European Union and its Neighbours
in a Globalized World 10

Oskar J. Gstrein
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Modernising European Legal Education (MELE)

Innovative Strategies to Address Urgent Cross-Cutting Challenges

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Contents

Introduction to Modernising European Legal Education (MELE)—Innovative Strategies to Address Urgent Cross-Cutting Challenges

Oskar J. Gstrein and Mareike Fröhlich

Abstract This introduction provides an overview of the contents of the edited volume Modernising European Legal Education (MELE)—Innovative strategies to address urgent cross-cutting challenges. The volume contains sections on Law and Education Innovation, Law and Gender, Law and the Climate Crisis, Law and Datafication, as well as Law and COVID-19. The purpose of this volume is to share the insights of this Strategic Partnership for Higher Education funded by the European Union's Erasmus+programme and make them available to a broad public. The volume starts with the summary of an empirical survey at 14 different European law faculties at universities in Albania, Bosnia and Herzegovina, Croatia, Germany, Lithuania, North Macedonia, and Spain on the status of teaching transversal competences in legal studies. Throughout the sections and individual chapters, this edited volume responds to specific aspects highlighted through the survey. Beyond that it engages with relevant topics identified in the research and educational practice of the consortium members. The rapid and profound transitions shaping societies at the beginning of the twenty-first century also come with a substantive influence on the legal profession. Reconsideration of the legal discipline is therefore needed to identify the skills and knowledge that future lawyers must be equipped with to successfully engage with this changed reality.

Keywords European and international law · Teaching innovation · Interdisciplinarity.

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1 Modernising European Legal Education (MELE)

The beginning of the twenty-first century continues to be defined by a seemingly non-ending sequence of profound paradigm shifts. A chain of events—summarized along themes such as globalization, the ever more visible climate crisis, global financial instability, a decrease in the stability of multilateral political systems, omnipresent datafication, or the COVID-19 pandemic—profoundly affects the legal profession and law as an academic discipline. For instance, a simple second instance case decided by a court in Cartagena, Colombia at the end of January 2023 received global attention, as the judge used OpenAI's ChatGPT as a semi-autonomous assistant to formulate parts of it (Gutiérrez 2023). In October 2018 the Court of Appeal of The Hague in the Netherlands upheld the stance of the first instance court in the famous *Urgenda* case (Leijten 2019). This judgment undeniably confirmed that it is legally possible for a private nonprofit organization to successfully sue a government over its hesitance to implement decisive and consistent policy measures to address the ongoing climate crisis (Verschuuren 2019). These are just two examples demonstrating how times are changing. With their implications and consequences, they suggest that the adaptations required in the legal domain are comprehensive. What seems needed is a substantive reconsideration of the place of law and regulation in and across communities. Correspondingly, the skills and knowledge that future lawyers must be equipped with to successfully engage with this new reality need to be reevaluated, and potentially change drastically.

The Erasmus+funded Strategic Partnership for Higher Education, Modernising European Legal Education (MELE), aims at responding to this challenge (MELE 2023a). The purpose of this volume—as one of the 'Intellectual Outputs' of the project—is to document the findings of the consortium and share new insights. The volume starts with a summary of a survey which was carried out at 14 different law faculties in seven European countries, both within and outside the European Union (EU). This survey is summarized in Chap. 2 (Zdraveva 2023). The findings of this survey, as well as other urgent cross-cutting issues and lacking transversal competences as identified by the members of the project consortium, are being discussed throughout in the different parts and individual chapters.

This volume is based on the observation that certain aspects of social life—such as the ability of individuals to bear rights and duties, in contrast to a weak legal representation of collective rights and interests, the general accessibility for some individuals and groups to claim rights and demand regulation, or the division of the legal discipline into specific 'atomic' sub-fields such as civil law, administrational law, constitutional law, international law, etc.—have been translated into established and recognized legal figures and regulatory frameworks, as well as corresponding rights and procedures. In contrast, other topics such as those covered in the different sections of this volume are considered as being novel or emerging, cross-sectional, cross-cutting, or transversal in the practice of legal education and research. While such '*Querschnittsmaterien*' increasingly gained societal relevance over the last two decades as they are frequently associated with urgent challenges, they seem hardly

addressed by the conventional frameworks of legal education and monodisciplinary research. During the project the consortium members considered this hypothesis particularly from the perspectives of future employers, subject experts, and (potential future) students. Thus, the question appears how legal education and research can change and evolve, to better address these cross-cutting societal challenges despite their emerging nature, complexity, as well as constant interaction and influence of a broad and diverse set of stakeholders.

2 MELE in a Nutshell

MELE is a three-year project funded by the Erasmus+program, specifically the KA203 Strategic Partnership for Higher Education (MELE 2023b). It started in September 2020 with a grant amount of €423,388. The objective of the project is to bring together a consortium of esteemed universities including the University of Belgrade (Serbia), University of Zagreb (Croatia), Cyril and Methodius University in Skopje (North Macedonia), University of Cadiz (Spain), Mykolas Romeris University in Vilnius (Lithuania), University of Groningen (Netherlands), Regent's University London (United Kingdom), and the South Eastern European Law School Network (SEELS), with the associated partner being The European Network for Clinical Legal Education (ENCLE).

The main objective of MELE is to enhance transversal competences and academic skills among law students by improving the teaching skills of academic staff across the consortium. The project also aims to raise awareness of cross-cutting topics such as gender issues, the EU's 'Green Deal', climate change, datafication, and multilevel governance in the field of legal studies. MELE has delivered several intellectual outputs to achieve its goals, which are also publicly available upon request. These include:

1. Conducting a survey on teaching transversal competences in legal studies.
2. Developing an online course for academic skills in a European and international context.
3. Creating a method toolbox for innovative teaching methods and transversal competences.
4. Publishing this edited volume exploring the links between cross-cutting topics and legal teaching and research.

During the project, also corresponding workshops, training events, and a summer school have been organized, to train teaching staff and expose students to transversal competences. Dissemination activities and multiplier events ensured that the four main outputs of the project reach a wider audience beyond the consortium partners.

3 Overview of the Contents and Findings

This volume contains 18 chapters, throughout five different parts. Following this brief introduction, it explores and outlines innovative teaching methods in and beyond the legal domain throughout Part 1. Then it goes on to explore specific aspects of selected cross-cutting issues. The selection of cross-cutting issues of this volume is based on the perception of necessity, urgency, as well as subject expertise of the consortium members and authors. The chapters cover aspects relating to topics such as Law and Gender in Part 2, Law and the Climate Crisis in Part 3, Law and Datafication in Part 4, as well as Law and COVID-19 in the final Part 5.

3.1 Part 1: Law and Education Innovation

As already mentioned, Part 1 starts with the summary of a survey relating to transversal competences developed or lacking throughout legal studies (Zdraveva 2023). This survey covers all partner institutions of the consortium, except for Regent's University London and Campus Fryslân of the University of Groningen, which both offer no conventional legal degree programs. This research aims at providing an overview of the trends in the development of the legal education at the faculties of law represented in the project consortium. The survey covers different cycles of education, relating to the Bachelor's, Master's and PhD level, as well as the German state exam qualification system—which is not corresponding to the general European Bologna system setup in 1999 (Pritchard 2019). The results covered in the survey reflect the positions of the respective faculty teaching staff, by stating which key transversal competences students should develop during the studies in the different cycles according to their opinion, expertise, and experience. While new types of skillsets such as leadership and the capacity to decision-making start to play an increasing role, classical capacities for the legal profession and their sound development continue to be a prominent requirement. This includes legal/normative analysis and synthesis, the construction of valid legal arguments, as well as appropriate and skillful communication. These competences remain highly desirable for all levels of legal education, according to the opinion expressed by teaching staff.

This overly simplified 'meta-conclusion' on the results of this comprehensive survey might indicate that classical skills and education still dominate legal education. However, this view is immediately challenged by the authors of Chap. 3. They argue for the necessity of interdisciplinary approaches when teaching and confronting the issue of human trafficking (Hebing et al. 2023). Rather than a purely legal issue or a crime, human trafficking ought to be understood with a more holistic perspective. In their view, it seems impossible to get to the core of the problem without considering the roles of migration, criminology, policymaking, economics, employment, and other key forces.

Such a holistic perspective with a focus on transversality is continued in Chap. 4,

which explores the successful implementation of the United Nations Sustainable Development Goals (SDGs) through the mechanisms provided by European and International law, specifically where the SDGs relate to national civil and procedural law (Garrido and Villar 2023). Besides SDG 16, which aims at building strong and just institutions, the authors consider SDG 1 (tackling poverty), SDG 5 (gender equality and empowering all women and girls), as well as SDG 10 (reduce inequality among countries) throughout their contribution.

Chapter 5 then refocuses on the territory of the EU and potential future Member States. It highlights and discusses the challenge of teaching the rule of law as a fundamental value of the EU system (Cenevska 2023). The author argues that university lecturers should re-evaluate their roles towards becoming facilitators of an increasingly independent learning process of law students. However, when it comes to teaching the rule of law as a value specifically, the author highlights the challenge in doing so credibly and authentically in countries such as the Western Balkan nations, which have an authoritarian political past that is still part of the living memory of many citizens. Emphasizing the value and necessity of the rule of law is particularly challenging as several Member States of the EU itself question the principle through deeds such as reducing judicial independence, or freedom of expression by controlling the national media landscape, for example.

Chapter 6 focuses similarly on the future of legal education, with a particular view to strengthen transversal competences (Vlajković and Dabetić 2023). In a rapidly changing job market, law schools and professors have a crucial role in preparing law graduates to become competent and ethical professionals. To bridge the gap between formal legal education and real-world demands, it is necessary to enhance curricula with continuous training that develops transversal skills. Based on a large-scale online survey with students at the Faculty of Law, University of Belgrade, the authors identify educational needs of law students. They aim at providing guidelines for modernizing legal education. The research of the authors aims to ensure increased employability of graduates and improve the quality of legal education. In conclusion, the authors propose to embed practically oriented exercises such as workshops from an early stage of legal study programs to ensure that the development of transversal competences is being fostered from the outset.

Similarly, Chap. 7 explores venues to the modernization of legal curricula. However, here the authors consider environmental protection, sustainable development, and climate change (Erceg et al. 2023). They argue that achieving climate goals requires professionals trained in environmental law, yet current legal education fall short in adequately preparing such experts. This chapter highlights the need to include environmental topics in law curricula, foster collaboration through 'green legal clinics,' and organize workshops to emphasize the importance of educating young lawyers on environmental legal protection. The Faculty of Law in Osijek, Croatia serves as a case study for these activities, aiming to bridge the gap in environmental law education.

Chapter 8 concludes Part 1 on innovative teaching methods and approaches by introducing simulations and live-client clinics to address cross-cutting topics (Brozović 2023). Such student-centered approaches address the global challenges

present today, while meeting the expectations future lawyers are facing. The approaches and exercises demonstrated showcase the effectiveness of clinical legal education in preparing students for real-world scenarios. At the same time, they show the potential to connect the academic 'ivory tower' with its broader societal surrounding.

3.2 Part 2: Law and Gender

Part 2 of this volume is dedicated to gender related legal aspects. The two chapters in this section approach the subject from public and private law respectively. The author of Chap. 9 explores the question whether legally binding quotas should ensure gender parity in parliaments. It is being argued that underrepresentation of women in parliaments indicates a political empowerment gap and is therefore a de facto symbol of inequality. The study focuses on the situation in Germany, taking into account corresponding European and international developments. It finds that there are currently no binding supranational or international legal obligations for countries to implement mandatory quotas or gender parity requirements to improve the political representation of women. However, soft-law principles at the European and global levels are gradually gaining traction and becoming more stringent (Giegerich 2023).

Chapter 10 explores gender-related issues from the perspective of European economic law. The article examines the topic from different angles and ranks the different areas according to the level of influence on companies, in regulation, as well as in policy making. The chapter notes that, in addition to the newly introduced quota for appointments to corporate boards, further support for female entrepreneurs is needed. Moreover, the possibility of legislators exerting influence in the context of competition regulation should not be underestimated and gender mainstreaming should be introduced as a standard approach. Finally, the article discusses the opportunities for the EU in the context of its trade policy, particularly in the context of foreign affairs. In addition to the consideration of gender issues in trade agreements, the new initiative of a directive on the global responsibility of European companies in the supply chain can also penalize possible gender discrimination. (Fröhlich 2023).

3.3 Part 3: Law and the Climate Crisis

Part 3 of this volume contains two chapters which deal with the Climate Crisis through the lenses of labor law, as well as legal philosophy. Chapter 11 deals with the influence that the changing climate could and should have on working time regulations in regions such as Andalusia in the south of Spain, where increasing heat and draught makes it more difficult to work (Ribes Moreno 2023). The author argues that this is a problem that should be tackled both by the EU and its Member States.

Innovative regulations are needed, as well as a broader set of policies negotiated amongst significant stakeholders to ensure 'climatic oriented' working conditions.

Also arguing for the expansion of the legal toolbox, Chap. 12 explores 'ecocide' as an innovative conceptual legal figure (Baeza 2023). The author analyses different sources of international public law, and especially international criminal law to explore whether and how comprehensive destruction of nature and ecosystems could become subject to prosecution by legal authorities. In conclusion, the author argues that the recognition of ecocide would not only require institutional change in the legal domain, but also on a broader societal level including academia and civil society.

3.4 Part 4: Law and Datafication

In Part 4 selected aspects of the datafication of society are being explored. The authors of Chap. 13 take a closer look at the 'Google Assistant' to analyze whether the technical setup of such voice assistants is problematic from a privacy perspective (Backes et al. 2023). Using an interdisciplinary approach that considers the basic technical design and resulting legal implications, they argue that the use of voice assistants can be particularly challenging with a view to family life and children. Since minors have little influence on how their datafied upbringing looks like, much more consideration of system designers and parents seems necessary to make the right choices on which devices to use and which ones to keep away from children until their digital skills have evolved.

Chapter 14 then turns to the thorny subject of using artificial intelligence (AI) to support creative processes, and how intellectual property law should confront this changed reality of content creation (Mešević 2023). The author introduces several examples where AI has been used in the creation process, and highlights some of the questions that make it difficult to consider whether such systems can be seen as an assisting tool, or should rather be recognized as creators themselves. A closer look reveals that the changes brought in by these new content creating systems are not entirely different from the challenges intellectual property law had to confront in the past.

The final Chap. 15 in this part includes a highly relevant study on how inheritance law should categorize the increasing volume and quantity of digital remains (Klasiček 2023). The author studies how cryptocurrency assets, social media accounts, family pictures on physically accessible storage devices, and other digital remains can be considered from a legal perspective once a person passed away. The author also explores measures that individuals could take to better prepare for situations where they themselves are no longer able to share their data, or pass it on to their dear ones.

3.5 Part 5: Law and COVID-19

Finally, Part 5 contains three chapters that deal with the consequences and legal implications of COVID-19. The legal domain has been severely challenged by the rapid and unforeseen changes that were required to adapt to the pandemic situation, sometimes even mandated by governments in European countries (Gstrein et al. 2021). As the authors demonstrate, some of the developments relating to discrimination, social security law, or vaccination policies still require reflection.

Assessing discriminatory patterns from the perspective of law, the authors of Chap. 16 argue that data from the EU reveals widespread presence of racial and ethnic discrimination in the labor market (Kuzminac and Midžović 2023). This includes racial segregation and intersectional discrimination. They state that COVID-19 has further highlighted such structural inequalities, emphasizing the need for comprehensive and sustained efforts to achieve equality. Rather than discouraging, they argue that the crisis should serve as motivation to redouble the commitment to creating a fair and inclusive society for all.

Chapter 17 analyses the right to salary benefit during a temporary inability with a particular focus on the situation in the Republic of Serbia. There a government subsidy scheme has been put in place, which also indirectly led to an increased incentive for people to get vaccinated. The author's findings suggest that the differential treatment of vaccinated and non-vaccinated individuals aligns with Serbian law and is in accordance with the European Convention on Human Rights, as well as relevant case law of the European Court of Human Rights. While mandatory vaccination could have been a viable option, particularly during the peak of the pandemic, the incentive of providing financial rewards to individuals who chose vaccination served as a small yet significant encouragement for immunization (Obradović 2023).

The issue of mandatory or voluntary vaccination during the pandemic is also taken up in Chap. 18. The author aims to harmonize bioethical principles and legal standards, particularly those employed by the European Court of Human Rights, in assessing potential human rights violations arising from mandatory COVID-19 vaccination policies implemented by the Member States of the Council of Europe (Ignovska 2023). A deductive reasoning approach is utilized to examine the pioneering case of mandatory vaccination in Austria—a democratic country, which was about to introduce mandatory vaccination through law, yet never completed or enforced this legislative effort. The author contends that, with a well-designed methodology and framework, any severe disease posing a substantial threat to individual and public health could warrant limitations on individual autonomy through scientifically validated and safe vaccines. However, in the case of COVID-19 coercive measures are deemed disproportionate to potential infringements on private life and individual consent for the sake of public health.

4 Outlook

The modernization of European legal education presents a compelling challenge that calls for enhanced interdisciplinary collaboration among academic disciplines and innovative teaching methods. This endeavor not only emphasizes the importance of preserving traditional approaches to legal disciplines and transmitting them to future generations, but also underscores the need to critically reassess and revolutionize existing structures in response to emerging subjects. As our societies become more diverse and our understanding of legitimacy, justice, and value undergoes transformations, it becomes imperative to reconsider the role of traditional values while exploring promising alternative approaches. We extend our heartfelt gratitude to the authors of this volume for their valuable contributions and fruitful collaboration throughout the extensive 36-month project. Our hope is that the sense of joy and collaboration experienced during this endeavor permeates through the pages of this volume, captivating and inspiring its readers in each individual chapter.

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Law and Education Innovation

Transversal Competences in Legal Studies: A Summary of the Modernising European Legal Education (MELE) Project Survey Results

Neda Zdraveva

Abstract The survey Transversal Competences in Legal Studies, carried out within the project "Modernising European Legal Education" (MELE), aimed to provide an overview of the trends in the development of the legal education in the members of the consortium. The survey focused on several different aspects of the curriculum development and its delivery. The key questions, to which the results are presented in this chapter, focus on the qualifications that are being developed as a result of the legal studies and the key transversal competences supporting those qualifications. The survey was carried out among the management and the teaching staff of the law faculties participating in the MELE project. The assessment of the level of development of specific qualifications at a certain level of studies versus the perception of the importance of the specific descriptor done by the faculty management has shown that the overall teaching goals are achieved to a significant extent but not completely. When it comes to the specific transversal competences, as assessed by the teaching staff, the development of the ones related directly to the legal profession such as competencies for legal synthesis, construction and communication of legal arguments are (still) high on scale of importance on all levels of studies. It is shown, however, that there is a discrepancy between the perceived importance of a transversal competence and the how or to which level the capacities are being developed in the course of the studies.

Keywords Transversal competences · Legal studies · Qualifications · Capacities

1 Introduction

Legal education is in a state of evolution. The changes that occur in the curriculum and the methods for its delivery are influenced by changes in the societies and legal frameworks on national, regional and international levels. The needs of the

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legal market change and the key question is how legal education should respond to them.

What is and what should be a priority in the legal education of a new generations of lawyers? How could and should legal education respond to those ever-changing needs? These issues were of importance for the project Modernising European Legal Education (MELE)[1] as it intends to enhance the transversal competences and academic skills of students by improving the teaching skills of academic staff among consortium partners. The first key question of interest was—how are qualifications as education goals being developed and are the teachers having the skills needed for achieving the education goals of the legal studies? The second question to be observed was—what the teaching staff finds as important to equip the students with in terms of the specific skills and to what extend this is found to be achieved?

Based on these questions the survey on Transversal Competences in Legal Studies was developed and carried out within MELE. The survey aims to establish the status quo on the development of the transversal competencies within the legal studies[2] offered by the consortium members. The information obtained was to further and support the project activities.

In development of the survey methodology, the researchers[3] have taken into consideration the difference in the structure of the studies of the participating faculties

[1] Modernising Legal Education (MELE) is a project co-funded by the EU through the Erasmus + program. It is a Strategic Partnership between European universities for the purpose of modernising teaching methods in legal education.

[2] For this purpose, two of the consortium members do not participate in the survey.

[3] The following researchers participated in the development of the survey and the analysis of the survey results: Dr. Neda Zdraveva, Full Professor, Centre for SEELS; Dr. Anđelija Tasić, Associate Professor, Centre for SEELS/Faculty of Law, University of Niš; Dr. Aleksandar Mojašević, Associate Professor, Centre for SEELS/Faculty of Law, University of Niš; Dr. Sanja Djordjević Aleksovski, Assitant Professor, Centre for SEELS/Faculty of Law, University of Niš; Dr. Tunjica Petrašević, Associate Professor, Centre for SEELS/Faculty of Law, University Josip Juraj Strossmayer of Osijek; Dr. Barbara Herceg Paškić, Full Professor, Centre for SEELS/Faculty of Law, University Josip Juraj Strossmayer of Osijek; Dr. Damir Banović, Assistant Professor, Centre for SEELS/Faculty of Law, University of Sarajevo; Dr. Petar Bačić, Full Professor, Centre for SEELS/Faculty of Law, University of Split; Dr. Jonida Rystemaj, Lecturer, Centre for SEELS/Faculty of Law, University of Tirana; Dr. Aida Mulalić, Associate Professor, Centre for SEELS/Faculty of Law, University of Zenica; Dr. Maša Marochini Zrinski, Associate Professor, Centre for SEELS/Faculty of Law, University of Rijeka; Dr. Maša Alijević, Associate Professor, Centre for SEELS/Faculty of Law, University of Zenica; Dr. Enis Omerović, Associate Professor, Centre for SEELS/Faculty of Law, University of Zenica; Stefan Stefanović, LL.M., PhD Student, Centre for SEELS/Faculty of Law, University of Niš. In the development of the methodology contribution was provided by the team members with the MELE Project from all consortium members: Dr. Thomas Giegerich, Full Professor, Saarland University, Europa-Institut; Dr. Mareike Fröhlich LL.M., Research Associate, Saarland University, Europa-Institut; Karoline Dolgowski LL.M., Research Associate, Saarland University, Europa-Institut; Dr. Dušan Popović, Full Professor, University of Belgrade, Faculty of Law; Dr. Bojana Čučković, Associate Professor, University of Belgrade, Faculty of Law; Dr. Milena Đorđević, Assistant Professor, University of Belgrade, Faculty of Law; Marija Vlajković, Teaching Assistant; University of Belgrade, Faculty of Law; Dr. Isabel Zurita Martín, Full Professor, University of Cádiz, Faculty of Law; Dr. Francisco Carrasco González, Associate Professor, University of Cádiz, Faculty of Law; Dr. Antonio Álvarez del Cuvillo, Associate Professor, University of Cádiz, Faculty of Labour Sciences; Dr. Maria Isabel Ribes Moreno, Assistant Professor;

(consortium members and faculties that come under the SEELS); different categories of staff employed/engaged by the faculties (academic staff and external teaching staff, young and experienced staff, level of the degree a staff member holds); the need to assess the level of importance versus the level of development of competencies and skills in different cycles of studies.

As a result, two questionnaires were developed: Survey on Transversal competences in Legal studies for the Faculty Management and Survey on Transversal competences in Legal studies for the Faculty Staff. The questionaries were disseminated among the faculty management and the faculty staff of the University of Saarland, Faculty of Law (Germany), University of Belgrade, Faculty of Law (Serbia), University of Zagreb, Faculty of Law (Croatia), Cyril and Methodius University in Skopje, Iustinianus Primus Faculty of Law (North Macedonia), University of Cádiz, Faculty of Law (Spain), Mykolas Romeris University in Vilnius, Faculty of Law (Lithuania), University of Tirana, Faculty of Law (Albania), University of Rijeka, Faculty of Law (Croatia), University of Split, Faculty of Law (Croatia), Josip Juraj Strossmayer University of Osijek, Faculty of Law (Croatia), University of Niš, Faculty of Law (Serbia), University of Sarajevo, Faculty of Law (Bosnia and Herzegovina), University of Zenica, Faculty of Law (Bosnia and Herzegovina).

The Faculty Management Questionnaires provided data for the status quo on the 1st of October 2021. The Faculty Staff questionnaires were open for input in the period 15.07.2021–15.12.2021.

All of the faculties included in the survey provided responses to the Faculty Management Survey.

2 The Qualifications and Their Development as Perceived by the Faculties' Management

The descriptors set in the Framework of Qualifications for the European Higher Education Area[4] were used as a base for the assessment of the level of development of specific qualifications at a certain level of studies versus the perception of the importance of the specific descriptor as assessed by the faculty management. The

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[4] http://ehea.info/media.ehea.info/file/WG_Frameworks_qualification/85/2/Framework_qualificationsforEHEA-May2005_587852.pdf.

Table 1 Qualification from first cycle—Bachelor's level

Qualification	Importance (average)	Level of development (average)
Advanced knowledge and understanding in the field of study, involving a critical understanding of theories and principles	4.43	4
Skills to apply knowledge and understanding in a manner that indicates a professional approach to work or vocation, and competences typically demonstrated through devising and sustaining arguments and solving problems within their field of study	4.71	4.29
Ability to gather and interpret relevant data (usually within their field of study) to inform judgements that include reflection on relevant-social, scientific or ethical issues	4.57	4
Skills to communicate information, ideas, problems and solutions to both specialist and non-specialist audiences	4.43	3.86
Learning skills that are necessary to continue to undertake further study with a high degree of autonomy	4.57	4

faculties were asked to assess the level of importance of a specific competence[5] for each cycle/level of studies. The survey, having in mind the specificities of the educational systems, recognised the following: First cycle—Bachelor's level (typically includes 180-240 ECTS); Second cycle—Master's level (typically include 90-120 ECTS credits, with a minimum of 60 credits at the level of the 2nd cycle) and Integrated studies (typically 300 ECTS or 10 semesters)/German state exam degree and third cycle or doctoral dissertation preparation (usually with 180 ECTS).

The qualification for the first cycle—bachelor's level (typically includes 180-240 ECTS) were assessed by the faculty management of the participating faculties. The results show that there is a discrepancy between the perceived level of importance of development of the competencies and their actual development in course of the studies, however it is not seen as large. As seen in Table 1, on average it is found that for the first cycle of studies it is most important to develop skills to apply knowledge and understanding in a manner that indicates a professional approach to work or vocation, and competences typically demonstrated through devising and sustaining arguments and solving problems within their field of study. Still, although this skill is found to be of extreme importance the level of its development is assessed only as strong.

The data from the participating faculties[6] regarding the importance of the set of qualifications for the second cycle—Master's level (typically include 90-120 ECTS credits, with a minimum of 60 credits at the level of the 2nd cycle) and Integrated

[5] On a scale from 1 to 5 where 1 = not at all important, 2 = somewhat important, 3 = important, 4 = very important and 5 = extremely important) and the level of development (on a scale from 1 to 5 where 1 = none, 2 = weak, 3 = considerable, 4 = strong, 5 = very strong.

[6] The faculties offering integrated studies/German state exam studies were asked to provide input in this part, together with those offering separate master studies leading to total 300 ECTS. Data was not provided from the Law Faculty in Tirana.

Table 2 Qualification from second cycle—master's level/German state exam degree

Qualifications	Importance (average)	Level of development (average)
Knowledge and understanding that is founded upon and extends and/or enhances the knowledge typically associated with the first cycle, and that provides a basis or opportunity for originality in developing and/or applying ideas, often within a research context	4.5	4.17
Ability to apply knowledge and understanding, and problem-solving abilities in new or unfamiliar environments within broader (or multidisciplinary) contexts related to their field of study	4.67	4.08
Ability to integrate knowledge and handle complexity, and formulate judgements with incomplete or limited information, but that include reflecting on social and ethical responsibilities linked to the application of their knowledge and judgements	4.67	4.08
Skills to communicate conclusions, and the knowledge and rationale underpinning these, to specialist and nonspecialist audiences clearly and unambiguously	4.75	4.17
Learning skills to allow to continue to study in a manner that may be largely self-directed or autonomous	4.5	4.25

Studies (typically 300 ECTS or 10 semesters)/German state exam degree, finds all of them as extremely important (average above 4.5) while as the most important to be developed is the skill to communicate conclusions, and the knowledge and rationale underpinning these, to specialist and nonspecialist audiences clearly and unambiguously. Still, although extremely important, as shown in Table 2. This skill is not equally highly assessed on the scale for the level of development.

When it comes to the qualifications (to be) obtained in the course of the doctoral studies [Third cycle—PhD (a typical number of credits is not prescribed for this cycle, it includes all forms for obtaining a PhD)] it is to be noted that the faculties[7] management find the level of importance of the set qualifications much higher compared to the other cycles. At the same time, the discrepancy between the level of importance and the level of development is smaller on the overall level. From the set of qualifications, as presented in Table 3. It is found that it is most important to develop the ability to conceive, design, implement and adapt a substantial process of research with scholarly integrity. Simultaneously, this is considered very strongly developed as well as the ability to make a contribution through original research that extends the frontier of knowledge by developing a substantial body of work, some of which merits national or international refereed publication.

[7] Faculty of Law of Saarland University and the Faculty of Law of the University of Tirana not included.

Table 3 Third cycle—PhD

Qualifications	Importance (average)	Level of development (average)
Systematic understanding of a field of study and mastery of the skills and methods of research associated with that field	4.91	4.55
Demonstrated ability to conceive, design, implement and adapt a substantial process of research with scholarly integrity	5	4.73
Ability to make a contribution through original research that extends the frontier of knowledge by developing a substantial body of work, some of which merits national or international refereed publication	5	4.63
Capability of critical analysis, evaluation and synthesis of new and complex ideas	4.81	4.55
Ability to communicate with peers, the larger scholarly community and with society in general about the areas of expertise	4.91	4.64
Capability to promote, within an academic and professional context, technological, social or cultural advancement in a knowledge-based society henceforth	4.82	4.36

3 The Transversal Competencies in View of the Teaching Staff

3.1 Demographics

A total number of 260 teaching staff[8] members participated in the survey[9] providing their insight and perception in the different topics. As presented in Table 4, from the total 234 or 90% are academic teaching staff members and 26 or 10% are external teaching staff. Having in mind the number of staff at the participating faculties—total 17.96% of the staff members participated in the survey, representing over 25% of the total academic staff and 5.01% of the total external teaching staff. The response rate of the external academic staff is considered low compared to the overall number

[8] The term 'teaching staff' includes all of the members of the teaching staff that participate in the delivery of the curricula, regardless of their formal position as employees or personnel that is contracted, who's profession is solely or dominantly an academic (hereinafter: academic staff) or persons that are otherwise engaged in the delivery of the curriculum but who's profession is not dominantly academic and who only collaborate with the academic staff in the delivery of the curriculum (hereinafter: external teaching staff). It is to be noted that In Lithuania teaching staff is divided according to the employment position: teaching staff with tenure and teaching staff with contract. Therefore, in this survey, as for the teaching staff in Lithuania as "academic staff" it is included information for teaching staff with tenure and for "external teaching staff" information for teaching staff with contract.

[9] Total number of 275 responses were obtained, however 15 of them were considered incomplete thus not taken into consideration.

Table 4 Teaching staff status

Teaching staff	Total respondents	% from respondents	Total in all	% from all
Academic staff	234	90.00	928	25.22
External teaching staff	26	10.00	519	5.01
Grand total	260	100.00	1447	17.96

Table 5 Respondents per years of teaching experience

Years of teaching experience	Academic staff		External staff	
	Total respondents	% from respondents	Total respondents	% from respondents
< 5 years	35	14.96	1	3.85
5–10 years	27	11.54	4	15.38
10–20 years	97	41.45	10	38.46
> 20 years	75	32.05	11	42.31
Grand total	234	100.00	26	100.00

Table 6 Respondents per degree

Degree	Academic staff		External teaching staff	
	Total	% from respondents	Total	% from respondents
Bachelor degree	10	4.27	1	3.85
Master degree	41	17.52	4	15.38
Doctoral degree	174	74.36	13	50.00
Priv. Doz. Dr. Habilitation and Professor	9	3.85	8	30.77
Grand Total	234	100.00	26	100.00

of external teaching staff for relevant conclusive findings and comparisons based on the status of the staff.

Most of the respondents, both the academic and external staff, are those who are considered senior teaching staff—those with experience over 10 years of experience constitute over 70% of the academic staff and over 80% of the external teaching staff as presented in Table 5.

In terms of the degree, both the within the academic staff and the external teaching staff, most respondents are those holding a doctoral degree, while less than 20% of the respondents are those having a master or a bachelor degree as seen in Table 6.

When it comes to gender, as presented in Table 7, female respondents dominate, which reflects the overall gender structure at the faculties.[10] Thus, total 56% or

[10] As per the data of the faculties' management, 54% of the academic staff are females and 46% of staff are males. The data for the external teaching staff is similar—53% females and 47% males. There is no information on the non-binary persons or persons who prefer not to answer this question.

Table 7 Gender structure of respondents

Gender	Academic staff		External teaching staff	
	Total	% from respondents	Total	% from respondents
Female	132	56.41	10	38.46
Male	95	40.60	15	57.69
Non-binary	1	0.43	1	3.85
Prefer not to answer	6	2.56		0.00
Grand total	234	100.00	26	100.00

Table 8 Level of courses taught

Level of courses	Total	% from all respondents
1st cycle	49	19
2nd cycle	16	6
Integrated 1st and 2nd cycle or equivalent	42	16
3rd cycle/PhD studies	3	1
1st cycle and 2nd cycle	37	14
1st cycle and integrated studies	8	3
1st cycle and 3rd cycle	2	1
2nd cycle + integrated studies	2	1
2nd cycle and 3rd cycle	1	0
Integrated studies and 3rd cycle	2	1
1st cycle and 2nd cycle and Integrated studies	7	3
1st cycle and 2nd cycle and 3rd cycle	66	25
1st cycle and Integrated studies and 3rd	4	2
2nd cycle and Integrated studies and 3rd cycle	1	0
All cycles	20	8
Total	260	100.00

142 of 260 respondents are female or as per their status 132 academic staff and 10 external staff. Total number of 110 respondents are male i.e., 40% of the academic staff respondents and close to 58% of the external teaching staff. Two members of the staff are non-binary persons and 6 prefer not to answer.

The teaching staff participating in the survey usually teaches in more than one cycle/type of studies as presented in Table 8. Most of the respondents (25%) said that they teach on all three cycles of studies and 19% of them on integrated studies or equivalent, corresponding to the manner in which they are organized.

The teaching staff who participated in the survey usually teach in more than one filed of the law, as seen in Table 9. Most of respondents teach in the field of Private Law (36%) while the least represented in the survey are the staff coming from the field of Criminal Law (10%).

Table 9 Legal fields

The broader legal field of the course(s)	No. of respondents	In % from total
General (Legal) Topics (History of Law, Sociology of Law, Theory of Law, Philosophy of Law, Law and Economics etc.)	64	24.62
Public Law (Administrative Law, Constitutional Law, Tax Law, etc.)	58	22.31
Private Law (Civil Law, Civil Procedure Law, Roman Law, Commercial Law, Labour Law etc.)	93	35.77
International Law & European Law	63	24.23
Criminal Law (Substantive and Procedural)	25	9.62

3.2 Importance Versus Development of Transversal Skills

Having in mind the different educational goals of the studies and the qualifications the students are expected to have at the end of a cycle of studies, a set of 20 competencies were selected and the teaching staff was asked to determine the level of their importance[11] and to which extent they are being developed.[12] They included both competences related to qualifications typically needed for the legal profession per se, but also competences that are beyond the traditional understanding of the legal profession in a closed national context.[13]

Teaching staff were asked to assess the level of importance and the level of development in the different types of studies where they deliver their courses.[14] When analysing the results only the responses from teaching staff who deliver classes on the respective type/level of studies were taken into consideration as presented in Table 10.

For the teaching staff in the ***first cycle of studies—bachelor studies***—four of the 20 listed capacities are considered as most important to be developed in the first cycle of studies: capacity to construct valid legal argument (average 4.586), capacity for legal analysis and synthesis (4.582), oral/written communication of legal

[11] On a scale from 1 to 5 where 1 = not at all important, 2 = somewhat important, 3 = important, 4 = very important and 5 = extremely important).

