Public Governance, Administration and Finances Law Review

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

LUDOVIKA
UNIVERSITY PRESS

1.
2023

Public Governance, Administration and Finances Law Review

Vol. 8. No. 1. 2023

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Published by the University of Public Service
Ludovika University Press
Ludovika tér 2. 1083 Budapest, Hungary
Responsible for publishing
Gergely Deli, Rector
Copy editor
Zsuzsánna Gergely
Printed by the University of Public Service
ISSN 2498-6275 (print)
2786-0736 (online)
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Public Governance, Administration and Finances Law Review Vol. 8. No. 1. (2023) • 5–22.

DOI: 10.53116/pgaflr.6816

Should Liberal Democracy Respect Group Rights that Discriminate against Women and Apostates?[1]

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Abstract: The paper examines the limits of state interference in proscribing cultural norms by considering gender discrimination, right of people to leave their community free of penalties, denying women appropriate education, and forced or arranged marriages for girls and young women. The discussion opens by reflecting on the discriminatory practices of the Pueblo tribes against their women and analysing an American court case, *Santa Clara v. Martinez.* It is argued that the severity of rights violations within the minority group, the insufficient dispute-resolution-mechanisms, and the inability of individuals to leave the community if they so desire without penalty justify state intervention to uphold the dissenters' basic rights. Next, a Canadian case, *Hofer v. Hofer,* illustrates the problematics of denying reasonable exit right to members who may wish to leave their community. Subsequently, the discussion turns to the issue of arranged and forced marriages of girls and young women. While the latter is coercive the former is not. While forced marriages should be denounced as unjust, arranged marriages can be accepted. Finally, the paper considers denying education to women, arguing that such a denial is unjust and discriminatory.

Keywords: *Canada (AG) v. Lavell*, culture, education, forced marriages, gender discrimination, *Hofer v. Hofer,* Pueblo tribes, religion, *Santa Clara v. Martinez*

1. Introduction

Consider the following: A religious community within liberal democracy discriminates against women. When women complain, justification is produced that "this is how we conduct things in this community for hundreds of years. Rights of the group supersede your individual rights". Should the liberal state intervene and come to the aid of the discriminated women? Or should it perceive this as a "private matter" to be left for the group to sort and resolve?

[1] A former version of this article was published in Raphael Cohen-Almagor, *Just, Reasonable Multiculturalism: Liberalism, Culture and Coercion* (New York and Cambridge: Cambridge University Press, 2021). Permission to publish this article has been granted by Cambridge University Press.

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This paper examines the limits of state interference in proscribing cultural norms by considering gender discrimination, right of people to leave their community free of penalties, denying women appropriate education, and forced or arranged marriages for girls and young women. By "appropriate" I mean education that would enable individuals comfortable integration into the wider society if they so wish. Cases in point are practices that force children to marriage at a very young age, and denial of education to vulnerable populations. Both constitute serious harms. The discussion opens by reflecting on the discriminatory practices of the Pueblo tribes against their women and analysing an American court case, *Santa Clara v. Martinez.* A Canadian case, *Hofer v. Hofer,* illustrates the problematics of denying reasonable exit right to members who may wish to leave their community. Subsequently, the discussion turns to the issue of arranged and forced marriages of girls and young women, considering the Jewish–Yemenite immigrants who came to Israel during the 1950s. As customary in Yemen, young girls were married to much older men. Finally, the paper criticised the denial of education to women, arguing that the liberal state has a role to play in protecting basic rights of vulnerable populations.

In each of these cases, the question is whether a dominant culture has a right to interfere in the business of a cultural minority, if one or more of their practices or norms cause some harm to members of that same minority culture. Groups employed internal restrictions and erected external protections to protect themselves. In the name of culture and religion, they deny women basic human rights and undermine their ability to develop themselves as autonomous beings. John Rawls has argued that the various conceptions of justice are the outgrowth of different notions of society against the background of opposing views of the natural necessities and opportunities of human life. A conception of social justice is to be regarded as providing in the first instance a standard whereby the distributive aspects of the basic structure of society are to be assessed (Rawls, 1971, p. 7). A complete conception defining principles for all the virtues of basic structure, together with their respective weights when they conflict, is a social ideal that encompasses the aims and purposes of social cooperation (Rawls, 1993, p. 60). Following Susan Moller Okin (1999), it is argued that practices and arrangements that serve to undermine women's equal dignity and equal access to opportunities are incompatible with these two basic tenets.

The preamble to the Universal Declaration of Human Rights (UDHR), 1948 accentuates the need to protect human rights as "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind". The International Covenant on Civil and Political Rights (ICCPR), 1966 and the International Covenant of Economic, Social and Cultural Rights (ICESCR), 1966 are also designed to promote and protect basic human rights. Other important conventions are the 1967 International Convention for Elimination of All Forms of Discrimination against Women, the 1981 Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, and the 1990 Convention on the Rights of the Child. They all aim to safeguard the inalienable rights of women and children, perceived vulnerable and therefore in need of protection. Specifically, let me mention Article 26 of the International Covenant of Economic, Social and Cultural Rights, 1966:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Gender discrimination – The case of the Pueblo Indian communities

It is estimated that 370 million people in 90 countries belong to indigenous people (Kedar et al., 2018, p. 160). Most of them experienced great suffering at the hands of the white men who colonialised them, took their lands and exploited them. Many indigenous people were forced to forfeit their sources of substance. The colonialising powers dispossessed and subjugated the local communities by brute force, showing little regard to the indigenous just claims on land and natural resources.

During the 20th century, many western countries recognised the evil that their forefathers brought on the indigenous people. In their repent, they have aimed to compensate them in various ways. The old school repressive methods have been reversed. Instead of trying to suppress indigenous cultures, liberal democracies have been acknowledging cultural value and importance. Steps were taken to accommodate cultural rights. In the United States, some Pueblo Indian communities enjoy extensive rights of self-government. They limit freedom of conscience of their own members and employ sexually discriminatory membership rules. Similarly, some immigrant groups and religious minorities use 'multiculturalism' as a pretext for imposing traditional patriarchal practices on women and children. Some immigrant and religious groups demand the right to stop their children (particularly girls) from receiving a proper education, so as to reduce the chances that the child will leave the community; some other communities uphold compulsory arranged marriages.

Pueblo peoples are thought to be the descendants of the prehistoric Ancestral Pueblo (Anasazi) culture. This Indian tribe has been in existence for more than 600 years. They established villages in New Mexico along the Rio Grande and in northern Arizona (Britannica s. a.). Like many traditional communities, some Pueblo Indian communities apply discriminatory practices regarding women and people who decide to abandon the tribes. They discriminate in the distribution of housing and if female members marry outside the tribe, their children are denied membership.[2] Should the American federal government intervene in the Pueblo affairs to protect the rights of women and children?

In 1968, the American Congress passed the Indian Civil Rights Act (ICRA) which recognises the tribes' sovereignty and their right to self-government but stated that tribes are subject to constitutional guidelines resembling the Bill of Rights. This legislation was

[2] This discriminatory rule was upheld in *Santa Clara Pueblo v. Martinez* 436 US 49 (1978), discussed *infra*. For further discussion, see Shachar (2001); Resnik (1989).

widely opposed by Indian groups who perceived it as an unjust federal intrusion into tribal affairs, and for understandable reasons (Christofferson, 1991; Schneiderman, 1998). The assumption that all governments within a country should be subject to a single Bill of Rights, enforced by a common Supreme Court, was perceived inappropriate in the eyes of the Pueblo and other incorporated national minorities. After all, the indigenous population preceded the establishment of the United States. Most of their valuable assets were taken away from them by the colonising power.

Since the 19th century, Indian tribes were recognised by the courts to have a distinct political society. They are domestic dependent nations, capable of managing their own affairs and of governing themselves; yet they are dependent on the United States to whom the relation resembles that of a ward to a guardian (Brown, 1930). Still, many Indian leaders argued that Indian governments should be exempt from the Bill of Rights in order to maintain their coherence and unity. They fear that the United States will abuse its power to take their land, as white people did when they arrived to America, and they do not trust white judges to do a good job in protecting their rights. Pueblo communities wish to retain responsibilities for their communal affairs.[3]

Spinner-Halev (2001) asserted that avoiding the injustice of imposing reform on an oppressed group is often more important than avoiding the injustice of gender discrimination. The American Supreme Court legitimised the acts of colonisation and conquest, which dispossessed the Pueblo of their property and power. The Pueblo have never had any representation on the Supreme Court. Thus, the American federal constitution and courts do not enjoy obvious legitimacy in the eyes of an involuntarily-incorporated national minority. Why should the Pueblo agree to have their internal decisions reviewed by a body, which is, in effect, the courts of their conquerors?

The Pueblo have their own internal constitution and courts, which prevent the arbitrary exercise of political power. To be sure, while the Pueblo constitution is not liberal, it is a form of constitutional government. As Graham Walker (2000) notes, it is a mistake to conflate the ideas of liberalism and constitutionalism. There is a genuine category of non-liberal constitutionalism, which provides meaningful checks on political authority and preserves the basic elements of natural justice, and which thereby helps ensure that governments maintain their legitimacy in the eyes of their subjects.

In an earlier article, Kymlicka and I (Kymlicka & Cohen-Almagor, 2000) argued that the liberal state should not intervene in indigenous affairs because they have strong claims for self-government. Balancing group rights and gender rights, they gave more weight to the former. Kymlicka (1989; 1997, pp. 72–87; 2000, pp. 35–48) has long been arguing that liberal societies should extend group rights and special arrangements to cultural communities, especially to disadvantaged national minorities and some polyethnic or immigrant groups – as a matter of liberal justice. I have changed my mind. Now I argue

[3] The basic attitude of the American Supreme Court towards Indian sovereignty was determined by Chief Justice John Marshall's judgement in *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823). In this judgement, Marshall said that "Conquest gives title which the courts of the conqueror cannot deny", the validity of which "has never been questioned by our courts" (pp. 587–588). Marshall's approach continues to determine the Court's approach to Indian rights, not just in the United States, but also in other settler societies, such as Canada and Australia. On this, see Wilkins (1994, 161–168); Williams Jr. (1995, 146–202); Wilkinson (2006); Tsosie (2011, 923–950).

for state interference to redress gender injustice. Let me explain by reflecting on the landmark cases regarding the federal government's jurisdiction over Indian tribes.

3. Denying basic rights to women – Santa Clara v. Martinez

In *Santa Clara v. Martinez* 436 US 49 (1978), the Supreme Court contended with the issues of Indian autonomy and gender discrimination. Julia Martinez and one of her children, Audrey Martinez, challenged the Santa Clara Pueblo membership ordinance that disqualified Martinez's children because she had married outside the tribe. The same ordinance did not place similar restriction on men. Martinez appealed to the American justice system, seeking declaratory and injunctive relief, claiming that this ordinance discriminated against her on basis of gender, in contravention of ICRA which states that no Indian tribe in exercising powers of self-government shall "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law".[4] Although the Martinez children were raised on the reservation and continued to reside there as adults, they were denied basic rights. As a result of their exclusion from membership they were not eligible to vote in tribal elections or to hold secular tribal offices. They had no right to remain on the reservation in the event of their mother's death, or to inherit their mother's home or her possessory interests in the communal lands. The Pueblo successfully erected external protections to exclusively reserve land for their own community and did not wish to forfeit possession. Respondent Julia Martinez engaged with the tribe elders in an attempt to change the membership rule, but to no avail. Then she appealed to the courts, seeking justice. She was certified to represent a class consisting of all women who were members of the Santa Clara Pueblo and who had married men who were not members of the Pueblo, while Audrey Martinez was certified as the class representative of all children born to marriages between Santa Claran women and men who were not members of the Pueblo.[5]

The Santa Clara Pueblo argued that the 1968 ICRA did not authorise civil actions in federal court for relief against a tribe or its officials. The Supreme Court, *per* Justice Thurgood Marshall who delivered the opinion of the Court, in which Justices Burger, Brennan, Stewart, Powell, Stevens and Rehnquist joined (Justice Blackman took no part in the consideration or decision of the case) agreed, guaranteeing strong tribal autonomy except when Congress provided for federal judicial review. Marshall J. conceded that Indian tribes have been recognised as possessing common law immunity from suit traditionally enjoyed by sovereign powers (*Santa Clara Pueblo v. Martinez* 436 US 49 [1978], p. 58). The Pueblo successfully campaigned for external protections for devolution of powers to enable them to make decisions regarding their community. The Court emphasised that the role of courts in adjusting relations between and among tribes and their members is restrained. The tribes are better suited to understand their own culture.

[4] The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C.§§ 1301–1304 (ICRA).

[5] *Santa Clara Pueblo v. Martinez* 436 US 49 (1978), p. 53. See also Newton (1984, pp. 195–288).

Congress retains authority expressly to authorise civil actions for relief in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. "But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent", the Court is constrained to find that ICRA "does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers".[6]

Justice White disagreed. In his dissent he wrote that the Court in its majority decision had substantially undermined the goal of the ICRA, in particular its purpose to protect "individual Indians from arbitrary and unjust actions of tribal governments" (*Santa Clara Pueblo v. Martinez* 436 US 49 [1978], p. 73). While acknowledging that Indian tribes have had special status in American law, White J. did not think that the tribe was insular from State scrutiny (*Santa Clara Pueblo v. Martinez* 436 US 49 [1978], p. 75). He thought that in this case there was a need to interfere in the Pueblo affairs because its membership law was unjust. White J. reminded his fellow justices that the ICRA in itself was an intrusion into tribal affairs. Thus, he thought that the federal courts have jurisdiction to consider the merits of the respondents' claims (*Santa Clara Pueblo v. Martinez* 436 US 49 [1978], p. 83).

I side with White J. The non-liberal constitutionalism of the Pueblo is unjust from the point of view of liberal principles. The court judgment left Native American women with a general right but without recourse for remedy. The Pueblo courts were left to uphold their rules which discriminated against women (as well as Christians). Clearly, for the federal courts to overturn the decisions of the Pueblo courts and impose liberal principles is a problematic move. We need to seek a solution that would take into account the risk of denigrating the group's own system of government and courts, the high levels of legitimacy of the governance system in the eyes of its own members as well as rights of women and children, and the liberal goal of arriving at just and reasonable formula. Reasonableness consists in equitableness whereby an individual respects other persons' rights as well as her own (Gewirth, 1983). In this case, mutual respect is clearly lacking. The severity of rights violations within the minority group, the insufficient dispute-resolution-mechanisms, and the inability of individuals to leave the community if they so desire without penalty justify state intervention to uphold the dissenters' basic rights.

While acknowledging that imposing liberal principles on self-governing national minorities is problematic, and that attempts to impose liberal principles might backfire since they are perceived as a form of aggression or paternalistic colonialism, it is unjust to accept that it is, according to the Pueblo, a matter of cultural survival to oppose women claim for upholding their natural right to equality. After the *Martinez* decision, women who were denied tribal membership lost essential benefits including federal payments, education and medical care. Julia Martinez's daughter was denied medical treatment and later died from strokes relating to her illness (Christofferson, 1991, p. 169). In the name of culture, the Pueblo should not deny women equal individual protection that every American citizen enjoys. Reconciling multiculturalism and liberalism requires invoking

[6] *Santa Clara Pueblo v. Martinez,* 72. For further discussion, see Valencia-Weber (2004).

the Rawlsian Principle of Equal Liberty: Each person has an equal right to the most extensive liberties compatible with similar liberties for all. The State should provide education, minimum income and health care for all (Rawls, 1971, p. 302; Shalev, 2005).

By accentuating tribal sovereignty and narrowly interpreting the statutes in such a way that saw no urgency to interfere in the Pueblo affairs, the Court failed to appreciate Martinez's and other women's predicament. The Court accorded respect for tribal sovereignty, protected the "unique political, cultural, and economic needs of tribal governments" (*Santa Clara Pueblo v. Martinez* [1978], p. 62)[7] and had deliberately chosen not to extend every provision of the Bill of Rights to tribes, thereby accepting the Pueblo claims. Balancing tribal sovereignty vis-à-vis gender rights, my view – on the other hand – decidedly favours the latter. It is the duty of the liberal state to protect basic rights of vulnerable population and not to leave women at the mercy of men who employ cultural justifications to harm them and undermine their existence. Gender equality and mutual respect should be promoted as vital values. Chauvinistic group discrimination should not enjoy any form of legitimacy. Granted that liberal institutions can only work if liberal beliefs have been internalised by the members of the self-governing society; therefore, education and dialogue should be implemented rather than granting legitimacy to unjust discrimination.

Principally, as Brian Barry (2001, p. 89) noted, the Pueblo cannot run a sub-state that is religiously exclusive, certainly not in a liberal society. If the Pueblo want to retain their special political status, they should be required to observe the constraints on the use of political power that are imposed by liberal justice. They should have to accept that exercising political power cannot legitimately be used to foster religious and gender discrimination. This is in line with The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) which holds (Article 16) that men and women have the same right to enter into marriage, and that both spouses enjoy the same rights in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property. The Preamble of the same Convention holds that the full and complete development of a country, the welfare of the world and the cause of peace require the "maximum participation of women on equal terms with men in all fields".

Conversely, Chandran Kukathas (2003, p. 76) supports group rights and autonomy even if they trump individual rights. He argues that the good society is a free society and a free society is one that upholds freedom of association. In his extreme liberal view, there are hardly any restrictions on what communities can do to their members. Kukathas simply mistrusts the government to act prudently without exploiting its powers. He assumes that any government intervention is likely to violate individuals' freedom association and freedom of conscience and, therefore, hands-off policy is warranted.

[7] For further discussion about the tensions between minority group rights and gender equality, and about conflicts over the culture defence in American criminal law, aboriginal membership rules, tribal sovereignty and polygamy, see Song (2007).

Kukathas's theory (1997; 2003) does not see "cultural integration" or what he terms "cultural engineering" as a part of the state's *raison d'être*. He rejects the idea of making the boundaries, the symbols, and the cultural character of the state matters of justice. Consequently, overarching tolerance is advocated regarding a wide array of controversial practices that include the denial of school education to children, arranged marriages, denial of medical care to members and inflicting cruel punishment on members. All of this is possible in Kukathas's (2003, p. 134) concept of toleration. Kukathas explains at length why a free society should tolerate a variety of associations and practices, including those that do not value freedom or abide by the principle of toleration, and that embrace intolerable practices. While Kukathas acknowledges the importance of individual choice, he does not think it is important to ensure that the conditions within communities exist to ensure that individuals are free to make their own choices and live by them. In accordance with Kukathas's liberal theory, illiberal communities within liberal democracy can inflict all sorts of harm – physical and non-physical, on their own members.

Kukathas's theory celebrates tolerance. Indeed, the idea of tolerance embodies a normative stance geared to promote equal respect and self-determination when the latter results in allocation of resources and involves some form of legal coercion (Cohen-Almagor, 2006a). Respecting our fellow citizens entails that we should see them, in Kantian terms, as ends rather than means, appreciate diversity and differences, and not be quick to judge the others as "strange" or "peculiar" only because they adhere to a different way of life, or to a different conception of the good. In a democracy, government is said to tolerate people, providing others with scope to develop themselves and their respective ways of life. However, the important proviso is to tolerate as long as the subject of tolerance does not harm others. Tolerance should not be exploited to enable gross abuse of human rights. As Karl Popper (1962, p. 265) said, it is absurd to assume that we should tolerate the intolerant with little or no regard to consequences. The delicate task is to maintain a balance between tolerance and intolerance, between group rights and the preservation of basic human rights, otherwise the very foundation of tolerance might provide the intolerant the tools for continued abuse.

Kukathas (2003, p. 188) does not trust liberal justice because this concept of justice would lead to state interference and compulsion. Liberal justice cannot condone deep cultural diversity. He acknowledges that clitoridectomy, the denial of blood transfusions and religious coercion are all oppressive. Yet Kukathas (2003, pp. 135–136) maintains that if the concern is oppression, "there is just as much reason to hold (more) firmly to the principles of toleration –since the threat of oppression is as likely to come from outside the minority community as it is from within". Kukathas is more concerned with speculative future consequences of oppression than the here-and-now tangible oppression. Hypothetical fear of government abuse is more persuasive for him than present denial of basic rights. But silence and passivity will not stop abuse.

Kukathas (2003, pp. 136–137) concedes that there are cases where there is clear evidence of terrible practices. He believes that persuasion, rather than force, is the preferred, more effective and less damaging means of fostering change from the outside. Granted that government should first resort to mechanisms of deliberative democracy as the prime means to bring about change. But what if the leaders of the community are not

open to debate and persuasion? Kukathas would then say: "At least I tried", and leave the continuation of abuse intact. Whereas I argue that there are instances where external argumentation might fall on deaf ears and then we should resort to action that is deemed necessary to end abuse and preserve basic human rights. Kukathas's arguments might be convincing in the realm of philosophy alone, not in reality.[8]

While the argument regarding paternalism contains some force, it is not sufficiently powerful to override considerations that concern the very existence of human life. Fundamentally, the question is whether norms of the kind mentioned, which deny basic rights that everyone is supposed to respect, have a place in a liberal democratic society. True as it is that to ban those cultural norms is certainly to interfere with cultural norms. Yet by the same token, gender discrimination destroys the woman's right to seek meaningful choice for herself, and it contradicts the two basic liberal norms that hold society together: gender discrimination violates the requirement of not harming others and that of *mutual* respect for others as enunciated in liberal democracy (Cohen-Almagor, 1994).

Another North American country, Canada, has also experienced similar challenges with its indigenous people. The following case is concerned with granting just and reasonable exit rights to those who wish to lead their lives independently of their community. Having an exit opportunity is vital for members who feel oppressed by their culture. Whether it is justified for the liberal state to intervene in affairs of an indigenous tribe that restricts its members' freedom of conscience depends on how the community in question is governed; whether it is governed by a tyrannical leader who prevents members from leaving the community, or whether the tribal governance has a broad support and religious dissidents are free to leave.

4. Denying reasonable exit right – *Hofer v. Hofer* and *Canada v. Lavell*

In Canada, the relationship between the government and the Native peoples was marred by policies of genocide, countless broken treaties, and Canada's ongoing failure to recognise the nationhood of Aboriginal peoples (Deveaux, 2009, p. 129). *Hofer v. Hofer* (1970, p. 958) dealt with the powers of the Hutterite Church over its members. The Hutterites are spiritual descendants of the Anabaptists. They live in large agricultural communities and closely guard their religion by expelling those who abandon or renounce their religion. Members of the Hofer family who renounce their religion were expelled for apostasy but they did not wish to leave with nothing as for many years they contributed to the wealth of their community. The Hutterites refused to give them any share of the community and the offers sought relief at the Canadian courts.[9] The Hutterites argued that freedom of religion of the group limits individual freedom.

[8] For further critique of Kukathas, see Spinner-Halev (2000, pp. 81–85); Barry (2001, p. 239); Deveaux (2009, pp. 41–53).

[9] For further discussion, see Janzen (1990, p. 67). On exit rights, see Vitikainen (2015, pp. 127–150).

People who wished to leave the community were subjected to designated mechanisms of coercion to make their lives difficult, forcing them to reconsider their decision (Cohen-Almagor, 2021b). Is this just and reasonable?

The Canadian Supreme Court in a six to one decision accepted this Hutterite claim, holding that the "principle of freedom of religion is not violated by an individual who agrees that if he abandons membership in a specified church he shall give up any claim to certain assets" (*Hofer et al. v. Hofer et al.* [1970], p. 963). Yet again I side with the minority opinion. Justice Louis-Philippe Pigeon's dissent represents a just, liberal approach. Pigeon J. established that the Colony was a commercial undertaking, not a Church. The land was used essentially for growing crops and raising livestock. Its major part was sold to customers (*Hofer et al. v. Hofer et al.* [1970], p. 982). Therefore, the case should not be decided by the application of rules of law governing churches. Justice Pigeon acknowledged that the Hofer conduct was obviously of concern to the Hutterites and that the dispute was real and painful. The way to decide the dispute was through deciphering the principle of freedom of religion. Justice Pigeon noted that the usual liberal notion of freedom of religion "includes the right of each individual to change his religion at will" (*Hofer et al. v. Hofer et al.* [1970], p. 984). Hence churches "cannot make rules having the effect of depriving their members of this fundamental freedom" (*Hofer et al. v. Hofer et al.* [1970], p. 984). Pigeon J. thought that it was as nearly impossible as can be for people in a Hutterite community to reject irreligious teachings, due to the high cost of changing their religion, and so were effectively deprived of freedom of religion (*Hofer et al. v. Hofer et al.* [1970], p. 985).[10]

The Hutterite Church enforced unjust coercion. Canada, like other liberal societies, commonly reach just and reasonable solutions via the mechanisms of compromise and deliberative democracy. The essence of democratic legitimacy lies in people's ability to collectively engage in authentic deliberation about their conduct. Deliberative democracy presents an ideal of political autonomy based on the practical reasoning expressed in an open and accountable discourse, leading to an agreed judgment on substantive policy issues concerning the common good. Jürgen Habermas (1996) notes that the success of deliberative democracy depends on the institutionalisation of the corresponding procedures and conditions of communication and on the interplay of deliberative processes and informed public opinions (Habermas, 1990).[11] Deliberative democracy enables an understanding of cultures as continually creating, re-creating, and renegotiating the imagined boundaries between "us" and "them" (Benhabib, 2002). Securing and promoting human rights are desired goals, especially of vulnerable populations. Incentives can be provided, in a non-coercive way, for liberal reforms that promote gender equality in a deliberative, consensual way, by explaining the merits of just distribution of resources, mutual respect and reasonable accommodations that value tradition and the inherent dignity of all members of the community, notwithstanding gender.

[10] For general discussion, see Katz & Lehr (2012).

[11] See also Habermas (1990); Bächtiger et al. (2018); Dryzek (2002; 2012); O'Flynn (2021).

5. Arranged and forced marriages for girls

We need to distinguish between *arranged marriage* in which families take a leading role, but the parties have the free will and choice to accept or decline the arrangement, and *forced marriage* where one or both people do not (or in cases of people with learning disabilities cannot) consent to the marriage and where pressure or abuse is used. While the latter is coercive the former is not. While forced marriages should be denounced as unjust, arranged marriages can be accepted. In England and Wales, arranged marriage is permitted while forced marriage is illegal. Forced marriage includes taking someone overseas to force her to marry (whether or not the forced marriage takes place) or marrying someone who lacks the mental capacity to consent to the marriage.[12] It is estimated that 10% of the arranged marriages are forced (Deveaux, 2009, p. 164).

Arranged marriages for girls with adults under the age of sixteen or eighteen years old might constitute serious mischief to these girls. We can assume that such unequal marriage will result in subordination, discrimination, coercion and abuse. Commonly, such a marriage is between a grown-up man and a young female (I never heard of a cultural phenomenon in which female adults marry young males).[13] In such a marriage, the young female will have great difficulties in developing relationships that are built around values of equality, mutual respect and self-determination. Such inegalitarian arranged marriages are unreasonable in liberal terms. They gravely undermine children/adolescent's ability to enjoy long-term basic human goods and relationships as they are hampered by a commitment decided for them by their families without their consent. The question is whether the state can and should intervene to prohibit them.

Consider the following: Saadi (42-year-old) and Tohar (15-year-old), another Yemenite married couple, immigrate to a liberal society. They have been living together for six years. Should liberal democracy recognise the marriage?

This is a hard case. It is harder if the couple have children. The line of reasoning I wish to pursue has principled as well as consequentialist dimensions. We need to examine whether the culture has historical claims, whether or not it coerces others to follow its norm, and whether children and their families have protected exit right if they do not wish to follow the cultural norm. We need to weigh the rights of the child, the harms of separation, the pros and cons of state interference to the child and to the family at large. The liberal state should certainly reflect and consider, aiming to reach a solution through means of deliberation that would be just and reasonable. Let me demonstrate the relevant considerations by considering the behaviour of the Israeli establishment towards the Jewish–Yemenite immigrants during the 1950s.

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[12] Forced marriage, https://www.gov.uk/stop-forced-marriage. In the United Kingdom, the Forced Marriage Unit (FMU) is a joint Foreign and Commonwealth Office and Home Office unit which leads on government policy, outreach and casework. Its jurisdiction includes the UK where support is provided to any individual and overseas where consular assistance is given to British nationals. The FMU operates a helpline to provide advice and support to forced marriage victims as well as to professionals. The assistance includes safety advice and helping 'reluctant sponsors'. In extreme circumstances the FMU assists with rescues of victims held against their will. See Forced marriage, https://www.gov.uk/guidance/forced-marriage

[13] There are, of course, individual cases where older women marry younger men but this has nothing to do with group rites.

For these immigrants, who were Jewish observant, arrival in Israel presented a cherished opportunity to practice religion even more strongly in the sanctity of the Holy Land. They did not wish to break with tradition, their old customs or cultural heritage. They wished to maintain their traditional way of life, folkways and norms. They expected that the place of men and women, their status and honour will be as it was in Yemen. At that time, testimonials were brought before the two Chief Rabbis of Israel, Rabbi Herzog and Rabbi Uziel, that young women were encouraged to leave their older husbands. This action was made upon the assumption that teenage girls were forced to marry older people in Yemen.[14] In 1950, the Marriage Age Law 5710-1950 was passed, setting the minimum age at 17.[15] The motivation was well-intended. Israeli decision-makers wished to "save" women from their "locked" situation. The problem was that in many instances no action was taken to verify whether or not girls preferred to live with their husbands. Social workers and advisors took the liberty of interfering in this delicate issue of marital matters without checking other factors besides the age of the woman. The age factor, in their view, was the only significant consideration that justified intervention, aiming to break the marriage. This behaviour was a reflection of the then prevailing governmental attitude toward immigrants from Asia and Africa (Cohen-Almagor, 1995, pp. 461–484; Margalit-Stern, 2006, pp. 115–144; Menelson-Maoz, 2014; Frantzman, 2016; Altman, 2018). The absorbing elite believed that the best of the people and the best of the nation required paternalism; that they had to show "the light" to the Yemenite immigrants, and that in due course these immigrants would thank them for this involvement. This was not the case. The immigrants perceived this paternalistic measure as an arrogant interference in their affairs, displaying ethnocentrism and misunderstanding of their norms. With due appreciation of the sincere motives on the part of the establishment, it was done in a crude way that disrespected the feelings of the people concerned, and probably resulted on many occasions in more harm than good. Instead of opening channels of communication with the community, identifying desirable ends and seeking accommodation that would benefit first and foremost the women in question, the state behaved more as a bull in a china store, dictating instead of deliberating, using its coercive authority rather than seeking constructive compromise. Women, of course, young and old, should have the opportunity of opting out and asking for divorce. But their opinion should be sought and be taken into account.

Another pertinent issue was polygamy. In the Yemenite culture, polygamy was accepted and the State of Israel could not have it. Freedom of choice is important provided it is not discriminatory. It is just to prohibit polygamy because it discriminates against women.[16] But if both men and women would be free to marry as many partners as they wish, meaning that both polygyny and polyandry were to be allowed in a certain community, then we may honour freedom of choice. Marriage between two individuals is

[14] Archives of the State of Israel, G5543/3631, file 607 (II). See also G5543/3631, file 607 (III).

[15] In 2013, the minimum age for marriage was raised to 18.

[16] Polygamy has been documented in 80% of societies across the globe often to the detriment of women. In times of war, when many men are away and possibly not return home, some women would rather share a man than have no man. See Hassouneh-Phillips (2001, pp. 735–748); Elbedour et al. (2002); House of Commons (2018).

normative, and norms may change. Indeed, norms have been changing. In this age of time, marriage between people of the same gender is becoming more acceptable. This idea was perceived as an aberration in previous centuries (Noble, 2015). Today, most countries that permit polygamy are countries with a Muslim majority or with a sizeable Muslim minority. In India, polygamy is legal only for Muslims. In Russia and South Africa, polygamy is illegal but not criminalised (Burton, 2018). Legal and social contexts, informed by gender, race, sexuality and class, shape the experiences of social relationships (Heath, 2023).

6. Denying education to women and children

In Israel, while secular women are not equal to men in the job market, they are not denied education. Indeed, more than 50% of the students in institutions of high education are women (Report of The Committee for the Advancement and Representation of Women in Institutions of High Education, 2015). 58% of women in Israel in the young adult group (25–34-year-old) have a college education, compared to 38% of men (Gertel, 2019). The picture is very different where ultra-religious *(haredi)* women are concerned. In 2018–2019, the *haredi* population was just over one million and of them 8,400 *haredi* women attended Israeli institutions of higher education (Malach & Kahaner, 2018; Zaken, 2019). *Haredi* women tend to marry young and have large families. While there is a notable improvement in their education, forced by the fact that their husbands prefer to study in *yeshivot* (religious institutions where they study only Judaism) and have 7 children on average,[17] they lack educational opportunities that are opened for secular women. Ultra-Orthodox women are expected to first fulfil family roles in optimal manner. The family comes first, and *haredi* women prefer to work in their community and not in the larger secular job market (Malhi & Abramovsky, 2015). The ideal of being "the Queen of the House" is central to the traditional education rooted in the ultra-Orthodox community. Women have to juggle between their various demanding duties – taking care of their husbands, children and the home, and at the same time be the breadwinners of their large families.

The Global Gender Gap Report, published by the World Economic Forum (WEF), ranks countries according to participation by women in the workforce, their access to education and health, and opportunities for representation and promotion in politics. In 2020, Israel was ranked 64 out of the 153 countries rated. This ranking is explained by lack of representation and power for women in politics, reflected in the low number of parliamentarian women, their weak representation in government service, the substantial salary gap between women and men, and low women participation in the labour force (Global Gender Gap Report, 2020; Uni, 2019).

[17] In 2015–2017, the average fertility rate of ultra-Orthodox women was 7.1 children per woman. Malach and Kahaner (2018).

7. Conclusion

The theory of just, reasonable multiculturalism is about inclusion as well as exclusion, about freedom of religion and freedom from religion, about providing circumstances for people to promote their way of life as well as deserting it at will and having the ability to adopt another (Cohen-Almagor, 2021a). A fair and reasonable balance needs to be maintained between individual rights and group rights (Cohen-Almagor, 2022).

In both the Hutterite and the Pueblo cases, the courts supported the claims of illiberal groups, in the name of freedom of religion. The courts were reluctant to interfere in tribal affairs, viewing interference as an imposition of their own values on distinct minorities. The judges failed to realise that clinging to the principle of neutrality contradicts two other important liberal principles, those of gender equality and freedom. Hence, it seems that their judgments do not settle the disputes between liberal values and illiberal minorities. Tolerating tribal conduct had resulted in intolerant behaviour towards some tribe members. Since liberal tolerance is individual freedom-based, not group-based, it cannot justify internal restrictions that limit individual freedom of conscience. People should be free to move in and out of their cultural communities without penalties. They should not be coerced to stay in order to serve group interests.

