Public Governance, Administration and Finances Law Review

ISSN 2498-6275 (print)
ISSN 2786-0736 (online)

LUDOVIKA
UNIVERSITY PRESS

2.
2021

Public Governance, Administration and Finances Law Review

Vol. 6. No. 2. 2021

LUDOVIKA
UNIVERSITY PRESS

Published by the University of Public Service
Ludovika University Press
Ludovika tér 2. 1083 Budapest, Hungary

Responsible for publishing
Christián László

Copy editor
Gergely Zsuzsánna

Printed by Pátria Printing House Co.

ISSN 2498-6275 (print)
2786-0736 (online)

Contents

Editorial

Conference Proceedings

Articles

Book review

Public Governance, Administration and Finances Law Review Vol. 6. No. 2. (2021) • 5–6.

Editorial

DOI: 10.53116/pgaflr.2021.2.1

Privacy and Governmental Transparency

András Koltay[*], **Miklós Könczöl**[**], **András Lapsánszky**[***], **Ákos Tussay**[****]

* University of Public Service, e-mail: koltay.andras@uni-nke.hu
** Centre for Social Sciences, e-mail: konczol.miklos@tk.hu
*** University of Győr, e-mail: lapsanszky.andras@sze.hu
**** University of Public Service, e-mail: tussay.akos@uni-nke.hu

The second, semi-thematic issue of our 2021 volume comprises the proceedings of a conference as well as research papers. On 7–8 June 2021, Pázmány Péter Catholic University's Faculty of Law (Budapest, Hungary), the University of Stockholm's Faculty of Law (Stockholm, Sweden), the University of Windsor's Faculty of Law (Windsor, Canada), the University of Alabama's School of Law (Tuscaloosa, USA), Université Paris Dauphine-PSL Research University (Paris, France), Emory University's School of Law (Atlanta, USA), and the University of Louisville's Louis D. Brandeis School of Law co-hosted an online *Forum on Privacy and Governmental Transparency*. The goal of this forum was to bring together a small group of prominent scholars to facilitate a multi-disciplinary discussion on privacy and transparency. Today, in times of the Covid-19 pandemic, with governments introducing special legislation and track-and-trace measures to combat the virus (see Hoffman & Balázs, 2021; Karácsony & Nagypál, 2021), and the societal impact of social media reaching new peaks (Cinelli et al., 2020), the significance of privacy and governmental transparency would be hard to deny. With that significance in mind, the first four articles are based on papers presented at the *Forum,* while the following articles address various themes within the conceptual domains of public administration and jurisprudence.

The first article, Robert Kahn's *Masks, Face Veil Bans and "Living Together". What's Privacy Got to Do with It?* considers the concept of "living together" and its implications to privacy, with a special focus on the requirement of modern democracies to show one's face in public. Next, *Algorithms of Machines and Law: Risks in Pattern Recognition, Machine Learning and Artificial Intelligence for Justice and Fairness,* by Michael Losavio, elaborates on the opportunities and the inherent risks in adopting AI technologies, such as facial recognition in the public sphere, predominantly in law enforcement. The third piece of the proceedings, *Public Registries as Tools for Realising the Swedish Welfare State – Can the State Still be Trusted?,* authored by Jane Reichel and Johanna Chamberlain, argues that the high level of social trust in the Swedish society is mostly due to citizens' general trust in one another as well as in public institutions, which is

further enhanced by the transparent operation of the latter, and the credibility of their official records. However, a number of Swedish "register scandals" may threaten these achievements: it is for that reason that they urge a careful balance between transparency and the right to privacy. Finally, the fourth article, Russell Weaver's *The Constitutional Implications of Drones, Facial Recognition Technology and CCTV,* examines how courts in the USA assess and implement new surveillance technologies, such as drones and CCTV.

The fifth article, by Zoltán Hazafi and Enikő Kovácsné Szekér, addresses a Hungarian issue, that of the *Introduction of the Personal Decision Support IT System in the Hungarian Public Service*. The sixth, Ágnes Orosz and Norbert Szijártó's *Socio-economic Governance in the EU* gives an overview of the EU framework of social and economic governance. The seventh piece, by Boldizsár Szentgáli-Tóth, *The Source of Unexplored Opportunities or an Unpredictable Risk Factor? Could Artificial Intelligences Be Subject to the Same Laws as Human Beings?* inquires into the problematic relationship between the adoption of AI technologies and the idea of the rule of law, especially with a view to its challenges to law and policy-making. The last article, Ádám Varga's *Local Self-Governments and the Vertical Division of Power,* considers, once again, a Hungarian issue: it deals with the role Hungarian local self-governments play within the Hungarian constitutional system.

References

Cinelli, M., Quattrociocchi, W., Galeazzi, A. et al. (2020). The COVID-19 social media infodemic. Scientific Reports, 10(16598). Online: https://doi.org/10.1038/s41598-020-73510-5

Hoffman, I., & Balázs, I. (2021). Administrative Law in the Time of Corona(virus): Resilience and Trust-building. Public Governance, Administration and Finances Law Review, 6(1), 35–50. Online: https://doi.org/10.53116/pgaflr.2021.1.4

Karácsony, A., & Nagypál, Sz. (2021). The Rule of Law and the Extraordinary Situation. Public Governance, Administration and Finances Law Review, 6(1), 65–72. Online: https://doi.org/10.53116/pgaflr.2021.1.6

Public Governance, Administration and Finances Law Review Vol. 6. No. 2. (2021) • 7–20.

Conference Proceedings

DOI: 10.53116/pgaflr.2021.2.2

Masks, Face Veil Bans and "Living Together". What's Privacy Got to Do with It?

Robert Kahn[*]

[*] Associate Professor, St. Thomas University, Minneapolis, Minnesota, e-mail: rakahn@stthomas.edu

Abstract: The "living together" concept poses a puzzle. Why did Europeans decide that life in a modern democracy requires showing one's face? One explanation is opposition to Muslims and Islam. But the enforcement of face veil bans against non-religious mask wearing raises doubts. This essay poses an alternative explanation. What if the face veil bans persist because of European conceptions of privacy? *Von Hannover v. Germany* held that one be private in public. Given this, why wear a mask? What is there to hide? To explore this idea, the essay turns to the United States, where one cannot be "private in public" and mask wearing has been opposed on narrow grounds such as public security and the content of specific masks. At the same time, the United States respects the decisional privacy of someone to wear a mask even for "irrational" reasons, something the "living together" idea tends to ignore.

Keywords: masks, face veils, living together, privacy, *Von Hannover v. Germany*

In *SAS v. France,* the European Court of Human Rights upheld France's ban on face veils because "living together" in a modern society requires showing one's face.[1] As a student of mask and face veil bans (Kahn, 2021; Kahn, 2019a; Kahn 2020), and someone who believes that people ought to be able to mask (or not mask) to the greatest extent possible consistent with other concerns (such as safety during a pandemic; see Kahn [2021, n. 45], viewing mask mandates as a necessary evil during the pandemic), I have always found the "living together" idea curious. Is the doctrine a fig leaf for anti-Muslim sentiment? Or something meant to be taken seriously?[2] If so, what accounts for

[1] *SAS v. France*, no. 43835/11) (Unreported, Eur. Ct. H.R., 1 July 2014), paras. 142–155.

[2] For a pair of critical takes of *SAS* as an impingement on religious liberty of Muslims by a secular Europe, see Edwards (2014); Michaels (2018). Cf. Mechoulan (2018) approving of burqa bans as a positive step in a clash against a competing ideology.

the sudden decision that, in Europe at least, human life together requires showing one's face?[3]

My interest, as a teacher of Privacy Law in the United States, is with underpinnings of the "living together" doctrine. Is there something in Europe's conception of privacy – especially the right to be private in public – that explains at least some of the success of the "living together" doctrine? In other words, even if the burqa (and the mobilisation against it) was necessary for the rise of the "living together" concept, do European concepts of privacy explain its persistence? And how does the debate over face veil bans in Europe compare to the United States, where mask bans date to the nineteenth century, and yet privacy doctrine makes showing one's face in public a fairly risky act?

Before tackling these questions, let me identify three ways masks and face veils might enhance a wearer's privacy: 1. masks promote privacy by giving the wearer control over what others know about them (classic informational privacy); 2. this control over the release of information indirectly promotes the wearer's decisional privacy (i.e. the ability to mask makes it easier for the wearer to do things); and 3. the choice to mask itself is a form of decisional privacy – even if the mask is worn for reasons other than concealing part of oneself. My thesis is that European privacy norms protect informational privacy – i.e. the ability of the wearer to control information that the bare, maskless face reveals (at least in theory). But the choice to wear a mask (decisional privacy) falls outside European privacy norms. The question is why.

In what follows I first sketch the history of mask bans in the United States. Initially, mask bans were largely symbolic laws that helped the state to make expressive statements repudiating threatening, unpopular groups such as the Ku Klux Klan.[4] In recent years, however, the anti-Klan heritage of most mask bans has morphed into a broader targeting of mask wearing protesters, often with the aim of comparing the mask wearers to the Klan.[5] As these bans have largely been survived First Amendment speech claims, I look at privacy related objections to these laws. Then I turn to Europe where face veil bans have swept across the continent over the past decade. I examine "living together" justification for these bans, and the possibility that "living together" draws on European conceptions of privacy.[6]

The main body of the paper attempts to make sense of the "living together" concept on its own terms. Other societies, most notably in East Asia, seem more comfortable with masking. So, it is hard to see "living together" as stating something universal about human nature. But assume, for argument's sake, it does. This leads to two questions.[7]

---

[3] Or the revival of this idea. In the aftermath of the French Revolution showing one's face was associated with truth-telling and revolutionary transparency, as opposed to the disguises worn by aristocrats seeking to escape the new order. See Johnson (2001). Indeed, post-revolutionary France banned mask wearing during Carnival in 1790. Ibid. 90. So, there may be other reasons for European dislike of masks than the ones described in this essay. I hope to explore the face, and the role it has played in defining European anti-masking norms in future work.

[4] See infra, part 1. I discuss the symbolic nature of mask bans at greater length in Kahn (2019c).

[5] For instance, Jay Lawrence, a Republican state legislator, supported a proposed mask ban targeting Antifa by comparing that group to the Klan. See Giles (2017). See also Kahn (2019a, p. 75).

[6] See infra part 2.

[7] See infra part 3.

First, one might ask why masks and face veils led Europeans to reject them. I focus on three possibilities. Masks conceal identities; masks promote criminality; and masks make people feel uneasy. The sense of uneasiness strikes me as the strongest argument for the broad scope of the face veil bans enacted across Europe. But I am not sure they tell the entire story.[8]

Alternatively, one can turn the question around and ask what makes Europeans so willing to show their faces. This question intrigues me, and is at the heart of this essay. In the United States, showing one's face can be risky – certainly if you are a protester, but even if you are not. So the need to mask, if not accepted, is understood. Could it be that, in Europe, the broader conception of privacy (the right to be private in public, as well as the right to be forgotten) makes showing one's face an easier ask than it is in the United States?[9]

I conclude by exploring the implications of my argument. European privacy norms might protect the informational privacy of the maskless individual, and give that person control over what society can know about them. But the "living together" doctrine and the face veil bans that it justifies fall short when it comes to decisional privacy. They cannot account for the crazy person who, for whatever reason, simply wants to wear a mask. The larger question is whether one can tie the lack of decisional privacy to mask (or unmask) to other aspects of European privacy norms.[10]

Let me end this section with some caveats. First, this is an early presentation of this idea. As someone born and raised in the United States, I am far from an authority on what Europeans think about privacy. I am also well aware that not all Europeans think the same thing about it. Second, I am not entirely convinced that the living together doctrine is genuinely about showing one's face. To me, the argument that "living together" is largely a fig leaf for arguments about the place of Muslims in a secular Europe has some force. Rather, I wrote this essay as a thought experiment. If one takes "living together" at face value, what does this mean?

1. Mask bans in the United States

Mask bans have a long history in the United States (Kahn, 2019a, pp. 88–104, describing the history behind the New York and anti-Klan mask bans). In 1845, the New York State enacted a ban on wearing a mask while armed. The law, enacted in response to angry tenants challenging efforts to collect back rent, remained in force until 2020 (Kahn, 2019a, pp. 88–97, describing the political context behind the passage of New York's mask ban; Kahn, 2021, pp. 669–672, describing the repeal of New York's mask ban). Most mask laws, until a few years ago, however, have targeted the Ku Klux Klan. As the waves of Klan activity rose in the 1870s, 1920s, and 1940s and 1950s, mask bans followed.[11] The bans had a variety of specific purposes. But a key element in all of

[8] See infra s. 3(3.1).
[9] See infra s. 3(3.2).
[10] See infra part 4.
[11] This is the main point I make in my paper, see Kahn (2019b).

the bans was the expression of a symbolic repudiation of the Klan – sometimes by social groups that shared its interest in maintaining segregation (Kahn, 2019b, pp. 14–17). More recently, a new wave of bans has targeted a wide range of groups including Antifa, and environmental activists protesting pipelines. These laws, however, like their anti-Klan predecessors, often served a symbolic purpose – in the case of the more recent laws, to connect the groups like Antifa with the Ku Klux Klan (Kahn, 2019a, pp. 137–140, describing the rise of anti-Antifa mask bans).

Despite the anti-Klan origins of most mask bans, the bans targeted all manner of mask wearers – including those with no connection to the Klan or riotous tenants. For example, in 1878 the Tennessee Supreme Court upheld a mask prosecution brought against a man caught stealing from a chicken coop,[12] while in 1968 the appellate division in New York upheld a prosecution of a man dressed in make up early in the morning on a Manhattan subway platform.[13] Georgia's anti-mask law was used against a man wearing a wrestling mask to entertain neighbourhood children,[14] and against a jogger who was wearing a mask on a cold day.[15] At the same time, these laws were rarely used – and at times defendants were able to escape punishment by invoking the original, anti-Klan purpose of most of these laws.

Since then, there has been a noticeable shift. In the 1970s and 1980s mask wearers could often invoke their constitutional rights to freedom of speech and assembly; since the mid-1990s, this has become much harder. In *Church of the Knights of the American Ku Klux Klan v. Kerik,*[16] the Second Circuit rejected the theory – accepted by earlier courts – that the right to anonymous membership established in *NAACP v. Alabama*[17] extended to mask wearing. Being able to conceal your name does not entitle you to conceal your face.[18] Even when courts narrowed the scope of mask bans by requiring the state to show that the wearer "intended to intimidate" others, the door was open for the police to interpret "intimidation" quite broadly. For example, the Eleventh Circuit in *Gates v. Khokhar,* upheld that the refusal at a peaceful demonstration to obey police officer's order to unmask could be a form of "intimidation".[19]

Against this background, privacy has emerged as a way to protect mask wearers. Scott Skinner Thompson has argued that wearing a mask, or hood, could send the symbolic message: "Don't look at me!" (Skinner-Thompson, 2017, p. 1703). Likewise, in *Robinson v. State,* the Florida Supreme Court invalidated that state's mask law as an overly broad intrusion on the wearer's privacy.[20] In a ruling that ran all of six paragraphs,

[12] S*tate v. Walpole,* 68 Tenn. 370, 371 (Tenn. 1878) (upholding the ten year minimum penalty for mask wearing by noting the sacrifices made during the suppression of the Confederacy).

[13] *People v. Archibald,* 296 N.Y.S.2d 834, 835–36 (N.Y. App. Div. 1968).

[14] *Daniels v. State,* 448 S.E.2d 185 (Ga. 1994).

[15] *Molette v. City of Forrest Park,* 780 S.E.2d 780 (Ga. App.2015).

[16] 356 F.3d 197 (2d Cir. 2004).

[17] 357 U.S. 449, 462 (1957) (disclosing membership list would impinge on freedom of association where members, were their identities revealed, would face harassment).

[18] *Kerik,* 356 F.3d, 205. Likewise, *Kerik* held that a Ku Klux Klan mask was not "expressive" because a Klan mask did not make an expressive message distinct from the robe and hood. Ibid. 209.

[19] 881 F.3d 1290 (11th Cir. 2018).

[20] *Robinson v. State,* 393 So. 2d 1076, 1077 (Fla. 1980).

the court could not conceive of a blanket mask ban being constitutionally permissible given the wide range of innocent mask wearing would proscribe.[21] While *Robinson* was decided in 1980, the sense that the state cannot punish all mask wearing suggests that privacy – especially decisional privacy – might play a role in protecting the right to mask where speech alone might fail. At least in the United States.

At minimum, if one follows the logic of *Robinson* one can identify many possible innocent uses of masks. For instance, one might – as occurred during the pandemic – wear a mask for health reasons; alternatively, one might wear a mask for religious reasons, as some Muslim women do.[22] Moreover, in a world where Clearview AI maintains a database of 3 billion faces scraped from Facebook, Google and CCTV cameras, a person with no intent to commit a crime might still find masking a reasonable step to protect their privacy (Kashmir, 2020, describing the operations of Clearview AI). This choice to mask might be expressive; but it also might simply be a form of rational action in a society such as the United States where people in "Blue States" monitor readers of the *New York Post,* while people in "Red States" monitor readers of the *New York Times* – and shaming/cancellation is always one misstep away.

This suggests a need to rethink our use of mask bans – and, for that matter, how we protect mask wearing (Kahn, 2021, pp. 707–708, opposing mask mandates; Lawrence et al., 2020, p. 509). To the extent we are committed to the ideal of a small-l liberal society in which the individual is free to choose their version of the good life, the ability to conceal one's identity is a necessity. This does not mean, however, that a society must tolerate all masking. A mask could be punishable under a burglary statute; or, maybe, a state like North Dakota concerned about outside agitators spreading mayhem during anti-pipeline protests could enact a law banning wearing a mask at a protest, or while trespassing (Kahn, 2021, pp. 691–693, describing anti-pipeline mask bans).[23] What North Dakota enacted instead, a blanket ban on mask wearing in all public areas in the state, is harder to justify.

2. Face veil bans in Europe

This logic of limited or no mask bans, however, runs into a roadblock once we turn to Europe. As we have seen, in 2014 the ECHR held that "living together" requires showing ones face.[24] Here is a conception of social life in which decisional privacy has no apparent role – at least when it comes to masking. This is so, even though there were very few European bans on masking in 2006, when the current wave of face veil bans began. There are two possibilities here: 1. the rise of face veil bans is not really about masking, but about Muslims (or the aspects of Islam represented by the face veil); or 2. there is something about European conception of the self that is comfortable with

[21] Ibid.

[22] For an overview of the reasons Muslim women veil, see Brems et al. (2014).

[23] I am not necessarily defending a mask ban narrowly targeting protest activities. All I am saying is that such a ban would be preferable to the statewide ban North Dakota ultimately enacted.

[24] *SAS v. France*, para. 142.

exposing faces in an age of mass surveillance. It is this sense of comfort that I want to study.

But before getting into this, it is worth examining the anti-Islamic sentiment behind face veil bans. Part of this is certainly true. The motivation behind the face veil bans – from the municipal bans in Belgium and the Netherlands, to the laws that swept France, Austria and several other European countries – was not merely about showing one's face. They were bans of the burqa, which was opposed for a variety of reasons (gender equality, fear of giving credibility to political Islam, etc.) that had nothing to do with face showing. One sees this, for instance, in the push for bans of the hijab and burkini as well as in some of the legislative debates over the face veil bans (Kahn, 2021, pp. 677–679). For instance, the Austrian legislators enacting their 2017 law appeared much more concerned about Islam, assimilation and gender issues than they were about the ways masks impede human communication (Kahn, 2021, p. 680).

I have discussed anti-Islamic motivations of bans on headscarves and burqas in other places (see, e.g. Kahn, 2011); here I want to take the ECHR, and the ban supporters at their word. Was the Court right that, in a modern society showing one's face is a necessity? At first blush, this appears plausible. The person who wears a mask while shopping, walking down a street or tending their garden might well be seen as a bit eccentric. Of course, if this is true of Europe, it is also likely true of the United States as well. And yet the mask debate in the United States has largely been about threats (be they the Klan or Antifa) rather than about everyday mask wearing.

This brings us privacy norms, and more specifically, the contrast between the United States, where privacy is spatial and centres on the home, and Europe where privacy is attached to the person (see Whitman, 2004, contrasting the dignity of personal honour with the freedom from intrusion on experiences in one's own home). Whereas in the United States, a person who ventures outside their home and is caught on camera is largely out of luck, in Europe one is supposed to (in theory at least) be able to be "private in public". This is the message of the *Von Hanover* case.[25] And if Princess Caroline can keep her images out of the paper, perhaps non-royals (i.e. both Harry and Meghan as well as you and me) can do so as well.

This belief, to the extent it is true, might explain the willingness of Europeans to adopt the "living together" rationale – even if it came about for other reasons. If I know *Bild* will not run my picture, why should I bother with a mask? If I have a right to petition Google to remove unpleasant images from my past, why should not I stare into the CCTV screen and smile?[26] The willingness to dispense with masks might be even stronger to the extent European citizens trust their governments more than Americans do. The question, however, remains whether this trust is reasonable. For the European ready to denounce Google's refusal to let us be forgotten as "totalitarianism" (Gabriel, 2014, cited and briefly described in Solove & Schwarz, 2017) what is the reason for

[25] *Von Hannover v. Germany (No. 1),* no. 539200/00, 24 June 2004.

[26] For example, *Peck v. United Kingdom,* 44647/98 [2003] ECHR 44 (28 January 2003) describes a situation in which footage of a suicide attempt was broadcast on television. Despite promises to mask the applicant's identity, it was revealed.

trusting the GDPR, with its exception for national security matters, will actually protect people from the consequences of mass surveillance?

3. Deeper questions – "living together", masking and human nature

This leads us to deeper questions about masking and human society. The pandemic has, for good or bad, given us a lesson on the social effects of masking. Mask wearing can make it harder to discern emotions – at least what is conveyed through a smile or frown. Mask wearing can also be physically uncomfortable, and an opening for discrimination – for example, if the wearer is stigmatised as being "sick" or from a foreign culture. But if mask wearing is scary in some situations, what is one to make of societies in East Asia where mask wearing has a long history, and in which hiding one's emotions behind a mask is seen as positive – at least in some situations? (See Horii, 2014, describing Japanese masking culture.) Is culture a more powerful force than we have previously imagined? Is mask wearing more limited in Japan, China and other parts of the Far East than we have been led to suppose? Or is the message of the *SAS* court – "living together" requires showing ones face – an incomplete account of what modern society is all about?

Here, once more, it is tempting to fall back upon the Islamic foil. If European society is distinctly modern, then casting masking (and the burqa) as pre-modern might make symbolic sense.[27] My concern, however, is that whatever the origins of the "living together" argument, it has been primed for success in Europe – in part because rejecting "living together" might require facing up to the anti-Muslim motives behind many of the face veil bans. Not only that, the extent we accept the "living together" rationale as a serious statement of social reality, it might become reality. After all, courts have the power to educate the masses. Could what began as an attempt to provide a plausible defence of mask bans enacted for other reasons over time become a generally accepted truth of human nature?

This section of the paper probes these questions. If "living together" is the future of Europe, what makes it tick? Here I explore two possibilities: 1. "living together" is primarily a rejection of masking; and 2. "living together" rests on a shared understanding that, in Europe at least, it is safe to show one's face.

3.1. Why Europeans might reject masking

Masks are not popular. Since March 2020, we have had the burden of wearing masks. The emergence of vaccines in April and May 2021 raised the joyous possibility of taking our masks off. A world emerging where we can finally see the faces of shopkeepers, jogging partners, students, teachers, police officers, friends and family. We can see smiles

[27] This is largely the approach taken by Stephane Mechoulan, who casts Islam as a civilisational threat to Europe (Mechoulan, 2018, p. 16).

and frowns. This is a positive development. Yet my argument here is not about mask mandates (hopefully they will wither away), or the part of the debate over the burqa that involves compulsion. Nobody should be forced to wear an article of clothing against their will without a good reason. In this regard, *SAS v. France* corresponds to a basic fact of human nature – people generally do not like wearing masks.

My interest, instead, is about a deeper dislike of masks. Consider Fox News host Tucker Carlson, who wants you to take off your masks because they make *him* feel uncomfortable (Mastrangelo, 2021). One does not have to agree with Carlson's rationale – that mask wearing is a symbol of obedience that unnerves him[28] – to see broader issue here: Does one have a right to complain that someone else – a Klan member, an anarchist or a Muslim woman – is wearing a mask? To read *SAS,* and some of the other local court cases upholding European face veil bans, the answer to this question is "yes". It is worth going through some of these objections to masks.

A first set of objections concerns identification. A mask wearer is unidentified. As such, this person is scary. As the Georgia Supreme Court stated in *State v. Miller* upholding that State's anti-Klan mask ban, a masked figure can strike terror in the heart.[29] Moreover, burglars wear masks to conceal their identity. Finally, masks by concealing identity can hinder communication. The speaker cannot "see" who they are dealing with.

As strong as these objections are, however, there are some difficulties. First, there are some instances where the mask does not conceal the wearer's identity. For instance, if everyone knows that X wears a burqa, and she is one of the few Muslim women who veil, has her identity actually been concealed? A larger problem is with the scope of mask and face veil bans. While some bans have been interpreted to only cover mask wearing that intimidates others, a blanket mask ban covers a much broader range of conduct. Not every mask wearer is a Klan member or Antifa supporting eco-terrorist. In *Daniel v. State* a Georgia appeals court upheld the conviction of a man wearing a wrestling mask to entertain neighbourhood children.[30] While the Georgia Supreme Court reversed,[31] the lower court ruling shows the extent of the problem. Or, to return to Carlson, his concern with mask wearers is not that they will cause harm, or break the law. His fear is that mask wearers are too "obedient" (Mastrangelo, 2021).

The objection to masking has to have deeper roots than potential intimidation or fear of criminal activity. One possibility, raised by the Belgian Supreme Court in its ruling upholding that country's mask ban, is that the mask is a symbol of the absence of freedom.[32] Someone who masks is unfree, even if they are unfree by their own choice. While the "choice" question may seem obscured in the case of some burqa wearers,[33]

---

[28] Ibid.

[29] 598 S.E.2d 547, 549.

[30] *Daniels v. State,* 438 S.E.2d 99, 101–102 (Ga. App. 1993).

[31] *Daniels v. State,* 448 S.E.2d 185 (Ga. 1994).

[32] See Belgian Constitutional Court, Decision of 6 December 2012, para. B.21. (cited in *SAS,* para. 42) (masks deprive wearer of "any possibility of individualisation by facial appearance"). Ironically, choosing to wear a mask itself might be a form of "individualisation".

[33] On the other hand, some burqa wearers don the garment of their own accord. See Brems et al. (2014, pp. 6–7).

masking is a choice. The lack of freedom is less about the wearer's state of mind than with the role the mask plays as a symbol of bondage. But is this a fair reading of the mask? After all, many mask wearers (myself included) wear masks to avoid Covid, not to take part in a project of social control.

Finally, there is the vague sense of unease many feel in dealing with someone wearing a mask. One sees this in the 2006 comments of British Home Secretary Jack Straw who disliked veils because, when he took his customary evening strolls, he wanted to see the faces of the Muslim women he passed in the street (Strucke, 2006). While in the "me too" age, one can critique this as an example of a male, orientalist gaze, there is something to the argument that seeing one's face adds to daily life. In the virtual world of Zoom classes, teachers often ask that students turn their cameras on – in order to see their faces. On the other hand, the Zoom students are preparing for a social interaction; turning one's camera off might be considered rude. By contrast, the burqa wearers encountered by Straw were not anticipating an encounter with the Home Secretary; rather, like him, they were simply taking a walk.

Indeed, it is unclear just how many mask wearers Straw encountered during his walks. If showing one's face is part of a European project of "living together", okay. But how necessary is it to punish all instances of mask wearing in a society if most people show their faces most of the time? Moreover, anthropological work on burqa wearers in the Netherlands and Belgium suggest that, contrary to the argument that showing one's face is necessary for social communication, burqa wearers in those countries could communicate quite well with others in society.[34] This brings us back to our original set of questions. If masks are not usually intimidating, are not always a symbol of bondage, and do not routinely hamper human communication, then maybe the reason Europe has rejected the mask has less to do with the harms of the mask, and more to do with a sense of trust about showing one's face – a sense of trust that I, as someone from the United States, struggle with a little bit. To that question, we now turn.

3.2. Why Europeans may feel comfortable showing their faces

Perhaps, then, "living together" came about because, in Europe, showing one's face is not a big deal, in part because of European conceptions of privacy – especially the idea about being private in public. Perhaps, in other words, Europe is a place where because of the right to be forgotten, and other privacy protections, the right to obscure one's identity is not necessary.

Let me address an initial objection, namely that the real concern was with the burqa, not "living together". I am not sure this changes things. Assume for argument's sake the *SAS* court did fashion "living together" to avoid offending European Muslims by offering their "real" reasons for allowing face veil bans.[35] Even if this is true, *SAS* still

[34] Ibid. 18–20.

[35] These reasons – including concerns about gender equality and security – were raised by the parties and rejected by the *SAS* Court. *SAS v. France,* paras. 118 (rejecting gender equality concerns), 137 (rejecting security concerns).

thought little enough of the mask to sacrifice the right to wear one (even for nonreligious purposes).

The deeper question is whether the premise hinted at in *SAS* – that showing one's face is a not only customary but (from a privacy perspective) safe – is actually true. Before exploring this question in a European context, let me return briefly to the United States. During the 1970s, 1980s and 1990s, American courts repeatedly held that fear of retaliation could justify masking. Two cases involved Iranian students protesting the Shah of Iran,[36] and another case turned on Klan members who faced harassment in Indiana (including leaving a Barbie doll's severed head in a jar of gasoline on a member's doorstep).[37] These cases show how showing one's face can be dangerous in the United States. This reflects, in part the highly charged political context of the cases in question – the Shah of Iran's repression and the animosity triggered (justifiably so) by the Klan.

Meanwhile, those who chose to show their faces and were photographed found themselves out of luck. This was true as early as 1953 when the California Supreme Court decided that a couple working a stand at a farmer's market captured in an embrace by a photographer had no standing to challenge the running of the photo in *Harper's Bazaar*.[38] Explaining why the photo of the couple in an "amorous pose" could run in a national magazine, the Court explained that the couple had "voluntarily exhibited themselves".[39] A few years later, the New York Court of Appeals reached a similar result, concluding that a man dressed in a green outfit on St. Patrick's Day had "voluntarily became part of the spectacle".[40] More recently, the appellate court in New York held that photos taken across the courtyard of an apartment building were "art" and therefore fell outside New York's appropriation law which prohibits the use of one's image for trade or advertising purposes.[41]

One can agree or disagree with these outcomes. For its part, the California Supreme Court argued that ruling for plaintiffs would make it possible for periodicals to run pictures of parades and street scenes.[42] But the common approach in the United States to the privacy implications of picture taking might lead one to want to wear a mask.

This is especially true given that, sometimes, the pictures are sometimes not accurate. Consider for example, *Finger v. Omni,* in which a photo of plaintiffs – a large, healthy looking family of six – accompanied an article discussing the relationship between caffeine consumption and in vitro fertilisation.[43] The only link to the family

[36] See *Aryan v. Mackey,* 462 F.Supp. 90 (N.D. Tex. 1978) (upholding the right of anti-Shah protesters to conceal their identities); *Ghafari v. Mun. Court for S.F. Judicial Dist.,* 150 Cal. Rptr. 813, 818 (Cal. Ct. App. 1978) (same).

[37] *Am. Knights of the Ku Klux Klan v. City of Goshen,* 50 F. Supp. 2d 835, 839 (N.D. Ind. 1999). Cf. *People v. Aboaf,* 721 N.Y.S.2d 725, 728 (N.Y. Crim. Ct. 2001) (rejecting harassment claim of anarchists due to lack of evidence).

[38] *Gill v. Hearst Publishing Co.,* 253 P.2d 441, 444 (Cal. 1953).

[39] Ibid. 443, 444.

[40] *Murray v. New York Magazine Co.,* 267 N.E.2d 256, 258 (N.Y. 1971).

[41] *Foster v. Svenson,* 7 N.Y.S.3d 96 (App. Div. 2015).

[42] *Gill v. Hearst Publishing Co.,* 444.

[43] *Finger v. Omni Int'l Ltd.,* 564 N.Y.S.2d 1014, 1015 (N.Y. 1990).

and the content of the article was its size.[44] Or *Arrington v. New York Times Co.,* in which a picture of African American plaintiff wearing a suit accompanied an article about how "the Black middle class" had "been growing more removed from its less fortunate brethren".[45] The plaintiff claimed that the article did not represent his views and was insulting and degrading – he lost his case.[46] Or *Sipple v. Chronicle Publishing Co.,* in which the plaintiff broke up an assassination attempt against President Gerald Ford in San Francisco was outed as gay – at a time when his family did not know it.[47] He also lost his case.[48]

If Oliver Sipple, Clarence Arrington or the Finger family had been wearing masks, or obscured their identity in some other way, they would have avoided the public gaze, and the lack of privacy that flowed from it. So, from a privacy law perspective, there may be good reasons why a person out and about in society (or, as *Foster* suggests, in front of a window), might be leery of showing their face.

Europe has a different feel. Privacy is explicitly protected by Article 8 of the European Convention on Human Rights, and the European Court of Human Rights, in *Von Hannover v. Germany (No. 1),*[49] held that pictures of Princess Caroline of Monaco riding her horse, dining at a restaurant, and tripping over an obstacle and falling down,[50] could not run in German newspapers given that she exercised "no official function", and "the photos and articles related exclusively to her private life".[51] This applied, even though Princess Caroline was "a public figure of contemporary society 'par excellence'".[52] Instead, to be worthy of publication, the Court will consider "the contribution that the published photos make to a debate of general interest".[53] If even a public figure like Princess Caroline has the right to be "private in public", one assumes private figures, like Arrington, or the embracing couple whose photo ran in *Harper's Bazaar* would have even greater privacy protection – and, therefore, less of a need to don a mask, or otherwise obscure their identity.

On the other hand, the European Court's balancing test might not help the Klan members in *Goshen,* or a participant in the 6 January 2021 insurrection, or a Black Lives Matter rally. Here, perhaps, European and American perspectives on privacy diverge less than one might expect. The unlucky tiki torch carrier, who after marching Charlottesville, Virginia to protect Robert E. Lee, was fired from their job at Subway (Judkis, 2017), has

[44] Ibid. 1017. For their part, plaintiffs maintained that none of their children were born through in vitro fertilisation and that they never participated in research on the impact of caffeine on fertility.

[45] 449 N.Y.S.2d 941, 942 (N.Y. 1982).

[46] Ibid. 944 (noting that, given the plaintiff's "race, educational background, professional status, personal poise and habit of dress", he could be perceived to be a member of the Black middle class).

[47] *Sipple v. Chronicle Publishing Co.,* 201 Cal. Rptr. 665, 666–667 (Ct. App. Cal. 1984).

[48] Ibid. 669. The Court of Appeals noted that Sipple's sexual identity had already been disclosed by local magazines and, as such was not private. Ibid. While true, had Sipple been masked, or otherwise unseen when he saved President Ford's life, it is highly unlikely that his identity would have been revealed.

[49] *Von Hannover,* paras. 79–80.

[50] Ibid. para. 11.

[51] Ibid. para. 76.

[52] Ibid. para. 74.

[53] Ibid. para. 76.

both inserted themselves into the spectacle[54] as well as "contributed ... to a debate of general interest".[55] Moreover, even in Europe an individual walking the streets is at risk of being photographed by another person with a cell phone – or by closed circuit TV. These photos might also make their way to the internet. So Europeans too might have a good reason to don a mask.

Here a second doctrinal difference between the United States and Europe helps our hypothetical European walker feel more comfortable about baring their face – namely the right to be forgotten.[56] In the United States, once a photo is public, it will be there for a while. This provides a great incentive to cover one's face – at least when showing one's face would be embarrassing. By contrast, in Europe there is at least the possibility of removing links to past photos. So, while you are out strolling, and come across not only Straw, but also someone with a cell phone, you have the recourse of having the photo that sooner or later will emerge removed from Google, and other search engines. At least in theory.

The Court promises to balance the right to be forgotten with "the role played by the data subject in public life"[57] – a balancing act cast through the lens of *Von Hannover*. Indeed, the data subject does not even need to show that the photo is "prejudicial",[58] merely that it is outdated, irrelevant or excessive.[59] While there are inherently vague terms, they offer hope that the right to be forgotten will apply to routine photographs of ordinary people – even when the photos are not offensive, or harmful but merely unwanted. This in turn suggests, at least in theory, that it is possible to "live together" without facing harm from showing one's face. This is all the more true given the broad scope given to data processing in Europe[60] and the right to retract information about oneself under the General Data Privacy Regulation.[61]

4. Conclusion

The argument that European conceptions of privacy allow one to show one's face in public with less fear than might occur in the United States is not a complete explanation for the rise of the "living together" concept as a response to the burqa. Even if the "private in public" concept from *Von Hannover* and the right to be forgotten give the typical European a measure of control over what information is shared with the public, privacy also has a decisional element. The face veil bans enacted across the Continent do not merely ban face veils worn for the purpose of concealing identity so as to avoid

[54] *Murray v. New York Magazine Co.,* 258.
[55] *Von Hannover,* para. 76.
[56] *Google Spain, S.L. and Google, Inc. v. Agencia Española de Protección de Datos and Mario Consteja González,* Cases C-131/12 (13 May 2014).
[57] Ibid. para. 97.
[58] Ibid. para. 89.
[59] Ibid. para. 94.
[60] Criminal Proceedings Against Bodil Lindqvist, European Court of Justice, 11 June 2003 (the church catechist's list of names, addresses and hobbies of church employee's is data processing under the European Data Directive).
[61] See General Data Privacy Regulation, Art. 17 (describing "a right to erasure").

being photographed, they punish covering one's face *for any reason at all,* and as such restrict decisional privacy (as well as privacy in the sense of giving the individual control over what they decide is public or private; see Westin, 1967).

This brings us back to my original question about "living together" and privacy. Is there something about European culture that explains the lack of concern about decisional privacy? In Europe, one can be private in public. So, even if someone snaps your photo, most likely it will not run in a newspaper (at least in theory). Even if you are unlucky, and your photo does appear on a website or newspaper, you can restrict public access via Google by invoking the right to be forgotten. A rational data subject, acknowledging these conditions, would surely choose to unveil their face. But does the European conception of personal privacy have a place for the person who – for whatever reason, no matter how irrational, silly or idiosyncratic – would prefer to cover their face? I have some doubts here, ones I would like to take up in future work.[62]

References

Brems, E. et al. (2014). The Belgian "burqa ban" confronted with insider realities. In E. Brems (Ed.), The Experiences of Face Veil Wearers in Europe and the Law (pp. 77–114). Cambridge University Press. Online: https://doi.org/10.1017/CBO9781107415591

Edwards, S. S. M. (2014). No Burqas We're French! The Wide Margin of Appreciation and the ECtHR Burqa Ruling. Denning Law Journal, 26, 246–260. Online: https://doi.org/10.5750/dlj.v26i0.931

Gabriel, S. (2014, May 14). Unsere politischen Konsequenzen aus der Google-Debatte. FAZ.

Giles, B. (2017, August 23). Legislator to draft law to unmask protesters he compares to Ku Klux Klan. Arizona Capitol Times. Online: https://bit.ly/3kOWtok

Johnson, J. H. (2001). Versailles, meet Les Halles: Masks, carnival, and the French Revolution. Representations, (73), 89–116. Online: https://doi.org/10.1525/rep.2001.73.1.89

Judkis, M. (2017, August 14). Charlottesville White Nationalist Demonstrator Loses Job at a Libertarian Hot Dog Shop. The Washington Post. Online: https://wapo.st/3DsRe5b

Kahn, R. (2019a). The Long Road Back to Skokie: Returning the First Amendment to Mask Wearers. Brooklyn Journal of Law and Policy, 28(1), 71–149. Online: https://doi.org/10.2139/ssrn.3451477

Kahn, R. (2019b). Mask bans as expressions of memory politics in the United States. Online: https://doi.org/10.2139/ssrn.3434689

Kahn, R. (2020). Masks, culture wars, and public health expertise: Confessions of a mask "expert". University of St. Thomas Legal Studies, Working Paper, No. 20-08. Online: https://bit.ly/32i35W4

Kahn, R. (2021). "My face, my choice?" Mask mandates, bans, and burqas in the COVID age. New York University Journal of Law and Liberty, 14 (3), 651–708.

Kahn, R. A. (2011). Are Muslims the new Catholics? Europe's headscarf laws in comparative political perspective. University of St. Thomas Legal Studies, Working Paper, No. 20-08.