[12] On a scale from 1 to 5 where 1 = none, 2 = weak, 3 = considerable, 4 = strong, 5 = very strong).

[13] (1) Capacity for analysis and synthesis in general terms; (2) Capacity for legal analysis and synthesis; (3) Capacity to construct a valid legal argument; (4) Research skills; (5) Capacity for applying knowledge in practice; (6). Oral/written communication of legal arguments; (7) Knowledge of a legal terminology in second language; (8) Ability to communicate with non-experts in legal field; (9) Elementary computing skills; (10) Information management skills; (11) Critical and self-critical thinking abilities; (12) Capacity for generating new ideas (creativity); (13) Problem solving; (14) Decision-making; (15) Ability to work autonomously; (16) Ability to work in team/interdisciplinary team; (17) Leadership; (18) Ethical commitment; (19) Appreciation of diversity and multiculturality; (20) Ability to work in an international context.

[14] They are divided into the following categories: (1) 1st cycle of studies/bachelor studies (6 to 8 semesters, 180 ECTS to 240 ECTS); (2) 2nd cycles of studies/master studies (2–4 semesters, 60 ECTS to 120 ECTS); (3) Integrated studies/German state exam (up to 10 semesters, 300 ECTS if applicable); (4) 3rd cycle of studies (6 semesters, 180 ECTS) or doctoral studies.

Table 10 Respondents per level of studies

Studies	No. of respondents	In % from all respondents
First cycle of studies	193	74.23
Second cycle of studies	150	57.69
Integrated studies/German State Exam	89	34.23
Third cycle of studies/PhD	89	34.23

arguments (average 4.529) and critical and self-critical thinking abilities (average 4.505). Least important, although still high on the scale of importance having in mind the average score, is the ability to communicate with non-experts in legal field (3.874), ability to work in an international context (3.863), knowledge of a legal terminology in second language (3.816) and leadership skills (3.526). None of the capacities/skills is found to be developed "very strong" in course of the first cycle of studies (none has an average score over 4.5). One can consider as most developed with an average score above 3.7 (to be considered and strong in development) ethical commitment (3.812), appreciation of diversity and multiculturality (3.726), capacity for analysis and synthesis in general terms (3.720) and capacity for legal analysis and synthesis (3.715). The discrepancy between what is considered important to be developed and the perceived level of development in course of first cycle of studies is highest with one of the core competencies in terms of perceived importance. Thus, although the development of the skills oral/written communication of legal arguments is considered as extremely important (average score 4.529) one, the scale of development falls behind for one point with average score of 3.597 i.e., discrepancy of 0.932. The situation is similar for the capacity to construct valid legal argument and the capacity to apply the knowledge in practice. When it comes to the skills and capacities developed in the course of the first cycle of studies, as shown in Fig. 1, there is a discrepancy between the perceived level of importance and level to which they are being developed in course of the first cycle of studies.

The ***second cycle of studies or the master studies*** aims to further develop the qualifications of the students. Again, the given competencies were assessed as highly important and in average could be considered very important.

When assessing the perceived importance of the set of skills for the second cycle one can notice an increase in the number of capacities/skills that could be considered as extremely important by the teaching staff (having an average score of above 4.5). In this group we have the capacities needed for the legal profession per se [capacity for legal analysis and synthesis (4.639), capacity to construct a valid legal argument (4.632) and oral/written communication of legal arguments (4.590)], the capacity for applying knowledge in practice (4.549), but also the more abstract ones such as the critical and self-critical thinking abilities (4.618) and the ethical commitment (4.510).

In terms of development of the set of skills, again there is none that could be considered as being strongly developed (none is above 4.5 in average). The number of those to be considered strongly developed [above 3.5 in average) is higher than in the first cycle of studies, but still over 3.7 as average score we have the ones related to the

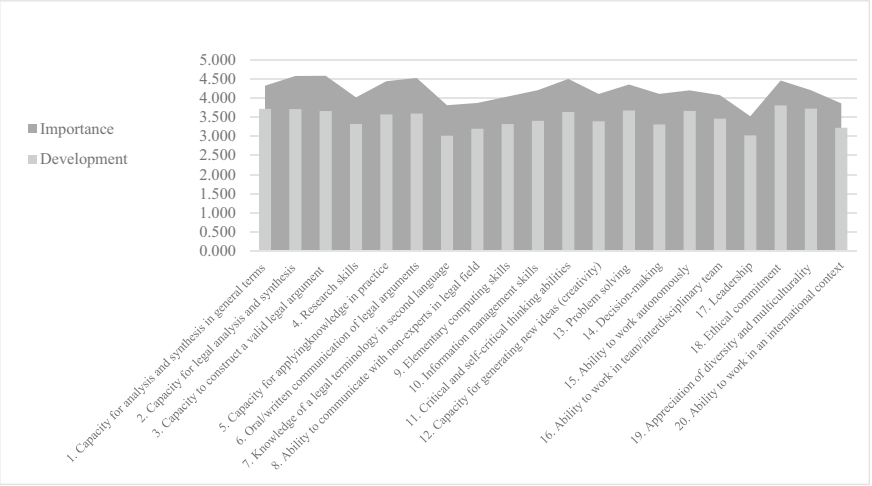

Fig. 1 Importance versus development of a competence in first cycle of studies/bachelor studies

core competencies (capacity for analysis and synthesis in general terms (3.720) and capacity for legal analysis and synthesis (3.715)] and even with higher development of the soft skills such as the ethical commitment (3.812) and appreciation of diversity and multiculturality (3.726).

The outlook of the discrepancy changes for the second cycle master/studies compared to the first cycle both in terms of where it could be found higher and the values of the differences as may be seen in Fig. 2. Thus, for the second cycle of studies it is highest for the capacity for generating new ideas (0.720) that on its own merits is not found as extremely important to be developed. Still the discrepancy between the perceived level of importance and the level of development in the core legal profession capacities that are perceived as highly important is high.

The ***integrated studies*** of the first and second cycle are specific to the Croatian legal education system, recently introduced in Albania and the studies for ***first state exam*** are offered by German universities. Having in mind the specific educational goals that are to be achieved in course of the studies and upon their completion the position of the teaching staff on these studies in regard to the set of transversal skills was separately analysed. It is to be noted that compared to the other cycles the number of 'no responses' to certain questions is a bit higher. The priorities of importance in the integrated studies/German state exam studies in general do not differ as much as for the first and the second cycle of studies. The ones that are considered classical for the legal profession have precedent over the soft skills. Thus, capacity to construct a valid legal argument (4.690) and capacity for legal analysis and synthesis (4.676) are considered as most important, followed by importance for development of ethical commitment (4.609) and problem-solving skills (4.606). In terms of the development of the specific competences in course of the studies, those related to the legal profession or directly connected to performance of tasks

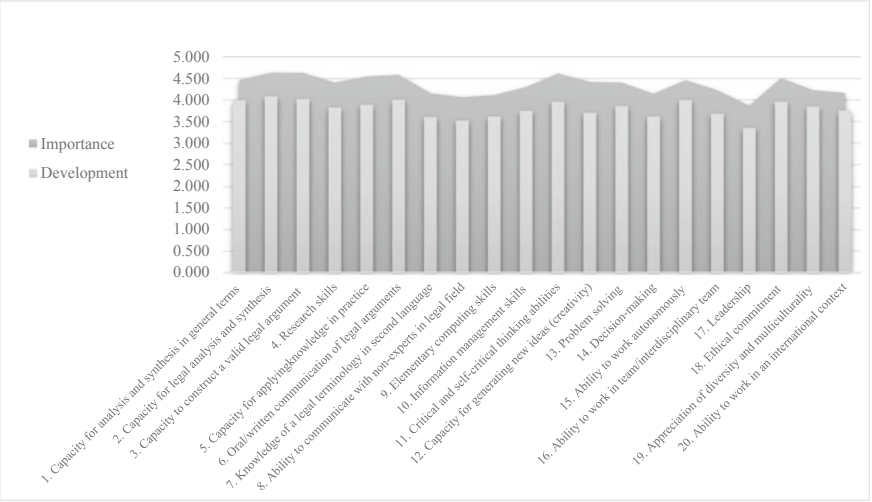

Fig. 2 Importance versus development of a competence in second cycle of studies/master studies

of what is considered a traditional work of a lawyer, are considered to being more developed—capacity for legal analysis and synthesis (4.265), followed by capacity for analysis and synthesis in general terms (4.227), ethical commitment (4.191) and capacity to construct a valid legal argument (4.162). Discrepancy exists between the perceived level of importance and level of development; however, it is to be noted as seen in Fig. 3, that for those competencies which are considered to be core ones for the legal profession, this discrepancy is not as large as the one presented for the second cycle of studies.

The final stage of legal education is the ***doctoral studies or preparation of doctoral dissertation*** depending on the system. Whatever the approach, the system should equip the student/PhD candidates with knowledge and skills—qualifications expected for this level of education. As seen in Fig. 4, many of the listed capacities have very high importance for the teaching staff, in average higher than as the other cycles. The highest in importance for the doctoral studies is the development of the research skills of the students (4.892), understandable when having in mind that one of the key qualifications the doctoral studies should provide are those related to research capacities. Development of the capacities for analysis and synthesis both specific for the law (4.865) and in general terms (4.861) follows, together with the perceived importance of development of critical and self-critical thinking abilities (4.851) and ability to work autonomously (4.822). In general, it is noted that higher number of the set transversal skills are considered to be highly important (with average score above 4.5) than the other levels of studies. When it comes to perception of the development of the set of skills, it is also to be noticed that teaching staff find that in doctoral studies a higher level of development of the capacities is achieved when compared to the other cycles. Thus, very strong development of the

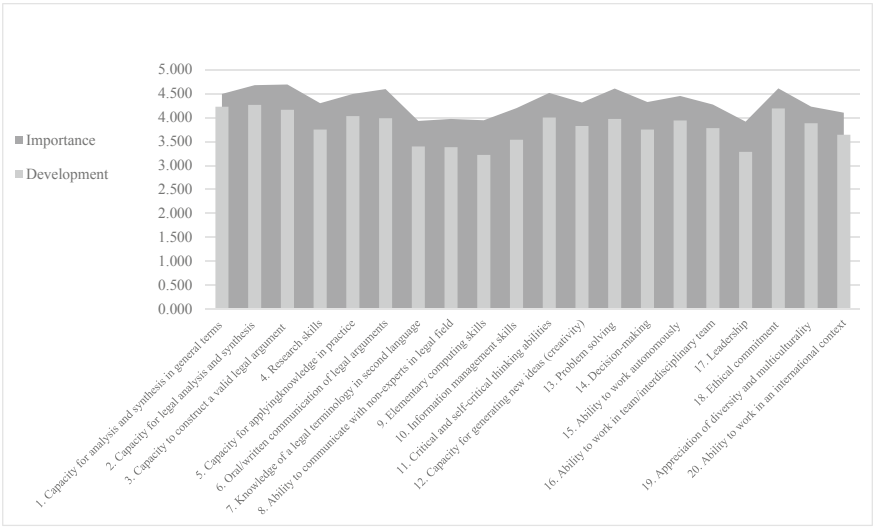

Fig. 3 Importance versus Development of a competence in in Integrated studies/German First State Exam

critical and self-critical abilities is achieved (4537) and the number of ones that are strongly developed is higher, including capacity for analysis and synthesis in general terms (4.37), capacity for legal analysis and synthesis (4.362) and research skills (4.304). Still, as presented in Fig. 4, discrepancy exists between the perceived level of importance and the achieved level of development of the set of skills.

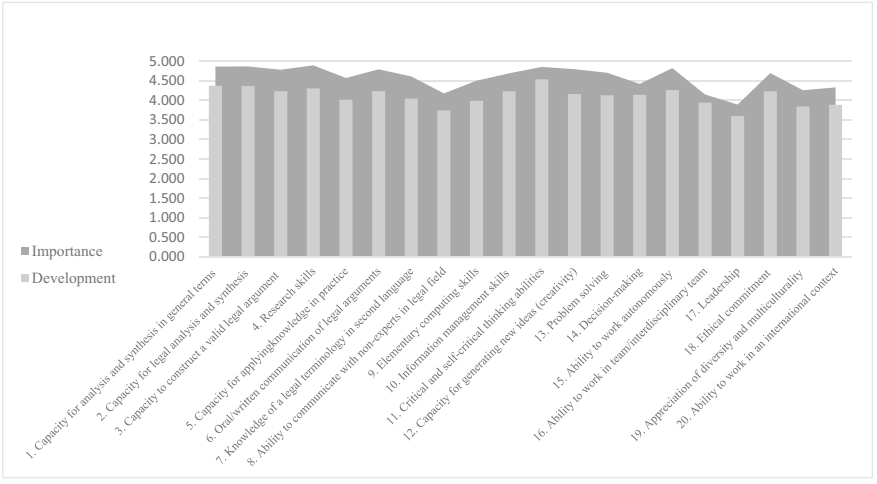

Fig. 4 Importance versus Development of a competence in third cycle/PhD studies

4 Conclusions

The research carried out among the faculty management has shown that the qualifications intended to be achieved in course of the studies in different cycles is achieved to a great extent.

The survey carried out among the staff shown that there is a discrepancy between a competence considered important and the level to which it is developed in the given studies in all of the cycles of studies. There are differences between which competence is considered specifically important for a given cycle of studies. Overall, the competencies related to the specificities of the legal profession (such as but not limited to legal analysis and synthesis and construction of legal argument) are found as most important for all level of studies. Still, at the same time it is found that the perceived level of their development does not match the perceived level of their importance by the teaching staff.

When the set of skills is analysed from the perspective of the position of each skill for the different level of studies, both how they are perceived in terms of their importance and the level to which they are developed, two tendencies are observed:

- The importance of each of the specific capacities rises with the rise of the level of studies. Rise in the level of development could also be observed in the course of the studies. As seen in Tables 11 and 12.
- The classical capacities for the legal profession—legal analysis and synthesis, construction of valid legal arguments and their communication are considered as highly important for all levels of legal education by the teaching staff. It is also considered, by the teaching staff, that they are being strongly developed in the course of the education.

Table 11 Capacity per level of studies

Capacity	1st cycle/ Bachelor studies	2nd cycle/ Master studies	Integrated studies/ German state exam	3rd cycle/ PhD studies
1. Capacity for analysis and synthesis in general terms	4.326	4.463	4.493	4.861
2. Capacity for legal analysis and synthesis	4.582	4.639	4.676	4.865
3. Capacity to construct a valid legal argument	4.586	4.632	4.690	4.781
4. Research skills	4.021	4.407	4.300	4.892
5. Capacity for applying knowledge in practice	4.444	4.549	4.493	4.569
6. Oral/written communication of legal arguments	4.529	4.590	4.594	4.792

(continued)

Table 11 (continued)

Capacity	1st cycle/ Bachelor studies	2nd cycle/ Master studies	Integrated studies/ German state exam	3rd cycle/ PhD studies
7. Knowledge of a legal terminology in second language	3.816	4.159	3.930	4.608
8. Ability to communicate with non-experts in legal field	3.874	4.069	3.971	4.176
9. Elementary computing skills	4.042	4.117	3.944	4.500
10. Information management skills	4.211	4.303	4.197	4.689
11. Critical and self-critical thinking abilities	4.505	4.618	4.514	4.851
12. Capacity for generating new ideas (creativity)	4.110	4.421	4.314	4.795
13. Problem solving	4.358	4.407	4.606	4.703
14. Decision-making	4.112	4.145	4.324	4.419
15. Ability to work autonomously	4.205	4.462	4.451	4.822
16. Ability to work in team/ interdisciplinary team	4.079	4.228	4.271	4.149
17. Leadership	3.526	3.869	3.915	3.892
18. Ethical commitment	4.463	4.510	4.609	4.694
19. Appreciation of diversity and multiculturality	4.209	4.231	4.229	4.257
20. Ability to work in an international context	3.863	4.167	4.101	4.329

Table 12 Development per level of studies

Development	1st cycle/ Bachelor Studies	2nd cycle/ Master Studies	Integrated studies/ German state exam	3rd cycle/ PhD Studies
1. Capacity for analysis and synthesis in general terms	3.720	3.993	4.227	4.371
2. Capacity for legal analysis and synthesis	3.715	4.088	4.265	4.362
3. Capacity to construct a valid legal argument	3.663	4.022	4.162	4.235
4. Research skills	3.324	3.825	3.750	4.304
5. Capacity for applying knowledge in practice	3.575	3.890	4.030	4.014

(continued)

Table 12 (continued)

Development	1st cycle/ Bachelor Studies	2nd cycle/ Master Studies	Integrated studies/ German state exam	3rd cycle/ PhD Studies
6. Oral/written communication of legal arguments	3.597	4.007	3.985	4.235
7. Knowledge of a legal terminology in second language	3.016	3.603	3.397	4.043
8. Ability to communicate with non-experts in legal field	3.198	3.522	3.382	3.743
9. Elementary computing skills	3.323	3.618	3.221	3.986
10. Information management skills	3.405	3.750	3.537	4.229
11. Critical and self-critical thinking abilities	3.636	3.964	4.000	4.537

The survey reflects the positions of the faculties and teaching staff as to what are the key transversal competencies that the students should develop during the course of the studies. The mechanisms for involvement of the legal professionals in the development of the curriculum and their delivery exist at all faculties, however, it cannot be established with certainty to which level the curriculum addresses the needs of the legal market and if the needs for development of specific sets of transversal competences are met. Further analysis of the positions of the students and the legal professionals in terms of what is to be considered important and to which level is developed in their experience will provide for a more comprehensive overview. It will address the extent to which is legal education is providing what is expected and needed for the contemporary legal market.

Human Trafficking and the Law: The Importance of Interdisciplinarity in Learning and Teaching

Mireille Hebing, Tatiana M. Martinez, and Stephen Barber

Abstract Human trafficking is a legal issue which can be found taught in standalone undergraduate modules and whose relevance reflects the volatility of today's global world. Human trafficking is a criminal offence in most jurisdictions and consequently subject to judicial processes. However, it is also an example of a topic which is challenging to teach using legal frameworks alone. Drawing on a longstanding case study, this chapter argues that for students to make sense of the inherent complexity, law must take a backseat to the understanding of migration, criminology, policy-making, economics, employment and other key forces. That is the overconfidence that creating an Offence can solve an identified problem. The paper argues that there is a need to develop Learning and Teaching methods which cultivate adaptable and transferable skills which enable students to see the relationships between all of these elements, especially in light of recent trends (i.e. Covid-19 and the Fourth Industrial Revolution) that have markedly reshaped the socio-political landscape.

Keywords Human trafficking · Interdisciplinarity · Teaching innovation · International law

1 Introduction

The law as a traditional institution and practice, as well as one of the key foundations of liberal democratic nation-states, is facing some profound challenges. Globalisation, a changing labour market, diversity, as well as the technological changes brought on by the Fourth Industrial Revolution, all impact on the daily practice of law and therefore its teaching. Added to this is the observation that movements across borders presents a particular challenge since it requires lawyers to think beyond the boundaries of national legal frameworks.

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Consequently, the legal profession is being forced to adapt rapidly, and those who work in it are required to develop a range of skills that are beyond many current learning and teaching methods in legal education. Law departments in universities across Europe are catching up with this at an accelerated pace in order that they might design courses and teaching methods that instil in students a range of transferable skills, which enables an interdisciplinary approach, as well as an enhanced focus on practice.

The aim of this chapter is twofold: firstly it will make the argument that recent changes to the world order, such as Covid-19 and the Fourth Industrial Revolution, require the legal profession to change, and that as a consequence the teaching of law needs to move beyond traditional learning and teaching methods. Secondly, it presents a case study of a Liberal Arts module on human trafficking, which uses real-world case studies to explore the issues from a range of perspectives, including but not limited to law. The way that the module is designed, taught and assessed offers an example of good practice which shows that teaching international legal issues can (and perhaps should) be taught in an interdisciplinary setting with a strong focus on practice.

As a contemporary issue for law students and for many lawyers in practice, human trafficking ranks among the most important and challenging. It is little wonder that it can be found taught in undergraduate modules in universities globally. In most jurisdictions across the world, of course, human trafficking is a criminal offence and the topic can be addressed in a narrow legalistic way by students who can consider the provisions of legislation and the reach of judicial processes. However, as highlighted from a South African vantage point, anti-trafficking legislation and even UN Protocols have proven ineffective at combatting this crime.[1] The authors argue that 'laws do not thrive in a vacuum' and the broader range of factors and influences need to be raised in prominence. Human trafficking is consequently complicated and presents as a topic which is challenging to teach using legal frameworks alone. These provide but one perspective on a complex and difficult issue where it must be acknowledged that the law itself is one of the weakest tools available.

This chapter presents and describes a longstanding case study delivered as part of teaching undergraduate studies in a UK University. The case is used to illustrate practice, to demonstrate how academics can organise learning experiences, and also to advance the argument that for students to properly make sense of the inherent complexity of human trafficking, law must take a backseat to the understanding of migration, criminology, policymaking, economics, employment and other key forces. The value of this approach can be seen in the way that it develops students' broader understanding as well as transferable skills. It does this because interdisciplinarity is at the heart of the learning and teaching philosophy.

Interdisciplinary approaches to teaching cut across discreet subject areas to create integrated learning spaces, encourage greater interchange of ideas and, consequently, support students to understand a given issue in a more holistic way. They also lend

[1] Bello and Olutola (2022).

themselves to learning through authentic cases and 'real-world' scenarios that require students to apply they knowledge they are acquiring.

Before presenting the case study and considering practice, this chapter contextualises by discussing relevant recent developments in law pedagogy and practice and then advancing the case for interdisciplinary teaching in higher education. The chapter concludes with the argument that there is a need to develop continually learning and teaching methods which cultivate adaptable and transferable skills which enable students to appreciate the relationships between all the elements studied.

2 Law Outside the Vacuum—Some Context

The world is changing at a remarkable pace. Consider that today's socio-political landscape looks markedly different from even the recent past due to various factors, such as the Covid-19 pandemic, a shift in the existing geopolitical order, and the rapid advances in technology with the current fourth wave in industrial revolution which has disrupted all industries, including the legal landscape. Combined, these call on the need to rethink higher education in all fields as courses attempt to form well-rounded professionals who are informed not only about their areas of expertise, but have a multi-disciplinary understanding of current issues, such as human trafficking.[2] In this regard, there is a need to form legal professionals with this type of mindset and contemporary understanding. What follows is some context setting which reviews these key forces that are currently impacting the current world order and what this means in terms of the changing higher education sector.

2.1 The Fourth Industrial Revolution

Technology is advancing at a remarkable pace and has already disrupted virtually every single industry. Currently, over 63% of the world's population is connected to the Internet[3] which is a transformation over the course of a generation. The Fourth Industrial Revolution is characterized by the introduction of technologies such as artificial intelligence and quantum computing, and how these are merging with the way individuals interact and work1. The term was defined as 'a fusion of technologies that is blurring the lines between physical, digital, and biological spheres.'[4]

This fusion and blurring of lines will have a significant impact on future workforces since it will signify the automation of many positions. The legal profession is no exception to this and neither is the Higher Education sector. On the one hand,

[2] Yuan (2021).

[3] Statista (2022).

[4] Schwab (2015).

technology will contribute $15 trillion to global GDP by 2030.[5] The global AI market is expected to reach almost $135 billion by 2025.[6] On the other hand, it will also translate into significant job loss, as many positions will become automatable, up to 30% by the mid-2030s.[7] This phenomenon is expected to extend to all industries, including legal, once a protected profession. Of large law firms, 56% believe artificial intelligence will become mainstream in the practice of law within even the next 5 years.[8] Initially, much of the automation in the legal space is likely to center on legal research and document analysis, but it will advance rapidly.[9] To this extent, Tippett and Alexander[10] report that 'lawyers' jobs are a lot less safe than we thought. It turns out that you don't need to completely automate a job to fundamentally change it. All you need to do is automate part of it'. Davis[11] complements this by affirming that 'the drudge work traditionally done by starting out lawyers is already vanishing and will ultimately disappear almost entirely'. This should translate into a shift in how legal services are delivered and consequently the nature of legal education.

Whilst such predicted changes may seem alarming, they also represent an opportunity for future legal professionals. For example, the automation of work processes will no doubt represent an opportunity for spearheading more creative endeavors.[12] This also extends to how we educate future legal professionals who, unburdened by the more menial tasks, will have to focus on the delivery of services artificial intelligence cannot provide, amongst which, judgement, empathy, and creativity,[13] the latter being a trait which 'cuts across disciplines and cultures as a highly coveted quality of human cognition'.[14] Moreover, as the world becomes increasingly interconnected, the dependency of sectors and events should become even more apparent, as previously discussed, highlighting the need to be cognizant of the changing landscape; what happens in one field necessarily cascades into others. Human trafficking, as will become apparent in this chapter, is a prime example of the complexities of a legal issue much of which exist outside of the law itself. As such, how we educate students must also evolve, ensuring future professionals are able to analyze events through multi-perspective lenses.

Technology is already having a large impact in the classroom. Currently, 67% of higher education institutions report on the use of technology in the classroom.[15] However, the level of technological penetration in the classroom still falls below its

[5] PwC (2022).
[6] Gartner (2021).
[7] PwC (2022).
[8] Reuters (2021).
[9] *Ibid*.
[10] Tippet and Alexander (2021).
[11] Davis (2020).
[12] Giudice (2021).
[13] Davis (2020).
[14] Henriksen et al. (2021).
[15] McKinsey (2022).

potential.[16] The technologies on offer are merely tools, the affordances of which reliant on how they are leveraged and adopted.[17] Thus, it can be concluded that the technology is not a substitute for quality of content. Rather, the technological evolution merely underscores the need for a shift in how we think about educating future legal professionals, not least by emphasizing the truly human contribution to understanding and tackling problems.

2.2 Covid-19

The Covid-19 pandemic represented a unique time in modern history, forcing the world to stop and do things differently. As observed by Chakraborty and Maity,[18] the pandemic could be characterized as the 'global health calamity of the century and the greatest challenge that the humankind [has] faced since the 2nd World War' It forced entire countries into lockdown and, in the context of higher education, the pandemic forced teaching professionals to rethink the delivery of education, moving from exclusively in-classroom teaching to online and blended models.

The changes experienced in this sector, however, extend beyond modes of delivery. These also highlighted the need to rethink assumptions about the content taught,[19] and the practice of delivering more meaningful learning activities.[20] In addition, the role of educators in supporting students' learning is evolving,[21] with a need to recognize that learning no longer occurs in silos but should instead consider the interdependency of world occurrences. Casey observed that law schools in the United States opened up greater spaces for students to discuss socio-political and economic issues in a more integrated way as a result of events spurred by the pandemic.[22] In this regard, Hollander noted that the pandemic has forced educators to relearn their ways of operating, spurring teachers to become more creative and integrative.[23]

Another resulting impact of the pandemic in the education sector refers to its adoption of technology. As Satya Nadella, Microsoft's CEO, remarked, 'We've seen two years' worth of digital transformation in two months'.[24] This is a key reflection that needs to be reviewed alongside the advent of the Fourth Industrial Revolution itself.

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[16] Frank et al. (2004) and Keengwe et al. (2008).

[17] Mishra (2012).

[18] Chakraborty and Maity (2020).

[19] Rapanta et al. (2021).

[20] Damşa et al. (2021).

[21] Rodríguez-Triana et al. (2020).

[22] Casey (2021).

[23] Hollander (2021).

[24] Shapiro (2021).

3 The Case for Interdisciplinarity

The case for interdisciplinarity in higher education is both a contemporary and a perennial one.[25] That is, interdisciplinary approaches have long been acknowledged as offering fresh 'ways of seeing the world' but that the more acute demands of today's world increasingly requires that the skills and mindset developed in students with these more challenging ways of learning are needed to prepare them as they graduate into that world. The rapid advance of technology is one reason for this: many of the tasks historically performed by skilled humans are increasingly being fulfilled by machines. This places greater emphasis on graduates and professionals who can think, adapt, and create in collaboration. Another is that graduates need to be prepared for career paths that are less linear, which are more likely to involve working across borders, and which will involve more job changes than was the experience of previous generations. Education needs to equip graduates with transferable skills and the ability to understand challenges from more than one perspective.

Law and the legal profession are no exception to this both in terms of having to adapt to a changing digital environment and the observation, made by Baron[26] last century, that the subject is not 'just rules and the techniques of rule manipulation'. And yet, the experience in so many higher education institutions is that subjects all too often continue to be taught in silo, emphasizing knowledge acquisition. This is perhaps all the more stubbornly observed in subjects like law with its obligations to the practiced profession and professional bodies.

Many of the issues that law graduates will tackle during their professional lives will be complex in nature and where those 'rules and techniques of rule manipulation' or narrowly focused law will prove insufficient to properly address. For students, and the professionals they aspire to become, to make sense of complexity, they need to appreciate multiple perspectives of multiple stakeholders. It is here that interdisciplinary learning design delivered actively in the classroom will better develop students.

There is a further reason for drawing interdisciplinarity more deliberately into the teaching of law and this is reflected in the argument made by Bello and Olutola[27] in their sobering analysis of human trafficking as well as other scholars observing the policy-making process.[28] Students should appreciate the often severe limitations of law as a policymaking tool. There is an observable overconfidence by those who make laws as well as those who practice, that the act of creating an offense by way of legislation can solve an identified problem. It very often cannot and it should not be considered as the endpoint of addressing an issue. Interdisciplinary approaches allow law to be contextualized in the context of the broader case and multiple perspectives taken, allowing for a more rounded evaluation.

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[25] For a more detailed discussion, see the works of Kockelmans (1979), Squires (1992), Davies and Devlin (2010), and Lindvig and Ulriksen (2019).

[26] Baron (1999).

[27] Bello and Olutola (2022).

[28] Barber (2016).

Interdisciplinarity, of course, is not without its challenges.[29] It places additional pressures on the tutor who is unlikely to be an expert in each of the perspectives employed. It also requires something of a change in mindset about learning resources. That is no longer relying on a single specialist text but rather curating materials that might be deployed, sometimes unpredictably, by students addressing the tasks or scenarios presented. Each of these challenges lends themselves to a more co-creational and exploratory relationship between tutor and student than the more traditional instructional approach and an environment that fosters collaboration.

4 Putting It into Practice—'Global Human Trafficking' Case Study

Having explored the evolving context and advanced the deployment interdisciplinary approaches to learning and teaching of Law, the remainder of this chapter concentrates on illustrating how this has been delivered in practice with a case study. Global Human Trafficking is a challenging module which is taught at level 5 to both students who need it to fulfil the core requirements of their degree, but also to those from other majors who can take the module as an elective. The approach is innovative in that it takes what might be considered a narrow legal issue and invites students to tackle it from a variety of different perspectives. This section highlights some of those perspectives in the shape of not only international law but also Globalisation, Migration, Crime and Gender. It shows how this interdisciplinary approach is aligned to the assessment and reflects on some of the benefits of the approach.

The ethos of the module should be considered and Global Human Trafficking forms part of the BA (Hons) Liberal Arts, which is historically made up of multiple majors. As a consequence, the interdisciplinary nature of the module's teaching and learning approach is supported by a broader programme and here it is recognized that radically changing a single module in isolation of a traditional course structure might be more ambitious.[30] Students on the Liberal Arts programme take half their modules in their chosen major, and the other half as electives from the other majors. The main aim of a liberal arts education is to achieve depth through the core modules and breadth through the range of electives.[31] A particular feature of this is that it educates the 'whole person'; the acquaintance with different disciplines offers qualitative intellectual experiences that ultimately train the mind.[32] It develops students with the ability to integrate across disciplines and perspectives, learning to think critically

[29] Holley (2009)
[30] Austin et al. (2001).
[31] Riggio (2009).
[32] Austin et al. (2001).

and intelligently.[33] This often leads to innovation, citizenship, the ability to address global challenges[34] and sustainable development goals.[35]

Given the interdisciplinary liberal arts context, the Global Human Trafficking module is designed on the premise that students have no prior knowledge of trafficking/slavery or even of the international laws that govern this issue. Instead, the module is designed to allow students to explore various global pressures and processes that contribute to the prevalence of human trafficking, as well as the tools to research a particular trafficking scenario and analyse which factors contribute to its existence. The module achieves these aims by investigating human trafficking from a range of perspectives and the relationships between them, including international law, globalisation, migration, crime and gender.

Students are given a real world scenario, a case study, as the basis for the module. The broad details are sketched out but there is plenty left unanswered for students to research, discover and ultimately shape as they work collaboratively through the planned curriculum. By way of illustration, two Case studies which have been used in the past are:

- The production of cocoa in Ivory Coast: this follows traffickers who move children across the borders of several countries, destined to work cocoa plantations. This case study looks at the families in origin countries who send their children across the border to look for work, the trafficking routes, the plantations themselves, policing and local governments, the European chocolate industry who are served by the plantations, as well as the international legal measures developed to counteract the practice.
- Sex trafficking into Western European countries: this follows organised international gangs operating from Eastern European countries where young women are recruited in their home countries by employment agencies who promise them jobs working in hotels. Instead, the women and girls end up in brothels run by criminals.

Different scenarios also allow for a focus on regions, for instance Latin America, Asia, Europe, America and Africa, as well as broader topic areas.

4.1 International Law

Law is a key component of the module and in understanding the issue but goes beyond legislative provision. The module begins the first few weeks by defining various forms of slavery and tracing the history of slavery, beginning with slavery in the classical era, in medieval times, slavery and Christianity, slavery and Islam, then moving on to transatlantic slavery.

[33] Riggio (2009).

[34] Zakaria (2015).

[35] Verma and Petersen (2018).

After this, it moves onto the early development of international law following the establishment of the League of Nations after World War I. The resulting international legislation was the 1926 Slavery Convention, which defined slavery as 'the status or condition of a person over whom any or all of the power attaching to the right of ownership are exercised'. It is important to note here that this early legislation was developed in the context of a post-war world, where empire still ruled.[36] This international law was very much developed in the interests of the European colonizing states, not the interests of the people it sought to protect. This is a key observation for students getting to grips with the challenge.

In a similar way the 1956 Supplementary Convention was developed in the context of the emerging Cold War, and in a struggle of political ideology it was used to emphasise the slavery practices of the USSR in the gulag, rather than developed to protect those vulnerable to slavery at a global scale.

As the weeks progress, the module covers various legislation in different regions at different times. It does not so much teach the content of the law, but rather focuses on understanding the socio-economic and political contexts that surround the development of legislation. Students are encouraged to take a critical stance on how law and policy governing slavery and human trafficking is developed and indeed why. Sometimes, legislation is passed for political reasons rather than with the sole intention of tackling the issue it identifies in its provisions.

4.2 Globalisation

To enable a thorough understanding of human trafficking, the module explores the consequences of globalization in some detail, particularly questioning how globalization has changed the way we work across borders, how it has weakened structures and changed culture. Relating this to trafficking, it focuses on increases in communication, cheaper travel, and opening up of borders to capital. This leads to the increases in migration across the world most notably since the late 1980s.[37]

4.3 Migration

The discussion in the module flows naturally from globalisation to migration, and it is typically at this point that students begin to make more profound connections across disciplines. They understand that slavery or human trafficking is not necessary an anomaly, but a consequence of global economic and political processes. They see the issue not simply in terms of legal remedy but multifaceted solutions.

[36] Allain (2012).

[37] Cohen and Kennedy (2013) and Castles et al. (2019).

Consider that since the late 1980s migratory flows have increased significantly, due to a range of contributing factors: the end of the Cold War; the opening up of borders; increases in global inequality; a breakdown of the political status quo in many regions leading to violent conflict; as well as more access to information and cheaper travel all lead to more people on the move globally.

In addition, where previously migration flows had followed historic colonial routes, and were more controlled by receiving states, after the fall of the Berlin Wall, migration became more spontaneous, less driven by the need of receiving states and was often portrayed as 'out of control': a domestic political issue. In response, receiving states in the West have increased border control and decreased legal avenues for migrant to enter for both migrants and refugees. The challenge for students considering these legal developments is to appreciate the motivation behind them as well as the behaviour they incentivise.