Israel is an economically developed democracy that strives to maintain a particular Jewish tradition and religious identity in a heterogeneous society. As a result of its distinct preference to Jewish orthodoxy, Israel has failed to adopt national standards for women that would bring Israeli law into compliance with international human rights. The constant challenge for Israeli democracy is to secure basic human rights for all. Improvement in women's status is possible if there will be a growing egalitarian consciousness to counteract the coercive nature of Jewish orthodoxy supported by continued advancement of socio-economic conditions (Israel Ministry of Foreign Affairs, 2013; Halperin-Kaddari & Yadgar, 2010, pp. 905–920; Halperin-Kaddari, 2004; Cohen-Almagor & Maroshek-Klarman, 2023).

Finally, I argued that the State should come to the aid of women who are denied education. It is incumbent on the liberal state to help women when men use their authority to deny the right of education to women, just because they can. Women should enjoy equal opportunities to develop themselves and become the persons they perceive in their dreams. Education is a key to self-development and to reaching interesting and fulfilling positions in society. These positions should be open to all, not just men. Cultural claims should not enable discrimination and coercion.

The principles of respecting others, and not harming others, require the State to intervene when basic human rights are violated. We should recognise the inner spark that women possess. Dignity as liability requires the State to ensure that all people are accorded equal treatment from birth (Kant, 1969; Bird, 2006). Women have a right to develop themselves as autonomous human beings exactly as men do. *Dignity as liability* requires us all to respect persons *qua* persons (McCrudden, 2014). People deserve to be accorded a certain treatment from birth. We are endowed with dignity and have the right to be treated with dignity. While people cannot expect genuine *concern* from fellow humans, we can expect *respect* from others. Gender should not constitute grounds for discrimination.

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Public Governance, Administration and Finances Law Review Vol. 8. No. 1. (2023) • 23–41.

DOI: 10.53116/pgaflr.6884

'Hamlet Without the Prince' – The U.S. Supreme Court on Religious Practice

Changes in Case Law in the Light of the Kennedy v. Bremerton School District Case

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Abstract: The Supreme Court of the United States of America has recently issued a decision in several cases that are closely related to First Amendment rights. In doing so, the Court has changed its own set of criteria from its earlier practice. The reasons for these decisions have attracted increased interest among practitioners and academics, as it is a long time since the Court has so clearly distanced itself from its own precedent and called lower courts to account for failing to take certain criteria into account. By analysing the Court's reasoning on the role of history and tradition and the compelling nature of religious belief, this paper seeks to answer the question whether the change in the Supreme Court's practice can indeed be considered truly substantial. I argue that the change is significant, but as a process is not without precedent, and is not necessarily unacceptable in terms of its consequences.

Keywords: religious freedom, religious neutrality of the state, First Amendment, U.S. Supreme Court, endorsement test, reasonable observer, prayer in school

1. Content of the First Amendment

The First Amendment (1791) to the Constitution of the United States (1787) protects five cherished values: freedom of religion, speech, press, assembly and petitioning the state. Each of these fundamental rights is linked to freedom of conscience, protecting the possibility of people to think and speak according to their beliefs. The document reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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The First Amendment therefore contains two clauses related to religion: one prohibiting the establishment of a state church and the other protecting free religious practice. The Establishment Clause is clear in that the establishment of a religion by the Congress, its 'officialisation' or a direct coercion to religious belief is a prohibited area of interference. However, the First Amendment's clauses on the free exercise of religion and freedom of speech protect individuals who engage in personal religious observance from state retaliation, and the Constitution does not authorise the government to suppress such religious expression. Perhaps it is thanks to this that most of the decisions related to the establishment clause have not been adopted in cases that can clearly be judged by a semantic interpretation of the First Amendment, but are in the 'grey area' of the rule, where courts have had to decide whether some governmental manifestation related to religion is at all covered by the constitutional prohibition.

The Establishment Clause was the result of a current affairs policy consensus, a significant element of which was the exclusion of the institutionalisation of religion from the powers of Congress – as a lesson from what had happened to the Church of England. Nevertheless, the colonists and their descendants considered themselves God-fearing people, much of American society is still religious today, and the United States has observed the national day of prayer and thanksgiving every year since its proclamation on 25 September 1789.[1] Unlike other Protestant nations, religion has remained central to American identity today (Huntington, 2005, p. 106). There is no doubt that President George Washington did not only use his thoughts on the providential grace of Almighty God as a rhetorical tool when designating Thanksgiving Day, and that the President who sought to establish a peaceful constitutional government demonstrated his religious tolerance, occasionally ahead of his time.

In contemporary America, of course, there were serious anti-religious forces in the footsteps of David Hume, Voltaire and Jean-Jacques Rousseau, and the personal presence of many (e.g. Thomas Paine), but this was not expressed explicitly in setting the content of the First Amendment. When Thomas Jefferson presented his commentary on the First Amendment to a Presbyterian minister, the minister asked him why he had not issued a Thanksgiving Day proclamation (unlike Washington and John Adams). Jefferson replied that religion was clearly a matter for the states. He explained that the U.S. Government should not interfere with the work, doctrines, dogmas and practices of religious institutions. No such power has been delegated to it by the member states, and therefore, if any human power has a say in such matters, the right to act is a matter for the *individual states.*

The view, attributed to Jefferson, though not derived from him,[2] that there should be an imaginary wall separating church and state, originally did not exist between the government and the people, but between the federal government and the individual states (Johnson, 1997,pp. 145-146, pp. 214–215). The separation of church and state did not originally mean that there was an impenetrable wall between the two, but that the

[1] On 25 September 1789, President Washington declared November 26 a national holiday of Thanksgiving.

[2] For example, the sixteenth century Anglican theologian Richard Hooker used the term 'wall of separation' in his writings, and Baptist Roger Williams, the founder of Rhode Island, wrote in 1644 that the Bible teaches that there should be 'the hedge, or wall of separation, between the garden of the Church and the wilderness of the world' (Williams, [1644] 1848, p. 435).

founding fathers were convinced that the union of church and state power would inevitably lead to tyranny. However, the doctrine of the 'wall of separation',[3] developed as a theory in the second half of the twentieth century, envisaged a very rigid wall of separation, which grew thicker and thicker, and eventually expressed the desire for government to be entirely secular, free from religious influence, and that religion should be in the homes of people and in the church.

Although the constitutional text itself only refers to the federal government (Congress), by 1833 all states had abolished 'official' religion, and the Court ruled in the 1940s that the provision applied to individual states.[4] This process has also taken place for other constitutional provisions: the same has happened with the constitutional prohibition of restrictions on freedom of speech, which covers all constitutional bodies and, since 1925, the member states and their bodies (Koltay, 2009, p. 98).

2. Subjects of the First Amendment' interpretation

Russell L. Weaver lists five areas that have from time to time raised points of law that need to be answered. The reason for their recurrence may be that, in the absence of generally valid criteria for their assessment, courts have been bound by the facts and circumstances of the particular case before them and have consequently been wary of making valid findings outside the scope of the case. The Supreme Court has done the same, keeping parallel several of the tests it has developed over time, and their modifications, in the system of judiciary. However, an overly fact-specific approach can obviously have a narrow scope, and personality law cases are not characterised by the routine repetition of situations.

The five issues mentioned include unconstitutional *financial aid* for religion, various *schooling benefits,* state support for *prayer,* the *inclusion of prayer in the curriculum* and *support for religious manifestations.*[5] In a different approach, the vast majority of cases involving establishment clauses have arisen in four main areas: *financial aid* for religious education[6] or other social welfare activities carried out by religious institutions, government *sponsorship of prayer,*[7] the *removal of religious dissidents* from generally applicable laws,[8] and in cases related to government owned or sponsored *religious symbols.*[9] These

[3] For more information on the Wall of Separation Doctrine see Baker, 2009.

[4] In *Everson v. Board of Education of the Township of Ewing* 330 US 1 (1947), all nine Justices agreed that the Establishment Clause applies to both the state and local governments.

[5] For the definition and detailed processing of the case groups see Weaver, 2017, pp. 274–321.

[6] *Everson v. Board of Education of the Township of Ewing* 330 US 1 (1947); *Board of Education v. Allen* 392 US 236 (1968); *Aguilar v. Felton* 473 US 402 (1985); *Zelman v. Simmons-Harris* 536 US 639 (2002); *Rosenberger v. Rector and Visitors of the University of Virginia* 515 US 819 (1995).

[7] *Engel v. Vitale* 370 US 421 (1962); *Abington School District v. Schempp* 374 US 203 (1963); *Lee v. Weisman* 505 US 577 (1992); *Santa Fe Independent School District v. Doe* 530 US 290 (2000); *Marsh v. Chambers* 463 US 783 (1983); *Town of Greece v. Galloway* 572 US 565 (2014).

[8] *Texas Monthly, Inc. v. Bullock* 489 US 1 (1989); *Cutter v. Wilkinson* 544 US 709 (2005); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* 565 US 171 (2012); *Burwell v. Hobby Lobby Stores, Inc.* 573 US 682 (2014).

[9] *Lynch v. Donnelly* 465 US 668 (1984); *County of Allegheny v. ACLU* 492 US 573 (1989); *McCreary County v. American Civil Liberties Union of Kentucky* 545 US 844 (2005); *Van Orden v. Perry* 545 US 677 (2005).

groups of cases, through their considerable diversity, have encouraged the Court to develop new tests for the effectiveness of the constitutional test.

3. State-sponsored prayer

Of the foregoing subjects, the assessment of cases of state-sponsored prayer is a particularly complex area, as reflected in the Court's less than consistent practice. The first two of the Court's best-known decisions ruled unconstitutional the practice of public school pupils starting the school day with prayer or Bible reading, even if this is ostensibly voluntary.[10] Although the reception of these decisions has been rather controversial,[11] the Court has gradually extended the ban to prayers at graduation ceremonies[12] and even to school sports events.[13] The school district practice under scrutiny in *Engel* and *Schempp* clearly consisted of regulating an act with a religious content, with prayer being regularly included in the institution's agenda, with a controlled content. In these cases, the Court, referring back to the principle of *religious neutrality,* declared that the mere support of religion in general resulted in an unconstitutional practice, in the assessment of which circumstance the voluntary participation in prayer or the sectarian neutrality of prayer was of no material importance (Koltay, 2016, p. 168). While the majority opinion in *Engel* did not refute the religious character of American society, it did emphasise that when the power, authority and support of government is placed behind the cause of a single religion, the interests of dissenters are harmed. In this case, religious minorities are under indirect coercion and must adapt to the religious preferences of the majority. It is therefore inadmissible to make any religion officially accepted. The ruling went on to say that the Constitution accepts other points of view, and that the right of atheists or agnostics to follow their own path cannot be denied. Overall, the Court declared that believers (and everyone) would benefit from a religion-neutral government.

The Court has already supported its finding of the need for neutrality in *Schempp* with a further argument, the religious diversity of American society, as demonstrated by demographic changes. The Court dismissed the arguments based on the historical practice of constitutional amendment (i.e. its narrower range of interpretation) by arguing that the practices of Jefferson and James Madison's time could be highly offensive to many today (including believers and non-believers).[14] The *Engel* and *Schempp* decisions thus relied heavily on the *religious minority and non-believer* criteria in finding a violation of the Establishment Clause. Consequently, the Court extended the interpretation of the clause as early as the 1960s, not only to the effect that the state may not establish a national

[10] For a detailed treatment of the relevant cases see Koltay, 2016, pp. 165–178; see also Weaver, 2017, pp. 297–304. The two cited cases are the *Engel v. Vitale* 370 US 421 (1962) and *Abington School District v. Schempp* 374 US 203 (1963).

[11] Thomas C. Berg, who wrote the detailed history of the *Engel* and *Schempp* cases, analyses at length how some members of Congress, outraged by the *Engel* case, made efforts to invalidate the decision by the amendment of the Constitution. These efforts continued after the *Schempp* judgment: by May 1964, 147 amending proposals had been made, but all ultimately failed in Senate hearings and House debates (see Berg, 2011, p. 221).

[12] *Lee v. Weisman* 505 US 577 (1992), p. 632.

[13] *Santa Fe Independent School District v. Doe* 530 US 290 (2000).

[14] *Abington School District v. Schempp* 374 US 203 (1963), p. 235.

church, but also to the effect that state support for certain religious practices is impermissible because it marginalises non-believers or those of other religions (Levine, 2012).

In *Lee v. Weisman,* the Court, in assessing the circumstances, emphasised that the decision to invite a rabbi to pray and give blessings at a school celebration was made by the principal,[15] acting on behalf of the state, and hence, in essence the content of the prayers was directed and controlled by the principal. The presence of the rabbi had a coercive effect on the pupils present, in that the school obliged all of them to attend the religious event. This procedure was described by the Court as pressure, 'subtle coercion'.

It cannot be overlooked that in *Lee,* which came to trial two decades after the *Schempp* judgment, the *Lemon* test of absolute religious neutrality and the Endorsement test had been part of the case law for ten years as the fundamental tests of the First Amendment. In *Lemon v. Kurtzman,* the Court held that direct government aid to denominational schools was unconstitutional.[16] To determine whether a law or other government action is constitutional, it developed a three-step test. The first test is whether the challenged state action has a secular purpose, the second is whether it has the primary effect of promoting or inhibiting religion, and the third is whether it does not involve excessive entanglement of state and religion.

The second test for endorsement was proposed by Justice O'Connor in *Lynch v. Donelly.*[17] The Court did not find unconstitutional the display of a nativity scene surrounded by other festive decorations in the heart of a shopping district, stating that it 'engenders a friendly community spirit of goodwill in keeping with the season'.[18] Under the endorsement test, the court is to examine whether the state intended to convey a message of 'endorsement' or 'disapproval', and whether the act had such a communicative effect. Accordingly, a violation of the Establishment Clause occurs when, to a reasonable, informed observer, the government's action appears to be an endorsement of religion. The endorsement test, which modified the first two criteria of the *Lemon* test, did not attack the speech of the religiously inclusive community and was more respectful of the identities of citizens of different religions, because it focused expressly on the government's message. The informed and reasoned observer benchmark was most often applied in cases involving religious symbols, although the Court also used it to judge a one-minute silence (meditation or silent prayer during school hours) a year after the *Lynch* decision.[19]

The third test, called the coercion test, was developed by Justice Kennedy in 1992 in *Lee.*[20] The criteria of the test are designed to determine whether the government's actions pressure or coerce someone to participate in a religious event or to remain passive in a situation of discomfort. The coercion test, despite its increased importance, has remained a doctrinal tool and has not replaced the other tests of the Court (Rode, 2016, p. 7).

Eight years after the Lee ruling, the subject of the investigation was prayer on school grounds, no longer in classrooms but on the sports field instead. In *Santa Fe v. Doe,* the

[15] *Lee v. Weisman* 505 US 577 (1992).
[16] *Lemon v. Kurtzman* 403 US 602 (1971).
[17] *Lynch v. Donnelly* 465 US 668 (1984).
[18] *Lynch v. Donnelly* 465 US 668 (1984), p. 685.
[19] *Wallace v. Jaffree* 472 US 38 (1985); McGrath, 2022.
[20] *Lee v. Weisman* 505 US 577 (1992).

Court ruled that a school policy allowing student-initiated and led prayer at a high school football game violated the Establishment Clause.[21] The policy required a vote first on whether to have a prayer and then on who should lead it. According to the decision, students and others present were forced to participate in a religious act. The Court focused on the active role of the school in the mechanism for selecting the student to lead the prayer. It attached importance to the fact that participation in the matches *was not voluntary* for the students and to the fact that the significant social pressure for such prayer was in a *special environment.* The Court assumed that students obviously perceived the situation as one in which participation was unavoidable, and that the pre-game prayer was endorsed and supported by the school. The Court concluded that the school policy clearly involved not only a perceived but also an actual endorsement of religion. As such, the presumed influence and action dynamics of the age group and the influence of the school's authority played a major role in the constitutional assessment of these practices at school events involving children or adolescents.

By comparison, at events in less coercive circumstances, essentially involving adults, the Court has generally not considered public prayer in a public institution to be unconstitutional. In *Marsh v. Chambers,* the Court held that prayer in public at the opening of a legislative day was such a practice.[22] In *Town of Greece v. Galloway,* the Court ruled the same way in relation to a prayer at the beginning of a town council meeting, where the town accepted any prayer without discrimination of religion.[23] In both decisions, the assessment was based on the practice built into historical tradition and its acceptability. The combination of these two factors, namely the low degree of coercion to participate in the prayer and the action as a tradition, prevented the practice from being found unconstitutional.

Some find it curious that while in *Schempp* the Court was keenly concerned with the sensitivity of people of other religions and non-believers, these aspects were not at all relevant in the majority decision in its assessment of the practice of legislative prayer, which favoured the dominant religious views (Levine, 2012, p. 785). In *Town of Greece v. Galloway,* however, the Court explained that the outcome of the inquiry is emphatically fact-dependent, and must take into account the context in which the prayer was said and the audience.[24] The Court also suggested that it would have considered the legal issue differently if the town council had persuaded the audience to participate in the prayer, and singled out dissenters, or indicated that agreeing to prayer would influence its decision making. However, these circumstances did not arise in the case[25] (Levine, 2012, p. 785).

In each of these cases, the 'democratic tradition' based on the separation of church and state has been a solid starting point for the Court. However, it is not easy to separate these two crucial forces of human existence. From the 1950s until roughly the early 2000s, the Court decided the cases before it by gradually widening the interpretative boundaries of the establishment clause, with only a few exceptions based on historical tradition. The

[21] *Santa Fe Independent School District v. Doe* 530 US 290 (2000).
[22] *Marsh v. Chambers* 463 US 783 (1983).
[23] *Town of Greece v. Galloway* 572 US 565 (2014).
[24] *Town of Greece v. Galloway* 572 US 565 (2014), p. 587.
[25] *Town of Greece v. Galloway* 572 US 565 (2014), p. 588.

Court applied its own constitutionally-constructed test to the facts found by the lower courts and, if their identification reached a 'critical mass'; in other words, if they fitted the elements of the test, decided on the constitutional issue. Where the facts did not fully fit the criteria known from previous cases, this resulted in either the constitutionality of the practice or the need for creating further tests. The prayer in the legislature escaped because it was uttered before persons of age, distinguished patrons and had a two hundred year tradition. The school morning prayer, on the other hand, was ruled unconstitutional because the Court presumed a high degree of influence on children or those on the verge of young adulthood. In these cases, however, the state *school* could always be identified as the initiator of the practice under scrutiny. The school prayer was therefore the decision of the institution, not of one of its employees.

In the cases just discussed, there was a competition between the First Amendment's coverage of the establishment clause and the free exercise of religion. The latter, however, concerned the prayer of the pupils of the school rather than the religious practice of the school's employees. The state school could therefore always be identified as the initiator of the practice under scrutiny. Of course, life produces other variations – for example, the case of the deeply religious school coach.

4. Kennedy v. Bremerton School District[26]

In *Kennedy v. Bremerton School District,* the point of law was whether the public school violated the First Amendment by firing a high school football coach for praying after school football games. In other words, the courts had to decide whether a public school employee's prayer during school sports activities was constitutionally protected or could be prohibited by the employer to avoid violating the Establishment Clause.

Joseph Kennedy, an employee of the Bremerton School District in Washington State, was a football coach at a public high school. As a Christian man of faith, he continued for many years (from 2008 to 2015) the practice of kneeling on the 50-yard line after school games for a short (about half a minute) prayer on the field, giving thanks for the players and the game. The prayer was done without public address and any member of either team was free to join in. According to his employer, the school, the coach violated the constitutional separation of church and state by this practice and was ordered to stop praying. Apart from a brief break, Kennedy refused to give up the practice, which had become a habit. He was then suspended and then dismissed by the school district. He sued his employer, claiming that the school district violated his rights under the Civil Rights Act of 1964 and restricted his right to freedom of religious practice and freedom of speech.

The lower courts ruled in favour of the school district. The trial court ruled that the school did not violate Kennedy's constitutional rights to freedom of speech and freedom of religious practice. The court set Kennedy's rights against the school's constitutional rule derived from the separation of church and state. According to the court's reasoning, the public school coach's duties did not end at the conclusion of the game, and that those on

[26] *Kennedy v. Bremerton School District* 597 US (2022).

the scene could not be convinced that the coach was off duty when he prayed on the field. His 'speech' was therefore not of a private nature, but a public service employee's speech. It was relevant that the coach, by virtue of his position, had an influence on the players, who obviously wanted to please their role model. Therefore, by his action, he exerted a 'subtle coercive influence' on the pupils, who were in a heightened emotional state at the sporting event, to participate in prayer. In the circumstances, it might have appeared to an outside observer at the event that the coach was conducting the prayer with the support of his employer and, ultimately, with the endorsement of the State. The court of appeal made the same assessment of the circumstances of the case and agreed with the first instance decision.

However, the Supreme Court reversed the decision (with 6 to 3 votes). It ruled that the Bremerton school district had violated Kennedy's right to freedom of religion and freedom of speech. Judge Gorsuch, who wrote the majority opinion, reasoned that the coach's prayer constituted private speech that was not generally within the scope of his coaching duties. The Court also rejected, for lack of evidence, the defence that Kennedy's actions compelled the students to pray. The majority also announced the rejection of the *Lemon* test, which had been the standard test that far.

According to the Court, irrespective of whether the Free Exercise Clause or the Free Speech Clause is the legal basis for the inquiry, a different test must be applied.[27] The school district was required to prove that the restriction on the plaintiff's constitutionally protected rights passed the strict scrutiny test, served a compelling interest and was focused solely on that purpose. Kennedy's silent prayer on the field did not have the effect of compelling student athletes to join. Although some may have witnessed the religious act and heard the prayer, learning to tolerate speech or prayer of any kind is 'part of learning how to live in a pluralistic society'.[28] The Court stated that:

> Respect for religious expressions is indispensable to life in a free and diverse Republic – whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances, even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.[29]

The Court also held that Kennedy's speech and religious exercise were protected even at a lower, intermediate standard. It declared the application of the long-criticised *Lemon* test in the *Kennedy* case 'long outdated', and abandoned it.

Justice Sotomayor and the two Justices[30] who joined him in the dissenting opinion disagreed with the Court's preference for the constitutional clause on the free exercise of

[27] *Kennedy*, 142 S. Ct. 2407, p. 2427; for an analysis of the tests applied by the courts see Ruello, 2023.
[28] 597 U. S. ____ (2022), p. 26.
[29] 597 U. S. ____ (2022), p. 5.
[30] Sotomayor J. filed a dissenting opinion, Breyer J. and Kagan J. joined.

religion over the Establishment Clause. They argued that Kennedy's prayers were said during his service as a coach. The prayers, visible to the students, compelled them to join him as a role model for the students. Therefore, allowing a school district employee to 'publicly and communicatively display his personal religious beliefs at a school event' violates the Establishment Clause.

It can thus be seen that the Justices of the Court, in their majority and minority opinions, interpreted the *same facts in different ways,* attributing different relevance to the circumstances of the case. While the justices in the minority did not consider the applicability of the previous tests to be excluded, the majority announced a change of direction in the way cases with similar facts were judged. This case can therefore be seen as a 'battle of tests'. Its real significance lies in the Court's explicit rejection of the previously accepted Establishment Clause doctrine, the *Lemon* test, which held the government's permitting the expression of pro-religious messages unconstitutional (S. D. Smith, 2022, pp. 26–28), and which lower courts had previously been obliged to consider and apply. Its other equally significant element is that what was previously considered a subtle influence, an indirect coercion, no longer creates the possibility of restricting religious speech, according to the Court, but only in the event of direct coercion.

5. Weighing opposing arguments

The *Kennedy* case attracted particular attention because the coach suffered disadvantage because of his *religious activity during working hours,* which led to the simultaneous application of several fundamental rights tests: freedom of expression, freedom of religious practice (Kennedy claimed a violation of both rights) and the Establishment Clause, which do not at all consist of identical criteria. The courts apply the *Pickering* test in analysing[31] whether the interests of the employee or the state are to prevail when the state seeks to restrict the employee's speech. The test itself consists of two parts. First, the employee must prove whether the speech can be considered a public utterance. If it is not within the scope of public discourse then the employer's interests shall prevail and the employee cannot claim constitutional protection for the speech. If the speech concerns a matter of public concern, then, as a second step, the interest of the state (as employer) in the efficiency of the public service must be balanced against the interest of the public employee in participating in matters of public concern. It is for the employer to prove the applicability of the measure.

In *Garcetti v. Ceballos,* the Court expanded this framework and imposed a two-step test for determining whether a public employee's speech is entitled to protection.[32] Here again, the first step is to determine whether the employee has spoken as an ordinary citizen on a public matter. If not, their speech is not constitutionally protected through the First Amendment. If so, it must be examined whether the public body concerned had proper grounds for discriminating against the employee. In fact, the test in *Garcetti* focused on

[31] *Pickering v. Board of Education* 391 US 563 (1968).
[32] *Garcetti v. Ceballos* 547 US 410 (2006).

whether the employee made a proper statement in a manner that did not violate his official duties. Freedom of expression does not apply when it is exercised in the course of the performance of official, job duties. Eight years later, in *Lane v. Franks,* the Court limited this test to the question of whether the speech in question fell within the scope of the employee's duties in general.[33] Accordingly, if the speech falls outside the employee's normal employment duties, the speech is protected.

In the *Kennedy* case, both parties requested the court to apply certain parts of the *Pickering* test. It was obvious that not all aspects were necessary to assess the circumstances of the case, since, for example, the very first step (whether the speech was on a matter of public interest) led to a clear affirmative answer. The parties considered this in the same way, so no discussion was necessary.[34] However, the relevant circumstances to be examined were whether the person concerned spoke as an individual or as a public employee; whether the school had an appropriate reason to discriminate against the employee and whether the school would have taken the adverse employer action even without the protected speech.

According to Kennedy, when he said the short, silent prayer at the 50-yard line, he was speaking as a private citizen. His statement cannot be classified as being within the scope of his normal public employee duties. He further argued that a reasonable observer would not consider the prayer to be school-sponsored. Given the coach's past practice, a reasonable observer would know that the school's players had joined in religious expression in the past, but would also be aware that they had never been required, coerced or actively encouraged to participate in religious activity. A reasonable observer would only see the coach kneel down and conclude that he is experiencing personal silence.

According to the defendant, the school considered this utterance to be a public employee's speech, which it sought to prove by the circumstances. The coach performed the prayer during working hours when he supervised and controlled the players. As these duties continued after the match, his 'speech' was delivered during his usual work duties. According to the school, the coach's conduct was an infringement under all tests, including the endorsement test, the coercion test and the *Lemon* test. First, the students who witnessed Kennedy's demonstrative religious practice concluded that he enjoyed the school's endorsement. Second, because the coach decides who plays in games and for how long, arguing with the coach's ideas is a deterrent, and thus subtle coercion was present in this case. Third, the school believed that the coach's prayer practice had no secular purpose and the supposed school endorsement had no such effect.

6. Error in the choice of tests to be used

As opposed to the above, the Court clearly distinguished government speech in support of religion, prohibited by the First Amendment, from protected private speech in support of religion. It stated that the district court did not choose the 'appropriate test' for

[33] *Lane v. Franks* 573 US 228 (2014).
[34] *Kennedy*, 142 S. Ct. 2407, p. 2424.

considering the circumstances of the case, as it applied the 'while at work' formulation in analysing the coach's practice, rather than the 'within the scope' formulation in the *Lane* case. The Court then focused on the coach's role, without properly examining the prayer in the light of the criteria set out in the *Lee* and *Santa Fe* cases, and, as a result of the inconclusive protocol, the court arrived at the wrong legal conclusion.

The district court held that Kennedy spoke as a public employee when he prayed at the 50-yard line because he was still at work at the time. This reasoning may be consistent with the reasoning given in *Garcetti* (statements made by an employee in the performance of his official duties are not considered private speech), but it is clearly contrary to the standard applied in *Lane,* which held that the key question is whether the speech in question is within the scope of the employee's duties in general. In assessing this, the time, place and attire of the employee and the immediate context of the action (its perceptibility) must be considered jointly in relation to the utterance. None of these can be separated from the assessment, because they are not decisive in determining whether the employee acted within the scope of his duties in making the utterance. In contrast to the former, the content of the utterance must be given decisive weight: on this basis, the prayer was not part of the coach's duties.

Had the *Lane* rule been applied, it would have been clearer that Kennedy was speaking as a private individual. The Court held that, as to whether Kennedy was on duty at the time of the prayer, rather than whether his prayer was part of his normal job duties, the district court considered a relevant element only that if he was acting *while at work* then it was in any event a public employee's manifestation. This is not a persuasive reasoning, and it violates the interpretive criterion announced in *Lane* by overly expanding the scope of *public employee speech,* thereby rendering virtually any prayer that is said while at work unconstitutional (Rode, 2016, p. 17). Under this approach, the Court ruled, a school could dismiss a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian employee from praying silently in the cafeteria while eating their lunch.

Unlike the prayer in the *Santa Fe* case, the coach's silent, and brief prayer was not broadcast over a public address system to the 'captive audience',[35] and those who did not attend could not hear it. Furthermore, it is a rather unrealistic assumption that the school teachers are acting solely in the course of their official duties while at work. At Bremerton, after sports matches, as is school custom, all employees were allowed a few minutes for personal activities (such as mobile phone calls, informal chats with spectators or team members), the legitimacy of which was never questioned by the school. Kennedy prayed during this time, for half a minute, on the pitch. It is unlikely that any reasonable outside observer would have regarded this activity as speech explicitly endorsed by the school. The post-match situation is more akin to a short break after a meeting, or a few minutes during working hours when everyone is minding their own business.

In this trial, the shortcomings of the endorsement test were also demonstrated. The constitutional criteria were essentially defined for cases concerning the permissibility of religious symbols, where the question of whether the display of a work of art or other

[35] The use of the term 'captive audience' is analysed by Garry, 2009.

object in public enjoys the endorsement of the state must be examined from the point of view of an impartial, objective observer. In school prayer cases, it is no longer easy to identify an observer with similar characteristics. It is unlikely that an objective observer, as envisaged by Judge O'Connor in the *Kennedy* case, would have happened to be on the field, as typically people with an interest in the match are present. Even if this were the case, it is not unusual for the game to be disconnected from the circumstances, as the atmosphere on all sides is heightened, everyone is usually more or less ecstatic, and at the end of the game neither the fans nor the students are concerned with what one coach is doing on the field. The context of a school team game is simply different from, say, a war memorial cross or the aspect of people gazing around a nativity scene in a shopping centre. In such circumstances, it is difficult to imagine an objective and rational outside observer wondering whether the coach is acting with the endorsement of the state in the half-minute in question. It is even more difficult to identify with the idea that we should judge what happened on the pitch, namely the behaviour of the participants and the impact of the prayer on them, from his point of view.

It is to be noted that coaches and players also kneel down on many less solemn occasions. In the event of a serious injury sustained during a game, it is common for coaches and players to kneel and fans to bow their heads, all praying for the same purpose in the silence (Rode, 2016, p. 21). It is unlikely, however, that any school would see this as a real threat to violate the Establishment Clause. In addition, there have been examples of teams kneeling before matches on the basis of other preferences, not as a personal time, but for explicit demonstrative purposes. Despite the religious origin of the gesture, no discrimination against this act has ever occurred.

Otherwise, in Kennedy's case, the facts suggested that there was a complete lack of school participation in the prayer. Bremerton did not supervise or control the subject matter or content of the prayer; the prayer was not the result of the school's policy of encouraging religious expression, and the school was unaware of the practice during the first eight years of the coach's career. Hence, because Kennedy's prayer was not influenced by the school, it could not be construed as having been endorsed by the school, so there were strong arguments for the private nature of his speech.

The Court also judged the effect of the coach's action differently from the lower courts. The Court found a fundamental difference from the Lee case in that the school did not participate in Kennedy's prayer, and the prayer itself was not officially known until eight years later, through a complaint from a parent. No one disputed that the coach did not encourage the students to join in, and that the students who voluntarily prayed with him were not a homogeneous group, either in terms of their identity or numbers. This calls into question whether they chose to participate in prayer under coercion. In contrast to the prayer at a graduation ceremony *(Lee)* or a student-led prayer before a football match *(Santa Fe),* Kennedy prayed after the players had left the field and the fans had left or were about to leave. Therefore, there was not even a question of direct coercion on the students.

On the question of the assessment of coercion, some differences emerged on the basis of an analysis of the analogy of the facts. In *Santa Fe,* the prayer broadcast over the public address system immediately preceded the match, so it would have been rather difficult to argue that the players had a way of distancing themselves, so the Court obviously did not

use the term 'captive' audience by chance. Such a situation did not occur in the *Kennedy* case. However, the school's concern about the role of the coach is more understandable. The coach is undoubtedly a leading figure for the team members; he has control over their place in the game, their playing time and influence over their careers as athletes based on his professional opinion. His role is not solely educational through sporting objectives: he bears more responsibility for the team's performance than, for example, a physics teacher for the class average. He gets to know the team members and their environment better, following not only their physical but also their mental development. The coach is a kind of role model, who can be perceived positively or negatively, and whose adaptation is driven by recognition or fear, but whose respect based on authority is undoubtedly present in the sporting world.

It is likely that Kennedy's players were involved in prayer because of this complex, unique relationship, and it seems plausible that this could be seen as a subtle coercive effect of his person. But what about those who joined the prayer from the opposing team or the spectators? In their case, it is not very logical to assume such a coercive effect, if only because of the aforementioned lack of personal connection. Moreover, the members of Bremerton's team did not always join him, and they varied in composition from one occasion to another, so the supposed coercive element must have been quite remote. The Court simply did not consider the subtle coercive effect sufficient to justify a restriction on the coach's exercise of religion. In this respect, quoting from the *Lee* decision, it valued, as a constitutional tradition, the tolerance of a wide range of human behaviour as part of living in a plural society.

7. Implications of the *Kennedy* case for the assessment of coercive effect

Gorsuch J. noted in advance that members of the Court sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause,[36] yet it seems that the Court in this case has clearly rejected the decisive importance of the 'subtle coercive effect' that remains below the threshold of direct compulsion. Consequently, in future cases before the courts, as long as the employer cannot prove direct coercion, prayer as an expression of free exercise of religion in the workplace cannot be restricted under the Establishment Clause. That is, as long as it is not said in school, 'You must come and pray', but only 'Who wants to come?', some degree of constitutional protection cannot be denied from a religious exercise. The presumption of 'psychological coercion' used in the early cases of school prayer (*Engel, Schempp*) became questionable with the *Kennedy* decision. Research into psychological coercion was essentially concerned with whether the institution exerts undue pressure on pupils with the view to participate in religious activities. Criteria to

[36] Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause; compare *Lee v. Weisman* 505 US 577 (1992), pp. 593, 640–641 (Scalia J. dissenting).

help determine this included: whether participation is compulsory, the extent of school involvement, who says the prayers, or the degree of involvement of the lead person (McGrath, 2022, p. 2464).