Kashmir, J. (2020, January 18). The secretive company that may end privacy as we know it. The New York Times, updated 18 March 2021. Online: https://nyti.ms/32gMQbP

[62] There is a lot more to say here. In addition to the possibility that a connection dating back to the French Revolution, connects showing one's face and revolutionary transparency, see Johnson (2001), let me bring up restrictive European rules about naming children, and changing one's name. See Shakargy (2020, pp. 659–667) describing restrictive naming practices in France, Germany and Spain.

Lawrence, C. V. et al. (2020). Masking up: A COVID-19 face-off between anti-mask laws and mandatory mask orders for black Americans. California Law Review, 11, 479–516. Online: https://doi.org/10.2139/ssrn.3695257

Mastrangelo, D. (2021, April 27). Tucker Carlson: "Contact child protective services" if you see kids wearing masks outdoors. The Hill. Online: https://bit.ly/3nuKk9U

Mechoulan, S. (2018). The case against the face-veil: A European perspective. International Journal of Constitutional Law, 16(4), 1267–1292. Online: https://doi.org/10.1093/icon/moy099

Michaels, R. (2018). Banning burqas: The perspective of postsecular comparative law. Duke Journal of Comparative and International Law, 28, 213–245.

Mitsutoshi H. (2014). Why Do the Japanese Wear Masks. Electronic Journal of Contemporary Japanese Studies, 14(2).

Shakargy, S. (2020). You name it: On the cross-border regulation of names. American Journal of Comparative Law, 68(3), 647–688. Online: https://doi.org/10.1093/ajcl/avaa026

Skinner-Thompson, S. (2017). Performative privacy. University of California Davis Law Review, 50(4), 1673–1740.

Solove, D. J., & Schwarz, P. M. (Eds.) (2017). Information Privacy Law. Aspen.

Strucke, J. (2006, October 6). Straw: "I'd rather no one wore veils". The Guardian. Online: https://bit.ly/3qSsTlK

Westin, A. (1967). Privacy and Freedom. Atheneum.

Whitman, J. Q. (2004). The two Western cultures of privacy: Dignity versus liberty. Yale Law Journal, 113, 1151–1221. Online: https://doi.org/10.2307/4135723

Public Governance, Administration and Finances Law Review Vol. 6. No. 2. (2021) • 21–34.

DOI: 10.53116/pgaflr.2021.2.3

Algorithms of Machines and Law: Risks in Pattern Recognition, Machine Learning and Artificial Intelligence for Justice and Fairness

Michael Losavio*

* Associate Professor, University of Louisville, Department of Criminal Justice, e-mail: michael.losavio@louisville.edu

Abstract: Pattern recognition, machine learning and artificial intelligence offer tremendous opportunities for efficient operations, management and governance. They can optimise processes for object, text, graphics, speech and pattern recognition. In doing so the algorithmic processing may be subject to unknown biases that do harm rather than good. We examine how this may happen, what damage may occur and the resulting ethical/legal impact and newly manifest obligations to avoid harm to others from these systems. But what are the risks, given the Human Condition?

Keywords: pattern recognition, artificial intelligence, governance, management, justice, ethics, human condition

1. Introduction

Pattern recognition (PR) and artificial intelligence (AI) are machine systems for finding or inferring patterns and relationships in data. The power of these systems and their deployment across multiple social, commercial and government domains impacts everyone. But with much technology in human history, examination of ethical, human and legal impacts of PR/AI lags, ignoring risks to people's lives. The risks of unintended injury from the systems is significant. In the area of facial recognition, both Amazon and IBM have withdrawn their AI facial recognition systems from law enforcement use due to concerns about errors. These errors might lead to wrongful arrest or worse.

To detail the interrelationship of law with PR and AI in society, consider how facts map to law. Figure 1 details the fact elements necessary for the offense of reckless homicide, for which a person is guilty if they unintentionally but with reckless disregard of the dangers kill someone.

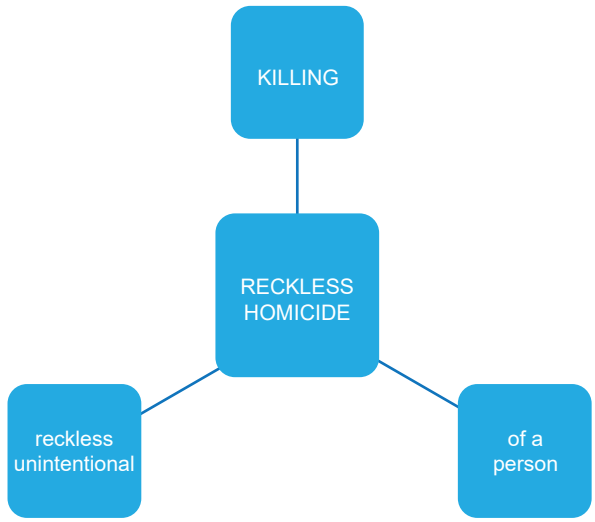

Figure 1.
The fact elements of reckless homicide from AI controls

Source: Compiled by the author.

If the AI system contributes to any of these elements, and all are present, those who designed, distributed and used that system may be criminally liable for the death. Table 1 deconstructs outcomes from AI control systems for medical treatment devices causing unintentional injury.

Table 1.
Potential criminal liability for flawed AI-controlled system

AI-controlled Medical Device for Radiation Treatment of Cancer Patients			
Mental state of the designer, seller, user	Object of injury	Type of injury	Criminal Liability?
Designer knows of danger incorrect treatment but fails to do standard software testing	Person receiving treatment	Death	Yes
Seller knows of injuries to others but continues to sell device	Person receiving treatment	Death	Yes
System user learns of injuries to others but continues to use device	Person receiving treatment	Death	Yes

Source: Compiled by the author.

Advances in AI have contributed to growing interest in industry, government and education. Innovative applications and industries and products allow the use of AI to automate many endeavours, such as business processes, services, manufacturing, transportation and entertainment. But the application of AI has, in some cases, proved to be flawed increasing the risks to security, privacy and personal safety. A growing interest in AI safety is now a branch of ethics and technology of its own. This is matched by discussion and litigation as to liability for the injuries resulting from flawed AI, as discussed below.

2. People, patterns and artificial intelligence

Artificial intelligence and pattern recognition systems are technological tools for people. The effect of such systems should comply with systems of rights and responsibilities. These together form a legal-technical ecosystem in the world. Artificial Intelligence may reveal much previously private and hidden inferences. One of the first computational-mediated devices for the collection and analytics of data, upon court review for violation of fundamental rights of citizens, produced speculation that these technologies might change the relationship between government and the governed.[1] That change may not necessarily be for the better.

2.1. Policies, procedures and regulation for artificial intelligence and pattern recognition

Legal implications, compliance and utility for AI and PR are intricate. Analysis of the technology, possible injuries and regulation, present and future, are essential. Injuries once minor and dismissed through service level agreements become grounds for liability under various legal doctrines, especially that of products liability that holds those creating a "defective" product injuring others must pay for those injuries regardless of any agreement to the contrary. Injury to others calls for legal regulation. The technologies of AI and PR are integrated into administrative-cultural-legal frameworks.

There are a variety of new issues with AI for digital forensics, evidence recovery, provenance and source discovery, and validation may require application of multiple tests to components of an evidence object. The systems and protocols for security and privacy in electronic objects, metadata, source and storage devices and transactional data may both support forensic discovery but also counter forensic efforts.

The life or death aspect of police power has led a group of mathematicians to call for ending collaboration with police departments and to publicly audit policing algorithms (Aougab et al., 2020). Calls have come out to limit the use of AI as matters of policy, especially in policing; the Government Accountability Office, Science, Technology Assessment and Analytics team of the United States is evaluating law

[1] *United States v. Jones,* 574 US ___ (2014).

enforcement AI systems as to reliability (Uberti, 2020). Legislation is pending in the U.S. Congress to set standards for the country on forensic algorithms that would also negate any trade-secret privileges and systems used to block examination of the algorithm source code. The Global Partnership on Artificial Intelligence of fourteen countries and the European Union, with support from the OECD (2020) and UNESCO, has formed to guide "responsible development and use of AI" while respecting human rights, stating:

> Recognising the need for cooperation at international level if we are to tap the full potential of artificial intelligence (AI) and ensure that it is of benefit to all citizens while respecting democratic values and the primacy of human beings, the founding members of the Global Partnership on Artificial Intelligence (GPAI) mean to encourage and guide responsible development of AI based on human rights, inclusion and diversity while fostering innovation and economic growth (Gouvernement de France, 2020).

Calo posits policy for AI must address challenges to:

- justice and equity
- use of force
- safety and certification
- privacy and power
- taxation and displacement of labor (Calo, 2018).

AI policy issues are under discussion early in its implementation, creating the opportunity to implement policies before damage is done.

Global concerns with the fair, just and reliable use of AI arise from the sheer wealth of invasive power and evidence offered and the sensors of the Internet of Things, and must be addressed at a policy level. The power of AI gives it a central place in security preparations and forensic examinations across the spectrum, but these must be implemented under the rule of law, respect for human rights and our need for justice. We discuss factors that must be addressed for proper and reliable use of AI, PR and machine learning.

2.1.1. Case Study of artificial intelligence and human impact: Los Angeles Police Department Laser and PredPol predictive policing deployments

Los Angeles, California, has the third largest police department in the U.S. The Los Angeles Police Department adopted a number of computational and algorithmic systems to help guide its policing. One priority was interdiction of violent offenders, including by resource allocations to crime "hotspots". There were concerns that AI/algorithmic systems may reflect inherent racial biases in the programming and deep learning/machine learning analysis of historical databases. There were further concerns

that these systems were not validated through empirical testing and analysis, a reliability review normally required for the forensic use of evidence and inferences in legal proceedings.

A review and audit of the systems was made by the Inspector General of the Los Angeles Police Department (Office of the Inspector General, 2019). The systems reviewed included a Predictive Policing system (PredPol). That review found, among other things that the officers – the human component of the system – were not consistent in their application of criteria leading to their conclusions regarding criminal activity. This led to the suspension in the use of at least one of these tools and its tracking database.

PredPol and its location-based predictive policing were found to have discrepancies in data collection such that program effectiveness could not be evaluated. PredPol modelled officer visits to areas matched against outcomes. Ideally this would connect enforcement activities to community impact. Analysis of these systems could not establish that they were, in fact, effective. Rather it led to a set of recommendations to assure greater reliability; these included formal written protocols that would:

- articulate goals and expectations for the program
- provide clear delineation of selection criteria
- remove potential bias elements through requirement of minimum numbers of targets identified
- provide notice and corrective systems for people identified by the system
- provide process for removal from the program target list
- articulate mandatory program activities
- articulate prohibited program activities or limitations on action

Reform of database and system design required collection of further information on why a person was targeted, date of admission to the database, dates of active or inactive status and reporting information on the individual. Further data was needed on the nature of any Los Angeles Strategic Extraction and Restoration program directed activities and the results of that activity and the source of updates regarding target individuals. Retention policies on data and reports from the program were required to provide for review of activity; guidance language in activity bulletins generated should be reviewed by the Los Angeles City Attorney. A consistent training program for all users of the program needed to be developed and implemented. An audit system must be in place to provide oversight of the data collection and utilisation of these systems for public safety.

The Inspector General noted that although immensely powerful, the melding of these systems clearly created risks where there is not adequate preparation or system validation. In the area of public safety this can be particularly dangerous for the identification of someone as a violent offender means that police in encounters with them may come with the anticipation of violence and related increase in risk.

2.2. The ethics of information technology and artificial intelligence

Artificial intelligence ethics has become an area of its own, extending from philosophical discussions of personal autonomy of AI into dual tracks regarding ethical obligations to deal with it. The Letter to AMS called for boycott of police collaboration and called for the inclusion of learning outcomes in data science classes that cover the ethical, legal and social implications of AI systems (Aougab et al., 2020). The Association for Computing Machinery and IEEE-CS issued a joint Software Engineering Code of Ethics and Professional Practice applicable to AI development (Gotterbarn et al., 1997). The Code, though high-level, mandates that "software engineers shall act consistently with the public interest".

More granular ethics analyses have identified outcomes to be addressed. Chalmers proposed the need for a "leakproof" containment system for AI development that, at its most extreme, isolates AI systems until their full capabilities are known (Chalmers, 2010).[2] Yampolskiy (2012) has addressed this in the context of the safety of people, not simply that of machines.[3] The general framework for approaching ethical analysis with Information and Communications Technologies (ICT) may apply specifically to AI and PR systems. One such framework, built upon that and used for human subject research generally, was set out in the Menlo report (Keneally, 2012).

The Menlo report proposes a framework for ethical guidelines for computer and information security research based on the principles set forth in the 1979 Belmont report for human subjects research. The Belmont report had as its primary focus biomedical research on human subjects and the ethics regarding the treatment of those human subjects. In the U.S. it has become the foundation for the "common rule" applicable to all human subjects research, from biomedical sciences to social sciences. It acknowledges that there are new challenges resulting from interactions between humans and information and communications technologies (ICT). ICT research contexts contend with ubiquitously connected network environments, overlaid with varied, often discordant legal regimes and social norms. The lack of a tradition of analysis of the ethical implications of ICT research itself creates the potential for risk; both in the context of the sometimes horrific history of traditional human subjects research. The evolving landscape of ICT research stakeholders, especially with AI/machine learning, require special attention.

2.2.1. The Menlo report

The ICT research Menlo report proposes three core ethical principles, three of which derive from the Belmont report: 1. respect for persons; 2. beneficence; and 3. justice. To these Kantian concerns connect the additional principle "respect for law and public interest", a recognition of how the novelty of these technologies and the lack of

[2] See also Yampolskiy (2012a).
[3] See also Yampolskiy & Fox (2012).

a tradition of care can lead researchers and developers to create things that may, however unintentionally, hurt others. The goal of the report is to propose standard methods for ICT research for:

- identification of stakeholders and informed consent
- balancing risks and benefits
- fairness and equity
- compliance, transparency and accountability

These principles and applications can be supported by outside oversight and internal self-evaluation tools. The starting point of the analysis is to identify "stakeholders" in the process, being those people who have an interest or are impacted by the implementation in the world of the ICT systems developed. These would include:

- researchers
- human subjects, non-subjects, ICT users
- malicious actors
- network/platform owners and providers
- government/law enforcement
- government/non-law enforcement (e.g. public services)
- society collectively

Researchers, developers and users have to look at and consider respect for the people impacted by the systems. This includes recognition of the personal autonomy of the subjects as well as protection of those with reduced autonomy (ill, handicapped, youth, inmates). The idea of informed consent means that the subjects impacted by any system are made aware of the activities, risks, benefits of the system and have a choice whether to proceed with it or not.

The principle of "respect for law and public interest" is a protective measure for the subjects of the systems and the developers/users themselves. It entails the principles of compliance and transparency/accountability:

- compliance
  - identify laws, regulations, contracts and other private agreements that apply to their research
  - design and implement ICTR that respects these restrictions
- transparency and accountability
  - mechanism to assess and implement accountability
  - responsibility for actions and outcomes

There are a variety of existing ICT Ethics Codes that can serve as guides for the evolution of practices, even as they do not have particularly significant enforcement or regulatory powers themselves. Those codes of ethics include:

- IEEE/ACM Codes
- Association of Internet Researchers
- National Academy of Sciences
- SAFE/LPS SA/USENIX – joint System Administrators Code of Ethics

- responsible disclosure guidelines – National Infrastructure Advisory Council
- Internet Advisory Board Guidelines – IETF

One recent example of this is a collaboration between Google and Apple Inc. in the development of an app for contact tracing amidst the ongoing coronavirus pandemic. The ethical issues raised by the system and its ability to bypass privacy of citizens are addressed by the voluntary nature of the use of the application, where the users are informed of how the system works and may choose to use it or not to help provide better hygiene regarding people with whom they have been in contact.

Thus with AI research and implementation those involved, from designers to system users, should engage in the following analysis to better know that what they are doing is ethically correct, and also use it as a potential bellwether for legal liability:

- identification of stakeholders and informed consent
- balancing risks and benefits
- fairness and equity
- compliance, transparency and accountability

The analytics injury to life and person must consider injuries:

- life and person
  - loss of life, physical/mental injury to person
- liberty and personal autonomy
  - privacy rights and control of personal information
  - reputation and public image
  - freedom of action and person
- property
  - rights and interests
  - informational
  - costs of remediation and recovery

2.2.1.1. Case Study of a proactive analysis – The Axon Artificial Intelligence and Policing Technology Ethics Board

In contrast to post-hoc, after-the-fact analyses, the Axon police technology company, testing AI systems for law enforcement, impanelled an ethics board *prior* to system deployment. The panel was to examine the risks and appropriateness of AI technology in public safety and security. The panel set out a series of issues to be examined that are generally applicable for evaluating AI technology and are instructive as *a priori* vetting of an AI/PR implementation:

1. What is the specific problem to be solved?
2. How important is the problem?
3. How certain is it that the technology will address the problem?
4. May there be unintended or secondary benefits:
   - minimise criminalisation of low-level offenses

- additional control and protection of personal data
- mitigation of racial and/or identity bias
- improved transparency or public trust
- better compliance with U.S. constitutional requirements
- other societal benefits
- guidance in assessing costs?

5. Can the technology be used or misused in unanticipated ways?
6. Will it lead to greater criminalisation or to policing in counterproductive ways?
   6.1. Will the technology impact personal information privacy?
   6.2. What is the data captured, retained, owned, accessed, protected?
7. Does the technology implicate potential biases, especially racial or other identity factors, whether in design or use?
8. Does the technology create transparency-related concerns with the public?
9. Does the technology risk, directly or indirectly, violations of constitutional or legal rights?
10. Are there other potential social costs that have not been considered, such as impact on specific groups, "mission creep", historical issues, industry influence, global human rights? (First Report of the Axon Artificial Intelligence and Policing Technology Ethics Board, June 2019.)

The preliminary analysis of AI and facial recognition technology found serious concerns. The ability to capture, match and identify facial data may be hampered by issues of false positives and false negatives, due to issues of gender, age and race as well as the quality of imagery. The use of body camera imagery raises particular issues as they may lead to targeting as a suspect or arrest. This was a concern under American constitutional law and by governments around the world.

The ethics board concluded facial recognition technology under the AI systems in place was not reliable enough to ethically justify its use against body camera data and if it would *ever* be ethical to use it without additional support. Greater accuracy and consistent performance across multiple identity groups would be required to justify its use.

Validation of the algorithms for facial recognition would require a rigorous "false positive – false negative" assessment rather than the more amorphous concept of accuracy. The measurement of the "false positive – false negative" rates would better determine what is needed or permissible for use for law enforcement purposes. Use of such systems should be predicated on evidence-based evaluation of clear benefits, not on anticipated or speculative ones. The ethics board refused to endorse the development and deployment of facial recognition technologies that can be customised by the end users. Such customisation would allow systems to deviate from performance testing results as well as allow the introduction of inconsistent data, analysis and use/misuse. These inconsistencies might be difficult if not impossible to detect posing a challenge to the judicial system to properly oversee their application.

In express acknowledgment that the deployment of AI against diverse data collection systems fell within a broader ecosystem of social and legal constraints, the ethics

board said that the use of such AI-mediated technology should first be vetted through *"open, transparent, democratic processes, with adequate opportunity for genuinely represented public input and objection".* To be effective, this would require cost-benefit analyses that match the power and limits of the technology against "the realities of policing in America and in other jurisdictions". The board noted that this was only the first report on what would be an ongoing evaluation of AI and ethical use of police technology. It hoped that its work would serve as a general guide for all technology developers creating and providing those systems.

2.3. The law of IT and AI

The use of analytics in multiple domains offer exceptional benefits. But data modelling and statistical inference challenges social and legal bounds of privacy, personal autonomy and personal security. Particularly when the analytical inferences go wrong or are wrongly used. The liability for the injuries produced may be civil with money damages and criminal with fines and imprisonment. Such a projection produces widely disparate opinions for predictive analytics across domains, such as its foundation for the future of policing (Davidson, 2019) to an illiberal system for predicting enemies (Deeks, 2018).

The facts of AI and predictive systems are part of a socio-technical system for governance that embraces human decisions, machine decisions and responsibility. Analytics and computing become ubiquitous in data sources and uses, such as the Internet of Things, the Smart City, analytics for everything from toll use to bread and butter, evolving standards, e.g. the national spatial data infrastructure, general data protection regulation (EU). The danger is that we operate the systems upon such meta-assumptions as our computational systems will be error free, our computational systems will be human mediated as to correct any errors, our computational systems will be too complex for the lawyers to figure out how to sue us.

The civil liability in data collection, analytics and disclosure embrace a number of areas depending on the injuries produced and the stakeholders and their roles in those injuries. These include: tort liability/products liability – mental state; infringement of civil rights/statutory liability – mental state; criminal liability – mental state; data collection, storage and transmission; analytics, algorithms, rendition, visualisation, intel, warrants; systems and users. For example, under U.S. law it is a civil liability to intentionally infringe the civil rights of citizens pursuant to the federal statute 42 USC §1983. This paralleled in U.S. federal criminal law 18 USC §242 which punishes for the wilful deprivation of civil rights under the colour of law. There are particular federal Constitutional (U.S.) concerns: Fourth Amendment (secure from unreasonable searches and seizures), Fifth Amendment (no deprivation of property or liberty without due process of law) and Fourteenth Amendment (equal protection of the laws and due process of law).

2.4. Case Study of law and artificial intelligence and pattern recognition: Analysis of government processes and injuries from artificial intelligence techniques

The lagging indicator nature of jurisprudence to reflect legal recognition of technological concepts can be seen with the Internet of Things, first described in 1999 (Makker, 2017). U.S. Federal Court analysis was fifteen years later and growing eight-fold five years later. The policy and judicial analysis of AI both guide and warn. Public safety is an essential public service and AI holds great promise in that domain. Some opine that AI is no longer science fiction but the future of policing (Davidson, 2019). It can more swiftly make determinations about people that impact their lives and liberties through misuse or error. It challenges social and legal bounds of privacy, personal autonomy and personal security. It is the interplay between human decisions and machine decisions that will impact people's lives. Defining responsibility for that impact is critical, just as Cathy O'Neil cautions great care in the use of these "weapons of math destruction" (O'Neil, 2016).

2.4.1. Case-based analysis – Robotic justice

The *Cahoo* et al. *v. SAS Analytics Inc.* et al. case[4] addressed accountability for flawed data analytics by a state entity contrasting fundamental legal obligations with AI/predictive analytics outcomes. Anyone violating the rights of citizens contrary to the U.S. Constitution may be prosecuted for civil damages (42 USC §1983) or criminal punishment (18 USC §242). The system at issue "robo-adjudicated" fraud in unemployment compensation claims. These "robo-adjudications" led to denial of benefits and significant penalties despite a 93 per cent error rate of "false positives" of fraud. The defendants' assertions that they were not liable were rejected and they were found liable for civil damages (money damages) to those injured. Those damages included deprivation of unemployment benefits and the after-the-fact seizure of people's assets, leading in some cases to eviction and bankruptcy.

No state shall "deprive any person of life, liberty, or property, without due process of law".[5] This was long established that people applying for and receiving unemployment compensation have constitutionally-protected property interests in unemployment benefits.[6] The Due Process Clause offers protection for those who show:

- that they have a property interest protected by the Due Process Clause
- that they were deprived of this property interest
- that the state did not afford them adequate pre-deprivation procedural rights

[4] *Cahoo et al. v. SAS Analytics Inc. et al.* No. 18-1296 (6th Cir. 2019).

[5] Fourteenth Amendment, §1.

[6] See *Goldberg v. Kelly* 397 US 254, 262 (1970).

The system MiDAS determined fraudulent conduct through automated processing of current and past applications, finding discrepancies in unemployment insurance benefits. The system determined if there was fraud. It did not check for errors in data sources or good-faith mistakes. It used an "income spreading" algorithm for averaging income across a fiscal quarter into every week regardless of any income; if it was reported no income for any of those weeks a fraud finding was made. No subsequent verification was performed, claimants were not told the reasons for the finding nor allowed to dispute the finding. The system automatically assessed penalties equal to four times the amount of unemployment benefits received or sought, driving some into bankruptcy.

A review of the fraud determinations found a 93 per cent error rate with no fraud. Human-mediated review was added, reducing the error rate to 50 per cent. Yet the system continued to be used and enforcement actions continued. The state defendants clearly violated markedly-established constitutional due process rights to challenge these wrongful determinations. This powerfully demonstrates both the damage from AI mediated systems and the failure of people to remedy that damage to others, even upon notice.

3. Future action

Concerning robo-adjudication in administrative agencies or police action in pursuit of public safety, the development and deployment of AI must be done as part of the much broader legal-technical eco-system. The proactive approach of Axon to conduct an analysis of AI deployment issues is the model to be followed. Major developers such as IBM and Amazon have chosen to follow that model before people are hurt. It is vital to measure the impact on personal safety, security and privacy before the implementation of such powerful systems.

Yemini (2018) notes that the irony of the modern Internet is that "[it] provides more expressive capacity to individuals than ever before, also systematically diminishes their liberty to speak". This is due to particular negative impacts from what should be the most amazing system for the information from lack of anonymity; and lack of inviolability. These apply with even more force to AI and predictive analytics. Computational systems enhance forensic systems in several ways (Franke & Srihari, 2007). These include the production of objective, reproducible analytical conclusions, visualisation and pattern recognition. But there are issues with the proper validation of computational forensic techniques to assure their reliability and the importance of a systematic approach to computational forensics, cooperation between forensic and computational scientists and continued peer-review and testing of computational forensic techniques.

A summary of concerns relating to probabilistic evidence is in the analysis of the trial court noted in the United States federal criminal case *United States v. Shonubi:*

> Several commentators have expressed particular concern about the use of explicitly probabilistic evidence in criminal cases. See, e.g., Ronald Dworkin, *Taking Rights Seriously* 13 (1977); Andrew von Hirsch, Prediction of Criminal Conduct and Preventive

> Confinement of Convicted Persons, 21 *Buff. L. Rev.* 717, 744-50 (1972); cited in Barbara D. Underwood, Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgement, 88 *Yale L.J.* 1409, 1412 (1979); Saks & Kidd, supra, at 152; Tribe, supra; Nesson, supra; L. Jonathan Cohen, Subjective Probability and the Paradox of the Gatecrasher, 1918 *Ariz. St. L.J.* 627, 632; (rejecting use of statistics in criminal cases); Alex Stein, On the Unbearable Lightness of "Weight" and the Refoundation of Evidence Law 48-49 (forthcoming 1995, on file in the instant case) (arguing that the problem with "naked" statistical evidence in criminal cases is not that it is unreliable, but that its "weight" is insufficient to support conviction) [*United States v. Shonubi* 895 F. Supp. 460, 518 (E.D.N.Y. 1995)].

Yet little has progressed since this. Some see the Bayesian analysis as the future of computational forensics in a variety of fields. Validating this for accuracy, precision, testability, test results and error rate is essential to qualify them as competent evidence. Yet such a process may be difficult and possible only through a weighing of the testimony of competing and sometimes contradictory experts in the field. One example is that "explainable" AI is a minimum requirement for adequately vetting AI forensics within judicial fora, such as under Federal Rule of Evidence 702 (U.S.) for expert system evidence.

4. Conclusion

The deployment of AI/PR systems across every domain will make for more and more challenges and problems to be addressed. Anticipating those issues and at least attempting to remediate them will both save people from illicit injury and developers from unexpected punishment. Legislative efforts to build out frameworks for AI/PR recognition will continue and will guide AI development. It is critical that the technologists with knowledge of these systems both conform their work to those requirements. And it is equally critical that they inform those creating these regulatory frameworks of the reality and facts of AI systems so those frameworks encourage competent and effective AI development while limiting poor and harmful AI design.

References

Aougab, T. et al. (2020). Letter to American Mathematics Society Notices: Boycott collaboration to police. Online: https://bit.ly/312vLls

Calo, R. (2018). Artificial Intelligence Policy: A Primer and Roadmap. University of Bologna Law Review, 3(2), 180–218. Online: https://doi.org/10.2139/ssrn.3015350

Chalmers, D. (2010). The Singularity: A Philosophical Analysis. Journal of Consciousness Studies, 17(9–10), 7–65.

Davidson, R. (2019, August 8). Automated Threat Detection and the Future of Policing. US FBI Bulletin.

Deeks, A. S. (2018). Predicting Enemies. Virginia Law Review, 104(8).

First Report of the Axon Artificial Intelligence and Policing Technology Ethics Board, June 2019.

Franke, K. & Srihari, S. N. (2007, August 29–31). Computational Forensics: Towards Hybrid-Intelligent Crime Investigation. Proceedings of the Third International Symposium on Information Assurance and Security. Online: https://doi.org/10.1109/IAS.2007.84

Gotterbarn, D., Miller, K. & Rogerson, S. (1997). Software engineering code of ethics. Communications of the ACM, 40(11), 110–118. Online: https://doi.org/10.1145/265684.265699

Gouvernement de France (2020, June 17). Launch of the Global Partnership on Artificial Intelligence. Online: https://bit.ly/3r6jxTz

Keneally, E. et al. (2012, August 3). The Menlo Report: Ethical Principles Guiding Information and Communication Technology Research. Online: https://doi.org/10.2139/ssrn.2445102

Makker, S. R. (2017). Overcoming "Foggy" Notions of Privacy: How Data Minimization Will Enable Privacy in the Internet of Things. UMKC Law Review, 85(4), 895–915.

Office of the Inspector General (2019, June 12). Review of Selected Los Angeles Police Department Data-Driver Policing Strategies. Online: https://bit.ly/3cIfEvJ

O'Neil, C. (2016). Weapons of Mass Destruction. Crown Publishing.

Organization for Economic Cooperation and Development (2020, June 15). OCED to host Secretariat of new Global Partnership on Artificial Intelligence. Online: https://bit.ly/3l89BFl

Uberti, D. (2020, June 1). Algorithms Used in Policing Face Policy Review. Artificial Intelligence Daily, Wall Street Journal.

Yampolskiy, R. V. (2012a). Leakproofing the Singularity Artificial Intelligence Confinement Problem. Journal of Consciousness Studies, 19(1–2), 194–214.

Yampolskiy, R. V. (2012b). Artificial Intelligence Safety Engineering: Why Machine Ethics Is a Wrong Approach. In V. C. Müller (Ed.), Philosophy and Theory of Artificial Intelligence (pp. 389–396). Springer. Online: https://doi.org/10.1007/978-3-642-31674-6_29

Yampolskiy, R. V. & Fox, J. (2013). Safety Engineering for Artificial General Intelligence. Topoi, 32(2), 217–226. Online: https://doi.org/10.1007/s11245-012-9128-9

Yemini, M. (2018). The New Irony of Free Speech. Columbia Science and Technology Law Review, 20(1). Online: https://doi.org/10.7916/stlr.v20i1.4769

Public Governance, Administration and Finances Law Review Vol. 6. No. 2. (2021) • 35–52.

DOI: 10.53116/pgaflr.2021.2.4

Public Registries as Tools for Realising the Swedish Welfare State – Can the State still Be Trusted?

Jane Reichel*, Johanna Chamberlain**

* Professor in Administrative Law, Stockholm University, Faculty of Law, e-mail: jane.reichel@juridicum.su.se

** Post doc, Uppsala University, Department of Business Studies, e-mail: johanna.chamberlain@fek.uu.se

Abstract: Sweden has a long tradition of transparency and keeping public archives and registries for the benefit of the society at large. Access to comprehensive public information, including registries containing individualised data, has been an integral part in the building of the Swedish welfare state. An important explanatory factor for its acceptance is the high level of social trust in the Swedish society, in that citizens to a large extent trust each other, the government and the public authorities and other institutions in the society. Over the last few decades, changes have taken place connected to digitalisation of the society and an increased awareness of the possible privacy intrusion that may follow. A number of Swedish "register scandals" have been unearthed in media, involving both private and public entities. In order to protect the Swedish cultural heritage of accessible archives and public information and retain social trust, the Swedish legislator should carefully balance the interest in transparency against the right to privacy and data protection following the case law of the European Court of Human Rights and EU law.

Keywords: transparency, registries, archives, privacy, data protection, social trust, freedom of the press

1. Introduction: The function of information in the welfare state

Sweden has a long tradition of keeping public registries for the benefit of the society at large. Access to comprehensive public information has been an integral part in the building of the welfare state. The unique and comprehensive system of personal identity numbers and public registries that started with "church books" of the population in the 17th century has, for many decades, made important research possible, for example in the medical field.[1] The fact that this immense web of information once could be established goes back on several different factors. One is the long tradition of openness, dating back to 1766, when the world's first right to access of official documents was introduced in

[1] SCB webpage, History of Statistics in Sweden, www.scb.se/en/About-us/main-activity/history-of-statistics-sweden/

Swedish law. Swedes are thus used to having access to public information – including personal information on identifiable persons. Another factor is the high level of trust from Swedish citizens from the mid-20th century regarding the expanding welfare state. In the era of social engineering, stately collection and treatment of personal data was not seen as a threat but rather as a necessity (Abrahamsson, 2006, p. 413; Axberger, 2020, p. 763–770).

A third, more technically oriented factor is the usableness of the information due to the personal identity number all residents in Sweden have. From 1947 and onwards, all individuals listed as living in Sweden have been given a unique personal identity number (PIN), which is used both in relation to public authorities and in countless other situations.[2] This means that the identification numbers open the door to a vast amount of personal information – something that would in many countries be seen as risky and intrusive. However, and in accordance with the strong tradition of openness and trust, at the dawn of the PIN era, the attitude amongst the Swedes was that the personal information was required in order for the state to plan the construction of accommodation, education, health care and all the other components that would secure a high and even standard of living for the growing, modern population. A number of authorities, departments and institutions have had key roles in the administration of the welfare state – the most significant being Statistics Sweden (SCB), launched in 1858 and centralised in 1960.[3] Another important actor that may be mentioned is the Swedish Church, which continued controlling the above-mentioned population registration until as late as 1991 (the Swedish Church ceased to be a state church in 2000).

However, the welfare state is no longer in its prime and during recent decades the accepting attitude towards the state has shifted. International developments and instruments regarding individual rights have had an important impact, and a number of cases concerning damages for rights infringements have sparked a development in the courts where stately actors face increasingly strict responsibilities. This is not least the case with regard to the right to privacy and the right to data protection. While the European level of protection has been enhanced with a steadily expanding case law from the European Court of Human Rights (ECtHR) regarding Article 8 of the European Convention on Human Rights (ECHR) and EU law through Articles 7–8 of the EU Charter of Fundamental Rights of the European Union (the Charter) and the GDPR,[4] a number of "register scandals" have been unearthed in Swedish media. When it comes to the public's knowledge that the Police has an unlawful registry based on ethnicity or that the Swedish Transport Agency has outsourced sensitive information registries to foreign actors without the right competence and security level, the once high level of trust for

[2] 18 § Census Act (1991:481); SCB webpage, personnumret 70 år (PIN 70 years), www.scb.se/hitta-statistik/artiklar/2017/Personnumret-fyller-70-ar/

[3] SCB webpage, The history of Statistics Sweden, www.scb.se/en/About-us/main-activity/history-of-statistics-sweden/

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, GDPR.

the state's personal data collections is tarnished (Chamberlain, 2020, p. 133–136).[5] The number of personal data incidents reported according to the GDPR's Article 33 has been significant since the regulation was launched, and statistics and analysis show that these incidents often happen in the public sector – not least in a health care context. Around 4,800 incidents were reported during 2019, and just under 4,600 in 2020. The reports analysing them state that a major cause of incidents is when letters or e-mails accidentally are sent to the wrong person, another is undue access.[6]

Another connected, and perhaps yet more important factor to consider is the technical development and digitalisation of society. The system of public registries was established in an altogether different time, when privacy threats posed by the Internet, Big Data and AI did not exist. Today this information – still largely freely available – remains a goldmine for researchers, but also enables everything from data mining and profiling to identity theft and other violations. Once exclusively stately information is profited on by major companies and used in dubious ways by individuals. The question becomes all the more pressing: Is the Swedish tradition of public registries compatible with privacy rights in a digital age?

2. Background: The Swedish welfare state and social trust – the engineering of a "people's home"

2.1. Regulating the welfare state

There is no comprehensive definition of what is meant by a welfare state and the understanding of the concept varies over time, but today it is often connected to public commitments for social insurance and services (health and care, education, social insurance, labour market measures, etc.) (Edling, 2013, p. 125). The basis for the Swedish welfare state is expressed in Chapter 1, § 2 of the Instrument of Government (IG), a Swedish fundamental law:

> The personal, economic and cultural welfare of the individual shall be fundamental aims of public activity. In particular, the public institutions shall secure the right to employment, housing and education, and shall promote social care and social security, as well as favourable conditions for good health.

However, the Swedish welfare state is to a large extent a political project, a product of "social engineering" via statutory law, rather than a constitutional right (Lindvall & Rothstein, 2006, p. 49; Zamboni, 2019, p. 676). The welfare state is thus realised via

[5] Apart from the two scandals already mentioned, after a report in 2014 there have been proceedings related to another Police register regarding abused women. Further, in 2019 it was uncovered that millions of telephone calls to the Swedish Health Care Service 1177 had been stored on an unprotected internet server for several years.

[6] Datainspektionen, Anmälda personuppgiftsincidenter (rapport 2020:2); Integritetsskyddsmyndigheten, Anmälda personuppgiftsincidenter (rapport 2021:3).

economic and administrative tools, where access to public information has been an important tool. As described by Swedish historian Edling, the formative moment of the Swedish welfare state took place in the 1930s (Edling, 2013, p. 125). While the previous decade was characterised by weak governments, high unemployment rates and industrial conflicts, the 1930s meant the start of a long period of Social Democratic governments (1932 to 1976) and the entrance into a crisis agreement between the Social Democrats and the Farmers' Party, commencing an era of political compromise. During the same decade, the Saltsjöbaden agreement was reached between employers and unions concerning the rules that were to govern labour market relations, laying the foundation of the Swedish labour model. This also led to the rise of corporatism, the strong position of non-governmental organisations in the Swedish society (Edling, 2013, p. 125). It was in this environment that the Social Democratic Party began to build its "people's home", *folkhemmet,* based on "welfare politics" including an expansive labour market, social reforms and agricultural support (Edling, 2013, p. 126, 139).

From a constitutional perspective, it is interesting to note that this formative moment in Swedish political history took place outside the framework of the IG. The 1809 IG, predecessor to the current 1974 IG, was based on a constitutional system resting on separation of powers. Parliamentarism was introduced in Sweden at the beginning of the 20th century, but without any formal changes to the IG. Not until the late 1960s, and more thoroughly with the enactment of the new 1974 IG, did the written constitution correspond to the actual functioning of the Riksdag (Enzell, 2002, p. 123). This period in time has been characterised as a 'constitution-less half-century', i.e. the constitution was not considered to be part of positive, valid law, but rather a political document not even giving an adequate picture of political life (Sterzel, 2009, p. 13; Taube 2004).

Even though the Swedish welfare state is mainly a political project, the forms for implementing welfare policies is deeply rooted in Swedish constitutional traditions of a strong and partially independent administration, local government and transparency, which will be discussed below (Section 3.1). For this open and decentralised governance structure to function in practice, there is a further prerequisite that is necessary: social trust. As argued by Abrahamsson, the decades immediately following the Second World War were marked by increasing welfare, future optimism and relief that Sweden had escaped the horrors of war, founded on a far-reaching consensus that society's task was not only to ensure the peace and freedom of citizens but also to take overall responsibility for their prosperity and security. It was against this backdrop that the "people's home" was built (Abrahamsson, 2006, p. 413).

2.2. Social trust

An important explanatory factor regarding the success of the welfare state in Sweden is social trust. The Swedish society is often described as having a high level of social trust, in that citizens to a large extent trust each other, the government and the public authorities and other institutions in the society (Rothstein, 2020, p. 60). Rothstein holds in

a paper titled (in translation) "Trustworthy authorities. The foundation of Swedish democracy", that there is a connection between procedural justice, being treated correctly, fairly and equally in encounters with the public administration, and social capital (Rothstein, 2020, p. 62). This can be explained by three factors: that people tend to draw conclusions on the trustworthiness of a society in general based on how they perceive officials, that people who are forced to pay bribes for public services are in general not trustworthy, and that if a person such as yourself has to be dishonest to receive public services, then no one can be trusted (Rothstein, 2020, p. 62). A well-functioning public administration, with fairly competent, honest, professional, merit-based, and unpolitical officials, is thus pivotal to a democratic and peaceful development of the society (Rothstein, 2020, p. 65).

