the present time.[61] In January 2021, the ECHR finally made a decision on the case of Georgia v. Russia after the events of 2008. The verdict confirmed the occupation of the sovereign territories of Georgia, as well as the responsibility of the Russian Federation for significant violations, since Russia exercises de facto control over the Tskhinvali region and Abkhazia.[62]

However, during the recognition of Abkhazia's independence, Russia also presented its legal arguments. In his Presidential Decree, former Russian President Medvedev cited various international legal sources including the UN Charter, the 1970 Declaration on the Principles of International Law Concerning Friendly Relations among States and the 1975 OSCE Helsinki Final Act.[63] According to Chirikba, the recognition of Abkhazia and South Ossetia by Russia only formalised the factual disintegration of the former Georgian SSR.[64] The Russian side also argued its position on the grounds that Abkhazia had already been a self-governed independent polity outside of any Georgian jurisdiction and control for a period of 15 years. Nonetheless, the statement of senior Russian officials should be emphasised when they stated that "Abkhazia and South Ossetia are unique cases and should not be a precedent for other territories".[65]

Soon after the recognition by Russia, several other UN member states recognised the independence of Abkhazia. The first was Nicaragua, then Venezuela, Nauru and finally Syria. In some of these countries, Abkhazia has its own representation, and their diplomats are represented in Sukhumi. Some ambassadors combine the status of ambassador to Russia and Abkhazia, for instance the Venezuelan ambassador

59 BBC News 2008.
60 Mirzayev 2014: 202.
61 CIS 1994.
62 European Court of Human Rights 2021.
63 Nikolsky 2012.
64 Chirikba 2008: 12.
65 Chirikba 2008: 12.

to Moscow. It is difficult to say exactly what reasons motivated these countries to recognise the independence of Abkhazia, however, there is a widespread opinion that by doing this, the above-mentioned countries were seeking to improve relations with Russia and subsequently Russia wrote off state debts from them.[66] Nevertheless, the analysis of economic interests is beyond of the scope of this article.

Many countries negatively assessed the recognition of Abkhazia by Russia. This was especially true of the member states of the European Union. For example, the British Foreign Secretary David Miliband commented on the Russian decision as follows: "Russian recognition of Georgia's breakaway regions was unjustifiable and unacceptable".[67] The Hungarian Foreign Ministry expressed regret over the decision of the Russian President stating that "these decisions will not contribute to stabilization in the Caucasus region and negotiations on resolving a serious conflict […] the Republic of Hungary, being a member of the European Union and NATO, strictly adheres to the position that this conflict must be resolved through dialogue and peaceful means, respecting the territorial integrity of Georgia and its internationally recognized borders".[68]

Russia recognised a state that emerged through violence, which contradicts some fundamental documents of international law. A rhetorical question arises as to whether this action might create a precedent for other peoples to secede from their state with the help of force and to establish a new state. Also, the fact that Abkhazia has been recognised by few countries globally may indicate that the practice of self-determination through secession appears in international law and Remedial Secession is not only theoretical. Usually, remedial secession is seen as a measure of last resort, where the very existence of the people or their characteristic features are in danger. A wave of interest in these issues was caused by the consequences of the declaration of independence by Kosovo and the adoption of an Advisory Opinion. It is worth noting the position of Russia on the declaration of independence of Kosovo. In a written statement by the Russian Federation on the Kosovo Advisory Opinion analysing remedial secession, Russia acknowledged the possibility of unilateral secession, but emphasised that this was not the case with Kosovo.[69] This opinion was given after the recognition of the independence of Abkhazia and South Ossetia.

Thomas de Waal, a scholar who specialised in the Caucasus region, made the following prediction regarding the future of the unrecognised states in the South Caucasus. "These separatist statelets have defied predictions that they would disappear and show every sign of persisting into the foreseeable future".[70]

66 Kukolevskiy 2010.
67 Tran 2008.
68 Napi Online 2008.
69 International Court of Justice 2009.
70 De Waal 2017.

Abkhazia today

As for today, one of the main hopes of Abkhazians is the recognition of their country by the rest of the world. The Abkhaz nation had lived for almost 15 years in isolation hoping that one day they would be recognised. However, the most important question remains whether Abkhazia has a chance to be recognised by other countries as well. Despite the great expectations of this nation to be a fully-fledged state with international recognition, one should not forget about Realpolitik. Practice shows that while human rights are of great value especially for some international organisations and for Western democracies, some countries nevertheless are driven primarily by their geopolitical interests.

As Souleimanov, Abrahamyan and Aliyev state in their article, "although the existing literature on unrecognized states expands well beyond the argument that these political entities are mere 'puppets' in the hands of their stronger neighbours or their base states, it is a fact that unrecognized states have masterfully been utilized by the regional actors that are their benefactors in their quests for regional dominance".[71] Is it possible to say that Kosovo also was 'puppet' in the hands of their stronger neighbours? Perhaps in the early 2000s there were some grounds to reason about it, but as for today most of the world has recognised the independence of Kosovo and therefore this is not the case.

The recognition of states is a unilateral expression of the will of one state in relation to a territory that wants to secede, and no international organisation can impose their opinion on a particular state. The case of Abkhazia did not become as resonant as the case of Kosovo. One can argue at length whether the Abkhaz had the right to self-determination by means of secession after the collapse of the USSR or whether there was genocide of the Abkhaz on the territory of Georgia before their secession. There was also discussion about whether there really was a threat of the complete disappearance of the nation. However, what is certain is that the modern world does not accept violence and war, moreover the principle of territorial integrity also should be kept in mind. Russia is still accused of recognising Abkhazia. For example, in August 2021, seven Western countries called on Russia to withdraw recognition of the independence of South Ossetia and Abkhazia.[72]

It is worth noting that despite the non-recognition of the independence of Abkhazia and the condemnation of Russia by some EU member states, the European Union still interacts with Abkhazia. In December 2009, the EU approved a non-recognition and engagement policy (NREP) for Abkhazia and South Ossetia. This policy provides communication with both territories, however, the recognition of their independence is unequivocally ruled out. The interaction of the EU with Abkhazia is illustrated by the fact that from 2008 to 2017 the EU allocated almost 40 million euros in the framework of the NREP to finance projects in Abkhazia or with the participation

71 Souleimanov et al. 2018: 73–74.
72 JAM News 2021.

of Abkhaz partners.[73] The financial aid went to support local NGOs, health and education, repairing water supplies and rebuilding houses that were destroyed by the hostilities. According to Thomas de Waal, "despite this large sum, the EU's visibility has remained low in Abkhazia".[74]

The current place of Abkhazia in the international arena is quite interesting. For example, despite the non-recognition of Abkhazia by most of the world, an NGO such as Freedom House considers Abkhazia as a separate country in its reports. Moreover, in the rating for 2020 Abkhazia was estimated as 'partly free' and received 40 points whereas Russia, which is the patron of Abkhazia, received half of these points, as well as the status of 'not free'. The report noted that the tumultuous political environment features significant opposition and civil society activity. Ongoing problems include a flawed criminal justice system, discrimination against ethnic Georgians, and a lack of economic opportunities.[75]

Another important international rating but from an international organisation is the Universal Periodic Review (UPR) by the UN. Since the Human Rights Council only considers the UN member states in this review, the Abkhaz issues are addressed in the review of Georgia. The last such review was in 2021. The Report of the Working Group for the UPR noted that the delegation was concerned that international human rights organisations were constantly denied access to Abkhazia. After analysing the comments of representatives of different countries, it becomes clear that representatives of the EU countries mainly express concern about the situation in the field of human rights in Abkhazia. Even though the report is supposed to be devoted to human rights, it also might have a political feature. The Russian Federation stated that references to the occupied status of Abkhazia and South Ossetia in the national report were unacceptable. Furthermore, Russia recommends conducting a thorough investigation into all the facts of crimes and human rights violations committed by the Georgian authorities before and during the 2008 conflict in the territories of Abkhazia and South Ossetia.

In regard to politics, which in any case is associated with the recognition or non-recognition of de facto states, one should not forget about human rights. It is paradoxical that in the literature related to the right to self-determination of Abkhazians, a lot has been written about geopolitics and about the interests of Russia or Western countries and yet so little attention is paid to human rights. During the proceedings and the disputes about which side provoked the war in Abkhazia, the world community forgets about the huge number of internally displaced persons. It was only international organisations which did not stop the dialogue during Abkhazia's period of isolation trying to facilitate the return of thousands of people to their homes.

73 De Waal 2017.
74 De Waal 2017.
75 Freedom House 2020.

Currently, human rights in Abkhazia are provided under Chapter II of the Constitution of the Republic of Abkhazia, which refers to Abkhazia's join to the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.[76] Since Abkhazia is not a member state of the UN, officially it cannot be considered a state which signed these covenants. In 2016, the position of the Commissioner for Human Rights was established in Abkhazia, and in 2019 the first Annual Report on the Activities of the Commissioner for Human Rights was issued. In the report, the main problems in the field of human rights were considered, and some recommendations were also given.[77]

Today Abkhazia is a partially recognised state whose residents continue to experience enormous inconveniences. What are the legal, political and real-life consequences of partial recognition? The non-recognition of an Abkhaz passport is a salient issue and it is problematic for Abkhazians to travel abroad. Even taking into account the Russian citizenship, obtaining a Russian foreign passport is difficult as only citizens who have residency in the territory of Russia can apply for such a passport. There are not many Russian citizens living in Abkhazia who have this residency. Another example, which might even be seen as paradoxical, concerns education abroad. According to the EU policy of interaction with unrecognised states, some European universities provide scholarships for Abkhaz students.[78] However, for Abkhaz students, an internationally recognised foreign passport is necessary to study abroad. That means that a European government needs to grant a visa to the Abkhaz holder of a Russian passport and according to Waal, this is "something that not every government is prepared to do".[79] Additionally, popular international chain shops and fast food restaurants are not available in Abkhazia and movie theatres also cannot be found. The country does not have a wide variety of foreign-made goods, moreover, the banking system cannot function properly. However, it is interesting to note that in Abkhazia a Duty Free shop is open on the border with Russia. Finally, the airport on the territory of Abkhazia does not operate international passenger flights because the International Civil Aviation Organization (ICAO) recognised the territorial integrity of Georgia and therefore the Sukhumi airport cannot be recognised as an international airport. According to ICAO, the airspace above Abkhazia cannot be opened without the permission of the Georgian authorities otherwise it might violate international regulations.[80] Member airlines of the International Air Transport Association (IATA) do not operate flights to Abkhazia in order to avoid sanctions and Russian airlines also do not fly to Sukhumi for this reason. Thus, in order to fly to any Russian city,

76 Constitution of the Republic of Abkhazia 2014.

77 *Annual report on the activities of the Commissioner for Human Rights in the Republic of Abkhazia for 2018–2019.*

78 For example, two Chevening scholarships are available, allowing Abkhaz students to study at British universities.

79 De Waal 2017.

80 Ministry of Foreign Affairs of Georgia 2019.

Abkhazians should firstly reach the border with another state and only from there they are able to board a flight to another destination. As a rule, it is the 'Psou' border with Russia and this significantly complicates the life of ordinary citizens.

It is also worth noting the position of the Georgians on a possible opening of branch offices of foreign companies in Abkhazia. This primarily applies to transnational corporations, which through the opening of their branches on the territory of a partially recognised state indirectly recognise its independence. The case with McDonald's in 2014 can be illustrated. McDonald's published on its website some information suggesting that a franchise of its restaurant could operate in Abkhazia. Soon after McDonald's denied this information. Nevertheless, some newspaper articles declared that "Georgia claims it has averted an accidental encroachment on its sovereignty by one of the world's most powerful forces. No, not by Russia. By McDonald's".[81] Moreover, the idea was mooted in Georgia of boycotting the company's four Georgia-based restaurants.[82]

Eventually, Abkhazian people are deprived of some services and their life is greatly complicated just because the status of the territory where they live is contested. These people work, study and would like to travel abroad, just like residents of recognised states. Moreover, they chose institutions and leaders for themselves that function in the same way as institutions of recognised states. Should these people join the state with which they had a war within living memory, and do they have the moral right to do so?

The way out of this situation would be the creation of some international commissions or committees that would purposefully deal with the problems of people who live in unrecognised states. Moreover, it would be extremely useful to introduce some neutral passports, the holders of which could travel to other countries without any particular difficulties.

Conclusions

The desire of the Abkhazians for self-determination through secession and the conviction of the Georgians in the territorial integrity of their country illustrate the contradiction between the right to self-determination and the territorial integrity of the state. In the theory of remedial secession, there are several justifications for the claims of independence; therefore, it is worth considering how the Abkhaz themselves legally explain their right to self-determination, expressed through secession. The three most common arguments should be highlighted: oppression by the majority, the illegitimate authority of the Georgian leadership in 1992 and dissolution of the USSR. One of the main arguments is the existence of the Abkhaz state before joining the Georgian SSR. According to the former Minister of Foreign Affairs of Abkhazia Viacheslav A. Chirikba "in the 20th century, within the Soviet framework,

81 Lomsadze 2014.
82 Democracy & Freedom Watch 2014.

the statehood of Abkhazia is declared in all Abkhaz and in Georgian constitutions".[83] He clarifies his opinion by stating an example. On 31 March 1921 Abkhazia was proclaimed a Soviet Republic, and the Georgian Revolutionary Committee (Revkom) recognised the independence of the Soviet Socialist Republic of Abkhazia.

Also, in explaining its independence, the Abkhaz side refers to the aforementioned referendum on the preservation of the USSR. The fact is that on 3 April 1990 the Soviet law on secession was adopted. According to this law, the autonomous republics and autonomous regions could decide independently whether or not to join the secession of the Union republic in which they were situated. Therefore, Abkhazia as an autonomous republic could decide by itself whether to withdraw from the Soviet Union as a part of Georgia, which was separating. The results of the referendum showed that Abkhazia had no desire to leave the USSR as a part of an independent Georgia. If the USSR had not collapsed, it is likely that Abkhazia would have remained a part of the Union and there would be no legal dispute about the status of Abkhazia within Georgia. This issue only arose as a result of the rapid dissolution of the USSR.

There is also a compelling case for the violation of the principle of 'non-use of force', given by the UN against recognition of Abkhazia. The precedent of East Pakistan can be cited. Violent secession took place in March 1971 after the unilateral declaration of independence by Bangladesh, which was soon recognised by many states. Clearly, there are many differences between Bangladesh and Abkhazia but the fact that the state was recognised by the outside world, even though force was used during the secession, still raises important questions.

However, the right of people to self-determination is very controversial and just a few researchers agree that it can be exercised through secession. The territorial integrity of states is still of great importance in international law. Imagine if each nation would like to separate from its 'mother' state, then fragmentation will be endless. Moreover, state practice remains opposite to secession. The fact that the secession of Abkhazia from Georgia may not comply with international law is illustrated by the fact that only five UN member states recognised the independence of Abkhazia. According to Cassese, "since the emergence of the political principle of self-determination, states have been adamant rejecting even the possibility that nations, groups and minorities be granted a right to secede from the territory in which they live".[84]

Returning to the fundamental question of whether the de facto state can survive without external help, the analysis of Abkhazia showed that it is possible. In the history of this self-proclaimed state, there was a period when Abkhazia was not recognised by any state in the world, moreover, the neighbouring territories actively increased the isolation of Abkhazia. Nevertheless, the country survived during those difficult years. Furthermore, the example of another territory which is not recognised by any recognised state has to be mentioned. Transnistria exists as a de facto state

83 Chirikba 2009.
84 Cassese 1999: 122.

around 30 years despite the fact that it is not recognised internationally. However, a significant difference in the history of Transnistria and Abkhazia is that Russia has never turned away from Transnistria and indirectly has always supported this self-proclaimed state, while Abkhazia had been isolated for several years.

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ACTA HUMANA • 1 (2023) 33–48. • DOI: 10.32566/ah.2023.1.2

Applying the Logic of Regionalisation in Minority Studies

FANNI KORPICS[1]

This paper aims to highlight why the logic of regionalisation can be applied in minority studies. Overall, the introduction of a regionalised structure benefits minority groups in a country, simply because through decentralisation their voices can be better heard. Two components constitute regionalisation: the strengthening of regional identities within the population, and the political will of the central state to enhance effectivity in public administration. Regionalisation is a concept based on the rediscovery of the necessity of territorial management which is slowly returning to public administration structures all over Europe, but especially in Spain, Italy and France. These three countries are represented in this paper as examples of countries where the status of minorities can be examined through the analysis of the regionalisation process introduced there.

Keywords: region, regionalisation, minority, language, public administration

Introduction

The world as we know it today experiences very serious and fundamental changes. Recognising that these have already been discussed by several papers at length, this present one wishes to highlight how the various global changes affect the international system, societies and minorities. We are now on the verge of the process that will probably lead to the erosion of the Westphalian system of nation states, and the rise of a new order that for now is difficult to define, and where both supra- and subnational levels are bound to gain in relevance. What I notice is that this new structure favours the creation of regions where local, national and transnational identities are also taken into consideration at the same time. Globalisation and localisation together point to a direction that prompts traditional nation states to decentralise, which might give room to new and more successful measures of minority protection.

As the world is becoming more and more globalised and new administrative, economic and social structures emerge we tend to think of subnational regions as a post-modern concept, losing sight of the fact that regions had been integral

1 PhD student, University of Public Service, Doctoral School of Public Administration Sciences

parts of governance up until the birth and the consolidation of the modern nation state. There are some researchers who believe that especially within the European Union a 'Europe of regions' will emerge making the regional level the most important among the above-mentioned ones. I personally disagree with this idea, yet I think that the regions will gain in relevance in the decades and centuries to come, especially in nations where relatively big proportions of the population belong to minority groups. I put a special emphasis on linguistic minorities, given my conviction that while most elements of the individual and group identities can be shaped by political will and systemic regulations, changing the mother tongue of a people is extremely problematic, almost impossible to realise.

Research materials discussing nations and minorities tend to overlook why an individual identifies with either one of them or both. To remedy this, I offer one possible solution, through the analysis of the connection between territory and identity. When a minority is confined in a smaller geographical space in a way that individuals are born to the community and do not leave it not even when they reach adulthood, maintaining a minority identity is easy. To establish and to impose national identity in a country where there is a considerable number of individuals not naturally sharing it is a difficult and a long process. When the imposition of a new national identity is needed political elites usually create imagined communities.[2] This concept introduced by Benedict Anderson is applicable not only in determining what holds national communities together, but we can also use it in defining the boundaries naturally developing or sometimes artificially being developed between a national majority and the minorities. These are constructed phenomena in my opinion that are continuously shaped and reshaped by the political elites both on a national and occasionally on a regional basis. When members of a community spread out on a vast territory, it is necessary to create and to continuously renew an identity members of the entire group can relate to, or at least aspire to be able to relate to. When regional identities strengthen within a formerly assimilated society, these constructed concepts erode presenting the need for something new. As central states do not tend to give up control over territories and populations, they introduce regionalisation so that they can remain in control of constructing identities while allowing a little space to regional characteristics. That is why instead of the essentialist approaches applied by many scholars I choose the modernist one, recognising the fact that national and minority identities have relevant historical roots, but arguing that it is rather a construction process that have been shaping them the way we encounter them today.

In several countries regions are historically well-established institutions. When giving a vague definition of the region – given the fact that different countries have different understandings of this concept – we have to draw attention to the following elements: it is a level of administration below the state but above the local level; it has its own capacities and areas of authority; it benefits from its own financial resources; it

2 Anderson 1983.

relies on its own organisation led by its own functionaries; and sometimes in addition to the executive powers it can also exercise judiciary powers. After presenting my understanding of regionalisation, I will attempt to examine how it can influence the situation of minorities, and following that, I prove my assumptions through the examples of Spain, Italy and France.

Spain's situation in terms of its relationship with its regional elements is the most complex, as we cannot say that it is a federalised country, yet its autonomous communities benefit from a high level of self-governance. In Italy, the notion of regions is strongly linked to the regional identities of the population, which is stronger in the case when minorities inhabit the territory. France, on the other hand, puts no emphasis on the identity of regional populations, in its centralised structure regions only serve to distribute development funds and carry out the highest possible level of social justice. In all three of these states regionalisation as a concept appeared as an alternative way of decentralisation or at least deconcentration as opposed to the heavy centralisation they had been experiencing for centuries before that.[3] In the second half of the 20th century, there were two forces triggering the need for regionalisation: regionalism and modernisation. Regionalism is a bottom-up process which calls for regions because of the re-found regional identities of the population, while the need for modernisation comes from the central state and sees an opportunity in smaller divisions of administration and economy.[4] Leading scholar Michael Keating introduced the concept of the "New Regionalism"[5] which is different from its medieval and pre-modern forms, in fact it is a post-modern form of regionalism, which means that for nation states in order to be able to function properly among the various challenges of our day, they will have to let go of the two centuries old rigid idea of nationalist and assimilative centralisation, and re-discover the historical roots they were built upon.

The concept of regionalisation

The term "region" comes from the Latin verb *regere* which originally meant: to govern.[6] My research is based on this ancient concept of region, from a governmental point of view. I would like to uncover what the institution of regions adds to the effectiveness and inclusiveness of a nation's public administration. There are several fields of science where they use the word region varying from geography to international relations theory. In my viewpoint an interdisciplinary approach is absolutely crucial when establishing the public administration of a country, especially if it is one where minorities reside. The birth of regionalisation in the second half of the 20th century took place in Western Europe, in a geographical area where for

3 Keating 1988: 184–204.
4 Józsa 2006: 166–170.
5 Keating 1998.
6 Sipos 1993: 13.

centuries the concept of centralisation and homogenisation prevailed. Before every state throve to establish a solid national identity that was commonly shared by every citizen and could be passed on to immigrants, if need be. However, since the 1960s what we experience is the strengthening of group identities that are linked to specific territories usually considerably smaller than a nation state. What once had been a scene for nationalisation and assimilation, became the scene for regionalism by the turn of the millennium.[7] Regionalisation is a concept present and applied more or less in the whole of Western Europe, and it is especially developed in Southwestern Europe. The condition of regionalisation is regionalism which is a bottom-up movement in societies where territoriality, ethnicity and socioeconomic disparity are equally represented. Regionalism emerges in countries where there are definable political, economic or socio-cultural regional differences.[8]

Regionalisation can be equally conducted in countries with unitary and with federal systems, despite their different understandings of regions. While for a unitary government, regions are merely a level of governance, in federal systems regions are organic elements of the administrative structure and they tend to grant more capacities to regions as well. Incentives for regionalisation are stronger in countries where autochthonous minorities reside on an easily definable territory, where they might represent a regional majority. In my take, regionalisation is one form of decentralisation, where the new subnational units are the regions. It is important to draw attention to the fact that in this framework the regions are supposed to be the level of governance right below the central, state unit. Decentralisation is a tendency that we can see developing in European countries, since the 1950s. While then, it was only a quarter of the European population that lived in decentralised countries, this figure grew to 60% by 1990,[9] and today we can hardly find a state where at least a low degree of decentralisation has not yet gone underway. Nevertheless, it is important to emphasise that when we assess the results of regionalisation on minorities living in those regions, we also have to consider that decentralisation is designed and carried out according to the interests of the national majority, and often it is based on their good will whether political elites are open to give room for increasing the capacities of the regions vis-á-vis the central state.