However, it is apparent *prima facie* that it is an impossible undertaking to establish a presumption as to the degree of coercion exercised on a target audience with a different composition in every case.[37] Justice Scalia, dissenting in *Lee,* strongly criticised such an expansion of the concept of coercion, stating that the majority opinion's notion of coercion is evidence of a confused understanding of the true meaning of 'coercion', a psychology practiced by amateurs that is boundless and subject to limitless manipulation. Only a combination of facts with concrete consequences for the person subjected to the coercion can be considered coercive, provided the correct approach is followed. In the *Kennedy* case, the defendant did not prove such a coercive effect.

Nor has state aid or government endorsement proved to be an easily applicable standard. The very fact that this test can be applied in school prayer-type disputes has made the practice uncertain, since coercion must be examined from the state's perspective and cannot be extended to the protected freedom of expression of the person saying a voluntary prayer. This uncertainty was intensified by the facts of the *Kennedy* case. The case is therefore seen by some as a symbolic parting of the waters, as it has made clear a constitutional change of direction that has been observable in the Court's decisions for a decade or even more (S. D. Smith, 2022, p. 27). In the American constitutional order, the 'wall of separation' theory of the relationship between church and state, developed in the second half of the twentieth century, dominated legal thinking for decades after the Everson case in 1947.[38] This doctrine, which was maintained for nearly seventy years, required the two spheres to be kept separate. According to this view, the experience of religion is essentially a private matter, to be protected only in the private sphere, but public and governmental functions (including public schools) must be neutral and therefore secular.

Prior to the *Kennedy* verdict, public schools had strong powers to control the religious communications of teachers and students under their responsibility (Lupu & Tuttle, 2023, p. 47). Those who have challenged the endorsement test over time have often argued that it relies on figurative abstractions that do not have their origin in constitutional tradition. A typical example of it is the three-step test created in the *Lemon* case, which cannot be derived from the text of the Establishment Clause. The Court's jurisprudence has subsequently required that governmental action must not even symbolically endorse religion, but there was no clear guidance on how to recognise symbolic endorsement.

In contrast, according to those who oppose an overly expansive interpretation of the Establishment Clause, the drafters of the Constitution were aware of the different meanings of 'establishment' and 'endorsement' when drafting the Establishment Clause and chose the former to express their intentions. They therefore challenged the constitutional jurisprudence by arguing that the original meaning of the Establishment Clause (the prohibition of the institutionalisation of religion) had been changed by the *Lemon* test

[37] *Lee v. Weisman* 505 US 577 (1992), p. 632.

[38] *Everson v. Board of Education of the Township of Ewing* 330 US 1 (1947); for an analysis of the case, see Ward, 2009.

and its 'successors'. They allow the judge to make a subjective assessment of whether the state actor had a secular purpose, so that the judge can engage in relatively informal speculation about the state of mind of another government official and draw a subjective conclusion about whether the government actor's purpose is secular. If the court finds that there was no secular motive, it must find that the state action violated the Establishment Clause.[39]

The requirement of a secular purpose as created by judges, and the prohibition on endorsing religion, is, according to opponents of the doctrine, a stretch of the judicial power under Article III of the Constitution. However, by overruling the *Lemon* test, the Court has called into question the justification of the criteria (religious purpose, effect on religion, interconnection between the two spheres) on which the practice of the Establishment Clause was based. The Court has not been able to establish, despite serious efforts, a coherent rule for assessing the infringement of the Establishment Clause.

8. The role of tradition in judging cases

According to the change of direction announced by the Court, courts in future will have to decide whether a law or practice violates the Establishment Clause by taking into account history and historical tradition and going back to the original meaning of the text as drafted by the Founding Fathers. This brings back on the agenda the not so recent debate between liberal and conservative interpreters of the Constitution as to whether subsequent practice of the Constitution can override its original understanding. The question of the nature of the mutual criticism between the two sides cannot be answered correctly by contrasting the extremes of their differences. To understand the differing views, we must accept that both approaches are ultimately based on a choice between value preferences, influenced by debates about the interpretation method of the Constitution. The history of dissenting opinions of the justices of the Court is also the history of how, and under what conditions, the liberal view of the Constitution (as an evolving organism) and the conservative approach of defending the original meaning of the Constitution can prevail over each other.

In the *Kennedy* case, the Court instructed the lower courts to interpret the Establishment Clause by reference to historical practices and interpretations, rather than applying the *Lemon* test and the endorsement test. This finding had already been made in the 2014 *Town of Greece* and 2019 *American Legion* cases,[40] and the Court also referenced it. According to the legal reasoning of the former judgment, 'the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers'.[41] In doing so, the Court wished to emphasise that an analysis focusing on the original meaning and history is not a feature of the *Kennedy* case but a long-standing rule, that is, it is not an exception to the

[39] A summary of the criticisms of the *Lemon* and endorsement tests can also be found in the *amicus* filed in the *Kennedy* case (February 2022).

[40] *Town of Greece v. Galloway* 572 US 565 (2014); *American Legion v. American Humanist Association* 588 US ____ (2019).

[41] *Town of Greece v. Galloway* 572 US 565 (2014).

Court's jurisprudence on the Establishment Clause. This should have been recognised by the courts of first and second instance. In *Marsh,* the Court emphasised the idea that the legislature's chaplaincy goes back to the First Congress, which is why it is such an old tradition that it has become part of the fabric of society.[42] Although the Court considered the decision an exception due to the limited context in which the prayer was said.[43] And, in *American Legion,* the Court considered the *Lemon* test inappropriate for adjudicating the point of law,[44] instead deeming the tradition-based reasoning appropriate to overcome the courts' overly broad interpretation of the Establishment Clause.

Some of the analysts of that thesis missed the set of application criteria of history and tradition as standard. They stressed that the Court had not revealed the techniques that would allow a more thorough understanding of the historical context of the original meaning and determining the historical tradition (analysed by Cooley, 2023, p. 61). It defined the scope of the Establishment Clause by reference to historical practices and perceptions, but did not carry out the analysis itself (mapping the historical practice and relating it to the facts of the case), referring only to its previous precedents (M. L. Smith, 2022, pp. 38–39). In doing so, the judges exposed the constitutional case law to the risk of inconsistency, thus ultimately creating the potential for undermining legal certainty.

The originalists also argued with legal certainty. Since such an approach to constitutional interpretation requires the identification of the communicative content of the constitutional text, it is essential to collect and evaluate all the evidence on the historical and traditional meaning. These then act as constitutional limits on judicial decisions and the formulation of doctrines. Where the text of the Constitution is vague, history and tradition can be the basis for the choice of the right doctrine, whereas the idea of a living constitution undermines the predictability of the law, empowering judges to interpret the content of the Constitution according to their own convictions. The rule of law (as an important political value), the separation of powers (including the desire for judges to rule according to existing rules) and popular sovereignty (as a political value of democratic legitimacy) are common premises of the different versions of originalism. However, the validity of the three elements is doubtful if the idea of a living constitution derives its primary definition of meaning not from social practices but from artificial, abstract principles and values (Barnett & Solum, 2023, pp. 2, 14).

9. Moving towards the free religious practice

What does all this mean for the *Kennedy* case? If the focus of legal judgment is on the fact that Kennedy is identified as a coach during his prayers, the Court's reasoning effectively makes any religious expression by public employees categorically prohibited. In this approach, the content of the utterance is irrelevant and, since the religious element is ignored, the case will be decided on the constitutional aspects of the employee's

[42] *Marsh v. Chambers* 463 US 783 (1983).

[43] *Town of Greece v. Galloway* 572 US 565 (2014).

[44] According to the ruling, the Bladensburg cross on the World War I memorial did not violate the Establishment Clause, and the historical approach should be taken as the guiding principle in the assessment of religious symbols.

freedom of speech. The conflict between the two competing interests precludes the free religious practice under the First Amendment, even though the employer also discriminated against the employee for fear of violating the Establishment Clause. The employee, on the other hand, cannot effectively invoke his right, at all, to freedom of religious exercise, which is in fact in conflict with the Establishment Clause.

In my view, this is the one-sided situation, which the Court has recognised and which has led it to take a different starting point in its adjudication of the case. Namely, the First Amendment protects not only two but all three values (the prohibition of the institutionalisation of the church, freedom of expression and freedom of worship) simultaneously, and does not establish any inherent hierarchy between them. The legal assessment of these matters will require a more comprehensive optic in the future, rather than the proverbial thinking that 'There are three kinds of people: Those who can count, and those who cannot'. It is true that the Founding Fathers said nothing about how they intended the Constitution to be interpreted, but these values were not placed side by side in the First Amendment by chance. The Court recalled a precedent that in Anglo–American history, government repression of speech has often been directed at religious speech, even though private religious speech is by no means an orphan child of the First Amendment, but is – from the point of view of freedom of speech – fully protected to the same extent as secular speech. Therefore, 'free speech clause without religion would be *Hamlet* without the prince'.[45]

The fact that the First Amendment doubly protects religious speech (both through free speech and independently) is not accidental, but a natural consequence of the Framers' distrust of government attempts to regulate religion and suppress dissent. The Court thus expressed the view that early opponents of the religious establishment were not concerned with the separation of church and state, but rather with state-sponsored religious discrimination. However, this had a well-defined, small number of issues, which the Court gradually broadened, increasing the wall of separation. This approach ignores the fact that there has never really been a consensus on the separation of church and state, nor that, in history, governance has always been conducted with some degree of cooperation between the two spheres.

The complete rejection of state endorsement for the church has never been achieved, as the church takes over certain public functions from the state, typically in the areas of education, running the social system and the pursuit of cultural goals. The institutional interactions that develop in the process are realities of the recent case law, of which the Court takes note.[46] In other cases of the Establishment Clause, such as the performance of prayer in a state institution or the display of religious symbols in public spaces, a narrow, exceptional range existed from the outset, precisely due to this historical tradition. In the *Lynch* case, the nativity scene in Bethlehem did not violate the Establishment Clause because of its Christmas context, its historical tradition and its friendly, community

[45] *The Capitol Square Review and Advisory Board. v. Pinette* 515 US 753, 760 (1995).

[46] In *Carson v. Makin* 596 US ____ (2022), there was a change of aspect. The Court's prior case law had held that the state *could permit* the allocation of public funds to religious purposes in certain cases, but in *Carson,* it concluded that if a public funding program funds secular purposes similar to those of a church-maintained institution, then the allocation of public funds should be permitted.

aspects. However, in *County of Allegheny v. American Civil Liberties Union,*[47] a majority of judges held that the mere display of a nativity scene on the main staircase of the courthouse violated the Establishment Clause because its display was 'indisputably religious – indeed sectarian'.

In *Kennedy,* the Court in effect simply reaffirmed the doctrine that some degree of governmental recognition and accommodation of religious utterances is a good practice that is part of the national heritage. In its interpretation, a religious person need not choose between adherence to his religious identity or participation in activities protected by the First Amendment. This ruling also suggests that freedom of expression and freedom of religion are not overtaking but complementing each other. The flaw in the doctrine of the State that is indifferent to religion is that it misconstrues religion and religious sentiment. Some people undoubtedly regard their faith as absolutely personal, but religion has never been (by its very nature) purely private for countless people, and the Court's precedents have not changed this (S. D. Smith, 2022, p. 27). The *Kennedy* ruling of 2022 ultimately moved the jurisprudence towards a freer religious practice and away from the separation of church and state. What are the prospects?

If the *Kennedy* decision is correct, and the arguments it makes are subsequently confirmed by the Court and incorporated into jurisprudence, this consequence may be seen as a correction of the Court's interpretation of the Establishment Clause. If religious activity in the personal time of a public school employee is protected in the same way as any profane speech then the prohibition of discrimination can function as a guarantee of the free religious practice. In this approach, the Establishment Clause and freedom of religious practice are not necessarily in conflict. Tolerance of the expression of religion does not make it a condition of respect that religious persons substitute a conscientiously determined purpose based on secular beliefs or traditions for a purpose based on religion (expecting them to act with a secular purpose, and not to support religion even in symbolic ways).

If the *Kennedy* ruling is wrong, then the Court has unnecessarily contradicted its own seventy years of practice, leaving the Establishment Clause vulnerable to vague, easily manipulated and emphatically non-legal notions of historical practice and tradition. The lack of clear legal criteria makes this jurisprudence uncertain and inconsistent, and favours a result-oriented, distorted search for precedents, in which the judges' own legal conceptions are strongly present.[48] History and tradition include, among other things, the recent precedent history, in which the wall metaphor has been explicitly applied over a long period of time, and cannot be disregarded without any consideration. The Court, by narrowing the doctrine of coercion to direct coercion, has allowed religious expression in public schools to an unprecedented extent, opening the door wide to the expression of any religious belief in a public institution.

We will see what happens.

[47] *County of Allegheny v. ACLU* 492 US 573 (1989).

[48] On the technique of selecting precedents according to a predefined outcome, see Cross and Harris, 1991, pp. 63–71, cited by Jany, 2021, p. 147.

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Public Governance, Administration and Finances Law Review Vol. 8. No. 1. (2023) • 43–54.

DOI: 10.53116/pgaflr.6692

Commentary on the Right to Education

An Expository of Article 12 of the Maputo Protocol

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Abstract: The right to education is identified as a crucial and classical right. This classification is premised on the fact that it provides the basis on which an individual has the potential to transform their status and build their desired personality. Additionally, it is the basis on which society is projected to be transformed and set on a better pedestal, with individuals playing positive roles. The recognition of the right, though emanating from the Universal Declaration of Human Rights (UDHR) received only tacit recognition through other treaties. The Maputo Protocol recognises the right to education, as it flows from the African Charter on Human and Peoples' Rights. This commentary, therefore, examines the right to education as enshrined in the Maputo Protocol with the aim of restating the grounds covered in the protection of female children and women and exposing lost opportunities. Finally, it makes recommendations on how the lost ground can be covered and give better content and scope to the right to education.

Keywords: girl child, education, Maputo Protocol, human rights

1. Introduction

The importance of the right to education is evidenced in the fact that education enables female children to acquire the knowledge, values and skills that are needed to function in a civilised society (Singh, 2016, p. 119). According to the World Bank, "every day, girls face barriers to education caused by poverty, cultural norms and practices, poor infrastructure, violence and fragility" (World Bank, 2022). The World Bank further reports that, according to UNESCO, about 129 million girls remain unable to access education. The statistics cover both girls of primary and secondary school age. From the above statistics, the completion rate is placed at about 63% (World Bank, 2022). A great concern is that close to about 4 million girls are projected as never being able to access school because of the factors mentioned above, especially that of growing conflict (World Bank, 2022).

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It is perhaps not surprising at all that one of the rights celebrated and protected in the struggle to emancipate the female gender is her right to education. Additionally, considering the patriarchal nature of African society, it can be said that the various treaties and literature that speak to the protection of rights of individuals, particularly females, can never be too much or over-emphasised.

Consequently, the right to education is a fundamental right that is appropriate and its implementation advances fulfilling the protection of the rights of female children and women in Africa. Mandela argues that education remains the tool through which the child of a peasant can change their status to become influential in society. Within the African context, Fafunwa (1974), Ikejiani (1965), Kenyatta (1979) and Ngugi (1981) all advocate education as a means of reaffirming dignity and ensuring that the identity of a people is not eroded, while promoting both individual and communal development.

This commentary focuses on the Maputo Protocol with specific attention to the provision in Article 12, the right to education. The Maputo Protocol was initiated by the OAU through its resolution AHG/Dec.126 (XXXIV) during the 34th Ordinary Session that was held on 8–10 June 1998 in Burkina Faso. The resolution came about because of the recommendation AHG/Res. 240 (XXXI) made during the 31st Ordinary Session held on 26–28 June 2005 in Addis Ababa, Ethiopia. The need for a Protocol arose from the acknowledgment of the priority of women in the socio-political development of Africa. The increased recognition of the structure of society as one that marginalises women and treats them as inferior, as well as the ratification of the Convention on the Elimination of Discrimination against Women (CEDAW) by African countries, led to agitation for a more comprehensive and domestic instrument that speaks to the rights of women in Africa.

The meeting, organised by the Women in Law and Development in Africa (WiLDAF) in March 1995, in Lomé, Togo enhanced advocacy in this respect. The meeting proved effective, as the Organization of African Unity called for an instrument to be drafted by the African Commission (Pambazuka website), which created a committee of experts made up of its members, representatives of African NGOs and international observers. The committee submitted its completed draft in 1999 and the protocol was adopted on 11 July 2003, by the African Union at its second summit in Maputo, Mozambique.

1.1. Did the right exist in other international treaties at the time – Or was it a first?

The existence of the right to education in Africa before the Maputo Protocol is one that cannot be categorically stated. This is premised on varying contextual histories of what amounts to an education in each particular society. Before the influx of colonialists and their formal system of education and the resultant effect of treaties emerging that address the right of women and the female children to an education, the perception of African societies regarding girls and their education was quite different, as girls were to be taught by their mothers while boys were to be trained by their fathers (Bowen & Hobson, 1974). In customary societies, females were seen as homemakers while men

were sent out to ensure the survival of their families and that is why, in the traditional African setting, a woman stays at home to cook while the man goes out to hunt or farm for the survival of the family (Anyanwu & Onuora-Oguno, 2013).

Society gave the education it deemed necessary to each child based on gender and perceived gender roles. This is perhaps why some people have argued that there has been no time in which girl children were denied a right to education. It is important, however, to restate that education, which was stereotyped and aimed at keeping the female child as a beast of burden, is not envisaged as education, *stricto sensu.* The extent of the numeric literacy of the female children was indeed one that left much to be desired; this necessitated a concerted effort towards ensuring the recognition of the right to education in general and specifically for female children (Ayodele & Adedokun, 2012).

Imperatively, before the advent of the Maputo Protocol, several other instruments in international law already provided for the right to education from a general perspective. The right to education is traceable to the Universal Declaration on Human Rights, which states that "everyone has a right to education" (Article 26 UDHR). This position is further elaborated by scholars such as Audrey, who identified the important role of governments in achieving a universal right to education (Audrey, 2012). Commenting on the importance of education, the United States Supreme Court in its landmark case of *Brown vs. Board of Education* (1954 para. 493*)* noted that "it is doubtful that any child may reasonably be expected to succeed in life if the child is denied the opportunity of an education" (Bantekas & Oette, 2013). Specially commenting on the importance of education for the female children, CEDAW in its General Comment No. 36 restates the importance of education for achieving equality in society and increasing equal access to available opportunities.

One of the main instruments for human rights is the African Charter on Human and Peoples' Rights (African Charter). It provides for the right to education of Africans in line with the mandate of the African Union, which is "freedom, equality, justice and dignity of the African people" (Article 17). The African Charter is at most an umbrella provision for the rights of persons, which causes a huge gap in the implementation of those rights based on the Charter alone. The right to education under the Charter is ambiguous and can be subject to various interpretations. For instance, the preamble of the Charter provides that the rights in the Charter are to be enforced in line with the traditions and values of the people, and this can lend credence to the interpretation of Article 17 as maintaining the status quo of the type of education traditionally given to women and the female children.

If such an interpretation is given to the Charter, it means the tradition of sending females to fattening houses, where they are taught to satisfy their husbands after marriage, which is the form of education practiced in some parts of Africa, would be deemed lawful and in line with the Charter although it may go against the spirit of the Charter. It is instructive to note that culture as envisaged is as explained in the African Commissions Guiding Principles, which provides that "the right to culture protects positive African values consistent with international human rights standards and implies an obligation on the State to ensure the eradication of harmful traditional practices that negatively affect human rights" (Para. 77).

1.2. Current relevant context – Brief information on the real-life situation addressed by the article, e.g. statistics on child marriage, for instance; how prominent is the issue?

With the influx into the continent of westerners, ideologies on various things such as rights, equality, education and several other key concepts strengthened the interaction of individuals in the modern world. This position is very important to note, as the concepts of equality, education and others already existed in Africa even before the influx of western education on the continent. The arrival of foreigners brought about the introduction of western or formal education, which society accepted, although for only male children, from the outset; males were allowed to go out of the home to learn about how to provide for their families. Females were, however, not given the same access to formal education as their male counterparts for many reasons steeped in the culture of several communities. Historically, women were treated essentially as chattels, who did not have a name but were given the name of their owners to indicate who owns them at a given time. Thus, women and female children were given the names of their fathers while preparing for married life and, once married, given the name of their husbands, who were considered their new owners. Thus, their ability to take care of the house of their owner at a given time amounted to sufficient education for them and their communities saw no need for any other form of education.

It was presumed that girls ought not to be exposed to cultures and places that can corrupt them and they are safest at home, hence, there was no need for western education, which they regarded with a level of distrust (Nduka, 1975). Due to these factors and others, women and the female children were not given access to formal education when it was introduced, and this history will lay a foundation for the dismal gap between the education of the male and the female population in Africa in later years.

The challenge of child marriage continues to stare the female children in the face, despite the increasing awareness of the importance of education. During the Covid-19 pandemic hot periods, several girls who stayed out of school were subjected to domestic abuse and sexual assault. The direct implication of this is that keeping girls in school helped to keep them safe and out of trouble.

Aside from the above challenge, a sustained threat in the school space arena is another violation of the right to education. Attacks on girls attending schools continue to soar with consistent abductions which scares girls away from attempting to access school.

2. Drafting history

In the initial draft of the Protocol, CAB/LEG/66.6/Rev.1, the right to education was provided in Article 11. The provision of the article concentrated on the removal of stereotypes in education and focused on training. It provided for shielding female children from sexual harassment in school and advocated the promotion of science and technology for girls. Following comments by the Legal Counsel and further consultations,

another draft was arrived at in 2003. It is important to take cognizance of the provisions of the UNESCO 1960 Convention Against Discrimination in Education, stating that private education or single-sex education does not amount to discrimination in this context.

The Draft Protocol adopted in 2003 enhanced the scope of Article 11, which in the present Draft became Article 12. A specific reference is made to the female children and providing sanctions against violators of the rights of the girls in school. The need for post-violation practice was also introduced in the form of guidance and counselling, while the need to include a gender approach in all spheres of activities was included. It is instructive to note the role of the Committee of Experts in the inclusion of the new clauses in the final draft version of the Draft Protocol.

The Maputo Protocol, as stated earlier, built upon the provisions of human rights in the Africa Charter particularly, those of women and female children by offering more detail. As opposed to the vague provision on the right to education in Article 17 of the African Charter, Article 12 of the Maputo Protocol provides for the right to education and training, which shows the recognition of the formal and informal education of females but most importantly, her right to choose the one more suitable for her.

The protocol's existence is in conformity with other international instruments on the rights of females and timely, as there is an increase in demands for equality and the dignity of females. Upon its adoption, there were reservations regarding certain provisions of the protocol, especially concerning the right to health and women's control of their own reproduction, which was seen as targeting the family, but no reservation to the right to education. Nevertheless, since its adoption, a total of 6 countries are yet to sign the protocol, 13 have not ratified it and 3 members of the African Union have neither signed nor ratified it, namely Botswana, Egypt and Morocco. In general, however, the protocol has received a good reception in African countries, at least on paper if not in implementation.

Despite the existence of this instrument, its acceptance and its binding nature, unlike other similar instruments such as the Beijing Declaration, it is noteworthy that the marginalisation of the female gender persists in most African countries in one form or another (Gawaya & Mukasa, 2005). For instance, the structure of academic and vocational institutions is one that prevents women from taking full advantage of their right to access to education and training (Ojobo, 2008). A female who is pregnant, for example, has very little allowance for balancing her education and impending motherhood and is most likely to drop out (Zewide, 1994). Moreover, the cost of education is so expensive in most African countries. Polygamy also impacts most families, which results in lots of children, and parents are unable to educate all their children but might have to select who will get a chance to be literate and the choice in most cases is the male child of the family, as there is a belief that it is only through male children that the family legacy can live on.

In Uganda, a high level of forced marriages, which represent a blatant disregard of the right to dignity of the female (Addaney & Onuora-Oguno, 2017) has been noted, mostly because of the Covid-19 pandemic which led to schools and the economy being shut down. Female children were given in forced marriages by their parents in exchange

for money, and such a transaction reduced them to chattels, which is a perception of the female that the Maputo Protocol set out to correct (Anyanwu & Onuora-Oguno, 2013). Girls were unable to continue their education even after the worst of the pandemic passed, as they were now saddled with the responsibilities attached to a married female in Africa.

In northern Nigeria, the terrorist group *Boko Haram* repeatedly kidnapped young girls from school and stated one of their reasons as the prohibition of female education according to the tenets of their religion (Onuora-Oguno & Abdulraheem-Mustapha, 2018). These girls were forced to marry and give birth to the terrorists' children, and even after their rescue they were mostly unable to reintegrate and regain their status in society. A country like South Sudan, which is yet to ratify but has signed the Protocol, also has a very low female participation in formal education as shown by statistics (Hodal, 2017).

All these show that the Protocol's effect is not yet as far-reaching as it should be and can be. Notwithstanding these limitations, since its adoption in 2003, the Maputo Protocol has contributed to shifting the trajectory on the promotion and protection of women's human rights in Africa.[1] Many countries have established mechanisms and policies to ensure the protection of women's rights and to make sure there is no violation or compensation is given for violations. In countries such as Uganda, Kenya, Rwanda and South Africa, in addition to human rights commissions, which are traditionally regarded as National Human Rights Mechanisms, there are specific Gender Equality or Equal Opportunities Commissions, specifically dedicated to the rights of women.

3. Concepts

Concepts important in the discourse of the right to education such as quality, access, availability, acceptability, adaptability, curriculum and teacher welfare are discussed in this section. The provisions of Article 12 is lauded in the sense that it specifically provides for means of ensuring that the experience of female children is enhanced. Article 12 (1) (a)–(e) is capable of enhancing access to education for female children. It seeks to ensure the elimination of all forms of stereotypes that would impact negatively on access to education. Similarly, the Article also advocates that governments should ensure proper policies that will enhance the education of the female children. The need to ensure their protection from all forms of harassment are equally captured in the Article.

Article 12 (2) is also very instructive, as it touches on sustained education and training for girls. A key point highlighted is the need to ensure retention at school. As already discussed, retention is a huge challenge that confronts female children's experience of access to education in Africa.

It is noted, however, that a key missing factor in the Protocol is an express provision on what the content of education itself should be as a fundamental right. Conversely, this is not a huge challenge, as this is covered by Article 13 of the International Covenant on Economic Social and Cultural Rights (ICESCR), which enshrined the right to education,

[1] Maputo Protocol on Women's Rights: A Living Document for Women's Human Rights in Africa, submitted by the Women, Gender and Development Directorate of the African Union Commission (https://bit.ly/431SgkB).

and its General Comment also gives a deeper reflection of its provisions (Beiter, 2006). Additionally, CEDAW, in its General Comment, focuses on three vital areas in its approach to education. These comprise the right to education, rights in education and rights through education (Para. 14, CEDAW GC No 36). Article 12 makes allusions to these key areas and therefore must necessarily be interpreted in conjunction in order to give full meaning to the intent of the drafters. Hence, considering the provisions of the General Comment (GC 13 and GC No 36 of CEDAW) on education it is plausible that one should rely on the provision and explanation of it to enhance the interpretation of Article 12. A further analysis reveals that GC 13 contextualises the right to education to encompass rights to and in education. Onuora-Oguno explains the context of the right to education as including issues of accessibility and reasonable accommodation, while rights in education includes the issues of curriculum content and an education space free from violence and discrimination (Onuora-Oguno & Shannika, 2018). Discussing this from a general and specific perspective, it is identified that the full gamut of Article 12 makes no direct reference to the concept of quality. Quality education, as captured by several scholars (Coomans, 2007), is pivotal to the realisation of the rights to and in education. Tomasveski (2001) clearly identifies four pivotal paradigms to ensure and measure quality. The 4As cover the ambit of Availability, Acceptability, Affordability and Adaptability.

The question of availability speaks closely to issues of access to education and availability of schools and learning materials. An emerging area that could be investigated is adaptability for the female children, especially in the emerging jurisprudence of girls' menstrual health. Poor sanitary conditions in schools and lack of access to sanitary pads are huge areas that impact negatively on the learning experience of the female children. The poor economic reality is another factor that denies the female child any experience of the right to education. For instance, school fees keep female children away from schools and in some circumstances force them into child labour, sexual violence and other abuses.

A core aspect of quality is teacher training. This continues to be elusive and leaves female children in looming danger every inch of the way in the school spheres: the continued kidnapping and murder (Usman, 2020) of female children. The mention of teacher training without adequate mention of teachers' welfare is perhaps another missed opportunity. Considering that women, for instance, are more common in the teaching profession, which is a gendered stereotyped role, as women are seen as caregivers with poor welfare (Onuora-Oguno, 2018) and their security demands further attention. In very recent times, news of attacks on teachers in schools have caused shock in several quarters (Serra, 2022).

4. Consolidating the gains of Policies on the Right to Education

There is a need to ensure that the gains on efforts towards realising and eliminating inequality in education must be sustained. A perusal of some Concluding Observations and Recommendations shows that States have been called upon to ensure the elimination of "inequality and gender disparity in school enrolment, retention and completion

at all levels of education (primary, secondary, and tertiary)" (Para. 88 Concluding Observation on Nigeria). Additionally, the need to "strengthen ongoing initiatives towards eliminating gender disparities in school enrolment, retention and completion at all levels of education (primary, secondary, and tertiary), and ensuring full and equal access to quality education for all children".

Further Concluding Observations made reflect the need for States to ensure an enhanced education budget (Para. 35). Uganda's effort in the growth of inclusive education is acknowledged and this should be emulated by other countries in order to improve the right to education.[2] Like Nigeria, Uganda is encouraged to ensure a growing retention rate in schools, especially by ensuring that the government does not neglect its primary obligation to provide education and rely on the establishment of private schools. On its part, the government of Togo, is acknowledged for its efforts on promoting girls' education.[3] However, it is further encouraged to eliminate harmful voodoo practices that inhibit girls' access to education. The need to strengthen equality of access to basic amenities in rural and urban communities was identified and addressed in the concluding observation for South Africa.[4]

A further consideration of all observations and State reports shows, for instance on a specific paradigm, that para. d of Article 12 continues to loom large, as its implementation is still strongly lacking. The culture of silence and disdain with which offences of sexual violence are treated in African communities continues to impact negatively on the threshold of access to education (Onuora-Oguno & Shannika, 2017). The poor completion rate of girls in schools are attributable to discrimination suffered within the school sphere. The curriculum content continues to perpetrate age-old discriminatory philosophies against female children.

Another core perspective for appreciating the extent to which states engage with the Maputo Protocol is that of a gendered approach to policy-making and implementation. This strategy can be implemented in Africa and countries can ensure that women are part of the decision makers in the education sector so that they can ensure that policies for that sector and its operations will favour women and ensure the protection of their access to education. A gendered approach would ensure that a deliberative model is adopted in tackling challenges facing women generally and particularly on the right to education. This process would impact the curriculum content and interpretation of curricula in schools. The effect would imply the gradual discontinuation of stereotyped narratives and approaches on issues that affect female children and women and therefore eliminate the violation of female children's rights to education (Onuora-Oguno et al., 2018).

The right to education in the majority of African countries still looms large as it is not fully recognised at constitutional level. In most countries, education is enshrined as a fundamental objective of state principles and thus seen as a mere obligation and aspiration. Scholars like Viljoen argue against this position, stating that it should be treated as obligatory for states to meet the aspiration rather than treat it as mere privilege. In Nigeria,

[2] For more information see https://www.maputoprotocol.up.ac.za/uganda
[3] For more information see https://www.maputoprotocol.up.ac.za/togo
[4] For more information see https://www.maputoprotocol.up.ac.za/south-africa

for instance, education is assumed to be non-justiciable, however, scholars such as Onuora-Oguno (2019), Egbewole & Alatise (2017) and Ikpeze (2015) all argue against this position. It is opined that, by virtue of the treaty obligation of the African Charter, the right to education is justiciable and enforceable. In contrast, South Africa, Kenya and Ghana are some of the leading countries that recognise education as a fundamental right. This position explains why there is more growth in legal cases in these countries. South Africa leads the way with the highest number of cases adjudicated by the courts. Skelton advances that the courts have a strong impact on ensuring that the right to education is protected within South Africa. This position, however, comes with some caveats for courts to know when to draw the lines in doing so. Mbazira also raises this caution while warning that court decisions must be ones that can be implemented, as non-implementation will whittle down the value of such decisions (Mbazira, 2009).

Sub regionally, the Maputo Protocol, alongside other treaties, has been relied on to reject any practice that can limit female children's equal access to education. An instant case is that of *Women Against Violence and Exploitation in Society (WAVES) vs. The Republic of Sierra Leone,* (*ECW/CCJ/APP/22/18):* the ECOWAS court found the Policy that provided a different learning space for pregnant girls breached, among several treaty obligations, the Maputo Protocol. The court urged the government to reverse such policies and adopt an inclusive learning model. The issue of teen pregnancy is a huge challenge that negatively impacts female children's education (Sefoka & Odeku, 2021). Sadly, society continues to ignore the fact that female children are constantly subjected to sexual violence at home and in the community and this results in discrimination against pregnant learners. Teenage pregnancy thus is a huge impacting factor in the completion rate of girls. This is one of the core areas that the Maputo Protocol condemns and it encourages governments to take legislative steps to ensure that this discrimination is not continually entrenched. The South African case of *the Head of Department: Department of Education, Free State Province vs. Welkom High School & Harmony High* (The Welkom Case, Case no: 766 & 767/2011) further provides interesting jurisprudence that points to the right of a pregnant learner not to be denied access to school. In the *Welkom case,* the courts found the actions of a school principal to suspend a pregnant learner from staying in school based on not impacting the morality of other girl learners to be a violation of the right to education.

The cases decided in most municipal courts, although protecting the female child in certain circumstances, are not rich in reliance on the Maputo Protocol (Onuora-Oguno, 2015). However, it is worth noting the decision of the court in *RM Katakwe vs. Edward Hakasenke and Others* (2006/HP/0327, High Court, Zambia). In this case, the court considered a case of sexual violence against a female child by a teacher, and relying on the provisions of the Maputo Protocol read in consonance with Zambian law, found the teacher and school liable. Omondi et al. reports the dictum of the court thus:

- that the school takes over parental responsibility for the child for the time they are at the school. The law therefore places an obligation on the school to take care of the children for the period they are under their care. The owners of the school, in this case the government, owed a duty to the child (Omondi et al., 2018).