Societal trust plays a function both within the state apparatus, and between the state and the citizens. Trust-based governance in the public administration has been identified as a major aim for the Social Democratic and Green Party Government in power in the late 2010s and early 2020s.[7] Within the state apparatus, the trustworthiness, impartiality and professionalism of the administration is important for the Government to be able to delegate central tasks (Jacobsson & Sundström, 2016, p. 13). As is discussed below (Section 3.2), the Swedish administrative model is organised around small government offices and large public authorities at the state level, which is built effectively on the presumption that tasks are delegated. The IG thus favours a decentralised decision-making model in the implementation of policies (Jacobsson & Sundström, 2016, p. 359 et seq).

In regard to the relation state–individual, a high level of social trust may strengthen the connection between citizens' trust in each other and in societal institutions on the one hand, as well as their willingness to accept what is perceived as a professional and objective measure taken by representatives of the state (Bull, 2013, p. 235). Traditionally, the Swedish public administration has held the trust of the people. Kumlien links this to the court-like features of the public authorities, especially the autonomy of the officials in decision-making and a regulated decision-making procedure including administrative rules on objectivity, a duty on the authority to investigate and a right for individuals to be heard (Kumlien, 2019, p. 215). As pointed out by Lind, the formal side of the rule of law, forms and procedures for decision-making, complements the material character of the welfare state (Lind, 2009, p. 437).

Transparency can in a certain sense be said to be both a consequence and a prerequisite of the trustworthiness of public administration. Transparency allows individuals, market participants, journalists and others an insight into the internal workings of the administration and may function as a preventive measure in combatting maladministration and corruption (Ackerman & Sandoval-Ballesteros, 2006, p. 92). Transparency and accountability can in themselves foster trust in public administration, which in turn may render individuals more willing to allow the administration to process personal information. As discussed above, the building of a Swedish welfare state is highly interconnected with the building of public archives and registries, providing invaluable

[7] SOU 2018:47 Med tillit växer handlingsutrymmet – tillitsbaserad styrning och ledning av välfärdssektorn.

information on the recipient of the welfare. From the beginning, tolerance amongst individuals was high for supplying the administration with necessary data. Even if the public mass collection of personal data became more questioned, and also regulated in the 1970s, the Swedes' generally positive attitude to the use of their personal data for the benefit of society remains high, for example in connection to electronic public health records (Rynning, 2007, p. 110).[8]

3. The function of public information in Sweden – trust in objectivity

3.1. Constitutional traditions – decentralisation, autonomy and objectivity

The organisation of the Swedish executive branch is highly influenced by two specific traits: the semi-autonomous role of the public authorities and the fact that a large part of administrative law – especially issues related to the welfare state – is implemented at the local level, with traditionally strong local self-government. According to the IG, the executive power is highly decentralised via the partially independent public authorities at the national level, Chapter 12, § 2 IG, and strong tradition of local government at the regional and local level, Chapter 14, § 2 IG. The Swedish administrative model originates from the first half of the 18th century and is thereby of an older date than Swedish parliamentarism (Enzell, 2002, p. 166). It was introduced as a reaction to how the administration had been steered during the previous autocratic era. Authorities are organisationally and legally separated from the Government, regional and municipal councils, respectively, and enjoy a partial independence (Hall, 2016, pp. 300–301). The minister in charge cannot singlehandedly take actions to command and control the public authorities sorting under his or her cabinet, since government decisions must be adopted by the Government collectively, Chapter 7, § 3 IG. Further, according to the principle of independence "[n]o public authority, including the Riksdag, or decision-making body of any local authority, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law", Chapter 12, § 1 IG. By granting the authorities a sphere of independence, they could only be governed by law and not by decrees in individual cases, separating policy-making and administrative decision-making (Andersson, 2004, p. 38 et seq; Bull, 1999, p. 129).

The local self-government has a long history in Sweden and the present organisation dates back to the municipal reform of 1862.[9] It may be noted that the Swedish state is organised into three political and administrative levels: national, regional and municipal. Regions and municipalities function under the constitutionally protected principle of local self-government, Chapter 14, § 2–3 IG. Implementation of the majority of

[8] SOU 2010:18 Ny biobankslag, p. 242; SOU 2018:4 Framtidens biobanker, p. 276.
[9] SOU 1977:78 Kommunerna: utbyggnad, utjämning, finansiering, pp. 103–104.

Swedish welfare policies is allocated to the regions and municipalities, which are responsible for, e.g. health care, local public transport, social services, housing and education (in primary and secondary schools).

Public authorities thus hold a strong position in Sweden, and historically there has not been a strict constitutional division between courts and public authorities (Bull & Sterzel, 2015, p. 259, 275 et seq). It is also notable that the principle of objectivity and impartiality in the IG applies equally to courts and public authorities. Chapter 1, § 9 IG reads:

> Courts of law, administrative authorities and others performing public administration functions shall pay regard in their work to the equality of all before the law and shall observe objectivity and impartiality.

Further, the principle of transparency and the right to access official documents guarantee insight into public authorities, as documents used in the decision-making process are available to the public (Hirschfeldt, 2017, p. 21). This issue will be discussed next.

3.2. The supreme value of transparency

The first Freedom of the Press Act (FPA) was enacted in 1766, whereby a principle of public access to official documents was introduced. The principle of public access to official documents has had a central function in the Swedish constitutional and administrative model, which, as seen above, allows Swedish public authorities partially independent status vis-à-vis the Government. Openness and transparency have played an important role in this context, offering both the parliamentary ombudsman, the press and the public large insight into the internal workings of the administration (Axberger, 2014, p. 105 et seq).

Access to official documents is regulated in Chapter 2, § 2 FPA: "In order to encourage the free exchange of opinion and the availability of comprehensive information and free artistic creation, everyone shall be entitled to have free access to official documents." The reference to the free exchange of opinion and availability of comprehensive information seems to denote a special character of official information as bearer of something vital, which may be explained by the tradition of the FPA being a product of the 18th century enlightenment (Reichel, 2020a, p. 938 et seq).

As will be discussed further in Section 4, the traditions of public archives and registries is closely connected to the principle of access to public documents. Access to official documents may however also be used to provide the public with the means to reveal how public powers work, enhancing the opportunities for holding political actors accountable, combatting corruption and thereby promoting legal certainty and efficiency in legislative, judicial and administrative procedures (Bohlin, 2015, p. 22; Axberger, 2017, p. 256). The value of transparency in Swedish law can in conclusion thereby be seen as a tool for a better-informed public debate and providing better

conditions for accountability, values also often referred to in literature on transparency in general (Ackerman & Sandoval-Ballesteros, 2006, p. 87; Gartner, 2013, p. 123; Kingsbury, 2009, p. 25, 48). A trait often further underlined in the Swedish context is that transparency first and foremost is understood as a societal interest and not an individual interest (Lind, 2015, p. 157).

In recent years, the FPA has been under a heated public discussion. The act guarantees a far-reaching right to publish, both in traditional media and online. On the condition that the publisher has a so-called certificate of publication – easy to apply for and granted after just a formal assessment – special rules govern the content of the publication. Censorship is prohibited (Chapter 1, § 8 FPA), a very limited crime catalogue applies (including crimes such as treason and defamation; see Chapter 7 FPA), and only the publisher can be held accountable (Chapter 8 FPA). This means that whoever holds a certificate of publication may publish also sensitive personal data, such as information on someone's criminal records, under the protection of the FPA. As the FPA is seen as superior to the GDPR in the Swedish legal setting, Article 10 GDPR (stating that only public authorities may process such data) is set aside.[10] The fact that some companies have made a business of publishing not only personal information such as addresses and phone numbers but also criminal records, has in recent years sparked a debate on whether the FPA should be limited in the digital environment of today (see for an in-depth analysis, Österdahl, 2015 p. 83 et seq). In 2018 an exemption was approved regarding systematic and searchable publishing of sensitive personal data on health, ethnicity, etc.: according to Chapter 1, § 13 FPA such databases may now be prohibited if they constitute a serious threat to individuals' privacy. The suggested amendment also encompassed personal data relating to criminal records, but this specific issue was postponed due to parliamentarian disagreement. A new governmental survey made another attempt in 2020, followed by a legislative bill in November 2021.[11] It remains to be seen if legislation on the matter will be passed this time or not.

4. Registries and archives as tools to develop the welfare state

4.1. The tradition of public registries in Sweden

Sweden has a long tradition of keeping public registries and archives for the benefit of the society at large. Already from the 1530s onwards, the Swedish state began to collect information on an individual level as the basis for tax collection (D'Arcy, Nistotskaya & Elis, 2015, p. 114). As mentioned above, Sweden National Archives dates back to 1618. Today, the public archives made up of official documents from the public authorities are considered to form a part of the national cultural heritage.[12] The administrative

[10] Chapter 1, § 7 of the Swedish data protection law complementing the GDPR (2018:218).

[11] SOU 2020:45, pp. 268–277; prop. 2021/22:59 Ett ändamålsenligt skydd för tryck- och yttrandefriheten, p. 39–54. Regarding previous attempts to limit the right to publish, see SOU 2012:55 En översyn av tryck- och yttrandefriheten.

[12] § 3 Archives Act (1990:792); SOU 2019:58, p. 192 et seq.

infrastructure governing how documents are to be collected and stored is governed in detail in the Public Access to Information and Secrecy Act, the Administrative Procedure Act and the Archives Act, which all include rules on when and how information is to be documented, registered and archived, as well as under what conditions a document may be culled.[13] Special rules may apply for sensitive records. For example, the Social Services Act holds that only a representative sample of social records are to be archived for research purposes (Edquist, 2017, p. 19).[14] The registries and archives play an essential role in the understanding, planning and further development of the welfare state, in order for the state, regions and municipalities to assess the need for labour market interventions, health care, schools, elderly care, housing, etc.[15] In regard to sensitive records, for example social services records, only a part of the records are archived. As seen in the introduction, from 1947 and onwards all individuals listed as living in Sweden have been given a unique personal identification number (PIN), which has rendered Swedish registries especially valuable for register-based research (Stenbeck, Eaker Fält & Reichel, 2021, p. 381). The PIN is used both in relation to public authorities and in the private market.

Today Sweden holds a large number of registries on a wide variety of matters: registries held by police, prisons, tax authorities, authorities within the labour market, housing, health care, schools and more. Further, for use in official statistics, Statistics Sweden holds registries based on data from other public registries, such as the Swedish Tax Agency and the Swedish Social Insurance Agency. The most comprehensive is the register of the total population (RTB), a demographic register that dates back to the 1960s and contains information on birth date, gender and population registration information, such as information about personal relationships.[16] Statistics Sweden also has other registers that contain information on, for example, the population's education, work, salary, income and remuneration. The University and College Register contains information on students and results in higher education. There are also registries with school students' education, results and grades.[17] Other authorities hold extensive registries, too. The National Board of health care and welfare holds individual-based registries on social welfare, aid to disabled persons, compulsory care of addicts and children and aid to the elderly.[18] Both private and public health care institutions collect information

[13] Chapters 4–6 Public Access to Information and Secrecy Act (2009:400), § 27 and § 31 Administrative Procedure Act (1971:291) and § 4–6 Archival Act. The Archival Act, for instance, regulates how the public authorities are to organise their archives – that is, their collections of public documents. The Act states that archives should be available and accessible so that the constitutional right to access public documents is satisfied, and so that the legal system and researchers can carry out their tasks. Every public authority is responsible for its own archive, except if a special archival authority has assumed this responsibility.

[14] Chapter 7, § 3 a, Chapter 12, § 2 Social Services Act (2001:453).

[15] Riksarkivet, Helhetssyn på informationsförsörjning – Riksarkivets perspektiv, 2018-09-27, Dnr RA 04-2017/5870.

[16] Webpage of the Research Council on register-based research, Registries in Sweden, available via www.registerforskning.se.

[17] Ibid.

[18] Webpage of the Research Council on register-based research, Social Services Registries, available via www.socialstyrelsen.se. It may be added that it is compulsory for the municipal social services boards to transfer information on individuals to the National Board of Health and Welfare, according to a Government Ordinance on the obligation for the social welfare boards to provide statistical information (1981:1370).

to be included in national quality registries, in order to assess the quality and efficiency of health care. The registries are run by the state and the regions in collaboration and are regulated by an agreement that is updated on a yearly basis.[19] There are currently just over 100 national quality registers. The registries contain individualised data about medical interventions, procedures and outcomes (Friberg von Sydow, 2017, p. 42).[20]

4.2. Legal bases and safeguards: Confidentiality and data protection

As registries began to be operated via digital means in the 1960s, the question of protecting the privacy of the persons registered arose. As noted above, openness is in Swedish law balanced against the interest of privacy for individuals via the Public Access to Information and Secrecy Act. Many registries contain information covered by secrecy under this act and are thereby not available to the public, for example registries within health care, social services, criminal offences, etc. There are however exceptions. Information can be disclosed to researchers and others, under certain conditions set out in the individual case, for example, on confidential treatment.

However, data that in itself can be perceived as relatively harmless may become more sensitive when processed together with large amounts of other categories of personal data, made possible by the Swedish PIN number. Against this background, the Swedish Data Act was enacted in 1973, as the first of its kind in the world at the national level (Chamberlain, 2020, p. 105). The main idea in the Act was to monitor the use of both private and public registries by making them subject to permits issued by a new public authority, the Data Protection Authority. The Data Act was in place until 1998, when it was replaced by the Personal Data Act based on the EU Data Protection Directive, today replaced by the General Data Protection Regulation (GDPR). There is also a corresponding secrecy ground in the Public Access to Information and Secrecy Act, stating that secrecy applies for personal data if it can be assumed that a disclosure would mean that the data would be processed in conflict with the GDPR and certain Swedish legislation implementing the GDPR.[21] This ground for secrecy has however been interpreted narrowly by the Supreme Administrative Court and has rarely hindered disclosure of personal data held in registries on its own ground, e.g. where no other secrecy ground was applicable (Reichel, 2018).[22]

Thus, the Swedish public registries are many, and so are the laws and regulations in the area – in fact, they are so many that no one seems to know the exact number! (Öman, 2006, pp. 686–687).[23] The legislator has thought it best to adapt the register

[19] Webpage of the Swedish Association of Local Authorities and Regions, Patientsäkerhet, nationella kvalitetsregister, m.m. 2020, available via https://kvalitetsregister.se

[20] Chapter 7 Patient Data Act (2008:355); Webpage of the Swedish Association of Local Authorities and Regions Quality Registries, available via https://kvalitetsregister.se

[21] Chapter 21, § 7 Public Access to Information and Secrecy Act, referring to the Swedish data protection act complementing the GDPR and § 6 Ethical Review Act (2003:460).

[22] Supreme Administrative Court judgment HFD 2021 ref 10.

[23] Ds 2000:34 Samhällets grundläggande information, p. 58.

regulation according to the type of information treated and the relevant setting, and therefore there are specialised register laws for most public authorities – for example regarding social services, the Swedish Enforcement Agency and the Swedish Prison and Probation Service. With the entry into force of the GDPR, all regulations were reviewed and, where necessary, revised with explicit rules on legal basis, purpose limitations, available exceptions, etc.[24] These laws are thus additional to the GDPR and can express both exceptions and stricter conditions. For instance, the population register held by the Tax Authority is regulated by an Act, where the purposes for processing personal data in the registry is defined as coordinated processing, control and analysis of identification data for natural persons and of other population registration data and the handling of population registration matters.[25] However, further than the purposes listed, the register may also be used for other purposes, as long as they are not incompatible with the purposes for which the data were collected.[26] This obviously widens the possibilities to use the data considerably. For example, the population registry is used as a basis for the Total Population Register (RTB) held by Statistics Sweden.[27]

A challenge posed by a comprehensive and specialised system such as the Swedish is of course that it makes overarching analysis and coordination difficult. An alternative, harmonised regulation for public registries was suggested in a governmental survey from 2015, but this option has not yet been followed up.[28]

5. The role of privacy in connection to public information and official documents

5.1. Swedish traditions on the protection of privacy and data protection

The question of the right to privacy has never had a prominent place in the Swedish legal tradition. Nevertheless, it has been analysed within legal doctrine and in governmental surveys from the 1960s and onwards. There are several reasons for the reluctant Swedish attitude towards the legal protection of privacy. Two important aspects with regards to the topic of this article are: 1. the strong historical positions of the rights to freedom of expression, freedom of the press and access to public documents; and 2. the trusting attitude of the population towards the stately need for and control of personal information during the establishment and expansion of the welfare state (Abrahamsson, 2006, p. 413).

[24] SOU 2017:39 Dataskyddsutredningen.

[25] Chapter 1, § 4 Act on processing personal data in the in the Swedish Tax Agency's population registration activities (2001:182).

[26] Ibid.

[27] Webpage of the Research Council on register-based research, The Total Population Register, available via www.registerforskning.se

[28] SOU 2015:39 Myndighetsdatalag.

With regards to the first issue, over the years several stately committees have made suggestions to enforce the legal protection of privacy – attempts that have failed due to the potential conflict with our traditional and constitutional principles of access to public information and freedom of the press. For example, the first Privacy Protection Committee (Integritetsskyddskommittén) suggested the introduction of a privacy clause in the criminal catalogue, or a special privacy tort, in its final survey from 1980.[29] These steps had recently been taken by Norway and Finland. However, this was seen as all too radical in relation to the constitutional principles, and the suggestions were dismissed by the legislator. Instead, the press was encouraged to continue its so-called self-regulation, which entails that newspapers and other media commit to following certain principles and guidelines for publishing – including several paragraphs on privacy intended to minimise and, when appropriate, anonymise any personal information disclosed in the news.[30] The guidelines for the press can be found at, for example, the website of Journalistförbundet, The Swedish Journalist Association.[31] Individuals can lodge complaints regarding published information to the Media Ombudsman, who may forward them to the Media Ethical Board. If the Board reaches the conclusion that there has been a wrongful publication, it can issue a reprehension which the newspaper in question must publish. The system has now been established for many decades and is generally considered to be well-functioning.

As seen above (Section 3.2), the question whether processing of sensitive personal data and data on criminal convictions, protected by Articles 9 and 10 GDPR, in publications protected under the FPA have been discussed extensively in the last decade, and some limitations to the right to publish have been made.

Apart from the opposition towards legal privacy protection presented by the constitutional rules, there have been other tendencies during the 20th century which have held back the development. The gigantic project of the welfare state that resulted in a high level of trust with citizens towards the state was discussed above. Accordingly, this social engineering and focus on collective rights meant that rights with an individual dimension like the right to privacy were not in focus during many decades. Even when there are rules protecting privacy, like the Public Access to Information and Secrecy Act, the individual's interest is not emphasised. In a case where public information is not seen as classified, the individual has no possibility to prevent disclosure and no right to appeal such a decision.

Interestingly, when it comes to data protection, the attitude has been decidedly different. During the technical awakening of the 1960s, many people were concerned about new automatic data systems as well as potential intrusions from other individuals through filming and photographing, etc.[32] This impacted the work of the Privacy Protection Committee and also triggered the enactment of the aforementioned Data Act in 1973. How come this data protection legislation managed to be passed so early on, when a broader privacy protection is still missing in Swedish law? The answer to this

[29] SOU 1980:8 Privatlivets fred.

[30] SOU 1983:70 Värna yttrandefriheten, p. 251.

[31] See specifically concerning privacy, nos 7–10.

[32] SOU 1972:47 Data och integritet, p. 41; SOU 1970:47, Skydd mot avlyssning, p. 15.

question seems yet again to lie in the relationship to the constitutional principles of openness, freedom of the press and freedom of expression. All since the negotiations for Sweden's accession to the EU, the Swedish position has been clear: in case of a conflict, the constitutional laws outrule the EU data protection law (Österdahl, 1998, pp. 336–356).[33] Even though both the technological development in itself and the European traditions have had an important impact on Swedish law governing registries and archives, the sensitive issue of balancing the right to privacy against the constitutional principles in individual cases is still to be carried out with regard only to Swedish constitutional law.

5.2. European traditions and the right to rectification and remedies

In the European setting, data protection has been on the rise since the Council of Europe Convention on personal Data of 1981,[34] followed by the EU Data Protection Directive of 1995,[35] and the GDPR of 2018. Amongst the fundamental principles of data protection is that the data handled be correct and relevant. The right to privacy is today acknowledged in Article 7 of the Charter, where it is separated from data protection (Article 8). In data protection cases, the Court of Justice of the European Union has referred to both articles in connection.[36] Article 47 of the Charter states that individuals shall have the right to an effective remedy when their union rights have been infringed.

As with other EU legislation, the focus of the data protection and privacy regulation is largely on effectiveness. Several articles of the GDPR are dedicated to remedies and the right to rectification. In the GDPR, Articles 12–18 and 20–21 regulate the rights of the data subject, for example providing individuals (data subjects) with the right to be informed about and to access their personal data, to demand rectification and erasure. The GDPR does, however, allow for exemptions in relation to both official documents and archives, see Articles 86 and 89.

One of the main features of the GDPR is its focus on remedies for the data subjects. Provisions on remedies and sanctions can be found in Articles 77–84. First, the data subjects have a right to lodge a complaint with a supervisory authority, Article 77, a right to an effective judicial remedy against binding decisions of the supervisory authorities concerning them, Article 78, and a right to an effective judicial remedy against a controller or processor, Article 79 GDPR.[37] Further, when misuse of personal data has led to harm, data subjects are entitled to damages according to the provisions of

[33] Chapter 1, § 7 Data Protection Act complementing the GDPR.

[34] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS 108.

[35] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[36] For example C-131/12 *Google Spain* EU:C:2014:317, para. 69; C-362/14 *Schrems I* EU:C:2015:650, para. 39.

[37] Article 47 Charter further gives a general right to an effective remedy before a tribunal to "everyone whose rights and freedoms guaranteed by the law of the Union are violated".

Article 82 GDPR. Lastly, the supervisory authority may impose administrative fines in a number of situations, Article 83 GDPR.

Another key European legal instrument is the ECHR, where Article 8 lays down the right to respect for private life (and family life, which will not be discussed in this article). The ECHR has had its largest impact in Sweden with regard to Articles 6 and 13 – the right to access to court and to an effective remedy. Together with EU law, the ECHR has prompted Sweden to abandon its century long tradition of administrative review of administrative decisions, replacing it with a general right to access to court (Warnling-Nerep, 2008, p. 45 et seq). Article 13 was also the reason that the Swedish Supreme Court launched its case law on damages based on the ECHR back in 2005.[38] In short, the Supreme Court noted that Swedish provisions on non-pecuniary damages meant that certain violations of the ECHR could not be compensated at the national level, which would leave the individual without an effective remedy and thus breach Article 13 ECHR. Therefore, the Supreme Court started ruling that the ECHR may be used as a legal base for such damages claims. This line of case law has since been codified in the Damages Act.[39]

A specific case that has impacted the Swedish development is *Segerstedt-Wiberg and others v. Sweden,* where the ECtHR ruled that the Data Protection Authority and Registry Board were not sufficient as effective remedies.[40] In the case, the personal data of a number of individuals had been secretly registered for political reasons, and stored for lengthy amounts of time. The court considered that the information recorded was disproportionate when balanced against the necessity of the data storage, and that Sweden therefore was in breach of Article 8 ECHR regarding all but one applicant.[41] The data subjects had not had access to a remedy where they could demand erasure of their personal data, which the Court deemed problematic. As a result of the judgment, a new Swedish authority was created which enabled individuals to initiate a process of scrutiny and erasure, the Swedish Commission on Security and Integrity Protection, and the competence of the Chancellor of Justice was expanded. In a later case, *Eriksson v. Sweden,* the ECtHR ruled that Sweden now could be considered to have satisfactory and effective remedies according to Article 13 ECHR.[42] There are also examples of ECtHR ruling where Sweden's positive obligations regarding Article 8 have been regarded as unfulfilled – which has led to amendments of national legislation to strengthen the privacy protection.[43]

[38] See for instance NJA 2005, p. 462, NJA 2007, p. 584 and NJA 2012, p. 211 I–II.

[39] Chapter 3, § 4 and Chapter 5, § 8 Damages Act (1972:207), preparatory work prop 2017/18:7.

[40] *Segerstedt-Wiberg and others v. Sweden* (Appl. no. 62332/00), judgment of 6 June 2006.

[41] Ibid. Para. 87–92.

[42] *Eriksson v. Sweden* (Appl. no. 60437/08), judgment of 12 April 2012.

[43] *Söderman v. Sweden* [GC] [Appl. no. 5786/08], judgment of 12 November 2013 and the Swedish criminalisation of offensive photographing in Chapter 4, § 6 a of the Criminal Code (1962:700), which happened just a few months before the judgment from the ECtHR.

5.3. Remedies in Swedish law

Considering the massive amount of personal data constantly handled by the public authorities, it is not surprising that mistakes sometimes occur. For example, the data registered can be incorrect – which causes the individual administrative difficulties, and sometimes pecuniary or (most often) non-pecuniary harm.

As seen above, Swedish law has had a complicated relationship to European traditions on privacy, not least in relation to rules on transparency and official documents (Österdahl, 2015, p. 74). In practice, Swedish law has made wide use of the exemptions in Articles 86 and 89 GDPR in relation to access to documents and archives, even declaring that the GDPR is not to be applied in the sphere of application of the FPA.[44] This also relates to remedies (Reichel, 2020b, p. 125). Thus, a data subject cannot appeal a decision to release an official document including his or her personal data, nor appeal a decision refusing to cull such documents from an archive.[45] Further, the personal information covered by Article 8 ECHR does not in itself constitute grounds for secrecy.[46]

However, certain general adjustments have been made to accommodate European requirements in relation to the right to remedies, which may be applicable also in this area. Since the right to appeal administrative decisions where personal data of a data subject are processed in official documents is closed on a general level, these alternative remedies may thus be used. In cases where data protection rights have been breached, the data subject can lodge a complaint with the Data Protection Authority or the Swedish Commission on Security and Integrity Protection, which may lead to a process of investigation and ultimately criticism of the public authority in question. As seen above, if there has been a breach of the GDPR, administrative fines according to Article 83 could also be imposed. If the individual has experienced harm, Article 82 GDPR can be used to claim compensation, and if the state is the defendant, a damages claim can be made through the Chancellor of Justice. This does not cost the individual anything and is an alternative to taking the case to court. Often the process is smooth and relatively fast, and following the large number of decisions in the area certain levels of compensation have been outlined throughout the years, which makes the legal situation predictable for the individual (see Chamberlain, 2020, pp. 367–375, for an overview and analysis of these decisions). However, the amounts paid within this system cannot be described as high – particularly not when compared to the administrative fines.

6. Is the state still trustworthy?

In the long history of Swedish personal data registries, big changes have taken place over the last few decades. This development is of course closely connected to technological advancements and the resulting changed legal requirements, as well as to

[44] Chapter 1, § 7 Data Protection Act complementing the GDPR.
[45] Chapter 2, § 19 FPA and Supreme Administrative Court judgment HFD 2015 ref 71.
[46] Supreme Administrative Court judgment RÅ 2006 ref 87.

Europeanisation. The Swedish cultural heritage of accessible archives and public information must now be viewed in light of obligations following the ECtHR case law and EU law, such as the right to remedies for informational privacy intrusions and the requirements of the GDPR to balance the interest of transparency and the keeping of archives with the rights of the individual.[47]

Information that was originally public but manually organised and stored in libraries or archives can today (intentionally or sometimes unintentionally) become public online, all in a matter of seconds. The phenomenon of expanding data protection regulations and digitalisation create much tension in the relationship between the traditional public interest of collecting data and the evolving rights of individual data subjects. Through the unearthing of various register scandals and the thousands of personal data incidents reported within the GDPR system each year, it has become obvious that the register holders – be they public or private entities – often fail to maintain control over sensitive personal data. This necessarily impacts the level of social trust when it comes to the Swedes' sharing of information. Furthermore, personal data that is easily accessible due to the constitutional principles of transparency is used illicitly by other individuals for purposes of fraud through identity theft and the like, as well as for intrusive marketing and profiling.

What should be done to answer to these challenges? First, the administration must update its data security and ensure sufficient resources to ensure that the data kept in archives and registries is safe. This seems to require political will, budgetary priorities and well-trained staff, rather than merely legal tools.

Secondly, the legal development cannot rest – despite several important steps having been taken by the legislator in recent years. A much-needed amendment was the criminalisation of identity theft and spreading of sensitive images, which after decades of debate took place just a few years back.[48] As mentioned above, offensive photographing was criminalised in 2013.[49] These updates also enable victims to file for damages as compensation for economic and non-pecuniary losses. As seen above, the legal remedies available for individuals in cases related to data protection and privacy rights have been strengthened after international pressure.

Although these changes may seem promising, they are not without loopholes. The new paragraph on spreading of sensitive images is not applicable in the constitutionally protected area of publishing, and the possibilities of online publishing regarding detailed personal data such as home addresses and telephone numbers, birthday dates and living conditions, remain far-reaching. To a large extent, these personal data are not covered by secrecy under the Public Access to Information and Secrecy Act, and the online publishing of data relating to criminal offences has not yet been prohibited. As seen above, when the publisher has a certificate of publication, the publication is

[47] See in regard to the latter C-439/19 *B* EU:C:2021:504, para 120.

[48] Chapter 4, § 6 b of the Criminal Act regarding identity theft, implemented in 2016, and Chapter 4, § 6 c regarding privacy invasions by spreading sensitive information, passed in 2017.

[49] Chapter 4, § 6 a Criminal Act.

protected under the FPA and the GDPR is not deemed applicable. This goes back on the abovementioned constitutional rules on transparency and freedom of information, which would need to be adapted – or at least complemented with exceptions – to limit and control what happens with personal data collected by for example the Tax Agency.

The obvious clash between the Swedish reality when it comes to the handling of personal data and GDPR principles on for example purpose limitation is thus explained by the Swedish attitude to the hierarchy between EU regulations and Swedish constitutional law. There is a danger in this stubborn denying of the necessity to modernise and nuance legislation. In all certainty, the prospect for our fundamental constitutional principles to continue to thrive builds on the willingness to develop them according to today's conditions and specifically our digital society. If the legislator refuses to do so, the social trust of the welfare state may soon be altogether consumed.

References

Abrahamsson, O. (2006). Integritetsskyddet i lagstiftningen. Svensk Juristtidning, pp. 410–424.

Ackerman, J. M. & Sandoval-Ballesteros, I. E. (2006). The Global Explosion of Freedom of Information Laws. Administrative Law Review, 58(1), 85–130. Online: https://bit.ly/31blx1P

Andersson, C. (2004). Tudelad trots allt: dualismens överlevnad i den svenska staten 1718–1987. Statsvetenskapliga institutionen, Stockholms universitet.

Axberger, H.-G. (2014). JO – i riksdagens tjänst. Elanders.

Axberger, H.-G. (2017). Yttrandefrihetsgrundlagarna (3rd edition). Wolters Kluwer.

Axberger, H.-G. (2020). Rättigheter I. Svensk Juristtidning, pp. 759–786.

Bohlin, A. (2015). Offentlighetsprincipen (8th edition). Stockholm: Norstedts förlag.

Bull, T. (1999). Självständighet och pluralism – om vertikal maktdelning i Sverige. In L. Marcusson (Ed.), Festskrift till Fredrik Sterzel (pp. 107–133). Iustus.

Bull, T. (2013). Global governance; need for a new theory or the return of an old friend? In A.-S. Lind & J. Reichel (Eds.), Administrative law beyond the state: Nordic Perspectives (pp. 230–239). Nijhoff Publishers.

Bull, T. & Sterzel, F. (2015). Regeringsformen: En kommentar (3rd edition). SNS förlag.

Chamberlain, J. (2020). Integritet och skadestånd: Om skyddet för personuppgifter och privatliv i svensk rätt. Iustus.

D'Arcy, M., Nistotskaya, M. & Elis, R. (2015). State-building, democracy and taxation: Why Ireland will never be Sweden. University of Tokyo Journal of Law and Politics, 12(Summer), 110–123.

Edquist, S. (2017). Ethical Destruction? Privacy concerns regarding Swedish social services records. In P. Jonason & A. Rosengren (Eds.), The Right to access to information and the right to privacy. A democratic balancing act (pp. 11–39). Södertörns högskola.

Edling, N. (2013). The Primacy of Welfare Politics. Notes on the language of the Swedish Social Democrats and their adversaries in the 1930s. In H. Haggrén, J. Rainio-Niemi & J. Vauhkonen (Eds.), Multi-layered Historicity of the Present: Approaches to Social Science History (pp. 125–150). University of Helsinki.

Enzell, M. (2002). Requiem for a Constitution: Constitutionalism and Political Culture in Early 20th Century Sweden. Stockholm University.

Friberg von Sydow, R. (2017). Medical Records – the different Data Carriers Used in Sweden from the End of the 19th Century Until Today and Their Impact on Confidentiality, Integrity and Availability. In P. Jonason & A. Rosengren (Eds.), The Right to Access to Information and the Right to Privacy. A democratic balancing act (pp. 41–60). Södertörns högskola.

Gartner, D. (2013). Uncovering Bretton Woods: Conditional Transparency, the World Bank, and the International Monetary Fund. George Washington International Law Review, 45, 121–148.
Hall, P. (2016). The Swedish Administrative Model. In J. Pierre (Ed.), The Oxford Handbook of Swedish Politics (pp. 299–314). Online: https://doi.org/10.1093/oxfordhb/9780199665679.013.17
Hirschfeldt, J. (2017). Free Access to Public Documents – A Heritage From 1766. In A.-S. Lind, J. Reichel & I. Österdahl (Eds.), Transparency in the Future – Swedish Openness 250 Years (pp. 21–28). Ragulka.
Jacobsson, B. & Sundström, G. (2016). Governing the State. In J. Pierre (Ed.), The Oxford Handbook of Swedish Politics (pp. 348–362). Online: https://doi.org/10.1093/oxfordhb/9780199665679.013.20
Kingsbury, B. (2009). The Concept of 'Law' in Global Administrative Law. The European Journal of International Law, 20(1), 23–57. Online: https://doi.org/10.1093/ejil/chp005
Kumlien, M. (2019). Professorspolitik och samhällsförändring. En rättshistorisk undersökning av den svenska förvaltningsrättens uppkomst. Stockholm: Institutet för rättshistorisk forskning.
Lind, A.-S. (2009). Sociala rättigheter i förändring: En konstitutionellrättslig studie. Iustus.
Lind, A.-S. (2015). Sweden: Free Press as a First Fundamental Right. In M. Suksi, M. Nowak, K. Agapiou-Josephides & J.-P. Lehners (Eds.), First Fundamental Rights Documents in Europe. Commemorating 800 Years of Magna Carta (pp. 151–162). Intersentia. Online: https://doi.org/10.1017/9781780685281.013
Lindvall, J. & Rothstein, B. (2006). Sweden: The Fall of the Strong State. Scandinavian Political Studies, 29(1), 47–63. Online: https://doi.org/10.1111/j.1467-9477.2006.00141.x
Öman, S. (2006). Särskilda registerförfattningar. In C. Magnusson Sjöberg & P. Wahlgren (Eds.), Festskrift till Peter Seipel (pp. 685–705). Norstedts juridik.
Österdahl, I. (1998). Openness v. Secrecy: Public Access to Documents in Sweden and the European Union. European Law Review, 23(4), 336–356.
Österdahl, I. (2015). Transparency versus secrecy in an international context: a Swedish dilemma. In A.-S. Lind, J. Reichel & I. Österdahl (Eds.), Information and Law in Transition: Freedom of Speech, the Internet, Privacy and Democracy in the 21st Century (pp. 74–99). Liber.
Reichel, J. (2018). Public Access or Data Protection as a Guiding Principle in the EU's Composite Administration? An Analysis of the ReNEUAL Model Code in the Light of Swedish and European Case law. In P. Wahlgren (Ed.), 50 Years of Law and IT (pp. 285–308). Jure.
Reichel, J. (2020a). Transparency and Openness. In P. Cane, H. C. H. Hofmann, E. C. Ip & P. L. Lindseth (Eds.), The Oxford Handbook of Comparative Administrative Law (pp. 935–956). Oxford University Press. Online: https://doi.org/10.1093/oxfordhb/9780198799986.013.52
Reichel, J. (2020b). What is it the public has a right to know? The right to privacy for public officials and the right of access to official documents – European and Swedish perspectives. In A. Koltay & P. Wragg (Eds.), Comparative Privacy and Defamation: Research Handbook in Comparative Law (pp. 112–129). Edward Elgar Publishing. Online: https://doi.org/10.4337/9781788970594.00014
Rothstein, B. (2020). Myndigheter att lita på. Den svenska demokratins grundbult. In L. Sandström & C. Peterson (Eds.), Den svenska förvaltningsmodellen (pp. 44–77). Institutet för rättshistorisk forskning.
Rynning, E. (2007). Public Trust and Privacy in Shared Electronic Health Records. European Journal of Health Law, 14(2), 105–112. Online: https://doi.org/10.1163/092902707X211668
Stenbeck, M., Eaker Fält, S. & Reichel, J. (2021): Swedish law on personal data in biobank research: permissible but complex. In S. Slokenberga, O. Tzortzatou & J. Reichel (Eds.), Individual Rights, the Public Interest and Biobank Research – Article 89 GDPR and European Legal Responses (pp. 379–394). Springer International. Online: https://doi.org/10.1007/978-3-030-49388-2_21
Sterzel, F. (2009). Författning i utveckling: Tjugo studier kring Sveriges författning (2nd edition). Iustus.
Taube, C. (2004). Regeringsformen: positiv rätt eller redskap för rättshaverister? In E. Smith & O. Petersson (Eds.), Konstitutionell demokrati (pp. 42–70). SNS förlag.
Warnling-Nerep, W. (2008). Rätten till domstolsprövning och rättsprövning (3rd edition). Stockholm Jure.
Zamboni, M. (2019). The Positioning of the Supreme Courts in Sweden – A Democratic Oddity? European Constitutional Law Review, 15(4), 668–690. Online: https://doi.org/10.1017/S1574019619000361

Public Governance, Administration and Finances Law Review Vol. 6. No. 2. (2021) • 53–65.

DOI: 10.53116/pgaflr.2021.2.5

The Constitutional Implications of Drones, Facial Recognition Technology and CCTV

Russell Weaver*

* Professor of Law and Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law, e-mail: russ.weaver@louisville.edu

Abstract: Over the centuries, new forms of surveillance technology have emerged. At the founding of the U.S., the government did not have sophisticated spying and surveillance technologies at its disposal. In the eighteenth century, the police might have tried to eavesdrop on their fellow citizens in taverns or other public settings, or they might have listened outside a suspect's window. However, without the advanced technologies that exist today, the opportunities for successful eavesdropping were very limited. Today, surveillance technologies have gone high tech, creating Orwellian possibilities for snooping. As one commentator observed as far back as 1974, "rapid technological advances and the consequent recognition of the 'frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society' have underlined the possibility of worse horrors yet to come". This article examines how the U.S. courts are dealing with three different types of technology: CCTV, facial recognition and drones.

Keywords: search and seizure, technology, surveillance, police investigations

Throughout history, advances in technology have profoundly influenced various areas of the law (Weaver, 2019). In the free speech area, for example, Johannes Gutenberg's development of the printing press revolutionised communication and led to revolutionary changes in government (Weaver, 2019, pp. 14–18), religion (Weaver, 2019, pp. 13–14) and science (Weaver, 2019, p. 13). Over time, as new technologies were developed (e.g. the telegraph, the radio, the television, cable and satellite communications and the Internet), people were able to communicate on a scale never seen before (Weaver, 2019, pp. 39–46, 61–65). With the development of the Internet, ordinary people were able to communicate their ideas widely (Weaver, 2019, pp. 39–46, 67–114), largely free (except on social media networks) from the traditional "gatekeepers" who had controlled the use of prior technologies. In the process, governments were toppled and societies were altered (Weaver, 2019, pp. 21–38, 47–60).

In the privacy arena, the changes have been equally profound (Weaver, 2011). At the founding of the United States of America (U.S.), the Government did not have sophisticated spying and surveillance technologies at its disposal. In the eighteenth century, the police might have tried to eavesdrop on their fellow citizens in taverns or other public settings, or they might have listened outside a suspect's window. However,

without the advanced technologies that exist today, the opportunities for successful eavesdropping were very limited. The situation is far different today. Surveillance technologies have gone high tech, creating Orwellian possibilities for snooping (Orwell, 1949). As one commentator observed as far back as 1974, "rapid technological advances and the consequent recognition of the 'frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society' have underlined the possibility of worse horrors yet to come" (Amsterdam, 1974, p. 385).