Regionalisation is a process that started as a consequence of the re-territorialisation of politics in Western Europe. Territory as a central element of political and social life, of economic exchange and structure of markets was rediscovered. State functions once again were connected to territory, just this time not in a centralised framework but a decentralised one. It became obvious in the second half of the 20th century that politics cannot be conducted without taking the identities of the populations into account. Indeed, one of the important elements of personal identities is territory, as it gives the everyday ground of life. Territory builds cohesion among people that share

7 A. Gergely 1997.
8 Hueglin 1986: 439–458.
9 Horváth 2001.

it, and recognising the linguistic and cultural differences that derive from territorial particularities is one of the most effective bases for minorities to thrive. This is why taking territory into consideration in social sciences is absolutely necessary, especially because it had been overlooked for such a long time. The region as a territory defined within a country came to life once again because of the re-discovery of territory and the benefits of territorial management. Regions as a specific type of territory can be defined according to the arrangement of differentiated physical spaces in the country, the economic functions attributed to it, and – what is central to the topic of this paper – characteristics of the population inhabiting it.[10]

It needs to be highlighted that regionalisation is not the same as federalisation. Regionalisation can be conducted both in federalised and in unitary structures. In the former, the federalised units are given well-defined powers and their constitutional role is better articulated than in the case of the latter. In a federation the units' political autonomy is enshrined in the constitution, while with the case of a regionalised state it is the centre's right to define their role in the administrative structure, their territory and their capacities, and very importantly their budgets, too. The power relations between the centre and the decentralised units are very different, and when it comes to minority protection a federation might seem more effective, yet if a country transitions from a totally centralised unitary structure to a looser one, regionalisation can in fact remarkably enhance the advocacy potential of minorities and regional communities. Often one of the most important reasons behind regionalisation is in fact the presence of groups on the national territory which have a common cultural and linguistic identity that differentiates them from the majority of the population. Besides, there is no guarantee whatsoever that a federalised structure will benefit minorities. Regionalisation is always based on a political decision but it can be additionally based on several different factors such as the presence of regions throughout the country's history, the surge of separatism among minority groups, too big territory to be governed in a unitary structure, over-concentration of the population on certain territories, remarkable socio-economic differences between certain territories. Overall, regionalisation is a highly flexible solution compared to the structure realised in federalised states.[11]

My approach to regionalisation and its application in defining the relations between minorities and the majority depicts a long process that can be best described by dialectics: the process started with assimilation, then as a response to that came regionalism, which in the end resulted in regionalisation. Assimilation is a tool in the hands of the homogenising nation state that has the objective of depriving minorities of their cultural and linguistic characteristics, hence to carry out acculturation. In this framework the cultural genocide can happen in two different ways. There can be an aggressive form of assimilation that requires citizens of the state to adopt the same culture, language, customs and traditions as the majority of the population

10 Keating 1998.
11 Józsa 2006: 170–182.

discriminating against those who do not comply with this requirement. On the other hand, it can also be incentivised and rewarded, by presenting all the benefits that belong to the majority, ranging from social mobility to international respect and recognition. It should also be noted that aggressive assimilation tends to be the means of dictatorships and totalitarian systems, while incentivised assimilation is applied more often by liberal democracies. Still, we can hardly mention an example of a European nation-building where we cannot detect at least some form of assimilation.[12]

After the period of assimilation came to an end, most countries could experience the effects of regionalism, which is a bottom-up process, where elements of the society re-discover their regional identities and make effort for preserving it for the next generations. When looking at the relationship between the national majority and the minorities from a public administration point of view I consider regionalism to be an intermediary stage which softens the strong desire for homogenisation, and transforms the public administration and the governance mindset of the political elites. Regionalisation on the other hand is a top-down process where it is the central state that initiates decentralisation for different reasons.[13] These reasons can vary from domestic to international. When they are domestic, they are often political, by this, I mean that it is implemented in order to enhance the effectivity of governance or to avoid social tensions and above all the secession of a territory inhabited by a dissatisfied minority group. They can of course be economic, when the central state realises the opportunity to reorganise national supply chains in a way that better access can be provided for nationally produced goods to the international markets. There are obvious international economic benefits of regionalising a country, especially when it is a member state of the European Union where the distribution of cohesion funds is based on a regional system. Last but not least there are also international political push factors which in the EU can be the respect for the principle of subsidiarity which is best ensured by administrative decentralisation. Within this approach I consider territorial autonomy to be a region within the state that has been granted a special status and additional decision- and policy-making capacities in order to enhance the advocacy potential of a minority group constituting majority on that territory and to effectively calm tensions within the society between the majority and the minority. Territorial autonomy inherently implies that a certain geographical area has been granted self-governing capacities. It is a region because it is based on a territorial concept, yet, at the same time it is much more than that, as it gained considerable independence, and it is not directly governed by the national centre.[14]

Regionalisation can be best introduced by reshaping the public administration of a country in a decentralised manner in a way that in the newly established administrative structure the regions, especially those where there is a strong presence of minorities and regional communities are granted some sort of a regional

12 Győri Szabó 2006: 51–53.
13 Wagstaff 1999: 6.
14 Brunner–Küpper 2003: 11–36.

government. This allows them to take part in national decision-making mechanisms and gives them certain capacities when it comes to the governance of their territory. The prerogative to organise a state's territorial management usually belongs to the executive, although sometimes to the legislative branch.[15] It is important to add here that when a country decides to carry out some sort of a decentralisation, they usually do it after a very centralising and assimilative regime, often a dictatorship, which did not give much room for the interest articulation of the minorities. We can see this trend for example in the case of Spanish democratisation, when the Franco regime ended and the monarchy was restored; but Italy also started similar processes once the over-assimilative fascist regime fell right after the Second World War. Indeed, minority communities usually need a strong push factor before they start articulating their own group interests and advocating for their group rights.

How regionalisation affects minorities

In my research I rely on Francesco Capotorti's definition of a minority, in spite of the fact that there is no widely-accepted definition used in international law. Capotorti grasped the essence of a minority group by claiming that it is a group of citizens that is smaller than the rest of the society, it is not in a dominant position within the country, its members share such ethnic, linguistic and religious characteristics that differentiate them from the majority of the population and they share a sense of belonging and a will to survive as a group.[16]

When a group is considered a national minority, then we can presume that some time in the past they must have been discriminated against, they must have suffered the consequences of assimilation or acculturation.[17] Being a member of a minority group is generally considered to be a disadvantageous position when we compare it with the social status of someone who is a member of the majority. Since the second half of the 20th century, national policies towards minorities have changed, aggressive assimilation has been tamed and eventually it became integration. There are some cases though where the central state took a different perspective abandoning the idea of homogenisation and turned towards the preservation of diversity. To maintain the heterogeneity of a society where different regional minority groups reside some countries applied the concept of regionalisation which allowed minority groups to take over some policy areas after a certain degree of decentralisation was introduced in the public administration system of the state.

Regionalisation is first of all a concept introduced into public administration. When we apply this idea in minority studies, we have to pay close attention to the relations between the power structure of a state, the relationship between the minority groups and the national majority, and how that is reflected in the geographical demarcation

15 Horváth 2004: 1–9.
16 Capotorti 1979.
17 A. Gergely 1997: 20.

of the regions. This is especially essential when we are trying to assess the situation of autochthonous minority groups that tend to be concentrated on definable geographical units. But as regionalisation is a top-down process owned by the central state, the way regional boundaries are drawn might not reflect the patterns of minority population concentration on the national territory. Indeed, sometimes, like in the example of the French regionalisation, the concept is used to further restrict minority movements, limiting their ability to hold important decision-making powers. Yet, creating regions totally in correspondence with areas inhabited by minority population does not guarantee either their inclusion in decision-making mechanisms. The state can freely decide what kind of authority it is willing to attribute to subnational administrative units.[18]

The relationship between the state and the established regions strongly influences the situation of the populations living there. When regions are merely considered administrative units, then minorities cannot expect noticeable amelioration of their status, there should necessarily be some additional factors that allow minorities to benefit from a regionalised structure. Identity-wise minorities can profit from the fact that in most Western European countries, but especially in Italy, Spain and France regional identities pre-dated the establishment of national ones, reaching back to them now might seem easier than in other countries, where the evolution of identities happened differently.[19]

Very often regionalisation is confused with autonomies. While I argue that some types of autonomies can be considered regions within the state, this might not always be the case. It is a scientifically and empirically well-established fact that autonomy is an effective tool in the endeavours to uphold minority identities and save minority languages and cultures. Regionalisation per se can be realised in countries where there is no noticeable presence of minority groups; however, the concept has been proved more effective in countries where regional identities are well-established within the society. As mentioned above, in my view granting territorial autonomy can be considered a form of regionalisation, given the fact that the territory of the autonomy is smaller than the entirety of the national territory, yet it is bigger than the territories under municipal governance. It is also true though that sometimes, just like in the case of the provinces of Trentino and South Tyrol, the autonomy is attributed to the provincial level, but then the terminology states use in order to describe their specific units of administration can vary significantly, yet usually they refer to the same concepts and ideas. When a region is created in a way that it can be considered sort of a territorial autonomy, often we find minority groups on its territory that constitute the majority of the regional population. In these cases, when a decentralised region becomes a territorial autonomy, there is always a representative body that is often elected by the regional populations, though in some cases its members can also be appointed by the central elites. It is important to

18 Kymlicka–Straehle 2001: 221–241.
19 Keating 1998: 7–15.

note that this representative body should serve the overall population of the region, not only those belonging to the minority. Regional autonomies can be the result of the central political will in an attempt to avoid secession, but it can also be the outcome of a bottom-up regionalism. It proves to be really long-lasting and effective when the interests of the national majority and the minority collide and both groups make efforts in order to create the frameworks for a successful coexistence.[20]

Case studies

In the next part of this paper, I am going to showcase some examples of countries where a certain degree of regionalisation has been introduced. Interestingly enough their results turned out to be dramatically different, but at the same time we can identify similarities as well. It is predominantly in Southwestern Europe where we can find strong regional identities, that strengthen the argument that regionalisation is more likely to happen in countries where a surge of regionalism has already happened. Spain, Italy and France all throve to become homogenous nation states, with a unitary administrative structure, but while in the former two dictatorships imposed heavy assimilation, in the latter this was conducted by a democratic, republican type of government. It is important to emphasise though that they did not succeed in their efforts to create a homogenous society, some minority groups prevailed. France and Italy are nation states, with a small overall number of minorities on their territories which tend to live in an easily definable geographical area. In Italy these areas during regionalisation were granted the opportunity of a low level of self-government based on the system of special status regions. In France, on the other hand, the constitution does not recognise the presence of national minorities in the country. Spain is different in this regard given the fact that there are vast Spanish territories where a minority is actually in a majority, therefore, we might categorise it as a multi-national state.[21]

Territorial diversity in European nation states is a natural and an integral element. Minorities are present in states of unitary, federal or union structures as well. While the forces introduced by the French Revolution and the Jacobin traditions pointed towards centralisation, this model now has to be reviewed given the fact that there are too many factors destabilising it.

Regionalisation of Spain

During the Franco dictatorship Spain had become one of the most centralised states in Europe, despite the relatively big number of citizens belonging to minority groups in the country. I argue that it was exactly this over-centralisation that led to the very vehement new concept being introduced by the 1978 constitution, where Spanish national elites created a regionalised structure from scratch, inspired by Spanish history, where the

20 Brunner–Küpper 2001: 11–36.
21 Győri Szabó 2006: 45–46.

nationalities have always benefitted from at least some sort of an autonomy. In the case of Spain, the concept of assimilation almost became synonymous with dictatorship, while minority protection was something that characterised the democratic transition of the early 1980s, which resulted in the establishment of a quasi-federalised monarchy.[22] The paradox of the Spanish model is that it was the different nationalisms within the territory that in the end managed to build a stable, democratic state. History did not allow though to see what would have happened with the Spanish nationalities if the tradition of Francoist centralism continued, but we can safely presume that regionalising the Spanish state contributed to the prevention of secessionist movements emerging, as examples show that when the autonomies of a minority are threatened there is an immediate surge of secessionism.

Regionalisation in Spain was based on a widespread regionalist movement that swept through the country right after Franco's death and affected not only territories where linguistic minorities resided but also those territories where there was a Castilian-speaking majority. Most regionalist claims referred back to those historical times when regions and their populations benefitted from the so-called *fueros,* which were special rights based on a territorial concept. What is also striking about Spain is that in the new, democratic political establishment regional forces played essential roles, and became pillars of the party system.[23]

Spain realised the model of political regionalisation. The reason behind this was that after democratisation they wanted to restore the rights of the historical regions that were abolished during the Franco era. The 17 autonomous communities became politically independent in a way that they have the authority to determine their organisation and capacities within the framework allowed by the constitution and their autonomy statutes as well. These, however, are far from being homogenous as they are based on the respective cultural identities, aspirations, social cohesion and development of the autonomous communities.[24] The new constitution adopted in 1978 aimed to provide a midway between two historical trends: federalism and centralism. Therefore, it named the Spanish community as the fundamental element that constitutes the nation, but it also recognised the right of the nationalities to gain their autonomies within the state. This solution provided a unique way to settle tensions deriving from the presence of huge minority groups, the Catalans, the Basques and the Galician community, on a national territory, by allowing autonomy to them. This territorial autonomy is what I consider regions in this model, as they are territorially defined and they provide a level of administration and governance between the national and the local levels. It is worth highlighting here that though there are 17 autonomous communities their capacities and status are different based on the strength of the regional identities experienced in them, respectively. This results in an asymmetric model, where there are simple regions that are not based on ethnic

22 Conversi 2002: 223–244.
23 Hueglin 1986.
24 Józsa 2006: 175–176.

or linguistic differences, which possess fewer rights than the ones with a prominent presence of ethnic and linguistic minorities. The most important right granted to communities where minorities live is the ability to decide on language policy, which on the national level creates linguistic pluralism, meaning that language-related regulations are territorially based without total multilingualism present on the whole of the territory. This model is a new concept, where the necessity of one nation-one language is questioned and overcome; all the while maintaining the unitary structure of Spain.[25]

Let us take a look now at how regionalisation affected minorities in Spain. Spain is a country, where a fairly big proportion of the population belongs to other ethnic groups than the Castilian majority; moreover, they occupy easily definable territories by the border regions of the state. Diversity was first recognised in the 1978 constitution which in addition to establishing regionalised units further differentiated between autonomous communities as it allowed 6 out of 17 to grant co-official status for the minority language spoken by the population there. Decentralisation in Spain shows several disparities, as every autonomous community has different decision-making capacities that are enshrined in their autonomy statutes. This is a disproportionate regionalisation where the regional level of governance varies in terms of the authority they gained.

One of the main reasons why the newly reinstated Spanish monarchy felt that they should give concessions to linguistic minorities was that these were the groups that were the most discriminated against during the Franco era, despite their very strong identities and common will of survival. While the constitution states that Castilian is the official language of the Spanish nation it allows the regions, hence the autonomous communities to introduce their own official language on their own territory, in addition to giving them authority over language policy within the limits allowed by the constitution.[26] In this system the protection of minority languages is in the centre of attention. The Spanish constitution recognises the value of the country's linguistic diversity, the protection of which is, however, a task assigned to the regions. Not surprisingly for Spanish national minorities, language is the most important element of their identities that differentiates them from the majority. The autonomy statute of Catalonia states for example that the Catalan language enjoys the same status as the Castilian, furthermore, the public administration in the region is also conducted predominantly in Catalan, but residents can opt for Castilian in their dealings with the authorities. Additionally, the Autonomy Statute gives all powers regarding education to the region, where schools favour the use of Catalan with the purpose of inspiring complete bilingualism by the end of compulsory education.[27]

This very widespread presence and the quick surge in popularity of Spanish regional languages is no doubt the result of regionalisation, as before we could see

25 Conversi 2002: 223–244.
26 Sipos 1993: 91–93.
27 Győri Szabó 2006: 189–191.

no initiative from Madrid to take care of the minority languages, although this might have been a side effect of the Franco era, yet once decentralisation started the minority languages started to strive parallelly. Moreover, concessions to minorities managed to keep the state together by avoiding secession, yet as a consequence of the 2017 upheaval in Catalonia they could witness what happens when cooperation between the majority and a strong minority fails.

Italy, the model of regionalisation

Italy is what we call the prototype of a regionalised state. Today, we can find two types of regions the authorities and rooms for manoeuvre of which are different. There are regions with a special status, which is only granted to territories where a significant number of people belonging to autochthonous minorities live. Here regional governments have more decision-making and executive powers than in the regions of ordinary status, which is the majority of them. As a result, in addition to the hole national territory being divided into 20 regions, 5 of these are governed according to special statutes of autonomy. Not surprisingly, these are regions where minorities reside such as Trentino-Alto Adige, Friuli-Venezia Giulia, Valle d'Aosta, Sardinia and Sicily.[28] Let us take a closer look at the region Trentino-Alto Adige, where the government had to create an institutionalised framework for the protection and the preservation of the German minority, in addition to the marginal number of Ladin population also residing in the same area. As a result, the region was further divided into 2 autonomous provinces with their respective autonomy statutes and the distinctive capacities and authorities assigned to them. All this decentralisation started after that the Italian leadership realised that assimilation after unification was not able to deliver the expected results after all. Especially when it came to territories, which both ethnically and linguistically differed from the rest of the country. Once the central government realised the benefits of regionalisation, the development of the process accelerated.[29]

In Italy the option for the establishment of regional governments was first provided by the 1946 constitution, yet it was not put into practice until a lot later. The need for it only arose, when due to rapid economic development and disparities in demography called for a more regionalised type of administration by the 1970s. Let us keep in mind that with every wave of decentralisation the main goal was to make administration and governance more effective while maintaining the most important central prerogatives. This is why regions did not emerge right away as the second most relevant level of public administration, as in Italy the role of provinces and local municipalities remained strong.[30] The decisive moment for the status of regions did

28 Vizi 2011: 361–377.
29 Sipos 1993: 110–136.
30 Keating 1998: 61–62.

not come until 1999–2001, when a complex constitutional reform extended the role of the regions and established Italy the regionalised unitary state it is today.[31]

Even though Italy can be considered homogenous at first sight, it is not. In fact, it has a huge linguistic diversity let alone the various dialects and variations of Italian that are spoken on its territory. What is striking about this country, is that there are very strong regional identities. Just like in the case of the Spanish autonomous communities, Italy also differentiates between its regions, also based on the vitality of minority languages. These differences are indicated in the constitution as regions with a special status that enjoy more extensive rights than those with ordinary statutes, which are protected by separate pieces of legislation. In South Tyrol, for instance, both the German and the Ladin language groups experienced aggressive Italianisation during Mussolini's fascist regime. But here, too, regionalism appeared which resulted in the Italian state reconsidering its stance on minorities in the regions. Furthermore, granting autonomy to South Tyrol was also a demand of the winners of the Second World War. Introducing regionalisation ensured that the German-speaking population's identity is properly respected, they are provided equal opportunities and compulsory education in their mother tongue. We must note however, that the right to give and to take away these capacities still remained in Rome's hands, yet they undeniably benefitted the minority population. In 1972, when the new autonomy statute was announced, the number of areas where the province had decision-making authority doubled. The most important of them were minority policy, education and a wide-range administrative independence, where complete bilingualism is required.

France, centralisation in disguise

While Italy can be considered the ultimate model of a regionalised state, France is said to be the perfect example of an overly centralised state. Heavy centralisation used to be considered necessary, because when the French monarchy was expanding, or after the revolution new nationalist elites wanted to consolidate the results of the regime. This was the only way to forge and to keep the vast territory and the very heterogeneous population together. I believe France is the country where the power of language to be used as a homogenising tool was discovered, and used for various purposes in several situations. People all over the territory were constrained to do their business in French if they wanted access to social mobility. In spite of all this, when Paris realised it was time to loosen the grip, they first started to delegate administrative authorities to the provincial level, which in France we call *départements.* This sort of territorial management instead of strengthening regional identities disrupted them, as provincial borders were drawn in a way that they cut regional communities in half, this way making it impossible for them to formulate a common ground for action.

31 Vizi 2011: 361–377.

The introduction of administrative regions in France was based on economic driving forces, and served effectivity purposes.[32]

France gave a totally different response to regionalism, which is more easily understandable if we keep in mind the Jacobine tradition the Republic was built upon. France is one of the best European examples of heavy assimilation and centralising homogenisation, yet even the French experienced a regionalist surge in the second half of the 20th century. Just when it appeared that regional minorities and identities in addition to regional languages and dialects disappeared there started a genuine social movement in order to preserve them, not to mention the other push factors coming from the international, and especially the European community urging France to decentralise. Nevertheless, regionalism in France always remained at the cultural level, it never really affected the political landscape of the state and it certainly was not strong enough to be able to alter the constitution in a way that it would recognise the presence of minorities on the national territory. Therefore France uses the concept of regionalisation as a tool of deconcentration instead of decentralisation. The farthest regional movements could get was the revival of regional languages and the establishment of a private school system where children coming from these groups can learn them.[33]

French regionalisation is associated with the Fifth Republic. The main reason behind it, as mentioned before, was economic, and the government had no interest in allowing more room for minority movements. In France, minority issues have no place in the public sphere, they belong to the civil sphere simply because the constitution does not recognise the presence of minorities on French national territory, as they define minorities as a group of people that are discriminated against, which the constitution explicitly forbids. The only territories where special concessions to regional communities were given are the territorial communities, mostly France's overseas territories, in addition to the island of Corsica, where decades long violence prompted Paris to change its previous conduct.[34] With regards to the island, it was the so-called Matignon process that resulted in additional capacities and authorities being granted to the regional level,[35] yet we cannot say that this practice was ever meant to be generally used in the relations with the continental regions.

France carried out what we can call a regional decentralisation. This allowed them to create bigger administrative units without having to raise their status in the hierarchy. The prefect is the functionary that represents the central state in the region and makes sure that the administration on the territory is carried out in line with Paris's requirements.[36] They are also charged with executing those minimal administrative and legislative powers that were granted to the regions. In France, regionalisation was

32 Sipos 1993: 136–155.
33 Hueglin 1986.
34 Sipos 1993: 156–184.
35 Daftary 2008: 273–312.
36 Józsa 2006: 173–174.

based entirely on functional and political considerations. Here creating regions did not have the objective of improving minority statuses, but of enhancing the effectivity of the highly centralised and sometimes completely inadequate administrative structure. Regions were not given additional capacities, they remained absolutely under national control, and just like in Italy, sometimes, the provincial level seemed to be a lot more competent in a variety of issues.[37]

Conclusion

In conclusion I think that applying the theory of regionalisation in minority studies can prove to be very effective in enhancing our capacity to better assess the situation of linguistic minorities within a state, and eventually it might contribute to the improvement of minority group rights advocacy. It is a theory that can be empirically examined, the results of its implementation can be assessed by analysing certain countries where governments have already introduced this decentralised structure into public administration. Regionalisation can be realised within a complex administrative structure, where the overall territory of the state is divided into smaller units. The most important one of them, which benefits from the widest range of authorities is the region. Minorities can highly benefit from this model if regions are created in a way that blocks of minorities remain within the same unit, and when certain administrative, executive or even legislative powers are attributed to them. It should be noted, however, that regionalisation is not necessarily the same as federalisation but it is very similar to the concept of granting territorial autonomy to areas dominantly inhabited by minorities.

The cases of Spain, Italy and France all show different kinds of regionalisation based on different motivations and historical as well as social and economic experiences. They are similar and different at the same time, but exploring the nuances between these three models can help in order to better understand the influence of regional decentralisation on minorities. Further empirical and comparative research is needed in this field especially if we expect regional elements to gain in relevance in the future. As far as this paper could go, minorities certainly benefit from the establishment of a strong regional level of administration, but further research will absolutely be necessary in order to be able to fully understand why this is the case and how successful models could be exported to other countries as well.

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37 Keating 1998: 62–64.

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ACTA HUMANA • 1 (2023) 49–66. • DOI: 10.32566/ah.2023.1.3

The Potential and Limitations of the Treatment of Caste Discrimination in International Human Rights Law

ASANG WANKHEDE[1]

This paper critically evaluates all the developments that lead to the making of caste discrimination an issue in international human rights law (IHRL) – both as racial discrimination and as an issue of the minority rights regime. It explores the reasons why such developments and the politics of it have proven to be insufficient in cause and totality in addressing the rampant abuses of the human rights of Dalits. While focusing on the obvious limitations of the minority rights regime in including Dalits as a minority, it weighs the limitations and the potential of the existing IHRL corpus in addressing caste discrimination. The paper will first outline the genealogy of caste discrimination in IHRL, which will provide a descriptive account of all the developments. I identify the treatment of caste in terms of a "violating norm" and as a "violation sub-category". Then the paper seeks to engage with the theory on the limitations and critiques of IHRL, to argue that there are theoretical and legal-doctrinal fault lines in the conception of caste discrimination as a sub-set of descent-based racial discrimination both normatively and interpretatively. To support this argument the paper explores reasons for the failure of IHRL in critical legal thought – which outline the triumph of cultural and social pressures in the society over the language of IHRL. Following this, a novel attempt is made to develop the concept of "cultures of oppression" as a central theme in imagining a "Dalit critique of IHRL" which in my opinion is not only a normative contribution to the critical discourses in reimagining IHRL which is more responsive to the problems of Dalits, but also provides a new outlook for human rights movements to combat caste discrimination.