In the case of *W.J & another vs. Astarikoh Henry Amkoah & 9 others,* an *imparia materia* case with Katakwe, it is further reported that a Kenyan Court held thus:

> – Indeed, I would go so far as to say that the TSC [Teacher Service Commission], the State and any educational or other institution in which teachers or other care givers commit acts of sexual abuse against those who have been placed under their care is vicariously liable for the wrongful acts of its employees" (Omondi et al., 2018, p. 74).

The import of the two cases above indicates that the courts are willing to engage with the provisions of regional and international law treaties protecting rights. While the Maputo Protocol was not relied on by the *amicus* in the instant case, reliance on treaties from the African human rights architecture is a pointer on the interest of courts to rely on treaties in safeguarding the interest of female children within the educational environment (Para. 147 of the Henry Amokah Case).

5. Conclusion

The importance of the Maputo Protocol in ensuring milestone progress in the continued struggle for the education of females is quite glaring from the improvements in the educational policies of African countries. There is however a need to ensure that there are follow up mechanisms to ensure that these policies are actually implemented and not just available on paper.

The chapter concludes that the importance of the right to education to the emancipation of female children is pivotal. It further underscores the need for equal access and quality content of the accessed education. Furthermore, the importance of appreciating that education must be tailored in such a way as to protect the dignity of girls was reiterated. The need for governments to treat education as a fundamental right resonates strongly with the need for a different approach to issues of education amongst African nations.

The chapter further concludes that the courts have roles to play in protecting the right to education, samples cases where both direct and indirect references are made to the right to education and dismantling of all discriminatory obstacles are highlighted.

6. Recommendations

To better facilitate the protection of rights to education for girls, the African Union can adopt new policies that have potential for sustaining the policy on education and the development of the continent. The African Union Agenda 2063 provides a framework, which, if read closely with the provisions of the Maputo Protocol, has great potential (Onuora-Oguno et al., 2018).

States are encouraged to ensure that they put in place policies that will drive the right to education to materialise. The treaty obligations of states to state reporting are measures

established to assess the extent of states' implementation of their treaty obligations. Other aspects are the roles courts can play in protecting the right to education and its impact on the development of female children. The rationale for an inclusive and holistic development of women is that "women who are safe, healthy, educated and fully empowered to realize their full potential transform their families, their communities, their economies, and their societies" (UNDP Annual Report 2017).

There are also several international policies for ensuring the participation of women in decision making in several sectors, such as the UN Framework Convention for Climate Change and the Hyogo Framework for Action. All these will ensure that the interest of all women is factored in whenever decisions are made.

Finally, the Maputo Protocol must not be considered in isolation if the gaps in it pertaining to the right to education are to be cured. General comment No. 13 and General Comment No. 36 must be closely relied on if the provisions of Article 12 of the treaty are to receive expansive interpretation and possible implementation.

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Public Governance, Administration and Finances Law Review Vol. 8. No. 1. (2023) • 55–71.

DOI: 10.53116/pgaflr.6650

Constitutional and Administrative Law in Nigeria: Are They Instruments of Governance?

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Abstract: Are constitutional and administrative laws in operation in the institutions and agencies of government in Nigeria? How effective are these laws at regulating the activities of the government in the country? Has the law enhanced the quality of services delivered by the government? What are the factors influencing the practice of public administration in Nigeria? Are these factors in consonance with administrative law? These are germane questions to which this study attempted to provide answers. It relies on secondary data, which were subjected to content analysis. The study argues that the 1999 Constitution of Nigeria, prepared by the government without legitimacy (the military), and handed over to the civilian administration some twenty-three years ago, with little or minor amendment to date, made the legitimacy of the government of Nigeria's Fourth Republic questionable. And, apart from the faulty preparation of the constitution and some amendments made to it by the National Assembly, the elite, who appear to be above the law, do not allow the constitution to work. These elite are mainly among the legislature, the judiciary and the executive; they are all guilty of stemming and whittling down the power of the constitution, and the law of administration by their flagrant disregard for the rule of law and the constitution in their various capacities. This study therefore, concludes that, until Nigeria's constitution is redrafted, and constitutional law and administrative law properly applied, quality or good governance will continue to elude the country.

Keywords: constitutional law, administrative law, governance, legitimacy, constitutionality, constitutional government and rule of law, human rights

1. Introduction

The place of law in regulating all forms of human activities and endeavours cannot be overemphasised. The importance of law can be seen in the areas of specifying what is and what is not accepted in society. A better way to understand the importance of law is by imagining the likely state society would be without it (Cronus Law, 2019). Suffice to say, without law within society there will be chaos, confusion and conflicts. In essence, the essentiality of law in society includes the maintenance of law and order; safeguarding the fundamental rights of citizens; controlling and regulating the political system;

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regulating economic activities; and ordering human relations, as well as international relations, among others (Shrivas, 2022).

Several countries across the world have a suitable constitution that provided for government structure, as well as defining the relationships between/among various governmental units, and specified how these units will be interrelated, and how the government was formed or set up, as well as the form of the country's constitution, will determine how the public administration of such a country will operate, and how its operation will affect other areas of the government's activities. Since public administration is considered part of the executive arm of government, with a modicum of independence in discharging its multiple functions, there is a tendency for public agencies to overstep their boundaries (Prunty, 2018). It is, therefore, through constitutional means that public administration can be regulated vis-à-vis agencies and institutions of government, hence the need for constitutional and administrative law.

Constitutional and administrative law is the branch of public law established to regulate the activities of government and its institutions in a given state. In essence, constitutional and administrative law are concerned with the distribution and exercise of power within the state. Constitutional and administrative law also covers the power to make legal rules, as well as to demand accountability on the part of those charged with the responsibilities of legislating, applying and enforcing the law. Constitutional and administrative law thus control and regulate the dealings and relationships between the state and the individual (Nottingham Law School, 2020).

Although it appears somewhat difficult to distinguish between constitutional and administrative law, simply because both are components of public law, which has to do with regulating the functions and activities of the government in modern society (Dhyani, 2022). Be as it may, constitutional law can be seen as the body of law defining the powers as well as structure of different entities of a state vis-à-vis the executive, the legislature and the judiciary, alongside the basic rights of citizens, and the relationship between the government at the centre with those of the state and local levels (Strictly Legal, 2022). Constitutional law derives from the constitution and, as such, is related to, or interpretive of a constitution; the term is therefore synonymous with the constitution, since it "connotes the constitution as interpreted and applied by the organs of government" (Encyclopedia.com, 2018, para. 1).

On the other hand, administrative law, otherwise referred to as the law of public administration, is that body of law governing the activities of administrative agencies of government. Their activities include, but are not limited to, rule-making, adjudication and the enforcement of a specific regulatory agenda (Robson & Page, 2023). Administrative law is also concerned with the decision-making of administrative entities or units of government. The key difference between constitutional law and administrative law is, therefore, that the former governs the legislative and executive branches, while the latter governs their operations. Constitutional law is derived from the constitution, while administrative law is derived from legislation, vis-à-vis administrative regulations, executive decrees, circulars, letters of instruction and conventions, among other sources (Dhyani, 2022).

Since governance is how a state's resources are being managed for effective services delivery, the welfare of its citizens and national development, among others, and agencies or institutions of government are in charge of translating government policies and program into reality, such agencies and institutions of government must therefore be well regulated in order to give utmost performance. Administrative law has, for that reason, become indispensable in regulating the activities of agencies and institutions of government in order to bring regularity, orderliness and certainty to them, as well as to control any misuse of powers vested in those agencies and institutions.

In essence, concerning the practice of public administration, administrative law plays a key role, especially in monitoring and remedying administrative blunders, including ineffectiveness, inaction, indiscipline and other unethical behaviour by public administrators. Furthermore, administrative law enhances accountability and probity in the conduct of government business. In other words, in order to promote quality governance, administrative law confines public administrators' powers and authorities within their legal borders to prevent them from abusing their offices.

It is against this background that the study analyses the place of constitutional and administrative law in the governance process in Nigeria. This is with a view to determining the factors that influence the practice of public administration in Nigeria and those that hinder the proper application of administrative law into the country's public offices.

2. The constitutionality of constitutional government in Nigeria

The essentiality of the constitution as a legal framework in the governance of any political entity cannot be overemphasised. This is because it remains a reference point for ensuring quality or good governance (Adegbami & Uche, 2016). It is for that reason that a constitutional government became desirable. Constitutional government, in essence, is one which operates within a set of legal and institutional constraints. Under a constitutional government, the activities of government are regulated by a set of rules. These rules spell out the powers and functions of government; in other words, "the institutional autonomy". The rules equally define the relationship between state and the individual, namely "individual autonomy" (Keman, 2000). Thus, constitutional government depends on the existence of a constitution that serves as a legal instrument, or a set of fixed rules generally accepted as the fundamental law of the polity; applied to control the exercise of political power. It covers the distribution of powers among levels of government and several other governmental units, in such a way that the component units of government shall cooperate to formulate the will of the state (Britannica, s. a.). The centrality of constitutional government is to run governmental affairs and businesses in line with the constitution of the land, which is considered supreme over individuals or groups. Similarly, all powers of exercising governmental functions by the supposed authorities and personalities must be derived from the constitution and, as such, the rule of law, or set of "basic laws" that connects public officeholders and the citizenry in a given country must be respected by government operators in line with the constitution.

The governmental system of Nigeria is based on a written constitution, although the country has intermittently had its constitution suspended through military incursion into its governance and administrative activities. The country, however, in the last 23 years, has witnessed unbroken democratic governance and operates under a written constitution that perhaps developed from the various military decrees. In other words, the so-called 1999 Constitution of Nigeria was handed over to the civilian administration by the military government some 23 years ago, with little or minor amendment by the current civilian administration. Although it could be said that Nigeria currently operates with a constitutional government with a written constitution, there have however been steady discussions, arguments and counter-arguments in various quarters as to whether the country is running or operating a constitutional government, and whether the country truly has a genuine constitution. While it is true that the military may seize power from the legitimate government for legitimate reasons, especially when the official government fails to exercise its functions as spelt out in the constitution. In Nigeria, for instance, the first military coup of January 1966 was attributed to the civilian rulers' corruption and misgovernance of the country. Excerpts from the coup speech delivered by the major actor in the first *coup d'état,* Major Nzeogwu revealed this. According to him:

> Our enemies are the political profiteers, the swindlers, the men in high and low places that seek bribes and demand 10 per cent [...] those that make the country look big for nothing before international circles, those that have corrupted our society and put the Nigerian political calendar back by their words and deeds (Nzeogwu, cited in Obasanjo, 1987, p. 99).

Ever since the 1966 *coup d'état,* the military persistently dominated the governance and administration of the country. The military was in charge of the country's administration between 15 January 1966, and 30 September 1979. On 1 October 1979, the civilian administration was ushered in, and by 31 December 1983, the military had come back to power again and stayed in power until 23 August 1993, when an Interim National Government (ING) was put in place after the annulment of the general election of 12 June 1993. By 17 November 1993, the military had suppressed the Interim National Government, came to power once again and ruled until 29 May 1999. In essence, for a long period, Nigeria's political history was of governments without constitutions, but decrees, and it was the government without a constitution that made a constitution for constitutional government. What an aberration! As such, it is not surprising that the 1999 Constitution of the Federal Republic of Nigeria suffers from many defects, which can be attributed to the process by which the constitution emanated. As pointed out by Ogboye & Yekini:

> One fundamental defect in this constitution, which one may rightly argue as robbing it of constitutionalism, is the fact that it did not emanate from the will of the people. In other words, it failed to meet one of the fundamental values of a constitution. The 1999 constitution (as amended) is a military decree and the preamble to the constitution is nothing but false. Be that as it may, we have generally regarded the document as the constitution of the country. Despite the fact that at the face value, the constitution proclaims constitutionalism,

> the actions and inactions of the government and its machinery more often than not are not in accordance with the constitution (Ogboye & Yekini, 2014, p. 125).

It is not surprising, therefore, that the so-called constitutional government in operation in Nigeria is full of defiance of court orders; disregard for fundamental human rights; faulty electoral process; poor accountability; and poor welfare and delivery of services, among others. While concerned Nigerians are calling for the review or further amendment of the Constitution, some stakeholders call for total annulment of the constitution to give way to a new people's oriented constitution. This set of stakeholders believes that the defectiveness inherent in the 1999 Constitution of Nigeria will be difficult, if not impossible to rectify through constitutional amendment by Nigeria's National Assembly. For instance, Babalola[1] argues that:

> It is common knowledge that the 1999 Constitution was made by the military, which, in its wisdom, claimed that it was made by the people. The constitution says among other things that "We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved [...] do hereby make and give to ourselves the following" [...] Of course, this claim is false. The truth is that there is no way the National Assembly can amend the 1999 Constitution to cure the inherent defects. First, you cannot cure fraud. Second, it is impossible, by way of amendment, to take away the military system of government under the 1999 Constitution or the power and control of public funds by the President. Or can we, by way of amendment, change the judicial powers of the President under the 1999 Constitution? Why then is the National Assembly afraid of calling a national constitutional conference to fashion out a new true federal constitution (Babalola cited in Afolabi, 2021, para. 6–9).

In a similar vein, Hassan in her position paper entitled "Nigeria's Constitutional Review: The Continuing Quest for a Legitimate Grundnorm" stated:

> Many of Nigeria's ethnic nationalities and interest groups believe that the content and character of the 1999 Constitution have been stifling their growth and development. As a result, the current Constitution has been openly rejected by socio-cultural groups, especially those representing various ethnic groups, civil society, and professional groups within the Nigerian polity. Importantly, too, anger remains in the polity over the historic lie told in the preamble of the 1999 Constitution that "we the people" of Nigeria came together to deliberate upon and collectively approve the nation's constitution when such debates and genuine public input did not occur at anything like a national level (Hassan, 2021, para. 6).

It is widely believed that the outlook of a country is determined by its constitution, how the constitution is made or allowed to work, as well as the respect that the constitution arouses, from the rulers and the ruled. Apart from the fact that the preparation of the

[1] Afe Babalola is a Senior Advocate of Nigeria (SAN); he holds the titles of the Officer of the Order of the Federal Republic (OFR), and Commander of the Order of the Niger (CON). He was a former Pro-Chancellor and Chairman of the Governing Council of the University of Lagos, Nigeria; and a former Chairman of the Committee of Pro-Chancellors of Nigerian Universities.

current Constitution of Nigeria is faulty; the constitution is not able or allowed to work. This is because some categories of Nigerian citizens, or the so-called elite, appear to be above the law. Beyond this, the executive arm of the government of Nigeria did not help matters, because the executive only obeys selected court orders, especially those that favours them, and disobeys others. To this extent, the so-called Nigerian Constitution on several occasions did not arouse any respect from Nigeria's citizens, especially from the political class/officeholders. In a country where the constitution is not supreme, where the rule of law is not upheld, and the rulers rule with impunity, the legitimacy of such a government is in doubt, hence the constitutionality of Nigeria's government is contestable.

3. Administrative law and institutions of government in Nigeria

The fact remains that the government of any given country cannot carry out all its functions and responsibilities, regarding implementing or transforming the policies and programs of government into reality all by itself. There is, therefore, a need for the government to involve bureaucrats to assist in implementing these policies and programs for the benefit of the citizenry. The government can achieve this through delegating some of its functions and responsibilities to the institutions of government, namely Ministries, Departments and Agencies and other government units across the different levels of government. For these institutions to function well and be able to carry out their given assignments, they need to be well-regulated and coordinated, hence the necessity of administrative law.

Administrative law also covers regulatory law, public law or the law of public administration, stemming from the executive branch of government, for the purpose of monitoring and regulating the responsibilities delegated to the institutions and agencies of government. Administrative law regulates government institutions and agencies to ensure effective delivery of services, by carrying out the government's business in a professional manner. Therefore, it can be thus deduced that administrative law is concerned with the protection of the interests of the public in relation to government. In other words, administrative law oversees the core activities and operations of government agencies, by laying down the guiding principles of how the business and activities of government should be handled to bring about the desired result. As such, public servants, the administrative machinery through which governmental activities are being delivered, are expected to operate under civil service rules and regulations for the effective delivery of civil services activities.

At this juncture, the pertinent questions are: is administrative law being applied to the operations of the institutions of government in Nigeria? How effective is administrative law at regulating the activities of these institutions in Nigeria? Has the law enhanced the quality delivery of services by the institutions? What are the factors influencing the practice of public administration in Nigeria? Are these factors in consonance with the contents of administrative law?

The knowledge of the ecology of administration has provided needed opportunity to understand some of the factors that influence the practice of public administration in a particular society. This has made it clear that there is no way public administration can be practiced in isolation without reference to the peculiarities of society. Suffice to say that the norms of that society and people's attitudes, as well as their orientation, determine its administrative system to a large extent. Several civil service rules and regulations, codes of conduct and of work ethics are available for various institutions of government, yet the administrative practices are designed to favour the political officeholders and their career official counterparts (Omolaja, 2009), and these unethical practices within the institutions of government are inimical to the interests of the majority of society. In Nigeria, for instance, political officeholders and their career official counterparts have used their offices to accumulate the "commonwealth" of the people on several occasions. The fact that career officials in Nigeria are poorly remunerated when compared with their colleagues in some other countries across the globe perhaps explains their unethical practices in their respective public offices. Besides, huge salaries are being paid to their political officeholders' counterparts. According to Sunday:[2]

> The gap between civil servants and political officeholders in terms of emoluments is too wide, because if on becoming a councilor or commissioner or minister you suddenly have multiples of what a director or permanent secretary would get, then some civil servants would feel, 'well, this is an unfair deal' and they would devise means to rock the system (Sunday cited in Aramide, 2020, para. 2).

In addition to this, the fear of the unknown about life after retirement makes some career officials use unethical practices. This is also buttressed by Sunday. According to him:[3]

> If the system guarantees that at the end of your service years you have packages to fall back on in terms of gratuity or pension or regular contributory pension scheme then the temptation to save or embezzle money to be used at the time of retirement would be reduced (Sunday, cited in Aramide, 2020, para. 6).

Politicians, on the other hand, given the pattern and nature of their ascension to public offices, through manipulation, vote-buying and faulty electoral process among other most crooked ways, have come to see political office as a business in which it is worth investing. To this extent, political office seekers did go the extra mile to get money and find ways of buying themselves through to offices, after which they convert public funds to theirs as a gain on their political investments. As career officials are looking for a way of amassing wealth through their offices, so are political officeholders. It has even been argued that it is the career officials in Nigeria who teach and support the political

[2] Edgar Amos Sunday is the Head of Service (HoS), Adamawa State, Nigeria.
[3] Edgar Amos Sunday.

officeholders in better ways of amassing public wealth. Supporting the assertion is Fayose.[4] According to him:

> No governor, minister or top political officeholders can steal a penny from the treasury without the cooperation of the civil servants. We don't write papers as politicians, but we only approve whatever the civil servants came up with (Fayose cited in Oluwole, 2015, para. 4).

Apart from the above-mentioned issues faced by career officials is the fact that political officeholders wield all the power, and in their hands are sledgehammers that can be used to knock out any career official who may want to obstruct their making money from public offices; as a result, career officers do not have an option but to cooperate. The result of the unholy cooperation of the duo of political officeholders and career officials is the precarious economic and developmental condition in which the country finds itself.

In essence, administrative law as far as Nigeria is concerned has not been able to curtail unethical practices in governmental institutions properly and, as such, has not enhanced the quality delivery of services in Nigeria, although the government of Nigeria has also established various regulatory agencies in addition to civil service rules and regulations and code of conduct, among other measures. It is believed that a good and effective regulatory agency will go a long way to foster the economic and welfare development of the country. To some extent, some regulatory agencies proved to be effective and enhanced economic growth and development, increased investment, and provided a better quality of service delivery. The feat achieved by these agencies has since been defeated by the constant corruption, bribery and extortion, and poor orientation of services, as well as the anti-business mentality that characterised many of these regulatory agencies. According to Osinbajo:[5]

> If the environment on account of regulatory authorities is so difficult or expensive, such that people are discouraged or it doesn't make sense for people to do business, then we are shooting ourselves in the foot in a manner we can only blame ourselves. These are human issues and we must do something very serious about these issues. I am in full support of holding our CEOs to account because they, in turn, must hold their staff to account. If there is systemic corruption, bribery and extortion, and nobody is held to account, there is a problem (Osinbajo cited in Adegboyega, 2021, para. 8–9).

As a result of the poor operations of the regulatory agency, Nigerians have continued to be exposed to a variety of threats, including unsafe food and drugs, environmental pollution, toxic waste, a risky civil aviation sector, and dangerous building designs, among others, while the so-called regulatory agencies appear incapable of controlling the menaces. Hence, these controllable challenges testify to the fact that administrative

[4] Ayodele Fayose is a former Governor of Ekiti State, from 29 May 2003, to 16 October 2006, and from 16 October 2014, to 15 October 2018.

[5] Oluyemi Oluleke Osinbajo is Grand Commander of the Order of the Niger (GCON); a lawyer, Professor and the Vice President of Nigeria since 29 May 2015.

law or the law of public administration has had, to a large extent, insignificant effect on the governance and administrative activities of Nigeria.

4. Challenges of constitutional and administrative law in Nigeria: Implications for governance

There is no doubting the fact that administrative law remains indispensable in propelling government toward providing quality governance. As such, if governance is a function of government and the body saddled with the responsibility of carrying out the function is public administration, the instrument that can adequately enhance public administration in order to carry out the function effectively is administrative law. Hence, proper application of administrative law to the administrative activities of a given country is *sine qua non* to good governance (Oikhala, 2020). However, there are some challenges militating against the proper application of administrative law to governmental activities in Nigeria. These include:

Societal factors: These are one of the factors that hinder the proper application and enforcement of administrative law in many governmental institutions in Nigeria. These can be viewed from different angles or perspectives. For instance, society's indifference to, instead of condemnation of corrupt practices in the country has continued to weaken the proper application of administrative law in the country. Nigerian society has been segregated, especially along ethnic and religious divides. As such, members of the society always fail to call a spade a spade, when any member of their ethnic group or religious affiliation is involved in unethical practices in public office. To defend corrupt officials with which they have an affiliation with, members of society have gone to the extent of intimidating law enforcement agents. On some occasions, members of the society have caused chaos and crisis that resulted in lawlessness in order to protect their kinsmen or enable co-religionists to evade justice. This practice has limited administrative law from taking effect in Nigeria.

From another angle, Nigerian society encourages wasteful and excessive spending; from the career officials to political officeholders, and individuals within the country, all are in the habit of living an ostentatious life. People prefer foreign clothes, jewellery, shoes, bags, drinks, wigs and hair attachments, as well as household goods (Omolaja, 2009), and of course, in recent times, they have even started importing soups, jollof rice and toothpicks from abroad. Some parts of the country set off flares for all kinds of ceremonies, especially funerals. The environment permits people to spend their life savings on ceremonies, and even go the extra mile, again and again, to borrow from banks and people around them. The consequence of these wasteful activities is the looting of public resources, as a means of augmenting funds wasted on ceremonies, and the only available and sure solution is to dip hands into the public purse, and when the law is about to take its toll, they always find ways to circumvent or pervert justice, especially through stirring ethnic and religious sentiments.

Social factors can also be viewed from an extreme taste for fashion; public officials in recent times have had an unquenchable taste for fashion. They love luxurious goods and

trendy materials. They crave different types and models of cars and big mansions. Public officials who are men marry many wives and have concubines, and end up building extended families. All these social practices need a lot of money for maintenance, and when there are not enough legal sources of generating income to cover their huge and accumulated expenses, public officials turn to stealing public funds.

Another angle from which one can look at societal factors affecting the proper implementation of administrative law is societal attachment to wealth. In times past, society frowned on sudden and questionable wealth, no matter who was involved. Society abhorred people with an unknown or dubious source of wealth like the plague. However, society today has lost the value of a good name and integrity, and, as such, people with a dubious source of wealth are highly celebrated and respected, to the extent that they are awarded or conferred with chieftaincy titles: religious sects, both Christians and Muslims alike, are not left out of being given religious titles (Ademu, 2013). For this reason, the pursuit of making money, by any and all means, has made public officials, career officials and political officeholders alike involved in corrupt practices while holding public office.

Poor conditions of service and welfare packages for the law enforcement agents: The law enforcement agencies, which are saddled with enforcing the law of administration, are not well-motivated. According to the study by Ipadeola (2016), agents are subjected to poor conditions of service and poor welfare packages. This has continued to limit their performance and also accounts for the high level of corruption even within the various law enforcement agencies. As such, it will be difficult for those law enforcers who are hungry to handle the law of administration as expected.

Delay in judicial process: Another impediment to the proper application and enforcement of administrative law in Nigeria is the problem of delays in dispensing justice on unethical behaviour. Justice delayed is believed to be justice denied; it is on record that the judicial process against unlawful activities being perpetrated in public offices takes a long time. To this extent, according to Ipadeola (2016), the anti-corruption agencies in Nigeria, particularly the Economic and Financial Crimes Commission (EFCC) have continued to demand a strong commitment from the executive arm of the government of Nigeria to intervene in the matter of delaying the judicial process of unethical practices in public office and encourage the judiciary and the Nigeria Bar Association to expedite action in handling unethical cases in Nigerian public institutions always. The unduly drawn-out nature of legal proceedings has continued to frustrate the performance of anti-corruption agencies.

Low or no punishment for corrupt public officials: Another factor that constitutes a blockage to the proper application of administrative law in Nigeria is the problem of meting minor or no punishments to public officials involved in unethical practices. The fact that the government has no political will to allow administrative law to take its course has contributed to this. The government has, on several occasions, provided a soft landing for corrupt officials. Many political officials who were found to be involved in corruption and misappropriation of public funds were not adequately punished. Some of them were allowed to settle their cases through a plea bargain. The corrupt public official in question is then asked to return the stolen money to public coffers. Most of the time, a certain percentage of the stolen money is returned. The leniency accorded to corrupt public

officials in this regard has continued to whittle down the efforts of anti-corruption agencies in Nigeria. Similarly, because corruption is deeply rooted in Nigerian society, corrupt officials always have a network of connections with different anti-corruption agencies. This also explains why the law of public administration is less impactful in the country. There is no way the battle against corruption can be won as long as corrupt officials have friends, family, kinsmen or people of the same religious faith within the agencies that are fighting corruption. As such, there must be a way to handle this issue; moreover, there is a need for stiffer punishments to be meted out to corrupt public officials to make administrative law function effectively.

Politicisation and political interference in the activities of administrative institutions: The improper implementation of administrative law in Nigeria can also be attributed to undue political interference in the administrative policies and practices of some administrative institutions. Most of the administrative policies in Nigeria are driven by politics rather than objectivity. The government did play politics with the judicial process on many occasions, and when it came to the prosecution of a public official accused of unethical practices. A statement such as "I have been ordered from above", and "the presidency is interested in the case", among other clichés, are in use whenever politics takes precedence and is made to override objectivity in public administration. Public officeholders hide under this undue advantage to involve themselves in unethical practices in their various offices. They use their advantage to accumulate public wealth, since they know that there is always a godfather to call upon at any time an issue is raised regarding their unethical practices. For that reason, institutions that are supposed to bring these public officials to justice are being castigated and compromised and have thus become toothless bulldogs that cannot bite.

Weak institutions for enforcing administrative law: One of the metrics for evaluating the government's effectiveness in terms of quality governance lies in its ability to have developed institutions or agencies that can adequately deliver social services and general development in the country. However, institutions and agencies in Nigeria appear weak, and unable to handle government business effectively. A weak institution can be seen in terms of a steady decline in the power of government agencies of a country, when such agencies can no longer discharge their assigned duties effectively (Usman et al., 2015). Due to the weaknesses in the powers of government agencies in Nigeria, they are unable to enforce administrative law adequately in their various offices.

Some of the causes of the weakness in the powers of government institutions and agencies in Nigeria have been mentioned under this sub-heading, which include societal factors; poor remuneration and poor conditions of service of law enforcement agents; delays in the judicial process; low or no punishment for corrupt public officials; weak institutions for enforcing administrative law; politicisation and political interference in the activities of administrative institutions, among others. What then are the implications of those challenges to administrative practices and governance of Nigeria?

Of course, the implications of the challenges are many. The fact that administrative law or the law of public administration is put in place by the constitutional government to regulate and keep the powers of public administration within the legal framework; protect the citizens against abuse of powers; make administrative law indispensable. The

indispensability of the law lies in the fact that it checks excesses, abuse or misuse of powers by public officials in their various offices and, by that, enhances good governance. The importance of administrative law for good governance notwithstanding, it is not accorded a special place in Nigeria's governance and administrative activities. It is not surprising that all the arms of government, the legislature, the judiciary and the executive are culpable for stemming and whittling down the power of the law of administration by their flagrant disobedience to the rule of law and the constitution in their various capacities.

Concerning the legislative arm of government, they do not normally sit for a stipulated number of plenary sessions. For instance, in 2021, the Senate, which is the highest law-making body in Nigeria, broke its rules and also undermined the country's constitution, which it swore to uphold, by not having the required number of plenary seasons as stipulated by the Constitution. Section 63 of the 1999 Nigerian Constitution (as amended), states unequivocally that "the Senate and the House of Representatives shall each sit for a period of not less than one hundred and eighty-one days in a year" (Federal Republic of Nigeria, 1999). Contrary to this stipulation, the Senate in the year 2021 sat for 66 days only, thereby, breaking the Constitution (Iroanusi, 2022). Besides, the legislative arm of government is also found to have abandoned or jettisoned some of its oversight functions. Legislative oversight is the responsibility of overseeing or supervising the executive arm of government to ascertain whether it duly implements the projects over which the National Assembly has approved funds. It also involves the National Assembly conducting investigations into governance matters by monitoring the performance of Ministries, Departments and Agencies, for the benefit of the citizenry (Policy and Legal Advocacy Centre, 2016). These powers of the legislative arm are provided for in Section 88 of the 1999 Nigerian Constitution (as amended) (Federal Republic of Nigeria, 1999). On several occasions the legislators could not perform their duties, simply because they had been bought by the executive. It was to this extent that Obaro states that the oversight of the legislature has been exchanged and substituted for pecuniary gains from the executive arm of government, to the detriment of the masses (Obaro, 2015 cited in Tobi & Adegbami, 2020). Commenting further on the defectiveness of the Senate in performing its responsibilities under the Buhari Administration, Adetayo states:

> The ninth National Assembly, unlike its predecessor, has become the pliant arm of an evermore authoritarian executive. On January 23, 2019, Buhari ordered the removal of Nigeria's chief justice on allegations of corruption in an unprecedented judicial intervention. There was no constitutional basis for this. The State Security Service, the country's intelligence unit, has grown all-powerful by flaunting court orders, arresting journalists, and operating outside the law (Adetayo, 2021, para. 10).

Further commenting on the ineptitudes of the legislative arm of the government is Sayuti. According to him:

> The National Assembly has a yearly ritual of accusing the federal government of failure to fully implement the budget of the preceding fiscal year. However, such accusations have been observed as amounting to the National Assembly indicting itself as weak and [with an]

> inability to oversight and hold the executive to account. Budget defense by Federal Ministries, Parastatals and agencies has been reduced to a yearly "parley" where various legislative committees and members of the executive negotiate sharing of the "national cake" with no interest to the Nigerian people. Their power of oversight has been slaughtered on the altar of corruption and weakened by their craving to amass wealth at the expense of the masses (Sayuti, 2016, p. 15).

On the part of the judiciary, it has been revealed how the actions and inactions of the judiciary cause delays to the courts' process. The timely administration of justice is a key requirement for the peace and stability of human society. Administration or dispensation of justice is a basic responsibility of the judiciary, just as it is widely believed that the judiciary is the last hope for the common man. This assertion portrays the significance of the judiciary as one of the major arms of government. The importance of the role of the judiciary notwithstanding, the body is often berated for causing delays in the judicial process. Delays in the judicial process have tended to make people lose confidence in the courts, especially since justice delayed is taken to be justice denied. This has continued to bring the legal profession into disrepute.

There is no doubt that the justice system in Nigeria is fraught with challenges, and this has made court proceedings to be seen as time-consuming activities. On many occasions, "by the time the case brought before the court is determined, the litigants possibly would have lost interest or the case would have lost the supposed economic value" (Monye et al., 2020). Judicial and legal officials have been found to use different means of delaying the judicial process, including but not limited to raising preliminary objections to challenge the jurisdiction of the trial court, and raising the irregularity or the validity of a charge brought against the accused based on some noticed or perceived defects. In addition, the counsel may use an appeal, either a substantive or interlocutory appeal, just to delay proceedings. While all these are parts of the judicial or court process, the judiciary normally uses them as tactics to frustrate the entire judicial process. In many instances, these antics and tactics have made the efforts of administrative law's regulatory and enforcement agents futile, and consequently constitute a hindrance to the proper application of the law of administration to public offices in Nigeria. In addition, the judiciary has also been accused of dispensing justice to favour the highest bidder. According to Daudu,[6] "there is a growing perception, backed up by empirical evidence that justice is purchasable and has been purchased on several occasions in Nigeria" (Daudu, cited in Nnochiri, 2011, para. 4).

The executive arm of government in Nigeria, on the other hand, is alleged to have disobeyed court judgments on several occasions. Some concerned advocators of the rule of law have continued to decry recurring disobedience of court orders by the executive arm of the government of Nigeria. According to Falana:[7]

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[6] Joseph Bodurin Daudu is a Nigerian Jurist, Bencher, Senior Advocate of Nigeria (SAN), and former President of the Nigerian Bar Association.

[7] Femi Falana is a lawyer, a Senior Advocate of Nigeria (SAN), and a human rights advocate.

> I've compiled about 32 court orders being flagrantly disobeyed by the government of Nigeria, which are not in line with the rule of law. It doesn't lie in the mouth of an attorney general or the president of a country to pick and choose which orders of the court to obey. When you do that, you are reducing the status of the country to a banana republic. And that is why the bar has to rise now and take its rightful place (Falana, on Channels Television, 2019, August 27).

In a similar vein, Fasusi[8] while commenting on the need to obey court judgments, and the effects of disregarding court's decisions states:

> It is crystal clear that the orders of the court are valid and ought to be enforced and complied with by all persons because there is a duty on everyone and every constituted authority to do so. Refusal to obey a court judgment/decision/order could lead to severe consequences. However, in recent times, it appears the executive arm of government has been paying lip service to this sacred duty (Fasusi, in Onyekwere, 2021, para. 3–4).