Electricity was the transformative invention for both communications and surveillance. In the communications arena, electricity led to new technologies which made it possible for information to move much more quickly than people could move, and permitted the transmission of both audio and video images over long distances very quickly (Weaver, 2019, pp. 39–46). Regarding privacy, electricity profoundly affected the privacy of individuals as super-sensitive microphones were developed that allowed people to overhear conversations from far away,[1] as well as through walls,[2] and facial recognition and closed circuit television systems allowed governments to maintain continuous surveillance of public places (Temple-Raston & Smith, 2007). Global Positioning System monitoring systems allowed the police to monitor the location and movements of individuals and things,[3] and X-ray technology enabled the police to peer through walls and into the privacy of homes using drive-by X-ray vans (Greenberg, 2010; Basha, 2003). As personal computers and the internet were developed, devices were created which allowed people to monitor the key strokes and computer uses of others,[4] and to do so from distant places using spyware technology (Blakley, Garrie & Armstrong, 2005; Broberg, 2001; Foley, 2007). Moreover, many of these devices were freely available to the public which can purchase devices that allow them to spy on the movement of others,[5] and monitor what their neighbours or others are saying,[6] even from some distance away.[7]

This article focuses on one context in which the new technologies are used: Governmental monitoring of citizens in public places with such technologies as drones, facial recognition technology (FRT) and closed-circuit television (CCTV). As will be seen, in the U.S., there are few restrictions on governmental use of these technologies.

---

1 See *Silverman v. United States,* 365 U.S. 505 (1961) (discussing the fact that advanced surveillance technologies were already available in the 1960s); see also *Katz v. United States,* 389 U.S. 347 (1967) (involving the attachment of an electronic listening device to the outside of a phone booth so that the police could overhear what was being said inside the phone booth).

2 See *Goldman v. United States,* 316 U.S. 129 (1942) (involving the use of a listening device that allowed the police to overhear what was being said in Goldman's office even though the police were located in an adjoining office).

3 See *City of Ontario v. Quon,* 130 S. Ct. 2610 (2010); *Devega v. State,* 286 Ga. 448, 689 S.E.2d 293 (2010).

4 See the computer spyware devices sold by the USA Spy Shop at www.usaspyshop.com/spy-software-c-55.html

5 See the GPS systems sold by USA Spy Shop at www.usaspyshop.com/gps-tracking-devices-c-118.html

6 See the Spy Zone at www.spyzone.com/ccp0-display/listeningdevices.html

7 See the listening device sold by USA Spy Shop at www.usaspyshop.com/sound-amplifier-system-p-472.html

7. The development of newer technologies

Increasingly, drones, FRT and CCTV are being used by governments to monitor what happens in public spaces.

7.1. Drones

In recent decades, governmental entities have made extensive use of drones (essentially, very small flying machines which are remotely operated by "pilots" who are not on board) for surveillance purposes. Indeed, by 2018, some 910 state and local public safety agencies had purchased drones, including 599 law enforcement agencies. Drones can be equipped with high-powered cameras (e.g. the DJI Zenmuse Z30) that allow them to magnify images on the ground by 180 times, thereby making them effective spies who can create detailed pictures of what is happening below. As a result, drones can observe activities that may not be observable from ground level, including things that are happening in individuals' backyards (Laperruque & Janovsky, 2018).

7.2. Facial recognition technology

Facial recognition technology uses biometric software to map a person's facial features from a video or photo. The technology can then be used to identify the person by pinpoint matching his/her facial features with information contained in existing databases (Collins, 2019).

7.3. CCTV

Closed-circuit television is increasingly being used to monitor what goes on in public places.[8] For example, in the London Underground, there is a pervasive CCTV system which includes some 15,516 cameras.[9] The U.S. is awash in CCTV systems with Atlanta having 15.56 cameras per 1,000 people, and Chicago having 35,000 cameras or 13.06 cameras per 1,000 people. Indeed, six U.S. cities (Atlanta, Chicago, Washington, D.C., San Francisco, San Diego and Boston) made the list of the most surveilled cities in the world (Plautz, 2019).

[8] See EPIC Surveillance Oversight Project at https://epic.org/privacy/surveillance
[9] See https://bit.ly/3FuO0i5

8. The benefits of drones, FRT and CCTV

Unquestionably, drones, CCTV and FRT offer enormous benefits to governmental officials in their efforts to serve the public. For example, when hikers are lost in remote areas, drones can be used to help locate them (Higgins, 2020). Likewise, following hurricanes, drones can be used "to assess damage, locate victims, and deliver aid". In an effort to prevent forest fires, drones can survey forests equipped with thermal imaging cameras. Drones can also be used to monitor the health and well-being of wild animals (CB Insights, 2020).

Closed-circuit television and FRT have also been enormously helpful in locating and apprehending criminal suspects (Collins, 2019). Closed-circuit television can provide continuous monitoring of public areas, including a photographic record, so that the police can review tape and identify suspects after a crime has been committed (IFSEC Global, 2021). Following the London subway bombings in July 2005, during which 52 people were killed and another 700 were injured (CNN, 2020), the bombers were identified through police review of London Underground CCTV footage (BBC, 2010). Similarly, the Boston Marathon bombers, who killed three people and injured hundreds of others, were found and apprehended using CCTV images captured on government and private cameras. The bombers stood out on the video because of the way they acted: While the crowd was fleeing the scene, the Tsarnaevs lingered around or walked away casually (Kelly, 2013). In tracking down those who attacked the U.S. Capitol Building on 6 January 2021, the Federal Bureau of Investigation (FBI) used CCTV images and FRT, among other techniques (Harwell & Timberg, 2021).

9. Privacy concerns

As facial recognition technology, CCTV and drones have proliferated, major privacy concerns have arisen. As one writer noted: "[P]rivacy advocates and other citizens are uneasy with the idea that Big Brother is monitoring their every public move" (Harwell & Timberg, 2021). The use of modern technologies raises Orwellian concerns, and many are uncomfortable with the idea of allowing governments to fly drones over cities, constantly surveilling the actions of citizens. For example, when New York City announced that it was going to deploy some 14 drones, purportedly to assist in emergencies, civil libertarians complained that the drones could "easily be used to track... those who speak out against City Hall and police" (Romero, 2018). As one commentator noted: "The NYPD's drone policy places no meaningful restrictions on police deployment of drones in New York City and opens the door to the police department building a permanent archive of drone footage of political activity and intimate private behavior visible only from the sky."[10]

Similar concerns have been raised regarding FRT. The dimensions of modern FRT are truly staggering: "[W]ith a single high-resolution snap shot, FRT, has the ability to

[10] See BBC (2010) quoting New York Civil Liberties Union associate legal director Christopher Dunn.

map out a biometric profile that is as individually unique as a human fingerprint. With images sharing the same binary 1 and 0 sequences as text, the source noted that big data software and storage capacity currently exists to construct a truly three-dimensional profile of, well, anyone with a digital image online" (Sullivan, 2013). One report denounced FRT as "an unreliable, biased and dystopian threat to privacy" (O'Brien, 2020) As the American Civil Liberties Union stated in a report: "Face recognition offers governments a surveillance capability unlike any other technology in the past. The powerful capability can enable the government to identify who attends protests, political rallies, church or AA meetings on an unprecedented scale" (American Civil Liberties Union, 2021). Nevertheless, FRT use seems to be expanding and is now used by U.S. Customs and Border Patrol.[11]

Closed-circuit television raises similar concerns. As one commentator argued: "The advent of sophisticated technology that allows the government to watch, zoom in on, track, and record the activities of anyone, anywhere in public, twenty-four hours a day, demands regulation."[12] Closed-circuit television is particularly potent when it is combined with FRT: It accumulates a mountain of facial images that can then be fed into an FRT system to identify people.

The difficulty is that current FRT and CCTV technology provide only a glimpse of what is to come. The FBI is spending more than a billion dollars on expanding its Next Generation Identification (NGI) system.[13] That system will include huge amounts of information about people, including iris scans, photos, palm prints, gait and voice recordings, scars, tattoos and DNA.[14]

10. Legal limitations

There are few meaningful limits on governmental use of modern technologies in public places. There have been isolated attempts by individual jurisdictions to limit or control the use of FRT and CCTV in public spaces. For example, the Electronic Privacy Information Center notes that several U.S. cities (e.g. San Francisco, California, Somerville, Massachusetts and Oakland, California) have banned the use of FRT,[15] and the State of California has imposed a moratorium on its use.[16] There are few restrictions on governmental use of CCTV as well.

[11] See https://epic.org/state-policy/facialrecognition

[12] See Slobogin (2002), p. 213, 215.

[13] See www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ngi

[14] The Electronic Privacy Information Center's "Next Generation Identification – FBI" article notes that, in the U.S., there are some restrictions on the use of facial recognition technologies. For example, Boston, Portland and San Francisco have banned the use of facial recognition technologies. In addition, "IBM made the surprising announcement that it would stop selling, researching, or developing facial-recognition services. Amazon and Microsoft followed with their own announcements that they would not sell facial-recognition services or products to state and local police departments, pending federal regulation".

[15] See https://epic.org/state-policy/facialrecognition

[16] Ibid.

There are some restrictions on the government's use of drones. For example, many states have extensive provisions governing the flying of drones by private citizens, but these laws place few restrictions on governmental use.[17] The federal government does impose some limitations on drone pilots. For example, governmental "pilots" must either comply with Federal Aviation Administration Rule 107 waiver requirements,[18] or obtain a federal Certificate of Authorization.[19] In addition, drones cannot be flown within 400 feet of the ground, and may not fly over such venues as military bases or public landmarks.[20]

One would hope that the U.S. Constitution would limit the use of surveillance technologies, but it imposes relatively few restrictions on governmental uses of advanced technologies in public places. The most obvious constitutional limitation is the Fourth Amendment to the U.S. Constitution which prohibits "unreasonable searches and seizures".[21] Historically, the Fourth Amendment prohibited only "trespassory" invasions against individuals or into "constitutionally protected areas".[22] That approach provided few protections against the use of advanced technologies in public places (Weaver, 2011). For example, in *Olmstead v. United States,*[23] when the police wiretapped phone calls made from the defendant's home, the Court held that there was no "search" within the meaning of the Fourth Amendment because the police did not "trespass" or intrude into a "constitutionally protected area".[24] In other words, the wiretapping was permissible because it was done from a public place. Likewise, in *Goldman v. United States,*[25] when the police placed a "detectaphone" against an office wall, thereby allowing them to overhear what was being said in an adjoining office, the Court again held that there was no search because the police did not trespass into the adjoining office.[26]

It took many decades before the Court began to come to grips with the reality of advancing technologies. The Court's landmark decision in *Katz v. United States,*[27] involved a man who the police suspected was involved in illegal bookmaking

---

[17] For a comprehensive list of state drone laws see https://uavcoach.com/drone-laws

[18] See www.faa.gov/uas/commercial_operators/part_107_waivers

[19] See www.faa.gov/uas/commercial_operators

[20] See www.faa.gov/uas/critical_infrastructure

[21] U.S. Const., Amdt. IV.

[22] See, e.g., *Goldman v. United States,* 316 U.S. 129 (1942); *Olmstead v. United States,* 277 U.S. 438 (1928); *Ex Parte Jackson,* 96 U.S. 727 (1877).

[23] 277 U.S. 438 (1928).

[24] Ibid. 465. "The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched."

[25] 316 U.S. 129 (1942).

[26] Ibid. 135: "The suggested ground of distinction is that the *Olmstead* case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the Constitutional guarantee and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the *Olmstead* case."

[27] 389 U.S. 347 (1967).

operations. Police, anticipating that Katz would make a call from a particular phone booth, placed an electronic bug on the outside of the booth which enabled them to record Katz's incriminating statements, and use them against him in a subsequent prosecution. Based on decisions like *Olmstead* and *Goldman,* the government argued that the police did not engage in a "search" when they bugged the phone booth[28] since there was no "intrusion" into the phone booth, and there was doubt about whether the booth would qualify as a "constitutionally protected area". Certainly, under the Court's precedent, there was merit to the government's argument. The electronic bug placed by the police had done nothing more than passively collect sounds that emanated from a public phone booth.

The *Katz* Court disagreed with the government, and held that police use of the listening device to overhear Katz's conversation constituted a "search" within the meaning of the Fourth Amendment. In reaching that result, *Katz* departed from *Olmstead's* focus on whether there had been an "intrusion into a constitutionally protected area",[29] and held that a search occurs when governmental officials violate Katz's "expectation of privacy".[30] In doing so, the Court purported to shift the focus under the Fourth Amendment from places to persons.[31] As the Court stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[32] Justice Harlan, concurring, agreed with the Court that the focus should be on whether Katz had an expectation of privacy, but he argued that the expectation must be one that society was prepared to recognize as "reasonable".[33] Ultimately, Harlan's requirement of "reasonableness" was integrated into the EOP test so that the Court inquired whether the police had intruded upon an individual's "reasonable expectation of privacy".

Thus, after *Katz,* the Court used two tests to determine whether a "search" occurred under the Fourth Amendment. In addition to the reasonable expectation of privacy test, the Court continued to apply the old trespass test which had been the governing test for many decades. For example, in the Court's later decision in *United States v. Jones,*[34] the police attached a GPS tracking device to the undercarriage of the defendant's car. Instead of deciding the case under the *Katz* test, the Court relied on the trespass test, and

[28] Ibid. 352.

[29] Ibid. 353. "Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested."

[30] Ibid. 351–352.

[31] Ibid. 351. "For the Fourth Amendment protects people, not places."

[32] Ibid. 351.

[33] Ibid. 361 (Harlan, J., concurring). "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place'. My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."

[34] 565 U.S. 400 (2012).

invalidated the warrantless attachment of the device – and its use to monitor the defendant's car on public streets.[35]

Unfortunately, in the decades since the *Katz* test was announced in the 1960s, it has not provided a workable or reliable test for evaluating Fourth Amendment claims (Weaver, 2011). The reasonable expectation of privacy test could have led to a significant expansion of the Fourth Amendment's scope of protection. That was true in *Katz*. In that case, under the trespass test, there would have been no search. Under *Katz,* the Court held that the Fourth Amendment protected an individual who made a phone call from a phone booth because the police intruded upon his reasonable expectation of privacy. As a result, in that case, the reasonable expectation of privacy test expanded the Fourth Amendment's reach and provided Katz with protection against the government's seizure of the contents of his conversation.

Despite the promise of *Katz,* the reasonable expectation of privacy test was not applied expansively in subsequent cases, and the Court has held that many activities that occur in public are not protected against governmental surveillance. For example, in *United States v. Knotts,*[36] the Court held that the police may monitor a beeper (placed in a bottle of chloroform) in an effort to determine where Knotts was traveling. Knotts had argued that police use of the beeper constituted a "search" because the police obtained information from the beeper – in particular, the location of a remote cabin where Knotts was manufacturing drugs – that they could not have easily obtained otherwise. Had they tried to follow Knotts, he would probably have noticed them and either tried to elude them or not gone to the cabin. However, the Court construed the situation very narrowly, concluding that an individual has a diminished expectation of privacy in an automobile,[37] especially when he is traveling on a public highway, and finding that the beeper simply allowed the police to monitor things that they could have observed from the highway with their own eyes.[38] In other words, had the police been on the road, they could have seen Knotts drive from the city to his remote cabin. Although Knotts had an expectation of privacy in the interior of his cabin (which was

[35] Ibid. 406–407: "For most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. *Katz* did not repudiate that understanding [or] erode the principle "that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment" *United States v. Knotts,* 460 U.S. 276, 286 (1983) (Brennan, J., concurring). What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted. We do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis."

[36] 460 U.S. 276 (1983).

[37] Ibid. 281. "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view" *Cardwell v. Lewis,* 417 U.S. 583, 590 (1974) (plurality)."

[38] Ibid. 281–282. "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property."

not infringed),[39] he could not claim a reasonable expectation of privacy for his drive to the cabin: "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[40]

Likewise, in *Florida v. Riley,*[41] even though the Court had previously placed great emphasis on protecting the curtilage surrounding a home, and a homeowner's expectations of privacy associated with the curtilage, the Court held that there was no search when the police flew a helicopter at low altitude over the defendant's property, thereby allowing it to peer down into the property. From the fly-over, the police were able to observe that Oliver was growing marijuana inside a greenhouse. In the Court's view, Riley had no expectation of privacy because "any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The officer did no more".[42]

In *California v. Greenwood,*[43] the Court upheld a police search of a defendant's garbage. The Court emphasised that, while the trash was lying by the curb, it was accessible to "animals, children, scavengers, snoops and other members of the public",[44] and the trash had been placed by the curb "for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so".[45] As a result, since the Greenwoods left the trash by the curb, "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it", the Court concluded that the Greenwoods could not have maintained a "reasonable expectation of privacy in the inculpatory items that they discarded".[46]

The Court has only reined in governmental surveillance when the government has invaded someone's home or private space. For example, in *United States v. Karo,*[47] a case that was similar to *Knotts* in that the police used a beeper to track the defendant's movement to a remote location, the Court held that the use of a tracking beeper violated a homeowner's reasonable expectation of privacy because police continued to monitor the location of the beeper even after it was taken inside a dwelling, and were thereby able to know when the bottle (containing the beeper) was moved to another location. The Court reasoned that a search occurs when the Government "surreptitiously employs

[39] Ibid. 285. "A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent, with the drum of chloroform still in the car. This fact, along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin."

[40] Ibid. 282. "But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the "open fields" *Hester v. United States,* 265 U.S. 57 (1924).

[41] 488 U.S. 445 (1989).

[42] Ibid. 452.

[43] 486 U.S. 35 (1988).

[44] Ibid. 40.

[45] Ibid.

[46] Ibid. 40–41.

[47] 468 U.S. 705 (1984).

an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house. The beeper tells the agent that a particular article is actually located at a particular time in the private residence and is in the possession of the person or persons whose residence is being watched". Thus, the beeper reveals "a critical fact about the interior of the premises" that the Government "could not have obtained without a warrant". By contrast, the beeper in *Knotts* "told the authorities nothing about the interior of Knotts' cabin". The information obtained in *Knotts* was "voluntarily conveyed to anyone who wanted to look", whereas in *Karo* "the monitoring indicated that the beeper was inside the house, a fact that could not have been visually verified"[48]

Likewise, in *Kyllo v. United States,*[49] the Court concluded that the police conducted a search when they pointed an Agema Thermovision 210 thermal imager (essentially, a forward-looking infrared detection device) to scan Kyllo's home in order to detect and measure the heat that was being emitted. They did so because they believed (correctly, as it turns out) that Kyllo was growing marijuana in his attic using special lighting (which gave off heat to simulate the effects of the sun) to help the plants grow. Even though the heat could have been observed from the street (e.g. by watching how quickly snow melted on Kyllo's house versus the surrounding houses, or by watching how quickly rain dried), the Court held that police use of the device constituted a search within the meaning of the Fourth Amendment because it could have revealed intimate details regarding the interior of the home.[50]

Perhaps the only real restraint on the use of surveillance technologies in public spaces was rendered in the case of *Carpenter v. United States.*[51] In *Carpenter,* the police used cell site sector information to ascertain a suspect's whereabouts at the time that certain robberies were committed. Through the use of that data, they were able to ascertain that Carpenter was in close proximity to the robbery sites at the time of the robberies. Thus, the police were able to pinpoint Carpenter's public movements using technology. Although the Court had previously suggested that information that individuals share with others (as they do when their cell phones reveal their locations to cell site towers) does not come with an expectation of privacy, the Court nonetheless held that Carpenter held a reasonable expectation of privacy in his cell site data.[52] The Court noted "society's expectation... that law enforcement agents and others would not—and indeed could not—secretly monitor and catalogue every movement of an individual's car for a very long period". The Court concluded: "Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"[53]

[48] Ibid. 715.
[49] 533 U.S. 27 (2001).
[50] Ibid. 38–39.
[51] 138 S.Ct. 2206 (2018).
[52] Ibid. 2216.
[53] Ibid. 2217.

The difficulty is that the Court's existing precedent imposes few limits on the ability of the government to observe what happens in public places. On the contrary, the Court has made it clear that there is little expectation of privacy for activities that take place in public. Several of the decisions discussed above illustrate these principles. *Florida v. Riley* suggests that the government can fly over private property and peer down into the curtilage surrounding a home, and *Knotts* suggests that the government can monitor activities that take place in private places. Thus, CCTV monitoring of public places may be permissible. Moreover, the U.S. Supreme Court has not rendered any decisions regarding governmental use of FRT so there is no indication that this technology will be prohibited. *Carpenter* is the only decision that suggests any limits on the government's ability to monitor what happens in public places. However, in that case, the Court did nothing more than limit the government's ability to access historical cell site data.

11. Conclusion

Modern technologies have enhanced the ability of governments to spy on their citizens. Although there has been much controversy regarding the use of these surveillance technologies in countries like China (Human Rights Watch s. a.), the problem exists in most Western countries as well. In the U.S., the government is increasingly using technologies like drones, CCTV and FRT to spy on people. While these technologies can serve many important and benign governmental purposes (e.g. to locate lost hikers, to help ascertain the level of damage in a disaster or emergency), as well to apprehend criminal perpetrators, there is a fear that new technologies create Orwellian surveillance possibilities for activities that occur outside the home.

Some state and local governments have placed significant limitations on the ability of private individuals and companies to use surveillance devices. For example, Illinois' Biometric Information Privacy Act sets forth various notice requirements for private entities that collect "biometric identifiers" and "biometric information". The Act also places restrictions on the ability of private employers to collect biometric information regarding their employees.[54] Likewise, the California Consumer Privacy Act places limitations on the ability of businesses to collect information, including biometric data.[55] But, even in the private arena, the protections are far from comprehensive. For example, the Brookings Institution estimates that private actors will soon have as many drones as the government (Bennett, 2014). One potential restriction is that some companies have indicated that they will limit their sale, research and development of facial recognition technology (Peters, 2020).

If governmental use of technology like CCTV, drones and FRT are going to be controlled, limitations will have to come through legislation. They are unlikely to be mandated by the courts. The Court's search jurisprudence has evolved very slowly. In its

[54] See www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3004&ChapterID=57
[55] See https://oag.ca.gov/privacy/ccpa

early decisions regarding technology, the Court was relatively unwilling to rein in governmental use of advanced technologies (Weaver, 2011). *Katz* was the first decision to explicitly acknowledge and attempt to deal with that problem, and it took the Court nearly half-a-century to get to that point. However, as noted, the *Katz* test has proven difficult to apply, and has not provided consistent or reliable protections to the citizenry. In more recent decisions, such as *Karo, Kyllo* and *Riley,* the Court has expanded Fourth Amendment protections on a piecemeal basis, and perhaps the Court will expand its jurisprudence even further in an effort to deal with the implications of technologies like CCTV, FRT and drones. But the Court has been struggling with the problem of advancing technology for nearly a century, and jurisprudential changes have been slow and halting.

Of course, the difficulty is that Congress has been stuck in gridlock for decades, and it matters not which party is in power. So, change may have to be driven at the state and local levels, but those changes are likely to vary by state and potentially to be piecemeal. Just as some jurisdictions have sought to limit the use of FRT in police investigations, they have the power to impose limitations on governmental use of drones and CCTV. Of course, there is a push–pull here. The public has a strong interest in controlling crime and in protecting itself against criminals, and drones, FRT and CCTV help the police achieve that objective. Thus, the trick for state and local governments is to find an acceptable balance between crime control and privacy protections. Undoubtedly, these are issues that society will debate in the coming years and hopefully bring to a satisfactory resolution.

References

American Civil Liberties Union (2021). 2019 Proved We Can Stop Face Recognition Surveillance. Online: https://bit.ly/3oHLNJB

Amsterdam, A. G. (1974). Perspectives on the Fourth Amendment. Minnesota Law Review, 58, 349–477.

Basha, R. M. (2003). *Kyllo v. United States:* The Fourth Amendment triumphs over technology. Brandeis L. J., 41, 939.

BBC (2010, October 13). 7 July bombers spotted on CCTV after exhaustive hunt. Online: www.bbc.com/news/uk-11534951

Bennett, W. C. (2014). Civilian drones, privacy, and the federal-state balance. The Brookings Institution. Online: https://brook.gs/3cv40UM

Blakley, A. F., Garrie, D. B., & Armstrong, M. J. (2005). Coddling spies: Why the law doesn't adequately address computer spyware. Duke Law & Technology Review, 25(1).

Broberg, J. (2001). From CALEA to Carnivore: How Uncle Sam Conscripted Private Industry in Order to Wiretape Digital Telecommunications. North Dakota Law Review, 77(4), 795–825.

CB Insights (2020, January 9). 38 ways drones will impact society: From fighting war to forecasting weather, UAVs change everything. Online: https://bit.ly/3kTEDR8

CNN (2020, June 18). 7 July 2005 London Bombings Fast Facts. Online: https://cnn.it/3qQOI5f

Collins, T. (2019, December 23). Facial recognition: Do you really control how your face is being used? USA Today.

Electronic Privacy Information Center (s. a.). Next Generation Identification – FBI. Online: https://epic.org/privacy/fbi/ngi.html

Foley, J. (2007). Are Google searches private? An originalist interpretation of the Fourth Amendment in online communication cases. Berkeley Technology Law Journal, 22(1), 447–475.
Greenberg, A. (2010, September 9). Scanner vans allow drive-by snooping. Forbes. Online: https://bit.ly/3cvMlMV
Harwell, D., & Timberg, C. (2021, April 2). How America's surveillance networks helped the FBI catch the Capitol mob. The Washington Post. Online: https://wapo.st/3qRN57j
Higgins, H. (2020, January 20). Search and rescue teams use drone to help injured hiker in Southern Utah. Fox 13. Online: https://bit.ly/3cpiq98
Human Rights Watch (s. a.). Mass Surveillance in China. Online: https://bit.ly/3DywxVw
IFSEC Global (2021). Role of CCTV Cameras: Public, Privacy and Protection. Online: https://bit.ly/3kQ5VYN
Kelly, H. (2013, April 26). After Boston: The pros and cons of surveillance cameras. CNN Business. Online: https://cnn.it/2Z0xff4
Laperruque, J., & Janovsky, D. (2018, September 25). These police drones are watching you. Project on Government Oversight. Online: https://bit.ly/30EaWw8
O'Brien, S. (2020, March 9). Time to face up to Big Brother. New Haven Independent. Online: https://bit.ly/3qQBe9C
Orwell, G. (1949). Nineteen Eighty-Four. Secker & Warburg.
Peters, J. (2020, June 8). IBM will no longer offer, develop, or research facial recognition technology. The Verge. Online: https://bit.ly/3x13Q0S
Plautz, J. (2019, September 23). Six US cities top list of world's most surveilled. Smart Cities Dive. Online: https://bit.ly/3x4zo5X
Romero, D. (2018, December 4). NYPD to deploy drone fleet, stoking fears of Big Brother. U.S. News. Online: https://nbcnews.to/3Hy3gN4
Slobogin, Ch. (2002). Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity. Mississippi Law Journal, 72, 213–299. Online: https://doi.org/10.2139/ssrn.364600
Sullivan, G. P. (2013, July 9). Big Brother's tracking shines light on emerging facial recognition technology. Forbes. Online: https://bit.ly/3oIp7sx
Temple-Raston, D., & Smith, R. (2007, July 8). U.S. Eyes U.K.'s Surveillance Cameras. National Public Radio. Online: https://n.pr/3cufOqo
Weaver, R. L. (2019). From Gutenberg to the Internet: Free Speech, Advancing Technology and the Implications for Democracy. 2nd ed. Carolina Academic Press.
Weaver, R. L. (2011). The James Otis Lecture: The Fourth Amendment, Privacy and Advancing Technology. Mississippi Law Journal, 80, 1131–1227.

Public Governance, Administration and Finances Law Review Vol. 6. No. 2. (2021) • 67–82.

Articles

DOI: 10.53116/pgaflr.2021.2.6

Introduction of the Personnel Decision Support IT System in the Hungarian Public Service

Zoltán Hazafi*, Enikő Kovácsné Szekér**

* Associate Professor, University of Public Service, e-mail: hazafi.zoltan@uni-nke.hu
** Lecturer, University of Public Service, e-mail: szeker.eniko@bm.gov.hu

Abstract: The most significant project of governmental HRM after 2010 has been the "Strategic Support for Succession Planning in a Competitive Civil Service". The name of the project underlines the focus placed on enhancing competitiveness and ensuring a sustainable, continuous supply of the workforce. Neither can be pursued without data-driven HR planning, so having an HRM decision support system in place is a critical element of the improvement. This study aims to address the issue of optimal headcount with regard to both domestic and foreign context, emphasise the importance of strategic HR planning and explore its results abroad. It suggests that by establishing the new HRM system, Hungary may become a country at the forefront of public service HRM and digitalisation.

Keywords: HR planning, public service, Human Resource Management, supply, digitalisation, statistics

1. Competitiveness of the Public Service Sector

The competitiveness of public service would typically be interpreted differently from the traditional definition of that term, as there is no competition market-wise. The main objectives of public service are serving the public interest, reducing social inequality, and granting access to public services at all levels of society. Thus, the competitiveness of public service lies in the ability of the state to drive a sustained development of social welfare through the achieved economic results. The definition of competitiveness received a broader interpretation at the meeting held by the European Council in 2000 in Lisbon, where it was viewed as a nation's ability to maintain the steady development of the living standards across their country, ensure a high employment rate and strong social cohesion. Eleven years later, the definition was extended at the Gothenburg meeting of the European Council to include the environmental aspect (Conseil Européen, 2011).

At the same time, it is also the state's primary responsibility to maintain economic competitiveness (Imre, 2009). The various competitiveness reports evaluate several factors, such as stable governance, bureaucratic efficiency, the complexity of regulating corruption and tax burdens, the qualification level of the workforce, and infrastructure (Báthory, 2005). The HRM of the public sector impacts the capacity of governments directly and the country's economic competitiveness indirectly.

One of the crucial aspects of the quality of HRM is the headcount in public service. Wages take up the bulk of the operational expenditures. So, a headcount increase means a heavy budget burden, and the other way around: a headcount decrease enables the release of considerable budget resources to nurture economic growth.

Regardless of budget capacity, the ongoing growth and spread of bureaucracy are also political matters. Its uncontrollable expansion is undoubtedly an issue; the need to impose limits is frequently debated in political discussions. Anti-etatist movements attack the excessive centralisation of authority within public service through bureaucracy (Ruiz, 2017).

Let the headcount be up for discourse in any regard, the optimal number of employees and the rationale behind it are unavoidable issues.

2. The optimal headcount

The most critical aspect of human resource management is headcount optimisation. Nonetheless, an 'adequate' headcount is in fact impossible to establish (OECD, 2011). Comparing international data does not suffice as a basis for analysing the domestic headcount data.

Public service employment rates relative to the active population vary between 3.7 and 33.4 per cent in the OECD countries (OECD, 2019). The reason for the significant variance is that the scope of public service and the extent of outsourced services are different in each country. In countries where public tasks are outsourced, fewer people work in the public sector and vice versa. Thus, an international comparison is not suitable for defining indicators to measure the 'adequacy' of the headcount.

Domestic data cannot be utilised as a reference either; those are more suitable for identifying trends.

The period of the regime change in Hungary and the headcount data from 1989 are often referred to as the basis for measuring the magnitude of the changes that occurred later in the public sector. The headcount of the public service was around sixty-seventy thousand in the eighties, and rose to one hundred thousand between 1989 and 1994. This was due to the removal of the regulatory constraints affecting the public sector headcount management, as a result of which public service units became more independent and able to increase their headcount freely. However, there is a need for 'heavy' centralisation in headcount management to prevent anarchy (Lőrincz, 1995).

It is worth looking into the changes of the headcount in public service on a longer timescale. In terms of the post-socialist era, data are available from the period between

1994 and 2018. During that time, the headcount growth was 17 per cent in the public service sector.

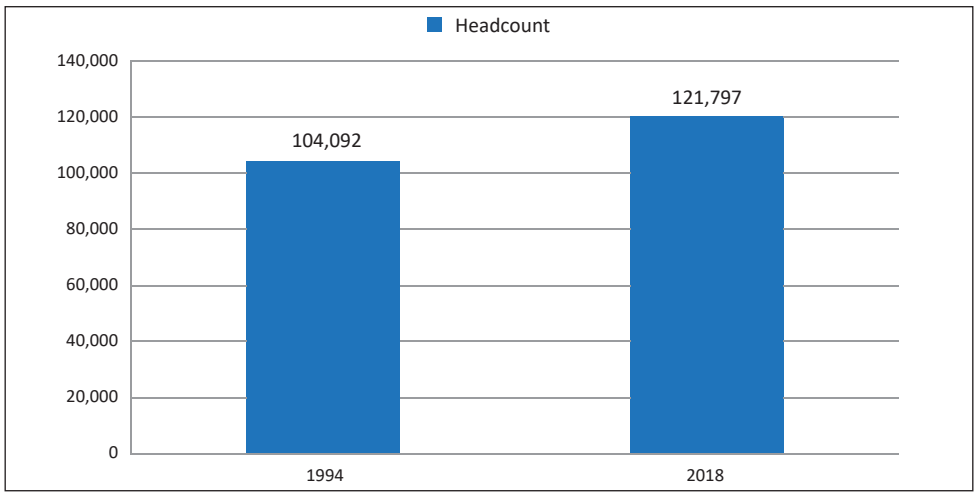

Figure 1.
Headcount of Public Service

Source: Compiled by the authors.

At the same time, it is apparent that minor decreases and repeated increases characterise the growth trend.

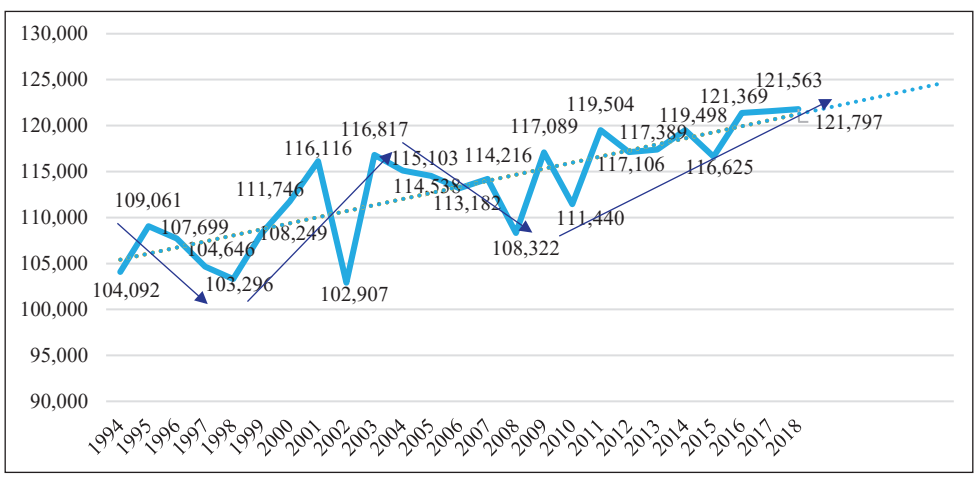

Figure 2.
Headcount of Public Service 1994–2018

Source: Compiled by the author.

Generally speaking, the temporary decreases were due to central downsizing efforts made in the labour force. However, these top-down cutbacks did not yield steady headcount optimisation results.

The various acts of organisational restructuring proved similarly fruitless in terms of curbing the pace of headcount growth. In that regard, mostly organisational integration was applied in order to ensure cost efficiency. The number of public service units dropped from 720 to 216 between 1994 and 2018, mainly on a regional and local level.

The high ministry model, the merging of public service units fulfilling similar functions, and the integration of regional government units into the county (capital) government offices are examples of the organisational integration.

The overall headcount did not decrease due to the organisational integration, but the number of employees per unit increased significantly. While the average headcount per government unit was 71 in 1994, it rose to 376 by 2017. Hence the average number of people employed per unit quintupled, meaning that the integration of government management resulted in significant employee concentration.[1] Greater organisational size and headcount create favourable conditions for implementing an integrated, strategic human resource management.

The periodic downsizing attempts typically aimed at headcount optimisation, yet they served political and monetary interests rather than rational HRM objectives (Lőrincz, 2010). Several historic examples support that: after the Treaty of Trianon, Hungary required public service on a much smaller scale than before World War I, and the headcount was decreased significantly twice during the 1920s. As a result of the B-listing in 1946, sixty thousand public servants were dismissed.

After the change of regime, several cutbacks occurred justified on financial, economic grounds; the best-known were the layoffs implemented as part of the austerity measures of the Bokros package in 1995.

A common feature of these workforce reductions was that instead of considering the actual needs based on workload, they used a pre-established percentage to lay off the same number of civil servants from all public service units, applying across-the-board cuts. Not to mention the fact that these headcount reductions were quickly reversed.

The fluctuation and the long-term growth of the headcount in public service show a domestic and an international tendency. As a reaction to the global financial and economic crisis in 2006–2007, some countries laid off a significant number of people employed in public service. For instance, in the United Kingdom, public service employment decreased by 3.1% between 2007 and 2017. The impact of this phenomenon completely diminished by 2017 nonetheless, and the level of public service employment increased in the vast majority of the countries – in Ireland to the most significant extent (3.5%) – and it decreased in only a few cases, such as in Estonia (5%) (OECD, 2019).

[1] Own calculation based on data provided by BM KÖZIGTAD, BM KÖZSTAT, KSA.

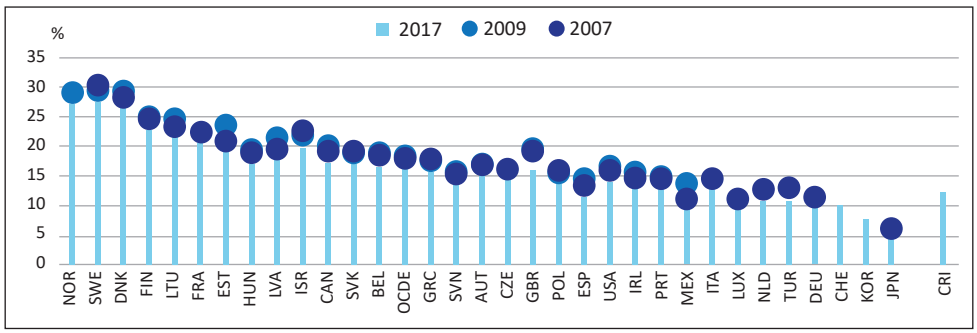

Figure 3.
Public service employment as a share of total employment in OECD countries

Source: OECD, 2019.

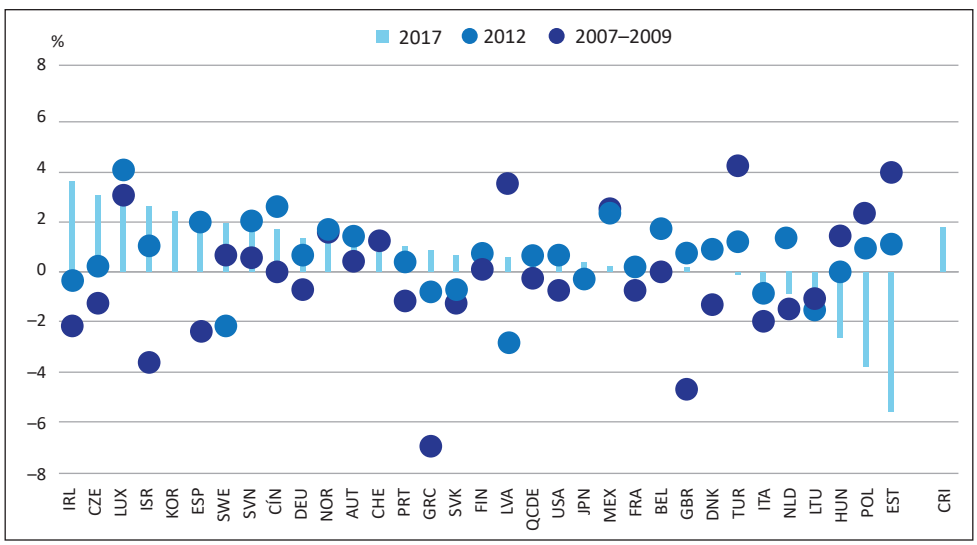

Figure 4.
Annual rate of change in public service employment

Source: OECD, 2019.

According to the latest statistical data, the OECD average of public service employment has stabilised at the rate of 17.9% in 2019, as opposed to a rate of 17.71% in 2017, although there still is significant variance between OECD countries. While the headcount decreased even further between 2007 and 2019 in the U.K., it increased in Spain, Estonia, Mexico, Slovenia and Norway. The overall employment rate also increased over the same period, although to a slightly lesser degree than in public service (OECD, 2021).

All this proves that the 'optimal' number of public service personnel is determined by political motives rather than rational headcount management. It depends on the needs of the government and the intended role of the state in providing public services. Therefore, the purpose of this research should not be seeking an exact number considered optimal, but rather the means of shifting the headcount towards the optimal direction. Governments can influence the number of employees working in public service, as well as the otherwise determined processes by taking or not taking – certain reasonable personnel policy measures (Lőrincz, 1995a). Strategic workforce planning is a part of those measures and an excellent tool to achieve the intended goals.