Keywords: caste discrimination, minority rights, human rights, social change, international law

1 PhD candidate, University of Oxford

Genealogy of caste discrimination in International Human Rights Law

Dalit movement for "internationalisation" of caste discrimination: 1945 – present date

In a nutshell, the struggle for recognition of caste discrimination as a violation of international human rights law (IHRL) can be contemplated as "norm entrepreneurship".[2] The international advocacy carried out by Dalit groups from the 1980s onwards bore fruits only in 1996 when the Committee on the Elimination of Racial Discrimination (CERD) recognised caste discrimination as a form of discrimination based on *work and descent* under Article 1 of The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[3] The advocacy from the 1980s onwards has to be contextualised in the function which IHRL played in the post-cold war era as a "New Humanitarianism".[4]

This recognition came in the era of "politics for human rights" which according to Baxi was led by movements of resistance "arising from the responsiveness to the tortured and tormented voices of the violated".[5]

The post-1996 decade saw major human rights Non-Governmental Organisation (NGOs) such as the Human Rights Watch (HRW) collaborating with grassroots Dalit organisations in India in establishing a national organisational network of Dalit civil society organisations called the National Campaign on Dalit Human Rights (NCDHR) and later a transnational institution called International Dalit Solidarity Network (IDSN). Through these networks, the transnational advocacy has primarily mooted, rather rhetorically, for the recognition of untouchability as a "crime against humanity" and for abolishing of the caste system itself.[6]

One may question the "need" Dalit groups felt for demanding redressal of their wrongs in international law. The answer is not quite straightforward the way it is often outlined in the failure of domestic mechanisms in India in addressing the grievances of Dalits.

Significant guidance can be drawn from the pre-Indian independence history of the Dalit movement for emancipation, which involved mobilisation using the rights framework. Dr B.R. Ambedkar, the Principal architect of the Indian Constitution and Dalit social reformer, used the language of rights to give group recognition to Dalits.[7] At the beginning of the 1920s Ambedkar constructed the identity of an "untouchable" as a separate political and social minority.[8] This helped him in painstakingly voicing

2 Lennox s. a.
3 UNCERD 1996c.
4 Hoffmann 2010: 8.
5 Baxi 2008: 58.
6 Bob 2007: 180.
7 Jaffrelot 2005: 34–35.
8 Jaffrelot 2005: 34–35.

the problems of Dalits in the rights and legal framework making them worthy of safeguards and redressal.[9]

It can be said that using the historical experience of deploying rights framework, Dalits utilised the "political opportunity structures" to carry out their efforts in making caste discrimination an IHRL violation.[10] The dichotomy of the absence of caste discrimination in the lexicon of IHRL, along with the strong opposition by the Indian government to the internationalisation, can also be viewed as a significant factor that motivated Dalit groups.[11]

Caste discrimination as a "violating norm" and a "violation sub-category" in IHRL

The absence of "caste" as a sui-generis norm in any of the international human rights law treaties begs for a discussion on the sources of legal obligations on states to eradicate caste discrimination and provide safeguards to the affected groups if any.[12]

The presence of caste discrimination in IHRL has to be contextualised in terms of it violating the general IHRL corpus, I refer to it as the "violating norm", and caste discrimination being a ground of violation in itself, as falling within a specific anti-discrimination theme such as racial discrimination – "violation sub-category". The former is broader and general in nature. By its very nature, the caste system violates a range of civil, political, socio-economic and cultural rights, most commonly, the right to equality and human dignity.[13] Such violation emanates from the prevailing systemic discrimination and violence that a member of a lower caste (Dalit) faces due to their disadvantageous position in the stratified society.[14]

The latter, on the other hand, refers to caste discrimination in itself as a sub-category of a specific international law anti-discrimination norms, racially based *descent* discrimination which is prohibited.

Caste discrimination as a violating norm in IHRL

As a "violating norm", caste discrimination practically operates in various forms – in public, private, religious, social, economic and cultural paradigms.[15] Based on the notion of graded inequality, barring the topmost caste (Brahmin), every other category relatively faces some form of disability or discrimination in the social hierarchy.[16]

9 Waughray 2010: 344.
10 Keane 2007: 218.
11 Bob 2007: 185.
12 Waughray 2010: 327.
13 Bob 2007; for an overview of all the rights in the IHRL regime which caste discrimination violates see Babar 2016: 117.
14 Thorat–Umakant 2004.
15 Galanter 1969: 171.
16 Ambedkar 2014c: 106–107.

Caste being the reason for persistent inequalities, in society, it is safe to conclude that it not only violates the basic universal rights of liberty, equality and human dignity but also jeopardises the second and third-generation rights of these categories.

A guidance can be drawn from various UN human rights treaty bodies evoking "caste discrimination" as an issue violating treaty-specific rights with or without reference to descent-based discrimination.

The Human Rights Committee (HRC) in its concluding observation of India's periodic report in 1997 raised concerns about the insufficiency of the measures taken by the government to curtail rampant discrimination and inter-caste violence faced by Dalits in practice.[17] HRC further expressed regret on "the de facto perpetuation of the caste system entrenches social differences and contributes to these violations"[18] and called upon India to adopt measures such as education programmes to eradicate discrimination faced by vulnerable groups.[19] However, due to the failure of India in submitting a periodic report to the HRC since 1997, HRC has not received an opportunity to review the situation of caste discrimination under the International Covenant on Civil and Political Rights (ICCPR).

The Committee on the Elimination of Discrimination against Women (CEDAW) too has in the Concluding Observations on combined fourth and fifth periodic reports 2014 of India, raised concerns on the increase in caste-based violence against Dalit women and how they face multiple barriers while accessing justice, legal aid, and gynaecological/maternal health services.[20] It also raised concerns about the poor enforcement of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act and the underlying caste impunity of the perpetrators.[21]

Another important observation by the Committee has been regarding the intersectional discrimination faced by Dalit Women.[22] Reiterating its General Recommendation 28,[23] the committee raised concerns on the absence of a comprehensive legal regime in the country which addresses both the direct/indirect and intersectional discrimination faced by women.[24]

The Committee on Rights of the Child (CRC) raised concerns about the impact of caste discrimination on children under the themes of non-discrimination, the standard of living, education, leisure, cultural activities and special protection measures.[25] Under these themes, CRC raised concerns about the discrimination faced by Scheduled Castes children in enjoying rights under the convention such as access

17 UNHRC 1997: [15].
18 UNHRC 1997: [15].
19 UNHRC 1997: [23].
20 UNCEDAW 2014: 4–5.
21 UNCEDAW 2014: 34–35.
22 UNCEDAW 2010.
23 UNCEDAW 2010.
24 UNCEDAW 2014: 10.
25 UNCRC 2014: para. 31–32, 70.

to education, safe water, sanitation facilities and healthcare.[26] Like CEDAW and HRC, CRC too raised concerns about the failure of the "initiatives aiming at addressing inequalities and improving living conditions and access to education, health, and social services" in reference to children belonging to Scheduled Castes community.[27]

This recognition of caste discrimination by UN bodies not only in India but also in over two dozen countries across the globe provides an insight on the global scale of the problem, which has been strongly argued by the Indian government to only exist domestically in India.

UN Special Procedure mechanisms and caste discrimination

Another major guidance can be drawn from the concerns raised by various UN Special Rapporteurs (SRs) under UN Special Procedure mechanisms, where caste discrimination has been addressed in over twenty diverse themes.[28] In principle, caste discrimination is considered to affect rights covered by all UN special rapporteurs,[29] and therefore this issue has been addressed in varying degrees by special mandate holders.

The Special Rapporteur on extrajudicial, summary, or arbitrary executions of his mission to India raised concerns on the executions of Dalits and criticised the inadequate implementation of legislation meant to avoid such killings.[30] Another major concern raised by the rapporteur was about violence against the Dalit community, especially communal violence, at the hands of non-state actors, and recommended that the government must not give shelter to non-state actors who perpetuate caste-based violence, because that is the result, that gives such actors the power to commit caste-based crimes with impunity.[31]

The Special Rapporteur on the right to food raised concerns about the effects of social segregation on the violation of the right to food, due to the intersectional nature of discrimination.[32] The SR recommended that the government should take measures in improving access to food among children and adults alike.[33] Raising concerns on multiple ways in which Dalit children are discriminated against, SR again rightly pointed out that "these disparities, whether they are the direct or indirect consequences of governmental policies and practices, constitute violations of the prohibition of non-discrimination in the enjoyment of children's right to food".[34]

26 UNCRC 2014: para. 79–80.
27 UNCRC 2014; for discussion by the Committee on Economic Social and Cultural Rights (CESCR) see UNCESCR 2008: para. 13.
28 See IDSN 2022: 11–13.
29 IDSN 2022: 11–13.
30 UNCHR 2012.
31 UNCHR 2012.
32 UNCHR 2015.
33 UNCHR 2007.
34 UNCHR 2007.

The wide recognition of caste discrimination as a "violating norm" provides on the face of it, a promising picture. However, the "violating norms" provide only "implicit" recognition to the human rights abuses faced by Dalits. This is because the acts carried out in the name of caste discrimination violate specific human rights such as the right to equality, right to liberty, etc.

Caste discrimination as a "violation sub-category"

India ratified ICERD in the year 1968. In a period of about two decades, India diligently submitted reports to ICERD providing substantive information on the legal and policy safeguards for the emancipation of Scheduled Castes and Scheduled Tribes in India.[35] CERD reciprocated by lauding such efforts.[36] It further made inquiries about the steps taken by India to eradicate untouchability and caste discrimination in the country and along with it, the effectiveness of the laws criminalising caste discrimination.[37]

However, neither India nor CERD ever explicitly recognised caste discrimination as a form of human rights violation falling within the folds of ICERD until 1996.[38] CERD in its Concluding Observation of India's state party report in 1996, finally identified that caste is a sub-type of descent-based racial discrimination, and hence prohibited in IHRL, more specifically under Article 1(1) of the ICERD.[39]

This observation by CERD has to be contextualised in light of India's tenth to fourteenth consolidated periodic report where India categorically stated that: "The term 'caste' denotes a 'social' and 'class' distinction and is not based on race."[40] India's argument was based on the logic that the "use of the term 'descent' in article 1 of the Convention clearly refers to 'race' and although the caste and tribal systems are based on 'descent' they are not based on race, hence the situation of scheduled castes and scheduled tribes doesn't fall within the purview of the convention. It was in response to this position that CERD observed "the term 'descent' mentioned in article 1 of the Convention does not solely refer to race"."[41]

Through this step, ICERD played a vital role in the internationalisation of caste discrimination as a violation of human rights, as a violation sub-category, law by making 'descent' "the legal home for caste" as seen from later developments in treaty-based bodies and mechanisms.[42] Caste helped expand the wider international legal norm of 'descent', which includes caste as practised in India and across the globe but

35 Waughray 2010: 336; see also UNCERD 1996b.
36 Waughray 2010: 336.
37 Waughray 2010: 336.
38 Waughray 2010: 336–337.
39 UNCERD 1996c.
40 UNCERD 1996a.
41 UNCERD 1996c.
42 Keane–Waughray 2017: 137.

is definitely not limited to it. Caste thus is a subsumed category within descent-based racial discrimination.[43]

Another major contribution of CERD in making ICERD as the "Pre-eminent human rights treaty" for recognising caste discrimination in IHRL is the General Recommendation 29 (2002) – on Article 1, Paragraph 1, of the Convention (Descent) (GR 29).[44] Modeled on GR 27 on Roma persons,[45] GR 29 reiterated the term "descent" in article 1(1) of ICERD "includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights".[46]

General Recommendations/Comments (GR) are important tools for human rights treaty bodies in interpreting the convention to assist State Parties in drafting respective country reports under the conventions.[47] GR 29 falls in the category of "special categories of persons"[48] and it gave a global recognition to descent-based discrimination which also includes caste and analogous systems.[49]

Following the lead, the UN Sub-Commission on the Promotion and Protection of Human Rights in its Resolution 2000/4, declared that discrimination based on work and descent is prohibited by IHRL.[50] Albeit, it did not include discussion on caste as a subsumed category falling under the category of work and descent, but only gave rise to subsequent discussions of caste in various working papers,[51] appointments of two Special Rapporteurs on work and descent and adoption of Draft Principles and Guidelines for the Elimination of Work and Descent Discrimination.[52]

As a later development in the Draft Principles, the UN Human Rights Council outlined the definition of "work and descent" to include "any distinction, exclusion, restriction, or preference based on inherited status such as caste…"[53] which in effect impairs the enjoyment of human rights in all spheres of society.[54]

Minority rights framework

The recognition of caste discrimination as a possible violation of the UN minority rights framework is rather recent when compared to developments before other UN forums.

43 Keane–Waughray 2017: 137.
44 UNCERD 2002b
45 UNCERD 2000.
46 UNCERD 2000.
47 Ando 2008; see Çali 2013.
48 Other subcategories in which CERD's GRs can be classified are "reporting obligations and subjects of report", the second to "methods of achieving ICERD goals" and "other issues"; see Keane 2007.
49 Keane 2007.
50 UN Sub-Commission 2000.
51 UN Sub-Commission 2003: 10–43.
52 UNHRC 2009: 6.
53 UNHRC 2009: 8.
54 Waughray 2010: 338.

The special rapporteur on minority rights in the 2016 report provided comprehensive insights on capturing caste within the international minority rights framework. At the outset, the report recognised "the complexity of addressing this topic within the minority rights framework, as there exists the view that caste systems are a way to organize society without the domination of majority groups, and that therefore, 'lower caste' groups may not strictly fall under the category of minority groups".[55] Despite this express recognition of the limitations of the approach, the report confirms and recommends using the minority rights framework to address caste discrimination as Dalits who face caste discrimination "share minority-like characteristics".[56] "The historic use of minority rights framework" to address marginalisation based on caste and "historically the use of particularly their non-dominant and often marginalized position, stigma" were foundational, according to the committee, for extending minorities status to Dalits.[57]

A deeper insight into the place of caste in UN minorities mechanisms reveals a more nuanced picture of the "inclusive" approach of the UN minorities mechanism "in addressing discrimination based on caste and analogous systems of inherited status under the minority rights framework".[58]

The recognition of caste-based discrimination under the ICERD framework, as discussed previously, was a 'passport' for bringing Dalits within the international minority category based on their status as a group protected by ICERD.[59] As Waughray rightly observes:

> In 2009, the minorities forum brought Dalits into the international minority category based on their status as a group protected by ICERD, stating that the term 'minorities', as used in the Minorities Declaration, 'encompasses the persons and groups protected under the ICERD.[60]

Waughray's analysis of the issue of caste within the minority rights framework further outlines the limitations of the approach as "Dalits do not constitute a discernible ethnic, religious, cultural or linguistic minority".[61] The core definition of a minority with which there is an international consensus that it "embraces non-dominant groups possessing stable ethnic, religious or linguistic characteristics that differ sharply from those of the rest of the population, which have been retained over time and which members of the group wish to preserve".[62] Therefore, despite various UN

55 UNCHR 2016.
56 UNCHR 2016: para 21.
57 Waughray 2016: 154–155.
58 Waughray 2016: 154–155.
59 Waughray 2016: 156–157.
60 UNCHR 2009: Para 2, fn 160 cited by Waughray 2016: 156–157.
61 UNCHR 2016.
62 UNCHR 2016.

actors confirming Dalits as a minority, the acceptance of such a position remains far from being a universally accepted one.[63]

Though the developments towards recognition of caste discrimination under the minority rights framework are welcomed, the upcoming parts will critique these interventions by analysing the emancipatory potential they have in addressing caste discrimination.

Critique of caste discrimination as a violating norm and violation sub-category

The primary reason for problematising the making of caste discrimination as a subset of descent-based racial discrimination and in a limited way also in the minority rights framework is the manner in which the former came to be recognised as a violation of IHRL.

The GR 29, which was adopted after a thematic debate on the issue, came only after 6 years of CERD declaring in its Concluding observation of India's periodic report, that caste discrimination is covered by ICERD and hence a violation of IHRL.[64] GR 29 does not outline any reason for including caste discrimination under descent-based discrimination, and therefore the discussion warrants a short insight into the thematic discussion which preceded the adoption of GR 29 by CERD.

However, it seems to be a general consensus among the CERD members that: a separate definition of descent is not needed as the term was clearly to include discriminatory systems based on some "inheriting characteristics", caste being one such system under its meaning;[65] the term "descent" had to be construed in the broadest possible manner to ensure that protection is extended to the groups which are discriminated on the basis of some inherited characteristics;[66] hence, the term descent should not be confined exclusively to caste but must also include caste as one of its facets not in reference to a country but as a global phenomenon.[67]

On the defence of using ICERD to address the issue of caste discrimination, one of the former CERD members, Thornberry, outlines that caste or analogous forms of social stratification were included as a form of "descent" due to the "open character" of descent terminology as caste has "race-like" features outlined in Article 1 of ICERD.[68] He also defended such expansive interpretation on the basis of the "living instrument" principle.[69] Under this principle, the existing human rights corpus is used to address discrimination faced by certain groups "even in the absence of direct reference to the community in question".[70]

63 Waughray 2016: 156–157.
64 UNCERD 2002b.
65 UNCERD 2002a: para. 11, 18; see also Keane–Waughray 2017.
66 UNCERD 2002a: para. 5
67 UNCERD 2002a: para. 8, 10.
68 Keane–Waughray 2017.
69 Keane–Waughray 2017: 142–143.
70 Keane–Waughray 2017: 143.

I submit that this justification of the interpretative approach adopted by CERD is fundamentally problematic because while invoking the principle of living instruments, it was not guided by the rules of interpretation in international law.[71] The evolutive interpretation deployed by treaty bodies and courts is based on the understanding that instruments are continuously evolving.[72] However, this concept lacks its own independent standing, being guided by the principles of treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT).[73]

In *Judge v Canada,*[74] the UN Human Rights Committee held that ICCPR must be interpreted as a living instrument by contemplating the underlying rights in the context of "present-day conditions," and held that the living instrument principle must be considered and applied in due regard to VCLT.[75]

Another important reason for using the interpretative method outlined in VCLT while drafting the general recommendation/comment is the clarity of method needed to interpret a provision, given the competing views of different actors involved in the process.[76] The GR 29 merely "reaffirms" that descent includes forms of "social stratification such as caste and analogous systems of inherited status…"[77] without giving any reasons based on the context, the object and the purpose of the treaty, or without even the slightest mention of the teleological interpretations and specific treaty interpretation methods provided for, in the scheme of VCLT.[78]

Such use of the "living approach" principle only comes out in the academic writing of erstwhile members of CERD and in some places, in observations made by CERD members in the thematic discussions, however, they do not form part of the reasoning in GR 29.[79]

Thus, the CERD fails to provide a sound legal background for considering caste as a form of racial discrimination, which ought to be based on rules of interpretation under VCLT.

Even though the value of General Recommendations/Comments is often seen as quasi-legislative in nature and are even characterised as soft law, having no binding effect on the state parties, the vital role human rights treaty body play in expanding, clarifying and ensuring the protection of human rights of individuals and groups as part of treaty obligation of the state parties cannot be neglected.[80]

The triumph of India's opposition arises out of the failure of CERD in providing concrete reasoning for including caste discrimination as a sub-category of descent,

71 Herdegen 2020.
72 Orakhelashvili 2008.
73 Orakhelashvili 2008.
74 UNHRC, CCPR/C/78/D/829/1998, para. 10.3.
75 Orakhelashvili 2008.
76 Mechlem 2009: 927–928.
77 UNCERD 2002b.
78 Orakhelashvili 2008.
79 UNCERD 1996c.
80 Mechlem 2009: 905–947.

and also the lack of sound rebuttal of India's position. It merely states that India's argument is not the case.[81] Though India could have denied such an obligation even in the existence of a strongly reasoned General Recommendation, but that would be at the percept of opposing a strong normative justification with rather an untenable and dubious logic.

Briefly, the other range of critiques targets such an interpretation of three broad themes: a) incoherency in the word "descent" from analysis of CERD's *travaux préparatoires*;[82] b) absence of caste as a sui-generis category in IHRL,[83] and c) the paradox such an interpretation presents while not problematising caste as a socio-cultural system in itself.

Keane disputes such an interpretation is disputed, where Keane highlights the lack of foundational basis of caste discrimination in ICERD, a convention conceived on anti-apartheid, anti-colonialism and anti-Semitism sentiments.[84] This critique is untenable given the scope of VCLT, which recognises dynamic teleological interpretations of the human rights treaty on the basis of the "living instrument" principle.[85]

Furthermore, Hugo and Weiner outline the paradoxical nature of this "positive" development, where caste discrimination is prohibited and the caste is not problematised.[86] This comes from the understanding that attacking caste discrimination will be less helpful when steps are not taken to address caste as a form of social and cultural stratified system which is discriminatory and exploitative in its very conception.[87] This non-attacking of caste also lays support to the claims of the defenders of the caste system as a "natural" cultural identity.[88]

Experience of legal reforms with eradicating caste discrimination in India

The discussion in the preceding section indicates the limitations of legal and policy safeguards in addressing caste-based discrimination and violence in India. Such discussion shows that such failure cannot be attributed to a mere lack of political will.[89] The most compelling of these reasons is the role the cultural legitimacy that caste plays in the dismissal of formal legal safeguards, thereby perpetuating discrimination and triumph of the "rule of caste" over the "rule of law" in India.[90]

The rationale for enacting anti-caste discrimination legislation in India is – to not only punish the offenders but to change the behaviour in society.[91] In the context of

81 UNCERD 2002b.
82 Keane 2007: 231–232, 237.
83 Waughray 2010: 353; Keane 2007: 277.
84 Keane 2007: 278.
85 Herdegen 2020; Orakhelashvili 2008.
86 Waughray 2009: 414.
87 Ambedkar 2014a: 23–96.
88 Keane–Waughray 2017: 129.
89 Eisenman 2003: 133.
90 Narula 2008: 255, 295.
91 Galanter 1993: 217.

the Untouchability (Offences) Act, 1955, Galanter identifies the failure of the "Halo-effect" – which denotes general adherence to law – due to anti-discrimination laws being contrary to the "sentiments and established behaviour patterns of wide sections of public" and as they go "counter to the perceived self-interest and valued sentiments and deeply ingrained behavioural patterns".[92] This is also true for the subsequent legislation enacted by the Indian government to tackle the issue, as they have a cumulative effect of providing a symbolic means for Dalits to assert their rights in the public domain,[93] however in reality, given the steady rise of caste-related violence and discrimination, such legal mechanisms only help the perpetrators in committing crimes with impunity.[94]

Narula problematises the sufficiency of the formal constitutional and legal safeguards for Dalits by coining the term "culture of under-enforcement",[95] which depicts not only the limitations of the law in assuring the protection of Dalits, but also changes the social reality of India – which is "de facto segregation, exploitation, violence, and other forms of 'untouchability' practices".[96]

Emphasising on Thorat's thesis of the need for addressing the embedded structures in Hindu society for proper realisation of rights, Narula argues that the rule of caste overpowers the rule of law in India, where the former expands *de facto* caste discrimination, and the latter prohibits caste discrimination in a *de jure* fashion.[97]

Thorat attributes the lack of access to human rights of Dalits to the framework of "social behaviours" in the socio-religious and cultural institutions guided by untouchability which is opposed to constitutional and human rights corpus.[98]

On human rights, Narula calls for adopting a two-fold strategy to redeem human rights promises: a) "remedying the effects of discrimination"; b) "dismantling the discriminatory mindset".[99] It will be the second one that will be the foundation for imagining a Dalit critique of IHRL.