Similarly, a report by the Socio-Economic Rights and Accountability Project, (SERAP), showed that the administration under President Muhammadu Buhari has flouted many court judgments since its inauguration in 2015. In its recent public presentation, SERAP listed some of the court judgments that it had secured against the Federal Government of Nigeria but which the government flagrantly disobeyed. According to the SERAP spokesperson, Oludare:[9]

> The first of such judgments is the judgment by Justice Hadiza Shagari delivered on July 5, 2017, ordering the federal government to tell Nigerians about the stolen assets it allegedly recovered, with details of the amounts recovered. The second judgment, by Justice Mohammed Idris, on February 26, 2016, ordered the federal government to publish details on the spending of stolen funds recovered by successive governments since the return of democracy in 1999. The third judgment, by Justice Oluremi Oguntoyinbo on November 26, 2019, ordered the federal government to challenge the legality of states' pension laws permitting former governors now serving as ministers and members of the National Assembly to collect such pensions and to recover pensions already collected by them. The fourth judgment, by Justice Mohammed Idris on May 28, 2018, ordered the federal government to prosecute senior lawmakers suspected of padding and stealing N481 billion from the 2016 budget; and to widely publish the report of investigations into the alleged padding of the 2016 budget. The fifth judgment, by Justice Chuka Obiozor on July 4, 2019, ordered the federal government to publish the names of companies and contractors who have collected public funds since 1999 but failed to execute any electricity projects. *These judgments and many others by the courts have remained unchallenged till date and the federal government has refused to obey them* (emphasis added are ours) (Oludare cited in Ojelu & Dania, 2022, para. 3–6).

[8] Deji Fasusi is a lawyer and litigation partner.
[9] Kolawole Oludare is a Deputy Director of the Socio-Economic Rights and Accountability Project, (SERAP).

Besides this is the undue interference in the judicial process by the executive. The judges are not decisionally independent in all the cases they handled. According to West-Idahosa:[10]

> There is a fair presence of decisional independence amongst Nigerian judges in respect of civil cases founded on common law and general criminal litigation. The area of concern has to do with the conduct of political matters, whether pre-election or post-election ones. While it has been generally acknowledged that election matters are *sui generis* (one of its kind), many believe that some of the decisions given were largely influenced by political, religious, tribal and social actors. I must point out that a number of judges are also influenced by corruption, greed and avarice in the discharge of their duties. It is this notion that has given rise to such concepts as "black market" orders, "cash and carry" judgments and a host of uncomplimentary theories surrounding the nature of some of the judgments delivered in Nigeria. The danger is that a negative perception of this nature erodes the three basic elements of the independence of the judiciary (West-Idahosa, 2021, para. 8).

This development has continued to cause crises in governance, thereby questioning the legitimacy of the government of Nigeria. The snowball effect of this is the weak condition of governance, where the government appears unwilling and incapable of carrying out its responsibilities effectively. Whenever a government fails to preserve the rule of law and uphold human rights, among others, sit is structurally out of order (OECD, 2005), and faulty political structures and weak institutions make a country susceptible to organised crime (Henkel, 2013). Therefore, the series of governance challenges in the country can be seen as the mounting effects of jettisoning the proper application of constitutional and administrative law to the governance and administrative practices of Nigeria.

5. Conclusion

The place of the constitution in the governance of any political entity cannot be overemphasised, because, it remains a reference point in ensuring quality or good governance and, for that reason, a constitutional government became desirable. The activities of government are believed to be well regulated under a constitutional government, via the constitution and administrative law. This is because administrative law remains indispensable in propelling government toward providing quality governance. In Nigeria however, the legislature, the judiciary and the executive are guilty of restricting the power of the law of administration by their deliberate disobedience of the rule of law and the Constitution in their various capacities. Other challenges militating against the proper application of administrative law to governmental activities in Nigeria include societal factors, poor remuneration and poor conditions of service for law enforcement agents, delays in court proceedings, lenient or no punishment for corrupt public

[10] Ehiogie West-Idahosa is a former member of the House of Representatives of Nigeria from 1999 to 2011.

officials, weak institutions for enforcing administrative law, and politicisation and political interference in the activities of administrative institutions, among others.

The implication of these challenges is the abuse of power by public officials in their various offices. This development has continued to cause crises in governance and put a question mark on the legitimacy of the government of Nigeria. The effect of this is the weak condition of governance, which has made the country susceptible to organised crime that has continued to torment the country. The study, therefore, concludes that until Nigeria's Constitution is redrafted, and constitutional law and administrative law properly applied, quality or good governance will continue to elude the country.

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Public Governance, Administration and Finances Law Review Vol. 8. No. 1. (2023) • 73–89.

DOI: 10.53116/pgaflr.6850

Principles for the Europeanisation of Public Administration

In Search of the European Procedural Administrative Principles

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Abstract: Administrative regimes are no longer isolated phenomena: they are constantly confronted with international influences, which shape the internal structure and system of the states. The cooperation between the European Union and the Member States' administration is today a kind of convergence in principles. This is what the EU expects from the candidate countries and in the neighbourhood policy. The main question of the study is whether the content of the principles used by the EU is cognisable and consistent. The study covers two policy instruments: the SIGMA project, which is a joint EU–OECD collaboration, and the comparative legal activities of the ReNEUAL. These instruments testify two completely different attitudes: one does not explain the principle but holds it accountable, the other seeks the means to understand its content and the reasons for the differences in interpretations. Both programs have undergone internal development, but while SIGMA has moved away from its administrative procedural roots, ReNEUAL has confirmed it. The paper is another argument in favour of the need for administrative research using the tools of comparative law.

Keywords: EU, OECD, SIGMA, ReNEUAL, principles, accountability

1. Integration and sovereignty – The path towards cooperation on fundamental principles

1.1. Peaks and troughs

The Europeanisation of public administration faces constant challenges. Ever since the European Economic Community came into being, the Western half of Europe has aimed for economic cooperation. In his speech at the University of Zurich on 19 September 1946, Sir Winston Churchill mentioned his vision of a 'United States of

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Europe', which has since become the identity-shaping symbol of European international organisations (in particular the Council of Europe and the European Communities). The initial enthusiasm and desire for unity soon evolved into 'convergence', as it became clear how strongly Member States were attached to their sovereignty and power positions within Europe.

This was probably one of the reasons that the expansion of the Community's sphere of competence, and later that of the Union, has been such a gradual process. It was also that, until the late 1980s, regional policy and the related statistical cooperation were the most prominent examples of active and genuinely harmonised administrative cooperation. During the decades preceding its codification, the NUTS system became an influential factor, by establishing a link between the territorial structure of Member States and statistical reporting. Indeed, all member states' spatial structure have become comparable on a European scale.

The transformation into a Union in 1992 and the emergence of the ten candidate countries provided further impetus for administrative convergence, or to put it more aptly, the development of a 'willingness and ability' for cooperation. The SIGMA program, to be further discussed below, is a good illustration of the fact that there has been no 'unification', in the Churchillian sense, in the European Union since its beginnings. Instead, the focus has been on providing *support* to individual Member States and disseminating good practices in an effective manner. In the first decade of the 2000s, the significance of coordinative and networked bodies, such as the so-called 'agencies', increased within the operation of the EU (Polt, 2019, pp. 67–70). The reason for convergence replacing uniformity is that Member States are so strongly attached to sovereignty and autonomy. First, it is therefore worth taking a closer look at this issue.

1.2. The external necessity for cooperation among administrations as a force-shaping sovereignty

"In society, power is a fact" (Varga, 2020, p. 258). Power, a conceptual element of the establishment and functioning of the state, is also an essential component of sovereignty (Tamás, 2010, p. 67). Sovereignty is conventionally defined as an "actual and theoretically absolute (supreme) power within a given territory over a given population, which is acknowledged as such by other similar power holders" (Varga, 2020, p. 259). According to the traditional differentiation between the external and internal aspects of sovereignty, the former includes independence, autonomy and decision-making capacity without external control, whereas the latter includes the right to command and the obligation of subordination (obedience) (Varga, 2020, p. 259).

Also according to the conventional approach, administration means functioning on the basis of popular sovereignty; in other words, functioning based on a position of power (Waldo, 2006). This way, the relationship between administration and power points to the internal aspects of sovereignty, as administration is an activity of executive power, which results, among other things, in the actual performance of state functions through governance in possession of the state's authority (Varga, 2017, p. 91). The conceptual

framework makes it clear that, within the public law doctrine, administration is an internal power, characteristic of the state. On a conceptual level, one could stop here, as it is at the discretion of each state to choose the kind of internal set of rules, functioning and implementation; taken altogether, the kind of administration it wants. This diversity is illustrated, for example, by the fact that, in Germany, certain aspects of federalism, namely judicial review and parliamentary governance, have supported and applied that public administration should continue to be the ability of general government branches to define and pursue rational policies while respecting constitutional requirements. In France and the United States, however, administrative agencies partly reflect a departure from regular governmental power in order to protect the public interest better (Rose-Ackerman et al., 2019).

Experience, however, shows that the administration of each state is subject to significant external influences. Rather than stemming from power, such influences emerge on the basis that the external and internal aspects of sovereignty continuously interact with and thus influence each other. Rather than being seen as isolated phenomena, countries should be interpreted as parts of larger or smaller systems of relationships. These may be bilateral relationships between countries with or without a common border, looser (political or economic) multilateral cooperations (such as the Visegrád cooperation between Poland, the Czech Republic, Slovakia and Hungary), or a stronger political and legal relationship (such as the European Union, the Council of Europe or other international organisations). In order to be able to maintain the balance among its diverse external and internal relationship networks, it is necessary for each European country to understand, receive and process the impacts affecting its internal functioning. That attention to external influences may thus also shape the administration.

In terms of their legal binding force, these external influences on public administration can be examined from two different aspects: either as a *normative* influence, as exemplified by the Convention on the Rights of the Child adopted by the UN in 1989, which has shaped the participating states' child protection legislation. In Hungary, this is expressed by imposing a legislative obligation in order to comply with a mandatory international standard. However, the external influence on administration may also be of a *cooperative nature,* as exemplified by the services of the UNPAN (United Nations Public Administration Network) or the supportive functions of the OECD, to stay within the realm of international public law (Heidbreder, 2011, pp. 709–727).

The rest of this paper will focus on normative influences on public administration from the perspective of the European Union.

1.3. The Europeanisation of administration and administrative law

The Europeanisation of public administration has been discussed repeatedly and extensively. From the point of view of the analysis presented in this paper, Europeanisation includes, in a broader sense, any influence exerted by the European Union on administration and administrative law (Grabbe, 2003, pp. 319–320). On the whole, it is a process that includes activities to set up institutions, create norms, develop procedures

for managing conflicts and resolving problems and to establish formal and informal networks at Union level in order to address the challenges posed by integration. On the other hand, it encompasses the changes in national policies, legislation and institutional structures as a result of Union policies and legislation and the rearrangement of the interests of various Member States (Láncos & Gerencsér, 2015, p. 121).

Closely related to Europeanisation is the concept of 'European (public) administration', which has been defined by Union law in very general, one might say 'foggy', terms only (ReNEUAL, 2014, p. 17. para. 43). Article 9(3) of the Treaty of Amsterdam and the first indent of Article 24(1) of the Treaty of 1965 were replaced by Article 298(1) of the TFEU. This provision refers to 'an open, efficient and independent European administration'. In the primary (narrowest) interpretation of the term, European (public) administration means the administrative dimension of Union law, meaning any piece of Union legislation that is applicable to the implementation of EU decisions by Union bodies (institutions, offices and agencies) and the organisation and functioning of such bodies (Balázs, 2020a, [12]–[19]; Torma, 2011, p. 201). It is not by accident that the term 'public' is absent in the TFEU, given that EU executive bodies lack the kind of sovereignty and authority vested in the bodies of Member States. Therefore, the EU relies on the efficient implementation of its decisions by the public administrations of Member States.

In its secondary (broad) interpretation, 'European (public) administration' therefore presupposes the active participation of administrative bodies of the Member States in the implementation of Union decisions (Balázs, 2020b, 86–87). Given that the implementation of EU decisions, particularly in matters of exclusive or joint EU competence, greatly relies on the administrative bodies of Member States, such a broader approach is considered more relevant by the research of EU procedural law discussed below (ReNEUAL).[1]

The implementation of EU decisions thus creates a direct link between EU law and Member State administrative law, which is no longer 'vague' but manifests itself in a tangible legal form.[2] As administrative norms are traditionally understood on the basis of substantive, organisational and procedural provisions, it is worth examining the administrative law links between the Union and the Member State on the basis of these guiding principles.

It is evident from the Treaty on the Functioning of the European Union (TFEU) that the primary form of the relationship concerns *substantive law.* As far as the exclusive, shared and supportive functions of the EU are of an administrative nature, they clearly have a substantive law dimension: see in particular competition rules for the single market among exclusive competences [Article 3(1)(b) TFEU], agricultural law, environmental protection, consumer protection, transport and energy among shared competences [Article 4(2) TFEU], or any of the supportive, coordinating or supplementary functions under Article 6. Such substantive law cooperations between the EU and the Member State are provided for in the Treaties, while their actual provisions are determined by secondary

[1] Paragraph I-1(2) of the Model Rules clearly states that national bodies must also apply the EU procedural rules where they are obliged to do so by EU law (provided, obviously, that they apply EU law).

[2] For the purposes of this paper, 'legal form' should be understood as referring to both the provisions of an administrative nature in secondary EU legislation and decisions of the CJEU that affect public administration.

legislation, often as a combination of substantive and procedural rules, similarly to Member State law.

The EU does not have significant influence on *organisational law,* given that this field is determined primarily by the characteristics of Member State sovereignty as referred to above. Similarly, it is obvious that, since the EU strives for efficiency through specific cooperations, it tends to leave the shaping of the organisational framework to the Member States. In other words, it does not provide for an explicit organisational norm that would be binding for both Union and Member State law. The initial distance and respect for Member State autonomy have, however, changed and it can now be observed that EU law is capable of transforming the organisational rules of Member States. This is exemplified by the increasing prominence of autonomous bodies within central administration, as the independence of those bodies from the government does not fall into the (exclusive) discretion of the Member States. For example, Recital (8) of the ECN+ Directive[3] states that "there is a need to *put in place fundamental guarantees of independence*, adequate financial, human, technical and technological resources and minimum enforcement and fining powers [...] for applying national competition law [...] so that national administrative competition authorities can be fully effective". Similarly, Recital (37) of the European Electronic Communications Code[4] provides that the "*independence of the national regulatory authorities was strengthened* in the review of the electronic communications regulatory framework completed in 2009 in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions". The secondary legislation is thus capable of formulating requirements that Member States are only able to fulfil by also harmonising their organisational rules.[5]

As far as the provisions of EU organisational law are concerned, territorial administration is the only area where the organisational framework can only be filled by an EU administrative institution and by the explicit cooperation by the Member States. These are called European Groupings of Territorial Cooperation (EGTC), which were developed with a view to facilitating cross-border, transnational and interregional cooperation between Member States and regional and local authorities. EGTCs enable partners to carry out joint projects, share expertise and improve coordination in territorial development. An EGTC may be set up by partners established in at least two Member States (or a Member State and one or more non-EU countries). Apart from businesses, however, the parties involved in the cooperation may include national authorities (i.e. administrative bodies), as well as regional and local authorities. The EGTCs thus provide an organisation framework for cross-border cooperation, which is able to adapt flexibly to the administrative structure of the Member States concerned.

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[3] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (italics added).

[4] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (italics added).

[5] It should be noted that the authorities under the two examples cited above were identified by the Hungarian Parliament as autonomous administrative bodies more than a decade before the publication of the aforementioned EU norms. That said, the obligation for harmonisation with EU law still affects an organisational issue.

Finally, mention must be made of the EU and Member State cooperation on *procedural rules*. The current rules governing administrative procedures (or procedures of an administrative nature) in the EU are fragmented (i.e. there is no uniform norm) and tend to be industry-specific (della Cananea & Bussani, 2019). As part of the substantive law cooperation referred to above, the various industries have developed their procedural guarantees, which have been adopted by both EU bodies and Member State administrative bodies applying EU law. The fragmented nature of industry-specific rules has led to a situation where "it is not always possible to have a coherent interpretation of the rules that apply in different sectors, even though they are intended to be similar".[6] However, the harmony and readiness to cooperate between the procedural regimes also draw our attention to an important aspect: while the definition of procedural rules also lies within the exclusive competence of the Member State owing to its sovereignty, all procedural rules are based on identical or similar patterns, while public administration is based on similar conditions, the entirety of which may be termed the *convergence of fundamental principles*.

As the following chapters reveal, since the 1990s, procedural law principles have become the driving force for EU convergence, establishing a common denominator for European countries with diverse legal traditions. In particular, the criteria of legality, equality and fair procedure serve as the basis for the functioning of all types of democratic administrative regimes, the mutual recognition of which facilitates cooperation between the Member States as well as between EU bodies and the Member States. However, how can one get to know what the fundamental principles are? The difficulty lies in the fact that no positive legislation provides for the content of fundamental principles, while each law-enforcement decision of a judicial body (e.g. the CJEU, Member State courts and constitutional courts) relates to an individual case. In order for a fundamental principle to be truly applicable and be a tool capable of measuring convergence, its content should be properly understood. The content of the principles applied by EU law can be found primarily in EU administrative law and its more general rules on public administration[7] (ReNEUAL, 2014, p. 9).

The following is a discussion of two well-known European or partly European tools affecting public administration, which include fundamental principles pertaining to administration in all Member States. However, these two document systems that generally support administration, differ from each other mainly in their methods and their attention to understanding the content of fundamental administrative principles. For simplicity, the first is referred to below as a system of 'declared principles'. As will be seen, in this system, concepts are not individually justified; their content is taken for granted and is only communicated to recipients in the form of a catalogue. The second is referred to as 'systematic principles'. It consists of well-founded, thoroughly explained and interpreted information that was collected according to a systematic methodology using transparent

[6] ReNEUAL 1.0 Model Rules Book I Definitions.

[7] For example, the European Code of Good Administrative Behaviour issued by the European Ombudsman (https://www.ombudsman.europa.eu/hu/publication/en/3510), and the Charter of Fundamental Rights of the European Union [2007] OJ C 303/1.

research. Both methods' starting point is procedural law, which reveals the true face and guarantees of public administration as a functioning tool.

2. Declared fundamental principles in the SIGMA program

2.1. The first phase of SIGMA

The accession process, which started in 1994, posed political, economic and legal challenges for the ten candidate countries.[8] The first of these challenges was addressed by the PHARE programme of the European Union, which served as one of the main facilitating measures in the accession of Central and Eastern European countries.[9] It ran in parallel with the SIGMA program,[10] designed to provide administrative (mainly government) and state management support, established within the OECD in 1992.

SIGMA's original goal was to provide information and expert analysis on public administration to policy-makers and to facilitate communication between and pooling experience among leaders in the public sector. The countries were provided support with a view to improving good governance and the efficiency of public administration and developing the public sector, putting the emphasis on democratic values, ethics and the rule of law. To achieve these objectives, it provided knowledge support to the participating governments through the provision of expert networks, information and technical expertise (SIGMA, 1999, p. 2).

To this day, the program has been providing practical knowledge.[11] While support has been country-specific, it is based on uniform principles: from the beginning, the EU and the OECD have been aware that the acquis communautaire is unable to support government reforms adequately, and there are no Union norms or practices that could be adopted by the candidate countries. Therefore, they gathered the principles that the program organisers considered necessary in order to achieve good governance and gave them a common name: it became the European Administrative Space.[12]

Four types of principles are named in the 1999 SIGMA paper: reliability and predictability; openness and transparency; accountability and efficiency; and effectiveness (SIGMA, 1999, p. 9–14). As far as those principles are concerned, the paper only says that they "can be found in administrative law across all European countries" (SIGMA, 1999, p. 14). Apart from some excellent studies, it cites the case law of the Court of Justice of the European Union in general among its sources. Importantly, the paper states, however,

[8] Cyprus, the Czech Republic, Estonia, Poland, Latvia, Lithuania, Hungary, Malta, Slovakia and Slovenia.

[9] PHARE was a supporting tool to facilitate accession, one of the tools helping candidate countries to fulfil the accession criteria. It was replaced by the Instrument for Pre-accession Assistance (IPA) during the 2007–2014 cycle.

[10] Originally: Support for Improvement in Governance and Management in Central and Eastern European Countries. Since the focus shifted towards the Balkans and Eastern Europe following the 2004 round of accession, the former geographical reference to Central and Eastern Europe was subsequently removed. The first group of countries receiving support: Albania, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, Macedonia (FYROM at that time), Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia (SIGMA 1999, p. 2).

[11] See in particular the 'SIGMA Papers' series published by SIGMA (https://doi.org/10.1787/20786581).

[12] "European Administrative Space" (SIGMA, 1999, p. 14).

that these principles tend to appear scattered among different pieces of legislation, from the constitutional level to acts of Parliament and delegated legislation as well as the case law of courts. It specifically emphasises the significance of administrative procedural rules, whether they are contained in codified law or otherwise (SIGMA, 1999, p. 8). For us, this may carry the message that the most comprehensive principles defining public administration may focus on the functioning and actions of public administration and, in particular, specific acts of the authorities.

SIGMA did not come to an end with the accession of the originally supported countries in 2004. Relying on the experiences of the first decade, the program has been further developed and has now become a support for knowledge in general and a tool for measuring 'development' for countries aspiring for accession to the European Union and other countries in the EU's Neighbourhood Policy Area (SIGMA–OECD, 2019).

2.2. The reform of SIGMA and its separation from procedural rules

The enlargement process continues to place emphasis on each candidate country's public administration, which plays a key role in achieving economic growth, competitiveness and a better quality of life. According to the 2021 monitoring documents, "democratic governance and the rule of law require capable, accountable and effective public administrations" (SIGMA–OECD, 2021, p. 4). In its 2018 Enlargement Strategy, the Commission emphasised three fundamental areas: "the rule of law, fundamental rights and good governance" (European Commission, 2018, p. 4). In addition to being a recommendation, these three areas, which are all based on the reform of public administration, also constitute a benchmark, on the basis of which candidate countries are examined and assessed by the EU. Apart from taking the goals of the enlargement strategy of the Union into consideration, the OECD is actively interested in taking part in the accession process, in particular given that, in addition to the EU, the United States also pays significant attention to the West Balkans and the supported regions of the Middle East and North Africa.[13]

In 2014 and 2017, SIGMA further improved its now approximately one hundred-page document entitled *The Principles of Public Administration* (SIGMA–OECD, 2017). SIGMA's transformed and thoroughly reconsidered goal is to achieve stability, security, prosperity and democracy by furthering policies that enhance economic prosperity and social well-being. The program has measured and evaluated (by monitoring) progress in the public administration reform in six areas: 1. the strategic framework of public administration reform (Sántha, 2021, p. 57); 2. legislation, policy development and coordination; 3. civil service and human resource management; 4. accountability; 5. services; and 6. public finance, public procurement and external audit.

[13] List of the countries supported in 2022: Albania, Algeria, Azerbaijan, Armenia, Bosnia and Herzegovina, Egypt, Georgia, Jordan, Kosovo, Lebanon, Moldova, Montenegro, Morocco, North Macedonia, Serbia, Tunisia, Turkey and Ukraine (https://www.sigmaweb.org/countries/).

This expanded and edited publication has retained the formal characteristics of the previous document in terms of not being an academic document, in that it does not explain the reasons for imposing a regulatory condition, does not cite arguments or provide evidence. However, the title and the content of the document now differs from that of its 1999 counterpart: instead of 'European' principles, it now talks about public administration principles in general, abandoning (or rather transforming) the former categories of principles (including the concept of the European Administrative Space), focusing on the six areas referred to above. Rather than being legal principles,[14] some of them are associated with the toolkit of governance (management). It uses concepts (e.g. responsibility, transparency, efficiency) without defining them but refers to them as 'main requirements', in other words 'criteria' that will later be assessed by a body of the EU.[15] It is thus a management tool supported by a legal framework.

SIGMA monitors the Balkans region, for example, by assessing the state of affairs in the six focus areas in 2017 and then monitoring progress in 2019 and 2021. The three sets of data recorded are comparable and a certain trajectory can be described in each country.[16] The program, however, has not lost sight of its fundamental objective, of preparing these countries for accession: it states that "the EU enlargement criteria recognise and emphasize the need for countries to build a strong national public administration with the capacity to pursue the Principles of good public administration, and effectively transpose and implement the EU acquis" (SIGMA–OECD, 2017, p. 6). The principles have transcended the procedural framework established in the 1999 version. In their current form, they specify what good governance entails in practice and outline the main requirements with which countries are expected to comply throughout the integration process. They also include a monitoring framework, which enables progress in implementing the principles to be analysed regularly and the reference values for each country to be determined.

Based on the individual country assessments,[17] I specifically examined the *accountability* principle which, unlike the other criteria, is both present in the 1999 and 2017 SIGMA system as a genuine principle of public administration. My review focused on the specific meaning attributed to that principle by the OECD. Each monitoring report breaks down the accountability principle into five sub-principles (review criteria):

1. The overall organisation of central government is rational, follows adequate policies and regulations and provides for appropriate internal, political, judicial, social and independent accountability.
2. The right to access public information is enacted in legislation and consistently applied in practice.
3. Functioning mechanisms are in place to protect both the rights of the individual to good administration and the public interest.

[14] Compared to the previous version, the principle of 'transparency' has retained most of its former legal relevance in the OECD document.

[15] Similar phrases appear in each monitoring report (e.g. SIGMA–OECD, 2021, p. 6).

[16] See the SIGMA–OECD data portal (https://par-portal.sigmaweb.org/).

[17] The Country Reports are available on the SIGMA website (https://www.sigmaweb.org/publications/monitoring-reports.htm).

4. Fair treatment in administrative disputes is guaranteed by internal administrative appeals and judicial reviews.

The public authorities assume liability in cases of wrongdoing and guarantee redress and/or adequate compensation. Further 'indicators' are added to each review criterion, the fulfilment of which is rated using a five-point scale. Regarding review criterion 1, the indicators have the same title for each country under review:

I. Policy and legal framework for the central government organisation

1. Clarity and comprehensiveness of the official typology of central government bodies
2. Adequacy of the policy and regulatory framework for managing central government institutions
3. Strength of basic accountability mechanisms between ministries and subordinated bodies
4. Managerial accountability mechanisms in the regulatory framework

II. Central government's organisation and accountability mechanisms in practice

5. Consistency between practice and policy in government reorganisation
6. Number of public bodies subordinated to parliament
7. Accountability in reporting between central government bodies and parent ministries
8. Effectiveness of basic managerial accountability mechanisms for central government bodies
9. Delegation of decision-making competence within ministries

Each of the above indicators is individually assessed by the monitoring reports. However, they are not analysed using a comparative legal methodology. In fact, there are no benchmarks associated with any findings in the report,[18] against which to compare the mechanisms of the country under review. As countries are not compared with each other in the explanation of indicators, there is no way to tell whether a piece of legislation, or the lack of it, should be attributed to a factor in the regional legal culture or whether it should be regarded as a general and fundamental legal or administrative deficiency. Rather than statistical codes, the fulfilment of indicators is shown by assessment along a scale of 1 to 5, the reference points for which are not specified. The absence of a comparative toolkit entails that the social and legal characteristics of the region under review are omitted.

[18] For example, the 2021 Serbia Report declares that the "organisation of public administration lacks clear policy direction" (SIGMA–OECD, 2021, p. 95) without specifying a relevant benchmark.

3. Systematic principles in ReNEUAL projects

3.1. Innovative codification

A completely different method is outlined in the study by the Research Network on EU Administrative Law,[19] which was set up in 2009 under the leadership of Herwig C. H. Hofmann, Jens-Peter Schneider and Jacques Ziller (ReNEUAL, 2014, III). The Research Network covers the entire European Union and has included researchers from all Member States. Five years of research, conducted in cooperation with the Commission, resulted in the 'Model Rules' document, first published in 2014 (ReNEUAL, 2014), and designed primarily to promote the improvement of implementing EU law and policies while ensuring that the constitutional values of the EU should be enforced in the course of exercising public power. The Model Rules, published as an academic paper rather than as part of the legislative process, demonstrated that, from a legal point of view, it is possible to draft a standard text for public administration procedure, "adapted to the sometimes complex realities of implementing EU law by Union bodies and Member States in cooperation. According to ReNEUAL, the evolution of the European legal system has reached a point where such codification is not only possible but also necessary for the EU's future development as a regulatory system" (Ziller, 2015, p. 247).

The authors of the ReNEUAL Model Rules have made a proposal for 'innovative codification'. The draft is therefore intentionally not limited to 'consolidation' ('codification à droit constant'), norms and jurisprudence. According to Schindler, at first sight, the draft is different from Verwaltungs-Vollstreckungsgesetz (VwVG), which aimed at achieving 'minimum codification' in order to harmonise existing legislation. In a speech before the Association of German Constitutional Law Professors (Vereinigung der Deutschen Staatsrechtslehrer) prior to the VwVG, the author of the preliminary draft (Max Imboden) described that effort as a "modest legislative programme" (Schindler, 2017).

The document itself was drafted on the basis of 'innovative' practices, as is reiterated in the text. The Model Rules comprise a uniform document, combining existing principles scattered in various pieces of legislation and the jurisprudence of the courts (ReNEUAL, 2014, p. 2). In my opinion, however, in addition to the compilation effort, the really forward-looking aspect of the project was that no time and energy was spared by the large number of contributing researchers, who worked in several working groups conducting systematic and transparent analyses, on the basis of which the six books of the Model Rules could subsequently be drawn up (Ziller, 2014, p. 248).

The document, however, was not created for scientific purposes alone. The real purpose was to enable the European Union to draft a regulation on procedures if policymakers decided to do so. To that end, the document also includes a draft standard. As European Ombudsman Emily O'Reilly put it, "the Model Rules make sense both as a basis for possible future legislation and as a persuasive synthesis of principles to be found in the existing law" (ReNEUAL, 2017, IV). That twofold objective, namely drawing up draft

[19] Research Network on EU Administrative Law (ReNEUAL).

legislation and, at the same time, conducting a detailed analysis of content, can be detected throughout the document.

In 2015, the year following its first publication, the Model Rules were revised. Hereinafter, all literal citations from the document will be based on that second edition (ReNEUAL, 2017).

3.2. The awakening of EU Administrative Law: ReNEUAL 1.0 (2009–2015)

Throughout its activities, the Research Network on EU Administrative Law has focused primarily on EU legislation, intending to reveal the intersections of administration that are identical when implementing the rules falling under any kind of EU administration, regardless of whether the rule is implemented by an EU body or a body of a Member State.

Only a narrow range of the principles applied in public administration are specified in the Treaties of the Union. Such principles include Article 298(1) TFEU, which was referred to above and which invokes the principle of *openness, efficiency* and *independence* as the – perhaps, from an EU perspective, most important – attributes of administration. Lower-level EU sources may also include procedural aspects, particularly in the field of substantive law.

Another important international source in addition to the above is the Council of Europe's Recommendation on Good Administration.[20] As a general principle, the Recommendation invokes the *rule of law* as one essentially consisting of procedural principles such as *lawfulness, equality, impartiality, proportionality, legal certainty,* taking action within a *reasonable time* limit, *participation,* respect for *privacy* and *transparency.*[21] As observed below, these principles will reappear later in the Model Rules as common values in European public administration.

While the drafting of the Model Rules in 2014 did not lead to new EU legislation, two *soft law* documents were published in that context, providing general guidance for EU administration. These include the 2013 Recommendations for Commission procedures, which is in fact a call for drafting a regulation on the basis of the Model Rules in the form of a European Parliament resolution,[22] or the Resolution on an open, efficient and independent European Union administration, adopted in 2016[23] (Boros, 2018, pp. 202–209). According to the EP resolution referred to above, higher value is attached to

[20] Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration.

[21] Recommendation (2007)7, Preamble, last paragraph; moreover, these principles are discussed in more detail in Articles 2 to 10.

[22] European Parliament Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union, 2012/2024(INI).

[23] Resolution on an open, efficient and independent European Union administration, 2016/2610(RSP). Similarly to the Model Rules, this resolution puts forth a legislation initiative, although with a significantly different approach: it sets out laconic provisions on the basic legal requirements for the initiation and conclusion of EU administrative procedures, administrative review and standard administrative decisions. It is, however, less detailed than the Model Rules.

EU administration since, with the development of the competences of the European Union, citizens are increasingly directly affected by the Union's administration, from which they expect *transparency, efficiency* and *swift* action. However, the fact that the Union lacks a coherent set of rules and the complexity of legal texts make it difficult for citizens to understand EU law, hinders the application of EU law. According to the resolution, drafting uniform procedural rules is therefore in the interest of both the bodies of the Union and the citizens of the EU. Of the recommendations set out in the resolution (Recommendation 3), it stresses the principles specified in the Council of Europe Recommendation referred to above, almost in the same order and with almost the same wording as in that document.

Having studied the rules of the public administrative procedure of the EU and Member States, the Research Network set out the principles in the Preamble to the Model Rules. While they did not intend to reiterate the principles already articulated in the Founding Treaties, they considered it important to recall them here (ReNEUAL, 2017, p. 32). The draft Model Rules can be interpreted as distinguishing four groups of actors when summarising the principles defining public administration. 1. Public authorities in the EU and, where they apply EU law, in the Member States, are bound by the principles of the *rule of law,* the right to *good administration* and other related principles of EU administrative law. 2. Every person reading and applying the standard provisions of the Model Rules must have regard to *equal treatment* and *non-discrimination, legal certainty, fairness, objectivity* and *impartiality, participation, proportionality,* protection of *legitimate expectations, transparency,* and due access to effective *remedies.* 3. Public authorities[24] must have regard to *efficiency, effectiveness* and *service* orientation. 4. The parties applying European administrative procedures must respect the principles of *subsidiarity,* sincere *cooperation* and a clear allocation of *responsibilities.* According to the Explanations to the Model Rules, the latter are especially important for the design of complex procedures, but are also applicable to other types of European administrative procedures (ReNEUAL, 2017, p. 32). The principle of clear allocation of responsibilities is very important with regard to complex procedures in order to provide appropriate access to effective judicial review and other remedies. Moreover, the responsibilities must be clearly delimited, not only regarding the various public authorities but also within the various institutions, bodies, offices and agencies, in particular in the case of the most influential European authority, the European Commission.

Rather than dividing the principles, the groups of principles draw the attention of the parties applying the law (whether decision-makers or citizens applying the law or seeking remedy in an individual case) to the importance of principles in administration in line with the EP Resolution and the Council of Europe Recommendation referred to above.