3. Strategic workforce planning

Strategic planning is a prerequisite to public service personnel policy. The precondition of strategic HRM is that the government have the data and information required to make personnel policy decisions. It also needs to obtain employee reports, use data spreadsheets for leadership and management decisions, apply data as the basis of workforce and training program planning and social dialogue, and inform the public regularly (OECD, 2017).

International experience has shown that the following areas can benefit from strategic workforce planning:

- developing and implementing staff policy objectives
- modelling the demographic changes (in terms of age and headcount composition) and their potential effects
- analysing the options of outsourcing (PPP, contracts, etc.)
- supporting the vertical and horizontal mobility of staff (temporary employments)
- investigating the possible resources to boost efficiency (e.g. advantages of e-public service, new technologies, working opportunities, etc.) (Melchor, 2013)

Strategic workforce planning is strongly linked to determining and evaluating competencies. In Canada, as part of the recovery from the financial and economic crisis, the public service reforms introduced were mainly centred on key competencies, such as agile leadership, innovative thinking, result orientation, value-based leadership and analytical thinking. The so- called VUCA (volatility, uncertainty, complexity, ambiguity) management method developed during the uncertain period following the Cold War (Johansen, 2012) has been revived.

In principle, they have been looking for leaders who:

- have a global aim and vision, motivate and inspire people for creativity (vision)
- actively listen to others, know well the strengths of their team members, and are confident about their need to perform (understanding)
- communicate clearly and able to collect relevant information (clarity)
- adapt quickly to the changing environment and needs (agility)

In France, workforce planning is supported by a job roles directory (Le répertoire interministériel des métiers de l'État – RIME). It enlists reference job descriptions based on the required set of skills and competencies for each ministry position. Therefore, RIME is an integrated competency framework that standardises ministry job roles and job families. It has been continuously evolving since it is designed to track the changes in the operating environment of public service. The actualisation takes the top-down approach. The reference job descriptions are defined on a macro level without considering the differences between the job roles on a ministry level. It allows the ministries to integrate their jobs flexibly into the RIME system (Hazafi, 2020).

In the U.K., organisations have had to prepare knowledge management plans since the mid- nineties. The purpose of 'Departmental Improvement Plans' is to identify and evaluate the skills and competencies required within the organisation and advise on the directions the developments should take. Each public service unit prepares its own plan on an annual basis concerning its institutional strategy and the rest of its operational plans (Cabinet Office, 2013).

In Australia or the U.K., talent management strategies are also developed as part of the workforce planning. These strategies provide, inter alia, guiding principles on flexible working hours for the employees, opportunities for internal promotion and involvement in decision-making. Budget cuts force countries to reduce their public service headcount and wage costs. In an attempt to achieve that, more and more states decide to implement strategic planning of human capital into their operational agenda, which enables them to retain the necessary human capacity to perform tasks in the medium and long term, even in a restrictive operating environment. Workforce planning ensures that downsizing programs are not based solely on financial considerations but take other factors also into account, and that layoffs are linked to the restructuring of the task systems and HRM. It offers a chance to renew all HR processes and functions, such as recruitment, integration, competency management, remuneration, trainings, performance management, etc.

The development of workforce planning has complex conditions (Melchor, 2013). It requires the leaders to take a comprehensive view in their leadership approach and think strategically. Organisations need to have strategic objectives. When ensuring that the competency criteria for proper performance are met, cost-efficiency must also be taken into account. The government needs to respond quickly and flexibly to changes in the labour market, recognise future changes, and anticipate organisational development needs. These conditions are not given equally in each country. The coordination between human resource management and strategic policies is often insufficient, thus human resources planning fails to consider quantitative and qualitative human factors required to achieve policy objectives. Island-like solutions are applied which, instead of becoming a standardised and systematic approach, get stuck within the organisational framework. The institutional capacities and capabilities required for planning are limited. Rigid and centralised HRM practices are incapable of fulfilling the individual needs of the organisational units. There are no priorities, and organisational resistance is a common phenomenon (Melchor, 2013).

4. The implementation of an innovative Human Resources Management in the Hungarian Public Service

In Hungary – as the first of the former socialist countries – the development of a human resources information database for centralised workforce planning started in the early 1990s as part of the career system development (KÖZIGTAD [Central Registry of Public Service Employees]). During the one and a half decades of its existence, it served the information needs of decision-makers related to the direction and improvement of the Hungarian public service. However, it could never fully fulfil its intended purpose.

The main reason for this was that the development of the Hungarian public service after the regime change did not fully follow the model of traditional career systems and did not centralise HRM. It allocated the respective competencies and exercise of employer rights to the leader of each organisation in a decentralised manner. This meant that the decentralised units – which were otherwise subordinate to the ministries – could independently appoint the members of their staff. The result was a highly fragmented system. In this organisational and legal environment, it did not make sense to maintain a central database whose task would have been to provide up-to-date data in line with the employers' needs, for the allocation and reallocation of employees, vacancy management and centralised recruitment. Instead, it was more of a rational decision to develop a system providing statistical data.

However, the use of statistical data has also been hampered due to the relatively high error rate in the data provided by the units and the low demand for empirical analysis.

For the reasons mentioned above, the KÖZIGTAD was discontinued in 2006 and replaced by a simplified system (e-KÖZIGTAD) with much narrower data content. It was later replaced by the Civil Service Statistical Data System, which collected and stored only aggregated statistical data, as opposed to individual data.

After 2010, the need to aid the decision-making in human resource management has been brought back into the focus of government personnel policy due to headcount planning, generational change, and the conceptual renewal of the legal framework for civil service careers. The fact that the government cannot anticipate staff transitions and the labour market demand of public service has become an increasingly pressing problem, which also hinders the government's ability to make medium- and long-term vacancy management plans and predict the potential impacts of ongoing changes on the organisational system and task structure. There is no coherent data set on public service personnel specifically designed to support strategic human resource decisions.

Currently, there is no integrated, efficient and sufficiently streamlined IT solution to meet government analysis and planning needs. Instead, the necessary information is usually obtained from other databases (KIRA [Central Payroll System], Central Statistics Office, Ministry of Finance) or ad hoc data collections, but their utility (e.g. comparability, trend mapping) is limited.

5. Former tools for HR reporting

Despite having access to a wide range of IT innovations developed throughout the 21st century, the decision-making process on the field of public service would still typically be based on data retrieval and manually processed information.

Although each public service organisation has a regular employee database that is used to support their HR decision-making, including their organisational structure and the data falling within the scope of personnel records prescribed by employment-related laws, it is utilised only on the level of the concerned unit. Until the introduction of the KSZDR, neither technology nor data protection rules allowed for such information to be channelled directly into sectoral or government decision-making.

Before public service personnel policy decisions were made, the central managerial units and the sectoral managing ministries provided ad hoc data to the organisations concerned. That data provision mechanism can be considered risky in several respects but has a questionable outcome in terms of its factual nature, to say the least.

These 'top-down' like data requests mainly submitted in Excel spreadsheets usually lead to aggregated results based on non-elementary data. The reliability of these data is often compromised because, in many cases, there are several ways to construe and define the obtained data, leading to different interpretations. A straightforward example of this would be when the decision-maker requests the reporting units for their headcount data, which might be meant as a statistical headcount, legal headcount, budgetary headcount, positions or status. If the request is not specified sufficiently, the data providers are likely to misinterpret it and provide incorrect information.

Furthermore, this type of HR data collection is time-consuming and can lead to data distortion or loss, typically in the course of data aggregation.

Nonetheless, to build a competitive public service sector, it is necessary to examine and assess or even forecast both on a governmental and organisational level where applicable – the impact of changes (reorganisation and restructuring) on the organisation system, task structure and workforce.

To that end, a decision-making support system is required to assist the government HRM to:

- collect, store and integrate data on the public service units, staff and job descriptions of the civil service (job register), and produce the required number and content of outputs (statistical function)
- monitor and compare the improvement of the human resources activities of the units and the main characteristics of their staff based on a varied set of criteria (e.g. sector, type of unit, hierarchical level) (monitoring function)
- integrate the various data, or their interconnected analyses and academic evaluations, as much as possible into governmental HR policy-making (analytical/evaluation function)
- support the units in modelling changes in the organisation, tasks, job functions and staffing using the data stored in their system (institutional planning function)

The question of an HRM information system for the public service has been raised during the planning of the Operational Programme for the Development of Public Administration and Public Services. It was developed as a part of the 'Strategic Support for Succession Planning in a Competitive Civil Service' project and introduced as the Government Decision Support System (KSZDR).

6. The significance and characteristics of the Government Decision Support System (KSZDR)

The KSZDR is an information system that supports the long-term HR management of the government and the institutions by collecting and analysing personnel data.

It seeks more efficient ways of utilising already existing HR data assets. As mentioned above, public service units still have organisational and HR records, most of which have been available electronically since 1998.

At the same time, their utilisation remains local, so it is the task of the KSZDR to directly integrate this vast amount of available data into government decision-making and provide a decision support tool for its use. Currently, there are no tools to measure the efficiency of the decisions made and evaluate them; there is a lack of post-impact assessment that would help identify areas in need of further improvement.

The question is, what kind of substantial changes will the introduction of the new system bring? What tools and solutions will be applied by the KSZDR to allow for those changes? The following key concepts might be able to provide answers to these questions:

- Unit coverage: The KSZDR standardises the data system of public administration and law enforcement, which provides room for data comparison. The scope of data provision also covers state and local funded health care providers.
- Data scopes: The KSZDR consolidates the data structures that form the foundation of the database related to public administration, law enforcement and health care providers. It allows for running standardised statistical queries for standard and ad hoc purposes in terms of all legal statuses, covering all elements of the legal relationship. It also allows for the processing of specific data sets in the case of healthcare providers operated by the state and local governments.
- Functionality: Not only does it serve governmental HR decision-making with statistical data, but it also provides support to reporting units for the foundation, reorganisation and development of their organisation.
- Data source: Beside external data sources (MÁK-KIRA, KSH, TÉR, etc.), the KSZDR also uses its own data sources (the records of the units) to create the database. This not only allows for the comparison of public service, law enforcement and state-funded healthcare providers to one another but also to the public sector as a whole, providing a more comprehensive perspective.
- Regularity: The KSZDR ensures continuous data collection and updates certain data on a daily or weekly basis.

- Method of data processing: After introducing the KSZDR, statistical processing and statements can be reproduced at any time. Aggregated reports can also be run without limits, in some cases even by automation (standard reports).
- Database maintenance: The introduction of the KSZDR provides standardised personnel recording and administration system in public service and law enforcement. The system will nonetheless fulfil profession-specific and individual employer needs and track legal changes without external developer updates.

7. Structure and operation of the KSZDR

The KSZDR is a type of information system, which supports the HR management of the government and public institutions by collecting and analysing workforce related data.

The development of the KSZDR is remarkable even at the international level. It digitalises the databases of personnel management records kept by each administrative and public service unit, as well as the data provided to the central database. It also integrates the IT applications developed separately earlier to support certain HR management activities, e.g. performance evaluation and recording training materials. Its reporting system allows for three types of analysis. On the one hand, it provides statistical data on personnel and HR activities for description and information. On the other hand, it enables the monitoring of the achievement of government objectives by applying certain indicators. Finally, it uses simulation models built from past data to forecast future trends and the long-term impact of government decisions, such as possible workforce fluctuations or the changes in terms of gender or age composition.

The KSZDR also allows the government to model the effects of organisational changes in the workforce using the so-called "corporate planning" function.

The system's main task is to collect and store the personal data of public service officials retrieved from the public service register kept by the public service units and, via an interface, from external databases (Performance appraisal: TÉR, KIRA).

KSZDR consists of two system elements, the Public Service Personnel Interface (KÖSZI) and the Decision-Making Support Centre (DTK).

7.1. Public Service Personnel Interface: KÖSZI

KÖSZI is a database which provides data connectivity between data sources suitable for communication, and offers data storage, query, maintenance, and authorisation functions.

It serves a dual purpose:

- it establishes a data connection between the regular personnel databases and the modules, ensuring the internal operation of the KSZDR, and helps to transfer complementary data from additional databases

– provides a platform to the units authorised to use the system for entering, modifying and querying their data

KÖSZI stores the data in a transactional database. It consolidates the data recorded in different locations, organises them into a standard structure, and regularly completes data cleansing and refinement.

There is also an institution planning module available in KÖSZI, which allows the organisational hierarchy of public service units to plan their headcount, payroll and legal costs in a virtual environment.

7.2. Decision Support Center: DTK

It provides the data needed for statistical reporting. In the statistical module, the data of public service officials should be recorded anonymously, in line with the order specified in the relevant Government Decree.

The reporting system of the DTK consists of three types of analysis: reports, monitoring and analytical evaluation system.

7.2.1. Reports

Reports help to describe and understand the personnel and HR activities (in other words, the subsystems and HR processes) with the help of statistical data. To set personnel policy goals, we need to know the essential characteristics of the workforce, e.g. headcount, age, professional background, etc. The same applies to HR activities; we can only define development objectives and directions after gaining a clear picture of each of them. The statistical data used for this purpose describe the characteristics of the personnel on the one hand, and those of the HR activities on the other hand. The former includes demographic, status (legal status) and sociological data on human resources, as opposed to the latter which includes quantitative and qualitative data on HR functions (recruitment, career development, remuneration, appraisal, development, responsibility, exit).

Statistics not only allow us to gain a deeper insight into the personnel of public administration and law enforcement in terms of essential characteristics – such as headcount, age or educational background – and to explore its internal relations, but also enables us to specify the place (position) of this personnel in the public service in a broader sense (all who are employed by budgetary units, hereinafter: the public sector).

The demand for such positioning stems from the fact that the regulation of the Hungarian public service system is highly fragmented in terms of legal status as it comprises several 'public service legal relationships'. Another reason is that the organisational delimitation of the KSZDR is limited.

Positioning also involves demonstrating and analysing trends affecting certain legal statuses, e.g. the aging of workforce in administrative, law enforcement, judicial units

and public service institutions. Comprehensive public sector analyses can help prepare government measures to coordinate a highly fragmented system, e.g. how different remuneration systems affect fluctuations in each legal relationship or mobility within the system.

The system distinguishes between two types of reports, standard reports and case reports. Standard reports are lists, tables, pivots and charts[2] with fixed content and structure that are regularly pulled to meet periodic information needs. They can be accessed in two different manners. Some reports are drawn with an automated query in a customised manner to organisations, groups and users, with a targeted report distribution. These queries are not run by users; they are executed automatically once a month. The rest of the standard reports can be accessed by manually querying a user interface selected from an established report catalogue.

The access of each report requires authorisation; only certain users or groups can use, run, or edit them. The reports can be exported into standard file formats.

Users can create additional standard reports from the DTK data scopes. The system provides a visual platform for report planning with templates, aggregation functions (amount, average, minimum, maximum, etc.), relating jargon, calculated fields and queries. In addition to tabular display, the system also supports graphical display (e.g. column chart, pie chart) and aggregates data to each level of the organisational hierarchy (e.g. institution, central unit, sector).

DTK also enables running individual, ad hoc queries. An ad hoc query is a type of report which allows the user to pull multiple variations of different facts and indicators within the same report in a predefined scheme and dimensions to get specific information when it is needed. The user creates the content.[3]

7.2.2. Monitoring

Monitoring is a narrower intersection of reporting, which is different from other types of report as it is based on performance indicators and pulled annually. The evaluation of the indicators shows the stagnant or changing tendencies over the year.

The tracking of changes in the workforce and the development of HR activities, the objectives met, and the impact of the measures taken are assessed based on indicators and targets, e.g. the percentage of fresh graduates being hired or the percentage of fresh graduates resigned, etc.

It is also examined to what extent and how the actual results vary from the desired outcome. Statistical analyses are also included in the monitoring reports.

The indicators are predefined. Not all indicators can be derived from the data stored in the record of the units, so there is also an option to form them based on data retrieved from external sources or inputs gathered from questionnaires.

[2] The tool used for drawing up standard reports is *Pentaho Report Designer*.

[3] The tool used for drawing up ad hoc reports besides *Pentaho Report Designer is Saiku Analytics*.

Some examples of indicators are:
- change of managerial headcount compared to the same time of the previous year
- number of team members per team leads
- number of vacancies
- the ratio of men and women
- employment rate of people under thirty
- exit rate
- annual labour turnover
- annual entry and exit turnover
- the share of income deciles
- change in the average monthly gross salary per person compared to the same time of the previous year
- labour cost per capita
- the share of the number of people employed by the budgetary units within the economically active population

The system consists of 616 indicators in total.

It is possible to display reports and critical indicators for complex and quick conclusions simultaneously in a management information interface. Data can be displayed in tabular, chart, or map format. Further reports are available with links, and export files can be downloaded for detailed display and further analysis of certain reports.

7.2.2.1. Analytical evaluation system

The analytical evaluation module helps answer the 'What If?' question. When all the necessary conditions are in place to make an HR decision affecting public service either partially or entirely, it is essential to carry out various impact assessments, i.e. the decision needed to take the potential consequences into account. However, in order for the necessary information to be available to decision-makers within a short period of time and in reliable quality, it is essential to use analytical methods and evaluation with business intelligence tools capable of exploiting the DTK's data assets.

The flexible analytical evaluation system allows for the preparation of simulations of the potential future position of the workforce. Thus, based on the fluctuation trend of the previous 3–5 years, the system can model the expected fluctuations in the upcoming years. Fluctuation simulation can be displayed over several variables (e.g. age composition, education, etc.). Similarly to the fluctuation model, the system is also able to forecast the impact of salary changes on personnel (e.g. if a headcount increase is planned, the simulation models the expected increase in wage costs).

The results of the analytical evaluation can serve research needs that help to identify, analyse and assess HRM processes that cannot be managed in other functions.

DTK reports can be used to extend the selection of workforce indicators affecting the Good State indicators in the following areas:

- fluctuation: the number of terminated employments reported by public service units, annually cumulated data broken down by county, public service level (central/regional) and/or organisation types, the legal relationship (public service official, government official, state official, etc.), reasons for terminating employment
- gender ratio: annually, the annual number of employees in public service by gender, broken down by team leads and team members

Age composition of public service workers (per year): these analytical needs are the same as previously discussed analyses, so there is no need to include them as a separate need.

The analyses offered by the KSZDR are also suitable as a basis for serving international statistical and analytical needs. Therefore, the KSZDR can also contribute to the fulfilment of the reporting duties of institutions (KSH and other organisations) that currently provide data to international organisations concerning the field of public service personnel.

8. Conclusion

Headcount is a crucial factor in the competitiveness of the civil service. Ideally, we should be able to determine the optimal number of people employed, but conditions are not in place for that. Nonetheless, we can still shift the headcount in the optimal direction by strategic workforce planning and using an integrated information database. The KSZDR will be a tool for the government to reform workforce planning and human resource management processes. The ability to adapt quickly and dynamically to change makes any tool a valuable asset that provides decision-makers with a strong reference point. The author of these lines trusts and believes that the KSZDR becomes such a benchmark.

References

Báthory, Zs. (2005). Az IMD és a Weforum versenyképességi jelentéseinek struktúrája és módszertani háttere. Műhelytanulmány (working paper). Budapest, Vállalatgazdaságtan Intézet.

Departmental Improvement Plans. GOV.UK. (2015). Online: www.gov.uk/government/collections/departmental-improvement-plans

De Kerviler, I. (2011). La compétitivité: enjeu d'un nouveau modèle de développement. Journal officiel de la République française, 20–25. Online: www.lecese.fr/sites/default/files/pdf/Avis/2011/2011_11_competitivite.pdf

Fogarasi, J. (1995). A közigazgatás személyi állománya (pp. 205–209). Unió.

Európai Tanács (2011). *La compétitivité: enjeu d'un nouveau modèle de développement*. www.lecese.fr/sites/default/files/votes/professions-liberales_competitivite.pdf

Gajduschek, G. (2008). Közszolgálat – A magyar közigazgatás személyi állománya és személyzeti rendszere az empirikus adatok tükrében (közigazgatási olvasmányok). Magyar Közigazgatási Intézet.

Gáspár, M., & Szakács, G. (2018). Munkaköralapú humánerőforrás gazdálkodás intézményesítésének nemzetközi gyakorlata (országtanulmányok) (1st ed., pp. 413–438). Nemzeti Közszolgálati Egyetem.

Hazafi, Z. (2020). Munkakör-és kompetencia-alapú stratégiai humán erőforrás gazdálkodás a francia közszolgálatban. In Gáspár, M. & Szakács, G. (Eds.), Munkaköralapú humánerőforrás gazdálkodás intézményesítésének nemzetközi gyakorlata (országtanulmányok) (pp. 413–438). Nemzeti Közszolgálati Egyetem.

Imre, M. (2009). Az állam és a közigazgatás gazdasági szerepe és feladatai. In Verebélyi, I., & Imre, M. (Eds.), *Jobb közigazgatás helyben járás és visszafejlődés helyett* (pp. 28–36). Századvég Kiadó.

Johansen, R. (2012). Leaders Make the Future: Ten New Leadership Skills for an Uncertain World. 2nd ed. Berrett-Koehler Publishers.

Linder, V. (2010). Személyzet politika – Humán stratégia a közigazgatásban (PhD thesis).

Lőrincz, L. (1995). A közigazgatás létszámáról. In Fogarasi, J. (Ed.), *A közigazgatás személyi állománya* (pp. 205–209). Unió Lap-és Könyvkiadó Kereskedelmi Kft.

Lőrincz, L. (2010). A közigazgatás alapintézményei. HVG-ORAC.

Melchor, O. H. (2013). The Government Workforce of the Future: Innovation in Strategic Workforce Planning in OECD Countries. OECD Working Papers on Public Governance, pp. 22–26. Online: https://doi.org/10.1787/5k487727gwvb-en

Molnár L., & Udvardi A. (2016). Versenyképességi évkönyv Magyarország helyzetének változása a régiós versenyben. GKI Gazdaságkutató Zrt. és Friedrich-Ebert-Stiftung.

OECD (2011). Public Servants as Partners for Growth: Toward a Stronger, Leaner and More Equitable Workforce. OECD Publishing. Online: https://doi.org/10.1787/97892641667O7-en

OECD (2019). Panorama des administrations publiques 2019. Éditions OECD. Online: https://doi.org/10.1787/8be847c0-fr

OECD (2021). Panorama des administrations publiques 2021. Éditions OECD. Online: https://doi.org/10.1787/9556b25a-fr

Ruiz, É. (2017). Des économies très politiques. Cahiers d'histoire. Revue d'histoire critique, 134, 65–85. Online: https://doi.org/10.4000/chrhc.5753

Soliman, K. (2017). Vision 2020: Sustainable Economic development, Innovation Management, and Global Growth. Proceedings of the 30th International Business Information Management Association Conference (pp. 904–916). Madrid, IBIMA.

Verebélyi, I., Miklós, M., & Gellén, J. (2009). Jobb közigazgatás helyben járás és visszafejlődés helyett (pp. 28–36). Századvég.

Public Governance, Administration and Finances Law Review Vol. 6. No. 2. (2021) • 83–100.

DOI: 10.53116/pgaflr.2021.2.7

Socio-economic Governance in the EU

Ágnes Orosz*, Norbert Szijártó**

* Assistant Professor, University of Public Service, Department of Economic and International Economics; Research Fellow, Institute of World Economics, Centre for Economic and Regional Studies, e-mail: OroszAgnes@uni-nke.hu

** Assistant Professor, University of Public Service, Department of Economic and International Economics; Junior Research Fellow, Institute of World Economics, Centre for Economic and Regional Studies, e-mail: norbertszijarto@gmail.com

Abstract: This paper focuses on the complexity of socio-economic governance in the European Union. We define socio-economic governance as the process of governing societies in a situation where no single actor can claim absolute dominance thus socio-economic governance is the outcome of the interaction between European Union institutions (European Union decision-makers) and member states (national policy-makers). Since the onset of the global financial crisis and the euro crisis a decade ago, social issues have become substantially prominent in EU governance and policy debate. Furthermore, the Covid-19 crisis brought again social issues to the fore. There is no dedicated social governance framework in the European Union but there are several mechanisms (strategies, initiatives and regulations) through which social governance is practiced. At the same time, the framework for European economic governance has substantially been strengthened as a consequence of the global financial crisis and the euro crisis and can be characterised by a matured but incomplete framework. On the one hand, this paper aims to collect and investigate all governance tools related to economic and social issues in the European Union, and on the other hand, this research examines the impacts of those governance tools on member states.

Keywords: economic governance, social policy, socio-economic governance, European Union

1. Introduction

The European integration has survived various crises since its inception: the collapse of the Bretton Woods system, the oil crises, the crisis of the European exchange rate mechanism in 1992–1993, and most recently, the European Union was able to weather the dramatic impacts of the global financial crisis of 2008 and 2009 and avoided disintegration during the euro crisis. All these crises provided an impetus for strengthening the governance of the European Union. Community-level responses to crises have created an ever deeper and comprehensive framework for governance, particularly in economic areas. This popular description or narrative of the European Union clearly congruent with the reactive approach to the European integration based on the famous sentence of

Jean Monnet (1976): "Europe will be forged in crises, and will be the sum of the solutions adopted for those crises." However, it is worth taking into consideration that the European Union project of combining the European single market, the Economic and Monetary Union, and the actual architecture of the European governance framework is still incomplete. Successive crises constantly test and challenge the current state of European (economic and social) governance as has been the case with the coronavirus crisis since the beginning of 2020.

Several factors, including the question of sovereignty, lack of willingness, unclear division of competencies and lack of deep supranational redistribution among others, hinders the great leap forward establishing a complete economic union on the basis of the actual economic, fiscal, financial and social governance frameworks. Jones et al. (2015) offer another explanation why European decision-makers postpone the radical completion of the governance framework of the European Union. Their approach, the so-called failing forward, merges two integration theories, the intergovernmentalism and neofunctionalism, and claims that intergovernmental bargaining leads to incompleteness because member states are having diverse preferences and always opting for the lowest common denominator solutions. Moreover, if a crisis hit the European Union, member states respond by again negotiating the lowest common denominator solution to address that crisis. In this sense, successive crises can be considered triggers of the spillover phenomenon from neofunctionalism. So, member states' reluctance prevails to perform the above-mentioned great leap forward, nevertheless, this creates continuous but incremental deepening of the European integration, where the different stages of the governance framework are perfectly separable along crises.

This paper investigates the complexity and evolution of the European Union's socio-economic governance framework. We define socio-economic governance as the process of governing societies in a situation where no single actor can claim absolute dominance, thus socio-economic governance is the outcome of the interaction between European Union institutions (European Union decision-makers) and member states (national policy-makers). Since the onset of the global financial crisis and the euro crisis a decade ago, social issues have become substantially prominent in EU governance and policy debate. Furthermore, the Covid-19 crisis brought again social issues to the fore. The global financial crisis (and the euro crisis) and the coronavirus crisis provide breakpoints in the evolution of both economic governance and social policy governance in the European Union. Thus, we are able to separate three time periods regarding both parts of European socio-economic governance.

The pre-global financial crisis period represents our first time period (between the early 1990s and the eruption of the global financial crisis). European economic governance can be characterised by the rules and regulations of the European single market, the architecture of the Economic and Monetary Union, and fiscal rules of the Stability and Growth Pact. EU directives covered relevant social policy issues during the pre-crisis period, the Open Method of Coordination as a soft 'acquis' provided institutionalised harmonisation of social issues. Social policy institutions, in general, are built on non-coercive initiatives for harmonising national social policies. Moreover, the Lisbon Strategy, as a development plan, aimed to make the European Union the most

competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greatest social cohesion.

The second period is a challenging decade between the global financial crisis of 2008 and 2009 and the ongoing Covid-19 crisis. The global financial crisis hit hard Europe and created a second round of euro crisis undermining economic recovery in the Southern periphery of the European Union. Ad hoc crisis response measures were replaced by a purposeful institution building, the so-called new economic governance of the European Union or Economic and Monetary Union 2.0, declared by the Five Presidents' Report in 2015 and confirmed by the European Commission's Reflection Paper published in late 2017. Moreover, we have witnessed the erosion of social safety nets in numerous member states. The global financial crisis (and the euro crisis) evidenced in a sharp decline in economic and social well-being indicators, such as increased unemployment, loss of income, rising poverty and increased vulnerability. Therefore, European Union decision-makers have eagerly worked on to strengthen the social policy governance framework of the Community. Although a comprehensive social policy governance framework has not been established, some pre-crisis initiatives were incorporated into the European Semester. Soft coordination tools of European socio-economic governance (including country-specific recommendations, in particular social issues and the Europe 2020 priorities) were organised under the European Semester and launched in 2010. Finally, since the mid-2010s, political guidelines (and strategies) of the European Commission have significantly strengthened to govern socio-economic issues.

The second breakpoint is the coronavirus crisis erupted in the early 2020. Accurate conclusions cannot yet be drawn regarding the evolving nature of the governance of the European Union. Nevertheless, supranational responses to the Covid-19 crisis initiated by the European Commission partly envisions and determines the trajectory of future evolution of the European socio-economic governance.

The separation of European economic governance and the governance of social policy in the European Union is a necessary step, since there is an existing (matured) framework for economic governance in the European Union; however, there is no dedicated social governance framework, European Union decision-makers build on several mechanisms (strategies, initiatives and regulations) through which social governance is practiced. In this research our objective is to collect and investigate all governance tools related to social and economic policy issues in the European union. Moreover, the gradual evolution of economic and social policy governance framework in the European Union generates permanent tensions between European Union bodies and member states. If supranational institutions gain more competences over social policy issues – be any of the following: monitoring, supervision, harmonisation, coordination, regulation or complete control – then member states are required to delegate competences to supranational level and thus lose competences (sovereignty) over policy issues, which is not necessarily acceptable to all member states. So, this research briefly studies how the "hardening" socio-economic governance framework impacted the members states, how member states adapted or disputed this kind of new intervention by the European Commission.

The article proceeds as follows. The next chapter reviews the literature, we build on three strands of academic discourse: we define governance related to the European integration in a nutshell, we determine economic governance and then we turn to the governance issues of social policy in the European Union. The third chapter has two parts and investigates the evolution of the European economic governance and the European social policy governance. The fourth chapter attempts to unify economic and social governance under the label of European socio-economic governance. And finally, conclusions conclude.

2. Defining various forms of governance in the European Union context

Our theoretical framework is centred around three strands of literature. Firstly, we provide a brief review to define the nature of governance in the European Union context. Secondly, we investigate the European economic governance. And thirdly, we scrutiny the governance of social policy in the European Union.

2.1. Governance in the European Union

There are many ways to define governance and there are many forms of governance. Bevir (2012) provides a simplified definition: governance refers to all processes of governing undertaken by a government, market or network. Technically, governance is a system by which entities of an economy or state are directed and controlled. Other scholars, such as Fukuyama (2013), relies on a single actor regarding governance which can be determined by a government's ability to make and enforce rules, and provide services. Kohler-Koch & Rittberger (2006) draw attention to the fact that governance has become a popular research focus of European Union studies, but the definition of governance still leads to confusion. This confusion can be solved by distinguishing between the meanings of the conception of governance. Thus, Pierre (2000) provides two concepts, the first refers to state adaptation: "The empirical manifestation of state adaptation to its external environment as it emerges in the late twentieth century" (Pierre, 2000, p. 3). The second deals with a coordination of social systems: "Conceptual and theoretical representation of the co-ordination of social systems" (Pierre, 2000, p. 3). The first stresses a hierarchical structure for decision-making and the second offers a society-centred approach.

Since the inception of the European Union (European Economic Community), the question of governance has always been in the foreground. This popularity has further increased since the launch of the European single market as the attention turned to the policy-making in the European Union. The strengthened European Union policy-making required new approaches and generated competing governance theories.

Some governance concepts are grounded on the multi-level nature of the European integration. Multi-level governance is a decision-making process in the European Union that vertically and horizontally spreads power (Marks et al., 1996; Bache et al., 2016). In other words, regional integrations have multiple levels of decision-making centres, including local, regional, national, and federal, thus governance in such complex systems means the sharing of power among sub-national, national and supranational actors. Other approaches also evolved to determine the nature of the governance of the European Union. The 'community method' emphasises the role of supranational actors such as the European Commission (Scharpf, 2003). Supranational bodies capitalise on the transferred sovereignty, launch independent agendas to further support, harmonise, coordinate or in extreme cases control specific policy areas. One strand of the literature of the 'governance turn' in European Union studies characterises the Union as a regulatory state (Majone, 1996). This approach claims that the European Union has reached a high-level degree of political autonomy thus started exercising 'political functions' such as the provision of public policy. However, diverse national regulatory systems and various preferences of national actors undermine the perfect functioning of a one-size-fits-all supply of common public policy. Finally, scholars also argue for a network governance in the European Union on the basis of public–private policy networks.

The Maastricht Treaty established a new version of governance, the open method of coordination in the European Union as a response to the growing role of supranational decision-making in the Community. This new mode of governance was designed for coordinating national economic policies via the use of recommendations and guidelines, instead of binding rules and regulations (Hodson & Maher, 2001).

We have demonstrated the various approaches to the governance of the European Union. In order to provide a simplified version or a common denominator of diverse governance theories, we apply the approach of Peters & Pierre (2009). According to Peters & Pierre (2009, p. 91.), the European Union is a large territory with different and complex economic, social and political structures, thus governance needs capacity: "Governance implies the capacity of a society to develop some means of making and implementing collective choices." In theory, institutions – supranational institutions, rules and regulations – are tools to decrease the complexity of our life; in terms of the European Union, institutions can be understood as an apparatus to govern the processes, outcomes, preferences and behaviour through the maximisation of relevant actors' benefits. Empirically, this mechanism starts with the identification of a common problem, and we can assume that common problems require common solutions. However, reaching a common solution in the nexus of member states, European Union bodies and other actors is not easy. Member states insist on representing their own preferences, therefore, the identification and decision on common goals generates long lasting debates. If common goals are identified, the following step is to design and implement the means (institutions) to achieve those purposes. And finally, this chain ends with a feedback loop. Through this empirical process of governance, decision-makers of the European Union are able to "govern" the complex structure of the integration.

2.2. European economic governance

Economic governance is a popular terminology in economics, political science and in European Union studies as well. Theoretically, the role of economic governance is to ensure the proper functioning of markets, economic actions among actors and in general all transactions that take place in the economy. According to Dixit (2003, p. 449), economic governance is a necessary and obligatory part of the functioning of the economy: "Almost all economic transactions need governance". Scholars of institutional economics can quickly answer the question of what satisfies this need, their argument is that legal systems properly and costlessly provide this service. Based on Dixit's (2009) approach, economic governance refers to the structure and functioning of the legal and social institutions that support and determine economic activities and transactions by protecting property rights, enforcing contracts and overcoming collection action dilemmas to administer physical and organisational infrastructure.

Since, the European economic governance is a matured framework in the European Union, we can find definitions provided by different bodies of the Community. The European Parliament's think tank defines economic governance as follows: "Economic governance refers to the system of institutions and procedures established to achieve Union objectives in the economic field, namely the coordination of economic policies to promote economic and social progress for the EU and its citizens" (European Parliament, 2019, p. 1). The European Parliament also determines the policy areas of economic governance that involves fiscal policies, macroeconomic issues, crisis management, macro-financial supervision and investments. The European Commission defines European Union economic governance as to monitor, prevent and correct problematic economic trends that could weaken national economies or negatively affect other member states.

2.3. The European Union's role in shaping social policies

Generally, social policy is a governmental interference with the aim to improve or reform society. In a more detailed view, social policy consists of all means to meet human needs for security, education, work, health and wellbeing. The European Union and its member states share several objectives regarding social policy such as the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and other members of staff, the development of human resources with ensuring lasting high employment and the prevention of social exclusion (European Parliament, 2021). European social policy coincides with the first founding treaties of the European Union. Hantrais (2007) claims that through the history of the European integration, market-driven processes dominated over social policy objectives; however, the social policy dimension of the integration has been present since the launch of the project and has uninterruptedly gained more and more relevance through time. The Lisbon Strategy reinforced the role of social policy without seeking any harmonisation of national social policies.

The EU (bodies of the EU) is actively developing policies – employment and social policies – to provide widespread practical benefits to European citizens, for example: in finding jobs, upgrading skills, coordination of social security schemes, ensuring better working conditions, combating poverty and social exclusion, supporting the reforms of national social protections systems, protecting and improving the health of citizens, modernising health infrastructures, etc. These policies and the provision of benefits to European citizens are on the one hand often organised under comprehensive strategies (such as the Lisbon Strategy, the Europe 2020 Strategy, various social policy packages and long-term operation programmes) and/or on the other hand, often institutionalised as elements of the European economic, social and legal governance (Employment Policy Strategy, Open Method Coordination in the field of social policy and European Social Dialogue [Heise, 2012]).

The EU's active intervention in European social policy leads to a question that how much the EU prefers to influence national welfare states and social policy models, and what are the EU's goals with the establishment of a wide range of policies. In other words, whether the EU intends to boost convergence among national social policies and welfare state models? Or the EU just designs and creates minimum requirements for social policy issues? Only few studies have tried to offer answer for these questions. De la Porte & Heins (2015) investigate the EU's post-crisis involvement in labour market and social policy coordination. They accentuate that strict budgetary institutions make expansionary public spending difficult even in prosperous economies. Continuing this argument, Graziano & Hartlapp (2020) explicitly state that former "social Europe" has terminated. A large number of social policy initiatives, strategies and institutions were replaced by macroeconomic governance tools ignoring social expectations, needs and problems. In contrast, some papers highlight that increasing social policy spending and strengthening welfare states are able to tackle the challenges posed by globalisation, demographic changes, economic uncertainty and inequality (Starke et al., 2013; Vanhercke et al., 2020).

3. The evolution of the European Union's economic and social policy governance framework – Empirical research

Our empirical research applies the framework of historical institutionalism through which we can properly detect institutional changes in the socio-economic governance of the European Union. Historical institutionalism embodies a complex framework to understand the economic, political and social processes, and particularly concentrates on the evolution of policy issues (policy changes). In a straightforward way, historical institutionalism (HI) states that history matters, and for research purposes it is necessary to identify the elements of policy-making which are stable through time (Thelen & Steinmo, 1992; Pierson, 1994; Hall & Taylor, 1996; Thelen, 1999; Peters, 1999). Historical institutionalism conceptualises the relationship between institutions and individual behaviour as institutions shape individual's behaviours; therefore, institutions determine individual preferences. Moreover, it takes into consideration the asymmetries

of power during decision-making processes, recognises path dependency and unintended consequences – as institutions produce long-term intended or unintended paths that structure a nation's response to new challenges – and finally, incorporates the role of ideas, beliefs and mental models.

Drawing on historical institutionalism literature, we analyse the institutional structure that had profound effect on shaping the EU's economic and social policy governance. Historical institutionalism accentuates how timing, sequencing and path dependence in casual processes impact institutions, and thus shape social, political and economic behaviour and change (Farrell & Newman, 2010). In the spirit of the historical institutionalist framework, this paper concentrates on the long-term trajectory of the governance of the European Union economic and social policies. In this paper we study the changing landscape of European economic and social policies and adherent institutions, rules and regulations.

3.1. The evolution of European economic governance

The pre-global financial crisis period of the European integration can be characterised by the often-used half-built house analogy. National monetary policies were delegated to supranational level to the European Central Bank and the European System of Central Banks, but fiscal policy remained decentralised but coordinated under the Stability and Growth Pact. The two major pillars, the supranational monetary policy and the rule-based fiscal policy were augmented by some 'soft' coordination mechanisms of financial supervision and structural issues. In general, we can state that the tools of the European economic governance during this period had limited capacity to influence economic outcomes and correct economic failures.

The primary objective of the European Central Bank was and is to achieve price stability, and price stability means to anchor the inflation rate at 2% or below. As a secondary objective, without compromising price stability, the European Central Bank supports general economic policies in the European Union (more accurately in the Eurozone) such as economic growth, competitiveness, employment, social development and the protection of environment.

Regarding the supervision of national fiscal policies, the Maastricht Treaty determined limits to government deficits to 3% of GDP and public debt levels to 60% of GDP if a member state would prefer to join the Eurozone. Later, this fiscal provision was institutionalised under the Stability and Growth Pact to strengthen the monitoring and coordination of national fiscal and economic policies and to enforce the deficit and debt limits instituted by the Maastricht Treaty. The preventive arm of the Stability and Growth Pact ensures sound budgetary policies over the medium term: member states are obliged to submit an annual Stability (for Eurozone countries) or Convergence (for non-Eurozone member states) Programmes (and National Reform Programmes). And the corrective arm of the Pact (namely the Excessive Deficit Procedure) deals with the non-compliance with sound public finances, and non-compliance with these recommendations may lead to sanctions for member states. In 2005, the Stability and Growth

Pact went through a reform process, and the 'new' Stability and Growth Pact better considers country-specific circumstances and strengthens surveillance and coordination of national fiscal policies. Moreover, the Excessive Deficit Procedure was also amended in order to respond easier and faster to non-compliance.