By the early to mid-1990s, we were in a global situation of increased numbers of migrants with fewer legal ways of entering destination countries, leading to migration journeys being pushed more and more underground. From a legal perspective as well as from multiple other disciplines, this is revelatory since it meant that transnational criminal gangs increased to run both smuggling and trafficking operations.[38]

4.4 Gender

Here, the module focuses gender inequality and how this contributes, in particular, to sex trafficking. Student are introduced to feminist literature as well as UN legislation relation to Violence against Women and Girls. They are, therefore, able to combine an understanding of conceptual approaches with international laws. They learn how outdated attitudes, informed by toxic masculinity contributes to the prevalence of sex trafficking. Often women are recruited from regions where gender culture remains traditional and where women in general have little opportunity to make a life in their own right, making them vulnerable to criminal trafficking organisations (references to come).

4.5 Crime

This all puts understanding 'crime' into a different perspective than simply breach of the law and corresponding legal frameworks. In that sense, it serves as an enlightening 'bookend' to the international law first encountered in the module. The multidisciplinary approach means that human trafficking as crime broadens out into understanding the rise of transnational criminal networks and the social, economic, and legal pressures that have incentivized their operations. Students, having been

[38] Castles et al. (2019) and Franko Aas (2013).

Table 1 Overview of Module Assessment

Assessment I: Research poster	Assessment II: Integrated analysis
Create a research poster, following these steps: Choose a topic • Describe the situation • What is the aim of your work, are you trying to answer any questions? • Discuss your framework of analysis; how do wider political, economic and/social structures impact on your topic? (are you using any theory, making broader links to policy, international or national law, any historical or political processes?) • Present your findings Students must also write a 300 word synopsis of the presentation, with references and bibliography	Write an advocacy report. This should evaluate the process of Human Trafficking in relation to the law and two or more of the following issues. Students should also propose solutions to the issues identified: • Migration • Organised crime • Gender • Globalisation • Prostitution • Human Rights • National and/or International policy, solutions • NGOs

presented with real-world scenarios at the beginning of the module, start to appreciate the challenges they are working through as case studies and all that entails in terms of the multi-dimensional aspects of the problem and any potential solution.[39]

4.6 Assessment and Outcomes

Finally, assessment needs to be described since it is important that the learning activities and outcomes of the module are aligned to the outputs expected of students. The overall aim of the module is that students learn to situate a real-world human trafficking case in the context of the global processes that cause the particular issue. This may be different per case study. Two assessments are set and these are designed to facilitate the learning process for students as outlined in this section (see Table 1).

4.7 Some Reflections

This case, which uses real-world studies to explore human trafficking from a range of perspectives, including law, offers an insight into the needs of law education in the future. The way that the module is designed, taught and assessed not only represents what might be described as 'good practice', but is also one which shows that international legal issues can be taught in an interdisciplinary setting with a strong focus on practice.

[39] Cohen and Kennedy (2013) and Franko Aas (2013).

The interdisciplinarity of the learning approach outlined in this chapter encourages students (and eventually as graduates) to view and solve problems through multiple perspectives and collaboratively. Students learn to situate issues very quickly, placing cases into different global processes and legal frameworks and even comparing their own scenarios with those very different problems tackled by other students. On reflection, this prepares students for the challenges of the 'real world' by developing a mindset through which they adapt their skills and knowledge to an uncertain and emerging environment. In turn, this is a skillset that will serve them well as they navigate the impact of digital change throughout their professional lives.

Although this class is not a singular or even predominantly law module, students develop a sophisticated understanding of the nature of law and its allied frameworks. This is because of the international and national nature of the situations which invite students to reflect, critique and compare what they discover about the law and all which surrounds the situations. Perhaps departing from traditional legal approaches, which focus on remedies, here students tend to be more solutions focused, generating multi-faceted ways of analysing the scenarios.

For law students this is particularly enlightening since it equips them with a skillset that will prepare them for the vagaries of the career challenges they will face in professional life. A key reflection is that this approach begins to prepare them for the rapidly changing and complex nature of the Fourth Industrial Revolution in a way that traditional law education might be said to fall short.

What is offered here is not so much a blueprint for teaching delivery than it is a philosophical approach to learning that better prepares students for the world they are about to enter. Law graduates in particular will find this supportive of how they will need do their jobs by deploying knowledge; it moves somewhat from the objective to the subjective. Whereas new technology will be capable of generating higher knowledge that was once the preserve of a human professional, the ability to understand the true nature of a problem, empathetically, represents something of a uniquely human skill that must remain at the heart of higher education.

5 Conclusion

By reporting on a tried and tested approach to learning and teaching, this chapter has explored how students have been able to understand the complexities of an issue like Human Trafficking from an interdisciplinary perspective. They have been able to move their thinking beyond the narrow confines of law and instead draw upon and deploy a range of social science approaches and contexts to thoroughly investigate a topic given topic. This means seeing a topic for all that it is—the socio-political, economic landscape, in all its complexity and levels of interconnectedness, with issues that cut across disciplines and fields. The case made is that if the issue addressed presents with this level of complexity there is a need for tutors and students to rethink how law is taught.

In making the compelling case for interdisciplinarity in teaching topics that pertain to the law and beyond, the chapter observes that the broader skills developed reflect also the needs of the changing professional world. In particular, the coming Fourth Industrial Revolution places greater emphasis on multi-dimensional approaches to problem solving as it promises technological change that replaces many of the knowledge based skills of professionals like lawyers.

Events do not occur in silos, but rather are embedded within a wider context. Law cannot exist in a vacuum and neither can the teaching of it. The case study presented is offered as an illustration of how this might be achieved, with benefits observed in practice rather than as some sort of blueprint for delivery. It sees law as just one aspect of a more complex issue, the final remedy perhaps, rather than the simple solution to tackling the problem. It accepts that there is not a single predetermined answer to the areas of concern identified. As such, students are challenged to rethink how they view solutions to issues such as human trafficking, allowing them the experience to view it from a multitude of facets which may or may not be relevant, discussing the merit of each one.

In this context, law is not considered as a solution to a global problem, but as an instrument to be used once a criminal offence is brought before a Court. Such an approach aids in addressing the need for forming more rounded professionals who are aware of the world's current complexities and are ready to tackle these more effectively.

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Civil and Procedural Law Through the Sustainable Development Goals (SDGs): A Transversal View

María Amalia Blandino Garrido and Isabel María Villar Fuentes

Abstract The commitment and responsibility to know and implement the SDGs are universal. Indeed, public authorities and civil society are called to simultaneously be active and passive subjects, protagonists to intervene and recipients of the achievements reached with all the actions that serve any of the 17 proclaimed goals. One way of countering the slow progress is through the joint and coordinated effort of researching and teaching law in universities. With this commitment, this paper aims to analyse how international and EU legislation incorporates sustainability goals related to civil and procedural law. It is based on the consideration that the contents of civil law and procedural law comprise various institutions and regulations that materialise different SDGs. SDG 16*:* Peace, Justice and Strongs Institutions have a particular impact on these areas and, more specifically, the aspects that relate to several of its targets. However, the legal implications, specifically in civil and procedural law, extend to many other objectives. This is the case of SDG 1, which aims to end poverty, SDG 5, which aims to achieve gender equality and empower all women and girls or SDG 10, whose motto is *to Reduce inequality within and among countries*, which also impacts civil and procedural aspects. Among the civil and procedural institutions that develop these objectives, we can highlight the regulations that prevent inequalities arising from poverty in access to justice, the recognition of the legal capacity of persons with disabilities or the prohibition of child, early or forced marriages.

Keywords Sustainable development goals · European law · Civil law · Procedural law

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1 The Scope of the Sustainable Development Goals (SDGS)

The UN General Assembly adopted the 2030 Agenda for Sustainable Development on 25 September 2015,[1] an action plan for individuals, the planet and prosperity, which also aims to strengthen universal peace within a broader concept of freedom.[2] In order to achieve the targets that the Millennium Development Goals failed to achieve, 17 Sustainable Development Goals (hereafter SDGs) and 169 targets were announced through this new universal Agenda. It also seeks to realise the human rights of all people and to achieve gender equality and the empowerment of all women and girls.[3]

Against this background, Agenda 2030[4] is characterised by being more ambitious in its objectives, which no longer only revolve around poverty and the environment. There are five spheres of action (known as the "The 5Ps of the Sustainable Development Goals"): people, planet, prosperity, peace, and partnership. These areas act in a coordinated manner in the three dimensions of sustainable development: economic, social, and environmental.[5] In this sense, the idea has been put forward that the SDGs can be the social contract of the globalisation era, capable of bringing security and freedom to the world.[6]

All countries and stakeholders should implement this plan through a collaborative partnership.[7] Although the SDGs are not legally binding, signatory countries must set national or transnational frameworks to implement them. At the European level, however, the 2030 Agenda cannot be seen as something new or disruptive but as generalising and inclusive.[8] Indeed, the European Union started from a strong position on sustainable development, and its influence was crucial to including SDG 16 (*Promote peaceful and inclusive societies*).[9]

International, EU and individual Member States' policy development must interlink these policy areas in a way that impacts people, the planet, prosperity, peace, and partnerships. Thus, the analysis perspective cannot be of compartmentalisation but integration and mainstreaming. Each SDG aims to achieve that goal and its associated targets and holistically seeks to improve and achieve other SDGs.

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[1] Resolution adopted by the General Assembly on 25 September 2015 (A/70/L.1), *Transforming our world: the 2030 Agenda for Sustainable Development.*

[2] Preamble UN General Assembly Resolution A/70/L.1, p. 1.

[3] Preamble UN General Assembly Resolution A/70/L.1, p. 1.

[4] The 2030 Agenda is the result of a long process of maturation, which has its precedents in the United Nations Conference on the Human Environment in 1972 and is based on the Millennium Development Goals, signed in 2000 by the international community with a deadline for measuring progress in 2015; in the same vein, in 2015 the Climate Change Agreement was approved in Paris.

[5] Preamble UN General Assembly Resolution A/70/L.1, p. 1.

[6] Alcaraz Ramos (2023), p. 38.

[7] Preamble UN General Assembly Resolution A/70/L.1, p. 1.

[8] Alcaraz Ramos (2023), pp. 21–22.

[9] Calzadilla Medina and Martinón Quintero (2022), p. 9.

The commitment and responsibility to know and implement the SDGs are universal because it considers us all as actors involved. Indeed, public authorities and civil society are called to simultaneously be active and passive subjects, protagonists to intervene and recipients of the achievements reached with all the actions that serve any of the 17 proclaimed goals. However, the UN Economic and Social Committee's 2019 Progress Report on the implementation of the SDGs highlights that progress is slow in many of the SDGs, as the most vulnerable people and countries continue to suffer the most, and the global response so far has not been ambitious enough.[10]

One way of countering the slow progress is through the joint and coordinated effort of researching and teaching law in universities.[11] Interestingly, both the academic and scientific communities support this contribution.[12] With this commitment, this paper aims to analyse the extent to which civil law and procedural law have generated the necessary mechanisms for protecting rights and freedoms while reducing inequalities under the guise of legal sustainability to identify gaps and challenges.

2 The Correspondence of the SDGS with Various Institutions of Civil and Procedural Law

This paper aims to analyse the extent to which international and, mainly, EU legislation incorporates sustainability goals related to civil and procedural law. It is based on the consideration that the contents of civil law and procedural law comprise various institutions and regulations that materialise different SDGs specifically envisaged in their goals.

Firstly, we should see where the SDGs link with civil and procedural laws. Secondly, we should identify any EU regulatory actions that are in line with the SDGs. This cross-cutting work should meet various goals in an integrated and interrelated manner.

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[10] United Nations E/2019/68 Economic and Social Council. Special edition: Progress towards the Sustainable Development Goals. Report of the Secretary-General, 2019, session 26 July 2018–24 July 2019 (https://unstats.un.org/sdgs/files/report/2019/secretary-general-sdg-report-2019--EN.pdf).

[11] The Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013, in its Whereas 2 and 10, considers that the Research and Innovation Framework Programme for the period 2021–2027 "Horizon Europe" should address global challenges, such as the United Nations Sustainable Development Goals (SDGs) and that its conception and design should be in line with the 2030 Agenda for Sustainable Development and the SDGs.

[12] Mayor Zaragoza (2015), p. 9, considers that higher education, as its name suggests, is the one that must catalyse, propose, persuade… of the need for radical and urgent changes. In short, the scientific, academic, artistic, and intellectual communities must cease to be impassive spectators of what is happening. They must become actors and protagonists in the transformations that are so urgently needed.

SDG 16: *Peace, Justice and Strongs Institutions* has a particular impact on these areas and, more specifically, the aspects that relate to several of its targets, such as target 16.3 ("[…] ensure equal access to justice for all"); 16.4 ("[…] strengthen the recovery and return of stolen assets and combat all forms of organized crime"); 16.9 ("provide legal identity for all, including birth registration") y 16.10 ("Ensure public access to information and protect fundamental freedoms"). However, the legal implications, and more specifically in civil law and procedural law, extend to so many other objectives. This is the case of SDG 1, which aims to end poverty and includes among its targets the "access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance" (1.4). Also of a solid legal nature, with relevance to civil and procedural law, is SDG 5, which aims to achieve gender equality and empower all women and girls, including through the goals of 5.1, 5.2, 5.3, 5.4, 5.6 and 5.a).[13] Promoting innovation in SDG 9, sustainable production in SDG 12 and health and wellbeing in SDG 3 also find a place in our legislation through industrial property rules. Likewise, the contents of civil law and procedural law correspond to another of the goals proclaimed by the UN, SDG 10, whose motto is *to Reduce inequality within and among countries*, which impacts civil and procedural aspects. Similarly, environmental protection is a cross-cutting objective that can be drawn from several SDGs, notably SDG 15: *Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.*

3 Measures for the Adaptation of the SDGS in Civil and Procedural Law

3.1 Civil and Procedural Measures that Contribute to Achieving SDG 1 in Order to End Poverty Situations

The end of poverty recognised in SDG 1, like the rest of the SDGs, must be interpreted at the international level, through the development of policies aimed at its eradication, as well as at the national level, insofar as States are committed to adopting actions in their legislation.

[13] "End all forms of discrimination against all women and girls everywhere" (5.1); "Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation" (5.2); "Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation" (5.3); "Recognize and value unpaid care and domestic work […] and the promotion of shared responsibility within the household and the family as nationally appropriate" (5.4); "Ensure universal access to sexual and reproductive health and reproductive rights as agreed" (5.6); o "Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws" (5.a).

Poverty has innumerable consequences at various levels, which is why these disciplines address the existing tools to alleviate its effects. These also contribute to the sustainable approach by impacting SDG 10: *Reduce inequality within and among countries.* Poverty is one of the conditions of vulnerability that generates inequality, which is why the actions developed in the legal systems reach both objectives transversally. The particular condition of vulnerability due to poverty translates, in turn, into a possible difficulty in defending the interests and rights of those affected, in the event of any violation of their legitimate rights and interests.

The EU has been developing actions and strategies to eradicate poverty and social exclusion. In November 2017, the European Parliament, the Council, and the Commission proclaimed the *European Pillar of Social Rights*, setting out 20 principles to support well-functioning and fair labour markets and welfare systems. These principles revolve around equal opportunities, access to the labour market, fair working conditions, and social protection and inclusion. Principle 11 provides children's right to protection from poverty and specific measures to enhance equal opportunities for children from disadvantaged backgrounds. The European Commission has also developed an Action Plan for the Pillar, which sets out the concrete actions to be taken to implement the principles of the Pillar.[14] The *European Pillar of Social Rights Action Plan* provides a new impetus to address poverty and social exclusion in the Union by setting the target with the 2030 horizon to reduce the number of people at risk of poverty or social exclusion by 15 million (or 5 million at the very least).

Furthermore, the *EU Strategy on the Rights of the Child*[15] states that "children will be able to get good education and healthcare and families will have enough money to meet children's needs". The *Council Recommendation establishing a European Child Guarantee*[16] is also based on the consideration that "together with its Member States, the Union is fully committed to being a frontrunner in implementing the United Nations 2030 Agenda and the United Nations Sustainable Development Goals, including those on eradicating poverty […]" (Whereas 8) and that "the objective of this Recommendation is to prevent and combat social exclusion by guaranteeing the access of children in need to a set of key services. This includes mainstreaming a gender perspective in order to take into consideration the different situations of girls and boys, by combating child poverty and fostering equal opportunities" (Whereas 15). Finally, the *European Platform on Combatting Homelessness*[17] establishes a series of actions to ensure concrete progress in Member States fights against homelessness.

[14] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Pillar of Social Rights Action Plan', COM(2021)102 final.

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'EU Strategy on the Rights of the Child', COM (2021) 142 final.

[16] Council Recommendation *Establishing the European Child Guarantee* (EU) 2021/1004 of 14.6.2021.

[17] Lisbon Declaration on the European Platform on Combatting Homelessness, 21.6.21.

From the point of view of civil and procedural law, legislative measures that help to avoid situations of poverty include the following: the family maintenance obligations, especially when children are minors; regulations to protect the consumer contracting party, in particular, to ensure that the content of contracts is balanced and free of unfair terms[18]; or regulations that prevent inequalities arising from poverty in the area of access to justice.[19]

3.2 The Guarantee Contained in SDG 1, Target 4, Regarding Access to the Property, Inheritance and Economic Services

Of relevance among the targets of SDG 1, which is aimed at measures to end poverty, is target 1.4, which promotes the "access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance". The promotion of this objective requires a cross-cutting interpretation imbued with the sustainable nature of the rights recognised.

The right to enjoy property ownership and bequeath is recognised in Art. 17 of the Charter of Fundamental Rights of the European Union.[20] Access to the property is promoted through mortgage credit agreements. European legislation now aims to ensure a secure, agile, and effective legal regime to protect this type of operation.[21]

The social function of property takes on particular significance in housing. The protection of the home is recognised in Art. 8 of the European Convention on Human Rights, which recognises the right of everyone to respect his private and family life, his home, and his correspondence. The intimate connection between home and

[18] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

[19] Several international texts proclaim the right to free legal aid. Thus, in Art. 47, third paragraph, the Charter of Fundamental Rights of the European Union (Official Journal of the European Communities C 364/1, 18.12.2000, 2000/C 364/01), guarantees that "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". In the same sense, Art. 6.3.c) of the European Convention on Human Rights states that everyone charged with a criminal offence has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

[20] Art. 17 (Right to property) of the CFR provides as follows: "1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected".

[21] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 *on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.*

privacy has given rise to a consolidated case law of the European Court of Human Rights.[22]

As far as the right to inheritance is concerned, respect for the testator's will is the fundamental law of inheritance law. Consequently, with the limit of the legitimate rights (in those systems, such as the Spanish one, in which they are established), it must be guaranteed that the testator's wishes are fulfilled when his last will is executed. The prevalence of the will of the deceased when deciding the destiny of the succession implies the recognition of a "freedom of testament". This "freedom to testate" includes the free decision to make a will and determine the will's content. The EU, through Regulation 650/2012,[23] establishes all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights, and obligations because of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession. It regulates the jurisdiction, applicable law, recognition and enforcement of decisions, acceptance, and enforcement of authentic instruments in matters of succession, and the creation of a European Certificate of Succession.

3.3 Gender Equality in Civil Institutions and the Process: Adapting SDGs 5 and 10

Gender equality is considered a fundamental right but also one of the essential foundations for building a peaceful, prosperous, and sustainable world. On this premise, SDG 5 aims to *Achieve gender equality and empower all women and girls.* This SDG connects transversally with SDG 10, which promotes reducing inequalities and ensuring that *no one is left behind* as an integral element of achieving the SDGs. Historically, the elimination of all forms of discrimination between men and women has been proclaimed at the international level, by the United Nations, specifically in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[24] as well as by the EU in Directives 2002/73[25] (now abrogated) and 2004/113.[26]

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[22] Of note is the case of Sargsyan v. Azerbaijan, Judgment of 16 June 2015.

[23] Regulation (EU) No 650/2012 of the European Parliament and the Council of 4 July 2012 on *jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.*

[24] Adopted and opened for signature and ratification or accession by the General Assembly in its resolution 34/180 of 18 December 1979.

[25] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 *amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.*

[26] Council Directive 2004/113/EC of 13 December 2004 *implementing the principle of equal treatment between men and women in the access to and supply of goods and services.*

Equal treatment of women has necessitated repeated amendments to family law, with a logical recognition that spouses are equal in rights and duties, as well as through the establishment of a regime of joint ownership and exercise of parental authority.

One area of inequality for women is child, early or forced marriages, which is addressed in target 5.3 ("Eliminate all harmful practices, such as child, early and forced marriage […]"). As the European Parliament has highlighted in its Resolution of 4 July 2018 *Towards an EU external strategy against early and forced marriages—next steps*,[27] these marriages are "a serious violation of human rights and, in particular, women's rights, including the rights to equality, autonomy and bodily integrity, access to education and freedom from exploitation and discrimination, and are a problem that exists not only in third countries, but might also occur in some Member States". The Report on the Resolution mentioned above "calls on legislators, both in the EU Member States and in third countries, to set the minimum uniform age for marriage at 18 years".[28] Regarding the freedom to marry and choose a spouse, the Istanbul Convention classifies forced marriage as a form of violence against women.[29]

Concerning women's access to property ownership, as referred to in target 5.a), at the European level, it is worth mentioning the Directive 2004/113/EC of 13 December 2004, *implementing the principle of equal treatment between men and women in the access to and supply of goods and services.* Its object is "to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women" (Art. 1). It is foreseen that Member States will ensure the existence of judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures to enforce compliance with the obligations laid down by this Directive (Art. 8.1); that will introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of a discrimination, in a way which is dissuasive and proportionate to the damage suffered (Art. 8.2); and that the associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive (Art. 8.3). With regard to the burden of proof, it is established that "Member States shall take such measures as are necessary […] to ensure that […] it shall be for the respondent to prove that there has been no breach of the principle of equal treatment" (Art. 9.1). By the end of 2022, the

[27] P8_TA(2018)0292.

[28] Report Towards an EU external strategy against early and forced marriages – next steps, 24.5.2018 - (2017/2275(INI)). A8-0187/2018.

[29] The *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Istanbul, 11.V.2011, declares that "Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised" (Art. 37).

Council has approved a Proposal for a Directive that aims at creating a strengthened framework for equality bodies in the European Union to promote equal treatment and equal opportunities and combat discrimination on all grounds and in the fields set out by various Equality Directives.[30] This Proposal defines "the designation of one or more equality bodies by Member States, to tackle discrimination".[31] Faced with situations of possible discrimination, the Proposal proposes a threefold alternative solution: "Amicable settlements" (Art. 7), "Opinions and decisions" (Art. 8) and "Litigation" (Art. 9).[32]

Achieving equality for women must start as a priority and be indispensable in the fight against any form of violence against women. The social need to achieve the peaceful coexistence of women is one of the targets of goal 5, precisely target 2 ("Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation"). The UN, in the Fourth World Conference on Women, already recognised that "violence against women is an obstacle to the achievement of the objectives of equality, development and peace" and that "violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms".[33] For victims of gender-based violence, procedural specialities should be recognised to avoid double victimisation caused by the process, in line with Directive 2012/29.[34]

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[30] Proposal for a Council Directive *on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services*, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC, Brussels, 7.12.2022 COM(2022) 689 final 2022/0401 (APP). The aim of this Proposal is "to establish binding standards for equality bodies in the field of: (a) equal treatment between persons irrespective of their racial or ethnic origin, (b) equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, and, (c) equal treatment between women and men in matters of social security and in the access to and supply of goods and services" (Explanatory Memorandum). The Commission has adopted a separate proposal to establish binding standards for equality bodies in equal treatment and equal opportunities between women and men in matters of employment and occupation, including self-employment ('parallel proposal').

[31] Art. 2 Proposal for a Council Directive.

[32] Art. 9 grants litigation powers to equality bodies to ensure that the principle of equal treatment laid down in Directives 79/7/EEC, 2000/43/EC, 2000/78/EC and 2004/113/EC is complied with. Litigation powers allow equality bodies to support victims in accessing justice and elicit legal interpretation of rules and social change via strategic litigation. In that regard, acting in their name, in the public interest, in the absence of an identified victim and in support or on behalf of several victims is particularly important. Finally, the possibility for equality bodies to submit oral or written statements to the court (e.g., amicus curiae) usefully complements these litigation powers, as it is less resources intensive for equality bodies but still allows them to submit their expert opinion to courts.

[33] Report of the Fourth World Conference on Women, 4–15 September 1995, Beijing, China (112).

[34] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 *establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*.

3.4 Achieving SDGs 10, Target 2 and 16, Target 3: Equality for Persons with Disabilities in the Exercise of Their Legal Capacity

Objective 10 aims to reduce *inequality within and among countries*; it must start with eliminating any discrimination enunciated by the various Declarations of Rights. This is the case of the Charter of Fundamental Rights of the EU, Art. 21.1, which prohibits all discrimination, in particular on the grounds of disability. Specifically, target 10.2 aims to "empower and promote the social, economic and political inclusion of all, irrespective of […] disability […]". Disability has been a particular condition of vulnerability that has historically been aggravated by legislators who have denied recognition of legal capacity to those affected by mental or psychological impairments. This necessary recognition of legal capacity has a strong sustainability character, as it underpins target 10.3 ("Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard").

The Convention on the Rights of Persons with Disabilities (CRPD)[35] marked a shift in protecting the freedoms and rights of persons with disabilities to gain global recognition of disability as a human rights issue. The Preamble of the CRPD recognises "the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices". The Convention is based on the consideration that persons with disabilities include "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".[36] In turn, it contains the commitment of the Signatory States to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity".[37] In its far-reaching Art. 12, the Convention obliges States Parties to recognise that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" (paragraph 2) and the obligation to provide them with "the support they may require" to exercise it (paragraph 3), through "safeguards" that ensure respect for "the rights, will and preferences of the person" (paragraph 4).

[35] Adopted 13 December 2006 by Sisty-first session of the General Assembly by Resolution A/RES/61/106.

[36] Art. 1, second paragraph, CRPD.

[37] Art. 1, second paragraph, CRPD.

3.5 Promoting Innovation in SDG 9, Sustainable Production in SDG 12 and Health and Well-Being in SDG 3 Through the Defence of Industrial Property

SDG 9: *Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation*, more specifically, goals 4[38] y 5,[39] have their specific adaptation in the regulatory framework of industrial property and, in particular, patents. Likewise, SDG 12.a ("Support developing countries to strengthen their scientific and technological capacity to move towards more sustainable patterns of consumption and production") requires strong protection of exclusive rights combined with the need for flexibility and speed required for innovation and research. Industrial property is recognised in Art. 17, paragraph 2 of the Charter of Fundamental Rights of the EU. The many Directives aimed at its protection show the importance attached to it.

EU legislation in this area consists essentially of the Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 and the Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.

Concerning SDG 3, target 8, aimed at "[a]chieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all", the EU regulates a system for granting patents for disadvantaged countries. We refer to Regulation (EC) No 816/2006 of the European Parliament and of the Council of 17 May 2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems. The purpose of this Regulation is "to address public health problems faced by least developed countries and other developing countries, and in particular to improve access to affordable medicines which are safe and effective, including fixed-dose combinations, and whose quality is guaranteed" (Whereas 5).

3.6 The Guarantee of Equal Access to Justice in SDG 16

SDG 16: *Peace, Justice and Strong Institutions* is an aspiration to achieve a strict rule of law with strong institutions in the face of the existence, unfortunately, of

[38] Target 4 of SDG 9 aims to "[b]y 2030, upgrade infrastructure and retrofit industries to make them sustainable, with increased resource-use efficiency and greater adoption of clean and environmentally sound technologies and industrial processes, with all countries taking action in accordance with their respective capabilities".

[39] The aim of target 5 of SDG 9 is to "[e]nhance scientific research, upgrade the technological capabilities of industrial sectors in all countries, in particular developing countries, including, by 2030, encouraging innovation and substantially increasing the number of research and development workers per 1 million people and public and private research and development spending".

numerous "failed States". One of the fundamental pillars of a healthy rule of law is access to and proper functioning of justice, which is embodied in target 3 of this goal ("Promote the rule of law at the national and international levels and ensure equal access to justice for all"). The goal of equal Access to justice for all reinforces the aspiration of Leaving no one behind and is interlinked with objective 10: Reduced inequalities, especially with targets 2 and 3. In this respect, the European Economic and Social Committee has emphasised that "[w]hat defines the social dimension in a comprehensive sustainability policy is not only that it further develops traditional social policies (such as better welfare payments), but that it does more for justice and participation in the economy—to the benefit of people and regions".[40]

SDG 16 revolves around three concepts, *Peace, Justice and Strong Institutions*, which can be understood as intertwined. The achievement of strong institutions and the healthy rule of law rather than failed states requires independent justice and equal access to justice for all citizens.[41]

Justice referred to in this SDG 16 has a fundamental value as a guarantor of respect for legality and fundamental rights and freedoms. We must focus on access to justice as a fundamental guarantee of society. To this end, access to justice for people in vulnerable conditions is crucial. At this point, the momentum of the normative body of the 100 Brasilia Rules on Access to Justice for Persons in Conditions of Vulnerability must be recognised.[42] These Rules define vulnerable persons as a group who "are in a condition of vulnerability when their capacity to prevent, resist or overcome an impact that places them at risk is not developed or is limited by various circumstances, in order to exercise fully before the justice system, the rights recognised by the legal system" (Rule 3). The recognition of the need for specific measures to promote access to justice for vulnerable groups has materialised in different ways in States, not only from the perspective of the existence of an equal right to enforce rights but also from a factual view of the specific procedures to facilitate such access.[43]

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[40] Opinion of the *European Economic and Social Committee*, *Leaving no one behind when implementing the 2030 Sustainable Development Agenda,* SC/053, 1.3.

[41] For Alcaraz Ramos (2023), p 33, inequality is not only an attack on justice, conceived as a strong principle of democracy, but also calls into question the very structure of our societies.

[42] XIV Ibero-American Judicial Summit. Brasilia, 4–6 March 2008 (https://www.acnur.org/fileadmin/Documentos/BDL/2009/7037.pdf).

[43] Birgin and Gherardi (2012), p. XIV y XVII, raise this binomial of the concept of "access to justice", which is fundamental to correctly articulate development policies and the factual facilitation of access to justice. They also echo the 100 Brasilia Rules in the delimitation of persons in conditions of vulnerability and cite some measures. Capeletti M, Garth B (1983) El acceso a la justicia. Movimiento mundial para la efectividad de los derechos, Informe general. Colegio de Abogados del Departamento Judicial de la Plata, p 20 - 22, shows the evolution of the problem of access to justice from its consideration as a natural right in the liberal ideology of the eighteenth and nineteenth centuries, where the State ignored the "legal indigence" of the citizenry, to the conception of effective and equal access to justice as a social right. These authors stress that the recognition of the importance of effective access to justice would be meaningless without providing the legal means for rights to be exercised practically.

In the area of access to justice for consumers, it is worth mentioning Directive 2020/1828 of 25 November 2020,[44] which has as its object "to ensure that at Union and national level at least one effective and efficient procedural mechanism for representative actions for injunctive measures and for redress measures is available to consumers in all Member States".[45] In short, it involves the development of collective redress with the articulation of the entities empowered by the Member States to defend the individual consumer in national and cross-border infringements, overcoming the obstacles of the costs of the process and imbalances between the parties.[46]

3.7 Recovering and Returning Stolen Assets and Combating All Forms of Organised Crime Recognised in SDG 16, Target 4

Target 4 of SDG 16 identifies the economic aspects of crime as one of the essential elements to target in the fight against crime. This goal establishes, among other things, the desirability to "strengthen the recovery and return of stolen assets and combat all forms of organized crime". In this respect, it is worth noting the concern at the international level, and more specifically in the EU, about the need to combat the enrichment of criminal activity through confiscation.[47] Awareness of the new scenario of cross-border organised crime and its economic benefits has a starting point with the Communication from the Commission to the European Parliament and the Council *Proceeds of organised crime. Ensuring that "Crime does not pay"*.[48] This line has been continued by the Stockholm Programme and the Conclusions of the Justice and Home Affairs Council on asset confiscation and recovery, adopted in June 2010, which recommend intensified coordination between Member States in the framework of the United Nations Convention against Corruption (UNCAC), the Group of States against Corruption (GRECO) and the work of the Organisation for Economic Co-operation and Development (OECD) on the fight against corruption. The Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 *on the freezing and confiscation of instrumentalities and proceeds of crime in*

[44] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 *on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.*

[45] Whereas 7.

[46] Planchadell-Gargallo (2022), p. 285.

[47] Farto Piay (2020), p. 164, considers, in relation to the deprivation of the use and enjoyment of criminal assets and rights subject to confiscation, that this is an obligation to avoid any income or profit from the criminal offence, as well as the need to cut off its sources of financing and, with it, the commission of new crimes.

[48] Brussels, 20.11.2008 COM(2008) 766 final.

the European Union, establishes minimum rules on the freezing of property with a view to possible confiscation and on the confiscation of property in criminal matters.

3.8 Access to Legal Identity, Including Through Birth Registration SDG 16, Target 9

Target 16.9 ("provide legal identity for all, including birth registration") requires that recognition of legal personality be acquired at birth without any additional temporal or other requirements. It also requires that birth registration be organised in the States through an organised and efficient system.

One of the manifestations of access to legal identity is the right to know one's origins. At the international level, the right to know the identity of the biological parents is provided for, with different nuances, in Art. 7.1 of the Convention on the Rights of the Child and in Art. 30 of The Hague Convention.[49] At the European level, it is provided for in the European Charter on the Rights of the Child.[50]

3.9 Measures Ensuring Public Access to Information and the Protection of Fundamental Freedoms in SDG 16, Target 10

Target 10 of SDG 16: *Peace, Justice and Strong Institutions* aim to "ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements". Access to information is recognised in different areas. We can cite, firstly, the duties imposed on contracting States and, in particular, for the protection of the consumer or user. Secondly, access to information is also recognised in health-related interventions, where the patient's right to information plays an essential role. The field of data protection should also be mentioned as one of the essential areas in which the right to information plays an important role.[51]

Concerning the procedural protection of fundamental freedoms, States' legal systems must recognise effective procedures for the protection of the fundamental rights of the individual.

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[49] Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

[50] Official Journal of the European Union No C 241 of 21 September 1992.

[51] Art. 13 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 *on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC* (General Data Protection Regulation), determines the information to be provided when personal data are obtained from the data subject.

3.10 The Cross-Cutting Value of Environmental Protection in SDGs 6, 7, 13, 14 and 15

The five central axes around which the SDGs revolve—planet, people, prosperity, peace and partnership—are holistically reflected in the protection of the environment. The SDGs 6: *Clean Water and Sanitation*, 7: *Affordable and Clean Energy,* 13: *Climate Action*, 14: *Life Below Water* and 15: *Life on Land* are connected to SDG 1: *No Poverty*, 2: *Zero Hunger* and 3: *Good Health and Well-Being*. Environmental protection articulates and enables achieving a wide range of sustainability objectives, hence the importance of its adequate and effective protection. In this respect, the European Economic and Social Committee considers that "social concerns should be addressed in full synergy with environmental and economic ones".[52]

National courts must ensure access to justice for the resolution of disputes relating to acts or omissions by private persons or public authorities in breach of national environmental provisions under Art. 9 (2) and (3) of the Aarhus Convention.[53] At the EU level, access to justice in environmental matters is also guaranteed regarding the acts and omissions of public authorities.[54]

4 Teaching Transversal Competencies in Civil and Procedural Law Through the Sustainable Development Goals (SDGS)

4.1 The Introduction of Sustainability in University Studies

In 1987 the World Commission on Environment and Development (UNCED), through the Brundtland Commission Report (1987) "Our Common Future", introduced the concept of Sustainable Development, defining it as *development that meets the needs of people today without compromising the ability of future generations to meet their own needs.*

In 1992, the UNCED brought together representatives of 179 governments in Rio de Janeiro, Brazil, in what is known as the "Earth Summit". At this event, the critical issues of sustainability and the conservation of natural resources were raised; a plan

[52] Opinion of the *European Economic and Social Committee*, *Leaving no one behind when implementing the 2030 Sustainable Development Agenda,* SC/053, 1.2.

[53] Convention on *Access to information, public participation in decision-making and access to justice in environmental matters done at Aarhus*, Denmark, on 25 June 1998.