[24] In EU law, the category of 'Public Authorities' is broader than authorities that can adopt specific decisions (in the Hungarian law in general: 'államigazgatási szervek'), as they also include bodies authorised to adopt normative decisions (see, for example, local authorities). The NUTS Regulation [Regulation (EC) 1059/2003 on the establishment of a common classification of territorial units for statistics (NUTS)], in particular its Article 3(1) is similarly a regulating Union legislation.

3.3. Assessing the situation and diving deeper: ReNEUAL 2.0

The Model Rules have so far not been published in the form of an EU Regulation, which means that they have not become a genuine standard. While one of the twofold objectives, legislation, has not been achieved, the other objective, of a research network bringing to the surface genuine and substantiated scientific results, has been successfully achieved beyond dispute (della Cananea & Bussani, 2019).

Today, the continued existence of the Research Network does not mean drafting a uniform document. Instead, it has defined topical administration-specific research issues. Retaining the earlier working practices, research is still conducted in working groups. Research units have been set up on three topics: 1. 'Common European Principles of Administrative Law and Good Administration'; 2. Digitalized Public Administration in the EU; and 3. International and transnational administrative law.

Work in the first research group focuses on the principles of administrative law shared by the national administrative law of Member States, the legal system of the European Union and the law of the Council of Europe. The comparative analysis conducted for drafting the Model Rules and the review of supranational rules has been developed in two main directions: on the one hand, it considers administrative standards applied by European legal systems and the content of procedural guarantees on the basis of a factual methodology; in other words, it conducts a comparative analysis of Member State responses to hypothetical cases (vignette research methodology).[25] On the other hand, it reveals the administrative law principles applied in the national administrative law of Member States in the light of the activity of the Council of Europe, including not only the judgments of the Court of Justice of the European Union but also the soft-law documents adopted by the Committee of Ministers.[26] In fact, there are two projects that aim to set up a 'European Administrative Law Toolkit', revealing the deeper motives for legal tools considered necessary or at least useful for enforcing the democratic principles in states under the rule of law, including, for example, the right of individuals to administrative protection, transparency and the democratic legitimacy of administrative procedures.[27]

The exploration of the genuine and up-to-date substance of the common European administrative principles and the communication of results are still in progress, as the ReNEUAL 2.0 research project (della Cananea & Caranta, 2020; della Cananea & Andenas, 2021; Conticelli & Perroud, 2022) is currently underway at the date of this paper. It has, however, become clear that the guarantees related to administration as operation can be obtained from the comparative analysis of the various laws of administrative procedure (della Cananea, 2017, p. 2). In the view of Giacinto della Cananea, the concept of administrative procedure is becoming increasingly important in modern public law (della Cananea, 2017, p. 23). Law plays a key role through the procedures in furthering the objectives of the State and protecting individual interests. In addition to the action of the administrative body, the current ReNEUAL 2.0 research also focuses on its judicial

[25] The title of the project is *Common Core of European Administrative Laws* (COCEAL).

[26] The research project, the hub of which is in Germany, is entitled *The Development of Pan-European General Principles of Good Administration by the Council of Europe and Their Impact on the Administrative Law of its Member States.*

[27] For details see the website of ReNEUAL (http://www.reneual.eu/projects-and-publications/reneual-2-0).

review, thus treating the jurisprudence of courts as an indispensable source, in addition to positive legislation and providing a truthful picture for the assessment of the validity of administrative acts and actions.

4. Conclusions

The goal of the European Union is to strengthen integration in order to ensure common economic and social development for the Member States. The level and extent of integration has been a matter of dispute essentially ever since the founding Member States agreed on cooperation. The internal functioning of Member States and, in particular, the structure of executive power, is indisputably one of the crucial pillars of Member State sovereignty and autonomy. However, with the progress of integration, the expansion of the competences of the Union and the evolution of globalisation processes, national public administrations are facing an increasing number of external influences. That phenomenon need not be assessed here; for the purposes of this study, it seems sufficient to acknowledge it as a fact.

The public administration of the Member State is able to rely on the international network for a number of resources. From digitalisation to statistical activities and the most diverse branches of administration, there is a global pool of expertise available, which would be inaccessible without this type of cooperation. These externalities may, however, also take the form of a legal framework, just as the administrative principles examined above are also reflected in both EU and national legislations.

The increasingly close cooperation between systems of administration within the European Union has become a sort of value synthesis (Józsa, 2003, pp. 724–725). This is a set of public administration principles that are recognised and applied by both the Member States and the bodies of the European Union. One could safely say that 'unification' in the Churchillian sense has reached its political zenith and that the administration systems cannot be expected to become more 'unified' than that under the current EU policy framework. The issue of uniformity emerges on a theoretical level, in the value synthesis referred to above. In order to achieve at least the coherence (and convergence) of principles, the principles first need to be understood. The SIGMA and ReNEUAL documents, described in the previous pages, also reflect the need for a principle to be interpreted uniformly by all actors. However, this requires a method capable of understanding and processing both written legislation and the law applied by the court. It is a common feature of the two tools referred to above that they are both based on principles of administrative procedure (SIGMA'99 and ReNEUAL 1.0), which indicates that the dynamic characteristics of administration are pivotal for the analysis of good governance. A major difference between the two methods, however, is that SIGMA'17, as a support program related to the EU's enlargement strategy, has now been 'disconnected' from the procedural law environment, vesting management content with legal force (the fulfilment of accession conditions), and thus giving rise to an inconsistency of concepts.

Studies of the ReNEUAL research network (both the Model Rules and the partial publications of current research) have, however, stressed that the internal nature of

Member State laws must be understood in order to achieve a value synthesis in administration. The ReNEUAL research, conducted with a comparative law toolkit, may lead to sound results, given that the methodology is sufficiently transparent to reveal the genuine content of each principle.

Finally, the principal research mechanisms under review have also neatly illustrated why legal concepts must not be used in non-legal contexts. Similarly, SIGMA's evolution has illustrated that while the first version set out an analysis of legal principles, its current version has mainly focused on the description and monitoring of management tools. The major challenge for SIGMA (and ultimately the Union and the OECD) in that context is that legal tools and management tools and the legal and political tool, as well will also have to be distinguished in the future, in the same way as there is a difference between administration and administrative law, management and normativity, structure and system (Tamás, 2010, p. 68).

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DOI: 10.53116/pgaflr.6496

Tax Law in Slovakia under the Influence of Pandemic, Digital Transformation and Inflation[1]

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Abstract: Tax law, as a branch of law belonging to the hard core of public law, is one of its branches that are characterised by instability rather than the stability of its rules. The reasons for the frequent changes in tax law can be found not only in political agendas and the economic view of taxes, but equally in external impacts, to which the legislature tries to respond promptly. The paper aims at clarifying the competing views on the position of tax law in the legal system and defining its functions, as they have been interpreted differently in different periods of social development. The paper then examines the significant changes in tax law in recent years, triggered by the Covid-19 pandemic, digital transformation and inflation, and assesses the extent to which these changes contribute to the fulfilment of the core, the fiscal function of taxes.

Keywords: tax law, pandemic, digital transformation, inflation

1. Introduction

Taxes are a crucial source of revenues for public budgets in modern economies. This is also the case in the Slovak Republic, whose economy is based on the principles of a socially and ecologically-oriented market economy (Article 55/1 of the Constitution of the Slovak Republic). The meaning and purpose of taxes, as well as fees and other types of revenues for public budgets, is to ensure that public budgets receive sufficient revenues to meet their expenditure requirements. Naturally, taxes and fees may only be levied by law or on the basis of a law (Article 59/2 of the Constitution of the Slovak Republic), in accordance with the principle of "Nullum tributum sine lege". It can be clearly deduced from the above that, in order for (in particular) taxes to fulfil their core function, States must create a legal environment that enables them to do so in accordance with the principles of constitutional law. Taxes, as an instrument of power, interfere in the property sphere of the obliged persons and serve as an instrument of the State or the local self-government, intending to take away part of their legally acquired property. They can therefore also be seen as a public payment obligation that is not matched by a right to receive consideration.

[1] This paper was supported by the Slovak Research and Development Agency under Agreement No. APVV-19-0124.

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Given the nature of taxes, it is clear that these payments are not and cannot be made on the basis of voluntariness but, on the contrary, on the basis of coercive power, through tax laws. The primary purpose of tax laws is to create a legal environment that ensures the generation of revenues for public budgets to an extent that enables the various tasks and functions of public entities to be carried out.

Based on the above, we will focus on areas in this paper. First, also using the method of historical interpretation, we will take a closer look at tax law as a branch of law and at the functions that are attributed to taxes. These, in their current form, can undoubtedly be seen as a product of historical development, as they have changed and evolved as the socio-political order has evolved. Of course, although taxes have essentially been part of the life of society since ancient civilisations, it is not possible to go back to such a distant history for the purposes of this paper. We will therefore only look at the functions of taxes over the last hundred years or so, taking into account the different models of government systems and the nature of the economy.

The second phenomenon that we will look at in more detail are three external factors identified by us that have had a significant impact on tax law in recent years and, to some extent, on other branches of law. These are the Covid-19 pandemic, digital transformation and inflation and their impacts on tax regulation. In addition to the historical method already mentioned, in this paper we will use the methods of description, analysis and synthesis. The aim will be to test the hypothesis that taxes, as their regulation by tax laws changes under the influence of the pandemic, digital transformation and inflation, continue to fulfil their primary fiscal function.

2. Tax law and functions of taxes yesterday and today

Tax law as a separate branch of law has been forming in the Slovak Republic, and partly also in other countries in the so-called Visegrád Four, especially in the last twenty years or so. We are aware that this is not yet a generally accepted conclusion, but rather an opinion competing with the view that tax law is subsumed under financial law (Karfíková et al., 2018, p. 77). The issue of the subsumption into or, on the contrary, the exclusion of tax law from the financial law system, is essential. This issue is perceived in Slovakia – and particularly within the Košice school of tax law, which is also represented by the author – somewhat differently from other countries in Central and Eastern Europe. The strengthened position of tax law within the financial law system has, in the course of a few years, outgrown the previous boundaries of financial law. Nowadays, tax law is on an equal footing among the branches of law in Slovakia (Babčák, 2022, p. 48). This is true for tax law as a branch of law, a branch of study and a branch of science as well (Štrkolec, 2022a, p. 182). Finally, this view, although not held by the majority, is also expressed by a number of academics in the Czech Republic and Poland. As one example, we can refer to the words of the renowned Czech professor M. Bakeš, who states that the understanding of tax law as a separate branch of law can undoubtedly be described as a new phenomenon in law on the threshold of the 21st century (Bakeš, 2009). Similarly, in Poland, the authors A. Gomułowicz and J. Małecki stated many

years ago that tax law should be perceived as a separate branch of law and its science as a separate legal science (Gomułowicz & Małecki, 2004, p. 142). Moreover, these views also appear in the works of other representatives of the science of tax law (Etel et al., 2010; Radvan, 2020, p. 21).

For the purposes of this paper, however, it is more important to look at the functions of taxes and tax law as they have been perceived at different stages of social development. Of course, we are aware that the notions of the "functions of taxes" and "functions of tax law" are not identical. However, neither can they be separated on purpose, since the individual functions of taxes are not and cannot be accomplished without the corresponding regulation of taxes by tax laws. In other words, taxes cannot fulfil their functions without tax law. In countries respecting human rights and fundamental freedoms, adequate legal regulation is the instrument which, in a constitutionally compliant manner, imposes on taxes the functions which they are intended to fulfil. This is, after all, not only a consequence of the above-mentioned national regulation, but also of the international conventions on human rights and fundamental freedoms. Typically, in this respect, reference may be made to Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, which, on the one hand, guarantees the right to the peaceful enjoyment of property, but, on the other hand, allows States to enforce such laws as they deem necessary to secure the payment of taxes or other contributions or penalties.

For the purposes of this paper, we will thus consider the functions of taxes in three periods of historical development: 1. the First Czechoslovak Republic in the interwar period; 2. the socialist period of the centrally planned economy; and 3. taxes after 1989.

From the period of the First Czechoslovak Republic, we can point out, for example, the works of Professor V. Funk, according to whom the primary purpose of taxes was fiscal, consisting of ensuring the existence and development of the economy of the State as well as private entities. Other purposes, such as national economic interests, limitation of consumption of the population, or promoting health were perceived as secondary (Funk, 1929, pp. 67–68). In the period of the centrally planned economy, other functions of taxes were highlighted, such as redistributive, controlling, stimulating, stabilising and accumulation roles (Slovinský et al., 1985, pp. 134–135; Girášek, 1981, p. 49). However, it was the accumulation function that was most close in content to what we now perceive as the core of the fiscal function, namely the provision of resources for the public budgets. For certain reasons, however, the notion of fiscal function was described as inappropriate (Slovinský et al., 1985, p. 133). Paradoxically, the social function of taxes was also mentioned in works from that period, which allows the differentiation of the amount of tax burden according to the family, social and other circumstances of taxpayers (Slovinský et al., 1985, p. 134).

Finally, in the current period of the market economy, the fiscal function is again typical and crucial for taxes, which is mentioned as the first or the most important one (Babčák, 2022, p. 25; Radvan, 2020, p. 23). The fiscal function of taxes in its present-day understanding means that taxes are to generate sufficient financial resources for public budgets in order to fund state and other public needs. In addition to the primary fiscal function of taxes, they of course nowadays also fulfil other functions (e.g. allocative, regulatory or control functions), but, as a rule, the social function does not appear among

them. In our opinion, three broad factors influence the provision of sufficient tax revenues for public budgets – and thus the real fulfilment of the fiscal function of taxes (Štrkolec, 2017, pp. 16–17):

1. Creating the basic elements of the legal construction of taxes, which determine, in relation to each tax, its payer, object, base and rate, or also other elements such as the due date of the tax, the increase or decrease in the tax rate, the increase or decrease of the tax itself, the exemption from tax, etc. The basic and other elements of the legal construction of taxes are contained in the substantive tax laws. From the point of view of the budgetary significance of each tax forming the tax system of the Slovak Republic, it is particularly crucial how the tax object and the tax base are formulated by law. The tax object defined by a law determines which economic actors, processes or benefits will be subject to taxation. The tax object may therefore be, for example, income, property or consumption. The tax base is then a quantitative expression of the tax object such as the amount of income, the size of property or the price of consumption. However, substantive tax law (it would probably be more appropriate to say substantive tax law relations) is not implemented by itself but needs procedural tax law for its implementation. This fact leads us to the second determinant of the generation of revenues for public budgets.
2. The second determinant is the efficient performance of tax administration based on the existence of precise procedural laws enabling such performance. The fiscal function of taxes can only actually fulfil the crucial significance attached to it if there is a proper procedural law formulation to achieve this function of taxes. Efficient tax administration, or its efficient performance, is one of the basic principles that should govern the tax and/or fee system (Bakeš, 2005, p. 38).
3. The third determinant is the simplicity and unambiguity of tax laws. This is because the simplicity of taxation is related to the efficiency of taxation. The more complicated the laws are, the more inaccessible the actual collection of taxes becomes (Bujňáková, 2005, p. 71). A complicated law is not only complicated for taxpayers but also for tax administration authorities. It may sound paradoxical at first hearing, but a minimalist and restrained approach by the legislature to the scope of the tax law-making process may lead to more efficient tax collection. From this perspective then, it is obvious that simplicity and clarity of tax laws have a significant effect on ensuring sufficient tax revenues for public budgets. Conversely, unclear, incomprehensible or confusing laws, as well as their changes, are naturally among the causes of tax evasion (Kubincová, 2015, p. 332).

3. The Covid-19 pandemic and impacts on state budget revenue

In order to define the importance of tax revenues for the state budget, it is useful to compare the pre-pandemic period with the pandemic period, based on the figures

according to the relevant state budget laws. However, it should not be forgotten that the state budget laws are teleological in nature and set out the objective to be achieved but not the methods or means of achieving it. These, in relation to the achievement of the required amount of tax revenues for the state budget, are set out in particular by tax laws (in the field of substantive, as well as procedural law).

The total state budget revenues for *2019* amount to EUR 15.497 billion. The tax revenues amount to approximately EUR 12.464 billion, i.e. about 80% of the total state budget revenues, which include income tax in the amount of EUR 2.952 billion, value added tax in the amount of EUR 6.629 billion, and excise duties in the amount of EUR 2.417 billion (State Budget Act 2019).

The total state budget revenues for *2020* amount to EUR 14.366 billion. The tax revenues amount to approximately EUR 11.546 billion, i.e. about 80% of the total state budget revenues, which include income tax in the amount of EUR 2.731 billion, value added tax in the amount of EUR 6.361 billion, and excise duties in the amount of EUR 2.204 billion (State Budget Act 2020).

The total state budget revenues for *2021* amount to EUR 15.806 billion. The tax revenues amount to approximately EUR 11.798 billion, i.e. about 75% of the total state budget revenues, which include income tax in the amount of EUR 2.089 billion, value added tax in the amount of EUR 7.038 billion, and excise duties in the amount of EUR 2.438 billion (State Budget Act 2021).

The total state budget revenues for *2022* amount to EUR 21.471 billion. The tax revenues amount to approximately EUR 15.845 billion, i.e. about 73% of the total state budget revenues, which include income tax in the amount of EUR 4.261 billion, value added tax in the amount of EUR 8.796 billion, and excise duties in the amount of EUR 2.512 billion (State Budget Act 2022).

The above figures do not include revenues collected under personal income tax, as they are the revenues for local self-government budgets in the Slovak Republic. According to the current legal situation, personal income tax revenues (except for withholding tax) are divided only between municipalities and higher territorial units in the ratio of 70% (municipalities) and 30% (higher territorial units). According to the available data, the revenues from this shared tax were EUR 3.426 billion in 2019 and EUR 3.736 billion in 2021.

Several facts can be deduced from the above data:

- a general year-on-year decline in the share of tax revenues for the state budget in its total revenues over the period examined (80%–75%–73%)
- a significant drop in income tax revenue (2019–2021), followed by a significant increase in this revenue (2021–2022)
- stable or partially increasing value added tax revenue
- substantially flat and stable excise duty revenue

These indicators are, to a significant extent, also the result of the Covid-19 pandemic, which affected them in several ways. In particular, there was a major economic slowdown as a result of the anti-pandemic measures taken in the context of the state of emergency or the extraordinary situation. The closure of businesses or the significant reduction in

their business activities in spring 2020 or at the turn of 2020 and 2021 contributed significantly to the decline in their productivity, which ultimately translated into lower income tax revenue. On the other hand, it can be seen that consumption levels remained broadly stable, as reflected in the non-reduction of the general tax on consumption (value added tax) and selective excise duties.

However, in order to further understand the reasons for the decline in tax revenues for the state budget during the pandemic, it is necessary to go back in time to the period of its beginnings. One of the first laws adopted in response to the first wave of the Covid-19 pandemic was the so-called *Lex Covid* in the financial sector, namely Act No. 67/2020 Coll. on certain emergency measures in the financial sector in connection with the spread of the dangerous contagious human disease Covid-19. In this context, it can be stated that the legislature responded flexibly, especially to the needs of taxpayers, by adopting a number of measures temporarily favouring the position of taxpayers in tax administration. For example:

1. suspension of tax audits at the taxpayer's request
2. suspension of tax proceedings at the taxpayer's request
3. limitation of liability for administrative offences committed during the pandemic
4. postponement of tax enforcement during the pandemic
5. postponement of the deadline for filing income tax returns for the period after the pandemic
6. exemption from the obligation to pay advance income tax in situations where the taxpayer's year-on-year sales had fallen by at least 40%
7. explicit recognition of the cost of testing for Covid-19 as a tax deductible expense
8. temporary application of the zero VAT rate on FFP 2 and FFP 3 masks
9. postponement of the deadline for filing local tax returns (real property tax, dog tax, tax on vending machines and tax on non-winning gaming machines)

Even without a deeper analysis of the impacts of the individual measures, it is clear that these measures in their entirety meant a decrease in tax revenues for the public budgets, especially in 2020, but, as it follows from the above, the impacts were also felt in 2021. The above-mentioned measures were either of a general nature, and thus applicable to all taxes (1–4), or they were specifically related to particular taxes belonging to the tax system of the Slovak Republic.

As far as the general measures are concerned, the suspension of tax audits in principle led to their later closure and, in the case of a detected tax difference, also to the later drawing up of a tax audit report. Similarly, the suspension of tax proceedings (in particular assessment proceedings) led to the later issue of decisions which could become an enforcement title. The same conclusion applies to the postponement of tax enforcement, which stopped, or more precisely temporarily delayed, the flow of recovered tax arrears to the state budget.

Other measures were related to specific taxes, most of them focused on income tax. The postponement of the deadline for filing tax returns naturally led to later tax payments.

Non-payment of advance income tax in turn not only suspended the expected flow of tax payments to the state budget, but also, indirectly, to the budgets of local self-governments, which are the recipients of the shared personal income tax. Similarly, the recognition of testing costs as a tax-deductible expense could significantly reduce the tax base and thus the tax liability, particularly for large employers employing hundreds or thousands of employees, since, during the state of emergency, employees could only perform their work obligations at the employer's establishment if they had a negative test result for Covid-19.

However, there were also measures that were rather symbolic in nature, without a significant impact on the extent of the tax liabilities of obliged persons in relation to the public budget revenues. These symbolic measures included in particular the temporary application of the zero VAT rate on FFP 2 and FFP 3 masks.

A number of partial conclusions can be drawn from the above. Taxes, as a legal instrument intended to take away part of the property from obliged persons and, at the same time, as a major source of revenues for public budgets, suddenly gave way during the pandemic to requirements which, at that time, not only seemed necessary in the interests of protecting public health, but also, in a certain sense, in the interests of social reconciliation. This corresponded to the State's efforts to accommodate at the same time the needs of taxpayers and employers, who were, in effect, put in the position of being unable to continue to do business, earn income and pay taxes on that income from one evening to the next.

4. Digital transformation

In the last few years, new technologies have significantly changed the ways in which the real market and economy are considered (Uricchio, 2016, p. 84). The phenomena that the digital economy brings with it were something that national legal systems did not foresee (Štrkolec & Hrabčák, 2021, p. 64), and this is also why the digital revolution is beginning to be seen as a material source of law (Hrabčák et al., 2021, p. 12).

It can be stated that, regardless of the degree of changes that the development of new technologies will bring in the future, it is clear that technological development will have a major impact on the shape of tax systems. The possible range of these changes is wide and includes a spectrum of new tax institutions, ranging from the introduction of some new types of taxes that will organically complement the "traditional" forms of taxation (income tax, general tax on consumption) to a complete "rebuilding" of tax systems on the basis of priority taxation by new forms of "digital taxes" (Štrkolec, 2021, p. 379). Research into these new challenges for tax law can be conceived in several areas:

1. taxation of activities based on advanced digital technologies
2. taxation of the sharing economy
3. taxation of virtual currencies

In relation to the taxation of the digital economy, it can be noted that the proposals for the taxation of digital services and the supply of goods, which have not yet been

implemented, respond to two fundamental questions. The first question is: "where to tax?" – in other words, how to ensure the power to lay and collect income taxes for a country where taxable income is generated through digital services by an entity that has no direct material presence in that country. The second question is: "value creation?" – namely, to whom to attribute taxable income in digital business models based on intangible assets, data and information. Despite some scepticism, we persist in the view that reaching a multilateral agreement at OECD level is the preferred option for regulating the tax law relationships arising from the taxation of income from digital services.

The sharing economy (or also the collaborative economy, collaborative consumption, or the so-called "peer-to-peer" economy) is a phenomenon of the digital or online age, the main principle of which is the lending of existing resources between persons carrying out the sharing economy in such a way that the process results in a profit for those persons. These are not new activities, but still the sale of goods and the provision of services on the basis of supply and demand. The peculiarity of the business transactions carried out within the collaborative economy is the extension of the originally bilateral relations to a third entity, a digital platform, which mediates the transaction in question (Bachňáková Rózenfeldová, 2022, p. 1). In view of the undoubtedly rapid development of Internet-based digital platforms and the provision of "sharing" services, the issue of international as well as national regulation of the sharing economy comes to the fore. This issue can be addressed separately or as part of a "package" of changes introduced for the taxation of digital services.

The third area closely linked to advanced digitisation is the issue of virtual currency. Virtual currencies are, by their very nature, a unit of value that is captured in cryptographic form. The introduction of virtual currencies was enabled by the development of a technology called blockchain, which was originally proposed by Satoshi Nakamoto as the basis for "an electronic payment system based on cryptographic proof instead of trust". The introduction of this decentralised payment system made it possible to make payments using tokens called "Bitcoin" and other digital assets and crypto assets. From a tax law perspective, these new objects of economic relations pose a number of legal challenges. Among the most prominent of these is the question of the legal nature of digital assets and crypto assets, which we addressed in previous research and concluded that they are neither money nor currency. They can be seen as other assets, which possess certain distinctive features, such as an intangible nature, an asset in the digital environment, a decentralised and only partially regulated status, a basis in cryptographic practices and DLT technology, the transactional capacity and the ability to serve as means of payment by consensus of the parties involved and, the prevailing absence of a link to legal tender (Popovič et al., 2020, pp. 222–226; Popovič & Sábo, 2021, pp. 44–45; Štrkolec, 2022b, p. 108–109).

Building on the above background, a closer look can be taken at the Slovak legislature's response to these challenges in recent years:

1. In relation to the taxation of the digital economy, the Slovak Republic is still among those countries that have not proceeded to the taxation of digital services or digital advertising. International or European solutions come into consideration, but undoubtedly also unilateral ones, which have been attempted in the last

few years by some countries, such as France, Spain and the United Kingdom. The Ministry of Finance of the Slovak Republic declares that it is not considering the introduction of a national digital services tax, but is waiting for a comprehensive and harmonised solution at the EU level, not only as regards the DST (digital services tax) version, but also a compromise in the DAT version, (i.e. only the digital advertising tax, Hrabčák & Stojáková, 2020, pp. 22–25).

2. The taxation of income generated in the sharing economy is, after all, somewhat further away in the Slovak Republic than the taxation of digital services. The amendment to the Income Tax Act by Act No. 344/2017 Coll., in force from 1 January 2018, established a legal definition of digital platform as a hardware or software platform necessary for the creation and management of applications. At the same time, for the purposes of determining the source of income of non-resident taxpayers, it was established that the repeated mediation of transport and accommodation services through a digital platform is also considered to be the performance of activities with a place of business in the Slovak Republic. This created the basic prerequisites for the taxation of income of digital platform operators in the Slovak Republic. This was later followed by the amendment to the Act on International Assistance and Cooperation in Tax Administration, made by Act No. 250/2022 Coll., which introduces, with effect from 1 January 2023, a reporting obligation and automatic exchange of information reported by platform operators. The amendment implemented the DAC 7 Directive in the Slovak Republic. However, in relation to digital platforms, we can also point to the current regulation of the accommodation tax (Act No. 582/2004 Coll., amended by Act No. 470/2021 Coll.), which, with effect from 11 December 2021, introduces the institution of the taxpayer's representative. This is a person who mediates paid temporary accommodation between the taxpayer and the taxable person through the operation of a digital platform. Such a taxpayer's representative may enter into an agreement with the municipality under which they will subsequently collect the tax from the taxable person and pay it to the tax administrator's account.
3. By the amendment to the Income Tax Act by Act No. 213/2018 Coll., in force from 1 January 2019, the sale of a virtual currency became a taxable transaction and the income from its sale became taxable income. For the purposes of the Income Tax Act, the sale of virtual currency means an exchange of virtual currency for property, an exchange of virtual currency for another virtual currency, an exchange of virtual currency for the provision of a service, or a transfer of virtual currency. The Act also regulates the rules for determining the tax base, the application of tax deductible expenses and the method of determining the entry price of virtual currencies. As regards the basic rules for the taxation of income from the sale of virtual currency, it is necessary to distinguish between the income of natural persons – non-entrepreneurs – and that of entrepreneurs. The income of a natural person from the sale of virtual currency is other taxable income under Section 8 of the Income Tax Act. The tax base includes the income from the sale of virtual currency less the expenses

> demonstrably incurred to generate it. These may include actual expenses demonstrably incurred for mining (energy, software, hardware) or the price paid for the acquisition of the virtual currency if it is acquired by purchase. The situation is different for entrepreneurs who sell virtual currency that is their business property. In such a case, the income from the sale of virtual currency is treated as part of the tax base of the business income under Section 6 of the Income Tax Act. The tax deductible expenses of a natural person – entrepreneur include expenses in the amount of the aggregate of the entry prices of virtual currencies under Section 25b of the Income Tax Act in the taxable year in which the sale takes place. The tax deductible expense is the acquisition price if the virtual currency was acquired by purchase or the fair value if the virtual currency was acquired in exchange for another virtual currency (Štrkolec, 2022b, p. 110).

Again, several partial conclusions can be drawn from the above. Taxes, as the main source of revenues for public budgets in the Slovak Republic, have so far only slowly and to a limited extent burdened the activities carried out in the digital world. The digital tax has not yet been introduced, digital platforms are taxed, but the question is whether the current legislation allows for their effective taxation at all (Simić, 2022, p. 134–139), and finally, virtual currencies (or the income from their sale) are subject to taxation, but the revenue from them is marginal. In this regard, reference can be made to the available data, according to which the share of declared income from the sale of virtual currencies in other income under Section 8 of the Income Tax Act oscillated between 0.39% and 1.06% in 2018–2020, and between 0.02% and 0.07% in the same period for all personal income (Putera, 2022, p. 91). It therefore appears that *de lege lata* the practical dimension of taxation of income from the sale of virtual currencies is at least problematic, and only a marginal part of taxable income is subject to real taxation.

5. Inflation

Finally, the third external factor with an impact on tax law, especially in the current year 2022, is rising inflation, which increased in the Slovak Republic to 14.2% in September 2022. It is not the aim of this paper to examine its causes in detail or to suggest stabilisation mechanisms. We will therefore only take a closer look at some of the already approved or forthcoming changes in tax law that are related to this phenomenon. These can be seen in two areas; the first is the State's (government's) efforts to help the population deal in particular with rising prices, and the second is the need to find sufficient coverage of the necessary resources.

With regard to the State's efforts to help the population with, among other things, the consequences of inflation, mention may be made in particular of Act No. 232/2022 Coll. on the financing of children's leisure time, and amending certain acts, among others, the Income Tax Act. This Act was approved by the National Council of the Slovak Republic despite the veto of the President of the Slovak Republic. From our point

of view, the essential change to the Income Tax Act made by this Act, in force from 1 July 2022, is the increase in the child tax bonus from EUR 22.17, or EUR 44.34 (for a child under 6 years of age) per month, to:

- EUR 40 per month for a child over 15 years of age and EUR 70 for a child under 15 years of age, for the period July to December 2022
- EUR 50 per month for a child over 15 years of age and EUR 100 for a child under 15 years of age, with effect from 1 January 2023

Although there are some corrective mechanisms in the amendment related to the maximum amount of the tax bonus, the aim of its authors, according to the explanatory memorandum, was to improve the financial situation of families with children, since the tax bonus reduces the tax. In other words, a higher tax bonus means a lower tax. Of course, this measure will have a significant negative impact on public administration budget revenues. In this regard, the anticipated decrease in public budget revenues may reach 500 million in the year 2023. Ultimately, however, the local self-governments will suffer the most from this measure, since the higher tax bonus per child will reduce the personal income tax collected, which, as a shared tax, is a crucial source of revenues for municipalities and higher territorial units. The budgetary coverage of this revenue shortfall is not yet known.

The second group includes so far only the proposed changes to tax laws, the declared aim of which is, on the contrary, to increase the tax revenues of the public administration budget, in particular the state budget. This is all in order to ensure budgetary coverage of the higher expected expenditure in 2023, not only in connection with the above-mentioned Act No. 232/2022 Coll. (which increased not only the tax bonus but also the child benefit and introduced a new payment called the child leisure allowance), but also in other contexts. For example, the following draft laws are currently in the legislative process:

1. A draft law on taxing a benefit obtained as a result of the special situation on the oil market. The government's draft law of May 2022 envisaged a revenue of EUR 57 million in 2022 and about EUR 23 million in 2023 and 2024, on the basis that the tax object is the economic benefit obtained as a result of the special situation on the oil market. The proposed tax rate is 30% of the tax base. Although the draft law has passed its first reading in the legislative process, it is generally not expected to be adopted.
2. A draft law on a tax on a special construction was introduced in August 2022. The purpose of the draft law is to introduce a new tax on a special construction used for the transportation of gas. It was therefore a proposal to introduce a gas pipeline tax. The tax should be based on the length of the pipeline in kilometres and the proposed tax rate is EUR 6,000 for each (even incomplete) kilometre of pipeline. The positive impact on the state budget is estimated at EUR 92 million in 2022 and EUR 126 million in 2023–2025.
3. Another draft law, which amends Act No. 530/2011 Coll. on the excise duty on alcoholic beverages, is also of August 2022. The draft law simply increases both the basic and reduced rates of the tax on alcohol by 30% compared to the current situation. The impact on the state budget has not been quantified.

What partial conclusions can be drawn from the above? First of all, the conclusion is that through tax laws, which should primarily fulfil a fiscal function, the State is implementing, in addition to budgetary policy, a pro-family or social policy. However, in our opinion, this should not be implemented primarily by tax laws, but rather by social security laws. The purpose of tax laws is the materialisation (generation) of the revenues for public budgets, not the withdrawal of resources from public budgets, as has been done by increasing the tax bonus. On the other end of the spectrum, there are the so far unsuccessful draft laws that aim to generate new tax revenue sources for public budgets, or to increase the existing ones. The problem, however, is not only their questionable passage through the National Council of the Slovak Republic, but also, ultimately, their marginal dimension.

6. Conclusion

In the introduction to the paper, we stated that our aim would be to verify the hypothesis that taxes, as their regulation by tax laws changes under the influence of the pandemic, digital transformation and inflation, would continue to fulfil their primary fiscal function. This hypothesis has been confirmed to only a limited extent, namely in relation to the taxation of digital platforms or income from the sale of virtual currency. However, we also note here that the revenues generated by the taxation of the new phenomena of the digital economy are far from being at a level that is commensurate with the scale of activities of the various actors in the digital space.

In relation to most of the tax regulations examined, however, the hypothesis has not been confirmed. In fact, under the influence of the pandemic, digital transformation and inflation, taxes partly cease to fulfil their primary fiscal function, which gives way to other objectives or functions. Typical cases are the above-mentioned changes brought about by the Covid-19 pandemic, or the changes brought about by the efforts to support families through the increased tax bonus. These changes were not primarily intended to ensure sufficient revenues for public budgets (which is the basic purpose of taxation as such), but rather to help businesses and the population to overcome the negative effects of the pandemic and inflation, also by reducing or postponing tax liabilities. To paraphrase Professor Funk, these changes instead exhibit the socio-political function (purpose) of taxation in order to meet the demands for social justice (Funk, 1929, p. 69).