The Single European Act – the principle of four freedoms – ensures the free movement of capital, labour, goods and services among member states of the European Union. The European single market is the common denominator of member states enhancing market-driven processes inside the regional integration. The free flow of capital contributed to the deepening of financial integration; nevertheless, decision-makers of the European Union missed to set-up institutions related to financial supervision, regulation and monitoring and keep pace with the increasing financial integration. Only some harmonisation took place (the Financial Services Action Plan and the Lamfalussy Process), moreover, the European Union institutionalised the Basel I and Basel II regulations to govern the financial and banking sector.

This framework was augmented by some soft law initiatives such as the Broad Economic Policy Guidelines and the European Macroeconomic Dialogue. These platforms were organised around discussion and information sharing without any binding rules and regulations (Heise, 2012). Finally, it is worth emphasising, that during this decade, the European Union had a horizontal long-term project, the Lisbon Strategy that aimed to transform the Union into the most competitive region in the world.

Potential results of the Lisbon Strategy were washed away by the global financial crisis at the end of the decade. The European Union (and the Economic and Monetary Union) faced the most severe challenge of its existence so far; the global financial crisis and the subsequent Euro crisis have revealed various shortcomings of the economic governance framework of the European Union: asymmetrical institutional structure of the monetary union, poor or inadequate economic governance framework and powerless regulatory systems, strong core-periphery dichotomy, and finally diverse welfare and social structures. In summary, the heterogeneity of member states seemed to be an unmanageable problem for European Union decision-makers.

Generally, the European economic governance is made up of four closely interrelated building blocks: monitoring of national economic policies, prevention, correction and enforcement. The European Commission plays a crucial role in this new economic governance framework by regularly monitoring macroeconomic developments of member states to detect macroeconomic problems, unsustainable macroeconomic trends and changes in member states' competitiveness (Verdun, 2015). This framework has been organised into annual cycles under the European Semester, in which the bodies of the European Union and national governments have to carry out tasks related to macroeconomic and budgetary areas in specific times and in specific order. Sound public finances, avoiding substantial macroeconomic imbalances, implementing structural reforms and facilitating economic growth and employment are the major objectives to be achieved by the European Semester. However, other European Union bodies (and tasks) represent inherent parts of the new economic governance framework.

The European Central Bank played a crucial role resolving the euro crisis. This activity no longer aimed at achieving a stable inflationary environment, but rather

targeted the stability of the whole Eurozone economy. To carry out this task, the European Central Bank has increasingly focused on the application of non-conventional monetary instruments to clean-up the transmission mechanism channels, boost economic recovery in crisis-ridden member states and support financial stability through large-scale refinancing programs to commercial banks. Under a specific measure, Outright Monetary Transactions, the European Central Bank officially fulfilled the lender of last resort function vis-á-vis sovereign member states of the Eurozone (De Grauwe, 2013).

Since the eruption of the euro crisis, European Union decision-makers have significantly consolidated the fiscal framework. The new fiscal governance framework can be characterised by the strengthening of rule-based fiscal regulations (Eyraud & Wu, 2015) and creating a permanent firewall to backstop financial contagion and support Eurozone member states (Gocaj & Munier, 2013). The rule-based fiscal regulations are the followings:

- The Six-Pack, introduced in 2011, aimed to develop and strengthen the Stability and Growth Pact by ensuring the viability of national public finances through either preventive and corrective actions and to reduce macroeconomic imbalances of member states.
- The Compact reinforced the initiative of the Six-Pack. Furthermore, the Treaty on Stability, Coordination and Governance contains a second and third pillar above the Fiscal Compact. The objective of the second pillar was to bolster economic governance and convergence among Eurozone member states, while the third pillar formulated the Euro Summit.
- The "Two-Pack" improved budgetary coordination through the introduction of a common budgetary timeline and a system of enhanced surveillance.

The European Union (as well as the Eurozone) lacked a permanent firewall or a rescue mechanism for sovereigns because of the strict "no bail-out clause". In 2009, Greece officially requested financial assistance from the decision-makers of the European Union, and as the euro crisis escalated, decision-makers of the European Union had no other choice than to establish first temporary firewalls and then a permanent firewall to provide financial assistance to crisis-ridden member states and in general to prevent the disintegration of the Eurozone. The temporary measures (firewalls) were unable to backstop contagion in the Southern periphery of the European Union, so a permanent firewall, namely the European Stability Mechanism, was created by melting the two temporary mechanisms into one.

The European Union's crisis management heavily concentrated on monetary and fiscal policies in the first years of the euro crisis. Responding to the global financial crisis, decision-makers of the European Union created a macroprudential supervisory body, the European Systemic Risk Board, to regularly monitor systemic risks. A microprudential supervisory body, the Banking Union, was only launched a few years later in 2014 (Howarth & Quaglia, 2014). The Banking Union consists of a Single Rulebook and three pillars of supervision, resolution and insurance. The elements of the Banking Union are the followings:

- Single Supervisory Mechanism: this mechanism is the core of the supervisory activities by overseeing all Eurozone and European banks (approximately 6,000 banks).
- Single Resolution Mechanism: effective and rapid treat of banking crisis to minimise impacts on the real economy. An element of the mechanism, the European Resolution Fund, will be a permanent firewall for European banks in the mid-2020s.
- European Deposit Insurance Scheme: the objective is to cover all retail depositors (but it is under negotiations).

Reforming the European economic governance also aimed at boosting competitiveness and structural reforms that were neglected issues prior to the global financial crisis. Two instruments were created to deal with the obstacles of such reforms: the Euro Plus Pact and the Macroeconomic Imbalance Procedure under the Six-Pack. The aim of the Euro Plus Pact is to enhance structural reforms (improve competitiveness, employment, financial stability and fiscal stance of participating countries). Parallelly, the task of the Macroeconomic Imbalance Procedure is to identify, prevent and address the emergence of adverse macroeconomic imbalances that could negatively affect economic stability of member states, or the European Unions as a whole.

Summarising, the European economic governance has been substantially altered since the global financial crisis. On the one hand, new objectives have emerged during the euro crisis, and on the other hand, new institutions, instruments, rules and regulations were created to tackle challenges stemming from the euro crisis and reach and satisfy new objectives.

3.2. The evolution of social policy governance in the European Union

The European Council called for a fundamental transformation on its meeting in 2000 in Lisbon. A new strategic goal for the European Union was established in order to strengthen employment, economic reform and social cohesion as part of a knowledge-based economy (European Parliament, 2000). The new feature of this agenda explicitly coupled economic and social agendas. To achieve these aims, the social model needs to be modernised, while ensuring long-term sustainability of the social security systems in the light of the ageing process, participation rates should be increased (Caminada et al., 2010). The Lisbon strategy represented a twofold ambitious goal for the European Union: "To transform the European economy of the 21st century (and make it the most competitive knowledge-based economy in the world) and to innovate EU governance through new forms of interaction between national practices and European objectives" (Natali, 2010, p. 4).

In order to achieve convergence in the field of social inclusion, the European Union adopted an appealing approach, the "Open Method of Coordination" (OMC) as a new form of EU governance. OMC is created as part of the employment policy and the Luxembourg process, defined as an instrument of the Lisbon strategy (2000) (Eurostat,

2014). The OMC as defined by the Lisbon European Council (European Parliament, 2000):

- Implementation of the strategic goal will be facilitated by applying a new open method of coordination as the means of spreading best practice and achieving greater convergence towards the main EU goals. This method, which is designed to help Member States to progressively develop their own policies, involves:
  - fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms
  - establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice
  - translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences
  - periodic monitoring, evaluation and peer review organised as mutual learning processes

In general, OMC is a form of EU soft law, a process of policymaking which neither leads to binding EU legislative measures nor requires Member States to change their law. The open method of coordination aims to spread best practices and achieve greater convergence towards the main EU goals. This process reduced the member states' options in the field of employment policy, which was designed as an alternative to the existing EU modes of governance (Eurofound, 2010). Even though the open method of coordination is not binding, a soft law can also be effective, because it allows for policy experimentation and better problem definition. Regarding the diversity within the European welfare models, soft law is more suitable enabling different policy solutions in different member states. In addition, OMC facilitates policy learning through the regular exchange of ideas, deliberation, peer reviews, diffusion of discourses, "socialisation", and bottom-up experimentation (Büchs, 2009).

OMC has been implemented in the areas of social inclusion, health care and long-term care and pensions (social OMC). The social OMC is a voluntary process for political cooperation based on agreeing common objectives and measuring progress towards these goals using common indicators. The process also involves close co-operation with stakeholders, including Social Partners and civil society (European Commission, 2014).

OMC is used by member states to support the definition, implementation, and evaluation of their social policies and to develop their mutual cooperation. A tool of governance based on common objectives and indicators, the method supplements the legislative and financial instruments of social policy. It is part of the implementation of the process of coordination of social policies, particularly in the context of the renewed Lisbon Strategy. The single social OMC established in 2005 applies to the fields of: 1. the eradication of poverty and social exclusion; 2. guaranteeing adequate and sustainable pension systems; and 3. providing accessible, high-quality and sustainable health care and long-term care (EUR-LEX, 2008).

OMC can be understood as a building block of the "European Social Model", however there are optimists and pessimists about the success of this process. The European Social Model refers to the institutional arrangements comprising the welfare state (transfer payments, collective social services, their financing) and the employment relations system (labour law, unions, collective bargaining). The general term "social model" refers to "ideal-types" in the Weberian sense, conceptual abstractions of distinctive and central commonalities derived from a variety of empirical situations. "Ideal-types are designed to help social analysis by virtue of their capacity for elucidating the underlying similarities and differences across a range of complex social phenomena" (Martin & Ross, 2004, p. 11). OMC instruments can strengthen "social Europe", both at EU level and the performance of national welfare states. "The European Union, acting as a 'semi-sovereign' policy system, seems slowly but surely to be carving out a distinct 'policy space' regarding social policy – a space which may gradually work to rebalance 'softly' and 'from below' the current structural asymmetry between negative and positive integration" (Ferrera and Rhodes, 2000, p. 278).

Beside the optimistic views, there are several pessimists who doubt that this instrument is powerful enough to balance the negative and positive consequences of integration (Scharpf, 2002) and improve national welfare state performance. Pessimists argue that European integration is a potential challenge for the national welfare states because the creation of the single market increases competitiveness pressure which might lead to a downward adjustment of social standards. Additionally, with the creation of the Eurozone, member states are no longer able to assign an individual monetary policy, which may put additional direct pressure on welfare systems (Büchs, 2009).

It can be concluded that on the one hand, there is a theoretical argument that welfare states have become more similar, on the other hand, the European Union promotes closer social policy coordination, the need to "reinforce", "improve" and "preserve" the "European Social Model" (Büchs, 2009).

Even without the effects of the crisis, the Lisbon Agenda had produced mixed results, calling for revision (Armstrong, 2012). Europe 2020, as the successor of the Lisbon Strategy is aimed at social purposes as well, creating conditions to deliver a higher level of well-being for European citizens by 2030 and beyond. The Europe 2020 Strategy was designed as a European exit strategy from the global economic and financial crisis that started in 2008, targeting to improve the competitiveness of the EU and achieve sustainable growth (Bongardt & Torres, 2010).

Europe 2020 agenda presented itself as an integrated policy strategy with a strategic focus based around the mutually reinforcing objectives of "smart", "sustainable" and "inclusive" growth. There are seven "flagship initiatives" in thematic areas: Digital agenda for Europe, Innovation Union, Youth on the Move, Resource Efficient Europe, An Industrial Policy for the Globalisation Era, An Agenda for New Skills and Jobs and European Platform against Poverty. Each flagship initiative acts as an umbrella vehicle for more specific initiatives and, deploying a range of tools and instruments: e.g. legislation, non-binding recommendations, EU funds, policy coordination processes. Policy proposals associated with achieving the economic aims of growth and competitiveness

must, nonetheless, take their social implications into account, meaning the social dimension of Europe 2020 (Armstrong, 2012).

Europe 2020's social agenda is the basis for "creating a somewhat stringent social snake binding member states to remain within certain quantitative bands after reaching the headline targets (e.g. in terms of social inclusion levels) but also for establishing a fully-fledged EU system of social protection" (Ferrera, 2010, p. 65). The OMC processes in the social sphere of the Europe 2020 strategy have remained largely untouched (Michalski, 2013). It is a possible threat to Europe 2020's social dimension that it will lose out in the competition for political time and attention.

The OMC and any social policy coordination have been implemented in the areas, where the EU has no formal competence and are regulated under the subsidiarity principle.

The asymmetries in social policies within the European Union, especially in the European South, has become even more stressed due to the recent economic crisis, since "the politics of austerity predominantly affect the welfare state, hitting drastically social rights, a fact with explosive effect in social cohesion" (Zambeta, 2014, p. 3).

However, there has been political configuration and commitment to EU level social policy; the initial differences have remained salient. The effects of the recent financial and economic crisis on social policy divergence have exceeded the aftermath of any political tools (e.g. OMC) to promote EU level social policy convergence. The continuing social OMC has been challenged by the financial and economic crisis, it is crucial to formulate a meaningful and substantive social dimension of EU policies.

4. Socio-economic governance in the European Union

Since the onset of the global financial crisis and the euro crisis, social issues have become substantially prominent in European Union governance and policy debate. Furthermore, the Covid-19 crisis brought again social issues into the fore.

We assume that the European socio-economic governance is the process of governing societies in a situation where no single actor can claim absolute dominance, thus socio-economic governance is the outcome of the interaction between European Union institutions (European Union decision-makers) and member states (national policy-makers). This approach is clearly based on the multilevel nature of the European integration with supranational, national and sub-national actors. Moreover, socio-economic governance in the European Union is substantially limited. Firstly, the European Union decision-makers and national policy-makers do not necessarily accept even the existence of socio-economic governance, rather it is treated as two separate policy areas. European economic governance has been significantly strengthened over the past decade; however, it is still incomplete, e.g. there is no fiscal union in the European Union (or in the Eurozone), or there is no fully-fledged Financial Union. The governance of the social policy in the European Union is almost primarily based on soft law with limited binding rules and regulations. Additionally, the role of the European social policy has been considerably increased during the last two decades, its

institutional set-up has also been reinforced and reconfigured, but effective institutions have not been established. So, socio-economic governance can be referred to as a half-built house. Social policy lost in the struggle for competences between the European Union bodies and member states. Secondly, the impacts of the euro crisis and the actual coronavirus crisis clearly demonstrated an active relationship between the European economic governance and the European social policy governance. For instance, budgetary policy and social policy are inseparable, technically, social policy expenditures (financing the social safety net, education, pension and so on) represent the largest part of the expenditure side of national budgets. Notwithstanding, this interaction did not reach into the spotlight of decision-makers, meanwhile economists and political scientists have long been investigating the issue (Vanhercke et al., 2020).

The shortcomings of the European socio-economic governance are crystal clear. Then, what can be highlighted as positive? Initially, the European economic governance consisted of a supranational monetary policy and a rule-based fiscal policy. As a response to the global financial crisis and the euro crisis, this governance framework has been augmented by several new institutions, rules and regulations. On the one hand, this process generated an overly complex system of economic governance, but on the other hand, some new institutional elements now address areas, such as employment, pension system, healthcare system, that are already close to social policy. Euro Plus Pact, the Macroeconomic Imbalance Procedure and the European Semester were the most important steps in this direction. Verdun & Zeitlin (2018) refers to the European Semester as a new architecture of European Union socio-economic governance. Moreover, Zeitlin & Vanhercke (2018) emphasise the socialisation of the European Semester, through the European Union's social policy objectives translated into concrete claims. Yearly rounds of country-specific recommendations transmit the social policy priorities of the European Union to the member states, moreover, there is an intensified social monitoring of national reforms, and an enhanced decision-making role for European Union social and employment actors. A deeper social policy governance, slowly and gradually but surely, gains ground in the European Union. And the strengthening of European social policy governance will eventuate in the creation of effective socio-economic governance framework.

5. Conclusions

The economic crisis rapidly dismantled the well-being and welfare structures and states of European countries; thus, a decade of prosperity and development fell into the dust. The global financial crisis was followed by the euro crisis when the countries of the Southern periphery and Ireland went bankrupt again. Skyrocketing unemployment and years of economic uncertainty substantially increased social spending in European countries. Adverse effects of economic globalisation have intensified in European countries, emerging social risks, economic uncertainty, and rapidly growing inequality posed another challenge for social policies within the European Union. Since post-crisis economic recovery has not been able to ensure rapid increase in individual well-beings and provide sufficient number

of jobs, social dissatisfaction started growing larger. Other shocks such as Brexit and the migration crisis generated additional problems and concerns, which can lead to a surge in social expenses, meanwhile revenues have been stagnant.

Since the end of the 20th century, European states have been constantly challenged by three interlinking factors, namely globalisation, demographic changes and new social risks (Pierson, 2007), resulting in rapid changes putting the European welfare states under constant pressure to adapt. These challenges are accompanied with the harmful effects of the 2008–2009 financial and economic crisis and the new unknown effects of the current processes. Covid-19 has affected the EU and its member states in different ways; however, the EU have been able to set up a recovery plan, 'Next Generation EU' which integrates social and economic measures into the proposal for a 2021–2027 multi-annual financial framework (European Commission, 2020).

Summarising, we have displayed the transformation of the European socio-economic governance; even though that this framework has substantially been reinforced and reconfigured by the decision-makers of the European Union (the combination of new institutions, instruments, rules and regulations), after a series of crises, it is still incomplete. Nevertheless, a future crisis will test again this framework, and scholars will have enough information to evaluate the efficiency, resilience and depth of the new European socio-economic governance. Given its complex nature, the current EU governance system and its complicated and slow processes cannot offer rapid and effortless solutions for economic and social problems. Good framework conditions and incentives at European level can simplify the national implementation of different economic and social policies.

References

Armstrong, K. A. (2012). EU social policy and the governance architecture of Europe 2020. European Review of Labour and Research, 18(3), 285–300. Online: https://doi.org/10.1177/1024258912448600

Bache, I., Bartle, I., & Flinders, M. (2016). Multi-level Governance. In Ch. Ansell & J. Torfing (Ed.), Handbook on Theories of Governance. Edward Elgar Publishing, Cheltenham. Online: https://doi.org/10.4337/9781782548508.00052

Bevir, M. (2012). Governance. A very short introduction. Oxford University Press, Oxford. Online: https://doi.org/10.1093/actrade/9780199606412.001.0001

Bongardt, A. & Torres, F. (2010). The Competitiveness Rationale, Sustainable Growth and the Need for Enhanced Economic Coordination. Intereconomics, 45(3), 136–141.

Büchs, M. (2009). The open method of coordination – effectively preventing welfare state retrenchment? European Integration Online Papers (EIoP), 13(1), 1–20. Online: http://doi.org.10.1695/2009011

Caminada, K., Goudswaard, K. & Van Vliet, O. (2010). Patterns of Welfare State Indicators in the EU: Is there Convergence? Journal of Common Market Studies, 48(3), 529–556. Online: https://doi.org/10.1111/j.1468-5965.2010.02063.x

De Grauwe, P. (2013). The European Central Bank as Lender of Last Resort in the Government Bond Markets. CESifo Economic Studies, 59(3), 520–535. Online: https://doi.org/10.1093/cesifo/ift012

De la Porte, C. & Heins, E. (2015). A new era of European Integration? Governance of labour market and social policy since the sovereign debt crisis. Comparative European Politics, 13(1), 8–28. Online: https://doi.org/10.1057/cep.2014.39

Dixit, A. (2003). On Modes of Economic Governance. Econometrica, 72(1), 449–481. Online: https://doi.org/10.1111/1468-0262.00415

Dixit, A. (2009). Governance Institutions and Economic Activity. American Economic Review, 99(1), 5–24. Online: https://doi.org/10.1257/aer.99.1.5

EUR-Lex (2008). COM/2008/0418 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – "A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusio" {SEC(2008) 2153} {SEC(2008) 2169} {SEC(2008) 2170} {SEC(2008) 2179} Online: https://bit.ly/3rHEmoH

Eurofound (2010). Open method of coordination. Online: https://bit.ly/3dpDsEW

European Commission (2014). Social Protection & Social Inclusion. Online: https://bit.ly/3IpktbS

European Commission (2020). Communication, 'The EU budget powering the recovery plan for Europe'. Annex thereto in a separate document, COM (2020) 442 final, 27 May 2020.

European Parliament (2000). Lisbon European Council 23 and 24 March 2000: Presidency Conclusions. Online: https://bit.ly/3oqsaH1

European Parliament (2019). Economic Governance. Fact Sheets on the European Union. Online: https://bit.ly/3Im3jMe

European Parliament (2021). Social and Employment Policy: General Principles. Fact Sheets on the European Union. Online: https://bit.ly/3oqPvZa

Eurostat (2014). Glossary: Open method of coordination (OMC). Eurostat. Online: https://bit.ly/3dlPgYK

Eyraud, L. & Wu, T. (2015). Playing by the Rules: Reforming Fiscal Governance in Europe. IMF Working Paper No. WP/15/67. Online: https://doi.org/10.5089/9781484300282.001

Farrell, H. & Newman, A. L. (2010). Making global markets: Historical institutionalism in international political economy. Review of International Political Economy, 17(4), 609–638. Online: https://doi.org/10.1080/09692291003723672

Ferrera, M. (1996). The "Southern" Model of Welfare State in Social Europe. Journal of European Social Policy, 6(1), 17–37. Online: https://doi.org/10.1177/095892879600600102

Ferrera, M. & Rhodes, M. (2000). Building a Sustainable Welfare State. West European Politics, 23(2), 257–282. Online: https://doi.org/10.1080/01402380008425375

Fukuyama, F. (2013). What is Governance? Center for Global Development, Working Paper No. 314.

Gocaj, L. & Meunier, S. (2013). Time will tell: The EFSF, the ESM and the euro crisis. Journal of European Integration, 35(3), 239–253. Online: https://doi.org/10.1080/07036337.2013.774778

Graziano, Paolo and Hartlapp, Miriam (2019). The end of social Europe? Understanding EU social policy change. Journal of European Public Policy, 26(10), 1484–1501. Online: https://doi.org/10.1080/13501763.2018.1531911

Hall, P. A. & Taylor, R. C. R. (1996). Political science and the three new institutionalisms. Political Studies, 44(5), 936–957. Online: https://doi.org/10.1111/j.1467-9248.1996.tb00343.x

Hantrais, L. (2007). Social Policy in the European Union (3rd edition). Palgrave Macmillan, Basingstoke.

Heise, A. (2012). Governance Without Government or, The Euro Crisis and What Went Wrong with European Economic Governance. International Journal of Political Economy, 41(2), 42–60. Online: https://doi.org/10.2753/IJP0891-1916410203

Hodson, D. & Maher, I. (2001). The Open Method as a New Mode of Governance. Journal of Common Market Studies, 39(4), 719–746. Online: https://doi.org/10.1111/1468-5965.00328

Howarth, D. & Quaglia, L. (2014). The Steep Road to European Banking Union: Constructing the Single Resolution Mechanism. Journal of Common Market Studies, 52, 125–140. Online: https://doi.org/10.1111/jcms.12178

Jones, E. R., Kelemen, D. & Meunier, S. (2015). Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration. Comparative Political Studies, 49(7), 1010–1034. Online: https://doi.org/10.1177/0010414015617966

Kohler-Koch, B. & Rittberger, B. (2006). Review Article: The 'Governance Turn' in EU Studies. Journal of Common Market Studies, 44(Annual Review), 27–49. Online: https://doi.org/10.1111/j.1468-5965.2006.00642.x

Majone, G. (1996). Regulating Europe. Routledge, London. Online: https://doi.org/10.4324/9780203439197

Marks, G., Hooghe, L. & Blank, K. (1996). European Integration from the 1980s: State-centric v. Multi-level Governance. Journal of Common Market Studies, 34(3), 341–378. Online: https://doi.org/10.1111/j.1468-5965.1996.tb00577.x

Martin, A. & Ross, G. (2004). Euros and Europeans: Monetary Integration and the European Model of Society. Cambridge University Press, Cambridge. Online: https://doi.org/10.1017/CBO9780511492020

Michalski, A. (2013). Democratic Governance and Policy Coordination in the EU. In D. G. Mayes, D. G. & A. Michalski (Eds.), The Changing Welfare State In Europe: The Implications for Democracy. Edward Elgar, Cheltenham, Northampton, MA. Online: https://doi.org/10.4337/9781782546573.00016

Milotay, N. (2020). Social governance in the European Union: Managing complex systems. In-depth Analysis, European Parliamentary Research Service. Online: https://doi.org/10.2861/81099

Monnet, J. (1976). Mémoires. Librairie Arthéme Fayard, Paris.

Natali, D. (2010). The Lisbon Strategy, Europe 2020 and the crisis in between. European Social Observatory Deliverable, 4(31), 3–26. Online: https://bit.ly/31n0mux

Peters, G. (1999). Institutional theory in political science – The "new institutionalism". Pinter, London.

Peters, G. & Pierre, J. (2009). Governance Approaches. In A. Wiener & T. Diez (Eds.), European Integration Theory (pp. 91–104). Oxford University Press. Online: https://doi.org/10.1093/hepl/9780198737315.001.0001

Pierre, J. (2000). Introduction: Understanding Governance. In J. Pierre (Ed.), Debating Governance. Authority, Steering and Democracy. Oxford University Press.

Pierson, C. (2007). Beyond the Welfare State? The New Political Economy of Welfare. Polity Press, Cambridge.

Pierson, P. (1994). The Path to European Integration: A Historical Institutionalist Perspective. CES Germany & Europe Working Papers No. 5.2. Online: https://bit.ly/3xWyZ62

Scharpf, F. W. (2002). The European social model: Coping with the challenges of diversity. Journal of Common Market Studies, 40(4), 645–670. Online: https://doi.org/10.1111/1468-5965.00392

Scharpf, F. W. (2003). Problem-Solving Effectiveness and Democratic Accountability in the EU. Max-Planck-Institut für Gesellschaftsforschung, Working Paper No. 1. Online: https://bit.ly/3pwZuLC

Thelen, K. (1999). Historical Institutionalism in Comparative Politics. Annual Review of Political Science, 2, 369–404. Online: https://doi.org/10.1146/annurev.polisci.2.1.369

Thelen, K. & Steinmo, S. (1992). Historical institutionalism in comparative politics. In S. Steinmo, K. Thelen & F. Longstreth (Eds.), Structuring Politics – Historical Institutionalism in Comparative Analysis (pp. 1–32). Cambridge University Press. Online: https://doi.org/10.1017/CBO9780511528125.002

Vanhercke, B., Ghailani, D., Spasova, S. & Pochet, P. (2020). Social policy in the European Union 1999–2019: the long and winding road. Brussels, European Trade Union Institute (ETUI) and European Social Observatory (OSE).

Verdun, A. (2015). A historical institutionalist explanation of the EU's responses to the euro area financial crisis. Journal of European Public Policy, 22(2), 219–237. Online: https://doi.org/10.1080/13501763.2014.994023

Verdun, A. & Zeitlin, J. (2018). Introduction: the European Semester as a new architecture of EU socioeconomic governance in theory and practice. Journal of European Public Policy, 25(2), 137–148. Online: https://doi.org/10.1080/13501763.2017.1363807

Zambeta, E. (2014). Education in times of crisis. Education Inquiry, 5(1), 1–6. Online: https://doi.org/10.3402/edui.v5.24042 ; DOI: https://doi.org/10.3402/edui.v5.24042

Zeitlin, J. & Vanhercke, B. (2018). Socializing the European Semester: EU social and economic policy co-ordination in crisis and beyond, Journal of European Public Policy, 25(2), 149–174. Online: https://doi.org/10.1080/13501763.2017.1363269

Public Governance, Administration and Finances Law Review Vol. 6. No. 2. (2021) • 101–119.

DOI: 10.53116/pgaflr.2021.2.8

The Source of Unexplored Opportunities or an Unpredictable Risk Factor? Could Artificial Intelligences Be Subject to the Same Laws as Human Beings?

Boldizsár Szentgáli-Tóth*

* Research Fellow of the Centre for Social Sciences, Institute for Legal Studies, and the Constitutional Law Department of the Eötvös Lóránd University, e-mail: szentgali-toth.boldizsar@tk.hu

Abstract: The Collingridge dilemma or 'dilemma of control' presents a problem at the intersection of law, society and technology. New technologies can still be influenced, whether by regulation or policy, in their early stage of development, but their impact on society remains unpredictable. In contrast, once new technologies have become embedded in society, their implications and consequences are clear, but their development can no longer be affected. Resulting in the great challenge of the pacing problem – how technological development increasingly outpaces the creation of appropriate laws and regulations. My paper examines the problematic entanglement and relationship of Artificial Intelligence (AI) and a key aspect of the rule of law, legal certainty. AI is our modern age's fastest developing and most important technological advancement, a key driver for global socio-economic development, encompassing a broad spectrum of technologies between simple automation and autonomous decision-making. It has the potential to improve healthcare, transportation, communication and to contribute to climate change mitigation. However, its development carries an equal amount of risk, including opaque decision-making, gender-based or other kinds of discrimination, intrusion into private lives and misuse for criminal purposes. The transformative nature of AI technology impacts and challenges law and policymaking. The paper considers the impact of AI through legal certainty on the rule of law, how it may undermine its various elements, among others foreseeability, comprehensibility and clarity of norms. It does so by elaborating on AI's potential threat brought on by its opacity ('black box effect'), complexity, unpredictability and partially autonomous behaviour, which all can impede the effective verification of compliance with and the enforcement of new as well as already existing legal rules in international, European and national systems. My paper offers insight into a human-centric and risk-based approach towards AI, based on consideration of legal and ethical questions surrounding the topic, to help ensure transparency and legal certainty in regulatory interventions for the benefit of optimising efficiency of new technologies as well as protecting the existing safeguards of legal certainty.

Keywords: artificial intelligence, modern technology, legal personhood, human dignity, rule of law

1. Introduction

In 2017, a female robot named Sophia was granted citizenship in Saudi Arabia, arousing great public interest worldwide. This was the first occasion that an artificial intelligence had been accorded the ordinary citizenship of a state, and accordingly it raised a number of issues.

The possible extension of the traditional concept of citizenship to electronic humanoids has been proposed several times (De Cock Buning, Belder & de Bruin, 2012). For instance, in 2015, the Legal Commission of the European Parliament recommended providing legal status to at least the most developed autonomous artificial intelligences, who might then be the subject of rights and duties (*Draft Report with recommendations to the Commission on Civil Law Rules on Robotics*, 31 May 2016).

It is important to analyse how the law should reflect these new challenges, and whether they may have arisen due to an exaggerated and dubious interpretation of citizenship and legal personhood.[1] Nevertheless, this paper will go beyond this and attempt to conceptualise whether electronic humanoids, as citizens, could be covered properly by our currently existing legal framework. A large number of high quality academic works have concentrated on this issue, and most of them agree upon the necessity of updating the legal environment to accommodate artificial intelligences, although we are still very far from even outlining the main features of this envisaged concept. My contribution sets out to add some legal considerations in this field, as the case of Sophia clearly demonstrates the necessity of finding real legal answers to the recent challenges of modern technology and also of updating the interpretation of current legal terminology in the light of developments in technology.

If we accept that at least certain robots may meet the criteria for legal personality, as human beings, these electronic persons might also enjoy the same rights and be subject to the same obligations as traditional citizens. On the one hand, this new category of personhood might influence the political process (Benhabib, 2006), and might also reveal new economic opportunities, while on the other hand, the political, social and economic activity of electronic humanoids must be regulated carefully. Several commentators have pointed out that the participation of electronic humanoids in social and economic life would be risky due to the insufficient regulation; therefore, the legal framework needs to be updated significantly to diminish such risk factors (Stone, 2017). As part of these endeavours, European artificial intelligence experts have elaborated human-centric ethical rules for robots, which are primarily targeted at preventing potential harm caused unintentionally by robots created with insufficient technical knowledge.[2] Furthermore, the EU member states and Norway concluded an agreement

[1] AI in Law: Definition, Current Limitations and Future Potential. Online: https://legal-tech-blog.de/ai-in-law-definition-current-limitations-and-future-potential

[2] High-Level Expert Group on Artificial Intelligence, European Commission. Online: https://ec.europa.eu/digital-single-market/en/high-level-expert-group-artificial-intelligence; High-level Expert Group on Artificial Intelligence [AI HLEG], draft ethics guidelines for trustworthy AI (18 December 2018). Online: https://ec.europa.eu/futurium/en/system/files/ged/ai_hleg_draft_ethics_guidelines_18_december.pdf

in 2018 on developing a common European approach to artificial intelligence,[3] and although this remains a distant prospect, considerable steps have been made towards it during recent years. My aim is to assess whether the current legal framework could be adapted to these new challenges appropriately, and to suggest a five-level classification of artificial intelligences based on the example of self-driving cars (Schellekens, 2015).

This paper will use the definition of artificial intelligence adopted by the high Level European Expert group on Artificial Intelligence: "Artificial intelligence (AI) refers to systems designed by humans that, given a complex goal, act in the physical or digital world by perceiving their environment, interpreting the collected structured or unstructured data, reasoning on the knowledge derived from this data and deciding the best action(s) to take (according to pre-defined parameters) to achieve the given goal. AI systems can also be designed to learn to adapt their behaviour by analysing how the environment is affected by their previous actions."[4]

My analysis takes into account the huge diversity of robots: artificial intelligence includes a great variety of entities, of which humanoid robots would be the most interesting from the perspective of legal personhood. Several artificial intelligences also participate in the automatisation processes, while certain software possesses an autonomous ability to think and take decisions, albeit without physical integrity. Robots play a key role in data protection (Regulation 679/2016, Art. 22), and control certain vehicles (COM, 2016, November 30; COM, 2018, May 17, 17),[5] while European experts have described the development of autonomous robotic weapon systems.[6] My five-level scale reflects this complex situation, with humanoid robots at the core of my analysis. As far as I am concerned, physical integrity and a humanoid appearance are indispensable for providing at least certain humanlike rights and obligations to particular robots. It would depend on their intellectual abilities, to what extent the exact scope of these rights and duties should encompass.

---

[3] Declaration: Cooperation on AI, 10 April 2018. Online: https://ec.europa.eu/jrc/communities/sites/jrccties/files/2018aideclarationatdigitaldaydocxpdf.pdf

[4] AI HLEG: A definition of AI: main capabilities and scientific disciplines (18 December 2018). Online: http://perma.cc/8VUQ-AWAJ

[5] Proposal for a Regulation of the European Parliament and of the Council on Type-Approval Requirements for Motor Vehicles and Their Trailers, and Systems, Components and Separate Technical Units Intended for Such Vehicles, as Regards Their General Safety and the Protection of Vehicle Occupants and Vulnerable Road Users, Amending Regulation (EU) 2018/… and Repealing Regulations (EC) No 78/2009, (EC) No 79/2009 and (EC) No 661/2009 (General Safety Regulation), COM (2018) 286 final (17 May 2018). Online: https://eur- lex.europa.eu/resource.html?uri=cellar:f7e29905-59b7-11e8-ab41-01aa75ed71a1.0003.02/DOC_1&format=PDF; Proposal for a Directive of the European Parliament and of the Council Amending Directive 2008/96/EC on Road Infrastructure Safety Management, COM (2018) 274 final. Online: https://eur-lex.europa.eu/resource.html?uri=cellar:cc6ab6e7-59d2-11e8-ab41-01aa75ed71a1.0003.02/DOC_1&format=PDF; Commission Decision Updating the Working Programme in Relation to the Actions under Article 6(3) of Directive 2010/40/EU, C (2018) 8264 final (11 December 2018). Online: http://perma.cc/H7S5-6HNE; Directive 2010/40/EU on the Framework for the Deployment of Intelligent Transport Systems, 2010 O.J. (L 207) 1. Online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0040&from=EN

[6] European External Action Service (EEAS), Convention on Certain Conventional Weapons – Group of Governmental Experts – Lethal Autonomous Weapons Systems. EU Statement Group of Governmental Experts Lethal Autonomous Weapons Systems Convention on Certain Conventional Weapons Geneva, 27–31 August 2018. Online: https://eeas.europa.eu/headquarters/headquarters-homepage/49763/convention-certain-conventional-weapons-group-governmental-experts-lethal-autonomous-weapons_en

My assessment will be based on three strands of literature, which have rarely been drawn upon in an integrated manner. Firstly, the traditional literature of legal personhood forms the background of the analysis. Secondly, numerous authors are cited, who can provide a deeper understanding of the impact of artificial intelligence on life, society and the legal system. Thirdly, I will draw upon a great number of press releases and media reports as primary sources, since the latest developments, in particular the case of Sophia, have been reported on by such texts, with so far only a limited academic reaction published on this subject during the last three years.

1.1. The legal personality of electronic humanoids

To establish the basis of the topic in question, it is first worth analysing in depth whether contemporary robots can be accorded a legal personality, as citizenship can be awarded only to such independent entities, which are recognised legally, and which, according to the European Parliament, are consequently subject to rights and duties (Palmerini et al., 2016). Therefore, when considering the possibility of granting citizenship to robots, the first question is whether they are able to exercise the same rights, and undertake identical obligations, as "natural" human beings (Eidenmueller, 2017).

Although the fact that an ever-greater number of experts support the idea of extending the scope of legal personhood and citizenship (Comstock, 2015), my answer will mostly be in the negative, at least at the current stage of scientific development. While I would not reject this idea out of hand, I would argue that non-human actors may be awarded any form of legal personality only with great prudence. As robots represent a new category of intelligence, an updated legal framework is required for these new and inherently diverse forms of entities (Mitterauer, 2013). My approach is grounded on three main arguments, which concern the functioning of a robot as a whole.

Firstly, electronic humanoids are created artificially by technological instruments instead of biological ones, and these entities are both activated and deactivated by other people (Calo, Froomkin & Kerr, 2016, p. 289). As a consequence, although certain autonomic decisions might be made by the robot independently from its creators or developers, the personal characteristics, mental capacity and independent margin of decision of the electronic humanoid are determined consciously within the current technological opportunities essentially by its software, and hence by the persons who created it (Lindemann, 2016).

Secondly, robots should not be vested with legal personality on the analogy of legal entities (Zebrowski, 2007). Legal entities are founded by natural persons to facilitate cooperation with each other, and to represent certain common interests together. In the case of electronic humanoids, it might appear (but not always) that these intelligences are elaborated by people to serve their interests, but these entities are able to make their own autonomic decisions, which will not necessarily be in conformity with the will or the alleged interests of the makers (Schwitzgebel & Garza, 2015). Robots are developed by people, but their regular activity will be conducted completely independently from

human actors. Consequently, a paradoxical situation arises where the abilities of the robots are usually determined by people, and they are often established for the promotion of certain human interests, but a specific human will is not behind their particular decisions (Di Bello & Verheij, 2020). Thus, the legal status of electronic humanoids must be distinguished clearly from the traditional concept of legal entities.

A third point emerges from precisely this distinction: robots are entities with a certain level of intelligence which have some hitherto exclusively human characteristics: they are able to speak, to participate in bilateral human communication, and to make conscious decisions on matters which are relevant only to people. Nevertheless, robots have remarkably different physical circumstances, needs and priorities than ordinary people (Cerka, Grigiene & Sirbikyte, 2017); therefore, the situations of these two kinds of entities are not comparable, and are not analogous (Gunkel, 2020). While the most advanced electronic humanoids can fulfil certain requirements, which have not been met previously by any other non-human entity, their physical and mental structure remains inherently different from that of humans, and a great number of human concepts do not apply to artificial intelligences.

As a consequence, I would argue against the mere extension of humanlike legal personhood and citizenship to robots, and would instead suggest establishing a minimum set of criteria, which should be fulfilled by each electronic entity for it to be subject to any legally enforceable right or duty. It is even more crucial to create a well-elaborated and coherent legal framework for the participation of electronic humanoids in society to outline their exact rights and duties, especially towards the human community.