[54] Arts. 10 a 12 of the Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

of action for a global future with concrete goals were drawn up, creating a working agenda for the new century, the so-called "Agenda 21" (1992).

While precedents identify Higher Education as essential for solving many global problems, Chapter 36 of Agenda 21 recognises that Education is critical to achieving Sustainable Development. Numerous universities have signed declarations, such as the Talloires Declaration (1990) or the Copernicus Charter (CRE 1993), which commit them to introduce Sustainable Development into the education they offer. These declarations have responded to the international awareness of the planet's unsustainability. In 2002, the United Nations proclaimed, for 2005–2014, the Decade of Education for Sustainable Development, designating UNESCO as the implementing agency for the Decade (2002).

The primary vision of the Decade is a world in which everyone could benefit from education and learn the values, behaviours and lifestyles necessary for a sustainable future and the positive transformation of society.

The new generations must be prepared by acquiring essential competencies coherent with sustainability that will enable them to make appropriate decisions during their personal and professional lives.[55] Undoubtedly, higher Education is a vital tool for achieving Sustainable Human Development. This forces the university to redesign itself. It cannot continue functioning as it has been up to now if it wants to train professionals capable of facing current and future challenges.

In this sense, the university should not limit itself to generating disciplinary knowledge and developing skills; as part of a broader cultural system, its role is to teach, foster and develop the values and attitudes required by society. Universities must prepare professionals who can use their knowledge in a scientific context and for social and environmental needs. It is a matter of approaching the whole educational process holistically, introducing competencies for sustainability in a transversal way so that the student learns to make decisions and carry out actions based on sustainable criteria.

4.2 The SDGs in Cross-Curricular Learning in the Subjects of Civil Law and Civil Procedural Law

On the road to Sustainable Development, as proposed by the 2030 Agenda and the achievement of the SDGs, education is presented as the main driver to achieving the 17 goals. Target 4.7 of SDG 4 aims to ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global

[55] Education for Sustainable Development Goals: learning objectives (2017). UNESCO [65157]. p. 11, declares that "[t]he cognitive domain comprises knowledge and thinking skills necessary to better understand the SDG and the challenges in achieving it".

citizenship and appreciation of cultural diversity and culture's contribution to sustainable development.[56] The content of civil and procedural law subjects are materialised in different SDGs. The cross-disciplinary perspective in studying civil law and civil procedure is also essential for students. The aim is to develop a strategy for achieving this objective in Law studies, specifically in the subjects of Civil Law and Procedural Law, to fully incorporate the ODs into the student's learning process. It is necessary to highlight the culture of sustainable development in the contents of the subjects involved and simultaneously transmit this knowledge and competencies through a methodology with a sustainable approach.

The methodology will consist of individual work with readings and reflections on identifying legal institutions and the SDGs and cooperative work through debates, which develop a critical and reflective spirit. In both cases, the channels for obtaining and developing materials will be through information and communication technologies (SDG 9: Industry, innovation, and infrastructure, 9. c: significantly increase access to information and communications technology and strive to provide universal and affordable access to the Internet and SDG 12: Responsible consumption and production, 12.5: substantially reduce waste generation through prevention, reduction, recycling and reuse).

The assessment will use a mixed system: an evaluation of theoretical and practical knowledge by the teaching staff and a self-assessment by the students regarding their reflections and conclusions concerning the application of the SDGs in the contents of the subjects involved.

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[56] The "Youth Declaration on the Transformation of Education" adopted by the UN at the Education Transformation Summit 2022, builds on the 2030 Agenda for Sustainable Development, in particular SDG 4 (https://www.un.org/sites/un2.un.org/files/2022/09/tes_youthdeclaration_en.pdf).

The Challenges Involved in Teaching About the Rule of Law as a Fundamental Value of the EU System

Ilina Cenevska

Abstract As the state of the rule of law continues to deteriorate in certain EU Member States, the EU is being presented with a unique challenge—that of protecting the value of the rule of law against internal systematic violations thereof. In the face of these ongoing developments, it has equally become a challenge for instructors at EU and non-EU universities who teach about the rule of law as an EU value to fully deliver the rule of law 'message' to their students. This chapter will firstly elaborate on the importance of the rule of law as a baseline principle of the EU framework, providing insight into the current state of play regarding the EU's rule of law issues. Secondly, the analysis will weigh in on the most appropriate methodological approaches to be employed in the university-level instruction covering the fields of EU Law and EU studies more broadly. Thirdly, the chapter will specifically look into the most suitable and most effective methodological tools for teaching the rule of law as an area of study. Lastly, conclusions will be drawn about the ways in which instructors can improve the methodological toolkit they utilize when teaching about the rule of law as an EU value as well as a general concept, such that would allow students to internalize their knowledge of the different components of the rule of law and, as a result, be prepared to successfully apply this knowledge to practical, real-world situations.

Keywords EU values · Rule of law · EU studies · Teaching methodology

1 Introduction

The rule of law is crucial to the proper functioning of any given society and yet, as a vastly diverse and complex concept it is still subject to varying interpretations and different ways of applying it. This contribution addresses this complexity while also highlighting the potential difficulties associated with teaching on the rule of law as a

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foundational value underpinning the EU political and legal order. It aims to provide answers to the question regarding the most suitable approaches to be adopted in educating students on the key components of the rule of law and developing their comprehensive understanding thereof.

As a uniquely complex and versatile,[1] but also "somewhat diffuse"[2] concept, the rule of law finds expression in various contexts—national (state), regional (e.g., European, EU) and international. In a general sense, to observe the rule of law means much more than to merely comply with rules.[3] As a legal concept, the rule of law requires that law binds all, including the state and the people.[4] The rationale of the rule of law is rooted in the need to protect individuals from the exercise of arbitrary power,[5] signifying that the actions of the sovereign (in modern times, the actions of those in power) cannot be unlimited nor unbridled.[6] Equally, as a context-dependent concept,[7] the precise content and interpretation of the rule of law is informed by the given historical and geographical setting, the legal and other traditions of the interpreter, and the context in which such interpretation takes place.[8] Although the usefulness and necessity of the idea of the rule of law is universally recognized, there are nevertheless distinct approaches (e.g., *formal* and *substantive*, or *thin* and *thick*) that have been distilled through examining the extent of compliance with *one particular* rule of law concept.[9] The formal dimension of the rule of law derives from the requirement that the governing institutions comply with the rules of 'formal legality' to the fullest possible extent—such formal legality denoting that state action is subject to the law and adheres to the core characteristics of the law.[10] Those characteristics include: generality, clarity, promulgation, stability, consistency between rules and behavior, non-retroactivity, non-contradictory rules, and not requiring the impossible.[11]

Fundamental to the organization of any given political system, the concept of the rule of law stems from liberal democracy and is a pre-condition for the exercise of a whole array of civil and political rights which are crucial to democracy and are embedded in any operational legal system.[12] However, this is not to infer that improving the state of the rule of law would automatically improve the state of democracy in a society—while the rule of law and democracy are intricately linked,

[1] Walker (2009), p. 119.

[2] Carothers (2003), p. 8.

[3] Palombella (2010) and Palombella (2016), p. 40.

[4] Moller (2018), p. 29 and Drinóczi and Bień-Kacała (2021a), p. 17.

[5] Palombella (2016), p. 40.

[6] Palombella (2016), pp. 40, 42; See also McIlwain (1947), pp. 67–92.

[7] Moller (2018), p. 33 and Bedner (2018), p. 41.

[8] Tamanaha (2012), p. 247 and Drinóczi and Bień-Kacała (2021a), p. 11.

[9] Drinóczi and Bień-Kacała (2021a), p. 11.

[10] Moller (2018), p. 29 and Drinóczi and Bień-Kacała (2021a), p. 17.

[11] Fuller (1969), in chapter 2 and Palombella (2016), p. 40.

[12] Carothers (2003), p. 7.

still, deficiencies in the rule of law can frequently be found within democratic political systems[13] (the Hungarian 'illiberal democracy' model which will be briefly discussed Part 2 below serves as a poignant example).[14] Moreover, democracy can often times exist alongside considerable shortcomings in the state of the rule of law, even in countries that are recognized Western democracies and serve as a model for developing and post-communist countries.[15]

This contribution focuses on the 'rule of law' as a foundational value of the EU's political and legal system as well as an exceptionally diverse and robust concept in its own right. On account of the rule of law backsliding developments continuing to take place in certain EU Member States, the theme of the rule of law has pervaded the EU discourse as the Union is being presented with a unique challenge—one of protecting the value of the rule of law against some of its own Member States' systematic violations thereof. In the face of these ongoing developments, it has equally become a challenge for professors (teachers) at EU and non-EU universities who teach the rule of law in its iteration as an EU value to fully deliver the rule of law 'message' to their students. The contribution will firstly expand on the importance of the rule of law as a baseline principle of the EU politico-legal framework and offer insight into the current state of play concerning the rule of law in the EU. Secondly, from a pedagogical and didactical vantage point, the contribution will explore the most appropriate methodological approaches to be employed in the university-level instruction covering the fields of EU Law and EU studies more broadly. Thirdly, the focus of the analysis will shift to those methodological tools that are considered as the most suitable for the teaching that specifically addresses the subject of the rule of law. The fourth and last part of this contribution will draw conclusions relevant to the improvement of the methodological toolbox available to professors when teaching about the rule of law in such a way that would allow students to internalize their knowledge of the different components of the rule of law and, as a result, be prepared to effectively apply this knowledge in their professional careers and be able to anticipate and confront the common traps that institutions in power sometimes deploy in order to misrepresent their disregard for the rule of law, giving a semblance that their actions are governed by it.

2 Is There an EU-Specific Version of the Rule of Law?

Seeing as the rule of law is a context-related and a time- and location-bound concept,[16] it is worth lending insight into how the rule of law is understood and applied within the EU context. The forging of an EU-specific understanding of the rule of law is logical and even expected for a multi-level governance polity such as the Union

[13] Carothers (2003), p. 7.

[14] On this topic, see Drinóczi and Bień-Kacała (2021a, b).

[15] Carothers (2003), p. 7.

[16] Drinóczi and Bień-Kacała (2021a), p. 13.

which exercises supranational authority and power and at the level of which law- and policy-making processes take place.[17] It has been argued that when a Member State's compliance with the 'rule of law' is being evaluated, the term is understood as referring to the observance of a particular 'rule of law' concept implemented within a particular (Western) kind of constitutionalism.[18] It therefore follows that the (Western) European states and the European Union have been fostering a distinct kind of constitutionalism that brings with it a particular understanding of the rule of law.[19] Some scholars have made the deliberate choice of using the broader designation 'European' instead of 'EU' rule of law to convey an understanding of the rule of law that is the product of a shared history and a common European heritage of values and principles.[20] In its thinnest legal sense, the European rule of law is a legally enforceable concept that embraces a formal legality, which necessarily encompasses the regulatory and judicial enforcement of EU law.[21] Nevertheless, as a concept applied both at the European and domestic level, the European rule of law is a concept that is more than thin and leaning towards thick given that it not only prescribes features of formal legality,[22] but also (to a given extent) places demands regarding the specific content of domestic laws that would make these compatible with EU rules and principles.[23]

The rule of law figures among the values enshrined in *Article 2 TEU* as values upon which the Union is founded and which are common to the Member States—the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.[24] These are values shared by all the Member States, the Court of Justice of the EU (CJEU) having repeatedly stated that the former have freely and voluntarily committed themselves to these common values and, as such, to respect those values and undertake to promote them.[25] Hence, the EU legal order is based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that those

[17] Williams (2010), p. 77.

[18] Kochenov (2017), p. 429 and Drinóczi and Bień-Kacała (2021a), p. 16.

[19] Drinóczi and Bień-Kacała (2021a), p. 36.

[20] Drinóczi and Bień-Kacała (2021a), pp. 17–19; Gosalbo-Bono calls it the "European way" of the rule of law as it derives from the EU law system and the system established under the European Convention of Human Rights (Gosalbo-Bono 2010, p. 259).

[21] Drinóczi and Bień-Kacała (2021a), p. 36.

[22] Drinóczi and Bień-Kacała (2021a), p. 19.

[23] Drinóczi and Bień-Kacała (2021a), p. 19.

[24] For a commentary on the terminological inconsistency and qualitative distinction between qualifying the rule of law as a value as opposed to classifying it as a principle, see Cenevska (2020b), pp. 8–9.

[25] Emphasis added; See C-896/19 *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311, para. 61; C-619/18 Commission v Poland, ECLI:EU:C:2019:531, para. 42; C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union,* ECLI:EU:C:2018:999, para. 63; C-64/16 *Associação Sindical dos Juízes Portugueses* (Portuguese judges) EU:C:2018:117, para. 30.

Member States share with it, those same values.[26] Furthermore, compliance with the Article 2 values is a condition for the Member States to be able to enjoy the rights deriving from the application of the Union Treaties[27] as well as a necessary condition that any European state applying for EU membership has to meet.[28]

Back in the 1980s, at the time when the *Les Verts* judgment was handed down, the (then) European Economic Community (EEC) was viewed by the CJEU as a *community based on the rule of law* inasmuch as neither its member states nor its institutions could avoid a review of whether the measures adopted by them are in conformity with the Community's basic constitutional charter, the (then) EEC treaty.[29] The CJEU has emphasized in subsequent cases that Member States cannot amend their legislation in such a way as to bring about a reduction in the protection of the rule of law as a "value which is given concrete expression by, inter alia, Article 19 TEU."[30] In particular, Member States are required to ensure that, in the light of the value of the rule of law, any regression of their laws on the organization of the justice system is prevented, and refrain from adopting rules which would undermine the independence of the judiciary.[31] *Article 19 TEU* is the provision which gives *concrete expression* to the value of the rule of law,[32] entrusting Member States with the responsibility to guarantee the full application of EU law, including the judicial protection of individual rights under that law, by the national courts and tribunals and the Court of Justice (of the EU) itself.[33] In this vein, the second subparagraph of Article 19(1) TEU[34] precludes those national provisions relating to the organization of the justice system which are such as to constitute a reduction in the protection of the

[26] Emphasis added; See Case C-619/18 *Commission v Poland*, para. 42; Case C-621/18 *Wightman*, para. 63; C-896/19 *Repubblika v Il-Prim Ministru* (*Repubblika*), ECLI:EU:C:2021:311, paras. 62; C-64/16 *Associação Sindical dos Juízes Portugueses* (*Portuguese judges*), EU:C:2018:117, para. 30; Emphasis added; *Repubblika*, para. 62; *Portuguese judges,* para. 30.

[27] Repubblika, para. 63.

[28] See Art. 49 TEU.

[29] Case 294/83 Partie Ecologiste 'Les Verts' v. Parliament ECLI:EU:C:1986:166 [1986] ECR 1339, para. 23.

[30] Repubblika, para. 63; Also, see, to that effect, judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraph 108).

[31] Repubblika, paras. 63–65; For a discussion on the obligation of non-regression, see Leloup et al. (2021); For a poignant discussion on what the *Repubblika* case adds to the CJEU's case law regarding the rule of law obligations of Member States as well as the EU candidate countries, see Łazowski (2022); For a commentary on how the EU's pre-accession rule of law conditionality matches the post-accession rule of law reality in certain Member States, see Cenevska (2020a).

[32] Emphasis added; *A. B. and Others*, para. 108; *A. K. and Others*, para. 167.

[33] Emphasis added; *A. K. and Others*, para. 167.

[34] Article 19(1) TEU states that: "The Court of Justice of the European Union […] shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

value of the rule of law, and in particular the guarantees of judicial independence.[35] The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, qualifies as a general principle of EU law stemming from the constitutional traditions common to the Member States, which has also been reaffirmed in *Article 47 of the Charter of Fundamental Rights of the EU* (CFREU), which guarantees the right to an effective judicial remedy and to a fair trial.[36]

Confirming the existence of an indisputable link between the meaning of the rule of law as it has been crafted within the confines of the EU legal order and the EU doctrines of direct effect and supremacy, the Court of Justice has invoked the principle of primacy of EU law to accentuate the imperative nature of the Article 19 TEU requirements, by stressing that the effects of the principle of primacy of EU law are binding on all the organs of a Member State and that rules of national law, including constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law.[37] The principles of supremacy and direct effect make up the foundation of a full-fledged legal order—that of the EU—whose instruments make *legality* work.[38] The logic behind the rule of law achieved in this way at the EU level revolves around the value of legality, including the principle of effective judicial review as a suitable tool for tackling the non-compliance of the state institutions.[39]

The rule of law places a limitation on the power exercised by domestic decision- and law-makers as such that cannot override the obligations stemming from EU law and has to be performed in accordance with the obligations prescribed by EU law.[40] However, a Member State's failure to comply with the "value aspect" of the rule of law should not always been taken to mean that the Member State concerned neglects the "compliance aspects" of the rule of law and does not comply with EU law at all.[41] The former lines up with the contention that the rule of law (at least its formal legality aspect) does not necessarily have to exist alongside a democratic rule—in a state subscribing to the thin view of the rule of law, democracy (albeit illiberal)[42]

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[35] See *Repubblika*, para. 65; C-824/18 *A.B. and Others (Appointment of judges to Poland's Supreme Court)*, EU:C:2021:153; Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others* (*Independence of the Disciplinary Chamber of Poland's Supreme Court*) ECLI:EU:C:2019:982.

[36] *Portuguese judges*, Para. 35; See also, *A. B. and Others*, paras. 108 and 144.

[37] Emphasis added; *A. B. and Others*, para. 146.

[38] Palombella (2016), p. 37.

[39] Palombella (2016), p. 37.

[40] Palombella (2016) and Drinóczi and Bień-Kacała (2021a), p. 19.

[41] Drinóczi and Bień-Kacała (2021a), p. 36.

[42] Drinóczi and Bień-Kacała give the example of *illiberal legality* which comes as a by-product of illiberal democracy and illiberal constitutionalism. The authors have found that the governing regimes in Hungary and Poland exhibit distinct characteristics of illiberal democracy and illiberal constitutionalism, the latter being put into place to enable the former (Drinóczi and Bień-Kacała 2021a, pp. 20, 21); Drinóczi and A. Bień-Kacała use the term 'illiberal legality' to describe the 'illiberal' version of the (European) Rule of Law. The term encapsulates the 'Rule of Law situation' in illiberal constitutionalism. Illiberal legality violates the basic tenets of constitutionalism, while at the same time, as a result of EU membership and being part of other international organisations,

can exist alongside significant shortcomings in the state of the rule of law.[43] As a consequence, repairing the rule of law in this instance would not boil down to fixing or amending one single rule—quite to the contrary, the rule of law should be regarded as "the entire picture, seen through the lens of the quality of legality."[44] Therefore, a Member State charged of infringing the Article 2 TEU values cannot respond by simply amending some of its rules—such a violation would require a revision and a rebalancing of the very rationale of its legal system.[45]

As the rule of law backsliding developments in Hungary and Poland continue to unfold,[46] commentators have singled out these two countries as having forged their own rule of law concepts (Hungarian and Polish, respectively) which depart from the EU's own understanding of the rule of law as a value and a legal concept.[47] Making a clear break from their communist past, prior to joining the EU in 2004, these Central and Eastern European (CEE) countries went through a unique transformation of their political and legal systems, making use of the rule of law, understood in its "most general" meaning, as one of the guiding principles that helped move forward this transformation.[48] These countries' endorsement of the rule of law as a concept rooted in the values of liberal democracy was their vehicle on the road towards EU integration and EU accession.[49] Upon accession however, the question of 'which rule of law?' for these counties morphed into one of deciding 'the rule of which law?' as they witnessed their traditional notions of sovereignty and legal unity being increasingly challenged,[50] which in turn raised controversies over the place of national constitutional rules within the hierarchy of the EU legal order.

being both politically and legally steered towards accepting certain constraints over the exercise of public power (Drinóczi and Bień-Kacała 2021b, p. 221). Important feature of illiberal legality is the emphasis put on the "instrumental and opportunistic use of the law in both legislation and law-application and adjudication." (Drinóczi and Bień-Kacała 2021b, p. 222). The law is thus used as as a tool of political power, in the sense of the "rule by law" approach without having an understanding of the higher purpose of the rule of law which is to prevent those in power from abusing and instrumentalizing the law (Drinóczi and Bień-Kacała 2021b, p. 222).

[43] Carothers (2003), p. 7.

[44] Palombella (2016), p. 57.

[45] Palombella (2016), p. 57.

[46] For the evolving situation regarding the Rule of Law Conditionality mechanism deployed by the EU in response to the rule of law situation in the two countries, see: European Commission, "*NextGenerationEU: European Commission endorses Poland's €35.4 billion recovery and resilience plan Brussels*" (Press Release), 1 June 2022 [https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375]; European Commission, Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary. COM (2022) 485 final, Brussels, 18.9.2022 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0485].

[47] Drinóczi and Bień-Kacała (2021b), p. 219.

[48] Přibáň (2009), p. 337.

[49] Přibáň (2009), p. 337.

[50] Přibáň (2009), p. 337.

2.1 The Constituent Elements of the Rule of Law as a Fundamental Value of the EU System

Once the existence of an EU-specific version of the rule of law has been established, the task ahead is to pinpoint the elements that comprise the rule of law as an EU value and by consequence, demarcate the scope and content of the requirement and the mirroring obligation for Member States and EU bodies to observe the rule of law. What are they expected to (not) do? There is a panoply of legal acts and policy documents that the EU institutions have adopted over the years, containing relevant references about the content of the rule of law as a Union value. Light will be shed on some of them.

In its *2014 and 2019 Communications* concerning the EU's efforts to strengthen the rule of law, the Commission has outlined the following essential constituent elements as providing the content of the rule of law: legality (guaranteeing a transparent, accountable and democratic law-making process); legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review; as well as respect for fundamental rights, and equality before the law.[51] The rule of law requires that all public powers function within the constraints established by law, under the control of independent and impartial courts, respecting the values of democracy and fundamental rights.[52] In addition, the developing case law of the Court of Justice of the EU and of the European Court of Human Rights, as well as the documents produced by the Council of Europe, including the work of the Council of Europe's Venice Commission, contribute in a significant way to the practice of enforcement of the rule of law.[53] The Commission has underscored that the foregoing standards for the observance of the rule of law form the bedrock for the respect of the rule of law in all Member States, regardless of their constitutional structures.[54] It has also affirmed that the core meaning of the rule of law has been well-defined and this meaning is the same in all Member States, regardless of "the different national identities and legal systems and traditions that the Union is bound to respect."[55] The former thus rules out the possibility for the Member States to craft

[51] Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final 11.3.2014, p. 4.

[52] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union A blueprint for action, Brussels, 17.7.2019 COM(2019) 343 final, p. 1.

[53] Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final 11.3.2014, p. 4.

[54] Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union State of Play and Possible Next Steps, COM/2019/163 final, Brussels, 3.4.2019, Part IV.

[55] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the rule of law within the Union A blueprint for action, Brussels, 17.7.2019 COM (2019) 343 final, p. 1.

their own individual understanding and interpretation of the core meaning of the rule of law.

Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation), which establishes rules for the protection of the Union budget in instances where Member State are found to be in violation of the rule of law, refers to the 'rule of law' as a Union value enshrined in Article 2 TEU.[56] As such, the rule of law comprises the principles of legality, implying a transparent, accountable, democratic and pluralistic lawmaking process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection and respect for fundamental rights, including access to justice, by independent and impartial courts; separation of powers; and non-discrimination and equality before the law.[57] The Conditionality Regulation lists the following as type of behavior that may be indicative of breaches of the principles stemming from the rule of law: "(a) endangering the independence of the judiciary; (b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities; (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law."[58] As clarified in the Commission's *Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budge*t,[59] the definition of the 'rule of law' provided in the Conditionality Regulation is not intended to provide an exhaustive definition of the concept of rule of law and merely outlines *a number* of the principles that the rule of law comprises—specifically, those that are most relevant to the Regulation's purpose, which is to ensure the protection of the Union budget.[60]

In 2020, the EU introduced a *European Rule of Law Mechanism* which launched a process for an annual dialogue on the rule of law between the Commission, the Council of the EU and the European Parliament together with Member States, including national parliaments, civil society and other stakeholders.[61] A Rule of Law Report prepared annually by the Commission is the foundation of this new process,

[56] Art.2 Definitions, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10.

[57] Art. 2 of Regulation.

[58] Article 3—Breaches of the principles of the rule of law, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10.

[59] Communication from the Commission, Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, Brussels, 2.3.2022 C(2022) 1382 final.

[60] Communication from the Commission, Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, Brussels, 2.3.2022 C(2022) 1382 final, p. 3; See judgement of 16 February 2022, Hungary v Parliament and Council, C-156/21, ECLI:EU:C:2022:97, paragraph 227.

[61] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

its aim being two-fold: first, to identify rule of law challenges facing the Member States as soon as possible and assist the former in finding solutions for safeguarding and protecting the rule of law and second, from a preventative standpoint, to forestall problems from occurring or evolving further.[62] As indicated by the Commission, the preparation of the annual rule of law reports is part of the EU's efforts to promote and defend its values.[63] The Rule of Law Report screens significant rule of law developments in the Member States by covering four pillars (i.e. key areas for the rule of law): the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances.[64] The national parliaments and national authorities of the Member States are invited to discuss the Report while the involvement of other stakeholders at the national and EU level is also encouraged, including relevant input from the Council of Europe and the Venice Commission.[65] The Commission takes full political responsibility for its assessment and the recommendations issued in the Report.[66] The most recent 2022 *Rule of Law Report* includes country chapters that document (positive and negative) developments in the 27 Member States.[67] Equally, the Report provides country-specific recommendations addressed to all the Member States; these recommendations are proportionate to the challenges identified and, as the Commission assures, sufficiently specific to enable the Member States to provide "a concrete and actionable follow-up," by taking into consideration "the national competences, legal systems and institutional context."[68] The purpose of these recommendations is to build a continuous dialogue with the Member States, assist them in their efforts to implement reforms relating to the rule of law and detect areas where further improvements may be required.[69]

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[62] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

[63] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2022 Rule of Law Report The rule of law situation in the European Union, COM/2022/500 final; https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en.

[64] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

[65] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

[66] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en.

[67] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2022 Rule of Law Report The rule of law situation in the European Union, COM/2022/500 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1658828718680&uri=CELEX%3A52022DC0500.

[68] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2022 Rule of Law Report The rule of law situation in the European Union, COM/2022/500 final; European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report https://commission.europa.eu/system/files/2022-07/rolm_methodology_2022.pdf, at p. 5.

[69] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2022 Rule of Law Report

3 The Challenge of Crafting a 'Core' Curriculum for the EU Law- and EU Studies-Related Courses

Bearing in mind the complexities surrounding the interpretation and application of the rule of law as an EU guiding principle and foundational value, for teachers at higher education establishments across Europe delivering EU studies-related course content can sometimes be a veritable challenge. This happens to the point where, concerning this particular (broadly defined) subject area, what is being taught and *how* it is being taught *directly affects* the present and future trajectory of the European integration process,[70] understood as such in its internal and external dimension.

Notably, European Union Law as a subject area is sometimes seen as a sort of "anomaly in legal education"[71] given that in the national higher education setting the study of the domestic legal system takes priority while the study of European Union Law is usually conceptualized in reference to categories and concepts of the national legal system.[72] EU Law scholars extensively research about the nature of different areas of EU law (competition, environment, migration, etc.) which are their specialty whereas there is considerably less research interest devoted to examining the nature of their teaching style and methodology of the courses they teach, the result being a scarcity of available comparative literature dealing strictly with EU Law teaching.[73]

The diversity of curricula in the field of the study of the European Union and European integration has its advantages and limitations.[74] On the one hand, it lends itself to a wide array of teaching approaches which are especially beneficial for conveying to the audience the nature of the EU as a system of multi-level governance and the complexities of the European integration process.[75] On the other hand, it raises obstacles such as the lack of a 'core curriculum' in EU studies[76] and lack of relevant pedagogical approaches intended to define the profile of students specializing in this field and provide them with some essential knowledge and skills.[77] The fact is that there is as yet no standardized system for EU law teaching and training uniform for all EU Member States, much less the EU candidate or membership aspirant countries.[78] At present, the Union Treaties confer limited competence to the EU to adopt and apply EU-wide standards for the content of EU law education in the

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The rule of law situation in the European Union, COM/2022/500 final; European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report https://commission.europa.eu/system/files/2022-07/rolm_methodology_2022.pdf, at p. 4.

[70] Visvizi et al. (2021), pp. 3–14.

[71] MacLennan (2020), p. 8.

[72] De Witte (2013), p. 107.

[73] DE Witte (2008), pp. 4, 5; Poiares Maduro (2008); For a similar critique when it comes to European legal research, van Gestel and Micklitz (2014).

[74] Timus et al. (2016), p. 654.

[75] Timus et al. (2016), p. 654.

[76] Umbach and Scholl (2003), pp. 71–80.

[77] Timus et al. (2016), p. 654.

[78] Alemanno and Khadar (2018), p. 170.

Member States.[79] Each Member State has its own legal system and traditions as well as its own individual approach to the overall legal education and training, not only the EU law-related one.[80] The picture is rather fragmented because of the different way in which EU law is being taught and presented in the legal literature of different countries.[81] Yet, the EU has in good measure influenced the legal systems as well as the legal training in the Member States seeing as EU law is a constituent part of the said legal systems. EU law is being incorporated into national law by the domestic legislators, implemented by the domestic executive organs and applied by the domestic courts—and it is as such taught at university level.[82]

It can be said that teaching on and learning about the EU today is presented with two major challenges—the first relates to how teachers can help students understand the true relevance of the European Union and the European integration process. The origins of the latter date back from quite some time ago (seven decades) and people are often inclined to forget the economic, political, and historical reasons that underpin the nature and goals of the European integration project thereby prompting the need to demonstrate the link between recent past and present.[83] The second issue has to do with finding ways to integrate the modern methodological and technological innovations into the teaching process regarding these subject areas.[84] With this in mind, would it be possible to envisage the components of a 'typical' EU law curriculum that would be applicable both for the teaching of EU law at EU and non-EU universities?[85]

The Jean Monnet Programme is an EU initiative launched in 1990 dedicated to promoting the integration of courses and educational activities in the larger field of European integration into university curricula, the so-called Jean Monnet modules.[86] The core stated objective of the Jean Monnet Programme, as noted by the European Commission, is "to stimulate excellence in teaching, research and reflection in European integration studies in higher education institutions."[87] In the first phase of its establishment, the programme promoted the integration of courses such as 'EU Law', 'EU Economic Studies', 'EU Political and Administrative Studies' and 'European Historical Studies' in the university curricula.[88] E.g., one academic study, the results

[79] On the expanding nature of EU's competence in the area of education, see, e.g., Garben (2008, 2011 and Alemanno and Khadar (2018), p. 170.

[80] See Lonbay (2008).

[81] De Witte (2013), p. 108.

[82] Kerikmäe and Nyman Metcalf (2014), p. 276.

[83] González and Mella (2021), p. 86.

[84] González and Mella (2021), p. 86.

[85] See e.g., MacLennan (2020).

[86] Baroncelli et al. (2014), p. 94.

[87] European Commission (2007), p. 4; Under the auspices of the Jean Monnet programme, university departments are awarded the distinction "Jean Monnet Centre of Excellence" which signifies excellence in teaching and research activities in subject areas related to European integration and the EU; likewise, individual professors teaching in the broader area of EU studies are awarded the title of 'Jean Monnet Chair'.

[88] Baroncelli et al. (2014), p. 95.

of which were published in 2014, has focused on the correlation between the Jean Monnet Programme and the use of innovative pedagogical tools in the university-level teaching and research on EU-law related courses.[89] Namely, the study examines the deployment of teaching methods and tools in EU-related courses across different countries in Europe, scrutinizing how frequently such innovative teaching methods and tools were used for this type of courses.[90] Likewise, the study investigates the factors that influence the deployment of innovative teaching methods such as, inter alia, the use of internships, distance learning, and exchange programmes.[91]

While it is certain that the teaching of EU law should not be focused solely on theoretical instruction and reliance on traditional lectures and knowledge assessment[92] the reality is that, broadly speaking, undergraduate-level EU law instruction remains predominantly doctrinal (outlining the most important case law, treaty provisions, and legal principles and norms), historical, and institutional (covering an overview of the development of the EU institutions and the evolution of the EU legal order).[93] A similar approach pervades the master-level instruction in different areas of EU law.[94] Aside from notable exceptions of examples of EU law teaching and academic work that are interdisciplinary in nature and engage with the social and political context of EU law and its practical application, in the main, EU law teaching still remains largely conservative in approach and passive in delivery.[95]

The move to reform teaching approaches and methodologies has been spurred by the development of new technological and digital tools that can be used in the delivery of lectures[96] As a consequence, we have been witnessing a transition from traditional to innovative teaching methods with many institutions now shifting from traditional teaching methods, characterised by the passive delivery of lectures without student participation to a digital learning approach which features an interactive learning process with the students as active participants.[97]

3.1 The Essential Methodological Toolkit for Teaching EU Law and EU Studies More Broadly

In light of the evolving modern technology tools of the digital era, the all-important mission becomes to equip teachers with the necessary knowledge and tools to teach

[89] Baroncelli et al. (2014), p. 95.
[90] Baroncelli et al. (2014), p. 96.
[91] Baroncelli et al. (2014), p. 96.
[92] See, Valcke (2018), p. 194 and Heringa and Akkermans (2011).
[93] Alemanno and Khadar (2018), p. 172 and Jakab (2007).
[94] Alemanno and Khadar (2018), p. 172.
[95] De Witte (2008), p. 4 and Alemanno and Khadar (2018), pp. 172, 173.
[96] See Bjerede et al. (2010), pp. 3–7 and Dede (2009), pp. 66–69.
[97] Fonti and Stevancevic (2014), p. 112; See also Hannan and Silver (2000).

the EU Law/EU Studies more *efficiently*,[98] seeking out the most suitable innovative methods and tools for teaching and learning that can be employed in order to guarantee the best results.[99]

Teachers rely on a variety of teaching techniques to engage students in an active learning process. Some innovative teaching methods employed in higher education learning across different learning cultures include: Teamwork; Fieldwork; Student-led discovery; Special expert sessions; Simulation and learning games; Project-based learning; Work-based learning (use of workplace skills or/and collaboration with companies), Role-plays; Distance learning; Peer tutoring; Internships and student's volunteering; Exchange programmes.[100] The creation of the European Higher Education Area and the start of the Bologna process[101] opened the way towards incorporating alternative methodologies of active learning (such as problem-based learning, problem-solving, peer teaching, role-playing, and simulation games) whose goal is to enhance student participation and create a more collaborative classroom environment.[102] This emphasis on 'student-centeredness' and active learning has helped empower students to apply their theoretical knowledge in practice, through various independent or group learning research-based activities.[103] Taking into consideration the demands of the current job market, the pedagogical approach in higher education should strive for a *deep learning process* (as opposed to surface learning where students are expected to merely reproduce material[104]) which enables the students to make practical connections with the acquired theoretical knowledge.[105] The deep learning approach is a student-centred one, where the learning process revolves around the student.[106] Teaching core concepts and theoretical notions by linking them to practical experiences—such as fieldwork, special expert sessions, and work-based learning—should be encouraged as a way to connect academia with business.[107]

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[98] Visvizi et al. (2021), pp. 3–14.

[99] Visvizi et al. (2021), pp. 3–14.

[100] Hannan and Silver (2000), Hattie (2005), Timus et al. (2016), p. 655, and Baroncelli et al. (2014), p. 98.

[101] Through the creation of the European Higher Education Area, the Bologna Process aims to increase the coherence among European higher education systems, by improving student and faculty mobility, making higher education more inclusive and accessible and raise the appeal and competitiveness of European higher education on the global stage [https://education.ec.europa.eu/education-levels/higher-education/inclusive-and-connected-higher-education/bologna-process].

[102] Van Dyke and Loedel (2009), Van Dyke Declair and Loedel (2000), and Baroncelli et al. (2014), p. 93.

[103] Angouri (2021), pp. 11, 17–18.

[104] Marton and Säljö (1976), pp. 4–11.

[105] Timus et al. (2016), p. 655.

[106] See Neumann (2013), pp. 161–175; One study shows that the most popular student-centred pedagogies in the EU geographical region are based on teamwork and student-led discovery (approximately 90% used at least 'sometimes'), expert sesions, and project-based learning (81% and 68% respectively) (Baroncelli et al. 2014, p. 104).