Of course, the above conclusions apply only to taxes under the influence of the external phenomena examined. In general, taxes are and will remain a crucial source of revenues for public budgets, especially for the state budget.

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Public Governance, Administration and Finances Law Review Vol. 8. No. 1. (2023) • 105–119.

DOI: 10.53116/pgaflr.6561

The Legal Status of Independent Regulatory Organs and Their Place in the Hungarian State Administration

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Abstract: Independent regulatory organs as a type of administrative body were included among the central state administrative bodies upon the entry into force of the Fundamental Law of Hungary. The key feature of independent regulatory organs is that they also have the power to legislate within the framework of the regulatory authority's activity; in other words, they can intervene in the relations of their administered sector through the creation of generally binding rules of conduct, which are enforced through the official activities falling within their scope of duties and powers. The characteristics of the legal status of independent regulatory organs and the components of their independence are therefore of particular importance in the system of public administration. The content and strength of their independence are not identical but are adapted to the professional content and EU and constitutional requirements of the specialised area of administration for which the Fundamental Law authorises the National Assembly to establish these bodies.

Keywords: independence, legislation, independent regulatory organs, cardinal act, regulatory authority

1. Introduction

This type of administrative body appeared in the Hungarian public administration system upon the entry into force of the Fundamental Law of Hungary (hereinafter: Fundamental Law). In 2012, two public administrative bodies became independent regulatory organs, the National Media and Infocommunications Authority (hereinafter: NMIA) and the Financial Supervisory Authority (hereinafter: FSA). In 2013, the FSA merged with the Hungarian National Bank, and another independent regulatory organ, the Hungarian Energy and Public Utility Regulatory Authority (hereafter: HEPURA) was established. The number of independent regulatory bodies did not increase until recently, but in 2021 the Supervisory Authority for Regulated Activities (hereinafter: SARA) was established and in 2022 the Hungarian Atomic Energy Authority (hereinafter: HAEA) became an independent regulatory organ.

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In light of the above, the independent regulatory organs have been part of the Hungarian public administration for ten years, but their establishment can be divided into two distinct periods.

The study aims to place independent regulatory organs within the system of state administration and to identify the main elements of their legal status. To this end, the study first reviews the creation of independent regulatory organs and then outlines the main features of their legal status. In this context, the study examines the specificities of the creation of independent regulatory organs, the tasks with which they can be entrusted, the main elements of regulatory activity, and the elements of independence of independent regulatory organs.

However, before doing so, it should be noted that independent regulatory organs and autonomous bodies,[1] although closely related from an organisational law perspective, are not the same type of body. Indeed, independent regulatory organs do not necessarily have an autonomous legal status and autonomous bodies do not necessarily have autonomous regulatory powers; in other words, they do not always have legislative powers. There are, of course, some organisations where the two coincide, where the organisation both has autonomous legal status and is an independent regulatory organ, but this is not always the case. From a constitutional point of view, both types of bodies are of course exceptions and justify an exceptional status, but there is a significant difference in their constitutional status, in particular in terms of their independence and the guarantees that guarantee it (if the two statuses do not coincide). It is also generally accepted that, if an organisation is autonomous, this affects its overall status as a body, which means that, in addition, whether or not it has legislative powers, it has autonomous status, with a condition of independence at the level of the branches of government. The autonomy of independent regulatory organs, and the content and strength of their independence are not identical but are adapted to the professional content, EU and constitutional requirements of the field of specialised administration for which the Fundamental Law gives the National Assembly the power to establish these bodies (Lapsánszky et al., 2017, p. 100).

2. The creation of independent regulatory organs

The predecessors of the independent regulatory organs had already appeared at the constitutional level, when the former Act XX of 1949 on the Constitution of the Republic of Hungary (hereinafter: Constitution) was amended in 2010, upon the designation of the FSA and the NMIA. The reason for the elevation of the two bodies to the constitutional level – to secure their constitutional status (Temesi, 2013, p. 177) – was

[1] Autonomous bodies are central public administration bodies with a special status, established by the National Assembly and not controlled or supervised by the Government. Autonomous bodies shall be deemed to be central state administration bodies according to Section 1(2) of Act XLIII of 2010 on Central State Administration Bodies and the Status of Members of the Government and State Secretaries (hereinafter: the Act). At present, the following are considered autonomous bodies in the Hungarian administration: a) the Public Procurement Authority; b) the Integrity Authority; c) the Hungarian Competition Authority; d) the National Authority for Data Protection and Freedom of Information; e) the National Election Office; and f) Directorate-General for Auditing European Aid.

to create the possibility of conferring legislative (decree-making) powers,[2] as the Hungarian Constitutional Court (hereinafter: HCC) in its Decision 37/2006 (IX.20.) ruled that the Constitution "forms a closed system for the creation of legislation: it designates the issuer, designates the name of the legislation, provides for their hierarchical relationship to each other and, through Article 32/A, also guarantees the consistency of the hierarchy of sources of law with the Constitution". In HCC Decision 121/2009 (XII.17.) on the unconstitutionality of the old act on legislation,[3] the HCC explained that "only the Constitution can specify a source of law in both senses – legislation and legislative power – since the Constitution is the ultimate source of the validity of the law in law. Since the Constitution itself determines the types of legislation and its binding force, there can be no source of law other than those listed in the Constitution". Thus, the conferral of legislative powers on these two organs of public administration has been achieved by the National Assembly through an amendment to the Constitution, by naming them in the Constitution.

András Jakab, in his private draft of the constitution, took the view that the mention of the FSA and the NMIA in the Constitution, which are conspicuously not constitutional bodies – but state administrative authorities – would undermine the authority of the text, and, possibly because of subsequent amendments (which inevitably arise from time to time in the state administration), would again only contribute to the loss of authority of the text of the Constitution (Jakab, 2011, p. 19). However, Jakab's argument is valid; it is necessary to point out that the state administrative bodies to be given legislative powers necessarily have their place in the Constitution, through some technical legal solution, since this is the only way to give them the power to legislate.[4] In light of the above, Article 23 of the Fundamental Law *established* independent regulatory organs as a *new type of body with a* constitutional definition, *breaking with the technique of designation* (Fazekas, 2015, p. 15). This type of body – without detailed rules on its legal status – was elevated to the status of a central state administrative body by Section 1(2) of the Act.[5]

Under the current Article 1(3) of the Act, there are four[6] independent regulatory organs in Hungary: a) the NMIA;[7] b) the HEPURA;[8] c) the SARA;[9] and d) the HAEA.[10]

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[2] The naming of the two – then autonomous – state administrative bodies in the Constitution was forced by the HCC Decision 33/2010 (III.31.), which declared the delegation of the power to issue regulations to the President of the FSA unconstitutional, based on the reasoning of HCC Decision 37/2006 (IX.20.) and HCC Decision 121/2009 (XII.17.).

[3] Act XI of 1987 on Legislation.

[4] See the Explanatory Memorandum of the Fundamental Law, which stipulated that only the bodies with legislative powers should be listed in the Fundamental Law, precisely given their legislative powers.

[5] It should be noted, however, that the term is not unknown in Hungarian legal literature (see Ferenczi, 2000, pp. 311–326).

[6] From the entry into force of the Fundamental Law until its integration into the Hungarian National Bank on 1 October 2013, the FSA was also an independent regulatory organ.

[7] It was established by Act CLXXXV of 2010 on Media Services and Mass Media (hereinafter: MSMM Act).

[8] Act XXII of 2013 on the Hungarian Energy and Public Utility Regulatory Authority (hereinafter: HEPURA Act).

[9] Act XXXII of 2021 on the Supervisory Authority for Regulated Activities (hereinafter: SARA Act).

[10] See Act CXIV of 2021 amending certain Acts in connection with the status of the Hungarian Atomic Energy Authority.

3. The legal status of the independent regulatory organs

The independent regulatory organs are central state administrative bodies with special powers, independent of the direction and supervisory powers of the Government, with constitutional status, established by the National Assembly in a cardinal act for the performance and exercise of certain functions and powers within the scope of executive power, and performing regulatory authority activities, with legislative powers.[11]

The legal status of independent regulatory organs is thus determined by the fact that a) *they can be established by a cardinal act;* b) *they can perform tasks and exercise powers within the scope of the executive power;* c) *they have legislative-regulatory powers, they perform the so-called regulatory authority activity;* and d) *they are independent of the Government*. In the following, the legal status of independent regulatory organs – their place in public administration – will be examined based on the above characteristics.

3.1. The creation of independent regulatory organs – The cardinal act

According to Article 23 (1) of the Fundamental Law, the National Assembly may establish independent regulatory organs to perform and exercise certain functions and powers belonging to the executive power. Concerning the establishment of independent regulatory organs, the Fundamental Law thus imposes two conditions on the freedom of the legislative power to establish organisations: a) *only through a cardinal act;* and b) *only a body exercising executive power may be classified as an independent regulatory organ* (Balogh, 2012, p. 284).

Regarding the first condition, the creation of a cardinal act, the most important question – and one that has given rise to academic debate – is *whether the Fundamental Law gives a general mandate to create a cardinal act to establish independent regulatory organs, or whether an explicit reference in the Fundamental Law to the creation of a cardinal act is required.*

The scope of independent regulatory organs – according to some literature (Jakab, 2012, p. 262; Balogh, 2012, p. 283) – cannot be expanded arbitrarily, not even by a cardinal act, since Article 23 of the Fundamental Law does not constitute a new mandate to create a cardinal act, but is a cross-reference to other provisions of the Fundamental Law, which already provide for cardinal acts. Of the independent regulatory organs, the NMIA and the now-defunct FCA (first generation of independent regulatory organs), as illustrated in Table 1, met the above requirements. Article IX (6) of the Fundamental Law, authorises the establishment of a body to supervise freedom of the press, media services, press products and the communications market. In case of the FCA, the legal basis, other than Article 23 of the Fundamental Law, was provided by Article 42 of the Fundamental Law, which was in force at the time.

[11] The definition is based on Article 23 of the Fundamental Law.

Table 1.
Legal basis for the creation of independent regulatory organs

Independent regulatory organs	Legal bases other than Article 23 of the Fundamental Law
NMIA	Article IX (6)
FSA	Article 42
HEPURA	–
SARA	–
HAEA	–

Source: Compiled by the author.

There is no doubt that the argument has merit, but it is too restrictive, since neither Article IX nor Article 42 of the Fundamental Law explicitly refers to the creation of independent regulatory organs, only to the creation of a supervisory authority in this area by a cardinal act. This is the regulatory approach taken in Article VI (4), but the National Authority for Data Protection and Freedom of Information was not established by the National Assembly as an independent regulatory organ but as an autonomous public administration body. A more correct and permissible interpretation concerning the freedom of the National Assembly to organise the administration system is that Article 23 of the Fundamental Law *is an autonomous cardinal legislative authorisation,* without the need to invoke any other constitutional legal basis for the creation of an independent regulatory organ. In case of the second generation of autonomous regulatory bodies – HEPURA, SARA, HAEA – there is no legal basis other than Article 23 of the Fundamental Law.

When interpreting the relationship between the Fundamental Law and the cardinal act establishing the independent regulatory organ, it must be borne in mind that Article 23 of the Fundamental Law regulates the function, the characteristics of the tasks and powers of independent regulatory organs in very broad terms only, and therefore the width of the legislator's scope of action is a matter of interpretation.

It is necessary to start from the premise that one of the functions of the "cardinal acts is to reduce the burden of the text of the Fundamental Law with a constitutional guarantee, that the Fundamental Law does not have to provide exhaustively for all the essential rules of the basic institutions, but that these rules should be adopted with the broad consensus of the members of the National Assembly. In the absence of this function of the cardinal acts, the Fundamental Law itself would have to contain all the detailed rules – essential but detailed – relating to the basic institutions, which would result in an overly detailed and unclear constitution".[12]

Taking this into account, the relationship between the Fundamental Law and the cardinal act establishing the independent regulatory organs can be described as follows: Article 23 of the Fundamental Law only *sets out common minimum rules for* independent regulatory organs, while the specific rules, in respect of which each independent

[12] HCC Decision 17/2013 (VI.26.).

regulatory organ may differ, are laid down in the cardinal act themselves. The HCC has interpreted the limitation of the criteria that can be included in a "cardinal act" to mean that they cannot conflict with the Fundamental Law; in other words, a condition has already been laid down by the constitutional rules, the cardinal act cannot provide a different rule. In case of independent regulatory organs, such a procedural criterion is the person of the nominator (the Prime Minister or the President of the Republic) or, in the case of a nomination by the President of the Republic, the person of the proposer (the Prime Minister).[13]

3.2. Executive tasks and powers

As pointed out earlier in the study, the Fundamental Law, in addition to the creation of independent regulatory organs by a cardinal act, stipulates that *only a body exercising executive power can be considered an independent regulatory organ*.

According to Article 15 of the Fundamental Law, the Government is the general organ of executive power and the principal organ of public administration, which means that the Government is responsible for all matters that the Fundamental Law or other legislation does not assign to another body and that the Government is politically and legally responsible to the National Assembly for the functioning of the executive branch and the implementation of laws in general. Because of this, the structure of the administrative organisation is essentially determined by the Government's degree of influence and the existence of its direction and supervisory powers vis-à-vis the administrative bodies, since in the absence of these types of activity, the Government cannot fulfil the role of the supreme organ of public administration. However, independent regulatory organs – and autonomous public administration bodies that do not appear in the constitutional arrangements – "polarise" the executive branch (Csink & Mayer, 2012, p. 80), since the autonomy of these bodies can be interpreted as relative independence from the Government within the executive branch. The monopolistic – supreme – role of the Government in the administrative organisation is thus overshadowed by the scope of independent regulatory organs – and autonomous public administration bodies – which means that the body that takes public authority decisions in the sectors administered by independent regulatory organs, in individual cases, does not bear any substantive professional and political responsibility for these decisions since the Government's influence is very limited (Fazekas, 2020), and independent regulatory organs are not accountable to either the National Assembly or the Government.

However, it only follows from the Fundamental Law that the organisation of public administration may include an autonomous status, but *which* sectoral policies to entrust to independent regulatory organs is already a *discretionary decision of the legislator*.

[13] HCC Decision 17/2013 (VI.26.).

Table 2.
Sectors administered by independent regulatory organs and EU legislation

Independent regulatory organ	**Sector managed**	**Union act**	**Does an EU act require the independence of the authority?**
NMIA	Media	Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in the Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)	Yes
	News Release	Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 on the establishment of a European Electronic Communications Code	Yes
HEPURA	Natural gas supply, natural gas security	Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC	Yes
	Electricity	Directive 2019/944/EC of the European Parliament and of the Council of 5 June 2019 concerning common rules for the internal market in electricity and amending Directive 2012/27/EU	Yes
	District heating	–	–
	Water utilities	–	–
	Waste management	–	–
SARA	Tobacco retail	Commission Implementing Regulation (EU) 2018/574 of 15 December 2017 laying down technical specifications for the establishment and operation of a traceability system for tobacco products	No
	An independent bailiff organisation	–	–
	Gambling	–	–
	Winding-up bodies	–	–
HAEA	Nuclear energy administration	Council Directive 2009/71/Euratom of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations	Yes

Source: Compiled by the author.

Nor is the principle of sectors requiring an independent regulatory organ directly *readable* from the narrow provisions of the Fundamental Law. Independent regulatory bodies are generally needed in areas where technical rules need to change rapidly, and therefore the abstract way in which the legislation is drafted does not allow the addressees to foresee the extent of administrative influence and the content of administrative decisions. At the same time, independent regulatory organs are generally needed in sectors where market liberalisation has been or is underway and the state itself is a market player, or in some cases a monopoly player (Fazekas, 2015, p. 17). However, it is also important to stress that EU legislation[14] in several cases explicitly requires – as Table 2 sets out – that an administrative body, independent of government, be established in the Member States to administer the sector in question.

However, the legislator must proceed with caution when establishing independent regulatory organs, since their independence or autonomy – like those of autonomous state administration bodies – disrupts the fundamental regulating principle of state administration, namely subordination to the Government and thus the Government's parliamentary responsibility, which is only slightly offset by the direct accountability of the head of the independent regulatory organ to the National Assembly. It can also be seen from Table 2 that the sectors administered by independent regulatory organs do not always require an autonomous authority, even under EU legislation.

3.3. Regulatory activity

The term "regulator" in the name of the independent regulatory organ refers to the fact that it is a so-called *regulatory authority*. A regulator is not a separate type of public administration (Lapsánszky, 2014, p. 3), but a theoretical category, a collective term for public administrations that perform regulatory authority activities, regardless of the type of public administration they belong to (Fazekas, 2018; Csink & Mayer, 2012, p. 81; Kovács, 2009, pp. 19–32).

The essence of regulatory activity is that the public authority managing the sector in question typically *has comprehensive intervention and management powers that affect the*

[14] See e.g. Article 30(1) of the Audiovisual Media Services Directive, under which each Member State designates one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and that they are independent in terms of their functions from their government and any other public or private body. This is without prejudice to the right of Member States to establish regulatory authorities to supervise different sectors.
According to Article 57(4) of Directive 2019/944/EC of 5 June 2019 concerning common rules for the internal market in electricity and amending Directive 2012/27/EU, Member States shall guarantee the independence of the national regulatory authority and ensure that it exercises its powers impartially and transparently. To that end, Member States shall ensure that when carrying out the regulatory tasks conferred upon it by this Directive and related acts, the regulatory authority:
- be legally distinct and functionally independent from other public or private entities
- ensure that its staff and the persons responsible for its management:
  - act independently of any market interest
  - not seek or take direct instructions from any government or other public or private entity in the performance of their regulatory functions

overall functioning of the market. Indeed, the regulatory authority's activity includes, among others (Lapsánszky, 2014, pp. 9–10; Lapsánszky, 2015, pp. 59–71), *market regulation* powers related to the maintenance and development of market competition. Market regulation can be considered an official and specific law enforcement activity, characterised by the continuous ex officio substantive review of market regulation decisions, the adoption of new market regulation decisions, and the use of market analysis and fact-finding tools. It is also specific in that a decision taken by the authorities as a result of market regulation has an impact on competition in the market as a whole and on the functioning of the market as a whole, although it only has concrete and direct legal effect on the relations between the addressees of the decision. *Market surveillance* is the other most fundamental instrument alongside market regulation. It is also a specific public authority activity, a special type of public authority supervision with specific characteristics. Market surveillance includes general professional assessment, market analysis type monitoring of economic and social conditions subject to market surveillance for decision making and overall regulatory supervision from a legality perspective, as well as supervisory powers specific to "general" public oversight. "Market surveillance is, therefore, comprehensive control and supervision covering a specific and distinct economic sector, market, service or a specific part of it, in which all the objectives of administrative control activities are simultaneously and uniformly achieved, i.e.: prevention, detection of infringements of the law, and the preparation of legislation, amendment of legislation and other decision-preparation activities" (Lapsánszky, 2014, p. 10). In addition to market regulation and market surveillance, the regulatory authority's activities also include an *extensive classical set of instruments of public authority* (individual licensing, record keeping, consumer protection tasks), which is complemented by several operational, organisational and coordinative activities. Legislative powers are not a general feature of regulatory activity, but it is an essential element of the legal status of independent regulatory organs that they also have legislative powers, and it is in this light that this element of regulatory activity is examined in more detail in this paper.

In addition to the above, regulatory activity also necessarily involves instruments that result in the regulatory authority establishing general rules of conduct and standards. Within legislative powers, a distinction can be made between the power to enact legislation properly and the power to issue acts of a non-legislative but normative nature. Regulatory authorities almost invariably have the latter power, but the power to legislate is to a large extent determined by the constitutional system of the country concerned. In case of regulatory authorities, the legislative power is not a conceptual element, but it is a specific feature of the regulatory activity of independent regulatory organs that – *also* – *have legislative power.* Independent regulatory organs may, therefore, act in the exercise of their public powers, and establish generally binding rules of conduct (standards) for the sector concerned. The chairpersons of the independent regulatory bodies issue decrees based on a statutory mandate, within the scope of their functions as defined in the cardinal act, which may not conflict with any Act, government decree, prime ministerial decree, ministerial decree, or decree of the Governor of the Hungarian

National Bank.[15] The legislative power is thus subject to two conditions: a) the cardinal act must determine the scope of the functions within which the President of the independent regulatory bodies may issue a decree; and b) the law must define the specific legislative subject matter.

A specific feature of the regulation of the power to issue regulations is that the scope of the regulations that may be issued by the chair of the independent regulatory organ is partly contained in the status laws[16] of each independent regulatory organ, and partly in the sectoral laws.[17] A characteristic feature of the legislative subjects covered by the status law is that they either authorise the adoption by decree of *technical and information rules, regulations* on internal organisation and *competencies* (regulations on the replacement of the chairman of the independent regulatory bodies) or regulations on the fees for supervisory and administrative services *(so-called fee regulations),* which ensure the budgetary independence of the independent regulatory organ, for all sectors administered by it. However, in addition to the above subjects, the sectoral law also contains several delegations of power to *regulate the sector's* implementing law, mainly in *substantive law,*[18] and to *lay down detailed and specific rules of procedure for the public authority.*[19]

Finally, it is important to highlight that, in addition to legislation, independent regulatory organs typically have the power to issue non-legislative but normative positions, communications and recommendations – *so-called soft law documents* – that guide the regulated sector on their enforcement activities.

3.4. Independence from the Government of the independent regulatory bodies

As has been pointed out earlier, the autonomous (independent) status within the system of state administration, in other words, the relative independence from the Government as the main body of public administration, is an exceptional legal status characteristic. This independence "can only be granted to a central state administration body in particularly justified cases: for example, when it is acting as a quasi-judicial body or when it is responsible for safeguarding constitutional rights" (Fazekas, 2010, pp. 229–230).

The independence of the independent regulatory organ thus essentially refers to the separation (decentralisation) from the hierarchy that is usually characteristic of public administration. However, it must be stressed once again that the autonomy of independent regulatory organs, the content and strength of their independence, is not the same as autonomous state administration bodies. The degree of autonomy is adapted to the

[15] Article 23 (4) of the Fundamental Law.

[16] E.g. HEPURA Act Article 21.

[17] E.g. Article 74 (4) of Act CCIX of 2011 on Water Utility Services.

[18] For example, under Article 38 (1a) (b) of Act XXXIV of 1991 on the Organisation of Gambling, the President of the SARA is empowered to lay down detailed rules for restricting the access of vulnerable persons to gambling in connection with the organisation of gambling activities following the principle of responsible gambling.

[19] E.g. Article 29 (d) of the SARA Act, which empowers the SARA to establish detailed rules for the control of the exercise of activities subject to a concession by the authorities; Article 182 (3) point 26 of Act C of 2003 on Electronic Communications (hereinafter: EC Act), which empowers the NMIA to establish rules for the procedures of the construction and construction supervision authorities concerning electronic communications facilities.

professional content, EU and constitutional requirements of the field of specialised administration for which the Fundamental Law authorises the National Assembly to establish these bodies. It should also be stated that it is inherent in the activity of the regulatory authorities that, in addition to the relative autonomy within the public administration, the independent regulatory organs must also be independent of the regulated, supervised market sector. The literature on administrative law (Fazekas, 2018, pp. 10–11) – and also the practice of the HCC[20] – typically emphasises three pillars of autonomy that the independence of independent regulatory organs must be ensured from the a) *institutional;* b) *personal;* and c) *professional* sides.

Institutional independence is ensured by how the independent regulatory organs are established, the allocation of tasks and powers and budgetary independence, and their relationship with the National Assembly and the Government.

Institutional independence is based on the fact that independent regulatory organs are created by the National Assembly in a cardinal act, as the study has explained in detail. Because of this, the Government's freedom of organisation does not apply to independent regulatory organs.

In principle, the functions and powers of independent regulatory organs may be established by law or by legislation issued based on a statutory authorisation, except the SARA, for which a municipal decree may not establish functions and powers,[21] and the HAEA, for which a statutory authorisation is not required for lower-level legislation to establish functions and powers.

Budgetary independence – as the foundation of autonomy – is basically guaranteed by the fact that the budgets of the independent regulatory organs are separate titles within the chapter of the National Assembly, and their expenditure and revenue budgets can only be reduced by the National Assembly.[22] This excludes the possibility of the government directly intervening in budgetary matters. Among the independent regulatory organs, the NMIA is special[23] in terms of budgetary independence, given that – as the only state body – its budget is governed by a separate act, which is submitted to the National Assembly by the committee of the National Assembly responsible for budgetary matters based on a proposal by the President of the NMIA.[24] To ensure the budgetary independence of the independent regulatory organs, it is common practice to impose a levy on market operators, under conditions specified in detail in the legislation, to ensure the financing and the financial basis of the independent regulatory organ.

While ensuring independence from the Government, the accountability of the independent regulator should be created, but the independent regulatory organs are only

[20] See HCC Decision 41/2005 (X.27.).

[21] However, this exception is only apparent, given that a local government may only adopt regulations to regulate local social relations not regulated by law or based on an express authorisation granted by law. Given this, a municipal ordinance cannot be a source of functions and powers for autonomous regulatory bodies.

[22] See Annex I, Chapter I of Act XC of 2020 on the Central Budget of Hungary for 2021.

[23] With this solution, the legislator has disrupted the principle of unity and completeness of the Budget Act, while this specificity already characterised the predecessor of the Media Council of the NMIA, the National Radio and Television Board (hereinafter: the Board). Article 32(1) of Act I of 1996 on Radio and Television Broadcasting provided that the budget of the Board shall be approved by Parliament in a separate Act.

[24] See Act CXXXII of 2020 on the National Media and Infocommunications Authority's 2021 Unified Budget.

accountable to the National Assembly and its committees. The rules on accountability are contained in the cardinal acts, but there are no other rules creating accountability to Parliament, nor can questions be addressed to the head of the independent regulatory organs (Chronowski et al., 2011, pp. 51–52). The relationship with the Government is ensured by rules requiring the independent regulatory organs to be consulted on regulatory proposals affecting their functions and, for some independent regulatory organs, the right to attend government meetings.

The personal independence of independent regulatory organs can be achieved by several means. Personal independence is ensured by the nomination and election of the head of the body independent of the public administration or with limited interference from the public administration, a term of office that spans the government's term of office, extensive rules on conflicts of interest and, in the case of the Media Council of the NMIA, decision-making by the body.

According to Article 23(2) of the Fundamental Law – as a limitation of independence – the head of an independent regulatory organ shall be appointed by the Prime Minister or, on a proposal by the Prime Minister, by the President of the Republic for a term of office determined by a cardinal act. The Fundamental Law thus confers the power to appoint the head of an independent regulatory organ to the Prime Minister, or the President of the Republic on the proposal of the Prime Minister. The President of the NMIA is appointed by the President of the Republic on a proposal from the Prime Minister. In all cases, the term of office of the President of the independent regulatory organ is significantly longer than the term of office of the Government. The term of office of the chairman is 7 years for the HEPURA and 9 years for the other independent regulatory organs. The term of office of the chairpersons of the independent regulatory organs can typically end before the end of their term only for objective reasons (death, reaching a certain age, final and binding criminal conviction, resignation) and can be terminated in very limited circumstances (e.g. permanent disability for reasons for which they are not responsible).

Personal independence is also ensured by the extensive conflict of interest rules for the heads, deputies and civil servants of the independent regulatory organs, which guarantee independence from the sector administered, from market players and the various branches of power. The general part of the conflict of interest rules is laid down in the Act on the Status of Employees of Bodies with Special Status,[25] while the specific – sector-specific – rules are contained in the cardinal acts establishing independent regulatory organs.

Independence can be facilitated by body decision-making, because this can facilitate independence by promoting self-awareness, reducing reliance on external cues, and empowering individuals to take responsibility for their own choices, but this is not the case for independent regulatory organs. One exception is the NMIA, one of its bodies being the Media Council. This five-member body has independent powers and responsibilities to manage and supervise the media sector. The President and members of the Media Council are elected by the National Assembly for a 9-year term.

[25] See Act CVII of 2019 for the status of employees of bodies with special status.

Professional independence is based on independence in the exercise of functions and powers. This is ensured by the fact that independent regulatory bodies are subject only to the law and exercise their functions and powers independently and by law. The decisions of independent regulatory organs are typically[26] not subject to an administrative appeal, nor can their decisions be amended or annulled by supervisory review. The administrative acts of independent regulatory organs are subject to administrative court actions.

Administrative proceedings are an instrument of subjective enforcement, so they can only be initiated by the party affected by the decision; the scope of the review is determined by the request for review, but the review can only be based on legality, not on mere technicalities or expediency (Trócsányi, 1991; Rozsnyai, 2013). The review activity of the courts is an institutional necessity, in contrast to the individual decisions of public authorities with specialised expertise,[27] from which it follows that the courts can be expected to ensure the accountability of public authorities through their subjective remedial role. However, judicial review, and thus accountability for the decisions of the independent regulatory organs, is constrained by the fact that the courts do not have the sectoral expertise – typically complicated technical, economic, IT and legal knowledge – that the apparatus of the independent regulatory organs possesses. Specialised expertise in administrative litigation can be provided by experts.

However, in addition to the independence to exercise their functions and powers, some independent regulatory organs have an explicit duty of cooperation with the Government or a member of the Government, or with other public authorities. The NMIA participates in the implementation of the Government's policy in the field of frequency management and communications, as defined by law,[28] while the SARA cooperates in the performance of its tasks with the Minister responsible for the supervision of state property, the Minister responsible for the regulation of the management of state property, and the Minister competent for the subject of concession activity, the Minister responsible for justice, the State Tax and Customs Authority, the law enforcement agencies, the body designated as the consumer protection authority and the body designated as the metrology authority.[29]

4. Summary

The study aimed to place the independent regulatory organs in the system of Hungarian public administration and to identify the most important elements of their legal status. In summary, it can be stated that the independent regulatory organs have constitutional

[26] In the case of the NMIA – because of the rules on the allocation of powers within the body (i.e. the President, the Media Council and the NMIA Office have their powers) – the possibility of appeal is provided within the body if the decision was taken by the NMIA Office in the first instance. Depending on the subject matter of the case, the internal appeal forum is the President or the Media Council, against whose decision only judicial review may be brought [see MSMM Act Article 165 (1) and EC Act Article 44 (1)].

[27] In constitutional and rule of law circumstances, it follows from the fundamental constitutional right to judicial remedy and access to justice that judicial review of individual decisions by public authorities is necessary.

[28] See MSMM Act Article 109 (2).

[29] See SARA Act Article 4 (1).

status, are central state administrative bodies with special powers, established by the National Assembly in a cardinal act for the performance and exercise of certain functions and powers within the scope of the executive power, and are regulatory authorities with legislative powers, exempted from the direction and supervisory powers of the Government, and, in some cases, autonomous. An analysis of some of the main features of the legal status shows that, in the case of independent regulatory organs, the various pillars of autonomy or, to use the correct terminology, independence, ensure full independence from the sector administered, while the extent of independence within the state administration is adapted to the professional content and EU and constitutional requirements of the specialised area of administration, which the Fundamental Law empowers the National Assembly to establish. The regulatory instruments exercised by the independent regulatory organs and their legislative powers, which are specific to the independent regulatory organs, allow for a significant degree of intervention by public authorities in the sectors they manage, but their professional and democratic control is very limited. It is precisely in light of the above that the democratic guarantees – openness, transparency and cooperation with market players – which can counterbalance this deficit are of particular importance.

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Public Governance, Administration and Finances Law Review Vol. 8. No. 1. (2023) • 121–137.

DOI: 10.53116/pgaflr.6811

Central European with a Post-Socialist Limp

On the Slovene Legal Identity

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Abstract: According to David and Grasmann, the recognised comparative law scholars, there are basically three main criteria for differentiating between legal families and their subgroups: 1. meta-legal considerations; 2. legal sources; and 3. dogmatic legal structures. Concerning the last two criteria, which could also be designated as formal elements of a country's legal identity, Slovenia has been deeply "immersed" in the civil law of a Central European type. Even after the decline of the Habsburg Empire, what remained to apply on the territory of nowadays Slovenia as part of the then Kingdom of Yugoslavia, was to an important extent Austrian law. Moreover, even the "decadent capitalist code" such as the *Allgemeines bürgerliches Gesetzbuch* (ABGB) more or less survived in spite of the communist "withering away of the state and law", and can today still be applicable to some older cases. After one thousand years of Germanic dominance, the Slovenes turned to the East in trying to build their national identity, one hundred years ago when the Empire collapsed. Although that seemed to be a necessary move towards stronger national identity, it was their first step away from the rule of law. The second step away from that was the period of communism that endured almost half a century. Nevertheless, the formal part of the Central European legal identity somehow survived in Slovene law, with certain "injuries" of course, but it is mainly the meta-legal considerations, their sociological and psychological elements in particular, that nowadays make a difference between the situations of the rule of law in the Republic of Slovenia and, for example, in the Republic of Austria, both parts of the onetime joint Empire.

Keywords: legal culture, legal consciousness, Slovenia, formal law, informal law

1. The Slovene historical overview in a nutshell

At the beginning of Christian times, the territory of the present Slovene state was an integral part of the Roman Empire, which was mainly populated by Celtic and Illiric tribes, to a certain extent Romanised. At the Great Migration period, between the 4th and 6th century, a number of Germanic tribes crossed the territory on the way to nowadays Italy, leaving behind only pieces of the onetime great Empire. Thus, when

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Slavic tribes moved here, in the 7th century, they faced almost an empty territory (Granda, 2008, pp. 16–42). The Slavs established at least two barbaric micro states: the Dukedom of Carinthia is quite well documented,[1] which is not exactly the case concerning the Dukedom of Carniola. When the Slavic tribes were baptised, their barbaric states lost sovereignty to be subdued first by the Bavarians and later the Franks to eventually become part of the Frankish Kingdom (Granda, 2008, pp. 42–47).

The Slavs brought with them their tribal customary law, and also got in touch, at least indirectly, with Roman law *(ius civile).* Moreover, with the process of early feudalisation in the Frankish Kingdom of Charlemagne, they needed to apply Frankish state feudal law (such as capitularies) (Vilfan, 1996, p. 23). With the fall of the Frankish Kingdom, the Slovene territory remained part of the Holy Roman Empire (ethnically German) (Granda, 2008, p. 53), in which a plurality of customary legal sources (territorial customs) as well as canon law applied. In the late Medieval period, a very significant influence on legal culture came from the reception of Roman law (gradually *ius commune* as the "learned" law of law faculties was developed, based on Roman law, canon law and parts of feudal law) (Škrubej, 2010, pp. 225–228), as well as from newly emerging town law (Vilfan, 1996, p. 146).