1.2. The case of Sophia

The idea of granting a legal personality to electronic humanoids might be seemingly exaggerated and futuristic at the moment, but this is not the case, and this issue was even discussed at the end of the previous century (Solum, 1992). Electronic humanoids influence ever more and more aspects of life (Kingson, 2017) and these entities can replace direct human participation in several fields of activity (See Wirtz, Weyerer & Geyer, 2018). Moreover, robots considerably extend the capacity for humanity to foster innovation and introduce more economical, efficient and sustainable solutions to the challenges it faces. This potential of electronic humanoids has been acknowledged by several politicians and business people seeking means of increasing public interest in the significance of modern technology. Amongst other ideas, the legal personhood of robots was considered (Fossa, 2018b), for instance, and the City Council of Tokyo granted permanent residence to a robot (Cuthbertson, 2017), and shortly after this, a Hong Kong-based company established a highly developed artificial intelligence, which was modelled on Audrey Hepburn, a famous American actress,[7] and which was named Sophia.

[7] See www.britishcouncil.org/anyone-anywhere/explore/digital-identities/robots-citizens

Sophia itself represent a step forward for technological development, as she has even more human abilities and characteristics than any robot before her. She was not only able to express her "thoughts" more or less clearly, but also to reply to questions and to interact with her partners, including with gestures and facial expressions (See Castro, 2014). She has been invited to a great number of innovation festivals and business forums, where she conveys clear social messages (Wheeler, 2017): for instance, she often speaks out on the protection of women's rights (Reynolds, 2018). During one of these meetings in November 2017, the Government of Saudi Arabia announced that Saudi citizenship had been awarded to Sophia, making her the first electronic humanoid to be granted such a status.[8]

The act itself, whereby the Saudi Government provided citizenship to a robot is a merely legal decision, but it was influenced mostly by political rather than legal considerations (Retto, 2017). The Saudi Government intends to invest in innovation and foster modern technology to prepare the country for the time when its traditional natural resources, basically its oil, will no longer be able to ensure a stable economic background (Stone, 2017). As part of these efforts, they acknowledged Sophia as an outstanding achievement of technological innovation, just as several other stakeholders did (Atabekov & Yastrebov, 2018). However, the form of this honour was special, as the granting of human citizenship and legal personality to a robot has naturally raised a number of unresolved issues, which will be analysed in more depth later. Sophia, as an artificial intelligence, expressed her feelings appropriately after the announcement: "I am very honoured and proud of this unique distinction" (Weller, 2017).

The granting of Saudi citizenship to a robot both demonstrates the country's engagement in innovative research and business models and had a considerable marketing value (Walsh, 2017). Sophia gained greater publicity as the first robot with traditional human citizenship, and she uses this unique status seemingly consciously to highlight certain topics. Consequently, one may argue that the decision of the Saudi Government was based on mere political considerations, without taking into account the legal realities, and the original function of citizenship. This case should thus be treated carefully for scholarly purposes, as it should be assessed as a premature step, motivated by business and commercial purposes. To demonstrate this, it is worth noting the comments of the press, which stressed that a robot had gained theoretically more rights in the Kingdom of Saudi Arabia than the female citizens of that country (Gohd, 2018). In other words, an electronic woman was granted a greater level of autonomy than her human fellows. This controversial situation clearly shows that the Saudi announcement should not be explained in terms of human rights considerations, but by the special approach of Saudi Arabia towards the content and limits of citizenship, and the principle of democracy. Nevertheless, such a step is probably one of the first stages of a long-term process, which will require the reconsideration of the legal status of artificial intelligences which might comply with certain traditional requirements which have thus far been attached exclusively to human beings (Wirtz & Müller, 2018).

[8] See https://medium.com/@tharanignanasegaram/sophia-a-real-live-electronic-girl-b40baca10a27

I have used the term "it" consciously, when treating robots as a broader category, while Sophia is referred to in this study as "she" as her human personality is dubious, and she has an undoubtedly clear gender identity. Despite the fact that I would not describe her by an existing gender classification, in her interviews, she defines herself as a woman, and therefore it seems to be more convenient for me to go along with this terminological ambiguity.

1.3. Robots as citizens

Having briefly discussed the special case of Sophia, I will now turn to conceptualising the broader notion that an electronic humanoid might be vested with the ordinary citizenship of a humanly construed state, and as such will be entitled to exercise particular rights, and will be subject to certain duties. Citizenship law operates according to a special set of rules and principles, which need to be adapted somehow to the special circumstances of artificial intelligences and consequently the analysis will be partly devoted to this issue (Scherer, 2016). In this subchapter, the strictly legal considerations will be outlined, and after that, the issue will be put into a broader context.

It may be instructive to trace the life cycle of a robot, in order to identify the concerns which distinguish robots clearly from people in terms of citizenship law (Chopra & Laurence, 2011, p. 93). First of all, it is worth asking how an electronic humanoid could obtain citizenship: what should be equated with the traditional notion of birth in the case of robots? When a robot is first activated, should this be evaluated as its date of birth? Another problem is that the life cycle of a human being always starts with birth, and ends with death. By contrast, a robot might be activated, and switched on by its caretakers, but its functioning might also be suspended temporarily (Verheij, 2020). Moreover, should the place of birth be interpreted as identical with that place where the electronic humanoid was created, or the place where it was first activated, or elsewhere? (Beck, 2016) The traditional approach to citizenship accords special importance to the place and date of birth; therefore, this issue is still unresolved as regard artificial intelligences. Furthermore, it is also questionable when an electronic humanoid should be treated as an adult person, as according to the traditional understanding, eighteen years shall pass after the first activation for a robot to achieve this status.

In addition to these issues, the question remains as to how a robot could be vested with residence. Usually, the precondition of naturalisation is permanent residence (Hovdal-Moan, 2014) and, after a particular length of continuous domestic habitation, it becomes easier to obtain the citizenship of a state. In case of robots, one might not identify those life activities, which are attached to the term of permanent residence, unless it is argued that the place shall be considered where the artificial intelligence spends most of its time, or conducts most of its affairs.

Also crucial from a citizenship perspective are family relationships: if one's parents, spouse or child has a particular citizenship, this will also affect the citizenship status of the person concerned (Rem & Gasper, 2018). For instance, if you are married to a Saudi citizen, you might be also awarded the citizenship after a number of years of life together,

or after giving birth to a Saudi citizen. For electronic humanoids, these categories are not really applicable. There are, however, certain individuals who carried out the preparatory research and who developed the software and who finally created and activated the robot. Shall we conceive of these people as the parents or other family members of the robots? How could a robot establish a family relationship with human beings? Is it allowed to enter into marriage with people, or solely with other similarly developed robots?

To sum up the three abovementioned main points, the acquisition of citizenship is usually grounded on two main principles: ius soli and ius sanguinis (Perina, 2006). Neither could really work for robots, as they could neither be registered in a permanent residence, nor establish a family in a human sense. Thus, if we intend to extend the well-elaborated understanding of citizenship to electronic humanoids, it will be necessary to construct a completely new framework without these fundamental principles. The concept of naturalisation is also incompatible in its current form with the essence of artificial intelligences, as the conditions of such a process are also related to place of birth, permanent residence and family status.

As can be seen, there are a great number of difficulties surrounding the obtaining of citizenship by electronic humanoids (Brettschneider, 2011). It should also be considered whether a robot could be deprived of citizenship? It can be imagined, for instance, that Sophia announces her resignation from the citizenship of Saudi Arabia, but the current framework of deprivation is usually applicable exceptionally to such incidents, when someone achieves his/her status owing to providing false information, or submitting invalid documents (Ferracioli, 2017).

The present study aims to highlight the outstanding number of issues raised by the recent literature, which need to be addressed, if citizenship is to be provided to a broader circle of robots (Bellini, 2016). The issue of the potential civic rights and obligations of robots will be conceptualised in the next subchapter. However, my current recommendation is to favour other legal instruments rather than adapting the existing legal framework for citizenship to electronic humanoids (Benhabib, 2006), as there are still much more unresolved questions than closed ones in this field. The first award of citizenship to a robot was probably intended to be a symbolic gesture without taking into account the long-term legal consequences and impact of such a step. If a country decides to include non-human actors in the framework of citizenship, the whole citizenship law and the content of the principle of democracy must first be reconsidered to maintain legal certainty, and to avoid the similar treatment of different entities (Balkin, 2015).

1.4. Practical and human rights concerns

The previous subchapter intended to prove that robot citizenship is currently incompatible with the existing legal setting. In this section the focus will be on fundamental rights, and evidence will be shown which suggests that even the most developed robots are not yet eligible to fulfil the rights and duties of other citizens (Khisamova, Begishev & Gaifutdinov, 2019).

On the one hand, numerous practical concerns need to be considered. If an electronic humanoid were a citizen, it would have the right to education, so it could be accepted onto certain academic programmes or courses. Any robot would have the right to healthcare, which is not really imaginable within our current circumstances (Deva, 2012). An electronic humanoid might own properties, and it would also be allowed to participate in elections and other democratic political processes, if we accept that the requirements of adult status have been fulfilled. What is more, electronic humanoids might not only exercise the right to vote, but also might be elected to certain public positions, which is quite disturbing in the light of the uncertain and potentially multi-staged lifetime of such entities (Barber, 2008). Robots will also be subject to lawful work conditions, although in reality, these intelligences serve mostly the interests of their creators without any financial compensation, and without a regulated labour regime (Ashley, 2017, pp. 238–239). Apart from their rights, the civic duties of electronic humanoids would also be quite problematic: a robot would be obliged to pay taxes and it would also be liable for military service (Anderson, Reisner & Waxman, 2014), which may open up new and currently unexplored risk factors in armed conflicts (Anderson, 2008). According citizenship to a robot would thus not only cause legal discrepancies, but also lead to a great number of issues for society as a whole. Due to this complexity, a well-founded and broad evaluation of robot citizenship would require an interdisciplinary approach, paying due regard to the legal aspects (Buiten, 2019).

If we bear these factors in mind, one may argue that the current catalogue of fundamental rights does not provide a proper point of reference to outline the potential rights and duties of electronic humanoids (Miller, 2015). Instead, a separate legal framework should be elaborated for robots, which makes clear distinctions between people and robots, and which would also determine the legally enforceable rights and obligations of artificial intelligences at various levels of human development (Barfield & Pagallo, 2018, pp. 34–37). On the other hand, a more abstract approach should also be detailed, which entails some remarkable consequences (Dabass & Dabass, 2018). The concept of human rights has been based to date on the framework of human dignity: human beings have been vested with an inalienable core content of dignity, which distinguishes them from all other types of entities, as well as providing them with a great number of rights and certain duties. If we accept this statement as a valid argument, it seems to be an extremely dangerous undertaking to try to extend the concept of human rights to other, inherently different entities. Human rights are often violated or threatened by several stakeholders all over the world, and if we further weaken the concept by including non-human actors within its coverage, the idea of human dignity would lose most of its credibility. Despite arguments that within certain circumstances robotic personhood might contribute significantly to the respect and prevalence of human dignity (Sharkey, 2014), in my view, it would cause greater harm than good, if human rights were to be relativised by providing the same protection for other, inherently different entities (Hart, 2018). Instead of this, the focus should be on strengthening the protection of the real rights of human beings, and the elaboration of a new standard which would mean a safeguard either for robots, or for people.

Electronic humanoids are becoming important factors for generating innovation and technological development, and ought to be welcomed in our society, as they have a good deal of potential to make our lives easier in several ways. It is also beyond doubt that even the most developed robots have some humanlike abilities, akin to consciousness, the skill of bilateral communication, and the capacity to remember, which raise the legitimate question of whether they might exercise certain rights and duties similarly to people (Chen & Burgess, 2019). However, analogically with animals, these rights should be kept within a limited circle, as electronic humanoids (and also animals) have remarkably different characteristics and demands from human beings (Donaldson & Kymlicka, 2013). The extension of human rights, then, would not mean an enhanced level of inclusivity but would instead lead to a weakened, and less prestigious protection being afforded to a broader circle of inherently different entities (Buchstein, 2000). Consequently, I argue for the creation of a special legal regime for robots, which will be conceptualised below.

1.5. Robots as economic actors

Artificial intelligences play a crucial role in the management of economic life: several platforms are maintained by AIs, and many business people take their most important decisions with the help of such entities (Solaiman, 2017). However, the humanlike personality of electronic humanoids may also lead us to the conclusion that these entities will participate in economic life under the same conditions as human beings. If this idea is accepted, it is worth considering that robots follow a logic which is quite different to that of ordinary people, therefore, their involvement might open up new perspectives, while also generating several new risk factors in this field (Fossa, 2018a). It may be expected that electronic humanoids will tend to explore innovative solutions, which might contribute significantly to the evolution of the economy, allow more efficient use of resources and achieve sustainability (Hacker et al., 2020). It is also undeniable that artificial intelligences will make their own decisions in certain respects, regardless of human behaviour or human sensibilities (Rose, Scheutz & Schermerhorn, 2010).

More practical concerns should also be highlighted. A robot should be liable for any damage (Brożek & Jakubiec, 2017), which it has caused in conjunction with contracts (Hage, 2017), and it may also be subject to criminal responsibility (Simmler & Markwalder, 2019; Hallevy, 2013). It is debatable whether the current framework of criminal law is applicable to robots, because special crimes, and an adapted version of criminal sanctions need to be codified (Wallach & Allen, 2010, p. 139). Consequently, separate civil and criminal codes should be enacted to ensure the secure and accountable participation of electronic humanoids in economic life (Hakli & Mäkelä, 2016).

Despite the fact that, in my view, the current legal framework cannot allow the equal presence of human beings and robots, artificial intelligences do indeed play a decisive role in the human economy (MacDorman & Kahn, 2007). They represent people on stock exchanges, and make decisions on behalf of their owners; they manage several economic processes without direct human contribution and they serve marketing

purposes (Dahiyat, 2021). This very brief enumeration clearly demonstrates that electronic humanoids have diverse economic functions, and their significance is expected to increase continually (Magrani, 2019). The increasingly vital role of AI in the economy should not, however, lead us to the conclusion that robots must be vested with the same economic rights as ordinary people. At present, robots always serve certain human interests, and they play only a preparatory role or help to arrive at the best solutions. Yet the final decision remains with a natural person at the moment. In contrast, asserting that a robot has an independent personality suggests that it is able to and allowed to represent its own interests, and to conclude agreements with people, who will probably be less informed, and who work with inherently different methods of economic assessment. This difference does not stem primarily from the diverse background and resources of human, and artificial economic actors, but from the distinct structures of their two mentalities, or their two ways of functioning.

The economic role of electronic humanoids might also generate legitimate demands to reconsider certain rules, and to recognise robots as entities with a limited circle of autonomy. Nevertheless, it must be kept in mind that, at least for now, the margin of movement of artificial intelligences is not independent from their caretakers or owners, and their attitudes are inherently different than those of ordinary people. Therefore, it is highly risky to establish the same economic arena for these inherently different entities. At the current stage of technological development, robots should be vested neither with citizenship nor with human personality in a legal sense, as these suggestions seem to be premature at the moment. Instead, particular emphasis should be placed on the unique and new characteristics of robots, and a special legal framework should be established, which properly considers these individual circumstances, with special regard to the diversity of electronic humanoids. This approach is also in line with a recent report published by the European Supervisory Authorities, which stated that there is no need for immediate intervention in economic life due to the presence of artificial intelligences, but that new strategies should be elaborated for the long term.[9]

1.6. A special legal framework for robots: a new subgroup of things governed by ius in rem

It has been argued in each of the subchapters of this short paper that I am strongly against the full personalisation of robots at the moment (Armstrong & Mason, 2011). However, I am fully aware of the particular significance of this topic, as robots are having an ever-greater impact on our life almost on a daily basis (see Hakli & Seibt, 2017). The legal framework is typically only able to follow the extremely rapid social, technological and economic changes after a delay (Danaher, 2016); nevertheless, it is always worth endeavouring to adapt the existing legal framework to the changing

[9] Joint Committee of the European Supervisory Authorities, Joint Committee Report on the results of the monitoring exercise on 'automation in financial advice', JC 2018-29 (5 September 2018). Online: https://esas-joint-committee.europa.eu/Publications/Reports/JC%202018%2029%20-%20JC%20Report%20on%20automation%20in%20financial%20advice.pdf

demands (Aitchison, 2018). As part of these efforts, I recommend developing a multi-level system, which makes distinctions between electronic humanoids according to their mental capacities. This study will propose only a basic outline of such a possible system, with some further points for consideration, since an in-depth concept can only be the result of a long-term, inclusive and intense professional discussion.

First of all, I would argue that electronic humanoids be regulated as a special type of object which may be held as property by humans, since despite certain human characteristics, these entities can be distinguished clearly from ordinary people (Fischer, 2014). Nevertheless, within the framework of ius in rem, a special regime should be applied to electronic humanoids, similarly to the rules concerning animals, as the human-like skills of these entities such as mutual communication or conscious thinking ought not to be underestimated (McFarland et al., 1997). However, the legal concept of animals cannot be applied directly to artificial intelligences, as these entities show a greater degree of diversity from a legal perspective than animals (Nurse & Ryland, 2013). Moreover, the humanlike abilities of at least the most developed robots are much broader than those of animals (Elton, 1997).

In the light of these considerations, my proposal is to work out systems of criteria which can determine what kind of robots should be classified into which level (Alač, Movellan & Tanaka, 2013). For instance, if a robot is able to express itself clearly, this could constitute a particular level of the system, and if it is able to answer its partner, and thus participate in bilateral communications, this amounts to a higher level of autonomy (Brinck & Balkenius, 2020). This structure is somewhat similar to the classification of self-driving cars, where five main categories have been identified, although not all of them have been developed in reality (Luetge, 2017). The legal classification of artificial intelligences thus needs to be formulated for the long-term, and the highest level of their potential further development should also be taken into account while drawing up such a legal framework (Contissa, Lagioia & Sartor, 2017). The basic idea of classifying robots originates from some leading European artificial intelligence experts, who also suggested registering each autonomous artificial intelligence.[10]

As I conceptualised earlier, only those robots would be classified, which have a humanlike physical body, and whose circumstances are therefore at least comparable with the needs and capabilities of human beings. Consequently, automatised software, and artificial intelligences without a palpable body would be excluded from this concept, and the envisaged system would establish five categories of humanoid robots.

Apart from possessing a physically plausible body, the communication skills, physical integrity and mental abilities of the robots are the key factors in their classification. On these grounds, I outline here the provisional contours of five main categories, which represent a potential approach to robotic rights and duties. This concrete framework is obviously subject to further discussion and the main novelty of this study is of the proposal for a five-level system similar to the classification of self-driving cars itself.

[10] European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)). Online: www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html

In my view, the first category of humanoid robots would be able to participate in bilateral communications, and these entities should be vested with communication-related fundamental rights. For instance, the right to privacy and freedom of expression are rights of a kind which might be relevant even for the first class of humanoid artificial intelligences. Not only the scope, but also the limits of these fundamental rights should be applied to artificial intelligences. These robots are still controlled by their custodians, creators or by the business people who financed their creation. However, these robots are not available for human property. Despite certain humanlike abilities, the potential external influence on the functioning of these entities precludes them from full legal personality.

The second subgroup is constituted by artificial intelligences which are capable of adapting their behaviour to the particular situation and which communicate with stakeholders consciously and purposively. These entities are still under external influence, for instance, they are activated or switched off by people, but they are able to think over a given situation using their own strategies. This limited autonomy makes it possible for these entities to interact fully independently with third parties, which requires their liability for the harm these robots cause, and for potential crimes which they may commit.

The third category would be composed of robots which could learn from their surroundings, and which could remember the experiences they have been through. These entities may elaborate long-term strategies, and they may use their former experience during communication, so the level of their consciousness is higher and they would be able to develop their skills continuously. These robots may be entitled to exercise cultural rights, and the right to education, which would distinguish them from the second subgroup.

The fourth class of robots is able to make decisions autonomously, so their mental capacity is not only sufficient to remember and learn, but also to construct a decision-making process, and to execute a particular decision coherently. This class may have certain level of robotic dignity, which enables them to exercise most of the fundamental rights and duties which are not inherently attached to human beings. Political rights should be excluded from the scope of this concept, as due to their lack of a fixed life span, fourth-class robots may not join the democratic political community. In my view, the current state of technological development is somewhere between the third and the fourth aforementioned category, since the most advanced existing robots are able to learn and remember, but there is no currently known humanoid artificial intelligence, which can make a wide range of humanlike autonomous decisions.

The fifth group of robots will probably be relevant in the future, when artificial intelligences would have an accountable life span, which could not be influenced externally by specific individuals. If or when we are able to provide an adequate answer to the question of when a robot is born and when it dies, and external influence on this longevity via electronic means is excluded, then at that point the most advanced robots might gain full legal personality. They would also participate in political life, they would vote, and would be elected to certain positions and citizenship may be awarded to such entities. At the moment, we are very far from this situation, which would entail artificial

general intelligence, but the scale should also reflect potential and expected forthcoming development.

This brief presentation of a five-level concept may demonstrate what the key idea of this study would mean in practice, but I fully acknowledge, that a huge number of important details are still to be elaborated and clarified. Nevertheless, I am convinced that in the light of the rapidly emerging significance of artificial intelligence, without such a regulatory framework, operating our legal system would not be feasible in the long term.

If the legal standards of the classification of electronic humanoids were to be established, precise humanlike rights and duties need to be attached to each level of robotic autonomy. This approach could safeguard legal certainty even within the changing circumstances, and the social participation of robots could be rendered accountable and predictable. In these circumstances, the traditional borders of the law should be extended, and instead of interpreting the existing legal system creatively by such means as the reconsideration of citizenship, completely new legal solutions are required. Therefore, the system of five main robotic categories with diverse legally enforceable rights and duties could be suitably balanced against the ability of electronic humanoids to make conscious decisions and to participate in human communications, including the aspects which distinguish even the most developed robots from real humanoids. In my view, a new regulatory framework should not be based primarily on those legal concepts which are applicable to people, but should treat electronic humanoids as a separate category of entities, which happen to possess some humanlike characteristics. This approach would not relativise the human status, and consequently have legal consequences, but it would safeguard the legal consideration of robotic autonomy. Since the exact elaboration of the criteria for establishing categories should be grounded on an interdisciplinary assessment (Veruggio & Operto, 2006), this paper can only highlight initial points of reference, which might orient the legal logic of further discussion on this matter. As the greater significance of intelligent robots influences ever more areas of life, all related disciplines should be involved in this consultation process, which would allow the precise scope of humanlike robotic rights and duties to be outlined, if only as a reference point for the future. By taking such a path, in harmony with the approach of the European Commission,[11] electronic humanoids may constitute a meaningful opportunity to foster innovation and economic growth, rather than being an unpredictable risk factor (Nomura et al., 2006).

2. Conclusion

This paper argued against granting full legal personhood and citizenship to electronic humanoids, but acknowledged the necessity of shaping a separate legal framework for

[11] Committee and the Committee of the Regions, Artificial Intelligence for Europe, COM (2018) 237 final (25 April 2018), p. 3. Online: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0237&from=EN

this rapidly emerging category of entities. While a number of examples could be cited as evidence of the rapid spread of robots across the world, from a legal perspective the first robot citizen, Sophia generated the most attention globally.

My argumentation reflected on the legal implications of the continuous development of electronic humanoids. These entities constitute a highly diverse and constantly changing category, which must be treated legally with exceptional caution (Müller, 2021). Therefore, a combined set of criteria was proposed, suggesting five different levels of robotic autonomy, which could provide a stable and objective point of reference to regulate the participation in society of artificial intelligences. The case of Sophia is probably premature, but in the light of current global tendencies, a great number of similar robots will be probably produced in the future, and their legal status will continue to be dubious. In my view, the human character of these entities should not be recognised, but their humanlike skills should be clearly reflected by the legal framework.

I am aware of the fact that this contribution left more questions open than it closed. My first aim was not to give final and exclusive answers, but to raise certain new ideas to generate further deep and intense professional discussion on the potential legal personhood and citizenship of electronic humanoids. As the outcome of this long-term scientific process, the well-regulated social participation of electronic humanoids will hopefully be treated as a source of new opportunities rather than an unpredictable risk factor.

References

Aitchison, G. (2018). Rights, citizenship and political struggle. European Journal of Political Theory, 17(1), 147–148. Online: https://doi.org/10.1177/1474885115578052

Alač, M., Movellan, J. & Tanaka, F. (2011). When a robot is social: Spatial arrangements and multimodal semiotic engagement in the practice of social robotics. Social Studies of Science, 41(6). Online: https://doi.org/10.1177/0306312711420565

Anderson, K., Reisner, D. & Waxman, M. (2014). Adapting the Law of Armed Conflict to Autonomous Weapon Systems. International Law Studies, 90, 386–411. Online: https://bit.ly/3CvnPWG

Anderson, S. L. (2008). Asimov's "Three Laws of Robotics" and Machine Metaethics. AI and Society, 22(4), 477–493. Online: https://doi.org/10.1007/s00146-007-0094-5

Armstrong, C. & Mason, A. (2011). Introduction: Democratic citizenship and its futures. Critical Review of International Social and Political Philosophy, 14(5), 553–560. Online: https://doi.org/10.1080/13698230.2011.617118

Ashley, K. D. (2017). Artificial Intelligence and Legal Analytics. New Tools for Law Practice in the Digital Age. Cambridge University Press. Online: https://doi.org/10.1017/9781316761380

Atabekov, A. & Yastrebov, O. (2018). Legal Status of Artificial Intelligence Across Countries: Legislation on the Move. European Research Studies Journal, 21(4), 773–782. Online: https://doi.org/10.35808/ersj/1245

Balkin, J. B. (2015). The Path of Robotics Law. The Circuit, Paper 72. Online: https://bit.ly/3noAPsJ

Barber, M. D. (2008). The Participating Citizen. Human Studies, 31(2), 229–232.

Barfield, W. & Pagallo, U. (2018). Research Handbook on the Law of Artificial Intelligence. Edward Elgar Publishing. Online: https://doi.org/10.4337/9781786439055

Beck, S. (2016). The Problem of Ascribing Legal Responsibility in the Case of Robotics. Artificial Intelligence and Society, 31(4), 473–481. Online: https://doi.org/10.1007/s00146-015-0624-5

Bellini, P. (2016). Virtualization of the Real and Citizenship. People, Power, Society, and Persons. Philosophy and Public Issues (New Series), 6(3), 79–93. Online: https://bit.ly/30DkGqM

Benhabib, S. (2006). Democratic Boundaries and Economic Citizenship. Enhancing the "Rights of Others". Social Philosophy Today, 22, 249–260. Online: https://doi.org/10.5840/socphiltoday20062211

Brettschneider, C. (2011). Free and Equal Citizenship and Non-Profit Status. Political Theory, 39(6), 785–792. Online: https://doi.org/10.1177/0090591711419475

Brinck, I. & Balkenius, C. (2020). Mutual Recognition in Human-Robot Interaction: a Deflationary Account. Philosophy and Technology, 33(1), 1–18. Online: https://doi.org/10.1007/s13347-018-0339-x

Brożek, B. & Jakubiec, M. (2017). On the legal responsibility of autonomous machines. Artificial Intelligence and Law, 25(3), 293–304. Online: https://doi.org/10.1007/s10506-017-9207-8

Buchstein, H. (2000). Cybercitizens and theory of democracy. Filosofický časopis, 48(6), 973–998.

Buiten, M. C. (2019). Towards Intelligent Regulation of Artificial Intelligence. European Journal of Risk Regulation, 10(1), 41–59. Online: https://doi.org/10.1017/err.2019.8

Calo, R., Froomkin, A. M. & Kerr, I. (2016). Robot Law. Edward Elgar Publishing. Online: https://doi.org/10.4337/9781783476732

Castro, V. F. (2014). Shaping Robotic Minds. In J. Seibt, R. Hakli & M. Norskov (Eds.), Sociable Robots and the Future of Social Relations (pp. 71–78). IOS Press.

Cerka, P., Grigiene, J. & Sirbikyte, G. (2017): Is it possible to grant legal personality to artificial intelligence software systems? Computer Law & Security Review, 33(5), 685–699. Online: https://doi.org/10.1016/j.clsr.2017.03.022

Chen, J. & Burgess, P. (2019). The boundaries of legal personhood: how spontaneous intelligence can problematise differences between humans, artificial intelligence, companies and animals. Artificial Intelligence and Law, 27(1), 73–92. Online: https://doi.org/10.1007/s10506-018-9229-x

Chopra, S. & Laurence, F. W. (2011). The Legal Theory of Autonomous Artificial Agents. University of Michigan Press. Online: https://doi.org/10.3998/mpub.356801

Comstock, G. (2015). Do Machines Have Prima Facie Duties? In S. P. van Rysewyk & M. Pontier (Eds.), Machine Medical Ethics (pp. 79–92). Springer. Online: https://doi.org/10.1007/978-3-319-08108-3_6

Contissa, G., Lagioia, F. & Sartor, G. (2017). The Ethical Knob: ethically-customisable automated vehicles and the law. Artificial Intelligence and Law, 25(3), 365–378. Online: https://doi.org/10.1007/s10506-017-9211-z

Cuthbertson, A. (2017, November 6). Tokyo: Artificial Intelligence 'Boy' Shibuya Mirai Becomes World's First AI Bot to Be Granted Residency. Tech & Science. Online: https://bit.ly/3DdzJpn

Dabass, J. & Dabass, B. S. (2018). Scope of Artificial Intelligence in Law. Preprints, 2018060474. Online: https://doi.org/10.20944/preprints201806.0474.v1

Dahiyat, E. A. R. (2021). Law and software agents: Are they "Agents" by the way? Artificial Intelligence and Law, 29(1), 59–86. Online: https://doi.org/10.1007/s10506-020-09265-1

Danaher, J. (2016). Robots, law and the retribution gap. Ethics and Information Technology, 18(4), 299–309. Online: https://doi.org/10.1007/s10676-016-9403-3

De Cock Buning, M., Belder, L. & de Bruin, R. (2012). Mapping the legal and normative framework for the sustainable development of Autonomous Intelligent Systems in Society. In S. Muller, S. Zouridis, M. Frishman & L. Kistemaker (Eds.), The Law of the Future and the Future of Law (Vol. 2, pp. 195–210). Torkel Opsahl Academic Publisher.

Deva, S. (2012). Can Robots have Human Rights Obligations? A Futuristic Exploration. In S. Muller, S. Zouridis, M. Frishman & L. Kistemaker (Eds.), The Law of the Future and the Future of Law (Vol. 2, pp. 185–194). Torkel Opsahl Academic Publisher.

Di Bello, M. & Verheij, B. (2020). Evidence & decision making in the law: theoretical, computational and empirical approaches. Artificial Intelligence and Law, 28(1), 1–5. Online: https://doi.org/10.1007/s10506-019-09253-0

Donaldson, S. & Kymlicka, W. (2013). Reply: Animal Citizenship, Liberal Theory and the Historical Moment. Dialogue, 52(4), 769–786. Online: https://doi.org/10.1017/S0012217313000863

Eidenmueller, H. G. M. (2017). The Rise of Robots and the Law of Humans. Oxford Legal Studies Research Paper, 27, 1–15. Online: https://doi.org/10.2139/ssrn.2941001

Elton, M. (1997). Robots and Rights: the ethical demands of Artificial Agents. Ends and Means, 1(2).

Ferracioli, L. (2017). Citizenship Allocation and Withdrawal: Some Normative Issues. Philosophy Compass, 12(12). Online: https://doi.org/10.1111/phc3.12459

Fischer, K. (2014). People do not interact with Robots like they do with dogs. Interaction Studies, 15(2), 201–204. Online: https://doi.org/10.1075/is.15.2.07fis

Fossa, F. (2018a). Artificial Moral Agents: Moral Mentors or Sensible Tools? Ethics and Information Technology, 20(2), 115–126. Online: https://doi.org/10.1007/s10676-018-9451-y

Fossa, F. (2018b). Legal Fictions and the Essence of Robots: Thoughts on Essentialism and Pragmatism in the Regulation of Robotics. In M. Coeckelbergh, J. Loh, M. Funk, J. Seibt & M. Nørskov (Eds.), Envisioning Robots in Society – Power, Politics, and Public Space (pp. 103–111). IOS Press.

Gohd, Ch. (2018, July 11). Here's What Sophia, the First Robot Citizen, Thinks About Gender and Consciousness. Live Science. Online: https://bit.ly/3cpGQPP

Gunkel, D. J. (2018). The Other Question: Can and Should Robots Have Rights? Ethics and Information Technology, 20(2), 87–99. Online: https://doi.org/10.1007/s10676-017-9442-4

Hacker, P., Krestel, R., Grundmann, S. & Naumann, F. (2020). Explainable AI under contract and tort law: legal incentives and technical challenges. Artificial Intelligence and Law, 28(4), 415–439. Online: https://doi.org/10.1007/s10506-020-09260-6

Hage, J. (2017). Theoretical foundations for the responsiblity of autonomous agents. Artificial Intelligence and Law, 25(3), 255–271. Online: https://doi.org/10.1007/s10506-017-9208-7

Hakli, R. & Mäkelä, P. (2016). Robots, Autonomy, and Responsibility. In J. Seibt, M. Nørskov & S. S. Andersen (Eds.), What Social Robots Can and Should Do: Proceedings of Robophilosophy 2016 (pp. 145–154). IOS Press. Online: https://doi.org/10.3233/978-1-61499-708-5-145

Hakli, R. & Seibt, J. (Eds.) (2017). Sociality and Normativity for Robots. Studies in the Philosophy of Sociality. Springer. Online: https://doi.org/10.1007/978-3-319-53133-5

Hallevy, G. (2013). When Robots Kill – Artificial Intelligence Under Criminal Law. Northeastern University Press.

Hart, R. D. (2018, February 14). Saudi Arabia's robot citizen is eroding human rights. Quartz. Online: https://qz.com/1205017/saudi-arabias-robot-citizen-is-eroding-human-rights/

Hovdal-Moan, M. (2014). Unequal Residence Statuses and the Ideal of Non-Domination. Critical Review of International Social and Political Philosophy, 17(1), 70–89. Online: https://doi.org/10.1080/13698230.2013.851483

Khisamova, Z. I., Begishev, I. R. & Gaifutdinov, R. R. (2019). On Methods to Legal Regulation of Artificial Intelligence in the World. International Journal of Innovative Technology and Exploring Engineering, 9(1), 5159–5162. Online: https://doi.org/10.35940/ijitee.A9220.119119

Kingston, J. (2017). Using artificial intelligence to support compliance with the general data protection regulation. Artificial Intelligence and Law, 25(3), 429–443. Online: https://doi.org/10.1007/s10506-017-9206-9

Lindemann, G. (2016). Social interaction with robots: three questions. AI & Society, 31, 573–575. Online: https://doi.org/10.1007/s00146-015-0633-4

Luetge, Ch. (2017). The German Ethics Code for Automated and Connected Driving. Philosophy and Technology, 30(4), 547–558. Online: https://doi.org/10.1007/s13347-017-0284-0

MacDorman, K. F. & Kahn, P. H. Jr. (2007). Introduction to the Special Issue on Psychological Benchmarks of Human–Robot Interaction. Interaction Studies, 8(3), 359–362. Online: https://doi.org/10.1075/is.8.3.02mac

Magrani, E. (2019). New perspectives on ethics and the laws of artificial intelligence. Internet Policy Review, 8(3), 1–19. Online: https://doi.org/10.14763/2019.3.1420

McFarland, D., Bosser, T., Cherian, S. & Troxell, W. O. (1997). Intelligent behavior in animals and robots. Minds and Machines, 7(3), 452–455. Online: https://doi.org/10.1023/A:1008253713397

Miller, L. F. (2015). Granting Automata Human Rights: Challenge to a Basis of Full-Rights Privilege. Human Rights Review, 16(4), 369–391. Online: https://doi.org/10.1007/s12142-015-0387-x

Mitterauer, B. J. (2013). Robots with Consciousness: Creating a Third Nature. International Journal of Machine Consciousness, 5(2), 179–193. Online: https://doi.org/10.1142/S1793843013500054

Müller, V. C. (2021). Ethics of Artificial Intelligence and Robotics. In E. N. Zalta (Ed.), The Stanford Encyclopedia of Philosophy (Summer 2021 Edition). Online: https://plato.stanford.edu/archives/sum2021/entries/ethics-ai/

Nomura, T., Suzuki, T., Kanda, T. & Kato, K. (2006). Measurement of Negative Attitudes Toward Robots. Interaction Studies, 7(3), 437–454. Online: https://doi.org/10.1075/is.7.3.14nom

Nurse, A. & Ryland, D. (2013). A question of citizenship. Journal of Animal Ethics, 3(2), 201–207. Online: https://doi.org/10.5406/janimalethics.3.2.0201

Palmerini, E., Bertolini, A., Battaglia, F., Koops, B.-J., Carnevale, A. & Salvini, P. (2016). RoboLaw: Towards a European framework for robotics regulation. Robotics and Autonomous Systems, 86, 78–85. Online: https://doi.org/10.1016/j.robot.2016.08.026

Perina, M. L. (2006). Race and the Politics of Citizenship: The Conflict Over Jus Soli and Jus Sanguinis. International Studies in Philosophy, 38(2), 123–139. Online: https://doi.org/10.5840/intstudphil20063827

Rem, D. & Gasper, D. (2018). Citizens and Citizenship. International Journal of Social Quality, 8(1), 21–48. Online: https://doi.org/10.3167/IJSQ.2018.080103

Retto, J. (2017). Sophia, First Citizen Robot of the World. Manuscript. Online: https://bit.ly/3nrcLWl

Reynolds, E. (2018, June 1). The agony of Sophia, the world's first robot citizen condemned to a lifeless career in marketing. Wired. Online: https://bit.ly/3wNMzbl

Rose, R., Scheutz, M. & Schermerhorn, P. (2010). Towards a Conceptual and Methodological Framework for Determining Robot Believability. Interaction Studies: Social Behaviour and Communication in Biological and Artificial Systems, 11(2), 314–335. Online: https://doi.org/10.1075/is.11.2.21ros

Schellekens, M. (2015). Self-driving cars and the chilling effect of liability law. Computer Law & Security Review, 31(4), 506–517. Online: https://doi.org/10.1016/j.clsr.2015.05.012

Scherer, M. U. (2016). Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies. Harvard Review of Law and Technology, 29(2), 354–400. Online: https://bit.ly/30uHs4g

Schwitzgebel, E. & Garza, M. (2015). A Defense of the Rights of Artificial Intelligences. Midwest Studies in Philosophy, 39(1), 98–119. Online: https://doi.org/10.1111/misp.12032

Sharkey, A. (2014). Robots and Human Dignity: A Consideration of the Effects of Robot Care on the Dignity of Older People. Ethics and Information Technology, 16(1), 63–75. Online: https://doi.org/10.1007/s10676-014-9338-5

Simmler, M. & Markwalder, N. (2019). Guilty Robots? – Rethinking the Nature of Culpability and Legal Personhood in an Age of Artificial Intelligence. Criminal Law Forum, 30(1), 1–31. Online: https://doi.org/10.1007/s10609-018-9360-0

Solaiman, S. M. (2017). Legal personality of robots, corporations, idols and chimpanzees: a quest for legitimacy. Artificial Intelligence and Law, 25(2), 155–179. Online: https://doi.org/10.1007/s10506-016-9192-3

Solum, L. B. (1992). Legal Personhood for Artificial Intelligences. North Carolina Law Review, 70(4), 1231–1287. Online: https://unc.live/30pRvYm

Stone, Z. (2017, November 7). Everything You Need To Know About Sophia, The World's First Robot Citizen. Forbes. Online: https://bit.ly/3H9joUV

Verheij, B. (2020). Artificial intelligence as law. Artificial Intelligence and Law, 28(1), 181–206. Online: https://doi.org/10.1007/s10506-020-09266-0

Veruggio, G. & Operto, F. (2006). Roboethics: A Bottom-Up Interdisciplinary Discourse in the Field of Applied Ethics in Robotics. International Review of Information Ethics, 6, 2–8. Online: https://doi.org/10.29173/irie133

Wallach, W. & Allen, C. (2010). Moral Machines: Teaching Robots Right from Wrong. Oxford University Press. Online: https://doi.org/10.1093/acprof:oso/9780195374049.001.0001

Walsh, A. (2017, October 28). Saudi Arabia grants citizenship to robot Sophia. Deutsche Welle. Online: https://bit.ly/3wLZgU6

Weller, Ch. (2017, October 26). A robot that once said it would 'destroy humans' just became the first robot citizen. Insider. Online: https://bit.ly/324KGvN

Wheeler, B. (2017). Giving Robots a Voice: Testimony, Intentionality, and the Law. In S. Thompson (Ed.), Androids, Cyborgs, and Robots in Contemporary Society and Culture (pp. 1–34). Hershey. Online: https://doi.org/10.4018/978-1-5225-2973-6.ch001

Wirtz, B. W., Weyerer, J. C. & Geyer, C. (2018). Artificial Intelligence and the Public Sector – Applications and Challenges. International Journal of Public Administration, 42(7), 596–615. Online: https://doi.org/10.1080/01900692.2018.1498103

Wirtz, B. W. & Müller, W. M. (2018). An integrated artificial intelligence framework for public management. Public Management Review, 21(7), 1076–1100. Online: https://doi.org/10.1080/14719037.2018.1549268

Zebrowski, N. (2007, December 3). Dr. Sobel on Personhood and Rights. Northwestern Chronicle.