[107] Baroncelli et al. (2014), p. 93.

The previously listed modern approaches to teaching have to a certain extent also been applied in the subject areas of EU Law and EU studies,[108] although, as some authors note, there is still a way to go for it to become the norm and be applied as a matter of routine.[109] The former exercise should undoubtedly go hand-in-hand with efforts aimed at incorporating EU law/EU studies courses in the curricula of EU and non-EU universities. For European countries that are not EU members, but have a short-, medium- or long-term EU membership perspective this has been an especially demanding task. These countries are actively undergoing the process of 'Europeanization' of their political and legal systems as a process that produces a fundamental change in the domestic hierarchy of sources of law, modifies the domestic legal culture and reforms the methodology of how legal sciences are taught and applied.[110] For example, a study the results of which were published in 2014 concentrated on the 'Europeanization' of the law curricula and teaching methods of universities across the Eastern Partnership countries,[111] evaluating the "Europeaness" of the curricula and the "European spirit" of the teaching process", found that this particular Europeanization exercise had not been comprehensively accomplished.[112] This last stemmed from issues that were more substantive in nature than the mere changing of course titles or the integration of EU-related chapters into existing course curricula—rather, they had to do with the overall course content and approach to teaching.[113] However, irrespective of whether the Europeanization of the law curricula is being carried out in the Member States or (as in this instance) the Eastern Partnership countries, the process's underlying objective remains the same.[114] Europeanizing the law curricula extends beyond the introduction of new disciplines and methodologies—its function is equally to introduce law students to the European legal culture, expecting that this would precipitate a transformation in their mind-set as future legal professionals.[115] The foregoing findings made with respect to the Eastern Partnership countries are also applicable to the current EU candidate countries as these countries' need for lawyers well versed in the basics as well as advanced (specialized) aspects of EU law continues to grow. These individuals will be expected to actively participate in the Europeanization of their respective domestic institutions and, will further down the line, once their country accedes to the EU, be adequately prepared to meet the legal challenges that EU accession entails.

[108] Fonti and Stevancevic (2014), p. 113 and Baroncelli et al. (2014), p. 90.

[109] Fonti and Stevancevic (2014), p. 113; A study undertaken by Timus, Cebotari and Hosein revealed that the most-used innovative research methods by respondents were teamwork (74.4%), followed by project-based learning (66.2%), simulations (65.0%), problem-based learning (54.4%), expert sessions (50.6%) and exchange programs (43.1%) (Timus et al. 2016, p. 660).

[110] See Ziller (2006) and Kerikmäe and Nyman Metcalf (2014), p. 281.

[111] The 'Eastern Partnership' is a joint initiative between the EU, its Member States and six Eastern European Partner countries: Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine.

[112] Kerikmäe and Nyman Metcalf (2014), p. 278.

[113] Kerikmäe and Nyman Metcalf (2014), p. 278.

[114] Kerikmäe and Nyman Metcalf (2014), p. 280.

[115] Kerikmäe and Nyman Metcalf (2014), p. 282.

Considering that learning is predominantly a culture-based phenomenon,[116] it should be expected that resistance will be met throughout the whole process of Europeanization of university curricula and teaching methodologies. This is why, in assessing the different cultural teaching and learning styles, it is necessary to have an awareness of the regional similarities and differences along with the understanding that pedagogical methods and their perceived efficacy can sometimes vary depending on the culture: teaching methodologies and learning styles that are effective in some cultures can prove ineffective in others.[117]

4 The Topic of the Rule of Law in EU Law- and EU Studies-Related Course Curricula

It follows from the complex and variegated nature of the concept that teaching on the rule of law can be a demanding task for teachers at the university level. What is more, as a public good, national education systems have a key responsibility in upholding and advancing the principles of the rule of law as they equip learners with the knowledge, values, attitudes and behaviors they would need to take ethically responsible decisions in their daily lives, thereby empowering the future generations to hold state institutions accountable for rule of law breaches.[118]

While teaching EU Law/EU studies represents a challenge in and of itself, teaching on the rule of law, as an EU value and more broadly as a baseline value of any democratic society, should be seen as a challenge within a challenge. This is especially true for post-authoritarian societies and vulnerable democracies, which include most of the current EU candidate countries from the Western Balkans and Eastern Europe. Successful transitions from post-authoritarian to democratic systems can require a lengthy period of time, with educational institutions fulfilling the function of facilitators of those transitions.[119] Initiating such a substantial institutional and constitutional transformation can take decades, even generations, the end goal being to garner overwhelming public support for and understanding of the rule of law[120] and cultivate what is called a 'culture of lawfulness' in a particular society. The idea behind the notion of a 'culture of lawfulness' lies in the necessity to create cultural and social conditions in which the rule of law can thrive and develop.[121] Moreover, the notion equally incorporates the non-formalized aspects of the law, manifesting in non-formal practices and traditions that impact how citizens behave and how they interact with the public institutions.[122]

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[116] De Vita (2001) and Timus et al. (2016), p. 665.

[117] Timus et al. (2016), p. 665.

[118] UNESCO and UNODC (2019), p. 14.

[119] See Doyle Stevick (2019).

[120] Tamanaha (2009), p. 13 and Doyle Stevick (2019), p. 1.

[121] UNESCO and UNODC (2019), p. 19.

[122] UNESCO and UNODC (2019), p. 19.

The ongoing erosion of the state of the rule of law in Poland and Hungary as EU Member States has brought to the fore the need for a rule of law culture to be *sustainable*.[123] As countries of the Central and Eastern European (CEE) region, following the dissolution of the SSSR, Hungary and Poland turned towards regaining their previous or newly instituted democratic institutional structures with adherence to the rule of law as their core objective.[124] Regrettably, what the processes of rule of law deterioration that have been taking place in Poland and Hungary over the past years make ostensibly clear is that these countries' rule of law accomplishments of the 1990s, resulting from the political and legal transformation of their societies,[125] seem to have come with an expiration date. We are presently witnessing the leaders of these countries from the Central and Eastern European (CEE) region deploying legal tactics such as changing the constitution and shifting the composition of the judiciary in order to create a context governed by a nationalistic and authoritarian political sentiment.[126] These societies remain vulnerable to populism and nativism ideologies while the public's support for democracy and the rule of law is not as all-encompassing as should be expected.[127] To confront these negative trends, educational institutions in the CEE region as well as the rest of Europe should be viewed as a space where students can become sensitized to the vital importance of the rule of law as one of the bedrocks of a democratic society[128] and a key agent in advancing broad public support for the rule of law and developing a rule-of-law culture in these societies.[129]

4.1 The Importance of Teaching Students About How the Rule of Law Works and How to Apply It

As one author encapsulates it, the rule of law exists as "a normative system that resides in the minds of the citizens of society."[130] Adherence to the rule of law is as much a cultural as it is an institutional achievement. In this sense, the cultural transformation serves as a *pre-condition* for the institutional transformation,[131] making it a priority for societies to "create the cultural and social conditions in which the rule of law is respected"[132] and highlighting the importance for education as a promotor of the rule of law and the accompanying 'culture of lawfulness'.[133] As an institutional

[123] Doyle Stevick (2019), p. 1.
[124] Doyle Stevick (2019), p. 1.
[125] See Přibáň (2009).
[126] Abiodun Olatokun (2019).
[127] See Doyle Stevick (2019).
[128] Abiodun Olatokun (2019) and Doyle Stevick (2019).
[129] Doyle Stevick (2019), pp. 2–3, 8.
[130] Carothers (2003), p. 8 and Doyle Stevick (2019), p. 1.
[131] Doyle Stevick (2019).
[132] UNESCO and UNODC (2019), p. 19.
[133] UNESCO and UNODC (2019), p. 14.

achievement, the rule of law will only be adequately implemented and respected if the public understands and adheres to the rule of law principles.[134] Such an approach instills in the general population of a society the obligation to follow the law *because* it believes that doing so provides a fair and just response to the needs of individuals and society as a whole.[135]

Education plays a crucial part in promoting and protecting the rule of law, principally, by equipping students (learners) with the appropriate knowledge, values, attitudes, and behaviors they would need to be able to contribute to the safeguarding of the rule of law and by encouraging students (learners) to value and apply the principles of the rule of law in their daily lives by making ethically responsible decisions as citizens.[136] By virtue of law's capacity to be a vehicle of democratic transformation, law professors and teachers have the task to guide the students' perception of law's potential to bring about change in society, among other things, by shedding light on the ability of lawyers as legal professionals to make these institutions better, individually or as members of a group.[137] The goal of legal education is to provide insight into the broader picture of legal knowledge and the rule of law network.[138] Conceptualized along these lines, legal knowledge becomes a "concrete feature of the way in which the rule of law is brought to life"[139] whereby citizens' legal knowledge of and participation in the relevant legal frameworks becomes one of the constitutive components of a democratic society.[140] Legal education therefore lies at the intersection between the formal demands of the rule of law, on the one hand, and the dynamic and growing complexity of the law.[141] It enables people to understand legal issues and developments and be aware of their legal rights, arming them with the requisite skills to address the legal challenges they may potentially face.[142] Hence, through the medium of education, learners gain the necessary knowledge and understanding of the rule of law and the culture of lawfulness by developing their ability to critically reflect on the meaning of these concepts and how they are being applied in the functioning of the government institutions and their domestic legal system.[143] Owing to

[134] Doyle Stevick (2019).

[135] UNESCO and UNODC (2019), p. 19.

[136] UNESCO and UNODC (2019), pp. 10, 20–21.

[137] Bartl (2022).

[138] Wintersteiger and Mulqueen (2017), pp. 1571, 2.

[139] See Bingham (2011).

[140] Wintersteiger and Mulqueen (2017), p. 1572; The 2007 UK Public Legal Education and Support Task Force Report sheds light on the intrinsic connection between legal knowledge and the constitution of the state (state-building) (see PLEAS-Public Legal Education and Support 2007).

[141] Wintersteiger and Mulqueen (2017), p. 1572.

[142] Wintersteiger and Mulqueen (2017), p. 1572; PLEAS-Public Legal Education and Support (2007); Legal education endows citizens with 'legal capability' as it helps them make an association between the law and how it is being effectively applied in practice (Wintersteiger and Mulqueen 2017, p. 1572; Collard et al. 2011, pp. 15–24) thereby creating a legally-enabled citizen that possesses the necessary capabilities to have an active part in democratic life (PLEAS-Public Legal Education and Support 2007, p. 13).

[143] UNESCO and UNODC (2019), p. 24.

the rule of law education, learners become empowered to demand accountability and transparency of the public institutions and become better equipped to recognize real-life examples of rule of law violations in their immediate environment and respond accordingly by taking practical steps.[144]

It is important to note that some of the literature differentiates between *civic education* (classroom instruction) and *civic learning*. Civic education relates to the formal part of the teaching and learning experience while civic learning is a much broader term that refers to all processes through which the public is taught to "embrace and function" in societies organized under the rule of law[145] and extends to other "aspects of accumulated learning" beyond the classroom.[146] These types of informal learning experiences, if guided effectively, can be impactful forms of 'experiential' learning by which learners apprehend the subject via accumulated and direct real-life experiences as their theoretical knowledge is being developed through parallel processes of "observing, reflecting, and experimenting."[147] What can be tricky concerning one's knowledge about the rule of law is that one can at once *know* what the rule of law should manifest as in practice, but not be as sure about what the *essence* of the rule of law is.[148] Therefore, the downside of prioritizing civic education is that in practice, as experts report, the former has failed to produce a consistently positive effect on the democratic values of learners.[149] As a part of civic learning, the lived experience is a vital but often overlooked factor in the building of a rule of law culture, one that complements the formal, classroom-based learning.[150]

4.2 Best Practices for Teaching on the Rule of Law in a European Educational Setting

University curricula coupled with co- or extra-curricular learning opportunities play a formative role in educating students who will contribute to society and be responsible citizens.[151] The mindset students develop during their studies is fundamental to their problem-solving capacity, adaptability and resilience but also, ultimately, to the wellbeing of societies.[152] This requires universities to strike the right balance

[144] UNESCO and UNODC (2019), p. 32.

[145] Doyle Stevick (2019), pp. 4–5.

[146] Doyle Stevick (2019), p. 5; For more on this type of integral (holistic) approach to learning, see Schugurensky and Myers (2003) and Blair (2003), p. 53.

[147] Cohen (2013), p. 121 and Doyle Stevick (2019), p. 5.

[148] Carothers (2003), p. 8.

[149] See e.g., Morris (2002), p. 17.

[150] USAID (2018), p. 4.

[151] Angouri (2021), p. 7.

[152] Angouri (2021), p. 7.

between providing for long- and short-term societal needs and responding to historical, regional, national and international priorities.[153] One of the recently occurring contexts that had a deep impact on the teaching process is the digital age combined with the pressures brought on by the Covid-19 pandemic.[154] The foregoing emphasizes the need for the development and promotion of the rule of law through education to follow a two-pronged approach which involves *learning about* the rule of law (acquiring knowledge) and *learning to apply* this knowledge in practice.[155] In this way, the educator at once transmits not only knowledge, but also, more implicitly, values and behaviors associated to that knowledge. This has been described as the 'hidden curriculum',[156] which represents a reflection of the educator's meta-orientations and curriculum positions, and is in a certain sense a byproduct of his/her ideologies.[157] It has to do with the unspoken (implicit) values, behaviors, procedures, and norms that are part of the educational space.[158] The hidden curriculum is an implicit curriculum by which educators' attitudes, knowledge, and behaviors are unwittingly transmitted to learners, through actions and words that are commonplace in a particular society.[159] Through this process, norms, values and beliefs are communicated to learners through tools that go beyond the formal teaching and learning tools, arming learners with the skills needed to participate in society as "ethically responsible citizens."[160]

What are the most appropriate methodological tools and approaches teachers can use to instill an accurate understanding of the rule of law and encourage the development of a culture of lawfulness? Such participatory and student-centered pedagogical tools and approaches can include: problem-based learning and project-based learning, community-based learning, web-based learning, the flipped classroom method, etc. *Problem-based learning* and *project-based learning* are both variations of a research-led approach to learning.[161] The *active learning* experience,[162] is essential to problem-based learning as a teaching approach and a process in which the learner "actively constructs knowledge."[163] When engaged in problem-based learning and project-based learning, learners work on a project or find a solution to a given problem, which motivates them to improve their analytical and problem-solving skills while at the same time familiarizing themselves with the researched topic and prepares them to be able to deal with complex issues in practice.[164] The

[153] Angouri (2021), p. 7.
[154] Angouri (2021), p. 7.
[155] UNESCO and UNODC (2019), pp. 32, 34.
[156] Alsubaie (2015), pp. 125–128 and UNESCO and UNODC (2019), p. 34.
[157] Miller and Seller (1990).
[158] Alsubaie (2015), p. 125.
[159] Jerald (2006).
[160] UNESCO and UNODC (2019), p. 34.
[161] Angouri (2021), p. 13.
[162] Tonra (2020), p. 15.
[163] Gijselaers (1996), p. 13.
[164] UNESCO and UNODC (2019), p. 44.

former two approaches are not dissimilar to the *flipped classroom* method as a type of student-centered learning where the curriculum content delivery revolves around student research engagement in and outside of the classroom.[165] Problem-/and project-based learning underscores the importance of the students' learning to apply theoretical knowledge to practice.[166] It does not presuppose compromising disciplinary training but rather serves to translate the application of disciplinary training to interdisciplinary contexts, so that the student directly experiences the relevance of their studies to real-world problems.[167] The effectiveness of problem-based learning as an alternative teaching and learning method in the field of European Studies has been extensively analyzed by scholars, in particular, its potential to allow for real-life problems to be explored by learners with due regard to their complexity and by assuming an interdisciplinary approach.[168] Scholars also point out that the basic logic of problem-based learning is substantially different from that of traditional teaching approaches and therefore calls for these last to undergo a "paradigm change."[169] Employing the problem-based learning approach to curriculum delivery in higher education institutions where traditional teacher-centered methods are the norm can be particularly demanding.

Through *community-based learning*, the learners' problem-solving skills are put to use to deal with a challenge that affects the community the learners live in, thereby enabling them to effect a positive and visible change in their community by implementing the findings and solutions they reach.[170] Similarly, as an alternative to the conventional classroom-based environments, *web-based learning* (learning that relies on digital technology tools) can be used in support of many of the previously elaborated approaches, while also helping learners develop their digital literacy.[171] Bearing in mind the complexity of the issues covered in the EU Law/European studies curricula, experts have found that the innovative methods such as the use of simulations,[172] web seminars,[173] and distance learning[174] have only to a limited extent responded to the demands of students in the digital classroom as a teaching environment.[175] Significantly, before the Covid-19 pandemic, the *synchronous online teaching* as a more interactive and engaging form of distance learning had rarely been

[165] Abeysekera and Dawson (2015).

[166] Angouri (2021), p. 12.

[167] Angouri (2021), p. 13.

[168] Maurer and Neuhold (2014), pp. 200, 204; For a case study on how the 'problem-based learning' approach has been developed at Maastricht University, see van Til and van der Heijden (2009).

[169] Birenbaum (2003) and Tonra (2020), p. 15.

[170] UNESCO and UNODC (2019), p. 44.

[171] UNESCO International Bureau of Education (2017) and UNESCO and UNODC (2019), p. 44.

[172] Usherwood (2014) and Guasti et al. (2015).

[173] Lieberman (2014) and Mihai (2014).

[174] Bell et al (2017).

[175] See Plank and Niemann (2020), p. 52.

used in the area of European studies.[176] Relatedly, *blended learning* as a teaching method that uses in-person instruction combined with "computer-mediated instruction"[177] has also been studied by scholars, in terms of its efficiency and effectiveness for the student's learning process.[178]

Finally, another issue that needs pointing out is the resistance that some students exhibit in the process of introduction and implementation of the aforementioned innovative methods.[179] In the initial stages of implementation of the new methodological approaches, students may feel overwhelmed and will need adequate guidance, especially in exercises involving group work where they may find themselves unprepared for the social interaction element of the exercise.[180] The personal experience of the author of this contribution is a confirmation of this: during the synchronous online teaching carried out throughout the period of the Covid-19 pandemic, there was a noticeable reluctance from the students in the EU law and related courses to engage proactively in class and class assignments. For some students, the digital tools available even had, in some part, the reverse effect. This was possibly due to the fact that in a large majority of universities in North Macedonia web-based instruction was only introduced for the first time during the Covid-19 pandemic, leaving the students with a lack of familiarity with the learning tools and approaches typical of the virtual classroom environment. The preceding observations clearly demonstrate the need to prepare and train both teachers and students for the demands and expectations brought on by the shift to synchronous online or blended learning in order that they do not feel overwhelmed or discouraged from embracing the novel teaching/learning approaches.[181]

5 Concluding Remarks

Several *general conclusions* can be synthetized based on the foregoing analysis of the innovative methodological approaches and tools available to higher education professionals (teachers) in the fields of EU Law and EU studies more broadly. First and foremost, it is crucial to understand that one of the main avenues for helping students become "independent, reflective and sustainable learners"[182] is by modernizing and innovating the teaching (and correspondingly, learning) methodology while at the same making the novel approaches and tools tenable and durable for the long term—in particular, by accommodating them to the specific needs and individual

[176] Plank and Niemann (2020), p. 54; For more on the advantages of the synchronous online classroom, see Mc Brien et al. (2009).

[177] Graham (2006), p. 5.

[178] Garrison and Vaughan (2007).

[179] Tonra (2020), p. 15.

[180] See Maurer and Neuhold (2012), p. 3.

[181] See e.g., Maurer (2015), p. 381 and Tonra (2020), p. 15.

[182] Maurer and Neuhold (2012), p. 3.

characteristics of the different academic environments. Any new teaching methodology should be put into practice in a way that takes into account the needs of the educational institution, the students' experiences and expectations, and the teaching techniques that teachers feel most at ease using. That being said, it is quite normal and expected for the first experiences with implementing novel academic methodologies to not always be as simple and straightforward.

In terms of which approaches to follow for optimal delivery of the curriculum content in these fields, efforts should focus on enhancing the students' digital and technical skills in the classroom context and assisting them in improving their critical thinking and active engagement with the topics covered in the curriculum, thus helping them develop *ownership* of the curriculum. Students should be led to understand the fundamental importance of the need to take ownership throughout the learning process as a necessary condition for improving their analytical and critical thinking abilities.[183] Teachers should encourage students to take ownership of the curriculum through active participation in the learning process—in fact, active learning approaches such as problem-based learning could potentially become unmanageable or overwhelming for students if they do not have or aspire towards ownership.[184]

Students should be motivated to proactively think and engage with the subject matter taught, which in turn enables them to not only critically analyze the issues covered in class, but also translate this knowledge to their everyday lives and respond accordingly.[185] An active learning process contributes to advancing students' understanding of the key EU concepts, doctrines and principles and their application in practical, real-world scenarios. It would therefore be desirable for teachers to reevaluate their role as facilitators in the active learning process and express a willingness to be more responsive, approachable and flexible in accommodating the demands of the innovative methodologies.[186]

Following now are the *conclusions specific to the university-level teaching on the rule of law* as a fundamental value of the EU system. Through the medium of education, students build their knowledge and understanding of the rule of law and the culture of lawfulness, developing their capacity to critically reflect on their significance and practical realization. As a consequence of the rule of law education being designed in a proactive way, students are better able to identify and be sooner sensitized to rule of law transgressions taking place in the societies they live in. In terms of identifying methodological approaches that best correspond to the objective of active learning, project- and problem-based learning have been found to be among the most suitable. By employing these approaches, students are taught about the practical difficulties associated with maintaining and safeguarding the rule of law. By encouraging student involvement in real-life cases, the practical application of the

[183] See e.g., Maurer et al. (2020), p. 10 and Tonra (2020).

[184] See Tonra (2020), p. 15.

[185] See also O'Mahony (2020).

[186] See also O'Mahony (2020).

rule of law can be observed first-hand, thereby making it less of an abstract and one-dimensional concept.[187] Furthermore, such type of active learning prepares students to competently deal with issues relating to the rule of law and take appropriate action when the state of the rule of law in their societies is being compromised. It is essential that the methodological toolkit used in the teaching on the rule of law be devised in a way that helps students to internalize their knowledge of the different components of the rule of law and, as a result, be equipped to effectively apply this knowledge in their professional careers and to anticipate and confront the common traps that the institutions in power sometimes deploy in order to misrepresent their disregard for the rule of law, giving a semblance that their actions are governed by it.

Teaching about the rule of law as an EU value, but also more broadly as a fundamental value of any democratic society, is indeed a challenge, especially for professors (teachers) in post-authoritarian societies and vulnerable democracies, as are most of the current EU candidate countries from the Western Balkans and Eastern Europe. By demanding accountability and transparency from the governing institutions and by acting as accountable and engaged citizens, students can be effective in applying their classroom-acquired knowledge about the rule of law. In this respect, it is important to draw attention to a potential disadvantage that teachers experience when delivering the rule of law curriculum to students from non-EU countries, particularly those with a short-, medium- or long-term EU membership perspective. The former disadvantage hails from, among other things, the EU's acute rule of law challenges whereby the Union is torn between, on the one hand, struggling to 'discipline' two of its Member States for their rule of law violations and, on the other hand, aspiring to serve as a rule-of-law role model for the membership aspirant countries. EU Law and EU Studies teachers tend to have difficulties explaining this discrepancy to their students, especially since problems with the rule of law have commonly been regarded as a legacy of those *outside* of the Union. Consequently, in the period to come, a major task for the teachers will be to keep the students as future professionals from being apathetic and discouraged about safeguarding and promoting the rule of law in their domestic contexts or altogether losing interest in actively supporting their countries' pre-accession efforts.

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[187] See, e.g., Gijselaers (1996), pp. 14–16 and Tonra (2020), p. 15.

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Building Transversal Skills and Competences in Legal Education

Marija Vlajković and Valerija Dabetić

Abstract At the time when law graduates are facing new challenges in the constantly changing labor market, the main task of law schools as well as law professors is to educate undergraduates to become above all competent and ethical lawyers. Education should adequately prepare students for the working environment in or outside the legal profession. Curricula (including extra-curriculum activities), in addition to formal legal courses, needs to be enriched with continuous training to develop transversal competences. To meet this aim and to map the gaps of the current (traditional) model of law teaching from the students' perspective, we have conducted a large-scale online survey with students at the Faculty of Law, University of Belgrade. The empirically obtained results, enabled us to identify and systematize the educational needs of law students that require further improvement. Having in mind that one of the main evaluation criteria of quality and success of the educational and teaching program is the level of graduates' employability, an additional goal of this explorative research is to provide guidelines for the modernization of legal education, primarily in Serbia, but at the law faculties in the region as well.

Keywords Transversal skills and competences · Teaching method · Legal education · Students · Teachers

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1 Introduction

In recent decades much has been written on transversal skills and competences, particularly in terms of their significance for one's personal development, influence on future employability, possible modes of implementation in curricula, enrichment of legal education etc.[1] Despite the number of significant contributions, frequently used synonyms for this term such as 'soft skills', 'twenty-first century skills', 'core skills', 'transferable skills' and 'skills for life' etc., maintain its pervasive ambiguity.[2] After analyzing a variety of definitions,[3] for the purpose of this research we accepted the universal determination—'*transversal skills and competences (TSCs) are learned and proven abilities which are commonly seen as necessary or valuable for effective action in virtually any kind of work, learning or life activity. They are "transversal" because they are not exclusively related to any particular context (job, occupation, academic discipline, civic or community engagement, occupational sector, group of occupational sectors,* etc.*)*'.[4] Despite the literal divergence on the meaning of this concept, the necesity and utility of transversal skills and competences for "one life many careers" instead of up until the recently dominant "one life-one career" style of life, has never been an issue.[5]

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[1] Sá and Serpa (2018), Gruzdev et al. (2018) and Gordon et al. (2009).

[2] Goggin et al (2019), p. 1.

[3] According to Council Recommendation on key competences for lifelong learning, there are 8 competences: (1) literacy competence, (2) multilingual competence, (3) mathematical competence and competence in science, technology and engineering, (4) digital competence, (5) personal, social and learning to learn competence, (6) citizenship competence, (7) entrepreneurship competence and (8) cultural awareness and expression competence. See more: Council Recommendation of 22 May 2018 on key competences for lifelong learning (Text with EEA relevance), Official Journal of the European Union (2018/C 189/01); European Centre for the Development of Vocational Training (CEDEFOP) ranked essential 6 skills: (1) communication skills, (2) team-working skills, (3) customer handling skills, (4) problem solving skills, (5) learning skills and (6) planning and organization skills. See more: CEDEFOP, „Importance of transversal skills", https://www.cedefop.europa.eu/en/tools/skills-intelligence/importance-transversal-skills?country=EU&year=2014&skill=Communications#1; According to International Centre for Technical and Vocational Education and Training there are six spheres of transversal competences: (1) critical and innovative thinking, (2) inter-personal skills (e.g. presentation and communication skills, organizational skills, teamwork, etc.), (3) intra-personal skills (e.g. self-discipline, enthusiasm, perseverance, self-motivation, etc.), (4) global citizenship (e.g. tolerance, openness, respect for diversity, intercultural understanding, etc.), (5) media and information literacy such as the ability to locate and access information, as well as to analyse and evaluate media content and (6) others. See more: UNESCO, TVETipedia Glossary, https://unevoc.unesco.org/home/TVETipedia+Glossary/filt=all/id=577.

[4] This universal definition was created by ESCO Member States Working Group and the European Qualifications Framework Advisory Group, as an expert group. It combines both skills („routine procedures"), competences ("proven abilities in new and complex situations and/or in the face of unforeseen challenges or issues") and knowledge ("as an integral component of skills and competences"). This group analyzed different definitions and made the transversal skills and competences model: (1) general knowledge, (2) health-related, (3) civic, (4) cultural, (5) environmental and (6) entrepreneurial and financial (Hart el al. 2021, pp. 2–5).

[5] Craşovan (2016), p. 172.

When it comes to acquiring legal knowledge, different teaching method(s) applied throughout the existing curricula that consists of readymade courses dealing with law, can improve different students' transversal skills.[6] A flexible and active teaching approach that is more oriented towards solving real-world challenges could (and should) enhance learning and students' motivation and participation.[7] A reconfiguration of teaching strategies will allow students to take part in courses that will have practical, obvious social, environmental, political and economic implications. In the same time this will also improve their transversal skills and competences.[8] Moving beyond the classroom, the traditional results-oriented higher education culture is changing towards adaptive and competences-oriented teaching and learning.[9]

We are aware that the process of improving law studies is quite complex and multidimensional. Besides the incorporation of transversal competences in the curricula and the willingness of students to take part, professors also need to be encouraged to redefine and enrich their method of teaching in different aspects.[10] As Tsaoussi notes, this "cultural paradigm shift" will help overcome the gap between "law in books" and "law in action".

At the same time, it will meet important pedagogical objectives such as understanding of social values. For instance tolerance, solidarity, democratic dialogue, and sustainable development of creativity, problem-solving abilities, emotional intelligence, etc.[11] In other words, in formatting an integral insight of reality, human values will be developed as well as students' personality and creativity.[12] To achieve this aim, professors need to be willing to design a learner-oriented educational environment and to accept their role as facilitators. Tsankov also points out, and we agree, that changing contemporary teacher profiles will "turn them from monopolists of knowledge into mediators between information chaos and organized knowledge".[13] In this way, universities foster interaction with students and encourage their active participation with an aim to minimize academic failure.[14]

[6] Although we advocate for "the cross-curricular learning method as integral part of existing curricula" (Greece example), we are aware of many advantages that the other two most represented approaches „adding to the existing curricula as a new subjects " (Bulgaria example) and „making a new curricula " (Denmark as a case study) have (Gordon et al. (2009, pp. 169–182).

[7] Gallagher and Savage (2020), p. 10.

[8] Sá and Serpa (2018), p. 1.

[9] Sá and Serpa (2018), pp. 4–5.

[10] Tsaoussi (2019), pp. 1–30.

[11] Tsaoussi (2019), pp. 2–4 and Cebrián and Junyent (2015), pp. 2768–2786.

[12] Tsankov (2017), p. 130.

[13] Tsankov (2017), pp. 135–136.

[14] Sá and Serpa (2018), pp. 6–7.

Table 1 Characteristics of interviewees in the sample

		Frequencies	
		N	%
Gender	Female	314	66.5
	Male	158	33.5
Year of study	First	193	40.9
	Second	112	23.7
	Third	91	19.3
	Fourth	75	15.9

2 Sample

We started this research by providing the sample, that was the basis for our further work and analysis. The sample that we used for our research was made of 472 students from the Faculty of Law, the University of Belgrade, out of which 66,5% were females and approximately half of this percentage were males (33.5%). As it is presented in Table 1, when the questionnaires were filled in 2022, the majority of students attended the first year of studies (40.9%), whereas the least of them were the final year of undergraduate studies (15.9%). The sample is representative, since the number of open places on the Faculty of Law University of Belgrade for freshmen is 1500, and it is quite common that the number of students who enroll every second year is less than half of the freshmen.

3 Main Findings and Discussion

Inspired by the survey conducted among the MELE (Modernising European Legal Education) partner institutions, on the sample of professors of law faculties (see Chap. 2), which identifies the status on teaching transversal competences in legal studies, we decided to learn more on students' perspectives. This online survey was launched in May/June in 2022 with two main aims—to learn more about: (1) students' perspectives on representation and development of *transversal skills and competences* at the faculty and outside it and (2) diversity and representation of *teaching methods* that could enhance the level of transversal competences, also from the students' perspectives.

3.1 Students' Assessment: Transversal Competences at the Faculty and Outside It[15]

Since the Bologna Process was initiated in 1999, development of transversal skills and competences was recognised as one of the learning outcomes in the sphere of higher education.[16] As it was previously emphasized, these so called 'transferable skills' represent one of the essential outcomes of the teaching process and learning and as such, it plays an important role in later employment and life in general. Taking into consideration the nature and essence of these competencies, it is important to point out that they do not have to be developed solely at the faculty as formal education setting, but they can be acquired outside it in various ways. This is exactly why we asked the students to estimate the level in which they developed a certain competence in the category of transversal competences at the faculty and outside it (Table 2).

We will commence with the crucial question: what do students consider they learn and have learned the most, and what the least, at the Faculty of Law? The students point out *the capability for critical and self-critical reasoning* as the most developed at the faculty whereas they emphasize *the knowledge of legal terminology in foreign language* as the least developed in this context. Although it could be hypothesized at first that, within this category (the competencies acquired at the Faculty of Law, which concern transversal skills and competences), the students would primarily choose those skills and competences that are strictly linked to the legal profession (e.g., capability of legal analysis and synthesis, capability to make a legal argument, etc.), the empirically obtained result is unsurprising having in mind the current high valuation of critical opinion development as an educational goal. According to Henri Pettersson this educational standard is basically an „educational ideal … behind all teaching", or, as he underlines "an antidote for… increasing political apathy among the youth".[17] Therefore, it might be expected that the students evaluate that such skill is developed during classes at their faculty.

The significance of critical reasoning development is perceived in management and selection regarding a multitude of information received daily, in autonomous reasoning and recognition of omnipresent manipulation strategies. Thus, students think that their professors at the faculty teach them to critically evaluate information, which consequently influences the formation of their value system. This skill represents the backbone of a democratic society, since citizens are responsible and informed, who ponder and re-examine not only their own decisions and behaviors, but also social processes and models.[18]

In the survey and follow-up research dealing with standpoints and opinions of university professors about development and importance of transversal skills,

[15] For this research, a broad theoretical description of transversal skills and competences was empirically applied in the context of legal education taking into consideration some competences specific for the area of law.

[16] Oleškevičienė et al. (2019), p. 64 and Sá and Serpa, (2018), p. 2.

[17] Pettersson (2020), pp. 355–358, 361.

[18] Serkan (2018), Noula (2018) and Benesch (1993).

Table 2 Transversal skills at faculty and outside it

	Transversal skills (arithmetic mean (M))[19]	
	At faculty (M)	Outside faculty (M)
Capacity for legal analysis and -synthesis	2.92	**2.55**
Capacity to construct a valid legal argument	2.94	2.69
Learning techniques and tools	3.26	3.16
Capacity for applying knowledge in practice	2.88	3.01
Oral communication of legal arguments	3.21	2.86
Written communication of legal arguments	2.88	2.67
Knowledge of a legal terminology in second language	**2.63**	2.69
Elementary computing skills	2.99	3.36
Information management skills	3.47	3.47
Planning and organization of time	3.38	3.48
Critical and self-critical thinking abilities	**3.62**	3.51
Ability to adapt to new situations	3.57	3.52
Capacity for generating new ideas	3.33	3.38
Problem solving	3.55	3.54
Decision-making	3.56	3.51
Designing and managing projects	3.01	3.12
Initiative and entrepreneurial spirit	2.99	3.10
Ability to work in a team	3.48	3.33
Conflict resolution	3.33	3.39
Leadership skills	3.22	3.25
Moral action	3.58	**3.60**

Numbers bold in the first column (At the faculty) represent the transversal skills that students perceived as the most and the least developed, as we mentioned in the text ("The students point out the capability for critical and self-critical reasoning as the most developed at the faculty whereas they emphasize the knowledge of legal terminology in foreign language as the least developed in this context"). The same goes for the second column (Outside faculty).

included within the MELE project, *critical thinking*, is evaluated as extremely important (according to 90% of teaching staff), but remarkably lower number (58% of the teaching staff) consider that it is actually being developed (see Chap. 2). This discrepancy occurs in the findings, since professors estimate that the competence mostly developed at the faculty within the teaching content is Ethical commitment and not the capability of critical and self-critical reasoning. It tells us about different insights and perspectives of students and professors in view of the contents transmitted during lessons as well as of the need to possibly have additional categorization of transversal skills in the context that some of them possibly represent meta-components i.e.,

[19] "M" stands for "Arithmetic mean " or „artihmetic average " or just „mean " or „average ".

that they are superior and preconditioned for other skills. It is certainly necessary to examine the professors' population in the Serbian sample to enable more valid extrapolation of results.