A more radical insight appears in Ambedkar's foresighted analysis of "lawlessness as lawful" in the context of Hindu social order. It throws light on the fault lines between not only law and caste system but also the meaning of "law" when contextualised in Hindu social order and the political and social context in which formal law operates.[100]

For Ambedkar, a manifestation of untouchability in the form of oppression, discrimination and structural violence faced by Dalits in the Hindu society is "lawlessness" if looked at from the prism of law as understood in the western liberal discourse. However, the same is considered completely lawful when contextualised

92 Galanter 1993: 217.
93 Galanter 1993: 218.
94 Galanter 1993.
95 Narula 2008: 297.
96 Narula 2008: 257.
97 Narula 2008: 275.
98 Thorat 2002.
99 Narula 2008: 331.
100 Ambedkar 2014e: 62–64.

within the "Hindu Law of Persons"[101] of ancient Hindu religion as proclaimed in various treaties and codes like Laws of Manu, Yajnavalkya, Narada, etc.[102] This in Ambedkar's conception is the epistemic factor "responsible for the perpetuation of untouchability and for the lawlessness".[103] Such ingrained inequality transposing out of the "Hindu Law of Persons" is what made Ambedkar further conceive the identity of a Dalit as a "sub-human", who are denied all forms of freedom in the Hindu Social Order.[104]

This absence of conscience in Hindus towards untouchables is also true in contemporary India, where the non-adherence to the rule of law and rampant human rights abuses of Dalits proves Ambedkar's thesis correct.

Ambedkar's critique of rights stems from his understanding of caste as a system of graded inequality – by which he refers to a system where each caste as an exclusionary unit discriminates against another caste with a vested interest of self-preservation through perpetuating inequality.[105] Therefore, even untouchables have some interest in maintaining the social order as long as they get some privileges over other untouchables within their own caste structure.

Due to these societal realities, Ambedkar was critical of the effectiveness of the formal rights corpus and emphasised restructuring the social and moral conscience of the society, which is conducive to rights adherence, as against the one which completely rejects rights on a social plane.[106]

The foregoing analysis is foundational in contemplating a Dalit critique of IHRL, where the "culture of oppression" emerging out of deep systemic norms requires due to focus and needs to be addressed by the international human rights movement. Before expanding on this proposition, it is vital to have brief insights into theoretical debates on the issue of law and social change.

Human rights and social change: Giving powers to rights it does not have?

Social change through the use of law indicates changes in the "social structure or in culture" of the society by evoking the language of the law.[107] On the issue of the gap between law and its actual compliance in society, Dror emphasises on the ever-lasting difference between the "actual social behaviour and the behaviour demanded by the legal norm". Such a difference transforms itself into a "lag" or a gap when "the sense of obligation generally felt towards legal norms significantly differs from the behaviour required by law" leading to changes in the law but no substantial changes in society.[108]

101 Ambedkar 2014e: 64.
102 Ambedkar 2014e: 64.
103 Ambedkar 2014d: 91.
104 Ambedkar 2014d: 93.
105 Ambedkar 2014c: 106–111.
106 Ambedkar 2014b: 222.
107 Dror 1959: 787, 797.
108 Dror 1959: 794.

Rosenberg's critical insights on the post-desegregation era social realities is critical to further expand on Dror's insights. Albeit the *Brown* judgement, which ruled the segregation policy in the U.S. as unconstitutional, led to a backlash from private groups, as well as from federal and local governments alike. Rosenberg argues that social and cultural constraints made it difficult if not impossible, to implement the *Brown* decision, as the culture of the society perpetuated slavery and apartheid making them non-conducive to social change.[109]

Thus, human rights cannot by themselves change the fundamental injustices in society but are an important tool for social movements in fighting against societal issues.[110]

Imagining a Dalit critique of IHRL

The question which emanates from the above discussion is what new can a Dalit critique of IHRL contribute to the existing human rights movement. The role of a critical inquiry is not that of anti-human rights, but is of deconstructing the human rights claims and their utopia, to make the existing framework work.[111] The need for such a critique is because rights, both domestically and internationally, have at large been inadequate in addressing caste discrimination faced by Dalits in India, therefore naturally leading us to look for possibilities for reconstructing international law which is more responsive towards the rights of Dalits in India.

Dalit critique at the outset envisages targeting the very root of the discrimination, which I argue is the "culture of oppression" – in this case, the caste system itself. Non-prioritising and non-problematising of the culture of oppression paralyse the human rights corpus in bringing about social change.

The foregoing expansive analysis of the theoretical insights indicates the challenge which the existing systemic forces and discriminatory attitudes pose, to the language of human rights. In developing a Dalit critique of IHRL, "cultures of oppression" take the central stage, by which I refer to the "culture" of non-adherence to the rule of law emanating out of oppressive cultural and social embodiments and religious legitimation generating *perpetual marginalisation.*

The terms "cultures of oppression" and "perpetual marginalisation" are further clarified from the discussion in this section and the preceding sections, which outline the limitation of human rights in bringing change in deeply entrenched discriminatory social and cultural attitudes leading to general lawlessness in the society.

One of the pivotal objectives of the Dalit critique is to challenge the IHRL and attempt at reconstructing its normative corpus, with the aim of centralising "cultures of oppression" as the primary target. This will only take place when the language of IHRL starts problematising the cultural and social embodiments in which law

109 Rosenberg 2008: 82–83.
110 O'Connell 2018.
111 Mégret 2012.

functions. Many critiques of IHRL do somewhat focus on such an inquiry, clear from forgoing discussion, however, a Dalit critique by relying on such theoretical insights calls for a more specific inquiry towards identifying cultures of oppression in society and envisaging ways in which the social and cultural justifications of lawlessness could be addressed, if not completely eliminated.

A caveat at this juncture is vital. This imagining of Dalit critique does not claim and cannot claim to be a completely novel inquiry. It rather emanates from the above discussion, especially from the understanding of third-world critiques and Ambedkar on the role culture and social norms play in adherence to IHRL. This inquiry may be seen as a novel one, in the sense that it develops a nuanced argument about reconstructing human rights by identifying the core reason for perpetual marginalisation which calls for such reconstruction in the first place.

Ambedkar's thought-provoking insight on the "destruction of caste" is fertile to contribute to the Dalit critique of IHRL, where he emphasises on bringing "notional change" as the only answer to fight caste discrimination.[112] Such change will only arise if the structures from where the "caste system" as a system derives its sanctity from, are problematised and dismantled. Ambedkar's analysis is relevant for the present critique as it recognises targeting cultures of oppression, which in the context of India and Dalits would need problematising the notion of the caste system in its entirety.

It is also not right to discredit the movement in IHRL to evolve from norm-setting to "capacity building", undertaken by international human rights bodies with an emphasis on making Human rights achieve its intended goal. The issue is that such attempts have had very little success in addressing caste discrimination.[113]

The experience with human rights has shown us that the oppressive forces reinvent themselves in the form of "neo" regimes of oppression – neo-colonialism, and neo-apartheid for instance. Such a critique would also call for envisaging ways and strategies, and opening a discourse, on using human rights language for ending the perpetuating behaviour of oppressive regimes or cultures of oppression.

The above inquiry need not make Dalit critique seem to give even the faintest impression of being defensive of the IHRL regime. Nor does such a critique establish human rights as a panacea for changing the entire status quo in society. It is only critical of the failures of human rights in not addressing the cultures of oppression. While recognising the limitations of rights and their importance in social movements, it calls for developing an approach that confronts systemic issues that perpetuate marginalisation.

That way a Dalit critique would not imagine vesting human rights with the duty of changing the whole structure of the society or social norms but would stress moving away from the rhetoric of rights language and its utopian promises, and expect IHRL to play a role, a much-needed role, in social movements that challenge systematic discrimination and cultures of oppression. This imagination also demands IHRL

112 Ambedkar 2014a: 68.
113 Eisenman 2003: 133, 171.

to problematise the symbolic adherence veil which masks the regime of cultures of oppression.

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ACTA HUMANA • 1 (2023) 67–76. • DOI: 10.32566/ah.2023.1.4

The Ohrid Framework Agreement and International Law: Twenty Years of Development

NIKOLA DONEV[1]

The Balkans can be described as a laboratory of modernity, especially when it comes to the form of multicultural life in the communities. The modern nation states that formed from the dissolution of Yugoslavia in the 1990s were faced on the one hand with a "need" to establish a state for the majority dominant ethnic group, and on the other hand to reconcile the multicultural reality of their societies and accommodate for the rights of minorities. This paper will focus on the constitutional and legal implications that followed the signing of the Ohrid Framework Agreement (OFA). It will also give an overview of the contents of the OFA and subsequent legislation juxtaposing it to international standards prescribed by documents such as the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the Framework Convention for the Protection of National Minorities of the Council of Europe. In the context of this legal analysis, the paper will examine the developing political environment through analysing certain dynamics in the political system focusing on parliament and political parties. It will also follow the discourse and popular support of the agreement and its effects on the internal and external stability of North Macedonia.

Keywords: Ohrid Framework Agreement, minority rights, international law, power sharing, reconciliation

Introduction

The process of state and nation building in the Balkans is forged in conflict and compromise. Coming out of the Yugoslav socialist federation in the 1990s that in its constitution recognised only the working class regardless of ethnic backgrounds,[2] these new states embarked on creating nation states at the tail end of the 20th century. North Macedonia, being the only state to secede from

1 LL.B, Faculty of Law "Iustinianus Primus", Ss. Cyril and Methodius University in Skopje, e-mail: donev.edu@gmail.com

2 Constitution of the Socialist Republic of Macedonia of 1974.

Yugoslavia peacefully through a referendum began building a vision for the new state that was a compromise between nationalist and liberal forces. While the multi-ethnic reality of the state was recognised in the new constitution, its symbolic place was always second to the dominant nation – Macedonians. This tension within the political system culminated in an armed intra-state conflict in 2001 in which the ethnic Albanian National Liberation Army (NLA) clashed with Macedonian security forces. The conflict was brought to an end through negations that resulted in the signing of the Ohrid Framework Agreement (OFA) between the dominant Macedonian political parties and Albanian parties with guarantees from the international community. This paper will focus on the constitutional and legal implications that followed the signing of the Ohrid Framework Agreement (OFA). It will also give an overview of the contents of the OFA and subsequent legislation juxtaposing it to international standards prescribed by documents such as the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the Framework Convention for the Protection of National Minorities of the Council of Europe. In the context of this legal analysis the paper will examine the developing political environment through analysing certain dynamics in the political system focusing on parliament and political parties. It will also follow the discourse and popular support of the agreement and its effects on the internal and external stability of North Macedonia.

Political context of 2001 and the aftermath

The breakup of former Yugoslavia in the 1990s was marked by violent conflict. Only the Republic of Macedonia seceded from the federation by peaceful means under the leading motto of its first president Kiro Gligorov "I will not let people die for piles of steel". The referendum that was held on 8 September 1991 saw 95% of the Macedonian population vote in favour of independence from the federation.[3] On 17 November 1991, the Assembly of the newly independent republic voted on the Constitution of the Republic of Macedonia. While the narrative of these events is meant to project an image of the country as one of peace and strong national consensus of independence, the reality of the events that preceded the referendum are far more complicated. While 95% of those who voted were in support of independence, the Albanian population did not participate in the referendum. This was the result of previous events in the Macedonian Assembly where Albanian demands were sidelined by the Macedonian majority. Having this in mind, it is clear that Macedonia lacked substantial political and democratic consolidation from the start of its independence.

As a new country on the international scene, Macedonia embarked on a nation-building project, the vision for which was forged in the Constitution. Namely, in the preamble of the text it is clear that Macedonia is "constituted as a national state of

3 Akademik 2018.

the Macedonian people in which full civil equality and permanent coexistence of the Macedonian people with the Albanians, Turks, Vlachs, Roma and other nationalities living in the Republic of Macedonia is ensured".[4] While it is clear that the text at the forefront pushes a vision for the country as a national state, the second half of the text attempts to accommodate national minorities through full equality as citizens. This creates a symbolic classification of people with Macedonians as the primary bearers of the right to a state.[5] Another point of symbolic contestation in the Constitution can be found in Article 19 paragraph 3: "The Macedonian Orthodox Church and other religious communities and groups are free to establish schools and other social and charitable institutions, by ways of a procedure regulated by law."[6] Although this article does not discriminate against other religious communities in the country, it again ranks the religion and religious community (the Orthodox church) practiced by the majority nation symbolically higher than the others. From these examples we can see that the political elite chose a majoritarian model of democracy, while disregarding minority demands for inclusion and participation in the constitution building process.

Even though this constitutional setup was more liberal compared to the constitutions of the new republics in the region, it still meant a degradation of established minority rights within Yugoslavia. From the text of the 1974 constitution of the Socialist Republic of Macedonia, Article 221 declared full equality in rights to all people belonging to different ethnic groups. It also stipulated that minorities shall be proportionally represented in the state and municipal assemblies and its bodies.[7] Article 222 of the text allows for the freedom of all ethnic groups to use their language, promote and develop their culture, and form organisations for these purposes. In addition, the local and national government is tasked with giving platforms to these efforts by minorities through support of the media (radio, TV and print).[8]

The divergence from established minority rights, and the marginalisation of minority ethnic groups in the constitution building process were catalysers for tension within the political system and society as a whole. One trigger event that led to the conflict in 2001 were the 9 July incidents that happened in Gostivar where police forces and protesters clashed over the attempt to lower the Albanian flag that was hoisted in front of the municipal building. This was in accordance with the decision of the Constitutional Court of Macedonia regarding the issue which set the scene for the future conflict. The different tensions culminated with the armed conflict in 2001 with battles between the National Liberation Army and the Macedonian armed forces, namely the police and army. The definition of the conflict remains vague since it cannot be characterised as a war, nor a civil war since no official state of

4 Preamble of the Constitution of the Republic of Macedonia of 1991.
5 Daskalovski 2002: 1–31.
6 Article 19. Constitution of the Republic of Macedonia of 1991.
7 Article 221. Constitution of the Socialist Republic of Macedonia of 1974.
8 Article 222. Constitution of the Socialist Republic of Macedonia of 1974.

war was declared by the Assembly. The conflict lasted from January until November until an agreement was reached following negotiations in Ohrid under international monitoring and support. On 13 August the Ohrid Framework Agreement was officially signed between the leading political figures from the Macedonian side (Boris Trajkovski, Ljubco Georgievski and Branko Crvenkovski), and leaders of Albanian political parties (Imer Imeri and Arben Xhaferi). Guarantors of the agreement from the international community were François Léotard from the EU and James Purdue from the USA. The legal nature of this agreement is difficult to understand since it cannot be considered an international agreement since the signatories are not foreigners, despite the international guarantors it remains an internal political agreement with wide-ranging legal implications. The agreement also has elements of a peace agreement in articles related to ceasing fire and disarmament despite there being no formal declaration of a state of war.[9] While the legal nature of the agreement remains vague it sets the foundation for a new constitutional order.

The Ohrid Framework Agreement and constitutional changes

The Ohrid Framework Agreement (OFA) encompasses 10 points with three included annexes (A, B and C). For the purposes of this paper points one, four, five and six will be analysed along with appropriate annexes. In point 1 (Basic Principles) the OFA categorically states that violence is rejected as a means in pursuit of political aims and that "only peaceful political solutions can assure a stable and democratic future for Macedonia".[10] It also stipulates that Macedonia's unitary character is inviolable and that there are no territorial solutions to ethnic issues.[11] At the same time, the OFA proclaims that the multi-ethnic character of Macedonia must be preserved and reflected in public life.[12] From the basic principles the OFA sets out to preserve the unitary character of the state, while also promoting minority rights of the different ethnic groups that live in the country; this is a difficult balance to achieve in a post-conflict situation, complemented by regional insecurity and conflicts.

The basic principles of the OFA are an effort to reclaim the legitimacy of the state in a situation in which nationality groups that claim the right of national self-determination and where dominant or majority groups deny the multicultural character of the state and exclude groups in the state building process, thus denying them full citizenship.[13] This is evident by the lack of inclusion of minority groups in the process of gaining independence and the framing of the 1991 Constitution. In accordance with the OFA, the Constitution was amended firstly in the Preamble, thus reconceptualising the vision of the state from a national citizen state into

9 Blazevska 2021.
10 Ohrid Framework Agreement, paragraph 1.1.
11 Ohrid Framework Agreement, paragraph 1.2.
12 Ohrid Framework Agreement, paragraph 1.3.
13 Linz–Stepan 1996.

a multicultural democracy. Since the OFA negates territorial solution for ethnic issues, thus disqualifying federalism as a possible model for the country, it needs to construct a political system based on power-sharing mechanisms and decentralisation (of the local self-government).

Point 4 tackles the concepts of non-discrimination and equitable representation with special regards to employment in the public administration on a national and local level. In addition, equitable representation is to be instituted in the police forces, as well as when electing judges to the constitutional court and, ombudsperson and members of the Judicial Councils candidates that are members of underrepresented communities. Annex C further outlines concrete actions regarding the equitable representation.

Point 5 envisions a special change in parliamentary procedure akin to the theory of consensual democracy. New "laws that directly affect culture, the use of language, education, personal documentation and use of symbols, as well as laws on local finances, local elections, the city of Skopje, and boundaries of municipalities…" must receive a qualified majority of votes of members of parliament (MPs), and a majority of MPs claiming to belong to communities not in the majority in the population – this is the so-called Badinter majority.

Power-sharing mechanisms allow for the state be administered jointly, and not by only one narrow constituency. North Macedonia can be described by two different theories. On the one hand, there is the consociational arrangement put forth by Lijpharht which has 5 features: 1. grand coalition, i.e. the inclusion of all major groups in the Government; 2. proportional representation of all relevant groups in the Parliament and public administration; 3. inclusion of the major groups in the Government; 4. veto rights; and 5. a high degree of autonomy.[14] North Macedonia with its constitutional changes has adopted some consociational elements, although in a different and less strict form. While grand coalitions are not mandatory, every government since 2001 has had an Albanian coalition partner. This has been proven necessary due to the fact that political parties' voting bases are not along ideological lines, but ethnical – which is why in North Macedonia there is a distinction between the Macedonian and Albanian "political bloc". Due to this need to form coalitions, Albanian coalition partners receive rolls in the government, therefore, they are included in the government. Proportional representation has been implemented in employment in the public administration through legal mechanisms. While the electoral system was not part of the OFA, changes were made to the law on elections and the electoral system from a majoritarian system to a proportional system with six electoral districts. There is no absolute right to veto of the minority. In this regard, the only mechanism that of power-sharing is the "Badinter majority", which is a kind of qualified majority that stipulates that for any law that has an impact on minority rights, a majority of MPs that identify as a member of an ethnic minority (different

14 Lijphart 1977: 25.

from Macedonian) must vote in favour in order for that law to pass. This means that for many laws there must exist a political consensus within parliament on laws impacting rights of ethnic minorities. While there is no full autonomy (such as the case with the cantons in Switzerland), the OFA and Constitution envision the strengthening of the competences of the local self-government. In essence it can be argued that North Macedonia is a minimalist consociational system.[15] This power-sharing dynamic has influence over the implementation of minority rights on a national and local level.

Point 6 regulates the questions on education and use of language. It states that primary and secondary education will be provided in the students' native language and unified academic standards will be applied. In terms of higher education, the state accredited the previously disputed and unaccredited university formed in Tetovo in 1994, and later formed a university that taught in Albanian and English (South East European University). This was complemented by the implementation of affirmative action measures in state universities.[16] Furthermore, this point envisions certain language rights. Languages spoken by at least 20% of the population in the state is an official language in the administration of the country. This same rule applies on the level of local self-government. In terms of languages spoken by persons that belong to communities that are below 20%, the discretion for its use in public bodies is to be decided by local authorities.[17]

The process of decentralisation in North Macedonia was meant to curb conflicts by balancing integrationist and accommodationist elements in the system.[18] By granting non-majority groups greater competences on the local level, decentralisation would instil a greater sense of security and protection from majorisation and discrimination, while at the same time ensuring the unitary character of the country.[19] Changes in the law on local self-government that implemented provisions on the OFA regarding decentralisation and language rights has been led to poor and inconsistent implementation of the consociational power sharing arrangements envisaged locally, which is another area where discrepancies in implementation of the law have affected the accommodation of non-majority community needs, particularly those of the smaller ethnic communities. Whilst greater municipal use of community languages has meant that Albanian has now acquired official status in 29 of the 85 municipalities (including the City of Skopje), the Turkish language has only become a working language in four, Serbian in one, and Romani also in one. Albanian is also in use in a further 17 municipalities where the community constitutes less than 20% locally, Turkish in another four, and Vlach language in one. It is worth emphasising that whilst the Albanian language has been recognised (formally if not in practice) in over half of Macedonia's municipalities, community languages other than Albanian are in official

15 Bieber 2008: 7–41.
16 Marolov 2013: 134–154.
17 Ohrid Framework Agreement, Point 6.
18 Lyon 2011: 87–115.
19 Manor 1999.

use in only 10.[20] The situation has remained unchanged even after the 2021 census, which confirmed the existing ethnic composition of the country. In 2018, a new law for use of the languages was passed through parliament which greatly expanded the use of minority languages, specifically the Albanian language in all state institutions. The law has been subject to public critique and has also been commented by the Venice Commission (which will be explored further in the text).[21]

Consequences on the rights to education and use of language

A survey in 2020 carried out by the National Democratic Institute (NDI) shows that the majority population is concerned about normal everyday problems, rather than about inter-ethnic issues. Regarding their consideration of what poses the most serious problems to the country, 27% mentioned the economy, 24% crime and corruption, 22% the Covid-19 situation, 17% judiciary and justice, 6% standard of living, 5% general political situation, 4% health, 3% EU integration, 2% human rights, democracy and freedom, and only 1% considered this problem to be inter-ethnic relations. The numbers clearly show that the majority believes that inter-ethnic tensions are easing. A most concerning issue, one that affects both the Macedonians and Albanians, but also all others living in the state, is at the very bottom of the list.[22] While ethnic tensions still arise in the form of hate speech or fights during football matches violent armed conflict is non-existent. While there is less attention towards ethnic issues in the country, the implementation of policies regarding education and use of language continue to influence the everyday lives of people.

Juxtaposing the changes in the Macedonian legal system to international norms, we can observe that the provisions regarding minority rights adhere to the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM). While the rights of the Albanian ethnic community have significantly improved since the signing of the OFA, the rights of other smaller communities are still lacking, despite the fact that the OFA in terms of its language is applicable to all minorities in the country. The Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), in its the fifth opinion on North Macedonia has noted several concerns. In terms of linguistic rights, the new Law on the Use of Languages of 2019 that extends the use of the Albanian language on a national and local level is considered ambitious since the state lacks the capacity to effectively implement the law. These concerns are also noted in the opinion of the Venice Commission that praised the willingness of the authorities to improve the linguistic situation of national minorities. However, it found that it imposed in certain areas "what proved

20 Lyon 2011: 87–115.

21 What is provided in the bill for the use of languages according to the legal explanation (see https://akademik.mk/shto-se-predviduva-vo-predlog-zakonot-za-upotreba-na-jazitsite-spored-zakonskoto-objasnuvane/).

22 NDI 2020.

to be unrealistic legal obligations on the public institutions" and particularly on the judiciary. The full implementation of the law in this field would risk slowing down the functioning of the entire judicial system.[23] The Venice Commission further noted the law's ambiguity about which provisions apply to other minority languages spoken by at least 20% of citizens at a municipality level and the discretion given to the municipal councils in deciding on the use of languages spoken by less than 20% of the citizens at the local level. The Framework Convention under Article 10.2 gives guiding conditions for the use of a minority language in communication with public authorities. In this regard the state has a wide margin of discretion where it needs to balance the effort and resources involved in the endeavour, but also the benefit from the application of such measure.[24] The ACFC also notes that the 20% threshold is too high since it will effectively only apply to the Albanian language, while the use of other languages spoken by minorities under the 20% threshold is up to the discretion of the local self-government.[25]

Article 12 of the Framework Convention promotes intercultural education. The ACFC notes that while some schools have become more integrated and promote intercultural learning and contact, many schools are still ethnically segregated and students receive instructions in different languages.[26] The school curriculum also lacks content regarding intercultural education. This is especially documented in the elementary school history textbooks since the historical narratives that are promoted are exclusionary and bi-national without inclusion of other minorities besides the Macedonian and Albanian narrative.[27] These changes to the historical textbooks were done as part of the implementation of the OFA, but scholars involved in the process had difficulties in constructing the new narrative for the country and feared that educational materials outside North Macedonia would be promoted as an alternative.[28]

Considering equal access to education, the ACFC notes that Roma students continue to be discriminated in the access to education, despite changes to the laws on elementary and secondary education. The ACFC also notes the de facto segregation of Roma students in several schools.[29]

Conclusion

It is clear that the Ohrid Framework Agreement had an important influence in shaping the constitutional order of the country by balancing many interests and tendencies. It is clear that the OFA stabilised the country and evaded a protected armed conflict.