More than one thousand years of Germanic dominance ended with the fall of the Habsburg Empire after the First World War. Due to such long-term historical influence, in terms of comparative law criteria, the Slovenian legal system is generally considered to be a typical Central European legal system within the broader civil law family. One of the strongest incentives shaping the Slovene legal identity was the Austrian Civil Code *(ABGB),*[2] adopted in 1811, that *de facto* applied in part all the way until 2002, when the Slovene Code of Obligations was enacted, which not only broke with the former Yugoslav Obligational Relations Act, but also finally with the *ABGB.*[3] Moreover, until 1919 when the University of Ljubljana was established with the Faculty of Law being one of the founders, the education of lawyers was predominantly Austrian, and thus in German language.[4] Moreover, especially in constitutional law and legal theory, great intellectual

[1] Thanks to the writing by the Archbishop of Salzburg, *Conversio Bagoariorum et Carantanorum,* from 871 (Škrubej, 2010, pp. 104–106).

[2] Based on the "revolutionary" federal Yugoslav statute of 1946, which repealed all pre-Second World War legislation, the *ABGB* was also formally repealed but still remained in force *de facto,* since major civil legislation (in the area of torts, contracts, real estate and inheritance) was enacted only in the '70s of the previous century. If the ABGB had not applied in some manner, there would have been large gaps in the law in civil legislation for several decades (Pavčnik, 2007, pp. 397–398).

[3] Until 2002, the contract of donation was regulated solely by the *ABGB,* which was one of the reasons why the relevant ABGB provisions were applied between 1978 and 2002. Finally, the contract of donation was included in the Slovene Code of Obligations, in 2002.

[4] The Slovene legal terminology was basically established 151 years ago when attorneys began to be appointed by the Slovene Bar Association, instead of the Austrian King, and the use of Slovene language started to be at least partially allowed in offices and courts (Razdrih & Premzl, 2018). The crucial year for this development was the revolutionary year of 1848, when statutes were decided to be published in all major languages of the monarchy (Babnik, 1894).

inspiration for Slovene lawyers to last for decades came from Hans Kelsen, the famous Austrian professor of law and judge.[5]

After the decomposition of the Austrian–Hungarian Empire, the Slovenes finally stepped out of the long-lasting Germanic influence to join Croats and Serbs and other Yugoslav nations in what was after 1929 called the Kingdom of Yugoslavia (or, colloquially, the "Old" Yugoslavia). That country was a unitary constitutional monarchy dominated by the Serbian King, in which Serbian nationalism was constantly in tension with the aspirations of other nations, mostly the Croats as the second biggest nation. Although the Old Yugoslavia was formally more promising than before for the development of Slovene nationality and their "own" law, e.g. there was own university legal education possible for the first time, and what applied in the territory of Slovenia was mostly Slovene and old Austrian law, the actual grounds for legal development were far from ideal. Although the first Yugoslav constitution was adopted democratically in 1921, it was soon replaced by a constitution imposed by the King. Due to constant national tensions, a greater wave of the unification of laws, mainly in the area of criminal law, came not until the last decade of the monarchy, when the King's dictatorship ruled.

The Old Yugoslavia was generally not fertile soil for the rule of law, democracy and human rights to flourish. However, compared with the life in the Austrian–Hungarian monarchy, there was a slight step forward for the Slovenes in their continued building of national identity, creating potentials for own statehood to come in less than a century thereafter, and making at least the contours of what later became their own legal system.[6] Still the overall legal culture in the Old Yugoslavia decreased in comparison with the one existing especially in the last decades of the Habsburg Empire, especially after the bourgeois revolution in 1848, when greater autonomy of the nations within the monarchy, constitutionalism and human rights including language rights of the nations were emphasised.

After the Second World War, Slovenia was recognised as a separate republic within the federal (New) Socialist Yugoslavia, having its own constitution and legal system in the framework of the federal constitution and legal system. It was another step forward towards the "final self-determination" of the Slovenes on their way to achieving statehood. However, the totalitarian system of socialism, preventing democracy and human rights, and the communist idea of "withering away of state and law", in which the principle of the rule of law was not very high in the social pyramid of values, were serious obstacles for a prosperous legal culture to develop. In the communist Yugoslavia, all the pre-war laws were officially annulled immediately after the Second World War by a special law, which means that the principle of discontinuation regarding the previous law was introduced. For that reason, soon after the war a new constitution was established as well as new laws

[5] It was his *Reine Rechtslehre* and particularly the *General Theory of Law and State,* which determined the curriculum of all kinds of courses in legal theory and legal philosophy for decades to come, not only in Slovenia but in the whole region. Furthermore, the first dean of the Ljubljana Law School was his student and fellow discussant (Pitamic, 2005).

[6] There were certain legal acts by an autonomous Slovene government enacted (called "Naredbe") in 1918 when the Habsburg monarchy was falling apart and the Slovene did not yet join the Croats and the Serbs in a new state (Škrubej, 2010, pp. 298–301).

introduced mainly in the area of criminal law, where "political" crimes against the state were severely punished, nationalisation regarding large areas of land and factories took place, and also an agrarian reform was implemented. Furthermore, in the area of civil law when large gaps in the law were faced, the Austrian ABGB *de facto* still applied,[7] all the way until the late '70s when the new Obligational Relations Act, Inheritance Act and Basic Ownership Relations Act[8] were enacted, replacing the ABGB, however, not entirely.

2. Independent Slovenia's legal identity: "Returning" to Central Europe

After the collapse of communism in Central and Eastern Europe and Yugoslavia's disintegration, the Republic of Slovenia was established, which in its Constitution of 1991 left out the elements of socialist law and "promised" to return to the classical legal family of civil law, the Central European subgroup. What is typical for that subgroup is *inter alia* a well-developed dogmatic structure thanks to the strong influence of the reception of Roman law including the Pandectist movement, a great role of legal academics, and the influence of the German *BGB* and the Austrian *ABGB*. According to Article 1 of the Constitutional Act to Implement the RS Constitution,[9] Slovenia relied on the principle of continuity with the former Yugoslav and socialist Slovene law unless it was contrary to the new Constitution of 1991. All major laws from the communist period were indeed superseded by Slovene ones: e.g. following de-nationalisation and privatisation laws, the first criminal substantive and procedural laws were adopted in 1994, whereas major civil laws in 2002 (the Code of Obligations and the Real Estate Code). However, our Inheritance Act is still from 1976, in which only a small number of provisions were substituted due to the new constitutional order. Technically, you can even found a law from 1946 that would be still applying, at least in part.

The idea that the Slovene law was to "return" to the Central European subgroup of the civil law legal family after the communist "experiment" seems to be obvious. According to David and Grasmann, there are basically three criteria to determine a legal system's place in the comparative law taxonomy: legal sources, dogmatic legal structures and meta-legal considerations (David & Grasmann, 1988). What follows from those criteria is their formal and informal aspects.[10]

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[7] Even though it was officially abolished along with all other pre-war laws, it actually remained to apply with some limitations stemming from the constitution and other *leges specialis,* at least when it concerned the prohibition to own private property beyond a certain limit.

[8] Dealing with real estate law.

[9] Off. Gaz. RS, Nos. 33/91-I and 21/94.

[10] Cf. Zweigert's and Kötz's five criteria of classification including historical background and development, a predominant and characteristic mode of thought in legal thinking, distinctive institutions, the kind of legal sources a legal system acknowledges and the way it handles them and its legal ideology (Zweigert & Kötz, 2011, p. 68).

According to the traditional role of legal sources, Slovenia would be a country of the Austrian law-oriented member of the Central European subgroup of the civil law legal family. The decisive factor for that was the historical influence of the Austrian law, in the area of civil law mostly the *ABGB.* It was already emphasised that the Code remained to apply in Slovenia even after the Empire's falling apart and was, together with large parts of other Austrian laws from other areas, in force there until 1946, when it was formally repealed by the communists. Still, under the communist rule there was no civil law legislation adopted until the '70s,[11] the ABGB remained in force *de facto,* and remained as such for certain areas of law (such as the contract of donation) all the way until 2002 when the Slovene Code of Obligations and the Real Estate Code were enacted, already in the second decade of the (independent) Republic of Slovenia. Nevertheless, Slovenia did not opt to re-adopt a great civil code like it had existed before.

The strong historical influence of Austrian law was more or less also exerted in other fields of law, e.g. in criminal law and administrative law. Although there was some legislative activity in the Kingdom of Yugoslavia, the basic tenets from the historical predecessors remained, which could also hold true, to some extent, for the period of communist Yugoslavia except for those areas that were changed for ideological reasons.

Concerning the dogmatic structures criterion, it needs to be said that there has been a great influence of Roman law in the area of civil law, which was manifested through several waves of reception, and the teaching thereof at the university, where the concept of *ius commune* was created (Robinson et al., 2000, pp. 106–124), consisted of Roman law, canon law and parts of feudal law, which even formally, however subsidiary if there was no local legal custom, applied in the Holy Empire. Associated with that is the tradition of great abstraction, generality and systemisation of law, which contributed to its typical dogmatic structures.

When the above-mentioned first two criteria are concerned, the Slovene legal system seems to be a typical Central European legal system within the legal family of civil law. However, when it comes to the third criterion, i.e. meta-legal considerations, which include historical, psychological and sociological circumstances, the situation is already quite different. This criterion is more specifically studied in the confines of legal sociology, and is usually depicted as legal culture, being an informal rule of law or legally oriented social behaviour. In comparison with older European democracies within the subgroup of Central European law, it seems that this criterion in particular shows why the Slovene legal system has not yet returned fully to its historical family.

This also seems to be a common feature of other ex-communist countries in Central European, such as Poland, Hungary, the Czech Republic, Slovakia and the countries in ex-Yugoslavia. Their desired transition from the group of socialist/communist countries to the traditional group of Central European legal systems was also not fully successful. Theorists who deal with such issues suggest that we should have the group of post-socialist countries as a special subgroup within the legal family of civil law. The mentioned countries share certain common characteristics, such as lower trust of their people in legal

[11] 1978 – Obligational Relations Act; 1976 – Inheritance Act; 1976 – Marriage and Family Relationships Act; 1980 – Basic Property Relations Act.

institutions and the rule of law in general, too frequent changes in legislation, court delays with long duration of proceedings, legal formalism, etc. (Kühn, 2011; Manko, 2013a; Manko, 2013b, pp. 207–233; Uzelac, 2010, p. 377). From the formal point of view, there is no huge difference between post-socialist laws and their fellow legal systems of older democracies in the same subgroup of Central European states.[12] What makes a difference is legal consciousness or the informal part of legal culture, which proves that the idea of the rule of law has not yet sufficiently been normatively integrated among the people after the transition.

3. Slovene post-Socialist legal culture

3.1. A concept of legal culture

It is a commonplace today to deal with 'legal culture' instead of merely with (formal) 'law' when we try to come to a broadest possible picture of law. This kind of shift of attention in the definition of law from formal (or 'positive') law to 'law in practice' seems to have become important with the advent of sociology, and subsequently legal sociology, and also the relevance of psychology in law, when sheer legal positivism was departed from in order to take into account a more comprehensive notion of law in society. In this context it is important to consider Pound's (1910) differentiation between "law in books" and "law in action" since these two syntaxes when juxtaposed can have a very different meaning, not being mere reflections of each other. As we will see in the continuation, this is of additional importance when different legal cultures are compared with one another.

The concept of legal culture was introduced in legal science by Friedman in 1975. It was derived from the concept of general culture being either everything human in opposition to the natural or biological (being a broader definition of culture) or what is as such culturally specific (as a narrow definition of culture) (Silbey, 2001, p. 8624). Friedman, who found that there is 1. internal legal culture being a culture of legal professionals; and 2. external legal culture composed of the general public's attitude toward the law, conceived it as those parts of the general culture such as customs, opinions, ways of doing and thinking that bend social forces toward or away from the law (Friedman, 1975, p. 15). In the context of such what interested him were a) the "social and legal forces that make the law"; as well as b) the "impact of the law on the behaviour in the outside world" (Friedman, 1975, p. 3). He was aware of the fact that patterns of social attitudes and behaviour towards law and legal systems vary depending on specific legal cultures, groups, organisations or states (Friedman, 1975, p. 194).

Legal culture (considered as a collective or social concept) as well as legal consciousness (more used to depict individual perceptions) are concerned with the understandings and meanings of law, legal institutions, and legal actors that circulate in social relations (Silbey, 2001, pp. 8623–8624). Both the mentioned concepts became of interest for legal

[12] Slovenia is for that reason frequently compared with their northern neighbour Austria.

scholars when formal legal institutions (such as formal legal materials, formal offices and institutions) and everyday social relations began to intersect and share cognitive resources.[13] According to Varga, the concept of legal culture is intended "to express how people experience a legal phenomenon, conceived as a kind of objectified potentiality; how and into what they form it through their co-operation; how and in what way they conceptualise it, and in what spirit, frame and purpose they make it the subject of theoretical representation and operation. In the beginning, it was "sociological interest that brought the conceivability of such an interest into jurisprudential thought" (Varga, 1992, p. 82).

Legal culture has become an interesting subject of study not only in general jurisprudence and legal sociology but also in comparative law. This was an evolution made in recent decades, since from the beginning of the 20th century within comparative law the main focus was on (legal sources and particularly) civil law when the general jurisprudence and also other legal disciplines were very much influenced by positive law. The interest in comparative legal cultures rather than just comparative law could also be considered a shift of attention from positivistic to more multidimensional accounts of law in particular societies.

Before it is discussed in what manner the Slovene legal 'system', or better called legal 'culture',[14] deviates from all the typical characteristics of the Central European subgroup, we need to describe at least the basic tenets of the (ideal) model of such legal culture. Then it becomes easier to discuss departures from the model.

A model that integrates elements of formal and informal law can be designated as an integral model of legal culture. According to Friedman, in relation to informal law, legal culture or its informal part is further divided into 'internal', being the culture of legal professionals, and 'external' legal culture, as the legal culture of ordinary people. Moreover, a model according to a four-dimensional concept of law is built, in which the four elements of legal norms, legal values, legal relations and ADR elements inseparably converge (Novak, 2016).

3.2. The integral concept of legal culture

One way of defining it is through a three-dimensional theory of law[15] as developed by Reale and other legal philosophers, mainly associating law with its three basic features such as legal norms, legal values and legal relations. This theory of law is otherwise also known as the integral theory of law. It finds the elements of law such as legal norms,

[13] There are basically two approaches to studying legal culture: a) taking it as an analytical concept within a theory of social relations; and b) dealing with it as concrete measurable phenomena (Silbey, 2001, p. 8625).

[14] When 'informal' characteristics such as meta-legal considerations are added to the 'formal' portrait of a legal system, the thusly composed entire picture, of formal and informal law, is begun to be called (legal) 'culture.'

[15] The founder of this theory was allegedly Kantorowicz, who already at the beginning of the 20th century developed the following trialism: legal philosophy, legal dogmatics and legal sociology (Kantorowicz, 1925; Pokrovac, 2018). This theory was in the global context mostly propagated by Reale (1968); see also Lima (2008). One of the most influential adherent of this theory in former Yugoslavia was Visković (1976). However, the three-dimensional theory of law is still alive – see in particular Falcón y Tella (2010).

social values and social facts as being part of an integral whole. This means that any of these elements cannot be understood alone – but all of them can only be comprehended in the whole: any fact in these legal worlds (i.e. legal norms, legal values and legal relations) has an impact on the two other worlds (Visković, 1976, p. 112). Every aspect of this theory: i.e. legal norms, legal relations and legal values constitutes the whole and, vice versa, the whole is expressed through any of them.

For example, due to an economic crisis, a state introduces a new tax to burden real estate valued 1 million euros or more, by amending tax legislation in order to fight the crisis. Certainly this amendment would have normative (positive law) consequences that are easily recognised in the legal system as certain legal rules are changed. From the axiological point of view this would have positive effects at least for a majority of people as they would perceive such a measure as justified as imperatives of social justice were allegedly followed. Moreover, this would also have implications on legal relations (both between individuals as taxpayers and the state and between the taxpayers themselves in their transactions that are "taxed"). This normative change of legal rules would on the one hand "activate" the axiological dimension in society and also the sociological-psychological dimension in the sense that some people would try to evade this tax and would try to seek gaps in the legal regulations of this tax.

Furthermore, the *(meta)* principle of the rule of law, being the apex of legal culture, can be understood in the sense of the integral theory of law. In this context what can be understood under the normative-dogmatic component of the rule of law is a set of (positive or formal) legal rules and legal principles (i.e. legal norms), which are part of a legal system, either in the form of general legal acts (constitution, statutes, executive regulations), which are generally created in the process of law creation, or individual legal acts (judgements, orders, decisions) that are basically made in the process of law application. The axiological dimension of the rule of law would moreover indicate how the positive law is a reflection of dominant social (or individual) values such as legal certainty and justice.

As the social component of the rule of law we could reflect on the (informal) legal culture in a certain state, or how the rule of law as the normative-dogmatic concept is perceived in the society referring to legal consciousness or normative integration about the rule of law in such a society. As to this aspect of the rule of law we want to know how its normative-dogmatic aspect "works" in the real world – how it is reflected as a fact in legal relations.

To these three dimensions (legal norms, legal values and legal relations) this author has added a fourth dimension which is resolving social conflicts by ADR techniques (Novak, 2016). These are alternatives to formal legal proceedings. They are complementary to the operation of the rule of law in a state and society, as they contribute to resolving social disputes out of court and thereby help courts operate more efficiently.

Therefore, to form a concept of legal culture one needs to extend one's concept of law or legal system being composed of these four dimensions, into comprehending that legal system both formally and informally. This actual dimension of legal culture is very important because often two legal cultures could appear quite close concerning formal legal

norms, but are in fact very apart regarding how these formal norms work in practice, or what the attitude of people is towards such norms. Hence we deal with the sociological and psychological aspect of formal legal norms. The same would apply to a distinction between the formal and actual aspects of legal values and legal relations, as well as ADR methods.

Thus, a broad view of legal culture includes both formal law (like Pound's law in books), referring to 'legalistic' (positivist) or normative-dogmatic aspects of law, and informal law (Pound's law in practice) encompassing axiological, psychological and sociological dimensions of law.

It is more than clear that an overall legal culture existing in a certain (state) territory encompasses also the major constitutional principles such as the democratic state and the rule of law principle. Moreover, the latter seems to be the synonym for legal norms applying in a certain legal system as being an overarching principle defining the legal system. What follows is a short analysis of the above-mentioned (four) components of the rule of law, in the sense of its integral conception, of which the normative-dogmatic aspect of the rule of law is dealt with first.

Firstly, the normative-dogmatic component of the rule of law primarily concerns (positive or formal) legal norms being part of a legal system. This subject matter is usually considered by the general theory of law.[16] What are dealt with in this context are legal norms (legal rules and legal principles), legal relations, legal acts, which appear in law creation and law application processes. Included with that could also be legal interpretation, gaps in the law and systemisation of law (see Novak, 2010, pp. 6–11).

Secondly, concerning axiology in law legal values are considered with regard to deontology or ethics in law. Thus the axiological-deontological component of the integral theory of law deals primarily with (ideal) law (and the rule of law) as it ought to be. Immanent to/in law are the following values: legal certainty, justice, constitutionality, legality, clearness and determinacy of legal norms, etc. A majority of the mentioned values can be found in the overarching constitutional principle of the rule of law, which seems to be the red thread of all law. Moreover, law itself regulates certain values such as human dignity, respect for human beings, etc. (Visković, 1976, pp. 105–145).

Thirdly, the sociological aspect of law (legal culture with respect to the rule of law) needs to be mentioned which unlike formal normativity addresses an actual state of affairs concerning law and its normativity. From legal sociology it follows that for the effectiveness of a legal system legal culture, which stimulates spontaneous law abiding – certainly if there exists a certain consensus or rule of recognition with respect to the legal system as being perceived as democratic and legitimate – is more important than forceful implementation of legal rules by the state or its agents (Novak, 2012, pp. 93–105).

Legal culture is otherwise a concept from the province of legal sociology, however, by its complexity it seems to exceed the frameworks of that discipline since it deals with a collective legal consciousness that involves all aspects of the integral concept of law

[16] According to Barberis, a major task of general theory of law is to establish what (positive) law *is,* while legal philosophy deals with what this positive law *ought* to be (Barberis, 2012, pp. 15–16).

(including legal rules, legal values and legal relations). To this, the fourth element of the integral theory of law, namely ADR as an important component of modern law, could be added.

3.3. The (integral) model of Central European (CE) legal culture

What needs to be described in such a model, firstly, is its formal law component. When it comes to legal norms, there is a traditional CE requirement that the norms of general legal acts (such as statutes) need to be as short as possible, concise and clear. Here one should remember the advice of the German scholar von Ihering that the legislature should think as a philosopher and speak as a peasant (Heindl & Schambeck, 1979, p. 189). A tendency towards systemisation, classification and abstraction within that subgroup historically culminated in the Pandectist tradition in the 19th century (Robinson et al., 2000, pp. 273–275).

With respect to individual legal acts (such as court judgements) it has been required that ideal ones must be as short as possible, concise and comprehensible.[17] Moreover, this subgroup was also very much influenced by Hans Kelsen and his pure theory of law, in which legal norms are to be arranged in a strict hierarchical pyramid, almost alike with the Pandectist tradition or the rationalist German Natural lawyers that insisted on a rigid schematic approach (Robinson et al., 2000, pp. 218–220). Also, Kelsen importantly contributed to the birth of the European model constitutional court, whose most prominent and model example within the subgroup became the German *Bundesverfassungsgericht* after the Second World War. Thus, the strong requirement of constitutionality and legality, that lower general legal norms be in conformity with superior ones and individual legal norms consistent with general legal norms, is in the "genes and tissues" of this subgroup's legal systems.

Concerning legal values, the CE post-war tradition began with Gustav Radbruch, his insistence on the importance of human rights as the *minima moralia* of our civilisation, and his formula of denial (non-law) and unbearableness suggesting, *inter alia,* that legal norms must contain particularly legal values of moral nature (such as equality, justice, human rights, legal certainty), in a proper manner and extent (Radbruch, 1973, pp. 345–346). Radbruch's ideas referred to extreme situations of injustice, however, it symbolically presented an important link between law and morality.

With respect to legal relations, there is a standard requirement in the CE group, as in any legal system aiming at stability and normative integration (Vertovec, 2010), that legal social relations should not be regulated in every detail, and that too frequent changes in general legal acts are not welcome. This is not a particular feature of only the CE subgroup but may well be a part of any legal system's model.

[17] This is a typical stylistic feature which differentiates the CE subgroup from the Western subgroup. For that reason, consider within the civil law family the difference between the style of judgements' reasoning in Germany and France (David & Grasmann, 1988).

Finally, concerning ADR, such possibilities for dispute resolution must be available to a sufficient extent in the norms of general legal acts, and ADR is to be provided as an effective alternative to formal legal procedures. In a well-organised and functioning society, there should not be too much pressure on courts to resolve disputes, but people should also try the so-called alternative ways to resolve their disputes, which many times contribute to better social effects than court proceedings. It is certainly not possible to say what the right proportion between ADR channels available and court proceedings initiated is but the fact that ADR facilities exist and people do make use of them points to a conclusion that traditional legal proceedings are not the only manner of resolving disputes.

Furthermore, the model's informal law component demands in its a) internal variant, concerning the legal profession, the following: legal norms must be consistently applied in legal practice or there should only be minor discrepancies. If lawyers as legal professionals, so to say the "servants" of the rule of law, do not follow legal norms, how could that be expected from lay individuals?

Then, legal values should be perceived as appropriately contained in the formal legal system, and legal rules should in general be perceived as consistent with the legal values encoded. If that is not the case, it is very hard to speak of the legitimacy of a legal system, and when trust in the legal system is lost what usually follows is anomie.

Moreover, with respect to legal relations, (cogent) formal legal relations need to be quite seriously respected in actual legal relations, or only minor discrepancies are allowed thereof. If this is not the case, it is difficult to say that legal norms are generally abided by and that the rule of law generally applies.

Finally, with respect to ADR, its possibilities are relatively frequently resorted to. This points to the fact that there is still trust in less formal ways of dispute resolution.

Concerning the b) external (non-professionalist) variant of the model's informal component, relating to legal norms there should be a high degree of normative integration: legal norms are relatively strictly followed in everyday life, or there are only minor deviations. As to legal values, legal norms need to be generally perceived as conforming to legal values, and actual relations should be perceived as legally consistent with legal values. Concerning legal relations, there should be a high degree of normative integration meaning that actual legal relations are not far from formal legal relations. Last but not least, there should be a spontaneous use of ADR methods in everyday life, and not too many request for disputes to be resolved in formal legal procedures.

The model is also presented below in the form of a table with all essential characteristics.

Table 1.
The model of Central European legal culture

	Formal law	**Informal law**	
		Internal legal culture	**External legal culture**
Legal norms	General Acts: short, concise and clear Individual Acts: short, concise and comprehensible; proper time for adoption or issuance Proper consistency among general acts and individual with general	Legal norms are strictly applied in legal practice (negligible deviations)	High degree of normative integration: relatively strict abiding by legal norms in everyday life (negligible deviations)
Legal values	Contained in legal norms: in a proper manner and extent	Legal values are viewed as properly incorporated in the legal system Legal rules are predominantly viewed as consistent with legal values	Legal norms are viewed as consistent with legal values Actual relations viewed as legally consistent with legal values
Legal relations	Legal relations not overregulated Changes in general legal acts not too frequent	Formal legal relations relatively strictly adhered in actual legal relations (negligible deviations)	High degree of normative integration: actual relations not too far from formal legal relations
ADR	Accessible through legal rules in a proper manner Provided as an effective alternative to formal legal procedures	Frequent applications of ADR methods	Spontaneous application of similar methods in everyday life: formal legal procedures not too frequently requested

Source: Compiled by the author.

4. Slovene (post-Socialist) departures from the model

What needs to be followed is an analysis how a particular legal culture such as the Slovenian departs from a typical (above mentioned) Central European model.

When Slovenia had declared independence, it wanted to return from the group of socialist law countries to the Central European family within the European Continental legal systems, due to historical influences in this territory mostly from Austrian law. For that reason, it even changed its constitution to adopt a new one following the German model. However, today it is impossible to say that the Slovene legal culture is Central European such as the German, Austrian, or Swiss since it is (still) quite different from these systems. Due to several decades of socialism which have very much changed the pre-war Slovene legal system and many elements thereof have not yet been eradicated, it needs to

be described as a part of the post-socialist legal culture, which is still in transition. Concerning the problems the Slovene legal system has been facing there are quite a few resemblances with other former communist systems.

In his article on general failings of the Croatian legal system when compared with modern developed democracies, which is quite typical for virtually all former Yugoslav republics including Slovenia, Uzelac stems from the position that post-socialist legal systems are necessary heirs of their socialist past. In socialism law was mainly instrumentalised: to serve economic and political policies in order to overcome socially and economically unjust ideals of bourgeois law (Uzelac, 2010, p. 377). This idea is still to some extent reflected in certain fundamental features of post-socialist legal traditions: 1. a legal process as the tool for the protection of the interests of political elites; 2. fear of decision-making; 3. low but comfortable status of judges; 4. feminisation of the judiciary; 5. deconcentrated proceedings; 6. orality as pure formality; 7. excessive formalism;[18] 8. lack of planning and procedural discipline; 9. multiplicity of legal remedies that delay enforceability; and 10. endless cycles of remittals (Uzelac, 2010, p. 382).

What about Slovenia? How much its rule of law, legal system and legal culture departs from the ideal model described above?

If we compare the normative-dogmatic element of the integral theory of law from the ideal model of the rule of law with the one existing in Slovenia, we will find certain deviations in the latter from the former. Both in the area of law creation as well as law application. In the relation to the first process, general legal acts (particularly statutes and executive regulations) seem to be sometimes too long and not always well prepared, too many in number and too frequently amended. Their texts are often too detailed, often they are difficult to be interpreted. Legal formalism is still too much embedded in the legal profession. Secondly, referring to law application, individual legal acts (i.e. judgments and decisions) are often adopted only until very long proceedings, tend to be quite long and also their language is less comprehensible and their style is sometimes poor, with procedures for their making often being too long. Additionally, with respect to legal relations, it follows that Slovene social relations are many times legally overregulated.

Despite the above-mentioned failings of the Slovene contemporary legal system, the normative-dogmatic aspect of the legal culture is, however, not the gravest problem of Slovene law. In the context of such, Slovenia does not seem to depart that much from more developed European legal cultures. Thus, one of the main ideas of this chapter is that the problem of our law is not that much of a normative-dogmatic character. We will notice that when a difference between formal and informal elements of the model is concerned, there are greater deviations with respect to the informal elements than the formal ones.

In the formal dogmatic-normative sense, our legal system is not ideal but seems to be comparable with other systems in the subgroup. The problem appears when we move from the formal level of the rule of law to its informal level. Here we meet the greatest problems, which are typically analysed by sociology of law, such as problems with regard to

[18] In a similar manner Manko has criticised the hyperpositivism of Polish (ordinary) courts by arguing that those courts still very much rely on linguistic and logical interpretation instead of also applying purposive interpretation, balancing and legal policies (Manko, 2013a; Manko, 2013b). Moreover, Kühn criticised the judiciary of new EU countries as being outmoded and unprepared for new tasks in the EU (Kühn, 2011).

normative integration, legal consciousness, legal effectiveness and legal culture (see Igličar, 2004).

Therefore, concerning the model's informal law component in its a) internal variant, concerning the legal profession, with respect to legal values, sometimes there is a wish that they be more directly considered in legal practice. Also, concerning ADR, legal professionals do not often enough make use of ADR procedures.

Concerning the b) external (non-professionalist) variant of the model's informal component, relating to legal norms there is a low level of normative integration: people less than ideally abide by legal norms in everyday life (e.g. still too many try to avoid taxes, abuse social benefits). With respect to legal values, legal norms are perceived as often inconsistent with legal values, and actual relations are perceived as legally incompletely regulated with respect to legal values. As to legal relations, there is a low level of normative integration: actual social relations are remoted from legally regulated relations. Finally, with respect to ADR, there is a less spontaneous use of similar methods in everyday life – there are still too often requests to have formal legal procedures.

The above-discussed Slovene deviations are also presented in a special table below, in which they are depicted in italics to be separated from those characteristics where the Slovene legal culture meets the model more or less.

Table 2.
Slovene (post-Socialist) departures from the model

	Formal law	**Informal law**	
		Internal LC	**External LC**
Legal norms	General acts: *too long and badly prepared; too many; too often changed* Individual acts: *too long and not enough understandable; excessive length of proceedings*[19]	Major following in legal practice (minor departures)	*Low degree of normative integration: lack of major following in everyday life*
Legal values	Contained in legal norms: conformity of legal norms with legal values	Perceived as properly included in the legal system Legal norms perceived as consistent with legal values *Occasional wish that legal values would be more seriously considered*	*Legal norms perceived as often inconsistent with legal values* *Actual relations perceived as not fully regulated in conformity with legal values*

[19] All those characteristics of post-socialist legal procedures that are mentioned by Uzelac in his article contribute to the overall length of legal proceedings (Uzelac, 2010, pp. 380–382).

	Formal law	**Informal law**	
		Internal LC	**External LC**
Legal relations	High enough mutual conformity of legal acts (in terms of constitutionality and legality): individual legal acts consistent with general legal acts *Over-regulated*	Taken into consideration in actual relations (minor departures)	*Low degree of normative integration: actual relations quite apart from legally regulated relations*
ADR	Properly accessible in legal norms Regulated as rather effective alternative to formal legal procedures	*Not frequent enough use of ADR*	*Less spontaneous use of similar methods in everyday life: too much demand for formal legal procedures*

Source: Compiled by the author.

5. Going forward?

If we want to remedy the defects, deviations, or departures from the model, we need to know the reasons and causes for them. As it was emphasised, there is a great problem with the informal part than the formal elements of our legal culture. You can replace formal laws as a relatively quick step, but it takes time to change informal patterns.

The theory of normative integration points to the effectiveness of law being dependent on how legal norms are internalised, which means that people follow them spontaneously. They internalise legal norms if they take them as being "theirs", legitimate, meaningful, or simply needed.[20] Connected with normative integration is the concept of (personal and collective) legal consciousness. Ross differentiated formal legal consciousness, which requires that we abide by law, from material legal consciousness that signifies following law that is legitimate (Ross, 2004, pp. 54–56). If legal norms are well-integrated assuming to be legitimate, the collective legal consciousness would be at a higher level, because it would dictate their respect. The level of both normative integration and legal consciousness may result in a greater or lesser effectiveness of a legal system. The connection here is causal: the greater the normative integration and higher the legal consciousness the greater the effectiveness of the legal system. The effectiveness of law could also be viewed either in a formal manner as the activities of legal authorities, or in a material manner meaning law application in real life (Ross, 2004, pp. 54–56). If that is below a certain degree, people would not spontaneously follow legal norms, and no control and sanctioning would improve that.

[20] What is important here is not only a general situation in the society, but also family upbringing and the process of internalising social norms, which is the subject of study by social psychology and psychoanalysis (see Olivecrona, 1971, pp. 246–260).

In Slovenia, the level of normative integration, and in relation with such also the most general level of legal culture, is lower than in older Western democracies. Since that was at a higher level at the time of the Austrian–Hungarian Empire, and perhaps to some extent also during the Old Yugoslavia (Pavlin, 2012), it could be ascribed to consequences of the communist experiment with the "withering away of state and law", and too slow a process of revitalisation of the rule of law in the independent Slovenia.[21] If during socialism, there was a high level of collective consciousness concerning economic and social rights (or welfare state), this cannot be said for the formal aspect of the rule of law and law's general authority in society.

A discrepancy between the normativity and actuality of a legal system and consequently lesser effectiveness occurs when the said dimensions are too much apart. The legal system of the Socialist Federal Republic of Yugoslavia (as well as the Socialist Republic of Slovenia) was quite alienated from the Slovenes particularly for two reasons: a) it was not democratic having being appropriated by political elites; and b) it was not autonomous in the national point of view. In order that the contemporary legal system works better, given that the mentioned reasons ceased to apply, it would be necessary to raise the level of normative integration and collective legal consciousness.

A lower level of legal consciousness from desired has also resulted from many negative stories of economic transition. The entrance into the EU, with the prior incorporation of legislations in the areas of anti-corruption, public procurement, public access to information, judiciary and public administration reforms, however, contributed to some extent to a raise in the level of people's legal consciousness. Thereby a European legal framework was established improving primarily the normative-dogmatic and axiological dimensions of the legal system. However, there is still much to be done in the areas that affect the mentioned informal dimensions of law.

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[21] Similar problems can be encountered in virtually all ex-communist countries.

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