As for the least developed competence, i.e. *knowledge of legal terminology in a foreign language,* in line with the prior obtained results that almost 100% of the students' population speak English,[20] it seems that is there are reasonable grounds to include certain English-based literature into the curricula. According to the Council Recommendation (2018), multilingual competence—communication as a non-native language—represents one of the key competencies that need to be learnt and developed so that an individual would lead not only a fulfilled and productive life but also to adapt successfully to various types of changes.[21] Therefore, in university settings, language skills, implying knowledge of one or more foreign languages, could enable a student to read and understand texts in that specific language, to communicate (verbally or in writing, formally or informally) with colleagues from other countries thus opening opportunities for international cooperation, expanding the range of possible sources from which knowledge is acquired, improving oneself as well as learning about different cultures simultaneously respecting their diversity. In this way the professional development of students will be enriched and cross-cultural communication will be facilitated.[22]

As for professors included in the Survey conducted within the project "Modernisation of the European legal education", 63% of interviewees find the knowledge of legal terminology in a foreign language as very important, while less than 40% considers that this competence is developed during lectures (see Chap. 2). This finding is in accordance with the percent of students in our sample, who also find this skill as the least developed at the faculty.

3.1.1 What is the Relationship Between Transversal Skills Acquired at and Outside the Faculty?

The results indicate that the average values of the variables "transversal skills and competences acquired at the university" and "transversal skills and competences acquired outside the university" positively corelate to moderate intensity, which

[20] For this research, we requested from the students in our sample to tell us which language do they speak and on what level (they are defined as basic (A1, A2), intermediate (B1, B2) and advanced (C1, C2). Almost all interviewees (99,15%) stated that they speak English as a foreign language from level A1 to C2. German is spoken by 53.17%, French by 47.03%, Russian 40.46%, Spanish 38.13%, Italian 36.44% and some other language 36.86%. This percentage confirms that students of the Faculty of Law have good knowledge of foreign languages (placing a special emphasis on the English language), thus making possible the usage of various types of studying and teaching contents in foreign languages so that students are enabled to have diverse opportunities for professional advancement and development.

[21] Council Recommendation of 22 May 2018 on key competences for lifelong learning (Text with EEA relevance), Official Journal of the European Union (2018/C 189/01), 8.

[22] Oleškevičienė et al. (2019), p. 75 and Tsankov (2017), p. 134.

further means that the majority of students who have acquired and are still acquiring transversal skills and competences at the university also acquire these skills outside of the university.

Furthermore, it has been shown that the average grade achieved by the students so far in their studies is positively correlated with transversal skills and competences acquired at the university and transversal skills acquired outside the university. In practice this means that those who have higher GPAs acquire more transversal skills in both settings. Such results tell us not only about the importance of including the acquisition of transversal skills in every domain of functioning, but also that their acquisition concerns internal personal factors, characteristics such as motivation, enthusiasm, creativity, ability and willingness to try new practices, etc.[23]

3.2 Students' Assessment of Representation of Teaching Methods

Table 3 shows the percentages of each of the teaching methods that should be developed within formal forms of teaching. First-year students mostly point out that they encountered independent oral presentations, and the majority of responses were gathered around the option "often", 33.2%. These students rarely encountered working on case studies and role playing (56.5%), while 43.5% of them reported that they had not encountered these methods at all. Among students of the second, third and fourth year of undergraduate studies, this pattern of familiarity with the mentioned methods continues, with a noticeable slight increase in knowledge of each of them in each subsequent year.

It is important to point out the results were, to some extent, expected considering the fact that students are mostly familiar with the method of independent oral presentation and, given that in their daily classes they are constantly faced with not only providing answers orally, but also presenting papers in that manner, followed by pre-examination obligations, oral examinations, etc. On the other hand, the low representation of encounters with role-playing and working on case studies may be a suggestion to the teaching staff to include such types of methods in their repertoire of working with students.

[23] Oleškevičienė et al. (2019), pp. 68–71 and Gallagher and Savage (2020), p. 10. A phenomenological research, semi-structured interviews with twelve students who are working and studying at the same time, showed that development of transversal skills and competences depends both on *internal personal qualities* – creativity, willingness to try new practices, personal courage, motivation, openness to new ideas, ability to take risk, not being afraid of change and *external factors* – peers support, idea exchange with colleagues, working in a group, institutional impact etc (Oleškevičienė et al. 2019, pp. 68–71).

Table 3 Methods developed within formal forms of teaching in terms of the year of study

	First year (%)	Second year (%)	Third year (%)	Fourth year (%)
Essay writing	77.7	87.5	86.8	78.7
Individual oral presentations	**89.6**	**93.7**	**93.4**	**96.0**
Case studies	**56.5**	**58.0**	65.9	76.0
Role play	**56.5**	59.8	**65.9**	**60.0**
Team work research	67.4%	72.3%	73.6%	72.0%
Individual research	75.6	83.9	82.4	76.0
Data-bases search	60.6	59.8	71.4	66.7
Group discussions	79.8	82.1	83.5	84.0

Bold numbers in the rows refers to the most and the least developed methods within formal forms of teaching in terms of the year of study according to the respondents in the survey.

3.3 Transversal Competences Outside Regular Forms of Teaching

Table 4 presents a clear pattern of the students' selection of offered transversal competencies they exercise the most: attending seminars, conferences, training. The table encompasses all years of undergraduate studies. It should be taken into account that the most frequently marked option among first and third year students on this variable is "sometimes", while among second and fourth year students the option "rarely" appears as the most frequent. This structure of answers was probably due to the fact that this form of extracurricular activity is easily available to students through various sources and advertisers at the college (recommendations of professors, announcements of the student parliament, invitations from various organizations to participate in seminars, etc.) and thus makes this form of engagement close to their experience.

In contrast to this, the competences assessed as the least developed are participation in the work of the legal clinic among first-year students (which is logical considering their level of study), while among the students of second, third and fourth years of study, the least developed in non-faculty setting is volunteering in other non-governmental organizations. Once again, the question of the availability of information about this type of proactive work arises. Opportunities to learn about the work of non-governmental organizations can be assumed to be insufficient, or at least not easily available.

Table 4 Transversal competences outside regular forms of teaching in terms of the year of study

	First year (%)	Second year (%)	Third year (%)	Fourth year (%)
Work in student organizations	57.0	54.5	70.3	54.7
Membership in a sports club	38.9	40.2	42.1	46.7
Attending seminars, conferences, training	**69.4**	**75.9**	**82.4**	**76.0**
Volunteering in other non-governmental organizations	34.7	**33.0**	**31.9**	**36.0**
Participation in the work of the legal clinic	**19.7**	25.9	36.3	52.0
Attending private practice	22.8	69.6	41.8	70.7
Foreign language course	48.2	59.8	56.0	61.3

Bold numbers in the rows refers to "the students' selection of offered transversal competencies they exercise the most: attending seminars, conferences, training" and "competences assessed as the least developed" as we mentioned in the previous text.

3.3.1 What is the Relationship Between Learning Methods and Extracurricular Activities?

Significant positive correlations were found between learning methods and extracurricular activities, which means that the more respondents agreed to use different learning methods, the more they agreed to participate in extracurricular activities. Also, those students with higher GPAs generally use a greater range of learning methods and participate in more extracurricular activities, while those with lower averages take up fewer learning methods and participate seldom in extracurricular activities. Such findings highlight the need to try as many variable teaching methods as possible in order to motivate students with a lower average. This can lead not only to a higher grade (and interest), but also to a greater and better acquisition of transversal skills outside the teaching context, which consequently opens a wider range of possibilities when accessing the labor market.

4 Conclusion and Recommendation

Besides the theoretical contribution, this explorative research conducted on the sample taken at the biggest Faculty of Law in Serbia, as part of the University of Belgrade, had a couple of practical—in our opinion—even more important implications. First, the obtained results helped in mapping the gaps of the current (traditional) model of law teaching, from the students' perspective, which require further improvement. Revising the existing teaching methods could help create a stronger connection between the two worlds that are mutually intertwined: education, on the one side, and labor market, on the other.[24] In this way, our students would be taught professional competences, that are"always appreciated, but … not always sufficient for getting hired", as well as transversal skills and competences, which might be needed even more.[25] Having in mind that employers in contemporary business value transversal skills and competences for the success of professional work, modern higher education institutions have to foster them as well as to work on their development more.[26]

Second, as competence development is a shared European and national policy goal,[27] the results could be used as a basis for further research on students' learning aspirations, motivation, and capacities. As the educational process is not a one-way street, „the shift from teaching to learning" requires shared responsibility for the educational process between teachers and learners.[28] We have already empirically found more on the experience of the professors (see Chap. 2), so to mitigate the traditional discrepancy students need to be involved equally as effective partners.[29] In other words, students are not being seen as an object, but rather as a subject of education who can engage in the learning process independently and actively with an aim to gain and expand multidisciplinary knowledge.[30]

Last but not least, and probably most important is that, after analyzing the results, we started rethinking and questioning current educational aims at our Faculty as well

[24] Research conducted on the sample of 165 respondents (122 graduates and 43 employers) of the State University of Physical Education and Sport in Republic of Moldova, showed that both categories of the respondents – 62% of graduates and even 80% employers, are of the opinion that dialogue between university and labor market is poor. These two seemingly distant "worlds", academic and economic one, have to develop a more productive communication and encouraging partnership (Dorgan et al. (2018, pp. 213–215; Gallagher and Savage (2020), p. 10).

[25] Interesting empirical research conducted on the sample of 551 students/Master's degree students and 258 employers from Western Romania showed a major difference in the perception of importance of professional competences in comparison to the transversal. Employers rated professional competences relatively low (56,9%), unlike students preparing to enter in the accounting field of labour (89,4%), while both categories have almost similar perception regarding the transversal competences (84% students and 85% employers) (Nicolaescu et al. (2017, pp. 127, 135–137).

[26] Gruzdev et al. (2018), p. 696.

[27] Gordon et al. (2009), p. 192.

[28] Gordon et al. (2009), p. 171.

[29] Gruzdev et al. (2018), p. 696.

[30] Tsankov (2017), p. 156.

as possibilities of our students to learn throughout existing courses.[31] Formal education can be more effective when is complemented with particular personal abilities of students. Therefore new findings induced the structural change in a form of non-formal bottom-up initiative.[32] Accepting the fact that we don't nurture, nor promote transversal skills and competences enough, we started changing academic culture by institutionalizing the workshops on different transversal skills. These "baby steps" were materialized through an online platform "Programs for quality and efficient studying"[33] where students apply for nine interactive workshops which are being organized occasionally. This platform was launched in September 2022, as part of the University of Belgrade Faculty of Law optional activity and was supported by the Institute for Legal and Social Sciences.[34] Even in its initial phase it proved that students are indeed interested in a more practical approach to learning in addition to the faculty's formal curricula that their Faculty offers. The program's educational courses focused on the development of practical and transversal competencies from the very beginning of the legal education, i.e. from the first year of studies. In the first cycle, a total of 1040 applications were received (for all the courses combined). Having in mind that students had the option to apply for as much as workshops as they were interested in, around 350 students participated. These numbers could serve, firstly, as an indicator that this type of education and courses are more in demand among students, our main target group; and secondly, they could serve as a strong guideline for the future gradual shifting focus of teaching methods and curricula content, in accordance with the findings presented in this research.

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[31] A good example comes from the West University Timisoara. Since 2014/2015, students who enrolled this university, can choose three complementary subjects to further develop transversal skills and competences. Courses where created with an aim to make „a flexible academic journey with multiple options ", so professors organized subjects as part of the existing curricula or made a totally new discipline (Craşovan 2016, pp. 171–178).

[32] See more on some innovative bottom-up initiatives in Hungary and Poland (Gordon et al. 2009, pp. 182–183; Gruzdev et al. 2018, pp. 696–697).

[33] Faculty of Law, University of Belgrade – Programs for supporting efficient and better studying (Pravni fakultet Univerziteta u Beogradu – Programi podrške efikasnijem i kvalitetnijem studiranju), http://orijentacija.ius.bg.ac.rs/.

[34] Institute for Legal and Social Sciences is a part of the University of Belgrade Faculty of Law organisational structure and bodies.

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Environmental Law and Cross-Cutting Challenges in Legal Education: Sharing Developments in Croatia

Biljana Činčurak Erceg, Ana Đanić Čeko, and Emina Jerković

Abstract Environmental protection, sustainable development, and climate change can be considered as cross-cutting topics. There is no doubt that these are some of the burning topics of the modern age. The achievement of climate goals (set primarily within the framework of the European Union) will require professionals trained in environmental law and protection, as well as related topics which will be involved in the process of achieving European environmental goals. However, such professionals are currently not trained sufficiently in law faculties in the Republic of Croatia, which is shown in the paper, based on a comparative analysis of the implementation plans of law faculties. It is necessary to educate young lawyers on environmental protection and create a perception of the importance of law and legal protection. This chapter presents activities related to environmental protection based on the implementation plans of faculties of law in Croatia, especially of the Faculty of Law Osijek. In addition to the inclusion of environmental issues in the curriculum of various established courses, the chapter emphasises the necessity of collaboration through 'green legal clinics.' Further activities include writing papers on environmental protection and organizing dedicated workshops, aimed at pointing out the importance of educating young lawyers on environmental legal protection.

Keywords Environmental law · Cross-cutting challenges · Legal education · Sustainable development

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1 Introduction

Cross-cutting themes are "important curriculum content which is to be covered across subjects (or disciplines or learning areas), rather than being taught and learned in one particular subject."[1] They deal with general principles such as democracy, equality, sustainability, and good governance.[2] They relate to and must be considered within other categories to be appropriately addressed, such as gender, age, equality, disability, etc.[3] Cross-cutting themes are frequently covered across several established subjects, rather than being taught and learned in one subject only. Studying cross-cutting themes can stimulate interdisciplinary thinking and mutual learning, relating to subjects such as gender issues, peace education, and education for sustainable development.[4]

Cross-cutting themes as curriculum content are gaining more and more importance.[5] However, existing legal study programs do not recognize their significance.[6] Knowledge of different topics and areas is essential for both students and employers and other actors (from civil movements and associations, to political and legislative actors). As stated by Graham, legal education plays an essential but underacknowledged role in environmental change, legal practicioners and policymakers, since their work can ban and legitimate specific environmental practices. Furthermore, he emphasizes that legal education often excludes environmental considerations.[7] Other authors point out that law schools have been shifting or diversifying environmental law teaching to keep up with the times, but still, law school curricula need to change, systematically promote, and implement education for sustainable development and sustainability topics in study programs.[8] Education for sustainability depends on the teacher's motivation and ability to integrate it into current curricula, so university teachers face new demands and challenges.[9] Teachers and professors are recognized when we talk about education for sustainable development and environmental law as the most important actors of change and promotion of sustainable development.[10] "Their knowledge and competences are crucial

[1] UNESCO, International Bureau of Education, Cross-cutting themes. http://www.ibe.unesco.org/en/glossary-curriculum-terminology/c/cross-cutting-themes.

[2] Cardiff University, Cross-Cutting Themes. https://www.cardiff.ac.uk/data-innovation-accelerator/what-we-do/cross-cutting-themes.

[3] Inter-agency Network for Education in Emergencies (INEE), Cross-cutting Issues. https://inee.org/eie-glossary/cross-cutting-issues.

[4] UNESCO, International Bureau of Education, Cross-cutting themes. http://www.ibe.unesco.org/en/glossary-curriculum-terminology/c/cross-cutting-themes.

[5] Rieckman (2018), p. 59 and Evans (2019), 3–36.

[6] Europa-Institut, Modernising European Legal Education. https://mele-erasmus.eu/teachers/.

[7] Graham (2014), p. 395.

[8] Rosenbloom and Rushlow (2022) pp. 545, 547, Buzov et al. (2020) p. 20, Črnjar, (2015) p. 162 and Boer (2000), p. 460.

[9] Buzov et al. (2020), p. 16.

[10] Vukelić (2020), p. 145.

for the restructuring of educational processes and institutions in the direction of sustainability."[11]

As Adelle, Hertin and Jordan point out, "sustainable development is a quintessentially cross-cutting issue that necessitates a high degree of policy coordination."[12] The issue of sustainability is becoming increasingly relevant in many professions, expanding and integrating into various social spheres. Addressing sustainability issues requires an integrated perspective and core knowledge from several disciplines. Therefore, many faculties and other educational institutions "have been engaged in incorporating and institutionalizing sustainable development (SD) into their curricula, research, operations, outreach, and assessment and reporting."[13] However, as Lozano further describes, and based on the data of different authors, sustainable development is still a new idea in most universities. Furthermore, "while law schools have begun to address sustainable development, they have not done so in any organized or systematic way"[14] which is also confirmed by the review of implementation plans of law faculties in the Republic of Croatia, presented in this paper.

Still, it should be remembered that work in environmental law is more comprehensive than in the beginning, and some new professions are emerging.[15] It is also emphasized that the relevant areas of the natural and social sciences should be included in environmental law courses, and other environmentally relevant disciplines must also interact with legal scholars.[16] The available literature also suggests that the extent to which a country is developed plays a prominent role in defining how successful its environmental education programs can be, with exceptions.[17]

Issues of sustainability and environmental protection are also important for young lawyers. In this chapter, the authors show the importance of environmental law in education and how environmental protection issues are represented in the study program at law faculties in the Republic of Croatia: in Osijek, Rijeka, Split, and Zagreb. Other related activities carried out at these faculties will also be highlighted. The chapter furthermore presents the results of a survey conducted at J. J. Strossmayer University, Faculty of Law Osijek, in which students expressed their opinions on environmental protection, whether they consider it important to them, and if they should be educated in more depth about the subject.

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[11] Vukelić (2020), p. 145.

[12] Adelle et al. (2006), p. 57.

[13] Lozano (2010), p. 637. See also Dernbach (2009), pp. 495, 504.

[14] Dernbach (2009), p. 492.

[15] "Knowledge of "environmental law" is now a requirement for many jobs that are not traditional "environmental law" positions-such as jobs in real estate, insurance, and corporate law. Some positions are abandoning the "environmental law" label entirely, and instead seeking to hire someone in "sustainability", "sustainable development"," etc. Rosenbloom and Rushlow (2022) p. 545.

[16] Boer (2000), p. 464. Similar Dernbach (2009), p. 502.

[17] Solomon (2010), p. 1071.

2 Legal Regulation of Environmental Protection in the European Union and Legal Education

Environmental protection is being promoted through an interdisciplinary legal approach and the application of legal rules from various different established legal domains. These include international, European, constitutional, traffic, administrative, financial, criminal and civil law, as well as various forms of supervision of the behaviour of subjects in terms of compliance with regulations, prevention of damages, and sanctioning of illegal behaviour. In this sense, an excellent knowledge of legal regulations is necessary for lawyers working in this field, especially when it comes to international, European and national sources of law.

The fight against climate change and pollution prevention requires greater ambition, increased climate actions by the EU and the Member States, considerable financial resources,[18] as well as extensive legal changes. In 2019 the European Commission adopted 'The European Green Deal',[19] a package of political initiatives with the ultimate goal of achieving climate neutrality by 2050. In 2021, after a series of non-binding documents, the EU adopted the 'European Climate Law',[20] which bindingly sets the goal of making the EU climate neutral by 2050. In the same year, the European Commission presented a series of legislative proposals in the Communication 'Fit for 55',[21] including a series of proposals for revising the EU's legislation.[22] To put them in practice, these ambitious plans will require many lawyers educated in environmental law issues.

Ofak, while stating that the European environmental law is one the most challenging, distinguishes three groups of challenges in European environmental protection law.[23] The first is related to the translation of the legal acquis into the Croatian

[18] The EU invests significant financial resources for the environment. In a EU budget for 2023 total commitments are set at 186.6 billion EUR and total payments amount to 168.6 billion EUR. Commitments directly connected to natural resources and environment amount to 57.26 billion EUR and payments amount to 57.46 billion EUR. European Council, Council of the EU, Infographic—2023 EU budget: Main areas. https://www.consilium.europa.eu/en/infographics/2023-eu-budget-main-areas/. Since 2013, Europe has more than doubled the funds raised to help developing countries mitigate and adapt to the impact of climate change: from 9.6 billion EUR in 2013 to 23 billion EUR in year 2021. European Council, Council of the EU, Infographic—Europe's contribution to climate finance (€bn). https://www.consilium.europa.eu/en/infographics/climate-finance/. This indicates that the environment and sustainable development is high on the list of EU priorities.

[19] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'The European Green Deal', COM/2019/640 final.

[20] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021, p. 1–17.

[21] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality, COM/2021/550 final.

[22] Činčurak Erceg (2022), p. 119.

[23] Ofak (2014), p. 1.

language, the second regarding the quality of regulations and their preparation, and the third is the application of these regulations in practice. In dealing with them, lawyers educated in environmental protection law are prerequisites.

The European Commission ensures that all Member States properly apply EU environmental law and launches infringement procedures when this is not the case. "With over 200 legal acts to monitor in 27 Member States, this is a major task in the environmental field."[24] The most numerous procedures conducted against the Member States of the EU are in the field of environmental law.[25]

The concept of sustainable development is relatively recent and represents one of the fundamental guidelines in environmental protection policy. The importance of sustainable development is evident because it is mentioned in the constitutions and numerous legal provisions of many countries.[26] Nevertheless, the concept is defined differently.[27] As stated in Agenda 21,[28] it comprises three main components: society, economy, and ecology.[29] Agenda 21 contains provisions on "Establishing a cooperative training network for sustainable development law"[30] (chapter 8.20). Boer suggests that this provision has been a starting point for a range of programmes.[31] The role and importance of the faculties in that process was emphasized. "Education

[24] European Commission, Legal enforcement. https://environment.ec.europa.eu/law-and-governance/legal-enforcement_en.

[25] European Commission (2022) Commission Staff Working Document, General Statistical Overview, accompanying the document Report from the Commission "Monitoring the application of European Union law", 2021 Annual Report, SWD (2022) 194 final, https://commission.europa.eu/system/files/2022-07/2021-swd-annual-report-eulaw-overview_en.pdf, pp. 26, 28, 30, 31; European Commission (2022) Report from the Commission "Monitoring the application of European Union law", 2021 Annual Report, COM (2022) 344 final, https://commission.europa.eu/system/files/2022-07/com_2022_344_2_en.pdf; Ofak (2014), p. 1.

[26] Jerković (2022), p. 62.

[27] Činčurak Erceg (2022), p. 114. The definition from the report 'Our Common Future' published by the United Nations World Commission on Environment and Development of 1987 is most often cited, according to which sustainable development is development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. Činčurak Erceg (2022), p. 115.

[28] Agenda 21 is a global and comprehensive plan of action to be taken in every area in which human impacts on the environment. Agenda 21 was adopted in 1992 in Rio de Janeiro at the United Nations Conference on Environment and Development and it is a global consensus with a strong focus on the principle of sustainable development. Vasilj and Činčurak Erceg (2016), p. 53. The full implementation of Agenda 21 and the Programme for Further Implementation of Agenda 21 were reaffirmed at the World Summit on Sustainable Development in Johannesburg in 2002.

[29] Omejec (2003), p. 31.

[30] Agenda 21 (1992), p. 69. It states: "Competent international and academic institutions could, within agreed frameworks, cooperate to provide, especially for trainees from developing countries, postgraduate programmes and in-service training facilities in environment and development law. Such training should address both the effective application and the progressive improvement of applicable laws, the related skills of negotiating, drafting and mediation, and the training of trainers. Intergovernmental and non-governmental organizations already active in this field could cooperate with related university programmes to harmonize curriculum planning and to offer an optimal range of options to interested Governments and potential sponsors."

[31] Boer (2000), pp. 459–460.

and training should equip young people with the skills to facilitate employability in the common market, especially by enabling them to respond to the changing circumstances the labour market is prone to because a highly qualified and flexible workforce is seen as the backbone of a strong economy."[32] However, curricular reform in the Republic of Croatia, which should modernize school curricula and teaching methods is still in progress. It was identified in the European Commission's Education and Training Monitor 2017 for Croatia as one of the major challenges.[33] Acceptance and alignment with the concept of sustainable development will involve the adoption and amendments of law, as well as the whole range of new skills besides educated and professional staff. Legal education must also adapt and consider changes in law, work, and society to prepare young lawyers for the labour market.[34]

3 Environmental Law in the Study Programmes in the Republic of Croatia

Starting from Graham's conclusion: "If the cradle of legal thought and practice is the law school, then the question of the contribution of legal education to environmental sustainability is clear",[35] and the fact that legal education often excludes environmental protection issues, we will present the issues of sustainable development, environmental protection, climate change, etc. that are included in the study programmes of law faculties in the Republic of Croatia (i.e. J. J. Stossmayer University of Osijek, Faculty of Law Osijek; University of Rijeka, Faculty of Law; University of Split, Faculty of Law and the University of Zagreb, Faculty of Law).

3.1 Josip Juraj Stossmayer University of Osijek, Faculty of Law Osijek

As for education and information about sustainable development and environmental law, students receive a lot of information while attending the compulsory courses in the Integrated Undergraduate and Graduate Study Programme, since the topic is interdisciplinary. In the 9th semester, students choose two out of 38 elective courses.

[32] Kasap et al. (2018), p. 253.

[33] Kasap et al. (2018), p. 264.

[34] See Art. 220. of the Environmental Protection Act of the Republic of Croatia (Official Gazette, Nos. 80/2013, 153/2013, 78/2015, 12/2018, 118/2018) in which it is prescribed that the State ensures the implementation of education for environmental protection and sustainable development in the educational system and encourages the development of the environmental protection system and the improvement of environmental protection [Art. 220(1)], but also ensures a system of teaching the public about effective environmental protection.

[35] Graham (2014), p. 422.

Two are directly related to sustainable development and environmental law, i.e. Environment and Sustainable Development and Traffic and Environmental Law.[36] Within the framework of the Professional Administrative Study Programme,[37] students can choose the following elective courses: Agrarian and Water Law[38] and Environmental Law.[39] In the same way, topics related to traffic and the environment are discussed within Management of Public Transportation, an elective course in the Specialist Professional Graduate Study Programme in Public Administration.[40] Furthermore, in the course State Administration and Special Administrative Procedures that is offered within the State Administration module,[41] students can analyse and compare the General Administrative Procedure Act[42] as a general act and special administrative procedures according to the Environmental Protection Act.[43]There is one elective course, i.e. Environmental Protection and Social Justice, in the Graduate University Study Programme in Social Work.[44] There are four elective courses in the Doctoral Study Programme: Sustainable Transport, Environmental Taxes, Sustainable Development—Legal Aspects and Legal Aspects of Environmental Protection.[45] Transport and Environmental Law and Environmental Protection are courses offered in English to ERASMUS students.[46]

The Faculty of Law Osijek is the only faculty in the Republic of Croatia that has the Green Legal Clinic and the Energy Efficiency Green Library.[47] In 2022, the Faculty also participated in the project "Environmental Legislation and Sustainable Economic Development—the State of Play in Serbia and Experiences of the Croatian

[36] Faculty of Law Osijek, Integrated Undergraduate and Graduate Study Programme"Law" . https://www.pravos.unios.hr/kolegij/?idcourse=206047&lang=en and Izvedbeni plan nastave Integrirani preddiplomski i diplomski sveučilišni studij pravo u ak. 2022./2023. god. https://www.pravos.unios.hr/wp-content/plugins/ciceroscope/download.php?file=7408.

[37] Faculty of Law Osijek, Izvedbeni plan Stručnog upravnog studija u ak. 2022./2023. god. https://www.pravos.unios.hr/wp-content/plugins/ciceroscope/download.php?file=7692, pp. 153–154, 180–182.

[38] Faculty of Law Osijek. https://www.pravos.unios.hr/courses/?idcourse=29191&lang=en.

[39] Faculty of Law Osijek. https://www.pravos.unios.hr/courses/?idcourse=29197&lang=en.

[40] Faculty of Law Osijek, Izvedbeni plan Specijalistički diplomski stručni studij javne uprave u ak. 2021./2022. god. https://www.pravos.unios.hr/wp-content/plugins/ciceroscope/download.php?file=4272, pp. 65–68 and https://www.pravos.unios.hr/courses/?idcourse=103413&lang=en.

[41] Faculty of Law Osijek, Izvedbeni plan Specijalistički diplomski stručni studij javne uprave u ak. 2021./2022. god., https://www.pravos.unios.hr/wp-content/plugins/ciceroscope/download.php?file=4272, pp. 85–88 and https://www.pravos.unios.hr/courses/?idcourse=223863&lang=en.

[42] Official Gazette, Nos. 47/2009, 110/2021.

[43] Official Gazette, Nos. 80/2013, 153/2013, 78/2015, 12/2018, 118/2018.

[44] Faculty of Law Osijek, Graduate University Study Programme in Social Work. https://www.pravos.unios.hr/kolegij/?idcourse=230251&lang=hr.

[45] Faculty of Law Osijek, Doctoral Study Programme. https://www.pravos.unios.hr/pravo-arhiva/doktorski-studij/izborni-predmeti.

[46] Faculty of Law Osijek, ERASMUS. https://www.pravos.unios.hr/courses-offered-in-english-language/.

[47] Faculty of Law Osijek, Energy Efficiency Green Library. https://www.pravos.unios.hr/nacionalni-projekti/#zeek.

EU Membership" in cooperation with the Institute of European Studies from the Republic of Serbia.

The Faculty of Law Osijek encourages students to write and thus publishes an annual journal called "Paragraf", which contains the best student papers dealing with legal and social issues. The thematic issue relating to law and environmental protection will be published in 2023.[48] Students are encouraged and supported to take part in conferences.[49] Let us also mention the "EU and Comparative Law Issues and Challenges" (ECLIC) conference organised by the Faculty, whose topic for 2023 is also related to the environment: "Digitalization and Green Transformation of the EU".[50]

3.1.1 Green Legal Clinic of the Faculty of Law Osijek

The role of legal clinics is indispensable to the improvement of legal education. The importance of legal clinics is manifested in numerous advantages, such as improving the quality of the teaching process, working on practical examples and considering legal problems, preparation and active participation, teamwork, greater availability of legal aid and more effective legal protection, a clearer insight into the social environment in which law is applied, and strengthening awareness of the role of lawyers in practice.[51] Three legal clinics operate at the Faculty of Law Osijek, the youngest of which is the Green Legal Clinic (founded in January 2021).[52] It was founded to ensure the necessary and appropriate protection of nature and the environment and the legal protection of citizens (free legal aid), as well as provide students with opportunities for adequate professional, scientific and social activation in the aforementioned areas. Numerous activities were organized in which professors involved in the work of the Green Legal Clinic and student clinicians participated.[53] Cooperation with the Association for Nature and Environmental Protection "Green Osijek"[54] (and

[48] Faculty of Law Osijek, Paragraf. https://hrcak.srce.hr/ojs/index.php/paragraf/.

[49] Students actively participated in the 2nd International Student Green Conference and were awarded prizes for the best student works at the 9th International Conference "Water for All".

[50] Faculty of Law Osijek, ECLIC. https://eclic-conference.com/.

[51] Đanić Čeko et al. (2021), pp. 184, 206–208.

[52] Pravilnik o organizaciji i djelovanju Zelene pravne klinike Pravnog fakulteta Osijek. https://www.pravos.unios.hr/pravo-arhiva/zelena-pravna-klinika/propisi-dokumenti-i-obrasci-16-02-2021.

It differs from the other two by its organizational structure and way of working and establishment. It arose as a result of one of the activities of the project "Transformation"—New approach to the management of protected and NATURA 2000 areas. https://www.zeleni-osijek.hr/projekt/projekt-transformacija-borba-protiv-korupcije-u-zastiti-prirode/.

[53] Projects, Science Festival, Days of Europe PRAVOS, guest lectures, ERASMUS guests, workshops, educations, exhibitions, field teaching, round table related to 'The European Green Deal', forum World Environment Day and other activities related to the field of environmental protection were organized. Zelena pravna klinika, Pravni fakultet Osijek. https://www.facebook.com/zelenapravnaklinika/.

[54] Zeleni Osijek. https://www.zeleni-osijek.hr/. Faculty of Law Osijek, Sporazum o suradnji.

other stakeholders responsible for this area) is particularly significant. The importance of cooperation is evident in solving specific problems in the field of nature and environmental protection, as well as other forms of socially useful learning.

3.2 University of Rijeka, Faculty of Law

Comparing the offer of "green" courses, it was established that at the Faculty of Law in Rijeka there is one elective course, Marine Environment Protection Law, which is directly related to sustainable development and environmental law. It is offered on four different study programmes: the Integrated Undergraduate and Graduate University Study of Law,[55] the Undergraduate Professional Study Programme in Administration Studies,[56] the Specialist Graduate Professional Study in Public Administration,[57] and the Postgraduate Doctoral Study Programme in the field of social sciences, the area of law.[58] The course is also taught in English.

3.3 University of Split, Faculty of Law

At the Faculty of Law in Split, there are several electives courses at all levels of study. Two—Criminal Environmental Protection and The Right to Protect the Marine Environment—in the Integrated Undergraduate and Graduate University Study[59]; The Right to Environmental Protection in the Professional Administrative Study[60];

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https://www.pravos.unios.hr/pravo-arhiva/zelena-pravna-klinika/propisi-dokumenti-i-obrasci-16-02-2021.

[55] University of Rijeka, Faculty of Law, Integrirani preddiplomski i diplomski sveučilišni studij Pravo (redovni i izvanredni studij), Izvedbeni nastavni plan za ak. god. 2022./2023. https://www.pravri.uniri.hr/files/studiji/diplomski/izvedbeni700.pdf.

At the Integrated Undergraduate and Graduate University Study of Law, it is necessary to fulfil the prerequisite of achieving ECTS points from the compulsory course Maritime and General Transport Law.

[56] University of Rijeka, Faculty of Law, Izvedbeni nastavni plan Preddiplomski stručni studij Upravni studij. https://www.pravri.uniri.hr/files/studiji/upravni/izvedbeni800.pdf.

[57] University of Rijeka, Faculty of Law, Izvedbeni nastavni plan Specijalističkog diplomskog stručnog studija javne uprave za ak. god. 2022./23. https://www.pravri.uniri.hr/files/studiji/specijalisticki/izvedbeniju.pdf.

[58] University of Rijeka, Faculty of Law, Opis studijskog programa. https://www.pravri.uniri.hr/files/ridoc/Opis_studijskog_programa2018_2019.pdf.

[59] University of Split, Faculty of Law, Integrated Undergraduate and Graduate University Study. https://www.pravst.unist.hr/en/studiji/preddiplomski-i-diplomski/integrirani-preddiplomski-i-diplomski/#1539032794067-c5be50bd-17da.

[60] University of Split, Faculty of Law, Elaborat o studijskom programu: Stručni upravni studij. https://www.pravst.unist.hr/dokumenti/upravni_strucni.pdf#page=62.

and an elective course Health Ecology and Occupational Medicine in the Postgraduate Specialist Study Programme in Medical Law.[61] In 2022, they launched the lifelong learning programme "Environmental protection issues—yesterday, today, tomorrow?[62] Courses offered in English to Erasmus students are as follows: Environmental Criminal Law and Marine Environment Protection Law in the Integrated Undergraduate and Graduate University Study of Law[63] and Environmental Law in the Professional Administrative Study Programme.[64]

3.4 University of Zagreb, Faculty of Law

In the fifth year of the Integrated Undergraduate and Graduate University Study of Law (Constitutional and administrative module) students have a mandatory course Environmental Law.[65] Within the selected module, students can also choose an elective course EU Climate Change Law.[66] Students also have a course Environmental Law in the Professional Undergraduate Study of Public Administration and Taxation.[67] The doctoral study programme in legal sciences[68] has been completely reformed, and there are no longer as many modules/specializations as before, but there are a couple of doctoral candidates with research topics in environmental law.

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[61] University of Split, Faculty of Law, Elaborat o studijskom programu: Poslijediplomski specijalistički studij iz medicinskog prava. https://www.pravst.unist.hr/wp-content/uploads/2018/11/dokpdf_elaborat_poslijediplomskog_specijalistickog_studija_iz_medicinskog_prava.pdf.

[62] University of Split, Faculty of Law, Lifelong learning programme. https://www.pravst.unist.hr/wp-content/uploads/2022/04/ENVIRONMENTAL-PROTECTION-ISSUES-%E2%80%93-YESTERDAY-TODAY-TOMORROW.pdf.