23 Venice Commission 2019.
24 Dimitrov 1999.
25 Council of Europe 2022: paragraph 90.
26 Council of Europe 2022: paragraphs 102, 103.
27 Todorov 2020: 69–91.
28 Pichler 2009: 217–251.
29 Council of Europe 2022: paragraph 110.

In its essence the OFA retained the unitary character of the Macedonian state while also allowing for the creation of a framework for minorities to be protected and equal in rights. It balances different diverging interests and tendencies of both sides of the conflict, which can cause issues in its implementation in the long-term. The constitutional changes allowed for greater inclusion of minorities in the national narrative and changes to laws created a political system akin to a consociational system in which proportionality and representation play a key role. While on a national level political parties and elites are divided along ethnic lines, the process of decentralisation and strengthening of the local self-government allow for different integrationist and accommodationist tendencies.

While the text of the OFA can serve for the promotion of minority rights in general, since it does not target the improvement of rights of a singular minority, even though its implementation has been heavily focused on the position of the Albanian minority. In light of international norms regarding minority rights such as the framework convention the right and legal changes derived from the OFA go beyond these minimal standards. As pointed out in the report of the ACFC, the rights of smaller minorities in the country are still lacking in key areas – education and use of language.

Twenty years after the signing of the OFA, political elites still follow its basic principles and are constrained by them in their actions. Now a majority of the Macedonian ethnic population are in favour of the agreement, which was not the case in 2001. In cases of severe political crisis, the OFA is often seen as a factor of instability, but it is also a framework that allows for the political system to develop in a way that is inclusive. Political elites need to strive for greater inclusion of other minorities in the political decision-making process to ensure the continuation of peace in North Macedonia.

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ACTA HUMANA • 1 (2023) 77–92. • DOI: 10.32566/ah.2023.1.5

Poland and the Local Poles in the Free City of Danzig between the two World Wars

RENÁTA SOMOGYI[1]

The Free City of Danzig was one of the peculiar European regions in the period between the two World Wars under the administration of the League of Nations. This was the present-day area of the city of Gdańsk and its vicinity. Danzig had a special legal status. This study attempts to capture one of the specific aspects of this complex issue – the relationship between local administration and the local Poles, and the Polish state agencies. Through the presentation and analysis of the situation of this "city" of special status, the reader may obtain an insight into the procedures of one of the first transitory crisis management operations of the international community and into the life of the minority population.

Keywords: Polish minority, transitory international management, League of Nations, legitimacy, Danzig, immunity, high commissioner

The minority issue as reflected by international law

The birth of modern national identity at the turn of the 18th and the 19th centuries, followed by the rise of new national sentiments as well as the everyday presence of the minority issue has caused increasing disturbance in the relationship of Europe's traditional Great Powers over the past 200 years. With this, a new set of problems began to be outlined in international relations, despite the fact that the "modern" (national) minority rights had not even been raised prior to World War I. Legally, there were no national minorities; only the case of religious minorities in the Balkans was controlled in the second half of the 19th century. Frequently, the minority issue was preferred to be neglected in international relations. "Nationalism emerging in the 19th century was the hotbed of modern minority rights and the dissatisfaction of minorities has been – to this very day – one of the most disquieting driving forces in the evolution of international relations."[2] In the 19th century, the Great Powers still made some attempts to normalise and regulate the situation of minorities living in Central and Eastern Europe in terms of religion, but these endeavours

1 PhD student, University of Public Service, Doctoral School of Public Administration Sciences

2 Szalayné Sándor 2003: 49.

and international agreements failed at the dawn of the 19th century. "An English Marxist historian, Eric Hobsbawm, attempted to make the point already with the title of one of his works that nations were the 'products' of modernisation: he spoke of the 'invention of tradition'. He argued that the symbols and rituals honoured today as traditions were deliberately created in the European countries in the last third of the 19th century in order to damp class conflicts generated by capitalism. For Hobsbawm, nations were neither ancient, nor natural."[3]

Nothing demonstrates the importance of this subject matter better than the fact that the perpetrator of the Sarajevo assassination sparking World War I regarded himself as a political activist belonging to the Serbian minority. This fact and the outbreak of World War I made Great Powers face the severity of the problem and open the eyes of the other international legal actors to the need to address the minority issue.

One of the main goals of the negotiations following World War I was the creation of a new system of states and to that end it was considered inevitable that the issue should be addressed and regulated, in which the main role was given to the newly-born League of Nations.[4]

The League of Nations or the "Champion" of the International Minority Protection System

The League of Nations (largely referred to as "Népszövetség" [Alliance of Peoples] in Hungarian terminology) established by the peace treaties can be referred to as a milestone in international relations being transformed as one of the consequences of World War I.

The League of Nations played a decisive role, and perhaps it may be claimed that it opened up new dimensions in international administration and in the regulation of the situation of national minorities. The League of Nations came into being with the execution of its Covenant[5] signed in January 1919, and was the first intergovernmental body whose principal mission was to maintain international peace and security. The tragedy of World War I spectacularly demonstrated that the alliance systems established earlier by the Great Powers (Concert of Europe, Triple Alliance, Entente cordiale) were unable to build up an efficient and lasting security system, moreover they led the world into a hitherto unprecedented conflict. Therefore, in 1919 there was a need for an organisation capable of preventing the outbreak of another war of this type over the longer term.

The initiative is associated with the name of Woodrow Wilson, who in his famous Fourteen Points[6] envisaged permanent and just peace as the foundation of

3 Egedy 2007: 72.
4 Szalayné Sándor 2003: 49.
5 Grotius 1933.
6 History Learning Site s. a.

international cooperation. Naturally, following the American initiatives and ideas, the British and French also came up with their own, many of which were incorporated into the Covenant entering into force in January 1920. At the same time, the Covenant became an integral part of the Paris Peace Treaties envisaging the maintenance of international peace and security.[7] Its most important provisions included guarantees for territorial integrity and political independence, disarmament, regional agreements and, most importantly from the viewpoint of our subject matter: the protection of minorities.[8] It is important to underline that only the losers and the East Central European successor states were made to sign the treaties concerning minorities. The League of Nations, as an international body with a general competence, had the task of developing and enforcing the system of minority protection. Compliance with the minority protection agreements was part of the peace treaties creating the new states, but they did not formally constitute a separate category, yet the new states could not have been established without them. It is important to note that this was the first attempt in international law and at the same time a "systemic attempt that wished to ensure the protection of minorities on an international basis".[9] Naturally, neither the drafting nor the execution of the resolutions and the various provisions was a simple process. This is best demonstrated by the fact that no deliberate, coherent policy came into being envisaging long-term cooperation, and the internal contradictions of the Paris Peace Treaties only added to the problems. The absence of efficient and collective work was a sign of weakness.[10] And, if we take a closer look at the final text of the Covenant of the League of Nations in the context of this study, it is revealed that: it contains no provisions concerning minority rights. Traces of the recognition of these rights can be found in some drafts of the Covenant (the draft of the German International Law Society and of the Swiss and the German Governments), moreover, they were also included in the 17, and the 21-point programmes of U.S. President Wilson.[11] It can therefore be said that there was no consensus on a broad and wide-ranging regulation of the protection of minority rights and on all participating states. To offset this, bilateral or multilateral agreements concerning minority protection were concluded within the Paris peace conference in 1919, which to date constitute the legal sources of international minority rights. At the same time, it is important to clarify that the Covenant of the League Nations and the minority protection provisions came into being in most cases (as chapters or so-called annexes) constituting inseparable parts of the individual peace treaties. In the light of all this, it can be claimed that the system established by the League of Nations was not a universal system for the protection of minorities, and that is why the Covenant of the organisation does not include itemised minority protection norms. The organisation played a role in

7 Blahó–Prandler 2005: 48.
8 Blahó–Prandler 2005: 49.
9 Szalayné Sándor 2003: 36.
10 Blahó–Prandler 2005: 50.
11 Szalayné Sándor 2003: 67.

monitoring the application of the peace treaties, including the minority protection clauses.

Danzig as reflected in historical Polish statehood

To understand the changes in the destiny of the population of the Free City of Danzig in the period between the two world wars and particularly that of the minority Polish population, we need to look back to a more distant past: Danzig, or Gdańsk in Polish, used to be one of the most important Hanseatic cities on the shores of the Baltic Sea. Its foundation is unclear, the first written records about the city date back to 997, when Saint Adalbert began to preach the Gospel here.[12] It is highly probable that the city itself was founded by the princes of Pommerellen (Upper Pomerania), who raised it to be their capital. With the end of the reign of the princes of Pommerellen in 1309, the Teutonic Order took control of the city until 1354. Then, the city broke away from the Teutonic Order and became a republic. In actual fact, however, it was under the protection of King Casimir of Poland, who granted several privileges to the city.[13] As a consequence, a public law relationship was established which bound Danzig to the historical Polish statehood. Later on, the city held a both legally and economically privileged position within the Polish Noble Republic. One of the main reasons for this was that Danzig supervised and controlled a decisive part of the foreign trade of the Polish–Lithuanian state.[14]

In 1734, in the War of the Polish Succession, the city was captured and heavily taxed by the Russians and the Saxons due to the joint intervention of the Russian and the Habsburg Empires. In 1772, at the time of the first partition of Poland, Danzig continued to keep its status of free city, but the Vistula estuary became a Prussian possession. At the time of the second partition, however, the city was forced to surrender to the armies of the Prussian King, Friedrick Wilhelm II, and on 7 May 1793, Danzig was also subjected to the rule of Prussia, which abolished the old self-government of the rich merchant city. A rather centralised model of governance was then introduced which, however, did not last long because the city became an "independent" republic subject to French rule between 1807 and 1815.[15] This took place as a consequence of the Peace Treaties of Tilsit.[16] The French decided not to annex the city to the Grand Duchy of Warsaw that they set up, but rather to manage it separately, and entrusted its administration to a French general Francois Joseph Lefebvre.[17] The administration of the first "Free State of Danzig" (1807–1814) was thus a curious blend of archaic traditions of governance and modern French influences.

12 Davies 2006: 12.
13 Davies 2006: 14.
14 Halász 2015: 142.
15 Halász 2015: 142.
16 Davies 2006: 521.
17 Loew 2003: 73.

Primarily, this stemmed from the fact that the French allowed the leaders of the city to re-establish their so-called "ancestral liberties" and institutions of pre-1793 era, while the Danzig leadership committed to upholding the provisions of the French Code Civil adopted in 1804. As a result, the French legal acts and solutions slowly infiltrated the management of the city's life and continued to shape the life of the Free City of Danzig.[18]

The aforementioned military governor, General Lefebvre and the presence of the French army greatly influenced the balance of power, let alone the fact that the French were in charge of customs administration too, which was of importance from a tactical (military) point of view.[19] Nevertheless, the population of the Free City of Danzig was able to operate and direct its own administrative institutions: its Senate, the autonomous city court of justice and the College of the Hundred, which was sometimes referred to as "the third estate" or class.[20] The judicial body consisted of 12 persons and it regularly made its verdicts in judicial councils of three. Although these bodies all had a substantial impact on the legal development of Danzig, legislation was primarily within the competence of the Senate. The Senate evolved from the so-called old city council at the end of the 18th century; it was headed by the president, who in fact replaced the old mayor. First, it had 12, then 22 members, essentially the mayors of the city districts. This body was the primary executive body of the "free city", and the city officials owed their allegiance to this body. The various committees greatly assisted the work of the Senate; with the progress of time, they specialised continuously until their operation became professional.[21]

The first free state of Danzig, however, could only survive for seven years, from the Peace Treaties of Tilsit to the Vienna Congress.[22] At the end of the Napoleonic era, the city's population continued to trust in retaining the free city status, but they were disappointed because Danzig was re-annexed to the rule of the Prussian King on 3 February 1814, so it constituted a part of Germany in general and Prussia in particular until 1918, and for about 104 years, it progressed under the German flag.[23] It is a fact that over a century, the people of Danzig were integrated into the new German state, so in 1919 they no longer wanted to be annexed to a reborn Poland.[24] As a result of the decision of the Great Powers victorious in World War I, Danzig was granted a peculiar historical role. This was a crucial period for the Polish minority, because they were granted various and decisive privileges in a "state" which, due to the German majority of the population, did not wish to be subject to Polish influence.

18 Halász 2015: 142.
19 Related to the continental blockade against the British.
20 The existence of the latter body is dated from the 16th century, representing primarily the interests of urban citizens, merchants and artisans. Its role was gradually enhanced and this held also for the period between 1807 and 1815.
21 Halász 2015: 143.
22 Loew 2003: 79.
23 Pangea 2014.
24 Halász 2015: 143.

The free city of Danzig under the aegis of the League of Nations

As a result of the decision of the Great Powers victorious in World War I, Danzig became an independent city state, safeguarded by a high commissioner appointed by the League of Nations.[25] Until 1920, it was the capital of West Prussia (Westpreussen);[26] the war, however, substantially changed the situation of the city and its population. During the war, Wilson's 13th point called for the establishment of an independent Polish state,[27] which was to have access to the see. Several arguments were raised for this, primarily ethnic and economic interests. If we study the ethnic aspect first, the official explanation was that more Poles lived in this area than Germans.[28] As subsequent research revealed, this argument was slightly faulty, because the Kashubs were also included among the Poles.[29] Naturally, the Germans did not accept the data of the census, nor did the Poles, who also had their doubts about the authenticity of the data recording the number of the German population. The other argument was economic, according to which "one of the guarantees of Polish independence is access to the sea, because this way Poland's exports would not be at the mercy of the German port cities".[30]

However, access to the sea could not be realised without the separation of the German territories and for this reason, West Prussia was divided into four separate parts in 1919.[31] The eastern part with its centre at Marienwerder was left under the control of Germany, but for administrative purposes, it was integrated into East Prussia. The central part of West Prussia together with the Hel peninsula and the coast became part of Poland; customarily this area was referred to as the Polish Corridor. Finally and most importantly for this study, the Free City of Danzig was created.[32] The victorious states found themselves in a very difficult position strategically because they knew that they could not annex it to Poland as 95% of the city's residents were German speaking,[33] at the same time, it could not remain part of Germany because its strategic and economic significance was far too great.

In February 1920, Danzig came under British occupation, indirectly guaranteeing the patronage of the League of Nations over the new state. Poland continued not to recognise the separation of the city and did not give up its claims to it. In this, the

25 Loew 2003: 98.
26 Loew 2003: 79.
27 History Learning Site s. a.
28 528,000 Poles against 385,000 Germans (see Pangea 2014).
29 "This group of people has its own identity and derives its language from Pomeranian. Poland does not recognise them as a separate nationality; it was expressly hostile to them during the years of socialism, questioning their loyalty to the socialist state. Around 1920, the German, Polish and Kashubian population were not sharply separated, they mostly lived in mixed neighbourhoods in West Prussia" (Pangea 2014).
30 Pangea 2014.
31 Németh 2013.
32 Pangea 2014.
33 Halász 2005: 250.

Poles could rely on the French, for whom the strengthening of Poland with a port city was a substantial issue of national security.[34] On 15 November 1920, the League of Nations officially recognised the Free City of Danzig as a new European state, and organising the management and administration of the city under the auspices of the organisation began.[35]

The structure and operation of the city administration

Under the Peace Treaty of Versailles ending World War I, Danzig became an independent entity, and this document provided for its fate and organisation in several clauses. A separate chapter dealt with the fate of the area devoting exactly seven articles to Danzig.[36] Under Article 100, Germany renounces its claims and rights arising in relation to the area in favour of the Allied and Associated Powers, as a result of which, based on Article 102, the Allied and Associated Powers declared Danzig to be a free city and placed it under the protection of the League of Nations. Furthermore, with a view to establishing a constitutional framework, according to the provisions of Article 103, this power was granted to the High Commissioner of the League of Nations and the regularly elected representatives of the city. From the viewpoint of our subject matter, of particular relevance is the provision that in the case of any legal dispute arising between the Free City of Danzig and Poland concerning the peace treaty, or any agreements or covenants supplementing it, the High Commissioner shall act in the first instance.[37]

With regard to the situation and legal standing of the Polish minority, the provisions of Article 104 were of the greatest importance, under which the peace treaty obliged the Polish Government and the Free City of Danzig to enter into an agreement with the participation of the Allied and Associated High Powers. This agreement had to enter into force simultaneously with the establishment of the Free City of Danzig in accordance with the following provisions and objectives: "(1) To effect the inclusion of the Free City of Danzig within the Polish customs frontiers, and to establish a free area in the port; (2) To ensure to Poland without any restriction the free use and service of all waterways, docks, basins, wharves and other works within the territory of the Free City necessary for Polish imports and exports; (3) To ensure to Poland the control and administration of the Vistula and of the whole railway system within the Free City, except such street and other railways as serve primarily the needs of the Free City, and of postal, telegraphic and telephonic communication between Poland and the port of Danzig; (4) To ensure to Poland the right to develop and improve the waterways, docks, basins, wharves, railways and other works and means of communication mentioned in this Article, as well as to lease or purchase through

34 Németh 2003: 328.
35 Loew 2003: 104.
36 Grotius 2013.
37 Grotius 2013.

appropriate processes such land and other property as may be necessary for these purposes; (5) To provide against any discrimination within the Free City of Danzig to the detriment of citizens of Poland and other persons of Polish origin or speech; (6) To provide that the Polish Government shall undertake the conduct of the foreign relations of the Free City of Danzig, as well as the diplomatic protection of citizens of that city when abroad[…]"[38] Finally, the treaty was executed on 9 November 1920 and entered history as the Peace Treaty of Paris. Under the provisions of the Peace Treaty of Versailles and the Treaty of Paris, the Free City of Danzig became an independent "state" which was, however, restricted in certain rights. The articles reveal that its foreign affairs were handled by Poland, and in addition, Poland was granted control over the railway network and communications and supervision over the port. The Polish post office continued to operate in the city; and the Poles were also responsible for land defence. In 1922, the mandatory customs union was also established between the two states, which provided even more leeway for Poland to "exercise power" over the free city.

The legal standing and everyday life of the local Poles

The territory of the Free City of Danzig included virtually the entire Vistula Delta, except for the right bank of the river Nogat. The total area of this separate entity was 1,966 square kilometres, and it had a population of approximately 366,000 early in the 1920s. Later, this figure reached 400,000. In terms of the ethnic distribution of the population, several different figures are available. According to the German census data earlier referred to, the Polish speaking population made up about 4–5%, while according to other sources, it reached 10%. When the city became an independent international entity, this latter percentage made up about 12,000 people, which increased to 25,000 by the time of the census ten years later.[39] According to more recent estimates, the share of the Polish speaking population of Danzig just before World War II was about 12–20%. In addition to the disputed census data, the presence of the Kashubs also complicate the issue. Kashubs were frequently counted with the Poles, even though they are members of a separate West Slavic group of people, who lived in the area of the Vojvodina of Pomerania during the stormy centuries of history. The Kashubs characteristically derived their language from Pomeranian, and have an independent identity.[40] The problem was caused by the fact that at the time of the establishment of the Free City of Danzig they were not sharply separated from the Poles, they mostly lived in mixed neighbourhoods in West Prussia.

The territory of the Free City of Danzig consisted of Danzig itself, three neighbouring towns, 252 villages and altogether 63 farmsteads or manors. It was

38 Halász 2015: 144.
39 Halász 2015: 144.
40 Today, 5,100 people in Poland identify themselves as Kashubs, including Donald Tusk, President of the European Council (see www.nyest.hu/hirek/kik-azok-a-kasubok).

not a negligible factor that because of the Polish institutions established in the city and the Polish influence, Polish had to be used as an official language. So, it can be established that the population of the Polish minority increased during the prosperity of the Free City of Danzig.[41] The legal standing of the Polish minority was governed by the Paris Treaty between Poland and Danzig and Article 4 of Danzig's Constitution.[42] According to these provisions, although the official language was German, legal and administrative instruments were in place to ensure the free national development of the Polish speaking part of society. This meant the use of the mother tongue in education, local administration and the administration of justice. No Senate dared to alter these provisions until 1939. A major part of the Polish minority was incidentally bilingual, so many of them found employment at the post office or on the railway network.[43] However, the issue was not nearly as simple as this, as several groups of different status could be found within the local Polish community, each of which were subject to different regulations. Persons enjoying diplomatic immunity constituted an important part of the local Polish community; their number was not large (moving between 50 to 70 people), their situation and legal standing was regulated by the mother country, that is, Poland. The majority of them joined the diplomatic missions of the Polish state, or the postal services or one of the customs offices, also in Polish hands.[44] Thanks to diplomatic immunity, this group of the Polish minority was virtually untouchable. The situation was different for Polish civil servants and government officials who, although employed by various local authorities of the Polish state, were subject to local legislation and the jurisdiction of the local authorities. Although this group of Poles did not enjoy diplomatic immunity, they did not regard the Danzig authorities as their superiors, but continued to report to the head of the Polish agency providing work for them. Their number was around 15,000–16,000.[45] The next Polish group consisted of professionals, merchants and entrepreneurs, about 2,000–3,000 people, who were fully subject to the Danzig jurisdiction. The Polish Government was unable to achieve "extra-territorial" status for them. Finally, we should not forget about the Poles living in the territory of the Free City of Danzig, who could be said to be natives because they had been living in the territory for a long time and taking on the Mazurian–Kashubian dialect. It is difficult to quantify them as they were largely merged with the Kashubian population. They, similarly to the previous group of the Polish minority, were governed by the Peace Treaty of Paris between Poland and Danzig and Article 4 of the Danzig Constitution.[46]

As already mentioned, the number of the Polish population increased between the two World Wars, primarily due to Polish clerks. According to the data of the

41 Halász 2015: 144.
42 Böttcher 1997: 163.
43 Loew 2013: 209.
44 Halász 2015: 146.
45 Halász 2015: 146–147.
46 Halász 2015: 146.

1923 census, the total headcount of the population was 366,730, of which 13,656 were of Polish descent. The most important institutions at the time where the Polish Village and the Society of the Friends of Sciences and Arts established in 1922. These two institutions and the Railway Directorate enabled the Polish minority living a structured manner to obtain work, and to achieve some economic "upswing" through the Polish banks and trading companies.[47]

The High Commissioner, the leader appointed by the main bodies of the League of Nations, played an important role not only in the life of the "city state", but also in the lives of its minority residents. He was authorised to approve the Constitution of the city state, and to take action in disputes arising between the city and Poland.[48] It was an established practice that "the Council of the League of Nations mandated the Polish commissioner for Danzig to study the situation of the free city and to submit their report at the forthcoming meeting of the Council".[49] As far as the League of Nations was concerned, the appointment of a leader intended to be neutral was understandable as the goal was to create an efficient, smoothly functioning state, which would also take international interests into account. However, the "outsider" official was confronted with difficult tasks. Naturally, the absence of knowledge about local relations, political parties and the "personal" interests of the city could be a major handicap to both the new leadership and the population. The League of Nations subordinated the locally elected People's Assembly (Volkstag) to the direction of officials of foreign origin (primarily, British, Italians, Swiss and Danes), which resulted in a certain limitation and partial marginalisation of socio-political forces.[50] Of the High Commissioners appointed to head the city, Sean Lester was the one, who paid greater attention to the Polish population regarding minority issues. At the time of his appointment (1 January 1934), he was rumoured to be highly actively interested in the actual state of minority affairs. "[…] his contributions to the Minority Subcommittee of Committee VI of the Assemblée revealed a decidedly pro-minority orientation. In circles here he is known as a person who conscientiously discharges the tasks entrusted to him or undertaken by him; however, the circumstance that he does not speak German and has absolutely no knowledge of Central and Eastern Europe is going to greatly hamper his mission in Danzig."[51]

Sean Lester had a relatively stable position in the life of the city; prior to the expiry of his usual 3-year mandate, his appointment was extended by an additional year, and in May 1936 the Royal Hungarian Representation next to the League of Nations reported highly positively of the person of the High Commissioner in Geneva: "[…]

47 Loew 2013: 194–195.
48 Ruhnau 1988: 125.
49 Hungarian National Archives 1936a.
50 Ruhnau 1988: 127.
51 Hungarian National Archives 1933.