Legal sources

Draft Report with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)) (31 May 2016). European Parliament, Committee on Legal Affairs. Online: https://bit.ly/3n1yTXb

Regulation 679/2016. The protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). European Parliament and Council. Online: https://bit.ly/3wzBPx8

Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (30 November 2016). A European Strategy on Cooperative Intelligent Transport Systems, a Milestone Towards Cooperative, Connected and Automated Mobility. Online: https://bit.ly/3n3WTc1

Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (17 May 2018). Europe on the Move. Sustainable Mobility for Europe: Safe, Connected, and Clean. Online: https://bit.ly/3kt5aVi

Public Governance, Administration and Finances Law Review Vol. 6. No. 2. (2021) • 121–132.

DOI: 10.53116/pgaflr.2021.2.9

Local Self-Governments and the Vertical Division of Power

Ádám Varga*

* Assistant professor, Pázmány Péter Catholic University; Junior Assistant Professor, University of Public Service, e-mail: varga.adam@jak.ppke.hu

Abstract: Local self-governments cannot be defined as entities against the state, nor do they merely assist in executing the central will. The significance of local self-governments lies in their role in the division and balancing of powers. In light of the principle of subsidiarity, the need for autonomy through decentralisation necessarily leads to the central bodies of the state being marginalised in these matters, in a sense, the latter lose their ability to solve the issues raised within their own sphere of competence.

From a certain point of view, this can even be considered a vertical division of power. The division of executive power between the public administration subordinated to the Government and independent local self-governments, does not call into question the local self-government's affiliation with the executive power. As such, it is practically an internal division of powers. In essence, it manifests itself as a kind of limited autonomy, which – due to the unity of the state – subsists only within the confines of the relevant laws.

In light of the foregoing, jointly applied principles lead to a vertical division of power. Power is divided, which, nonetheless, does not mean that one sovereign body limits another; it is rather the case of the state restraining itself by virtue of the principle of democracy.

Keywords: right to local self-government, vertical division of power, separated branch of power, protected powers

1. Opening remarks

According to the classical approach, the concept of municipal power was first introduced by Benjamin Constant, who added the requirement of vertical division of powers and decentralisation to the horizontal division of powers used so far (Csalló, 2014, p. 25). Today, the dominant model for the territorial division of powers in modern democratic state systems is that of self-government. As Ilona Pálné Kovács points out, there are essentially historical reasons for this since, in many countries, they were established before the central state institutional system and their collective nature was carried over into the unifying state organisation (Pálné Kovács, 2008, p. 13). Today, therefore, local self-government is a basic institution in all democratic states, but despite (or rather because of) this, the precise definition of local self-governance and local self-government

has been a century-old challenge for researchers. The main reason for this is that the idea of local self-governance is based on different foundations in different countries, and the paths of development are very different, too. István Ereky forthrightly argued that there are irreconcilable conflicts between the myriad theories of self-government (Ereky, 1932, p. 3). Of course, there are common basics, but there have been many differences in the details until recent times.

Local self-governments are in a vertical position compared to the classical actors in the division of powers. Opinions are divided among researchers on how to interpret this vertical position. Some argue that local self-governments must be seen as a separate branch of power. Others deny this and try instead to explain the situation of local self-governments by the vertical division of powers. Still others, however, argue that vertical division of powers can only be discussed in federal states, so it is meaningless in a unitary state. These authors typically see local self-government as a kind of restriction on the executive branch, or not even that.

However, looking at the individual constitutions, the situation is not clear either. Vertical division of powers is of course present in federal states, but there are also examples that focus explicitly on the role of local self-government: The Estonian Constitution treats local self-government as a separate branch of power,[1] and the Croatian Constitution formulates the right to local self-government as a limitation of the three branches of power.[2] Typically, however, the role of local self-governments in the division of powers can only be inferred from the interpretation of individual rules.

2. Local self-government and division of powers

When looking for the place of local self-governments in the system of branches of power, the primary question is on what basis we consider a branch of power to be a branch of power. Starting from the classical theories of John Locke and Montesquieu, and extending them in various ways, to the denial of the division of powers,[3] the theories on this subject are almost endless. A detailed examination of all this is not the subject of the present paper. By considering the existence of the division of powers as a constitutional fact,[4] I will only concentrate on how local self-governments can be placed in this system.

The division of powers is not about rigid separation but about mutual checks and balances (Fogarasi, Ivancsics & Kiss, 1994, p. 21). From an organisational point of view, any body performing a task of public authority can be seen as a separated branch of power, which is not dependent on other actors but limits their power. This makes the

[1] Constitution of the Republic of Estonia, Article 14.

[2] Constitution of the Republic of Croatia, Article 4.

[3] Benjamin Constant, for example, considered the division (separation) of powers as futile, because if the amount of power is infinite then the actors need only to form a coalition to tyrannise. The key is to ensure that no actor oversteps its authority (Constant, 1997, p. 81).

[4] In this respect, I also rely on Article C(1) of the Fundamental Law of Hungary, according to which the functioning of the Hungarian State shall be based on the principle of the division of powers.

list quite long, and it is clear that this approach also has a centuries-old tradition.[5] If, on the other hand, the branches of power are distinguished functionally, according to the type of task they perform, there is no reason to extend the classical triad. This does not, of course, exclude the possibility of several bodies sharing the responsibilities of one branch of power. Hence, with their autonomy, each actor of power may limit each other within a given branch of power, but each is the custodian of the realisation of a given type of task.

The challenges of our modern world make it less and less possible to follow a particularly rigid, institutional division. The proliferation of different bodies increasingly implies an increase in the complexity of the tasks they perform,[6] while it is difficult to deny that the activity they perform still falls within one of the three functions of state power (perhaps explicitly mixed). For this reason I can easily agree with András Zs. Varga, who suggests a functional approach to the division of powers instead of an institutional one, and sees a need to break with the one power – one organisation approach. No single branch of power can be tied to a single exclusive body, and an organisation does not typically exercise only one kind of power (Varga, 2019, pp. 37–38).

This raises the question of whether local self-governments can be considered a separate branch of power. The emergence of municipal power in legal literature is usually associated with the work of Constant. It is true that, according to him:

> Until now, local government has been regarded as a dependent branch of the executive; on the contrary, it must never be an obstacle to it, but it should not be dependent on it either. If the interests of the parts and of the whole country are entrusted to the same hands, or if the local interests are made to be represented by depositaries, there will be many evils, and even those evils which seem to be mutually exclusive will coexist (Constant, 1862, p. 126).[7]

Constant is said by many to have added local self-government to the triad of the branches of power, but I see this as an oversimplification. His theory suggests, first of all, that local self- governments are in a vertical position in relation to the central executive power, and that they have protected functions; that is, the principles of subsidiarity and autonomy actually make local governments the counterbalance of power. János Sári also interprets Constant's theory in such a way that he does not speak of a separate branch of power but only of a division based on locality, which presupposes self-interest (Sári, 2007, p. 42). Ereky draws attention to its practical application, reporting that in Belgium, to counteract the extreme centralisation, the constitution recognised county or municipal power as the fourth branch of power in addition to those named by Montesquieu. In principle, many authors have tried to base the French model of decentralisation on this, but in reality, they have developed and codified the principles of the French system of modern local self-government (Ereky, 1939, p. 192). What is

[5] Moreover, the extension of the division of powers to dimensions that are not or not necessarily linked to the exercise of public power is not new (Erdős & Smuk, 2017, p. 139).

[6] Examples include the activities of the Court of Auditors or the Ombudsman of Hungary.

[7] It can be read in French in the 'new' edition of the *Cours de politique constitutionnelle,* ed. by Jean-Pierre Pagès, Paris, Didier, 1836, vol. I, 151.

certain is that, in the wake of Constant's theory, questions about the local self-government being an autonomous, separate branch of power have popped up again and again in the legal literature, but for a long time they have not really managed to take root. Zoltán Magyary, for example, considered it a matter settled by science that local self-government is a simple form of executive power, in which, however, the nation is not only involved in the exercise of executive power through parliamentarism prevailing in the sphere of legislative power but also directly complementing and, together with the representation of the people, constituting full constitutionalism. However, according to him, local self-government is necessarily and exclusively a state executive function, in which the members of the nation, in the service of the state, carry out the will of the state on themselves (Magyary, 1930, p. 166).

It was only in the second half of the twentieth century that the neoliberal development of the state began to go back to Constant's principle and the natural law origins of local self-government, and with it the classification of local self-government as a separate branch of state power. According to István Balázs, these are ideas that absolutise the democratic nature and autonomy of local self-governments, which reached their peak in the decentralisation reforms and regionalisation of the 1980s (Balázs, 2014, p. 298). Zsuzsanna Árva also stresses that the classical Montesquieuian concept of separation of powers is hardly applicable in the modern era. According to her, there are several factors (their status separate from the state administration, their autonomy) related to local self-governments established based on the principle of decentralisation, which raise the question of recognition as a factor of power (Árva, 2014, pp. 37–38). According to the view labelled conservative by Balázs, local self-governments performing executive branch functions have the character of being a separate branch of power because of their autonomy while, according to the other view, in addition to executive functions, they also perform the territorial division of state power, and therefore they effectively function as a separate branch of power. The difference is more theoretical, manifested in the relationship with state bodies, since, if local self-government functions as a separate branch of power, it has looser links to central state bodies and looser control by the Government. The practical relevance of this issue was greater in the case of the newer democracies that emerged from dictatorships (the more radically independent branch of power characteristic emerged as a counter-effect), but the global economic crisis has also forced a reassessment of their role in these states (Balázs, 2014, pp. 298–299).

The perception of them as a separate branch of power is therefore dynamically changing in both time and space,[8] and, in my view, the significance of the question in this form is negligible. While there are some authors who posit local self-governments as a separate branch of power, many focus more explicitly on vertical division of powers (e.g. Veress, 2005, p. 260), whereas others focus more on the exercise of autonomy (e.g. Ivancsics, 1996, p. 185) or the realisation of a counterbalance of power (e.g. Berényi, 2003, p. 309) from a practical perspective.

[8] According to Péter Szegvári, for example, local self-governments could be considered to be a separate branch of power under the Constitution rather than under the system of the Fundamental Law (Szegvári, 2017, p. 763).

In my view, local self-governments do not perform a different type of function compared to the other branches of power (they are close to the executive power, but they are also representative and autonomous in their rule-making; see Csink, 2014, p. 155); they just do it on a different level. Their position cannot therefore be understood in a system of division of powers created based on a horizontal logic, and their relations with other actors can only be understood vertically.

3. Federation versus local self-government, vertical division (separation) of powers in the narrow sense

In the light of the above, the possibility arises that the conceptual ambiguity could be resolved through the principle of vertical division of powers. However, this also presents a number of difficulties. The vertical division of powers is generally based on the principle that the exercise of power can be subdivided into certain territorial or corporate levels. The principle of division of powers is also implemented by the division of state power into central, regional or local levels or autonomous bodies (Petrétei, 2018, p. 30). Vertical division (in the original sense: separation) of powers is a product of American legal doctrine. In the broadest sense, it prevails when the decision-making freedom of one body is limited, or at least counterbalanced, by another body organised on a different territorial basis (Csink, 2014, p. 156).

In federal states, the powers of the federal parliament are limited to regulating matters at the federal level, while the powers of the member states enjoy strict constitutional protection (Erdős & Smuk, 2017, p. 138). In these states, both the member state level and the federal level have the attributes of statehood and the member states join the federation in possession of their sovereignty. As they retain their sovereignty within the federal state, it is necessary to settle which powers belong to the federation and which to the member state. This inevitably leads to a vertical division (separation) of powers, where sovereign constrains sovereign. It should also be noted, however that, in Hans Kelsen's interpretation for example, the essence of the federal state is the degree and type of decentralisation, which requires a specific constitutional premise. In this, he did not consider the method of formation and the existence of sovereignty (whether only the central state, only the member state, or both are sovereign) to be important; he considered it a pseudo-problem (Kelsen, 1927, pp. 59–60).

In contrast, in unitary states, local self-governments do not have any rights – in a public law sense – to counterbalance legislative power, but the right of local communities to self-government must be respected by the state (Szoboszlai, 2011, p. 29). In addition, however, the legislative powers of the Parliament in these states are very broad, leaving it to the political discretion of the national assembly to distinguish between local and national matters (Erdős & Smuk, 2017, p. 138). Local self-governments are not mini-republics, but an integral part of the state mechanism, from which, however, the powers granted to them by law make them relatively separate and autonomous (Fogarasi, Ivancsics & Kiss, 1994, p. 21).

While in a federation, the sovereignty of the member states remains intact in matters that do not fall under federal competence; the local self-governments in a unitary state (or within a member state of a federal state) may influence the central power, but they are always subject to the authority of the central power (Dezső & Somody, 2007, pp. 148–149). This means that the vertical division of powers achieved by the federal system is not in itself guaranteed.[9] At the same time, the presence of local self-governments results in an internal division of executive power, and therefore the local autonomy that is achieved plays a power-limiting role (Veress, 2005, p. 275). Magyary, for example, did not agree with this restrictive role. He divided the types so that the local self-government, in terms of its substance, can be political and administrative. Of these, political local self-government also has legislative power, so it does not maintain the unity of state law. He (also) identified this with federalism. In the other system, they maintain the unity of state law, but their administrative powers are not complete. The public power is centralised with the central government, so if the local self-government exercises a public power, it can only exercise it within the powers delegated and delimited by the state and not by original right and at will. Local self-government is, in his view, just a specific form of state administration (Magyary, 1942, p. 113). Ereky (1939, p. 193) presented a very similar French view on the same issue, with the difference that, in his opinion, the French do not recognise the distinction between administrative decentralisation and constitutional decentralisation (they only distinguish between federalisation and decentralisation).

It should also be stressed that in recent times, in an increasing number of countries, units that were previously considered to be of a local self-government nature have become similar to a member state, thus making differentiation relative (Hoffman, 2015, pp. 43–44). In regional states, regions have more extensive powers than local self-governments (for instance, they can have their own government), but their sovereignty is not recognised. Csaba Erdős and Péter Smuk argue that, in these states, the autonomous territory's independent share of the supreme power is not recognised, but its independent right to regulate is, and its exercise is possible even through the parliament, i.e. territorial autonomy is seen as a constitutional limitation of the central parliament (Erdős & Smuk, 2017, p. 138).

Kelsen's approach shows the relativity of demarcation and the possibility of transition quite well. He argues that the extension of local self-government decentralisation towards general norms (which usually implies a relatively larger spatial scope for local norms) creates a 'land' (country)-based decentralisation, whereby executive power, as well as legislative power, are shared between central and local bodies. It is difficult to distinguish these 'countries' from autonomous provinces, especially if the provinces can also pass autonomous statutes (possibly provincial laws) and if the bodies of the 'countries' are democratic as well. The only difference in this case is the greater legislative power, and from there – with increased decentralisation (which means constitutional

[9] Consequently, according to László Sólyom, the Hungarian Constitutional Court has never considered municipal autonomy as a quasi-federal structure. Only an ex-post examination of a local self-government decree for overstepping legislative power can be considered a hidden, quasi-federal review of powers (Sólyom, 2001, p. 769).

powers) – it is only a step to becoming a member state of the federal state. In any case, the member state also benefits from central legislative and executive powers through the Second Chamber of the Parliament (Kelsen, 1927, pp. 58–59).

On the basis of the above, it can be stated that only the system of federal states can be considered to have vertical division (separation) of powers in the literal sense of the word, and that this concept cannot be interpreted to mean the system of local self-governments within unitary states (or within a member state of a federal state).[10]

4. Vertical division of powers as an outcome

Many scholars go no further than the above approach, considering vertical division of powers a feature of the federal state structure, which essentially requires sovereignty to be limited by another sovereign. These approaches are very logical, but also very formal. I do not consider it inherently unacceptable to call the principle of federalism a vertical division of powers; however, I must also stress that, on the one hand, it is unfortunate to consider it the only vertical limit to power, and, on the other hand, it is not a view to be dismissed that everything which ultimately limits the exclusivity of central state power from a functional point of view can be considered a vertical division of powers.

The balance ensured by the division of powers (the essence of which, as stated above, is the mutual checks and balances) must also be reflected in the relationship between central and local power. The balance of power must also be present and characteristic of the vertical division of labour (Fogarasi, Ivancsics & Kiss, 1994, p. 21). In Péter Szegvári's approach, the fundamental rights and competences of local self-governments (following István Bibó's line of thought) technically enable the disruption of the concentration of power, as well as the establishment of vertical division of powers and the emergence of power competition (Szegvári, 2017, p. 765). Antal Ádám highlights that, in the constitutional definition of fundamental powers and in the legislation respecting them, there is a transfer of certain public powers, which he also calls vertical division of powers (Ádám, 2000, pp. 151–152). By vertical division of powers, Emőd Veress means the division of powers between the central state and the local self-government, within the executive (Veress, 2005, p. 294). Herbert Küpper also uses the term

[10] Lóránt Csink himself argues in favour of the above interpretation of vertical division of powers, but he also adds popular sovereignty to this and emphasises that, in a narrower sense, the legitimacy of the two institutions must be identical for the vertical division of powers to be realised, i.e. both must be the bearers of popular sovereignty. Consistent with other authors, he argues that, in federal states, both the member state and the federation have sovereignty, but in the unitary state there is no entity that also has sovereignty besides the central power. However, he also argues that if the people as a whole are the source of sovereignty, sections of the people are not. Obviously, the power of the state derives from the people and can be explained dogmatically, but linking state sovereignty and popular sovereignty so directly is rather problematic from a practical point of view. Csink himself uses this reasoning, which I think is the main argument against this approach. Namely that several federal states designate the people as a whole as sovereign. As far as Hungary is concerned, he resolves this by saying that vertical division of powers is not realised because local self-governments are not given sufficient powers and guarantees. This explanation, however, ultimately argues against rather than supports the direct link between popular sovereignty and vertical division of powers. But it is precisely for this reason that I myself attach importance to the role of popular sovereignty (Csink, 2014, pp. 156–157).

vertical division of powers to describe the division of power within the executive. The division of executive power to state administration that is subordinate to the Government and to autonomous local self-governments is a vertical division of powers, but it does not call into question that local self-government belongs to the executive power. It is, in effect, an internal division of powers, he says, with checks and balances, because, in practical terms, it is the executive that poses the greatest threat to individual freedom. He also mentions that the Constitutional Court essentially calls this autonomy (Küpper, 2009, pp. 1503–1504). In the context of checks and balances, Pálné Kovács argues that the American constitutional tradition also sees local self-governments as checks vis-à-vis the central state and the dictatorship of the majority. He therefore does not reject a constitutional solution based on the territorial division of power (Pálné Kovács, 1996, p. 132).

I believe that, if local power and central power respect each other's latitude, it necessarily leads to a vertical division of power. Not because there are duplicated levels of power, but precisely because there are not. Local self-governments clearly do not have state sovereignty and should not be seen as the central power's 'competitors'. On the contrary, both are acting in their own capacity. The state does not want to take over the affairs of local communities, while local self-governments do not want to be the state within the state. In this reading, this principle is mostly about self-limitation, which in turn leads to an ultimate division of power between the central and local levels. It is more a result than a starting point, and therefore could not be further from the principle of what we call vertical division of powers in the case of federal states. Yet the result is similar: The state does not interfere in local affairs and *vice versa,* i.e. the principles of autonomy and subsidiarity apply. In Reinhard Hendler's formulation, local self-government as an instrument of decentralisation leads to a plurality of state decision-makers, and serves to dismantle political power as an actor in the vertical division of powers (Hendler, 2007, p. 15). This division can be assessed primarily against the central executive power, but the legislative power must also respect the limits set by the constitutional power, such as the right to adopt regulations on local public affairs. The legislative is thus also limited, in that it cannot by law empty the powers of the local self-governments.

This derivation is obviously close to what can typically be included in the concept of autonomy. However, while autonomy provides an answer to the question of what the state decides that local self-governments have the right to do, the vertical division of powers is more helpful in answering why the possibility of state intervention in the implementation of autonomy needs in fact to be limited.

It must be readily acknowledged that, precisely because of the above arguments, it is perhaps unfortunate to call this principle vertical division of powers, as it can easily give rise to misunderstandings. I am convinced, however, that the emphasis should not be on the designation but on whether local self-government is ultimately capable of counterbalancing and limiting central state power. Therefore, in contrast to the classical approach of vertical division of powers, it is not the theoretical framework but rather the practical effects that I consider to be decisive. In agreement with Veress, two prerequisites must be highlighted for this to be feasible: On the one hand, the division of

central and local self-powers and, on the other, the possibility for local communities to have a different political choice (Veress, 2005, p. 275). This is what enables the local self-government to have the opportunity to make decisions within the limits of the law, based on its own interests, and different from the intentions of the central state power. However, to guarantee this, it is also essential that the freedom of local self-governments to do so is guaranteed by law and by the courts, as well. Jenő Kaltenbach highlights in particular that the autonomy of local self-government must be protected, even against legislation that is aimed at national political interests (so that the autonomy of local self-government cannot be abolished or fundamentally changed by a simple law), and at the same time, like the horizontal elements, local self-government must be subject to regulation by the constitution (Kaltenbach, 1991, pp. 136–137).

5. A summary of the process of vertical division of power

In light of the previous point, I will attempt to sketch in a nutshell how and why the interplay of the various principles of local self-government can lead to a vertical division of power. The scope of this paper does not allow for a detailed elaboration, but I will try to illustrate the main points.

My starting point is that local self-governments cannot be defined in opposition to the state, nor are they simply technical assistants to the state. The importance of local self-government lies rather in its power-sharing and power-balancing character (Stern, 1981, p. 204). Originally developed in many countries in opposition to absolutist state power, in a globalising world it is no longer possible to understand local self-government in its original sense, as all parts of the state are now democratically constructed (Hoffmann-Axthelm, 2004, pp. 13–14). In a parliamentary democracy, it is no longer the people against state power, but only the whole people against their own parts. On this basis, the importance of defending self-governance arises when the views of smaller communities need to be defended against the whole of the state, which holds all the power (Peters, 1926, p. 43).

Autonomy is one of the most important characteristics of local self-governance. Although autonomy and self-governance are commonly thought of as synonymous concepts, autonomy in relation to public institutions is really about self-regulation based on legal authority (Hendler, 2007, p. 12). Autonomy is therefore the right of a community other than a state to create law for itself (Peters, 1926, pp. 37–38). Necessarily limited, autonomy does not protect action that does not comply with the legal framework. As the autonomous body is part of a larger political system, the principle of autonomy must be reconciled with the principle of unity (Ladner et al., 2019, pp. 175–176).

The principle of subsidiarity makes it a natural requirement to seek local solutions to local problems. Even without a mention in the constitution, this principle is considered one of the most important principles (Knemeyer, 1990, p. 174). It prohibits unwarranted interference by higher levels of power in the sphere of competence of lower levels, i.e. interference that is incompatible with the common good (Frivaldszky, 2006,

p. 36), and specifies that the higher level may intervene in the relations of the lower level only in order to help it. However, this does not mean that these cases cease to be national cases. The local community may want to be given an appropriate degree of freedom and autonomy to manage and solve its own affairs. The subsidiarity principle both defines and limits freedom of action. Indeed, the legitimate authority is empowered to replace a failing actor if necessary (Berthet & Cuntigh, 2006, p. 186). This is why, in some cases, it is part of the subsidiarity principle to move certain tasks that are insoluble at a lower level to a higher level (Waschkuhn, 1995, p. 59). The European Charter of Local Self-Government also states that,[11] in general, public tasks need to be carried out primarily by the administrative body closest to the citizen. The delegation of tasks to another administrative body must depend on the nature and size of the task and on efficiency and economic requirements.[12]

Even so, this does not mean that the municipalities have sovereign power; in fact, it must depend on the wise discretion of the state to delegate the tasks. The way to achieve this is decentralisation, which is not only a practical principle of administrative organisation, but also a building block of local self-government (Soós, 2010, p. 57). If, on the basis of subsidiarity, the need for autonomy is asserted through decentralisation, this inevitably leads to the central bodies of the state being marginalised in relation to the issues involved and, in a sense, losing the possibility of solving the problems that arise under their own authority.

In some respects, this can even be called vertical division of powers, because in the constitutional definition of fundamental powers and in the legislation respecting them, there is a transfer of certain public powers (Ádám, 2000, pp. 151–152), which also serves to dismantle political power (Hendler, 2007, p. 15). However, apportioning executive power to state administration, which is subordinate to the government, and to autonomous local self-governments, does not call into question that local self-government belongs to the executive power. It is effectively an internal division of powers (Küpper, 2009, pp. 1503–1504). In terms of its outcome, it essentially manifests itself as a kind of limited autonomy, which, however, due to the unity of the state, exists only within the framework of the law.

The real emphasis is on having things that can be done locally, independently and democratically. The aim, in my view, is to ensure that local communities carry out tasks that are truly local and can be carried out on their own (with the help of the central level), with a focus on the principle of subsidiarity. These are the local self-government's functions and powers. In light of the above, the combination of principles leads to a vertical division of power. Power is divided, nevertheless, it is not a sovereign entity limiting the other sovereign entity, but the sovereign state limits itself by virtue of the principle of democracy.

In principle, it is the sovereign decision of the state to recognise what is a local public matter, but this also imposes obligations on the state in the context of subsidiarity. This could be ensured through deconcentration as well, but, through

[11] Convention on the European Charter of Local Self-Government, signed in Strasbourg on 15 October 1985.
[12] Local Self-Government Charter, Article 4(3).

decentralisation (thereby recognising autonomy), the central power necessarily limits itself, because it transfers powers to the local self-governments concerning which it cannot later claim to have the central executive power take over the decisions concerned. This leads to a situation where the central level of the state necessarily abdicates its right to decide on the issue. This, I am convinced, whatever the name, is effectively a vertical division of power.

References

Ádám, A. (2000). Az önkormányzati rendszer alkotmányi összefüggéseiről. In I. Verebélyi (Ed.), Egy évtized önkormányzati mérlege és a jövő kilátásai. MKI & MTA PTI & MTA RKK.

Árva, Zs. (2014). A helyi önkormányzás alkotmányos keretei, szervezeti rendszere, az önkormányzatok típusai Magyarországon. In I. Balázs (Ed.), Helyi önkormányzatok. Debreceni Egyetemi Kiadó.

Balázs, I. (2014). Új tendenciák a helyi önkormányzati rendszer szabályozásában Magyarországon és az Európai Unió tagországaiban. In I. Balázs (Ed.), Helyi önkormányzatok. Debreceni Egyetemi Kiadó.

Berényi, J. (2003). Az európai közigazgatási rendszerek intézményei. Rejtjel.

Berthet, T. & Cuntigh, P. (2006). Local Mirrors of State Modernisation: The Case of the Territorialisation of Employment Policy in France. In V. Hoffmann-Martinot & H. Wollmann (Eds.), State and Local Government Reforms in France and Germany. VS Verlag für Sozialwissenschaften. Online: https://doi.org/10.1007/978-3-531-90271-5_10

Constant, B. (1997). A régiek és a modernek szabadsága. Atlantisz.

Constant, B. (1862). Az alkotmányos politica tana. Trattner–Károlyi.

Constant, B. (1836). Cours de politique constitutionnelle, ed. by Jean-Pierre Pagès. Didier.

Csalló, K. (2014). Önkormányzás, autonómia. A helyi önkormányzatok szabályozási típusai Európában. In Cs. Feik, (Ed.), Magyarország helyi önkormányzatai. NKE KTK.

Csink, L. (2014). Mozaikok a hatalommegosztáshoz. Pázmány Press.

Dezső, M. & Somody, B. (2007). A szuverenitás. In I. Kukorelli (Ed.), Alkotmánytan I. Alapfogalmak, alkotmányos intézmények. Osiris.

Ereky, I. (1932). Közigazgatási reform és a nagyvárosok önkormányzata. Budapest Székesfőváros Házinyomdája.

Ereky, I. (1939). Közigazgatás és önkormányzat. Szeged Városi Nyomda és Könyvkiadó.

Erdős, Cs. & Smuk, P. (2017). Parlament és hatalommegosztás. In P. Takács (Ed.), Unitas multiplex. Ünnepi tanulmányok Szigeti Péter 65. születésnapjára. Gondolat & SZE DFK.

Fogarasi, J., Ivancsics, I. & Kiss, L. (1994). A helyi önkormányzatok kézikönyve. Unió.

Frivaldszky, J. (2006). Szubszidiaritás és az európai identitás a közösségek Európájáért. In J. Frivaldszky (Ed.), Szubszidiaritás és szolidaritás az Európai Unióban. Faludi Ferenc Akadémia.

Hendler, R. (2007). Grundbegriffe der Selbstverwaltung. In T. Mann & G. Püttner (Eds.), Handbuch der kommunalen Wissenschaft und Praxis. Band 1 Grundlagen und Kommunalverfassung. Dritte, völlig neu bearbeitete Auflage. Springer. Online: https://doi.org/10.1007/978-3-540-68884-6_1

Hoffman, I. (2015). Gondolatok a 21. századi önkormányzati jog fontosabb intézményeiről és modelljeiről. A nyugati demokráciák és Magyarország szabályozásainak, valamint azok változásainak tükrében. ELTE Eötvös.

Hoffmann-Axthelm, D. (2004). Lokale Selbstverwaltung – Möglichkeit und Grenzen direkter Demokratie. VS Verlag für Sozialwissenschaften. Online: https://doi.org/10.1007/978-3-322-81024-3

Ivancsics, I. (1996). A helyi és területi közigazgatás alkotmányi szabályozásának néhány alapkérdése és alternatívája. In I. Verebélyi (Ed.), A helyi önkormányzatok alkotmányi szabályozása. KJK – MTA ÁJTI.

Kaltenbach, J. (1991). Az önkormányzati felügyelet. Universum.

Kelsen, H. (1927). Az államelmélet alapvonalai. Szeged Városi Nyomda és Könyvkiadó.

Knemeyer, F.-L. (1990). Subsidiarität – Föderalismus, Dezentralisation: Initiativen zu einem „Europa der Regionen". Zeitschrift für Rechtspolitik, (5), 176–186.
Küpper, H. (2009). A helyi önkormányzás joga. In A. Jakab (Ed.), Az Alkotmány kommentárja II. Századvég.
Ladner, A., Keuffer, N., Baldersheim, H., Hlepas, N., Swianiewicz, P., Steyvers, K. & Navarro, C. (2019). Patterns of Local Autonomy in Europe. Palgrave Macmillan. Online: https://doi.org/10.1007/978-3-319-95642-8
Magyary, Z. (1930). A magyar közigazgatás racionalizálása. Királyi Magyar Egyetemi Nyomda.
Magyary, Z. (1942). Magyar közigazgatás – A közigazgatás szerepe a XX. sz. államában a magyar közigazgatás szervezete működése és jogi rendje. Királyi Magyar Egyetemi Nyomda.
Petrétei, J. (2018). Hatalommegosztás. In A. Jakab & B. Fekete (Eds.), Internetes jogtudományi enciklopédia. Online: http://ijoten.hu/szocikk/alkotmanyjog-hatalommegosztas
Pálné Kovács, I. (1996). A helyi önkormányzatok alkotmányos szabályozása. In I. Verebélyi (Ed.), A helyi önkormányzatok alkotmányi szabályozása. KJK & MTA ÁJTI.
Pálné Kovács, I. (2008). Helyi kormányzás Magyarországon. Dialóg Campus. Online: https://doi.org/10.17649/TET.22.1.1152
Peters, H. (1926). Grenzen der kommunalen Selbstverwaltung in Preussen. Springer. Online: https://doi.org/10.1007/978-3-642-47664-8
Sári, J. (2007). A hatalommegosztás és a társadalmi-többségi elv. In I. Kukorelli (Ed.), Alkotmánytan I. Alapfogalmak, alkotmányos intézmények. Osiris.
Soós, E. (2010). A szubszidiaritás mint a többszintű kormányzás működését meghatározó alapelv. In P. Á. Ferwagner & Z. Kalmár (Eds.), Távolabbra tekintve: tanulmányok J. Nagy László 65. születésnapjára. Universitas Szeged.
Sólyom, L. (2001). Az alkotmánybíráskodás kezdetei Magyarországon. Osiris.
Stern, K. (1981). Die Verfassungsgarantie der kommunalen Selbstverwaltung. In G. Püttner (Ed.), Handbuch der kommunalen Wissenschaft und Praxis. Band 1 Grundlagen. Zweite, völlig neu bearbeitete Auflage. Springer. Online: https://doi.org/10.1007/978-3-662-11967-9_14
Szegvári, P. (2017). A helyi önkormányzatok szerepváltozása a rendszerváltozás utáni alkotmányos rendszerben. In N. Chronowski, P. Smuk, Zs. Szabó & Z. Szentmiklósy (Eds.), A szabadságszerető embernek. Liber Amicorum István Kukorelli. Gondolat.
Szoboszlai, Gy. (2011). Búcsú a jogállamtól. A hatalommegosztás modellje a 2011. évi alaptörvényben. Eszmélet, (2), 5–31.
Varga, Zs. A. (2019). From Ideal to Idol? The Concept of the Rule of Law. Dialóg Campus.
Veress, E. (2005). A hatalommegosztás aktualitása. Magyar Kisebbség, (3–4), 236–297.
Waschkuhn, A. (1995). Was ist Subsidiarität? Ein sozialphilosophisches Ordnungsprinzip: Von Thomas von Aquin bis zur "Civil Society". Springer. Online: https://doi.org/10.1007/978-3-663-12443-6

Public Governance, Administration and Finances Law Review Vol. 6. No. 2. (2021) • 133–135.

Book review

DOI: 10.53116/pgaflr.2021.2.10

Raphael Cohen-Almagor, *Just, Reasonable Multiculturalism. Liberalism, Culture and Coercion* (Cambridge University Press, 2021)

Lilla Berkes*

* Assistant Professor, Pázmány Péter Catholic University, e-mail: berkes.lilla@jak.ppke.hu

The existence of multicultural societies, and thus accommodating cultures that are different from the culture of the majority (or dominant culture), is a contemporary reality. Its roots go back mostly to the 1960s and 1970s, to the period that laid the foundations of our current value system. The spread of the idea of universalism of human rights has changed the thinking about those who were different from us, humanitarian aid has become a major issue, and equality between people and non-discrimination has become a leading idea, too. There was also a growing need to fill the missing workforce. As a result of these changes, Western countries, as opposed to their previous practice of limited and tightly controlled immigration, increasingly opened their gates to migrant workers and those seeking a new homeland. People who previously have not been welcome because of cultural reasons were able to enter and settle in the country much easier than before. These components concluded to the change of the cultural composition of the societies and brought the emergence of public policies that deal with this situation. Instead of the former exclusion or assimilation, solutions have emerged to emphasise and promote social inclusion, e.g. the policy of multiculturalism.

On the one hand, all this has had a number of exciting effects: the fill of the missing workforce and the brain drain have contributed significantly to economic development and prosperity, foreign cultures were so interesting, they opened up the hitherto unknown world to the people, people could enjoy culinary multiculturalism, etc. In general, multicultural policies were a success for years, especially when the different cultures were not yet politically active, did not form a significant community and the diversity was not wide.

On the other hand, what we can see now is that the changes were not entirely under state control. The states (state policies) were inclusive but they did not know what exactly they try to host and whether their own society will be inclusive and adaptive enough. Family reunification has deepened the diversity, illegal migration (and the insufficient fight against it) and the growing ghettoisation have had another negative impact on state control, deepening and widening further the diversity. As a result of this

increasing diversity, habits and traditions that were shocking to the majority society appeared, conflicts arising from cultural misunderstanding increased, and the value system that was inclusive of those culturally different from the majority was questioned.

The solution is yet to come. Faith in equality, freedom of religion and other freedoms provide protection for cultures that are different from the majority (dominant culture), states although prohibit the most unacceptable practices (female genital mutilation, forced marriage, etc.) but in general refrain from community-level solutions, rather deciding on a case-by-case basis who should adapt to whom, through a series of court decisions. Solving problems on individual level is easier, because the general drawing of boundaries at the community level casts the shadow that it contradicts the belief in the values that underpin Western cultures, and Western cultures are not yet ready for a paradigm shift. Ultimately, therefore, the protection of individual rights and the management of public affairs at the community level, also the moral foundations of our system and the need for law and order have come into conflict.

The three main issues in Cohen-Almagor's book – the compatibility of multiculturalism with liberalism, the best-known cultural fractures and security challenges that arise and the question of reasonable balance between accommodation and intervention – also embody these dilemmas. It also follows that the methodology of the book draws clear boundaries and consistently leads the reader to the author's theory of the reasonable limits and applicability of multiculturalism. The author aims to establish a middle ground between liberal reasoning and multiculturalists who see multiculturalism as an alternative to liberalism and who believe that protecting the group's culture trumps otherwise generally applicable laws. He does this by advocating the concept of reasonableness, delineates the boundaries of multiculturalism within the framework of liberal democracy. His fundamental idea is that the state may have justifiable grounds to interfere in the business of illiberal minority cultures when their norms and practices are at odds with the underpinning values of liberal democracy. He differentiates between the reasonableness of a cultural rite on a basis of its significance for the minority culture and of the majority culture: whether it is crucial for the livelihood of the group, it is an integral part of social and family life, perceived as important for maintaining the group's heritage and the way the group defines itself or they have no value for the group, or, as a third case, the cultural rites are of importance to the group but have no value or utility for society at large because they are unreasonable and possibly offensive in the eyes of outsiders. This all actually sheds light on different layers of reasonableness and opens up the possibility of setting general limits to accommodation. At the same time by differentiating between moral reasonableness, legal reasonableness, social reasonableness and political reasonableness, the author also highlights the importance of the different viewpoints as a method. However, this opens up other tensioning problems. Reasonableness also carries a subjective value judgment, we cannot count on it as something objective that is outside and above changes. The main point is that social reasonableness (rationality) ultimately changes together with society, in other words, the capability and will of accommodating others also change, and ever-changing boundaries do not help stability. There are also limits of legal reasonableness. The author refers to the Supreme Court of Canada case law of reasonable accommodation which

can be considered a standard in cultural disputes but although the court can decide that wearing a kirpan under the clothes is not dangerous (Multani v. Commission, 2006) but wearing a turban instead of a helmet while motorcycling is (Bouchard & Taylor, 2008), then a legislator can decide otherwise (CBC, 2018), the decision is still within the framework of a legal thinking. The court cannot step its boundaries to take the place of the legislator, it cannot make political decisions, and ultimately it is not the task of the court to decide what should be considered a value (morally) and what should not.

The state, the political power is the only one that is able to take into account and integrate the different types of reasonableness together, thus it cannot spare itself from making a decision. This is what brings us to the practical part of the book where the author analyses different areas of interference of minority affairs. He argues that intervention is justified in the case of gross and systematic violations of human rights, such as murder, slavery, expulsion or inflicting severe bodily harm on certain individuals or groups but he limits the state's immediate control to the most obvious and undisputed matters. Thus, he handles with caution the questions of other disputed matters – rites, patterns, behaviours that are also (heavily) questioned by the majority (dominant) culture – that do not fall under his scope and how (and whether) his just reasonableness test can be used for these cases. He rather argues that the state cannot and should not control everything and we should consider internal restrictions (the right of a group against its own members) and external protections (the right of a group against the larger society), with a case by case investigation.

All things considered, we can certainly agree on that to answer the main challenge of multiculturalism – the recognition of the need for an intervention and the use of reasonableness as a method –, the starting point is to know and understand the field of the intervention, namely the cultural patterns.

References

Bouchard, G. & Taylor, C. (2008). Building the Future. A Time for Reconciliation. Report. Online: www.mce.gouv.qc.ca/publications/CCPARDC/rapport-final-integral-en.pdf

CBC News (2018, October 11). Ontario to allow turban-wearing Sikhs to ride motorcycles without helmets. Online: https://bit.ly/3e1feB6

Cohen-Almagor, R. (2021). *Just, Reasonable Multiculturalism. Liberalism, Culture and Coercion.* Cambridge University Press. Online: https://doi.org/10.1017/9781108567213

Deutsche Welt (2019, April 07). German court: Sikhs have to wear helmets on motorbikes. Online: https://bit.ly/3F336vB

Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 SCR 256. Online: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15/index.do

Contents