[63] University of Split, Faculty of Law, List of courses available for Erasmus students. https://www.pravst.unist.hr/wp-content/uploads/2021/04/List-of-Erasmus-courses-Study-of-Law-2021-2022.pdf.

[64] University of Split, Faculty of Law, List of courses available for Erasmus students. https://www.pravst.unist.hr/wp-content/uploads/2021/04/List-of-Erasmus-courses-Professional-Administrative-Studies-2021-2022.pdf.

[65] Professors form various fields of law are included in this course (five Chairs: civil, administrative, criminal, international, financial law and science). University of Zagreb, Faculty of Law, Pravo okoliša. https://www.pravo.unizg.hr/GP/predmet/praoko_a/informacije_o_predmetu.

[66] University of Zagreb, Faculty of Law, Integrirani preddiplomski i diplomski sveučilišni studij Pravo, Izvedbeni plan, ak. god. 2022./2023. pp. 10–15 https://www.pravo.unizg.hr/images/50023617/Izvedbeni_plan_Integrirani_preddiplomski_i_diplomski_sveucilisni_studij%20Pravo_2022_2023.pdf, Peta godina—Integrirani preddiplomski i diplomski sveučilišni pravni studij. https://www.pravo.unizg.hr/studij/integrirani-pravni/peta-godina.

[67] Three Chairs are involved: administrative, civil and financial law and science. University of Zagreb, Faculty of Law. https://www.pravo.unizg.hr/GP/predmet/praoko_c/opce_informacije_o_predmetu.

[68] University of Zagreb, Faculty of Law, Doktorski studij iz pravnih znanosti. https://www.pravo.unizg.hr/studij/doktorski-pravni/izvedbeni_plan_nastave.

Table 1 Number of the surveyed students by study programme

Total answers	192	100%
Female students	156	81.3%
Male students	36	18.8%
Study programme		
Integrated Undergraduate and Graduate Study Programme "Law"	95	49.5%
Professional Administrative Study Programme	37	19.3%
Professional Graduate Study of Public Administration	29	15.1%
Undergtaduated Study of Social Work	17	8.9%
Graduated Study of Social Work	12	6.3%
Doctoral Study Programme	2	0.9%

4 Survey on the Attitudes of Students

For this paper, a survey on the attitudes of students towards environmental law topics was conducted at the Faculty of Law Osijek in December 2022. Responses were collected anonymously, voluntarily and online. The survey covered the perception of environmental protection, the role of law in environmental protection, and information about environmental protection that one could receive at the Faculty of Law Osijek. A total of 192 students completed the survey (81.3% women and 18.8% men),[69] from all years of study (16.1% 1st year, 18.2% 2nd year, 21.4% 3rd year, 18.8% 4th year and 25.5% 5th year) and, as Table 1 shows, all study programmes (49.5% Integrated Undergraduate and Graduate Study Programme "Law", 19.3% Professional Administrative Study Programme, 15.1% Professional Graduate Study of Public Administration and 8.9% Undergtaduated Study of Social Work, 6.3% Graduated Study of Social Work), 52.6% of the respondents had the status of a full-time student, and 47.4% in the status of a part-time student.

Answering the questions which courses at the Faculty of Law Osijek where covering environmental protection, sustainable development, climate change or the like, students mostly listed subjects such as: Maritime and General Transport Law, Administrative Law, Constitutional Law, Public Transport Management, Environmental Law, International Law, Administrative Science, European Public Law but also Economic Policy, Political Economy, Global Social Work and Society Development and Sociology, see Fig. 2. Therefore, also courses were mentioned that do not necessarily have ecology in their title.

Students think environmental protection topics are very important (34.4%), or important (58.9%). 6.3% of students are very interested, and 63% of students (see Fig. 1) are interested in topics related to environmental protection, sustainable development, climate change, etc. In comparison, 5.2% are not interested, or 2.6% are

[69] The share of female students in the total number of students at the Faculty of Law Osijek is 78%. Agency for Science and Higher Education. Share of female students per academic year and education provider (2013/14–2020/21). https://www.azvo.hr/en/higher-education/statistics.

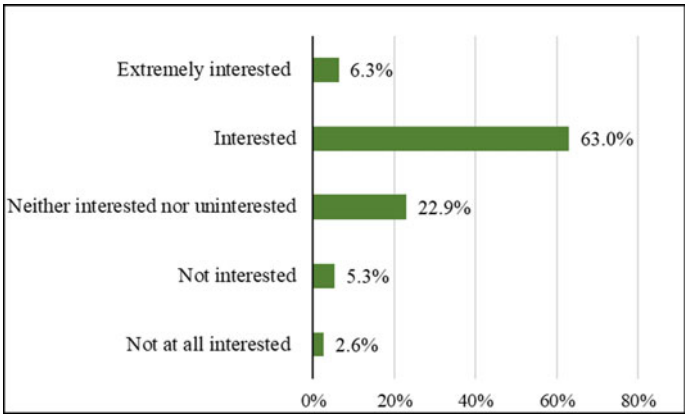

Fig. 1 Are you interested in topics related to environmental protection, sustainable development, climate change, etc.?

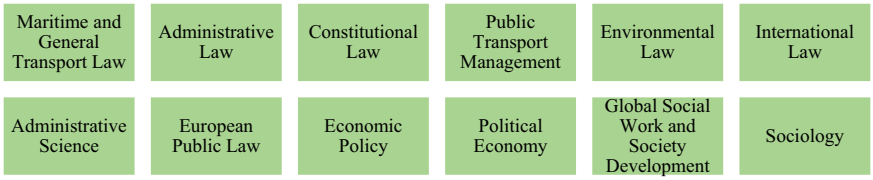

Fig. 2 Courses where environment-related topics are considered

not interested at all. As Fig. 3 shows, only 17.2 of students think that the topics of environmental protection are sufficiently represented at the Faculty of Law Osijek (41.1% respond that they are not, and 41.7% that they are neither important nor unimportant).

According to 80.7% of the surveyed students, the Faculty of Law Osijek should design new forms of education related to environmental protection, primarily through workshops and then guest lectures, as part of regular lectures, but also by introducing a compulsory course.

Students recognized the role of law in environmental protection, since 25% of them believe that law and the legal profession are extremely important, and 66.7% state that they are important in environmental protection. For 6.8% of them, it is neither important nor unimportant, for 1% it is not important, and for 0.5% it is not important at all (see Fig. 4). Surprisingly, 44.9% of students do not know the European Green Deal, despite the fact that its publication was widely followed in professional and scientific literature and the media. It is interesting that for 81.8% of students, knowledge about environmental protection is necessary for law students and future lawyers, yet only 62.6% are interested in additional education related to environmental protection law.

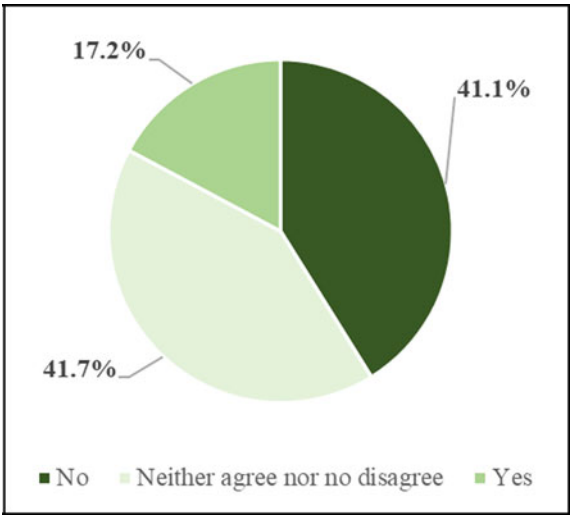

Fig. 3 Do you think that the environmental protection topics are sufficiently represented at the Faculty of Law Osijek?

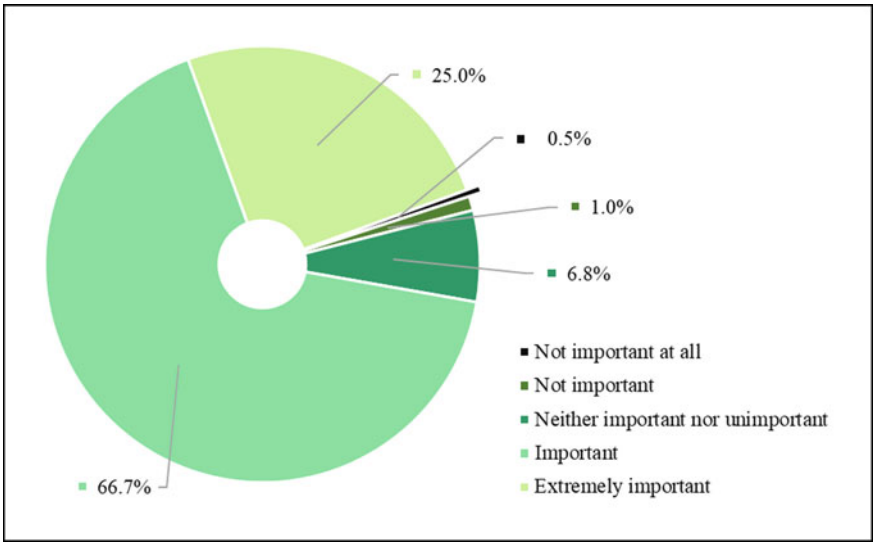

Fig. 4 The role of law and the legal profession in environmental protection

From the survey, we conclude that the students recognize the importance of environmental law and related education, but that they still need encouragement to increase activity and work in this area.

5 Conclusion

Law faculties as well as law professors and academics in different fields of law connected to environmental law, will have a significant role in creating and educating sustainable development. Legal education can contribute significantly to developing young lawyers, who will be future lawmakers capable of changing legal norms. Environmental issues and the concept of sustainable development must become part of the educational curriculum and study programs. Directions, reforms, and changes within the higher education system must consider the above as crucial and inevitable (integration into existing courses/programs, involvement of new ones).

Within the framework of the European Union, which has proclaimed its willingness to become a leader in environmental protection and the achievement of climate neutrality, there will be a substantive need for lawyers who work on adopting and amending a large number of documents and regulations. They will also monitor their implementation and enforcement. The deadline for achieving European environmental goals is ambitious and short, while it seems that environmental protection topics are still insufficiently represented in the existing curricula of faculties. Therefore, students and professors should be encouraged to receive additional education, both in postgraduate studies and lifelong education, as well as through dedicated workshops, lectures, etc.

As has been demonstrated in this chapter, the Faculty of Law Osijek should be considered an example of good practice related to environmental law. This research showed that professors at the Faculty of Law Osijek, whose courses do not have any word associated with the environment in their titles, also devote part of their lectures to environment-related topics. Moreover, a large number of professors are members of the Green Legal Clinic, the only one in the Republic of Croatia. This confirms their interest in environmental topics, their willingness and desire to acquire new knowledge, not only in the legal field, within the framework of Green Legal Clinic activities, and pass it on to students. The Faculty of Law Osijek encourages students to do scientific research, publish papers, and participate in various conferences. Some of the students decided to research environmental protection topics, publish their findings and apply for participation in conferences, thus showing interest in acquiring new and additional knowledge. In this way, they study these important issues, so such activities should be encouraged that strengthen their scientific, research and professional work. However, the authors have noticed that a large number of environment-related conferences organized in recent years (outside law faculties) do not perceive environmental protection as a legal category. Environmental protection is most often mentioned in the context of technology, agriculture, food production, water management, forestry, infrastructure, and chemical engineering. In this sense, further work is required to raise awareness of environmental protection as a legal category and strengthen the role of environmental law in protecting nature.

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Combining Simulations and Live-Client Clinics in Addressing Cross-Cutting Topics: The Best of Both Worlds

Juraj Brozović

Abstract Today legal education is expected to achieve sometimes incompatible and competing goals. Contemporary global challenges also give rise to constant adaption and rethinking of teaching methods used at law schools. The learning habits of the new generations call for a student-centred approach. As shown by the example of two clinical methods used at the Faculty of Law, University of Zagreb, clinical legal education is perfectly capable of tackling all these challenges, thus answering both the needs of the modern society and expectations of future lawyers.

Keywords Live-client clinics · Simulations · Clinical legal education

1 Introduction

Different forces are shaping modern legal education. At the same time, legal education should conform to the needs of the legal market and contribute to the objectives of social justice.[1] Tackling the contemporary global challenges which humankind is facing, such as poverty, hunger, social inequality and climate change, requires an interdisciplinary approach and careful consideration from the viewpoint of different legal and even non-legal disciplines.[2]

Students have also changed. Being digital natives, today's students are used to obtaining most of their information digitally, which affects how they behave and learn. They multitask, which often prevents successful carrying out of complex activities and lowers the quality of learning. Their attention span is generally shorter, so they prefer audio-visual to textual content, as well as shorter contents to longer ones. The information overload makes their learning efforts superficial, not necessarily

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[1] Chambliss (2020), 258.

[2] UNESCO (2017), 6–8.

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lowering their expectations of approval.[3] The use of well-planned and supervised experiential learning methods, with integration of modern technologies, is perhaps the only way they can effectively study and learn.[4]

In the author's view, clinical legal education (hereinafter: CLE) has the potential to successfully overcome all these challenges. After briefly describing the experiential learning method and the concept of CLE, this chapter describes two clinical methods used at the Faculty of Law, University of Zagreb. Its aim is to explore how careful combination of simulation and live-client clinic can answer the needs and expectations of contemporary law students, allowing them to become more skilful lawyers who are able to effectively deal with any issue in an interdisciplinary way, regardless of whether they have previously encountered it in their study.

2 Setting the Scene: Student-Centred Approach to Legal Education

2.1 Brief Overview of Teaching Methods

There are two basic traditional approaches to teaching in law schools which are usually associated with different legal traditions. Civil law countries are usually associated with a lecture-based method where teacher gives an *ex-cathedra* lecture to students with the aim of passing pre-set knowledge and helping them to memorise the rules and principles. In contrast to that, common law countries are usually associated with a Socratic case study method, which uses class discussions to facilitate the critical assessment of the law, thus focusing on the tools to understand the law instead of memorising.[5]

These contrasting approaches are by no means accidental. They reflect the different law-making experiences in various legal traditions. While in common law countries law is created by judges and the basic legal principles are derived from landmark decisions of the higher courts, in civil law countries the principles have been extensively analysed and created by scholars at the universities and later laid down in laws.[6] The first one uses induction to derive the general principles, whereas the latter uses deduction.[7]

These methods share some shortcomings. In their extreme variants, when teachers use the lecture method, the students are mere passive recipients of knowledge. Although situation is better in case of the Socratic method, as students do have

[3] Palfrey (2012), 110–114.

[4] *Ibid*., 117–118. Some authors see such warnings as exaggeration and stereotype (e.g. Levy (2016), 305).

[5] Hubacher (2021), 33 and 43.

[6] Van Caneagem (1987), 113–118.

[7] Srokosz (2017), 58.

to prepare and actively engage in class discussions, it is the conclusion their teacher makes what really counts in the end. When assessed, they have to perform reproductive tasks, imitating the knowledge or the method of reasoning presented by their teacher.[8]

This opens some space for a third method which can put students at the centre of attention and teaching activity. Unlike the two traditional methods, problem-based teaching methods require from students to not only actively prepare, but also to experience problem-solving in action. Instead of learning before doing, student learn by doing. The approach is necessarily a holistic one, because problems in real life are rarely purely legal, or they rarely relate solely to one legal discipline. The teacher is solely a facilitator of the learning activity, and students learn from their own experience—their own trials and errors. The tasks they have to perform when being evaluated are productive, instead of being reproductive. The effectiveness and superiority of the method has also been confirmed by educational theory.[9]

2.2 *Clinical Legal Education as the Most Effective Form of Experiential Learning*

The notion of CLE covers different teaching methods, not necessarily wearing the label 'clinical' in every context.[10] The label draws inspiration from medical training, as law students practice on simulated or real clients, or they work aside legal professionals, just like they would deal with patients in hospital as medical interns.[11] Typically, the following methods are mentioned as the most important ones:

- *live-client* (legal aid, representation, advice, and/or referral) *clinics* in which students provide legal services just like any law office (referral, advice or representation services)
- *externship programmes* in which students also provide legal assistance to live clients, but under the mentorship of external partners (law offices, NGOs, etc.)
- *simulation clinics*, in which students provide a variety of legal services in a simulated environment

[8] Brayne et al. (1998), 4–5.

[9] Brayne et al. (1998), 35–63. The authors lay out a comprehensive list of works confirming the educational value of this method. We would certainly emphasise an interesting swamp metaphor of *Donald Schön.* While traditional methods give a better overview of the swamp, as the observation is made from the top of the high cliff, problem-based method allows the student to experience the swamp and get to the bottom of the issue, not merely scratching the surface and dealing with trivial issues. Schön (1995), 233–234.

[10] The notions of CLE and experiential learning are sometimes used as synonyms. It is better to describe CLE as experiential learning method with "structured facility for refection and (possibly) re-application." Grimes and Gibbons (2016), 114.

[11] Duncan (2005), 7.

- *street-law projects*, in which students educate the members of the community about their rights and duties
- *specialist clinical programmes*, in which students perform other activities not fitting in the description above (e.g., lobbying, policy work, and monitoring).[12]

Despite the differences, clinical methods have some common basic features. First of all, they endorse problem-based learning in a real or at least realistic environment.[13] Problem-based learning is by definition student-centred, being focused on what student does instead of being focused on what the teacher teaches.[14] Creative problem-solving is also client-centred, so it necessarily involves interdisciplinary approaches, as problems transcend the particular field of law or even one specific discipline.[15] CLE also focuses on social justice, exposing the students not only to legal problems of their clients, but also their social and economic background too.[16] It also teaches the students to understand clients' needs and interests and encourages them to consider values and emotions in conflict management.[17] Perhaps the method can be best presented by using an example.

3 Forms of Clinical Legal Education at the Faculty of Law, University of Zagreb

3.1 Law Clinic Zagreb: Integral Live-Client Clinic

The Law Clinic is a semi-mandatory course that can be elected as one of practical courses offered in the ninth semester (out of ten).[18] To obtain 10 ECTS points, the students are required to fulfil the minimum objectives. In at least ninety hours of their work, they are expected to:

- regularly attend the joint meetings at the premises where they interview the clients
- travel to rural areas within outreach projects, twice in the semester, where they also take in some of the clients,
- volunteer in the partner NGOs, where they observe or assist some of their users, and
- provide the written legal advice in at least five cases.

[12] Kerrigan and Murray (2011), 1–3 and Kemp et al. (2016), 2.

[13] Grimes (2014), 172.

[14] Christensen (2009), 817, citing Nathanson (1998).

[15] Weinstein (1999), 323–324. The multidisciplinary approach becomes truly interdisciplinary only if the team members communicate and collaborate (*ibid*., 353). Live client work seems to effectively facilitate the interdisciplinary problem-based learning processes. Hyams et al. (2014), 2.

[16] Grimes (2014), 171–172 and Giddins and Lyman (2011), 305.

[17] Giddings and Weinberg (2020), 42–44.

[18] The other two options are moot courts and externships in law or notarial office (nowadays also: courts).

It may seem a lot, but most students do not have difficulties meeting those minimum requirements. Most of them exceed such expectations, assist more clients than needed, and stay for more than a semester. During the admissions, the advantage is given to the students who wish to stay longer than one semester or show more enthusiasm in certain fields. Most of them are not even on their fifth, but on their third, fourth, or rarely on their second year. They can use the earned credits eventually, when they officially enrol in the course, but their volunteering is an implied expectation.

Students can choose one of the seven groups which are focusing on different vulnerable members of the society (family members, foreigners and asylum seekers, overindebted citizens, patients, victims of discrimination, victims of crime and workers), depending on their interest and available free positions. Such division is not only useful to the clients, but to the students as well. They can touch upon different cross-cutting topics usually not covered within the curriculum (e.g. domestic violence, discrimination, women's rights, patient's rights, etc.) and to approach the observed legal issues in an interdisciplinary way. Usually, groups have twelve to fifteen members, so they are split into two subgroups, to boost the efficiency and to allow students to make best out of their teamwork. The interviews, that usually take place in the premises, are also done in teams of at least two students.

Students actually do most of the clinical work alone.[19] They interview the clients, they decide whether to take in the case, they draft the advice, and inform the client about it. The students are even in charge of the supervision. In case of general legal information, which is the simplest form of legal aid, usually provided in oral form, the younger colleagues are supervised merely by its group and student mentor, a student that has been engaged in clinical activities more than a semester. If the students are to provide a more complex written legal advice, there is an extra layer of supervision, done either by academic mentors (teaching staff) or external mentors (practitioners, nowadays mostly clinical alumni). The teaching staff is also in charge of logistics (funding, representation in relations with third parties, etc.), although everyday case flow management is also carried out by students. There are four of them—called student administrators—who are the only ones not volunteering but receiving a modest remuneration for their active engagement.

The autonomy of students has remained one of the cornerstones of the clinical method taken from the Norwegian source of inspiration.[20] However, such a self-sustainable concept is feasible only if the teaching staff works together with the

[19] Providing legal aid is only part of the clinical activities. The students also get opportunity to do some lobbying activities, either within the partner NGOs or within independent clinical initiatives. They also occasionally get to give street-law based lectures to citizen, thus informing them about their rights. Some of them also edit and/or publish papers within the official journal Pro bono. Some of them engages in different PR activities.

[20] Law Clinic of the Faculty of Law (JussBuss) is an almost exclusively student-run law clinic founded by students on the wave of 1970s' protests. The students are organized in small groups and they make all the decisions within the clinic, including decisions on the contents of the advice (without faculty supervision). Everyday and financial management is also carried out by students. For more info see https://foreninger.uio.no/jussbuss.

students. The management works closely with student administrators and student mentors and makes all the most important decisions within the special body called 'Small Council'. Student administrators also help to administer and take care of the finances in some domestic projects. Close collaboration and trust are truly essential in the process, and the result is that students can take care of variety of different tasks in accordance with general guidelines provided by the management or Small Council.

In 12 years more than 1200 students engaged in its work and more than 15,000 clients sought its assistance. Many students nowadays estimate that their clinical experience directly helped them with their employment and everyday tasks.[21]

3.2 Legal Counselling and Client Interview Simulations

The main goal of this optional course is to strengthen students' professional competences in the context of legal counselling (legal ethics, legal research, legal writing, negotiation, and client interviewing). The core of the course are role-play based interview simulations, similar to the ones conducted within the Brown-Mosten International Client Consultation Competition (hereinafter: the ICCC), that Zagreb students also occasionally take part in.[22] The course completely rejects the concept of classic lectures and tries to integrate as many elements of experiential learning as possible. The course is split into three parts.

The first part prepares the students for role-play by exploring who can provide legal advice and what are the ethical standards to be observed by the legal advisors. In order to provide ethically sound advice empowering the client to make their own decision on how to deal with legal issue, the students are also exposed to different dispute resolution methods which they can offer to their clients as a solution to some of their problems. The students are also introduced to the basic methods and tools for legal research which they are expected to use when preparing for simulations. The preparatory part ends with introduction to the basic structure and stages of client interviews.

In the second part, students team up in teams of two simulating an interview with a client. One or two of their colleagues play a role of client(s). During the simulation, the students are expected to learn how to investigate the relevant facts and to identify the issues their simulated client is facing, focusing also on their goals. The simulation should result in finding appropriate solutions which they communicate to clients in the form of structured legal advice. After each simulation, the class engages in a moderated discussion reflecting on the interview and the socio-economic context of observed simulated legal problems.

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[21] See Uzelac et al. (2021), Croatian only.

[22] The information about the competition and past events is available in the official website https://www.brownmosten.com/.

In the last part of the course, students develop their writing skills, by drafting letters to the opposing party, courts, and other public entities. They observe the differences in style, format, and contents of these written documents. Since there are several courses teaching students how to draft court pleadings, this course puts the emphasis on the written communication with the client and the opposing parties (and their lawyers).

The core method used before and after simulations is the flipped-classroom (or blended learning) method.[23] Students are not only expected to actively participate in lectures, but also to adequately prepare for the class and do their homework before the teacher engages in the teaching process.[24] All the materials are accessible in 'Merlin', a Moodle-based platform only accessible to the students enrolled in the course. Each week students are introduced to the topic of the next class and to the expected learning outcomes. They get an assignment either to read some texts (laws, case law or scientific papers), watch a short video, or conduct and independent research. They are always required to critically assess those materials and to be prepared to elaborate their opinion in class. During the lecture, different methods are used to address these topics. Sometimes the lecture consists of pure moderated plenary discussion which each student can feely join. Sometimes such discussion is preceded by some group assignments which are carried out either by using a jigsaw or gallery walk method.[25] Sometimes the discussion is carried out as a moderated debate between two groups of students. Video materials are also used in class, to the extent they are useful for the realization of learning outcomes.[26] Joint conclusions are always recorded and published in 'Merlin'.

All simulations are carried out by students, while the teacher and other colleagues are mere observers. Each student plays the role of an advisor and some of them play the role of the client—allowing a few to understand the position of their clients from both sides. Similar to the rules of the ICCC, students know in advance the topic and general issue of the client that seeks the legal advice. Only the student playing the role of the client knows in advance all (including hidden)[27] facts of the case. The students conducting the interview, on the other hand, are expected to do the research based on their guess of the client's issue.

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[23] There is no clear distinction between flipped and blended learning. Some authors see the difference in the level of integration of online elements. In that case, flipped classroom is exclusively online method. Wolff and Chan (2016), 10.

[24] This requires the 'front-loading' of teaching activities, focusing on preparation and careful planning of the student tasks. Flipped classroom does not mean that the teacher remains passive before the class, quite on the contrary. It only transforms the teaching activities and places them in different moment in time.

[25] For the explanation of these methods as part of common active learning strategies, see McConnel et al. (2017).

[26] For example, in-class videos were used to observe different ADR mechanisms (mediation and arbitration). Also, the video was created specifically for the class giving the example of bad and good interview. The author owes a special thanks to Ivana Zeljko and Fran Alfirević, clinical alumni, that agreed to play a role of client/attorney for this purpose.

[27] Just like in the ICCC, some facts can be revealed only after being explicitly asked a certain question. This requires careful preparation and planning of the fact-gathering process.

The simulations are slightly shorter than in the ICCC usually lasting no longer than 25 min. They are recorded with the explicit consent of students.[28] After each interview, all students comment on the success of the interview and, with the assistance of their teacher, they discuss the socio-economic context of the addressed legal issue.[29] This provides an opportunity to deepen their understanding of the real issues and interests which could be at stake in similar situations.

4 Combination of Clinical Methods as the Best Way to Address the Cross-Cutting Topics

The Zagreb example shows how two clinical methods can give opportunities to students to get a glimpse of their future careers and, simultaneously, to understand the real issues, needs and interest behind (simulated or real) problems of their clients. In the author's view, it is the combination of these methods and contents the students are exposed to, which effectively prepares the students to become modern lawyers and it does so better than traditional methods.

Both methods integrate the concept of active and experiential learning, meaning they are student-centred learning methods. Students are not merely passive listeners. They take responsibility and learn from their own experience. The teacher only gives the initial impulse, by putting the students in a situation where they face a real or simulated client. The teacher provides students with basic instructions, but the student is the one who acts and learns from his own activity and experience. There are some differences in methods, though, that prove how students benefit the most from participating in both courses.

In the Law Clinic the students are expected to conduct lot of important tasks alone. Not having anyone except your colleagues next to you when you interview the client for the first time is a great way to 'toss one in the water' and all students eventually 'swim' perfectly, but having a 'lifeguard' nearby might facilitate the teaching process even more.[30] The autonomous student self-run concept used in the Law Clinic is thus great for learning how to take responsibility and how to behave in professional environment, but the lack of direct feedback and assistance makes the experience unsystematic and to certain degree chaotic. For those students who combine their live-client clinical experience with Legal Counselling course, the above-mentioned shortcoming is successfully compensated by the extensive feedbacks and discussions

[28] Video recordings are sent to the students who conducted the interviews and can be used only for educational purposes.

[29] This is important because the issues in simulated cases reflect the areas of law which are either new and complex or not systematically covered within the faculty curriculum. Aside from giving opportunity to address such cross-cutting topics, it helps students to understand the social background and basis of the new rules and practices.

[30] It is not an easy dilemma to solve. Having a supervisor nearby might allow better reflection, but that can make students are more reserved and passive in the process, leaving the real work (and responsibility) to their supervisor.

following the simulations. If it were an isolated activity, the student would lack the 'real-feel' and learn more from feedbacks and comments than from their own experience.[31] But if they are involved in both clinical activities, they are exposed to the benefits of both worlds.

Both courses are adapted to new generations of students by wide use of online tools and modern technologies. In the Law Clinic, students are provided with online resources required for research. They also use an CMS-based online database ('*Klinikarij'*) to access the files of their clients, but also different written legal opinions that have already been provided to clients, so they also get to learn from each other. In the pandemic they also got to provide some legal assistance online within the outreach projects. Some street law activities have also sometimes been performed in online setting.

In the Legal Counselling course, the use of online tools is crucial for performing the flipped (blended) learning method. A Moodle based platform is crucial for preparation and subsequent reflection. Students are exposed to different type of teaching materials. Their need for audio-visual content is taken into account, so they are often required to watch a short video in their preparation. Even when it comes to textual content, students are exposed to different types of legal texts, ranging from laws and jurisprudence scientific articles. These different teaching materials are always accompanied by clear instructions on the task and expected learning outcome. The responsibility thus moves from the professor to students, giving them opportunity to learn from their own activities even before the professor directly involves in the learning process.

Finally, the combination of two clinical methods provides students with broader picture of interdisciplinary topics that are not adequately covered in the law school curriculum. For example, the clinical students involved in the work of the Group for victims of discrimination and minority rights get to interview the female employee who was denied promotion, as the result of her decision to do the maternity leave before doing additional training. To effectively engage in solving the client's issue, the students cannot limit themselves to only one field of law (e.g., focusing only on the issues of labour or antidiscrimination law). Instead, they have to research, understand and then advise the client to consider different legal options, taking into account the implication of each choice.[32] They will not only get to advise the client, but to feel her emotions and to understand the wider picture of the social dilemma in front of them. Due to its organisation and client-focus, the Law Clinic gives students many opportunities to encounter such interdisciplinary topics. The students better understand the scope and wider meaning of issues that arise in practice.

However, a live-client clinic has its shortcomings too. The type of cases that students get to solve depend solely on the clients. Real clients will not approach

[31] The students often perceive simulations only as exercise and not the 'real thing'. Duncan (2005), 10.

[32] Admittedly, the students are partially exposed to these topics within several elective courses. However, each of them has a specific focus (e.g., civil liability, bioethics, etc.) and not all students enrol in all these courses. Consequently, the synergy effect is usually absent.

the Law Clinic only when they have cases of greater social relevance or interest of students. They will often approach the students with typical ('boring') cases, where traditional fields of law are in question, whereas the cross-cutting topics will be left out.[33] This is where the Legal Counselling course fills in in the gap. In simulated environment, the issues are selected by teachers, allowing them to choose new and exciting topics. As an example, one pair of students had to prepare for an interview with the client who wanted to invoke their whistle-blower rights. In that specific field there are new, relatively complex, and unclear statutory rules. The students are thus exposed to the chaos they would encounter in the real world, but in a safe environment. The post-interview reflection and discussion deepens their understanding of the topic and allows them to comprehend a broader picture of the socio-economic context and interests.

5 It is All About the Timing: What is the Right Moment to Expose Students to These Teaching Methods?

The biggest challenge in combining simulation and live-client clinics is the issue of timing. When is the appropriate time to use the described teaching methods? *Grimes* suggests that simulation can be useful as a preparatory method for real-client work, but also later as an opportunity to revisit and reflect on the real-client experience.[34] So there is added value to using simulations prior, simultaneously, and after being exposed to the real clients. In other words, the decision what should go first does not depend on the teaching methods themselves, but on the desired learning outcomes at the faculty level.

For instance, simulations can easily be integrated into the general legal skills course, if such course is available. Separate skills courses facilitate the overall success and satisfaction of students, allowing them to concentrate on their own growth instead of focusing solely on academic performance.[35] Stand-alone course gives sufficient time to reflect on the social context of the analysed problem, also considering the emotions of simulated clients.[36] Even if such a general course is unavailable, skills training can be integrated into doctrinary courses. Such integration "… provides an offsetting benefit because it greatly enhances the students' understanding of substantive theories by placing them in a practical, hands-on context."[37]

There is one practical reason why integrating simulations in the first year seems to be essential for Faculty of Law, University of Zagreb. There are no general legal skills course available to the first-year students, aside from *Academic writing,* introduced

[33] Statistics show that approximately 70% of all cases received and processed in the Law Clinic are general civil cases (ownership, inheritance, obligations, torts, etc.).

[34] Grimes (2014), 184–185.

[35] Cristensen (2009), 813–816.

[36] *Ibid*., 824.

[37] Noble-Allgire (2002), 33. Similarly Christensen (2009), 796.

in 2022. The purpose of that course is to teach freshmen how to conduct academic research and to properly structure and write their papers and other student assignments. Although some of the skills acquired in that class are of general nature, so the course certainly contributes to the overall legal literacy of law graduates, it seems to facilitate the studying process more than it helps students to develop the skills which might be useful in their future careers.

In our opinion, simulations and role play carried out within the Legal counselling course are perfectly capable of being integrated into the first-year study. We also find that "an increase in role playing and a requirement of pro bono work beginning in the first year of school would accelerate maturation from both sociocultural and psychological perspectives."[38] There is no reason to believe the first year students are not fit to take part in such exercises. Our experience with the ICCC has often shown that the first-year students are capable of reaching (and even winning) the finals, thus proving that interviewing and counselling skills, combined with basic knowledge of legal research and reasoning, is something that can be acquired and practiced prior to any serious introduction to theoretical aspects of certain field of law.[39]

Introducing role play and simulations in the first year would be beneficial both as a preparation for live-client work in the Law Clinic, and as a part of general legal skills training. It would also teach students, early in their study, that the issues cannot be observed only from the legal perspective, thus making them more ready to deal with any cross-cutting topic that they may encounter in their future careers.

6 Conclusion

Clinical legal education and other experiential learning methods are more efficient in addressing cross-cutting topics than traditional ones, as they most often require consideration of multiple disciplines. Nowadays, their use seems even more important as they may be the only effective methods of teaching new generations, dependant on modern technologies. Although two clinical methods used at the Faculty of Law, University of Zagreb, show how their careful combination helps students to cope with complex topics they have not previously encountered in their classes, it would seem that at least some exposure to simulations and role play should be available in their first year. This would teach them, from the very beginning of their study, to think outside the box and to be creative problem solvers. If modern technologies are widely used in such attempts, the combination promises to yield the best results. Of course, introducing new methods does not imply that the old methods should be

[38] Weinstein (1999), 362.

[39] In the Law Clinic we have also seen how third year students manage to advise clients about their employment rights, although they enrol in Labour law only on their fourth year. If they collaborate with their colleagues and do their research properly, they are able to deal with such cases and, most importantly, learn from that experience.

completely abolished, but introducing more experiential learning elements certainly facilitates the learning process.

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Law and Gender

Gendering Political Participation in Germany and Beyond: Should Quotas Ensure Gender Parity in Parliaments?

Thomas Giegerich

Abstract The underrepresentation of women in parliaments indicates the political empowerment gap underlying the gender gap and is a symbol of their de facto inequality. Electoral laws that ensure gender parity are therefore on the agenda. This is also the case in Germany (both on the state and federal level) and in the EU in relation to the European Parliament. Gender parity laws typically require political parties to submit zipped lists with an equal number of alternating female and male candidates. The first two gender parity laws of German states were, however, struck down as unconstitutional by the state constitutional courts. According to the Federal Constitutional Court, the Basic Law does not require the enactment of gender parity laws, despite the constitutional obligation to promote the actual implementation of equal rights for women and men. But the FCC has not yet determined what limits the Basic Law may place on voluntarily enacted federal or state gender parity laws. The European Court of Human Rights has accepted gender quotas regarding electoral lists as permissible in the ECHR system. Soft law rules of the Council of Europe favour the use of such quotas. The Convention on the Elimination of All Forms of Discrimination of Women supports and perhaps requires gender quotas in political representation.