Sean Lester received commendations from the British, the Poles and the French as a faithful guardian of the Constitution of the Free City."[52]

At the same time, the fact that the Danzig Government frequently expressed the demand not to have the position of the High Commissioner filled, cannot be neglected. This was submitted to the League of Nations on several occasion, but the attempts failed every time. As an alternative, limitation of the powers of the High Commissioner was raised "[…] so as to enable the smooth operation of the Danzig Government at least in domestic policy. It is also known that it was discussed that the High Commissioner to be appointed should be Polish. Concerning this, Baron Weizsäcker expressed the view that such a solution would not really be desirable as the High Commissioner is called inter alia to make neutral decisions also in the Polish aspects of Danzig."[53]

As revealed by the above, the Polish minority had to enforce its rights in a rather difficult situation; this was perhaps best formulated by András Hory (at that time, Extraordinary Ambassador and authorised minister) in his Warsaw report of 1936: "[…] There were several incidents in Danzig with detrimental effects on the Polish–Danzig relationship. So, currently the Polish Government has undertaken a role of intermediary between Danzig and the League of Nations on the one hand, and has urged a solution to Danzig problems (in particular the protection of minority) directly affecting Polish interests on the other hand."[54]

The religious situation of the Polish minority

Sixty percent of the population were Protestants, belonging to the Lutheran Church of the Old Prussian Union. The majority of their pastors remained loyal to the new Nazi regime after 1933, so the parish and its members did not suffer any particular atrocities. Catholics made up forty percent of the population; they established the Bishopric of Oliwa in 1925. The first Bishop in office was Edward O'Rourke, who administered his diocese until the NSDAP party gained power, and once the party gained on muscle, he was forced to resign. His place was taken over by Carl Maria Splett, whose activities are rather controversial. During the war, he was forced by pressure from above to prohibit the use of the Polish language in Church life and in preaching, that is, within his Church. Finally, he collaborated with the Nazis, for which he was condemned after 1945, then in 1956 he was able to emigrate to West Germany.[55]

In 1923, there were roughly 7,500 Jews living in Danzig, of whom 2,500 were Polish citizens. Their headcount tripled since the 19th century. Because of the new arrivals, however, they did not constitute a homogeneous community. Relatively many of them

52 Hungarian National Archives 1936c.
53 Hungarian National Archives 1936a.
54 Hungarian National Archives 1936b.
55 Loew 2013: 209–210.

were East European refugees, arriving in the city only at the end of the Czarist era, or after World War I, and most of them were not German-speaking. Among them, one could find adherents of assimilation to Poles and Germans as well as Zionists. Consequently, the city served as the venue of many important Jewish congresses between the two world wars, in addition to having a Jewish theatre functioning in Danzig. After 1933, a Jewish Cultural Society was established.[56]

Political relations

The goal of the League of Nations was to establish a peaceful and secure environment, which would not allow another conflict or the outbreak of war. Nevertheless, it enabled every German political party to run for the local elections, respecting the wishes and interests of the population of the new state. Thus, the most influential parties, the German National Party (DNVP), the Social Democrats and the Centre Party, all participated in the elections. The members of the Senate were the representatives elected from amongst their candidates who were responsible for the proper functioning of the executive.[57] Initially, this system functioned smoothly and it seemed that thanks to international supervision the German and Polish interests could prevail equally (or proportionately). In the 1920s, a Parliament of 120 members was elected, with a coalition of the German national civic parties ruling, frequently in opposition to the party of the Polish minority, the so-called Mniejszoscpolska. The minority party kept on declining, while the Social Democrats gained on strength in the second half of the 1920s, and the Centre Party joining forces with the Catholics and the Liberals achieved a majority. In the meantime, the local German Social Democrats made several attempts to improve their relationship with the Polish minority; this, however, was prevented by the onset of the world economic crisis and the opposing interests of German citizens.[58] With the progress of time, every German party wished to accede to Germany under the leadership of the head of the Senate, Heinrich Sahm, but with NSDAP coming into power in 1933, balance of power shifted in the German-speaking city.[59] Despite the supervision of the League of Nations, the Centre Party shifting to the right and NSDAP won over the followers of the other parties in the name of the politics of unity, eliminating all the other democratically functioning parties and taking over full control of the city. Finally, they managed to have the Nuremberg racial laws adopted in a state which, in principle, was administered by the League of Nations.[60]

Ultimately, only two Polish MPs remained in opposition in the Senate; the Social Democratic Party was gradually dissolved, and finally the Centre Party. The measures

56 Loew 2013: 209.
57 Pangea 2014.
58 Loew 2013: 191–194.
59 Lemo 2015.
60 Pangea 2014.

and decrees of NSDAP drove the Jews out of posts in public administration, leading to the self-liquidation of the local Jewish community; only 1,660 of the 11,000 people remained in the area, the others emigrated in the hope of a better life.[61]

Hermann Rauchschning took over control of the Senate from Heinrich Sahm, who – although close to the Nazi Party – endeavoured to remain relatively independent. Finally in 1934, he decided to resign his position to avoid becoming an NSDAP puppet, and emigrated through Poland. His place was taken over by Arthur Greiser, who as president of both NSDAP and the Senate, enjoyed full territorial control over Danzig. Only Sean Lester, then High Commissioner of Irish origin, tried to support the opposition parties in order not to allow the Nazis to take over the whole city.[62]

However, these endeavours were unsuccessful, international peace and security was shaken to its very foundation; laws were adopted which subsequently led to ethnic catastrophe. Naturally, the lack of success of administration by the League of Nations cannot be attributed exclusively to the shortcomings of the organisation. In addition to problems and shortcomings of administration, other reasons also had a role in the failure of the League of Nations. One such reason was the intensification of German and Polish clashes in the city, which offered a favourable opportunity for Hitler and Stalin to launch World War II.[63]

On the eve of World War II, Germany openly demanded the return of the city of Danzig, from which the League of Nations and primarily the Poles fully dissociated themselves and the Polish soldiers still remained in their place. It is well-known that World War II began right here with the siege of the small fortresses of the Westerplatte peninsula which, after the relative calm of two decades, brought total destruction to this proud city. After 1945, the population was almost fully replaced. Most of the Germans fled before the arrival of the Red Army, while those who stayed were in for many trials and violence when the front passed through. The new Polish power insisted on the relocation of the Germans still living there. This took place in 1945–1946. Of the indigenous German residents of the city, only a few hundred managed somehow to verify themselves and remain in the city. They were largely replaced by persons resettled from the Polish territories annexed by the Soviet Union, but many came also from the central Polish Voivodinas. As a result, the pre-World War II residents, whether of Polish or German nationality, therefore represented only a few percent of the total population after 1945. The new social life of the city was dominated largely by Polish middle class and intelligentsia from Vilna (Vilnius) and its vicinity.[64] The new Poles also had to blend in with the old in a city with a different image. But that is a different story. The point is that the Free City of Danzig as an

61 Loew 2013: 207.
62 Loew 2013: 207.
63 Németh 2003: 329.
64 Loew 2013: 233.

independent state entity disappeared forever. Not only the Polish political parties but also the victorious powers insisted on this because of its symbolic significance.

Table 1: Election results in the Free City of Danzig between 1919 and 1935

	1919	**1923**	**1927**	**1930**	**1933**	**1935**
Voter participation rate	70.0%	81.6%	85.4%	89.1%	92.1%	99.5%
Changes in the number of representatives of the respective parties holding a seat in the leadership of the city						
National Socialist German Workers Party (NSDAP)			0 0.8%	12 16.4%	38 50.0%	43 59.3%
German National People's Party (DNVP)	34 28.2%	34 28.1%	26 20.6%	10 13.6%	4 6.3%	3 4.2%
German Social Party		7 6.2%	1 1.2%			
Various middle class groups	22 18.5%	18 15.3%	22 19.8%	11 16.1%	0 0.5%	0 0.1%
Centre Party	17 13.9%	15 12.8%	18 14.3%	11 15.3%	10 14.6%	10 13.4%
Social Democratic Party of Germany (SPD)	40 33.3%	30 24.1%	42 33.8%	19 25.2%	13 17.7%	12 16.1%
Communist Party of Germany (KPD)		11 9.1%	8 6.4%	7 10.2%	5 6.8%	2 3.4%
Polish minority	7 6.1%	5 4.4%	3 3.1%	2 3.2%	2 3.1%	2 3.5%

Source: Loew 2013: 203.

Summary and conclusions

International intervention continues to be a sensitive issue to this day, particularly in an area where the minority question is a crucial one. After World War I, when the Free City of Danzig became "part of" Poland, the Poles remained a minority within the city itself, and the issue of minority rights for Poles in Danzig constituted the subject matter of international agreements. The extent to which the League of Nations as the entity responsible for the transitory administration of the territory fulfilled the hopes of the great powers is very difficult to determine. It is even more difficult to say whether the designated agencies of public administration discharged their tasks well, in any case, the administration of the territory functioned through long years. The referendum and World War II prevented the League of Nations from continuing to supervise and administer the region. The Free City of Danzig was one of the first and at the same time the last region in the history of the League of Nations to ever be controlled by it.

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ACTA HUMANA • 1 (2023) 93–110. • DOI: 10.32566/ah.2023.1.6

Artificial Intelligence: Is the European Court of Human Rights Prepared?[1]

MELINDA SZAPPANYOS[2]

It is widely known that artificial intelligence is part of our lives. It is also generally feared that artificial intelligence has a potential to endanger human rights in this digital age. The paper intends to examine whether the European Court of Human Rights, dedicated to protecting human rights in Europe, has been forced to deal with artificial intelligence. The main focus of the analysis is the case law of the Court: after the identification of the human rights potentially in danger, the database of the Court's case law, HUDOC, has been screened by keyword search. Based on the examination of the jurisprudence, the paper will disclose if the Court has artificial intelligence-related cases and attempts to predict whether it ever will.

Keywords: artificial intelligence, European Court of Human Rights, case law, data protection

Introduction and methodology

The Secretary General of the Council of Europe (CoE) claimed related to artificial intelligence (AI) that "[t]he Council of Europe has, on many occasions, demonstrated its ability to pioneer new standards, which have become global benchmarks".[3] This paper intends to examine whether the European Court of Human Rights (ECtHR/Court), set up by the CoE member states, also has the ability to do so in this relatively new field.

"AI is already with us" – explains Marija Pejčinović Burić,[4] and its challenges are unavoidable not only for individuals, but also for international organisations, especially the ones dealing with human rights (HR/HRs). This is not surprising for science; academic journals have already published a plethora of papers on theoretical issues related to AI and HRs. While theory can support and influence practice, it cannot replace it. Thus, for a full picture on the relations

1 Project no. TKP2021-NKTA-51 has been implemented with the support provided by the Ministry of Innovation and Technology of Hungary from the National Research, Development and Innovation Fund, financed under the TKP2021-NKTA funding scheme.

2 Assistant Professor, University of Public Service, Faculty of Public Governance and International Studies, Department of International Law, e-mail: szappanyos.melinda@uni-nke.hu

3 Council of Europe s. a.a.

4 Council of Europe s. a.a.

between AI and HRs, the examination of HR protection on the ground is necessary. Still, analysing the practice on such a connection is too big of a mission for one paper, therefore, this work will be limited to the analysis of the case law of the ECtHR related to AI. It is important to note, that detailed analysis of the ECtHR practice on data protection in the digital age[5] and on mass surveillance[6] has been done, but of artificial intelligence as a violator or a tool of violation was not.

Despite countless scientific efforts, the very definition of AI is unclear. Thus, it seems necessary to dedicate the first section of the present paper to definitions and introductory explanations.

Second, the relevant practice of the ECtHR shall be explained. The Court regularly prepares and updates thematic guides for HR practitioners about its jurisprudence. Such a summary was prepared on data protection, which includes a collection of judgements under a chapter entitled "[T]echnological advances, algorithms and artificial intelligence".[7] The present paper focuses first on this list of AI-related judgements provided by the ECtHR itself. The paper also aims to identify the human rights listed in the European Convention on Human Rights (ECHR),[8] which can particularly be challenged by AI. To this end, also those human rights will be listed, which were claimed to be violated in these judgements, but the ECtHR did not examine them, or found no violation.

Third, literature reveals that AI is not a HR specific problem but concerns several human rights. Consequently, we cannot be satisfied by describing the judgements identified as relevant by the Court but must go further. In this most practice-oriented part of the paper HRs will be identified where the usage of AI may have resulted in a violation. Literature review will be complemented by analyses of the case law of the ECtHR, based on keyword search of the HUDOC database.

This paper intends to confirm two basic assumptions and answer three questions.

First, based on logic and the relevant literature, two assumptions seem logical: a) Data protection is the core of the problem;[9] but b) AI may touch upon the majority of human rights included in the Universal Declaration on Human Rights[10] (UDHR).[11]

Here, a remark must be made: in the literature two human rights are most often mentioned in connection with AI: privacy (data protection) and the prohibition of discrimination. Though both will be analysed in the case law of the Court, even before the detailed examination we dare to claim that the former got more attention from the ECtHR so far. Also, this paper examines the case law of the ECtHR, which covers

5 Çınar 2020: 26–51.
6 Rusinova 2022: 740–756.
7 ECtHR 2020.
8 CoE: European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
9 As shown by the ECtHR Guide (ECtHR 2020).
10 United Nations General Assembly: Universal Declaration of Human Rights. A/Res/217(III), 10 December 1948.
11 Risse 2019: 16.

exclusively the human rights incorporated in the ECHR. Naturally therefore, the list of human rights this paper uses is limited, thus the overall picture may be distorted. If one extends the scope of analysis to economic, social and cultural rights, as Nagy did in her work, the emphasis may shift from data protection.[12]

Second, the questions: a) Has the ECtHR dealt with AI-related issues already? b) Will it be forced to deal with these questions? and if so c) Will it be able to handle them properly?

Council of Europe and AI

CoE confirmed numerous times the importance of AI and human rights and tasked itself with working out recommendations to enhance the protection of the latter from the former. It seems that the CoE indeed achieved a lot in this field in a relatively short time. Standards were worked out during the last five years, starting with the recommendation of its Parliamentary Assembly in 2017.[13] After this report several documents were adopted, both transversal and field specific.[14] One of the most recent developments was a conference held during the Hungarian Presidency of the Committee of Ministers at the end of 2021. Going through these documents provides the reader with a perspective on what kind of guidelines the CoE wants its member states to follow. The documents list risks, principles, checklists. But the monitoring of the impact of these guidelines implemented by the member states of the CoE on human rights is up to the ECtHR.

Talk about AI more often than not implies superintelligence. The CoE itself explains AI as "[a] set of sciences, theories and techniques whose purpose is to reproduce by a machine the cognitive abilities of a human being. Current developments aim, for instance, to be able to entrust a machine with complex tasks previously delegated to a human".[15] Several other international organisations came up with AI definitions, for example the European Union (EU),[16] or the Organisation for Economic Co-operation and Development (OECD).[17]

Science is also working on different definitions. Some argue that such a definition cannot be created, because AI "stands for a confused mix of terms – such as 'big data,' 'machine learning,' or 'deep learning' – whose common denominator is the use

12 See a more inclusive analysis in Nagy s. a.

13 CoE Parliamentary Assembly 2017. It has to be mentioned that the recommendation itself refers to another relevant document dated back to 2015: CoE Parliamentary Assembly 2015.

14 See the comprehensive list at the CoE website www.coe.int/en/web/artificial-intelligence/work-in-progress#01EN

15 Council of Europe s. a.b. The CoE Commissioner for Human Rights uses another, mainly overlapping, definition: "A set of sciences, theories and techniques dedicated to improving the ability of machines to do things requiring intelligence"(CoE Commissioner for Human Rights 2019: 5).

16 European Parliament: Report on artificial intelligence: questions of interpretation and application of international law in so far as the EU is affected in the areas of civil and military uses and of state authority outside the scope of criminal justice, 2020/ 2013(INI), 4 January 2021, Art. 1.

17 OECD 2019.

of expensive computing power to analyse massive centralised data".[18] András Hárs concluded by comparing scientific definitions, that AI "operates independently or semi-independently from its maker; possesses knowledge; is able to utilize the latter in a manner not predetermined by its code; and is able to communicate with the outside world".[19]

The problem with all of the definitions, apart from being exceedingly vague, is that their content changes constantly. While we already have categories for autonomous driving capability in cars,[20] there are no such categories for AI technologies (at least not widely accepted ones),[21] which means that for the general public (whose human rights may be violated) both a supercomputer (occasionally) beating the world's best go player,[22] and a vacuum cleaner are AI.[23] While the categories of narrow and general (strong) AI exist, the technological development achieved only the former so far, thus all current technologies using AI in any field considered to be weak AI.[24] The real concern is not that the general public does not know, but also AI professionals and human rights practitioners have little idea where "deep learning" ends and superintelligence starts.

The only thing we can know for certain, that "artificial intelligence already *plays a role in deciding* what unemployment benefits someone gets, where a burglary is likely to take place, whether someone is at risk of cancer, or who sees that catchy advertisement for low mortgage rates" (emphasis added).[25] The extent of AI usage may influence the extent of the human rights violations, which happen *because of it.* If we accept that there is no superintelligence and AI "plays a role in decisions", there is one more remark to be made: a HR may be violated by something or somebody using AI as a tool. In this case the Court has a relatively easy job to do: find the violator and make it pay compensation to the victim. The situation becomes (or rather may/will become) more complicated, when decision-making is completely taken over by AI, because the violator is hidden: is it the creator of the AI system or is it the user, or ad absurdum, is it the AI itself?

Case law of the ECtHR related to AI

Looking through the ECHR, Art. 8, the right to respect for private and family life, seems like an obvious human right which can be potentially violated by an AI mechanism.

18 Katz 2017.
19 Hárs 2021: 325.
20 Society of Automotive Engineers (SAE) 2021.
21 The OECD prepared a report on the classification of AI, but the aim of this classification is not to distinguish the stages of development in a general sense, but rather the classification of existing AI systems based on a set of criteria (OECD 2022).
22 BBC News 2016.
23 Berry 2021.
24 Lele 2019: 142.
25 Fundamental Rights Agency 2020: 1.

Especially, if we partly or fully identify AI issues as data protection problems. And looking at the definitions mentioned before, we have a reason to: current AI is a collection of techniques making decisions from *data* provided for them. To confirm the two assumptions, the analysis of the jurisprudence of the ECtHR is necessary. The thematic guide on data protection under the "[T]echnological advances, algorithms and artificial intelligence" chapter mentions 5 key judgements of the ECtHR. All judgements were delivered after 2008, thus it seems that technological advancement started to cause HRs problems since the beginning of the 21st century. These judgements do not explicitly mention AI, but another case does, of which a brief description will be added.

Case of S. and Marper v. The United Kingdom[26]

Amongst the key judgements related to AI, this is the oldest, being delivered in 2008. Two applicants claimed that the retention of their fingerprints, DNA samples and DNA profiles for an indefinite time after the discontinuation of the criminal proceedings against them is a violation of their rights under Art. 8 of the ECHR. The Court held that there has been a violation of Art. 8. What is important from the point of view of this paper is that though AI was not explicitly mentioned, the Court took into consideration the development of technology: "Bearing in mind the rapid pace of developments in the field of genetics and information technology, the Court cannot discount the possibility that in the future the private-life interests bound up with genetic information may be adversely affected in novel ways or in a manner which cannot be anticipated with precision today."[27] The applicants of the case had a powerful argument claiming that the data stored about them was available not only for police bodies, but for government agencies, private groups and even for some certain employers.[28] The Court acknowledged that automatic processing, what is a key feature of AI, require more than normal safeguarding measures.[29]

In this case the applicants complained not only under Art. 8, but also under Art. 14, but the Court did not find it necessary to examine the latter.

Case of Szabó and Vissy v. Hungary[30]

The two applicants complained under Arts. 8, 13, and 6 of the ECHR against the Hungarian Government arguing that one form of surveillance allowed by law is "unjustified and disproportionately intrusive".[31] Without mentioning AI, the Court

26 *S. and Marper v. The United Kingdom* nos 30562/04 and 30566/04.
27 *S. and Marper v. The United Kingdom*. 71.
28 *S. and Marper v. The United Kingdom*. 87.
29 *S. and Marper v. The United Kingdom*. 103.
30 *Szabó and Vissy v. Hungary* no. 37138/14.
31 *Szabó and Vissy v. Hungary.* 3.

took into consideration some technological factors in its decision: "Automated and systematic data collection is technically possible and becomes widespread."[32] A third party, Center for Democracy and Technology refers to AI-based techniques even more concretely: "Sophisticated analysis of the intercepted data."[33] The main argument of the Court was that there were not enough guarantees built into the Hungarian legal system, therefore, the violation was unanimously decided.

The Court however did not establish the breach of Art. 13 and decided that there was no need to examine the violation of Art. 6.

Case of Roman Zakharov v. Russia[34]

The case has been decided by the Grand Chamber of the ECtHR in 2015 and is a widely cited judgement, because of its importance. The applicant claimed that "the system of secret interception of mobile-telephone communications in Russia violated his right to respect for his private life and correspondence".[35] The Court found that indeed there has been a breach of Art. 8 for several reasons, including the lack of effective remedy.[36] Like in other key judgements, AI was not mentioned, but technological advancement was taken into consideration as an important fact: It is "essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated."[37]

Besides Art. 8, the applicant claimed the violation of Art. 13 as well, where the Court decided that it requires no separate examination.[38]

Case of Breyer v. Germany[39]

The main question of the case was best summarised by Judge Ranzoli in his dissenting opinion: "What are the requirements under art. 8 – in particular concerning safeguards – with regard to storage of personal data which are qualified as being of limited weight but may easily be retrieved in huge amounts by a broad range of authorities?"[40] The applicants claimed that the German Telecommunications Act violated their rights under the ECHR, namely under Arts. 8 and 10 by making registration for pre-paid SIM cards obligatory. The ECtHR found that Art. 8 was not violated, because the restriction of its enjoyment was in accordance with the law,[41]

32 *Szabó and Vissy v. Hungary.* 68.
33 *Szabó and Vissy v. Hungary.* 49.
34 *Roman Zakharov v. Russia* no 47143/06
35 *Roman Zakharov v. Russia.* 3.
36 *Roman Zakharov v. Russia.* 302.
37 *Roman Zakharov v. Russia.* 229.
38 *Roman Zakharov v. Russia.* 307.
39 *Breyer v. Germany* no 50001/12.
40 *Breyer v. Germany.* Dissenting opinion of Judge Ranzoli. 2.
41 *Breyer v. Germany.* 83–85.

served a legitimate aim,[42] and answered to a pressing social need in a proportionate manner.[43]

Only if AI can be identified as a set of huge data, then indeed, the case concerns AI. But in this particular case no decision was made by AI, it simply was able to handle a big database, which can be done by a simple personal computer, with a basic software, there is no need for machine learning in this case. This judgement is listed among the key decision of the ECtHR, because the Guide is not limited to AI-related cases but deals with technological advances as well.

Besides Art. 8, the violation of Art. 10 was also claimed by the applicants. However, the Court decided that the latter would not be considered.[44]

Case of Gaughran v. The United Kingdom[45]

In this case the ECtHR established the violation of Art. 8 of the ECHR, because the DNA profile, fingerprints and photographs of persons, who were convicted for an offence punishable by imprisonment, could be retained for an indefinite time. The Court did not only focus on the unlimited time of the retention, but the lack of review in the system.[46] What makes this case interesting from an AI point of view is that in this judgement the Court recognised that the development of technology can be a decisive factor for the ECtHR in deciding if there has been a violation of the ECHR. Contrary to the Court's assessment in the S. and Marper case the storage of the photographs was considered an interference with the applicant's right under Art. 8, because the photos could be uploaded to a database, in which facial mapping and facial recognition software were available.[47] The ECtHR did not mention artificial intelligence though, and from the judgement it is not clear that the database referred to (Police National Database) was a simple database with search functions or a software capable of learning, equipped with AI.

Plus one: The case of Sigurdur Einarsson and Others v. Iceland[48]

This is the only case, according to the HUDOC database, where the expression "artificial intelligence" was mentioned, but the guide on the case law does not mention it.[49] The applicants claimed that their rights under Arts. 6 and 8 were violated.[50] As for the latter, the Court rejected the complaints for being manifestly

42 *Breyer v. Germany.* 86.
43 *Breyer v. Germany.* 90 and 95.
44 *Breyer v. Germany.* 62.
45 *Gaughran v. The United Kingdom* no 45245/15.
46 *Gaughran v. The United Kingdom.* 96.
47 *Gaughran v. The United Kingdom.* 68–70.
48 *Sigurdur Einarsson and Others v. Iceland* no 39757/15.
49 But another Guide does mention it as a key judgement (ECtHR 2022b: 183).
50 *Sigurdur Einarsson and Others v. Iceland*. 3.

ill-founded,[51] and in other cases, for non-exhaustion of domestic remedies.[52] AI was mentioned related to Art. 6, para. 1 and 3(b). According to the applicants, they did not have access to the full documentation of their case, only part of it, which was created by a software (Clearwell). Though the Court did not find the breach of the ECHR, Judge Pavli published a partly dissenting opinion, which concerns this issue. According to him, the ECtHR in this case "misses an opportunity to weigh in on the complicated questions at the intersection of new technologies and high-volume evidentiary issues".[53] He drew attention to the fact that technological advancement may challenge generally used principles, in this case the equality of arms.[54] Based on several argument, he concluded that Art. 6, para. 1 of the ECHR has been violated.

Summary

Looking at the judgements, a few basic remarks should be made:

- None of the judgments, which were considered "key" from a technological advancement and AI point of view mentioned AI explicitly. All judgements mentioned technological advancement not as a problem or a danger, but as something to be taken into consideration in creating safeguards for the better protection of private life.
- Art. 8 was the only article of the ECHR, where violation has been established. The other 4 claimed to be violated were Arts. 6, 10, 13, and 14, but only one of them, Art. 6. was examined closely by the Court. However, we have to keep in mind that according to the Court, these judgements should be interpreted together with the ones "on storage of personal data for the purposes of combating crime and data collection by the authorities via covert surveillance"[55] and the latter cases concern other articles of the ECHR. It thus seems to confirm the assumption, that AI related cases are somehow centred around Art. 8. We still must remember that Art. 8 is a very complex right, which covers several facets of private life: it "protects, inter alia, the right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world".[56]

Our first assumption was confirmed by the judgements above: the core of the AI problem *so far in the jurisprudence of the ECtHR* is data protection. However, the case of Case of Sigurdur Einarsson and Others v. Iceland judgement showed that the second assumption seems confirmed too: more than one human right may be endangered,

51 *Sigurdur Einarsson and Others v. Iceland*. 122.
52 *Sigurdur Einarsson and Others v. Iceland*. 124.
53 *Sigurdur Einarsson and Others v. Iceland*. Partly Dissenting Opinion of Judge Pavli. 4.
54 *Sigurdur Einarsson and Others v. Iceland*. 10.
55 ECtHR (2020): op. cit. fn. 16.
56 *Breyer v. Germany.* 33.

or rather touched upon by AI. Thus, it is worth examining the jurisprudence of the ECtHR even further.

Jurisprudence of the ECtHR related to other relevant human rights

Our first task in analysing jurisprudence is to identify the rights which may be relevant. The European Union Agency for Fundamental Rights (FRA) prepared a report in 2020, which identified several risks posed by AI on human rights.[57] This report was used as a starting point and was complemented by other works for clarity. After, the identification of the rights in question, the HUDOC database was used in search for the relevant judgements. The keywords used were difficult to determine, in lack of a generally accepted definition of AI. As shown in the previous unit, the ECtHR hardly uses the expression. Learning from the vocabulary used by the judgements, and the literature on the definition, the following keywords were used in the search: "software" and "algorithm".[58] These were complemented by right-specific keywords.

According to the FRA Report, the human rights, which are particularly vulnerable (already at the moment) to AI are: human dignity, right to privacy and data protection, which is a prerequisite for the enjoyment of freedom of expression, freedom of religion and freedom of assembly; and the right to non-discrimination. The following units are focused on both the literature on the potential connection of these rights and AI, and then they intend to find relevant cases of the Court, if any.

Right to life and prohibition of torture – Arts. 2 and 3

Public international law did not start to deal with AI in general but was and still is focusing on certain questions related to the development of this new technology.[59] One of the first questions, which interested international law related to AI was the use of autonomous weapon systems. These systems are defined in various ways,[60] but all definitions agree that they are able to kill.[61] This naturally means

57 Fundamental Rights Agency 2020: Chapter IV. We should mention that FRA used the Charter as a reference point in the identification of the human rights at risk, while our point of reference is the ECHR.

58 Artificial intelligence was used as a search filter beforehand, thus it was not used in the further analyses of the HUDOC. "Software" was relevant in the only judgement, where the Court used the expression of AI. "Algorithm" seems to be a common determinant in AI definitions, though it is missing from the definition created by the CoE (Ashraf 2022: 758).

59 In fact, Burri scolded international lawyers for not analysing AI in its complexity (Burri 2017: 92).

60 The International Committee of the Red Cross (ICRC) defines them as "weapons that can independently select and attack targets, i.e. with autonomy in the 'critical functions' of acquiring, tracking, selecting and attacking targets (International Committee of the Red Cross [ICRC] 2014: 7).

61 The lack of definition of AI causes a significant problem here. We can only assume that drones, which are controlled by humans are not equipped with AI, while autonomous weapon systems are, since the latter is able to identify a target and kill without human intervention (Laufer 2017: 68). This is also supported by the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, where it confirms that strong AI is not in the picture in the

that they can in fact violate the right to life. Some argue that human dignity is also endangered by the use of these systems since it is "an affront to an individual's dignity if the decision to kill them is made by a machine that does not recognise the value of their life".[62] Translating the problem to ECHR language: Art. 2, the right to life and Art. 3, prohibition of torture may be endangered by this form of AI.[63] It is important to note, that at the moment, these "killer robots" do not exist, but are under development.[64] Still, it would be wise to see the Court's assessment on drones and similar technologies.[65]

For the search in the jurisprudence the keyword "drone" was added, and the cases were selected out manually based on their significance.[66]

There are three judgements of the ECtHR, which are dealing with the usage of drones. In the Case of Hanan v. Germany,[67] where the applicant claimed, "that the respondent State had not conducted an effective investigation, as required by the procedural limb of Article 2 of the Convention, into an air strike of 4 September 2009 near Kunduz, Afghanistan, that had killed, inter alios, the applicant's two sons".[68] The airstrike was performed by manned aircrafts, not by AI equipped machines. The applicant, however, claimed that drones (un-manned aircrafts) should have been used for effective investigation.[69]

In the Case of Georgia v. Russia (III) drones were only mentioned as tools in the killings and no AI use is detectable from the circumstances of the case.[70] Lastly, a case under deliberation mentioned the usage of drones as tools for surveillance and claimed the violation of Art. 3 of the ECHR.[71]

Freedom of expression and freedom of thought, conscience, and religion – Arts. 10 and 9

AI has been used to find peoples' preferences for long. But recently, social media platform providers found a new application field: removal of information, which breaches their terms of services. Google provides a wide range of data on this

near future but does confirm weak AI presence in these systems being developed (Human Rights Council 2013: paras. 39 and 43).

62 Sharkey 2019: 78.

63 Laufer 2017: 63. See also Amnesty International 2015: 5.

64 Hynek–Solovyeva 2021: 79.

65 Amnesty International 2015: 5.

66 We must emphasise that this paper cannot cover all aspects of autonomous weapon systems and the right to life. The sole aim of it is to discover if the ECtHR has ever had the chance to examine the question itself in connection with AI.

67 *Hanan v. Germany* no 4871/16.

68 *Hanan v. Germany*. 3.

69 *Hanan v. Germany*. 164.

70 *Georgia v. Russia (III)* no 38263/08.

71 ECtHR 2018.

process.[72] Here, we will only draw attention to one fact with huge relevance: at the first 3 months of 2022, 99.3% of removed channels were flagged automatically by an AI system and only the rest of the channels were reported by people. There are several technologies using AI developed to limit hate speech, abusive content, and to detect anything which could harm children.[73]

The enjoyment of the freedom of expression can be restricted by States. However, based on the ECHR and the jurisprudence of the ECtHR, the restrictions must fulfil certain requirements: each shall be lawful, pursue a legitimate aim and be necessary in a democratic society.[74] When an AI system flags and deletes a comment it considers harmful based on the terms of service of a platform, it restricts beyond doubt the enjoyment of the freedom of expression. And yes, they might be wrong, unnecessarily limiting this right.[75]

Comments can be deleted for several reasons, one of them is because they are considered hate speech. While there is a common understanding among States that freedom of speech shall be protected, the extent and practice of this protection varies. It seems that the international community also agrees that hate speech does not deserve the full extent of this protection. But again, there is a disagreement in the definition of hate speech and its place in public discourse.[76]

From an AI perspective, the detection and regulation[77] of hate speech, even though it is defined in the actual State, are the challenges. Namely, when "hate speech" is found, how it should be tackled, who is responsible for the deletion and what are the remedies, if a mistake is made in the identification. This problem, supposedly, is reflected in the jurisprudence of the ECtHR.

For the search in the database, "internet" has been added as a keyword considering all social media platforms are available online.[78]

The ECtHR had to deal with some cases, where the government closed down websites.[79] But in these cases we do not know, how the government identified the website to be shut down, it may have been with the help of AI, but we have no information, thus these cases are not analysed.

Out of the 236 cases, which were closed with a judgement of the ECtHR, not even one dealt with AI in any form, at least based on a word search and a thorough analysis of the circumstances of the case. Thus, the ECtHR focused more on the decision of the authorities on how to handle the detected information, supposedly

72 Google s. a.
73 Oliva 2020: 623–629.
74 ECHR, Art. 19, para. 2.
75 Heller 2018.
76 O'Regan 2018: 408.
77 Yar 2018: 6.
78 ECtHR: HUDOC search (https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22(algorithm%20OR%20software%20OR%20internet)%22],%22languageisocode%22:[%22ENG%22],%22article%22:[%2210%22]}).
79 For example *Ahmet Yildirim v. Turkey* no 3111/10; *Cengiz And Others v. Turkey* nos 48226/10 and 14027/11.

"harmful" and not on the tool of the detection. It seems that in no cases of the ECtHR the deletion or shutting down websites was based on the decision of an AI system, but of the authorities.
As for Art. 9, altogether 11 judgements were found, none of them relevant from an AI point of view.

Prohibition of discrimination

The ECHR prohibits discrimination in two articles, in Art. 14 and in Art. 1 of Protocol No. 12. The former "merely complements the other substantive provisions of the Convention and the Protocols",[80] thus "does not prohibit discrimination as such, but only discrimination in the enjoyment of the 'rights and freedoms set forth in the Convention'"[81] and "has no independent existence".[82] The latter introduces a general prohibition of discrimination, as a "free-standing right".[83] Plethora of papers were written on the danger automated decisions may pose to human rights, in particular the chance that an automated decision is resulted in discrimination. The fields of concern include hiring processes, prediction of criminal activities,[84] access to services such as health care.[85]
Not only scientific literature is concerned about the potential for discrimination by automated decision-making processes,[86] but society in general feels threatened by it.[87] Therefore, the expectation of the author was to find a lot of cases to analyse. In the database search both articles were used as filters and no complementary keywords were added to find the biggest possible pool to analyse.[88] Despite the expectations only two cases were found in the database responding to the filters used,[89] none of them concerning AI. Does it mean that the prohibition of discrimination is not in danger, despite the obvious worry of scientists? Definitely not. Literature mentions a lot of systems, which have an inherent bias in them.[90] They do exist. Therefore, the lack of ECtHR judgments must only mean that the concerns, violations so far have not reached the ECtHR. Probably, yet.

80 ECtHR 2022a.
81 ECtHR 2022a.
82 ECtHR 2022a. "However, the ancillary nature of Article 14 in no way means that the applicability of Article 14 is dependent on the existence of a violation of the substantive provision."
83 ECtHR 2022a: 9.
84 Allen–Masters 2020: 585–598.
85 Hoffman–Podgurski 2020.
86 Zuiderveen Borgesius 2020: 1574–1576.
87 Meinschäfer–Kieslich 2020; Information Commissioner's Office 2019.
88 ECtHR: HUDOC search (https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22article%22:[%2214%22,%22P12-1%22],%22documentcollectionid2%22:[%22JUDGMENTS%22]}).
89 *Coëme and Others v. Belgium* nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96. *Stoian v. Romania* no 289/14.
90 Allen–Masters 2020: 587–590.

Summary

Based on the search and analysis of the results one conclusion seems well grounded: the ECtHR did not up until now have a case, which is closely related to AI, even though AI may touch upon several human rights apart from Art. 8.
At this point it is necessary to revisit the definition of AI for a second. As mentioned before "artificial intelligence already *plays a role in deciding* what unemployment benefits someone gets, where a burglary is likely to take place, whether someone is at risk of cancer, or who sees that catchy advertisement for low mortgage rates" (emphasis added).[91] Based on the examined case law, we found no judgement which even hinted that AI was a violator of any human right without human intervention. Decisions were not made by AI, but agents of a state. In all cases the violator was identifiable, AI was not mentioned to be an autonomous decision-maker. And if so, AI is not a violator, but a tool of the violation without any form of responsibility.

Should and is the ECtHR be prepared?

Though according to scientists, HR practitioners, NGOs, intergovernmental organisations and agencies, several human rights are endangered by AI, we found very little reference to the problem in the case law of the ECtHR. Does it mean that the ECtHR will have little to do with AI-related problems in the future, or should it be prepared to deal with the issue sooner or later? The latter seems the obvious answer for several reasons.

First, it seems unquestionable that the development of AI, taking over several spheres of our lives, is unstoppable. In addition to the organic development of AI, nowadays there are factors influencing international relations that are pushing AI on our everyday life. It is enough to mention the Covid-19 pandemic, when "online" became the norm and "in person" the exception. Or we could mention the war in Ukraine, where both participants discovered AI as a potential advantage in the course of the war.[92] International organisations seem to take these tendencies into consideration, when preparing for the future with AI.

Second, not only recommendations are worked out, but legally binding documents. For example, the European Commission proposed a regulation in 2021 on AI,[93] which after entry into force will be obligatory for all member states of the European Union, also members of the CoE and under the jurisdiction of the ECtHR. Critical voices warn that the Act in its present form may pose more risks than the number of problems it solves. "The Draft AI Act's poor drafting risks an extraordinarily broad scope, with the supremacy of European law restricting legitimate national attempts

91 Fundamental Rights Agency 2020: 1.
92 Paresh–Dastin 2022.
93 European Commission 2021.

to manage the social impacts of AI systems' uses in the name of free trade. The Draft AI Act may disapply existing national digital fundamental rights protection."[94] If so, natural and legal persons under the jurisdiction of the EU member states will be able to turn to the ECtHR, since the compliance with EU law is not a valid excuse for violations of human rights.

Third, there are several States under the jurisdiction of the ECtHR, which started to legally prepare for the AI age. As an example, more and more legislative acts are adopted (on the State's own initiative) on facial recognition, massive surveillance and privacy.[95] Also technology is slowly but surely taking public administration[96] and adjudication[97] over worldwide. Probably, this will result in challenges from a HR perspective.

Finally, national judges have more and more AI-related cases to decide. Surely, most of the cases analysed online were decided in the US.[98] Still, we find decisions related to AI in the member states of the CoE, under the jurisdiction of the ECtHR.[99]

Consequently, it does not seem possible for the ECtHR to avoid AI-related cases for long. But surely, as it seems, AI will remain a tool of HR violation, not a perpetrator itself. Not until we give control over to it by allowing decisions to be made without human intervention.

Is the ECtHR ready? Only time will tell, but based on the arguments above, it should be. But can we trust that the Court will be able to do a good job in dealing with AI in its case law? So far, the ECtHR has a proven record on handling new phenomena, for example including the right to a healthy environment in the scope of the ECHR;[100] or working out an approach stating that domestic violence can constitute the violation of Art. 3.[101]

Surely, the above-mentioned wins of the ECtHR required flexibility and profound legal knowledge, and in several cases, for example environment-related cases, specific technical knowledge. But in the case of AI, can the judges acquire such technical knowledge? When even the experts of AI are not sure how to define, categorise, and how to regulate AI?

94 Veale – Zuiderveen Borgesius 2021: 111–112.
95 Rusinova 2022: 740–756. For an interesting comparison, such legislative acts are being considered in the United States of America as well in huge numbers (National Conference of State Legislatures 2022).
96 Agarwal 2018: 917–921.
97 Themeli–Philipsen 2021: 213–232.
98 American Bar Association 2021; Ethical Tech Initiative s. a.
99 Vallance 2022; Two cases from the U.K. were taken into consideration by a judgement of the ECtHR as well in the party dissenting opinion of Judge Pavli in the *Sigurdur Einarsson and Others v. Iceland* case, 15 (Library of Congress 2020).
100 ECtHR 2022c.
101 McQuigg 2021: 155–167.

Conclusion

The initial goal of the paper has been fulfilled: the case law of the ECtHR is analysed. However, a few remarks must be made to protect the findings of this examination. Admittedly, the scope of the present analysis has been very restricted initially, but during the research process several limitations surfaced. One of the most important ones is that since the ECtHR examines the violation of the rights included in the ECHR, the analysis may be distorted in a sense that some human rights relevant from an AI point of view are ignored in this paper, e.g. the right to health, while social rights do have relevance in AI-related issues.[102] The other factor to consider is that the starting point of the paper was the collection of judgements considered of great importance ("key") by the ECtHR. It may have resulted in a pre-determined mindset, namely that much emphasis was put on data protection, though confirmed by the case law. Even if the research findings are too limited even to represent fully a small part of a big picture, they are valid and they may serve as a jumping stone for further research.

We conclude this paper with brief answers to our research questions. First, there are hardly any cases in the jurisprudence of the ECtHR dealing with a HR violation directly caused by an AI system, in fact, AI is mentioned only in one judgement of the approximately 25,000. Thus, no, the procedure of the ECtHR has almost never be triggered because of AI.

Second, yes, it seems inevitable that the ECtHR soon faces AI in its practice. However, the when, and the how are unpredictable. Presumably, AI will remain a tool for violation, instead of being an autonomous violator for a long time, as science does not expect superintelligence to appear for a very long time.

Third, will the ECtHR be able to deal with these problems? In the author's personal opinion: definitely yes. Because it will have to.

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102 Niklas–Dencik 2021: 1–29.

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ACTA HUMANA • 1 (2023) 111–125. • DOI: 10.32566/ah.2023.1.7

Explaining Climate Change Induced Human Mobility: Revisiting Traditional and Emerging Migration Theories in the Wake of Regularising Climate Change Induced Human Mobility under International Law

VALÉRIA ESZTER HORVÁTH[1]

Introduction

The term "environmental refugees" was used by the United Nations Environmental Program in 1985, drawing the international community's attention to environmentally induced human mobility for the first time. Almost 40 years on, migration experts, lawyers as well as the international community struggle to define and to conceptualise an imminent phenomenon. Migration studies as such are still struggling for their own emancipation among other fields of social sciences, and now migration experts are challenged with a novel social phenomenon, climate change induced human mobility. In fact, environmentally induced human mobility is not a new phenomenon, it is merely a novel research area. In this article, I will collect and summarise traditional and emerging migration theories and concepts, in order to establish whether climate change induced human mobility may be interpreted by any of these theories at all, or if not, how could these be adapted to understand climate change induced human mobility.

Keywords: climate refugees, climate displacement, migration, climate change

While there is an ever-growing abundance of agency reports on various forms and empirical experiences of environmental displacement from international organisations such as the World Bank, the International Organisation for Migration, the Food and Agriculture Organisation, and even human rights organisations, to this date the literature on the conceptualisation of such phenomena remain limited. And while many a times practical approaches yield solutions, the lack of adequate conceptual framework limits problem-solving to ad hoc, fragmented and emergency-type situations. The term "environmental

1 Assistant Professor, University of Public Service, Department of International Law, e-mail: horvath.valeria.eszter@uni-nke.hu

refugees" was used by the United Nations Environmental Program in 1985, drawing the international community's attention to environmentally induced human mobility for the first time. Almost 40 years on, migration experts, international lawyers as well as the international community struggle to define and to conceptualise this imminent phenomenon. "Ecological refugees", "environmentally displaced persons", "climate refugees", and more recently even "climigration" are all terms coined to reference the same thing, and yet as we will see, not precisely the same thing. At the same time, there is a regular and loud call in the media from non-state stakeholders of the international community to manage the social injustices tied to climate change, demanding "climate justice", and international organisations urge states to protect those most vulnerable to climate change, in particular those, who are displaced due to climate change. The confusion around the volume and the magnitude of this problem prevails, with references to old estimations between 25 million to 1 billion persons affected, and no further attempts to identify the potential number of persons of concern. The underlying problem also remains: without a standard definition, without the consolidation of fundamental concepts and conceptual frameworks, states as primary subjects of international law remain inapt to act in unity in a comprehensive way to provide protection to those most vulnerable to the negative effects of climate change.[2]

Creating a comprehensive conceptual framework does indeed require creativity. Migration studies as such are still struggling for their own emancipation among other fields of social sciences as a cohesive system of concepts and theories. On top of that, nowadays, migration experts are challenged with a series of situations of crisis, from all around the world, such as the 2011 Haiti Earthquake, the 2015 European Refugee Crisis, the 2018 Central American Refugee and the perpetual Rohingya Refugee Crisis in Bangladesh. Perhaps by now it is beyond discussion that environmental deterioration, natural hazards, climate change contribute in certain ways and to some extent to such crises. Understanding such complexities require abstraction of these empirical problems.

Although environmentally induced human mobility may seem to be a novel social phenomenon, it is not an entirely new phenomenon, it is merely a novel research area. Anthropology has long been researching and trying to explain how the human race actually evolved, and recently research has begun on how nomadic tribes settled in certain places. Human mobility resulting from environmental factors, an "ecological push", as Piguet notes is indeed the first form of migration in history, referenced as "primitive migration", because of human kind's inability to cope with natural forces.[3] In this paper, I will collect and summarise the most relevant, traditional and emerging migration concepts and theories, in order to establish whether climate change induced human mobility may be interpreted by any of these theories at all. If it is found that these cannot interpret climate change induced human mobility, then I will

2 For more information on this see Horváth 2021: 119–136.
3 Piguet 2013: 151.

assess how these could be adapted to understand climate change induced human mobility. In this paper I will use the term "human mobility", in its broadest sense, as a movement of a person or a group of persons across an internationally recognised state border or within a state border, either voluntarily or involuntarily, for whatever reasons, and for however long. Thus "international human mobility" is a movement of a person or a group of persons through an internationally recognised state border, either voluntarily or involuntarily, for whatever reasons and for however long. In this vein, "climate change induced human mobility" is the movement of a person or a group of persons, across an internationally recognised state border or within a state border, either voluntarily or involuntarily, for however long, due to gradual or rapid onset effects of climate change, affecting the habitual place of residence of a person of concern.

The state of current migration concepts

De Haas simply sums up the state of current migration concepts by stating that "theories on migration are underdeveloped".[4] In my own interpretation, the various concepts and theories on human mobility can rather be summarised as a brainstorm of relevant concepts spanning over decades and continents, focusing, one at a time, on a single event, a single aspect of mobility, a single empirical experience of a vulnerable person or a group of persons, or a specific situation of crisis.

This lagging behind can be explained by numerous factors and trends. First of all, as Nagy[5] points out, before the 1940s, international human mobility simply was not an issue, as it is today. Up until the end of the 1900s, with certain exceptions concerning resettlement, individuals could travel and relocate relatively freely. It is the emphasis of state sovereignty as a building block of the new world order and the international community after the Second World War that brings about state concern related to state sovereignty vis-à-vis migrants. So while human mobility is human nature, addressing it, in particular with issue-specific legal regimes is rather a novel trend. Subsequently, the research on international human mobility gained momentum through economic globalisation, the increasingly regularised international flow of labour and the aftermath of decolonisation, including resettlement of colonial nationals to former colonising countries as well as the civil unrest in certain countries as a result of the newly gained independence. Finally, nowadays, issues related to asylum and migration are so highly politicised, viewed as inevitably infringing state sovereignty, that this securitisation of migration brings about the exacerbation of research and political discourse on international human mobility. And yet, international migratory flows are relatively small compared to other international flows such as international trade,

4 De Haas 2021.
5 Kende et al. 2014: 526.

global financial flows or information, which is reflected in the marginalisation of an autonomous migration studies.[6]

To shed light on the available literature, analysing the available research on international human mobility, most scholars do not elaborate a whole paradigm or cohesive system of concepts and principles. In this vein, Póczik[7] maintains that the phenomenon of human mobility is examined by numerous social sciences, such as sociology, anthropology, history, demography, geography, political sciences, legal and international studies. At the same time, mostly reports by international organisations, as the most authentic source for climate change induced human mobility data, completely omit to touch upon theoretical explanations, and merely deduce generalisations from their empirical research. In my understanding, these fields limit their research and make one aspect of human mobility their focal point. Moving forward complex migratory flows call for multidisciplinary research. From the perspective of regularisation and legislation, the outcomes of a multidisciplinary research can yield an evidence-based, substantiated and substantial legal framework on climate change induced human mobility. Another oversimplified approach, yet a prevalent foundation for policy formation all around the world, is the division of persons of concern into groups of emigrants and immigrants and researching these two oppositely directed flows of human mobility as essentially separate.[8] Again, individual, particular fields of research are in fact effective in answering a question related to one aspect of human mobility but are unable to provide complex interpretations. Thus Massey et al. conclude that 'complex migration models'[9] should be created. However, Piguet[10] points out that even as migration theories grew in coherence and complexity, environmental considerations generally disappeared from explanations of displacement, as humans gradually gained control, or the illusion of control, over nature through technological progress.

I will now move on to introducing the most relevant traditional theories on human mobility, and add some of the most relevant new concepts on human mobility. I will also assess them altogether in order to establish whether these theories and concepts are able to explain climate change induced human mobility in any way. Since it is beyond the scope of my research and the material of this article, I will only list the theories on the causes and motivations, the type of movements and trends in this paper, and as less relevant for the subject of this article, I will omit theories on the integration of the new arrivals. Moreover, for effective assessment, human mobility may not be considered a single unit but must be examined in its elements. In my understanding, there are three essential elements of international human mobility: 1. leaving the country of origin or habitual place of residence (voluntarily

6 Sriskandarajah 2005: 3.
7 Póczik 2008: 66.
8 Póczik 2008: 69.
9 Massey et al. 1998: 20.
10 Piguet 2013: 151.

or involuntarily); 2. arriving in the country of destination (regularly or irregularly); 3. staying in the country of destination (temporarily or permanently). Additionally, there are two other recurring elements, such as 4. passing through a country of transit; and 5. leaving the country of destination (such as voluntary or forced return, expulsion). In this paper I will only address the circumstances of departure.

Classic theories on human mobility

To start off with, classic migration theories can be divided into two paradigms, namely 1. 'historical-structural theories', which maintain that persons on the move are fundamentally constrained by structural forces; and 2. 'functionalist theories', according to which human mobility is an economic optimisation strategy for an individual and/or their families as a result of making cost–benefit calculations.[11]

Historical-structural theories maintain that persons on the move are fundamentally constrained by structural forces. In this vein, the 'Dependency Theory'[12] explains the underdevelopment of "Third World" countries as a result of the exploitation of their resources by colonial interference. Although completely omitted by the theory itself, as a factor in itself, exploitation of natural resources leads to the gradual but profound degradation of the natural environment. Moreover, this dependency is perpetuated by the unfair terms of global trade with the overwhelming power dynamics and division of tasks between developed economies and less developed states. Considering that the Dependency Theory developed in the 1960s, in Latin America,[13] it is a direct predecessor of the Climate Justice movement of the 21st century. Subsequently, a more comprehensive 'World Systems Theory'[14] developed in the 1970s, focusing on the way 'peripheral' regions have been incorporated into the global economy controlled by core capitalist countries. De Haas claims that together with the emergence of multinational corporations, this accelerated rural change and deprived farmers and rural workers of their livelihoods, leading to poverty, rural–urban migration and rapid urbanisation, as well as the emergence of informal economies.[15] While in the World Systems Theory, there is but a mention of "rural change and deprived farmers", there is a clear vacancy for the incorporation of the effects of natural and anthropogenic climate change. All in all, the Dependency and World Systems Theories were precursors of the Globalisation theories[16] that emerged in the 1990s, which put forward that globalisation facilitates international human

11 De Haas et al. 2020: 49.
12 De Haas et al. 2020: 49.
13 Massey et al. 1998: 35; de Haas et al. 2020: 49.
14 Massey et al. 1998: 35; de Haas et al. 2020: 49.
15 De Haas et al. 2020: 49.
16 However, de Haas maintains that such improvements have also increased the scope for trade and the outsourcing of production and services, which as he argues, has replaced some forms of migration (de Haas et al. 2020: 49).

mobility as a consequence of improved transport infrastructure and communication technology.

Historical-Structural Theories are mainly criticised for depicting migrants as victims of global capitalism, who have no choice but to migrate in order to survive, and almost fully ignore human agency in this context.[17] In comparison, the Functionalist theories reduce human mobility to a premeditated and deliberate cost–benefit analysis for the individual migrant and/or their families.[18] One of the earliest and the most widely accepted complex migration models referring to this functionality is Lee's Push and Pull Model.[19] A typical interpretation of the Model is provided by Boswell, in the case of "economic migration", where Boswell lists typical usually push factors as economic conditions such as unemployment, low salaries or low per capita income relative to the country of destination, and migration legislation and the labour market situation in receiving countries as pull factors.[20] However, as Piguet points out,[21] originally, even Lee briefly mentioned that a good climate is attractive and a bad climate is repulsive to nearly everyone. Boswell continues to explain[22] that involuntary displacement would be explained through factors such as state repression or fear of generalised violence or civil war, but I would also add natural hazards or gradual natural deterioration due to climate change.

With the evolution of human mobility trends and patterns, reforming the abovementioned Classic Theories, Neoclassic Theories emerged. During the mid-20th century, neoclassical economic theories were extended to multiple dimensions of the social sciences, including migration. The neoclassical economics perspective[23] combines an individual decision motivated by income maximisation (micro level) with country-level structural determinants such as wages and employment conditions (macro level), which I will also address in a later section. An essentially neoclassic structural theory is the Dual Labour Market Theory[24] which maintains that international human mobility is caused by a structural and chronic demand within advanced economies for lower-skilled workers to carry out production tasks and to staff service enterprises. Subsequently, the New Economics of Labour Migration Theory[25] emerged as a critical response to this neoclassic structural approach, which regards migration as a family or household decision rather than an individual decision. And while the New Economics of Labour Migration theory incorporates the consequences for the countries of origin, the Dual Labour Market theory focuses on

17 De Haas et al. 2020: 49.
18 Boswell 2002: 3.
19 Lee 1966: 47–57.
20 In this context, Boswell also coins the term 'pioneer voluntary migration' (Boswell 2002: 4).
21 De Haas et al. 2020: 50.
22 Boswell 2002: 3.
23 Bueno–Prieto-Rosas 2019: 2.
24 Bueno–Prieto-Rosas 2019: 2.
25 Bueno–Prieto-Rosas 2019: 2.

countries of destination. Additionally, the Migration Transition Theory[26] maintains that demographic shifts and economic development initially increase levels of domestic and international mobility. Although at first it may seem that this Theory does not allow for the integration of environmental concerns, Hunter[27] takes natural hazards into account as "personal preferences". I would argue that the term "personal preferences" is usually used synonymously with personal circumstances, a variant of environmental pressures experienced by an individual, and as such climate change may affect such demographic shifts and economic changes that increase domestic and international human mobility. Finally, the concept of Cumulative Causation[28] maintains that international human mobility induces changes in social and economic structures that make additional human mobility likely. This is sometimes also referred to as "replacement migration", creating a chain of countries engaged in attracting migrants to replace those who have left for other countries. If the individual experiences are deemed a success, human mobility can give rise to a "culture of migration", revering to the Functionalist approach to human mobility. Such Transition Theories and Development Theories also do not provide sufficient explanations on why people move once development occurs, therefore de Haas[29] argues that it is necessary to conceptualise individual migration as a function of capabilities and aspirations to move, which I will later explain with his Aspirations and Capabilities framework.

As demonstrated above, within classic and neo-classic migration theories, constructed on fundamental classic and neo-classic economic principles, the emphasis of individual economic motivations (Functionalist approach) and economic inter-state relations (Structural approach) overshadow all other aspects, such as social and community factors or even completely omit some, such as environmental factors. Neoclassical approaches take no account of historical causes of human mobility, oversimplify the role of the state and structural constraints, and completely omit environmental factors, while historical-structural approaches overemphasise political and economic structures and fail to explain individual motivations. Additionally, these offer explicitly no explanation to environmental displacement, but historical-structural as well as to some extent neoclassic functionalist theories may be applied to environmental displacement. Nevertheless, in most scenarios environmental determinants such as the effects of climate change may be added to the equation. Adding factors outside their scope will not make these concepts more operational or effective. Therefore, instead of broadening such tools to encompass the various types and complex nature of the effects of climate change, new conceptual frameworks should be established.

26 Zelinsky 1971: 222.
27 Hunter 2005: 277.
28 De Haas et al. 2020: 60.
29 De Haas et al. 2020: 62.

Emerging concepts on human mobility

An emerging trend towards the end of the 20th century and at the beginning of the 21st century was to shift research focus from causes to actual movements and trajectories, to consider human mobility as a system or a network. As mentioned above, classic perspective on human mobility was to segment it in terms of its direction; in terms of immigration and emigration. By now, at the peak of economic globalisation, scholars realise that human mobility is not actually or at least not always one-way, nor is it linear (especially if illegal facilitation activities are involved), nor is it definitively permanent, or even individual in its strictest sense.

Massey's Network Theory,[30] similarly to Bourdieu's Social Capital Theory,[31] focuses on knowledge sharing among persons of concern, and the transmission of the migration experience to relatives and friends in the countries of origin as a driver of international human mobility. As a result, there is a multiplier effect referred to as 'chain migration', which implies that those who arrive following another person enjoy lower costs and risks of migration. Network theory is useful to explain family reunification processes and as Bueno and Prieto-Rosas refer to it, care-related migration. Similarly, Institutional Theory[32] operates at the meso level, pointing out how profit oriented organisations, including legal entities and illegal human smuggling networks, and even advocacy groups such as non-profit organisations, mediate the human mobility process. More recently, the Migration Trajectory[33] concept emphasises the trajectory of a person of concern observing them in the country of origin but emphasising the route and countries of transit and the circumstances of arrival. Studying the trajectories of international human mobility is especially vital in the study of irregular and mixed human mobility, when persons of concern are least likely to take a straight, direct and relatively short route to their country of destinations, or any location they deem ultimately safe. More specifically, this approach recognises that a) trajectories are turbulent, contests a supposed intended country of destination and focuses on constantly fluctuating opportunities and constraints; and b) certain critical events during the journey prove to be pivotal in the continuation of a migrant's journey. Although among critical events Wissink references events embedded in and outside of the migrant's social network and personal circumstances, we must add that such critical events may also involve natural disasters or rapid onset effects of climate change. Linked close to these theories, the concept of the Migration Industry[34] also emerged. Proponents claim that as a result of the industrialisation of international human mobility, the Migration Industry consists of any service provider in its economic as well as humanitarian sense, such as

30 Massey et al. 1998: 448.
31 Bourdieu 1986: 222.
32 Bueno–Prieto-Rosas 2019: 2.
33 Wissink et al. 2017: 282–291.
34 De Haas et al. 2020: 66.

employers, travel agents, recruiters, brokers and house agents, smugglers, traffickers, humanitarian organisations, immigration lawyers, and any other intermediaries, who have a strong interest, in most cases, an economic interest in the continuation of human mobility. Nota bene, while migration network theories focus on the role of social capital, migration systems theory looks at how migration is intrinsically linked to other forms of exchange, notably flows of goods, ideas and money; and how this changes the initial conditions under which migration takes place, both in origin and destination societies.[35] Moreover, as Migration Transition Theory focuses on the long-term interlink between development and human mobility, a Migration Hump[36] is used to describe a short-term hike in emigration in the wake of a trade reform or other economic shocks. Such migration humps are colloquially referred to as a "wave of migration" when referring to disaster displacement.

Thus, yet again, these emerging concepts on international human mobility are unable to fully accommodate environmental factors, and thus explain the trajectories of climate change induced international human mobility.

This leads us to de Haas's Aspirations–Capabilities Framework.[37] This Framework creates a double axis of a person's aspirations and their capabilities, and focuses on the person of concern as a "migratory agent". For the purposes of the application of this framework, de Haas describes migration aspirations as "a function of people's general life aspirations and perceived geographical opportunity structures", whereas "migration capabilities are contingent on positive ('freedom to') and negative ('freedom from') liberties". Additionally, a person of concern will have a certain extent of access to economic, social and cultural resources to be able to move. This provides a theoretical categorisation of five ideal-typical individual mobility types based on personal migration aspirations and capabilities, which are the following in my own interpretation: 1. voluntary immobility: due to low migration aspirations but potentially high migration capabilities; 2. acquiescent immobility: due to low migration aspirations and low migration capabilities; 3. involuntary immobility: due to high migration aspirations but low migration capabilities; 4. involuntary mobility: due to low migration aspirations but potentially high migration capabilities; and 5. voluntary mobility: high migration aspirations and high migration capabilities.[38] Moreover, based on the positive liberties, such as the freedom to do something, and negative liberties, such as the freedom from external constraints, de Haas identifies the following theoretical migration categories: 1. precarious migration: referring in general to short-distance, often internal human mobility by relatively poor people vulnerable to exploitation, i.e. poor rural–urban migrants, undocumented labour migrants, unsuccessful asylum seekers, internally displaced persons, which is characterised by the low level of positive and negative liberties; 2. distress migration:

35 De Haas et al. 2020: 68.
36 De Haas et al. 2020: 61.
37 De Haas et al. 2020: 17.
38 De Haas et al. 2020: 22.

referring to the deprivation of mobility freedom with no reasonable option to stay, characterised by high level of positive liberties and low level of negative liberties; 3. improvement migration: both internal and international human mobility for the purposes of improving one's economic circumstances, characterised by low level of positive liberties and high level of negative liberties; and 4. free migration: relatively unconstrained human mobility in and between wealthy countries or by wealthy people or skilled workers, characterised by high level of positive and negative liberties.[39]

While these established categories may not seem practical at first, in my understanding, they do more service to persons of concern in case of climate change induced human mobility, than any other conceptual framework. The Aspirations–Capabilities Framework essentially ends the debate on whether those persons who are displaced by the negative effects of climate change qualify as "voluntary migrants" or "involuntary migrants". The framework conceptually explains that human mobility moves on a scale. Recognising the essence of involuntary migration, which are external circumstances putting pressure on an individual's predisposed circumstances, and identifying on that scale of human mobility the point of intervention is the key to regulate climate change induced human mobility under international law and provide protection to those most vulnerable to climate change.

Conceptualising climate change induced international human mobility

Before we identify and adapt the most relevant concepts to climate change induced international human mobility, it must be reinforced that environmentally induced human mobility has not always been so undertheorised. At first, a behaviourist current in geography during the 1960s had a significant interest in human mobility. Wolpert's Stress Threshold Model[40] perceived human mobility as an adjustment to environmental stress and considered human mobility a decision as the result of stressors affecting individuals up to a certain threshold, beyond which persons of concern decided to relocate. Wolpert even elaborated a true mathematical model but 'environmental' factors incorporated therein were rather urban environmental factors such as noise, green areas, personal safety, congestions, than natural environmental factors.[41] Subsequently, from the 1970s onwards, migration theories concentrated on economic inter-state relations as already described above. Up until the political discourse on climate change exploded, migration scholars only sporadically addressed the nexus between environmental factors and human mobility. However, even today, scholarly literature remains limited and can be characterised by the broadening of mainstream migration concepts, with limited results.

As a premise, classic migration concepts divides 'migrants' into persons who leave for economic reasons and those who leave for other reasons, that are non-

39 De Haas et al. 2020: 27.
40 Wolpert 1966: 95.
41 Wolpert 1966: 101.

economic. On the one hand, as demonstrated above, neoclassical theories of migration, as well as new economics of migration, and even sociological theories, all perceive human mobility as a process through which people seek better general economic conditions. On the other hand, scholars like Póczik[42] establish that the traditional "push and pull" model's macro perspective identifies a two-by-two table of economic and non-economic push factors and economic and non-economic pull factors, which is then facilitated by the migratory network. Mayer summarises the "great semantic heterogeneity in the literature on environmental migration" as he refers to it, by dividing it into two schools, the minimalist and the maximalist. As such, Mayer qualifies Myers as a maximalist, who perceives a strict distinction between people who are displaced because of environmental factors and those who are displaced by other causes, such as economic, social or political causes.[43] While according to Mayer, minimalists maintain that environmental and other factors may not be distinguished so "neatly" from each other, and often times economic factors result from underlying environmental causes, thereby the environmental causation of a displacement is often indirect and complex.[44] Mayer continues to explain that the effect of environmental factors must be conceived as part of a cluster of causes, and causation, especially with regards to international mobility, may be indirect.[45] Focusing on climate change induced human mobility instead of environmentally induced human mobility makes this even more complex and vague, as climate change increases the likelihood of certain phenomena but it cannot be considered the cause of an individual environmental phenomenon.

A pivotal milestone in the literature on climate change induced human mobility, synthesising available research and scholarly literature, was the 2011 Foresight Report commissioned by the U.K. Government. The report established that human mobility is complex, multi-casual and non-linear, and that an environmentally deterministic approach is destined to fail because it does not account for the importance of human agency in migration outcomes.[46] The report also introduced a new conceptual framework based on the classis Push–Pull Model, with the premise that environmental change can affect human mobility through influencing existing drivers of migration.[47] In fact, there are thus five, interdependent drivers of human mobility: economic, social, political, demographic and environmental. Hinting at the Stress Threshold Model, the report established that human mobility happens based on the relative importance of a driver to the person of concern. Moreover directly and

42 Póczik 2008: 68.
43 Mayer 2017: 28.
44 Mayer also notes that the 2004 Toledo Initiative on Environmental Refugees and Ecological Restoration was based on maximalist concepts (Mayer 2017: 29).
45 Mayer 2017: 33.
46 Foresight 2011: 31.
47 Foresight 2011: 32.

indirectly available ecosystem services, as environmental drivers, through interaction with other drivers cause human mobility.[48]

Apart from identifying the causal link between climate change and international human mobility, for the sake of prognosis for policy formation purposes, identifying key geographical areas of concern, as well as key groups of persons of concern, has also gained support recently. One such approach to international human mobility, and in particular climate change induced international human mobility is the Migration Hotspots approach. This concept is rooted in, for example, the World Bank report on natural disaster hotspot,[49] and climate change hotspot,[50] and climate change in-migration and out-migration hotspots,[51] as well as the EU's hotspot approach to migration.[52] Another approach is identifying groups as multidimensionally vulnerable. As such, marginalised groups are most exposed to climate hazards and have the least capability to adapt to the effects of climate change. Marginalised persons of concern may belong to a certain social group or may be children, older people, disabled or sick, or even members of an indigenous group. Moreover, once displaced, vulnerability increases.[53] Simperingham defines the simple equation of "exposure + vulnerability = climate displacement" to explain climate change induced human mobility. Simperingham maintains that more often than not, it is exposure to climate hazards combined with the local vulnerability of an individual or community that leads to displacement.[54]

At this point we must also note that differentiating among vulnerable people perpetuates discrimination, inequality as well as local and global social and political tension. Echoing the human rights based approach, all measures to prevent and manage climate change induced human mobility must ensure that the rights of affected communities are respected, protected and fulfilled, that all measures are designed and implemented with the meaningful participation of affected communities, that non-discrimination is ensured across all measures, and that the particular needs of the most vulnerable are addressed.[55]

Furthermore, Boswell explains that theories on migration may be classified into three levels: the macro, the meso and the micro level assessments. Within this framework: 1. 'macro theories' emphasise the structural, objective conditions which act as "push and pull" factors for human mobility; 2. 'meso theories', rejecting the macro focus on push and pull factors, locate human mobility flows within a complex system of linkages between states; and 3. 'micro theories' focus on the factors influencing individual decisions to move, analysing how persons of concern 'weigh up the various

48 Foresight 2011: 44.
49 The World Bank 2005: 15.
50 Turco et al. 2015: 1.
51 Clement et al. 2021: viii.
52 European Commission s. a.
53 Simperingham 2017: 88.
54 Simperingham 2017: 88.
55 Simperingham 2017: 89.

costs and benefits' of moving.[56] While Boswell states that these three approaches are not mutually exclusive,[57] I would go as far as to say that these three levels of assessment should be applied at once or in three consecutive steps for the sake of efficiency. Thus, when analysing international human mobility flows, a multilevel perspective should be applied. In this case, regarding climate change induced human mobility, the effects of climate change should be incorporated on all three levels, as demonstrated in the table below.

Table 1: Multilevel perspective on Climate Change Induced Human Mobility

Classification	**Description**	**Aspects of Climate Change Induced Human Mobility**
Macro level	Structural conditions, Push-and-Pull models	Concepts of Climate Justice The principle of Common but Differentiated Responsibility
Meso level	Complex system of linkages between States	Interdependence of drivers Adaptation through development
Micro level	Individual decision-making	Identifying climate change hotspots Identifying multidimensionally vulnerable groups

Source: Compiled by the author.

Conclusions

Assessing the most relevant migration theories it must be highlighted that no theory or concept denies the climate change – human mobility nexus. Those concepts and models which ignore environmental factors, simply do not wish to be more than were originally intended, a limited economic model to demonstrate 20th century migratory flows. Those concepts and theories which accommodate environmental factors as potential drivers of human mobility vary from an environmentally deterministic perspective to a more contributory perception. Interestingly, unless commissioned for operational purposes for an international organisation such as the World Bank or for a particular government, scholarly literature fails to focus on climate change and inconsistently researches natural hazards or gradual deterioration of the natural environment. Such lack of focus and inconsistency, coupled with the segmentational and unidimensional approach to human mobility, renders it almost impossible to draw well-established, well-substantiated scientific conclusions on the causal effects of climate change with regards to international human mobility. Nonetheless, synthesis reports focusing on the social effects of climate change, such as human mobility, produce evidence for the interlink between climate change and human mobility.

56 Boswell 2002: 3.
57 Boswell 2002: 4.

Once the problem is well-established by the relevant scholarly literature, research finding may be used to elaborate policy recommendations. Consequently, the triangle of 1. multicausal, interdependent drivers of international human mobility; 2. climate change hotspots; and 3. the multidimensional vulnerability of certain groups, lay out the blueprint for the international community to act together. Incorporating the requirements of the Human Rights Based Approach with a Multilevel Perspective enables policy makers to anticipate and plan ahead instead of implementing ad hoc, emergency responses.

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