Keywords Gender parity laws · Political empowerment gap · Structural discrimination · Zipped electoral lists · De facto equality of women

1 Introduction: The Gender Gap in Political Empowerment

This chapter focusses on gender as a cross-cutting issue with increasing political and legal relevance. Gender-mainstreaming, i.e. the consistent inclusion of the gender perspective in order to eliminate discrimination and gender-based disadvantages and promote equality between women and men throughout, both de jure and de facto,

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has become a legal requirement.[1] The time has therefore come to extend gender-mainstreaming to legal education in the sense of including the gender perspective in the teaching of all legal subjects.[2] How this can be done is demonstrated below using an example from constitutional law—demands for election reform that ensures gender parity in parliaments.[3] The topic of gendering political participation is currently on the agenda in many jurisdictions around the globe, including the EU. It is hotly contested in particular in Germany. That topic also provides a vivid example of the long, hard and sometimes bitter political and legal struggles that need to be fought in parliaments and courts in order to achieve progress in favour of traditionally disadvantaged members of society. It further demonstrates the bottom-up and top-down (i.e., vertical) interaction of the different levels in the multilevel system of government in Europe. It also emphasises the value of comparative law (i.e., horizontal interaction) in solving legal problems that simultaneously arise in different jurisdictions. It finally encourages the inclusion of social reality in legal arguments so that law does not become detached and gradually loses its social relevance.

More than 25 years ago, the Beijing Declaration and Platform for Action of the Fourth World Conference on Women was adopted by 189 Member States of the UN.[4] There the importance of gender equality in political participation was explained thus: "Equality in political decision-making performs a leverage function without which it is highly unlikely that a real integration of the equality dimension in government policy-making is feasible. In this respect, women's equal participation in political life plays a pivotal role in the general process of the advancement of women. Women's equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women's interests to be taken into account. Without the active participation of women and the incorporation of women's perspective at all levels of decision-making, the goals of equality, development and peace cannot be achieved."[5] This statement is aptly borne out by experience.

As early as Beijing in 1995, participating governments committed themselves to "establishing the goal of gender balance in governmental bodies … including, inter alia, … implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental … positions; … [t]ake measures, including, where appropriate, in electoral systems that encourage political parties to integrate

[1] See, e.g., Art. 8 of the Treaty on the Functioning of the European Union (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=EN); Art. 3 (2) sentence 2 of the German Constitution of 1949 (Basic Law—English translation available at https://www.gesetze-im-internet.de/englisch_gg/).

[2] The first comprehensive textbook: Vujadinović/Fröhlich/Giegerich (2023).

[3] An earlier online version of this paper (Giegerich (2021)) is available at https://jean-monnet-saar.eu/wp-content/uploads/2021/05/Symposium-Gender-Parity_updated-version_II.pdf.

[4] https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf.

[5] Id., para. 181.

women in elective and non-elective public positions in the same proportion and at the same levels as men …".[6]

We have obviously not come far enough in the last quarter of a century. The following finding in the World Economic Forum's Global Gender Gap Report (2021)[7] aptly describes the problem we are still facing: "The gender gap in Political Empowerment remains the largest of the four gaps tracked,[8] with only 22% closed to date, having further widened since the 2020 edition of the report by 2.4 percentage points. Across the 156 countries covered by the index, women represent only 26.1% of some 35,500 parliament seats and just 22.6% of over 3,400 ministers worldwide. In 81 countries, there has never been a woman head of state, as of 15th January 2021. At the current rate of progress, the World Economic Forum estimates that it will take 145.5 years to attain gender parity in politics. Widening gender gaps in Political Participation have been driven by negative trends in some large countries which have counterbalanced progress in another 98 smaller countries. Globally, since the previous edition of the report, there are more women in parliaments, and two countries have elected their first female prime minister (Togo in 2020 and Belgium in 2019)."[9] The numbers in the World Economic Forum's Global Gender Gap Report (2022)[10] are hardly more promising. While the overall gender parity rose from 67.9% in 2021 to 68.1% in 2022, the gap in political empowerment remained at 22%.[11] "The Political Empowerment subindex registered significant advance towards parity between 2006 and 2016, fluctuating until 2021, after which it stalled below its 2019 peak. At this rate, it will take 155 years to close the Political Empowerment gap."[12]

The gender gap denotes the gender-related difference between theory and practice: For decades, the prohibition of discrimination on ground of sex and equal rights of women and men have been clearly established in national, supranational and international law,[13] but the inequality of women in fact still persists worldwide in many important areas, including political participation, and seems poised to stay for further generations, unless developments are accelerated. Although the reasons for

[6] Id., para. 190 (a) and (b).

[7] http://www3.weforum.org/docs/WEF_GGGR_2021.pdf.

[8] The other three gender gaps are in economic participation and opportunity, educational attainment as well as health and survival.

[9] See note 7, 5.

[10] https://www3.weforum.org/docs/WEF_GGGR_2022.pdf.

[11] Id., 5.

[12] Id., 13.

[13] See, e.g., Art. 3 (2) of the German Basic Law; Arts. 1 (3), 55 lit. c, 56 of the UN Charter; Art. 2, 7 of the Universal Declaration of Human Rights of 10 December 1948 (https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf); Arts. 1–16 of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (https://www.ohchr.org/sites/default/files/cedaw.pdf); Art. 14 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 (https://rm.coe.int/1680a2353d); Art. 1 of Protocol No. 12 to the ECHR of 4 November 2000 (https://rm.coe.int/1680080622); Arts. 20, 21, 23 of the Charter of Fundamental Rights of the EU (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=EN).

the cleavage between de jure equality and de facto inequality of women are well known, they have not yet been properly acted upon and therefore need to be recalled:

> There are many factors which lead to women's under-representation in politics. The most important factor is probably the decade-old backlash against women's rights. In Europe, societies remain characterised by attitudes, customs and behaviour which disempower women in public life, discriminate against them, and hold them hostage to prescribed role-models and stereotypes according to which women are "not suited" to decision making and politics. Unsocial meeting hours and a lack of child-care facilities for politicians can further deter women candidates – politics is tailored to fit men who do not bear even a minimum share of family responsibilities and who rely on their wives to keep the household running."[14] Another factor is the male networks which still dominate many bodies and organisations, including political parties, and tend to perpetuate themselves. Women's underrepresentation in politics is a particularly striking "manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.[15]

For those who consider 155 years as too long to achieve effective gender equality in the political arena, the introduction of mandatory quotas in favour of women may be the instrument of choice to accelerate developments. This raises a number of questions such as whether gender quotas for political participation are permissible or even required from a constitutional, supranational and international perspective and—if permissible—whether they are appropriate and advisable: If the adequate representation of women in parliament is a legitimate objective, why not the adequate representation of LGBTI persons, persons with disabilities, young voters, religious and national minorities, persons with a migration background? All these groups have long been victims of discrimination including with regard to political representation. That slippery slope argument can of course be countered by reference to the fact that an express constitutional mandate such as in Art. 3 (2) sentence 2 of the German Basic Law to "promote the actual implementation of equal rights for women and men" does not exist for any of the other disadvantaged groups.[16] The legitimate question whether we would need similar constitutional affirmative action mandates in their favour is beyond the scope of this paper. Suffice to recall that of all those disadvantaged groups only women make up more than half of the population—establishing their de facto political equality in the form of equal political representation therefore is an absolute democratic must. The assumption is not far-fetched that women's right to equal political participation and effective political influence is not fully realised until their underrepresentation in parliaments is remedied.[17]

Finally, one needs to remember that

> … changing the electoral system is not enough: to be really effective, this change must be accompanied by measures such as gender-sensitive civic education and the elimination of

[14] Parliamentary Assembly of the Council of Europe (PACE), Resolution 1706 (2010) of 27 January 2010, para. 3 (https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17809&lang=en).

[15] The quote is taken from the 9th recital of the preamble of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011 (https://rm.coe.int/168008482e). It there refers to violence against women.

[16] See, e.g., Hahn (2020).

[17] See in this sense Laskowski (2023), 35 f., 89 ff.

gender stereotypes and "built-in" bias against women candidates, in particular within political parties, but also within the media. In some Council of Europe member states, constitutions also need to be changed in order to accompany gender equality and anti-discrimination provisions with the necessary exception allowing positive discrimination measures for the under-represented sex, without them being considered a violation of the equality principle.[18]

2 Enactment of Political Gender Parity Laws at Constituent State Level in Germany

2.1 Unsuccessful Attempts in Thuringia and Brandenburg in 2019

In 1918, Germany introduced women's suffrage, earlier than many of its European neighbours.[19] More than a hundred years later, the ratio of women parliamentarians in Germany is comparatively low, both on the federal and constituent state (*Länder*) levels. In order to increase the number of women parliamentarians, two *Länder* enacted gender parity laws in 2019, requiring political parties to include 50% women in their electoral lists, interchangeably with men (zipped lists). Non-binary or third-gender persons could freely be included in those lists instead of women or men.[20] In both *Länder*, the parties' electoral lists are rigid (closed lists) in the sense that voters have to accept them as they are without possibility of cumulation of votes or cross-voting (panachage). If parties do not place enough women in promising positions on their lists, women will thus necessarily be underrepresented in the elected state parliament.[21] That still too many parties disadvantage women when drawing up their electoral lists is due to male dominance in party politics.

On the application of right-wing parties and parliamentarians, the pertinent laws of Thuringia and Brandenburg were struck down by the Thuringian and Brandenburg State Constitutional Courts.[22] These courts found violations of the respective state constitutions, in particular of the constitutional rights of political parties (freedom to

[18] PACE (note 14), para. 5.

[19] See the *Verordnung über die Wahlen zur verfassunggebenden deutschen Nationalversammlung* (Regulation on the Election of the Constituent German Assembly) of 30 November 1918 (*Reichsgesetzblatt* p. 1345) that was enacted by the revolutionary Council of People's Deputies after the demise of the monarchy.

[20] This is required pursuant to the case law of the FCC according to which non-binary persons are protected from discrimination because of their non-binary gender identity (BVerfGE 147, 1).

[21] See Hahn (2020).

[22] Thuringian Constitutional Court, judgment of 15 July 2020 (VerfGH 2/20), available at http://www.thverfgh.thueringen.de/webthfj/webthfj.nsf/8104B54FE2DCDADDC12585A600366BF3/$File/20-00002-U-A.pdf?OpenElement (in German); Brandenburg Constitutional Court, two judgments of 23 October 2020 (VfGBbg 9/19 and VfGBbg 55/19), available at https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfgbbg-919_4041 and https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfgbbg-5519_4042 (in German).

decide about composition of election lists) as well as voters (freedom to vote without state interference; eligibility without gender discrimination). While the eligibility of both men and women as a group is equally affected by the gender parity requirement, individual candidates can only run for every second place on the list, in accordance with their sex.[23] The two courts further determined that the gender parity laws could not be justified—neither by the constitutional principle of democracy nor by the State constitutional mandates requiring the legislature to ensure the equality of women and men in public life by effective measures.

With regard to the principle of democracy, the courts explained that German constitutional law did not include the mirror-image concept to the effect that parliaments had to reflect a reduced-size image of the actual composition of civil society. Rather, each and every parliamentarian represented the people as a whole, irrespective of gender, age, party affiliation, profession, wealth, ethnic or social background etc.[24] While this may be true in theory, the utterly unrepresentative composition of a parliament will undermine its representative function and the legitimacy of its decisions in practice. If elected male parliamentarians represent females no less than males, the alleged underrepresentation of women in parliaments is but a pseudo problem—in truth, there is no relation between the political empowerment gap and the gender gap …

Or is there? All those male parliamentarians having for decades equally represented females have arguably not cared enough about closing the gender gap, although ensuring women's de facto equality has long ago been transformed into an international, supranational and constitutional obligation.[25] Gender parity in parliaments may after all be a necessary ingredient to the empowerment of women, the latter having been recognised as an indispensable means of effectively eliminating their discrimination and ensuring their de facto equality. There is an obvious connection between the political empowerment gap and the gender gap. The persistent gender gap in most areas can be used as *prima facie* evidence that male-dominated parliaments do not care enough about ensuring the de facto equality of women, because male parliamentarians are socialised as males so that their decision-making is shaped by male experiences, perspectives and interests.[26] The *prima facie* evidence is strong enough for a shift of the burden of proof in the sense that those who deny the necessity of gender parity in political representation for achieving women's de facto equality bear the burden of proof.

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[23] The question whether that amounts to an interference in the freedom and/or equality of eligibility is not easy to answer—see Möllers (2021), 340f.

[24] These court decisions evoked numerous positive and negative comments in the legal literature, e.g. by Gersdorf (2020), Klafki (2020), Hecker (2020), Friehe (2021), Volk (2021), Edinger (2021); Möllers (2021) and Röhner (2022). See also the critical contributions to a symposium of the Verfassungsblog, starting with Hailbronner and Marín (2020).

[25] See Art. 3–5, 7 ff. CEDAW; Art. 2, 3 (3) subpara. 2 TEU; Art. 8 TFEU; Art. 23 CFR; Art. 3 (2) sentence 2 BL.

[26] See Laskowski (2023), 35 f., 89ff.

With regard to the justifying force of the State constitutional provisions requiring the legislature to ensure equality of women and men in public life, the State constitutional courts resorted to a historical interpretation—they invoked the lack of a respective intention by the framers to permit gender parity laws. They also argued that those provisions formulated only State objectives and not fundamental rights on a par with the fundamental rights that were infringed by the gender parity laws. This approach reveals the obvious endeavour by both courts to minimise the legal effect of the constitutional precepts to establish the de facto equality of women. The approach may be tenable, but it is certainly not cogent.

Another important aspect that was neglected by the two State constitutional courts is the apparent structural discrimination of female candidates in the nomination processes of political parties which violates their right to equal opportunities. This right can be derived from the general State and federal constitutional provisions setting forth that men and women shall have equal rights,[27] and more specifically from the provisions guaranteeing passive electoral equality,[28] i.e. equality in standing as candidates without gender-based discrimination.[29] According to Art. 3 (2) sentence 2 BL, the competent legislature is constitutionally obliged to remedy the situation in order "to promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist." This federal constitutional provision directly binds the State legislatures.[30] Conforming State constitutional provisions remain applicable,[31] while conflicting State constitutional provisions will be void.[32]

2.2 A New Advance in Bavaria in 2023

Recently, a new advance has been made in Bavaria to enact a "Half the Power Law" which ensures parity in the composition of the State parliament.[33] Currently, only 26.8% of members of the Bavarian State parliament are women which is the lowest percentage of female members in all German State legislatures. The Bill, which was introduced on 16 February 2023 by the Greens Party, provides for several amendments to the Bavarian State Constitution. The two most important ones are additions to Art. 118 and Art. 43 of that Constitution. In its current version, Art.

[27] Art. 3 (2) sentence 1 BL.

[28] Art. 38 (1) sentence 1 BL for federal elections.

[29] See in this sense Laskowski (2023), 55f.

[30] See Art. 1 (3) BL and BVerfGE 97, 298 (314 f.).

[31] Art. 142 BL.

[32] Art. 31 BL. See Laskowski (2023), 59 ff. on a potential conflict between Art. 3 (2) BL and Art. 118 of the Bavarian State Constitution.

[33] Gesetzentwurf der Fraktion BÜNDNIS 90/DIE GRÜNEN zur Änderung der Verfassung des Freistaates Bayern und das Landeswahlgesetze—Hälfte-der-Macht-Gesetz (LT-Drs. 18/27073, https://katharina-schulze.de/wp-content/uploads/2023/02/0000017323.pdf).

118 (2) of the State Constitution (which is almost identical with Art. 3 (2) BL) reads as follows: "Women and men shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist." The "Half the Power Bill" proposes the addition of the following sentence: "The legislature shall realise the equal access of women and men to elective office and public office." This would constitutionally require concrete legislative steps to eliminate the underrepresentation of women in parliament. The Bill also proposes the addition of the following sentence to Art. 43 (2) on the composition of the State government (executive): "At least half the members of the State government shall be female." This would introduce a strict 50% quota concerning composition of the State's executive leadership.

The Bill tries to achieve equal access of women and men to the State parliament by a two-part reform of State electoral law. Firstly, political parties are required to nominate a pair of candidates for each electoral district, one female and one male. Voters have two votes one of which must be cast for a female candidate and the other one for a male candidate. The female candidate and the male candidate who obtain the most votes each will be elected in each district. This will ensure that one half of the State parliament's seats are held by an equal number of female and male parliamentarians. The Bill provides that persons who cannot be assigned to either the male or the female gender (i.e., non-binary or third-gender persons) are free to decide whether to run as female or male candidates.

With regard to the other half of the seats which are allocated to candidates on party lists, the second part of the reform proposal comes in. It provides that these seats shall be distributed among the candidates according to the number of votes they receive, but based on the female and male gender of the candidates. Gender equality in the allocation of seats is ensured by the requirement that the seats be alternately distributed to the female candidate and then to the male candidate with the highest number of votes in each case. If a third-gender person has the highest number of votes and is therefore allocated a seat, the equal distribution of seats will be continued with the female or third-gender candidate with the next highest number of votes. If a gender-equal distribution of the seats is no longer possible because there are too few women or men on the party list, the distribution of seats shall be terminated. Taken together, the two parts of the reform will ensure gender parity in the composition of the Bavarian State parliament.

It is uncertain whether this "Half the Power Bill" will ultimately be enacted, all the more since constitutional amendments require a two-thirds majority in the State parliament and affirmation by referendum.[34] The State government has already rejected the Bill as "unconstitutional nonsense".[35] If ever enacted, there will also probably be court battles regarding the constitutionality of the two-part electoral reform (despite the accompanying constitutional amendments) and perhaps even

[34] See Art. 75 (2) of the Bavarian State Constitution.

[35] Buchholz and Zimmermann (2023).

regarding the admissibility of these amendments themselves.[36] The only decision of the Bavarian Constitutional Court concerning gender quotas in political representation dates back to 2018.[37] But then the Court only decided that the legislature was not constitutionally required to introduce gender quotas in order to ensure gender parity in elected representative bodies. It did not determine potential constitutional limits of an actually enacted gender parity law, let alone one that is connected with a supportive constitutional amendment. It is therefore unclear how the Court would deal with the "Half the Power Law", if it were actually enacted.[38]

3 Federal Constitutional Limits on Gender Quotas at Constituent State Level?

There have been some initial steps toward introducing gender quotas with regard to the federal parliament (*Deutscher Bundestag*). Currently, only 34.7% of its members are female. Sec. 55 of the Federal Electoral Law[39] provides for the establishment of a reform commission which is to present its results by 30 June 2023 at the latest. On 16 March 2022, the *Bundestag* established a Commission on Reform of Electoral Law and Modernisation of Parliamentary Work, consisting of 13 Members of Parliament and 13 external experts.[40] The Commission was primarily charged with making proposals for effectively reducing the size of the *Bundestag* and sustainably prevent its growth.[41] Its second task was to develop "proposals in conformity with the constitution on how equal representation of women and men in the German *Bundestag* can be achieved. To this end, it should examine possibilities, for example, in the nomination and the selection of candidates."[42] The constitutionality of gender parity laws was controversial within the Commission,[43] no less than outside. In its recent final report the topic is treated extensively.[44] The majority of the Commission determined that the proportion of women in the German *Bundestag* should be increased but that there was disagreement within the Commission regarding the

[36] According to Art. 75 (1) sentence 2 of the Constitution, constitutional amendments that contradict the fundamental democratic ideas of the Constitution are inadmissible.

[37] Bayerischer Verfassungsgerichtshof, Entscheidung vom 26.3.2018, Vf. 15-VII-16 (https://www.bayern.verfassungsgerichtshof.de/media/images/bayverfgh/15-vii-16.pdf).

[38] Laskowski (2023), 53 ff. considers the Bill to be compatible with both the State Constitution of Bavaria and the BL.

[39] Bundeswahlgesetz as amended (https://www.gesetze-im-internet.de/bwahlg/BWahlG.pdf).

[40] BT-Drs. 20/1023.

[41] The regular size of the *Bundestag* is 598 members, but it has grown to 736 members.

[42] Id., under II.2.b)—translation by the author.

[43] Interim Report of 30 August 2022, BT-Drs. 29/3250, p. 32 ff. (https://dserver.bundestag.de/btd/20/032/2003250.pdf).

[44] Deutscher Bundestag (2023), Kommission zur Reform des Wahlrechts und zur Modernisierung der Parlamentsarbeit—Abschlussbericht, BT-Drs. 20/6400 of 12 May 2023, p. 12–37.

concrete need for action.[45] The parliamentary groups of the Social Democrats and Alliance 90/The Greens considered a parity law to be constitutionally required and imperative. The parliamentary group of the Free Democrats rejected gender parity provisions in the electoral law and considered them unconstitutional. The Christian Democrat parliamentary group proposed to adopt a package of measures below the threshold of a binding (rigid) quota regulation in order to increase the proportion of women in the *Bundestag*. The Leftist parliamentary group advocated the enactment of a binding gender parity law which they considered as constitutionally justifiable. It is obvious from this that any federal gender parity law, if enacted in whatever form, will definitely be challenged before the Federal Constitutional Court (FCC).

One way to enable the (re-)introduction of gender parity laws at *Länder* level would be to include provisions in state constitutions which expressly permit such laws. This is part and parcel of the new Bavarian advance. Even if that suffices to ensure the law's compatibility with the State constitution, it will bring in the federal level because, pursuant to Art. 28 (1) BL, "[t]he constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of this Basic Law. In each *Land*, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections …"[46] According to Art. 28 (3) BL, "[t]he Federation shall guarantee that the constitutional order of the *Länder* conforms … to the provisions of paragraphs (1) …".We do not know for certain what the principle of democracy and/or the freedom and equality of *Land* parliamentary elections require in that regard because there is no definite decision by the FCC yet concerning the constitutional permissibility of gender quota or gender parity laws on either the *Länder* or the federal level.

4 Federal Constitutional Court Cases on Gender Quotas Concerning Political Participation

In 2015, the FCC held that the BL did not prevent political parties from voluntarily introducing gender quotas with regard to party offices and electoral lists. This was a permissible exercise of a party's freedom to adapt its internal organisation (which under Art. 21 (1) sentence 3 BL must conform to democratic principles) to their own political agenda and objectives.[47] More recently, the FCC was confronted with what may be called a mirror-image case to the aforementioned state constitutional court cases: Voters challenged the results of the last federal parliamentary election which had reduced the ratio of women parliamentarians in the *Bundestag* from 36.3 to 30.7%. The voters complained that the federal legislature had *not* enacted a law before

[45] Id., p. 31.

[46] Translation available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0148.

[47] FCC (Chamber), Order of 1 April 2015 (2 BvR 3058/14), margin note 25.

that election requiring political parties to observe gender parity in their electoral lists.[48] The FCC dismissed the complaint as inadmissible because the complainants had not adequately demonstrated that the legislature was constitutionally required to impose gender parity on political parties. While the FCC did not take a clear position on whether the legislature would have been constitutionally permitted to do so, one senses that the court is critical in this regard. The Bavarian State Constitutional Court, having to decide a similar mirror-image case in 2018, made it abundantly clear that there could be no constitutional obligation to introduce a gender parity requirement because that would violate the state constitution.[49] The Bavarian court more or less anticipated the later reasoning of its Thuringian and Brandenburg counterparts.

Constitutional complaints against all three state constitutional court decisions were lodged with the FCC. Two of them have meanwhile been dismissed as inadmissible by a Chamber of the FCC for being insufficiently substantiated.[50] The FCC referred to the constitutional autonomy of the German *Länder* in particular with regard to the organisation of their elections, which limited FCC interference. It also criticised the complainants for not sufficiently addressing the principle of overall representation according to which each and every Member of Parliament represents the people as a whole,[51] irrespective of age, profession, education, wealth, ethnic origin, religion, political affiliation—and also gender. The complainants had not sufficiently demonstrated that the principle of democracy required gender parity in the composition of parliaments.

Assuming that the FCC will in the future be seized with an admissible application concerning the constitutionality of a federal or state gender parity law, it would also have to consider the effect of Art. 3 (2) sentence 2 BL. According to that provision, "[t]he state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist." The state constitutional courts have refused to accept similar provisions in the state constitutions as sufficient justification for gender parity laws, not least because these provisions were quite general and not specifically geared toward ensuring equal representation in parliament. This is why the aforementioned new Bavarian "Half the Power Bill" proposes to add a sentence expanding the affirmative action part of the equal rights provision of the State Constitution. If enacted, it would require the legislature to take concrete steps for eliminating the underrepresentation of women in parliament.[52] One can only speculate how the FCC would assess the constitutionality of gender parity laws in the light of Art. 3 (2) sentence 2 BL, if they were properly brought

[48] FCC, Order of 15 December 2020 (2 BvC 46/19). Penz (2021).

[49] Bavarian Constitutional Court, decision of 26 March 2018 (Vf. 15-VII-16), available at https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2018-N-5484 (in German).

[50] FCC (Chamber), Order of 17.2.2021 (2 BvR 834/18), as paraphrased by Laskowski (2023), 17f. (concerning Bavaria); order of 6 December 2021 (2 BvR 1470/20), concerning Thuringia. The case concerning Brandenburg is still pending in the FCC.

[51] See Art. 38 (1) sentence 2 BL.

[52] See above II.2.

before it. While one senses a certain uneasiness with such laws in the aforementioned Chamber decisions, there is no clear indication how the full bench would decide.[53]

Assuming further that the FCC concludes that gender parity laws are incompatible with the BL, the next question would be if such laws could be made possible by a constitutional amendment specifically permitting them, provided the necessary two-thirds majorities in the two chambers of the federal parliament (*Bundestag* and *Bundesrat*) could be mustered.[54] That would bring in Art. 79 (3) BL according to which "[a]mendments to this Basic Law affecting … the principles laid down in [Article] … 20 shall be inadmissible." The pertinent principle possibly affected would be the principle of democracy, laid down in Art. 20 (2) BL, that also played a role in the aforementioned state constitutional court decisions. The question would then be if the constitutional mandate of Art. 3 (2) sentence 2 BL to promote de facto equality of women could justify modifications of democratic standards, if necessary to ensure women's political empowerment which is an inherent aspect of the democratic principle. While the FCC has been ready to accept system-inherent modifications of unamendable constitutional principles,[55] it is unclear how the Court would assess a gender-parity amendment to the BL.

Since German constitutional law and practice do not develop in isolation, but in constant exchange with comparable constitutional systems and international human rights law, I venture a look at how other European countries, the European regional level and the global level of government have dealt with women's political empowerment in general and gender parity laws in particular.

5 Gender Quotas in Other European Countries and on the European Regional Level of Government

5.1 France, Sweden, Italy and Spain

In France and Sweden, gender quotas regarding political representation are by now well established, have improved the ratio of women in parliaments significantly and are considered as constitutionally permissible.[56] Additionally, one can mention Italy and Spain.[57] In Italy there are quota rules concerning electoral lists on all levels of government (except with regard to the Senate) which are generally accepted as constitutional. In Spain, the Constitutional Court considered a 40% quota in favour of both genders with regard to electoral lists on all governmental levels, including elections for the European Parliament, as constitutional already in 2008. It did not find

[53] According to Meyer, Art. 3 (2) sentence 2 BL justifies gender parity laws (Meyer 2019).

[54] See Art. 79 (2) BL.

[55] BVerfGE 30, 1 (24 ff).

[56] See Cossalter (2021), 5ff. and Jansson (2021), 10ff.

[57] See Klafki (2020), 864f. and Möschel (2018).

any interference with the basic principles of electoral law, but only with the rights of the political parties which were, however, justified with a view to the general constitutional provision obliging public power to ensure real and effective implementation of freedom and equality for all.[58]

In sum, of the 27 EU Member States, eleven have gender parity laws.[59]

5.2 No Gender Parity Rule in EU Law Yet

5.2.1 No EU Law Requirement of Introducing Gender Parity Laws Concerning National Elections

The EU has no power to impose gender quotas on Member States concerning their national parliamentary elections. The general power of the EU to combat discrimination based on sex in Art. 19 (1) TFEU does not seem to cover the introduction of mandatory quotas in favour of women regarding those elections, all the more since the organisation of elections is part of the Member States national constitutional identity in the sense of Art. 4 (2) TEU. The EU does, however, have power to regulate municipal elections pursuant to Art. 22 (1) TFEU, but that power extends only to regulating the details of national treatment in favour of citizens of other Member States. It would probably not support the imposition of gender quotas. There is no provision in either primary or secondary Union law that would require Member States to introduce a gender quota or gender parity rule in their national election laws. If Member States do that on their own initiative, they cannot rely on any Union law provision to justify it and overcome national constitutional impediments by invoking the primacy of EU law.[60] Art. 23 (2) CFR on the permissibility of specific advantages in favour of the under-represented sex is addressed to Member States only when they are implementing Union law.[61] But when Member States regulate their national parliamentary elections, they certainly do not implement Union law.

[58] Klafki (2020), 864f.

[59] Klafki (2020), 863.

[60] See the Declaration (No. 17) concerning primacy in the annex to Final Act of the Intergovernmental Conference of Lisbon of 13 December 2007 (OJ 2016 C 202, p. 344).

[61] Art. 51 (1) CFR.

5.2.2 Election of Members of the European Parliament

Lex Lata

There is no gender-quota or parity requirement in current EU law concerning elections to the European Parliament, i.e., the Electoral Act.[62] With regard to elections to the European Parliament, the regulatory power of the EU goes further than with regard to municipal elections because, in addition to Art. 22 (2) TFEU on national treatment, Art. 223 (1) TFEU sets forth that the EU "shall lay down the necessary provisions". This would in general include power to introduce gender parity requirements which Member States would have to implement when they conduct the European election within their territory. But since such gender parity provisions would have to be enacted by the Council acting unanimously after obtaining the consent of the European Parliament and enter into force only after ratification by all Member States in accordance with their respective constitutional requirements, this is unlikely to happen any time soon. The most recent amendments to the Electoral Act by Council Decision (EU, Euratom) 2018/994 of 13 July 2018,[63] which has not yet entered into force because it has not yet been ratified by all Member States, does not include any quota rule.

In the Gender Equality Strategy 2020–2025, the European Commission states that in the 2019 European elections, 39% of elected MEPs were women, compared to 37% of MEPs in 2014. It then explains: "Equal opportunity in participation is essential for representative democracy at all levels—European, national, regional and local. The Commission will promote the participation of women as voters and candidates in the 2024 European Parliament elections, in collaboration with the European Parliament, national parliaments, Member States and civil society, including through funding and promoting best practices. European political parties asking for EU funding are encouraged to be transparent about the gender balance of their political party members."[64] The Commission's instruments of choice are promotion and encouragement, not legal obligations. The same applies even more to the elections at national level. In that regard, the Commission only quite generally "calls … on the Member States to … develop and implement strategies to increase the number of women in decision-making positions in politics and policy-making."[65]

[62] See the Act concerning election of the members of the European Parliament by direct universal suffrage, as amended (consolidated version available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01976X1008(01)-20020923&qid=1618756563275&from=EN).

[63] OJ 2018 L 178, p. 1.

[64] European Commission (2020), 14.

[65] Id., p. 15.

Lex Ferenda

A first step toward introducing gender parity requirements was made by the European Parliament in May 2022, when it adopted a legislative resolution on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage.[66] Art. 10 (1) of the Draft Regulation, that is based on Art. 223 (1) TFEU, obliges political parties and other entities, when nominating candidates, to "observe democratic procedures, transparency and gender equality". Specifically, "[g]ender equality shall be reached depending on the Member States electoral systems and in any event in the Union-wide constituency by the use of zipped lists or quotas, without infringing the rights of non-binary people."[67] Recital 3 of the Draft Regulation's preamble underlines the EU's duty of gender mainstreaming (Art. 8 TFEU) and recital 11 refers to the Commission's Gender Equality Strategy 2020–2025. Recital W of the preamble of the Legislative Resolution criticises the differences in the nomination process of candidates for the elections to the European Parliament between Member States and political parties, also with regard to gender equality, even though "open, transparent and democratic procedures respecting gender equality for the selection of candidates are essential for building trust in the political system".

The requirement of zipped lists or quotas (in an unspecified amount) in Art. 10 (1) of the Draft Regulation applies to the new Union-wide constituency for which only European political entities are permitted to submit one Union-wide candidate list each; for the national constituencies, however, the achievement of gender parity is made dependent on the electoral systems of the Member States. This gives them a certain discretion, for example with regard to the amount of the quota, although the ultimate objective—gender equality—seems to indicate a quota of around 50%. However, the gender quotas already introduced by eleven Member States for elections to the European Parliament vary widely.[68] Member States certainly have no *carte blanche* to omit gender-parity rules altogether because of constitutional concerns (Art. 4 (2) sentence 1 TEU). Elsewhere, recital 11 makes clear that gender equality "should apply to all lists of candidates in the elections to the European Parliament both in the national constituencies and in the Union-wide constituency." The extent of the member states' regulatory margin would ultimately have to be decided by the Court of Justice of the European Union (CJEU). The zipped list/quota requirement in Art. 10 (1) of the Draft Regulation has already provoked criticism, especially

[66] European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision [2020/2220(INL)–2022/0902(APP)], https://www.europarl.europa.eu/doceo/document/TA-9-2022-05-03_EN.html#sdocta1.

[67] In a system of zipped lists/quotas infringements of the rights of non-binary persons can only be avoided by giving non-binary persons the freedom of self-definition as either female or male. For an example in the new Bavarian advance see above II.2.

[68] European Parliament (2022), 5.

from Germany.[69] Since the Regulation can only be enacted by the Council acting unanimously after obtaining the consent of the European Parliament and enter into force only after ratification by all Member States in accordance with their respective constitutional requirements, it is quite uncertain if and when EU electoral law will include gender parity rules.[70]

Assuming for the sake of argument that such rules would enter into force, the question arises whether they would be compatible with primary Union law, and in particular Art. 14 (3) TEU as well as Arts. 12, 21, 23 and 39 of the Charter of Fundamental Rights (CFR). It should be remembered in this context that the Court of Justice of the EU struck down absolute and automatic preferences for women in recruitment and promotion as incompatible with the Equal Treatment Directive.[71] It is therefore unclear whether it would accept gender quotas in European electoral law. EU law does permit affirmative action: Art. 23 (2) CFR specifically sets forth that "[t]he principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex." Also, according to Art. 3 (3) subpara. 2 TEU and Art. 8 TFEU, the EU shall promote equality between women and men in all its activities. Perhaps the Court would consider these provisions as sufficient to justify gender parity rules in European electoral law.

The European Court of Human Rights does not consider gender quotas for electoral lists to be incompatible with the ECHR and the Additional Protocol.[72] Democracy implies the freedom of the Union's citizens to freely decide on their representatives in the EP,[73] but this freedom is pre-empted by the selection of candidates. Therefore, especially in the case of closed lists (as in Germany), the EU cannot leave the candidate selection process entirely to the political parties alone without violating its duty under Art. 8, 10 TFEU and Art. 23 CFR to combat discrimination and promote equality between women and men. For obviously gender parity in representation does not come about by itself. It is true that the proportion of women among MEPs increased after the 2019 European elections, in which 11 Member States had gender quotas, and at 39.5% is above the average of the Member State parliaments;[74] but it varies greatly both per parliamentary group and per Member State.

Finally, there is the question of how the zipped list/quota requirement is to be enforced. Art. 10 para. 2 of the Draft Regulation provides for a complaint procedure, which members of a political party, voters' association or European electoral unit can initiate. Whether the European Electoral Authority or the national electoral

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[69] Polzin (2022).

[70] During the first debate in the Council, the proposal met with strong resistance (see Gutschker 2022).

[71] ECJ, judgment of 17 October 1995, Case C-450/93—Kalanke, ECR 1995, I-3051; judgment of 11 November 1997, Case C-409/95—Marschall, ECR 1997, I-6363; judgment of 19 November 2020, Case C-93/19 P—Hebberecht.

[72] See below under 5.3.1.

[73] Polzin (2022).

[74] https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/646189/EPRS_ATA(2020)646189_EN.pdf.

authorities may reject incompatible electoral lists *ex officio* is not regulated. If the provision is to be effective, such a power will have to be assumed.

5.3 European Court of Human Rights and Council of Europe

5.3.1 European Court of Human Rights Accepts Gender Quotas

Art. 3 of the Additional Protocol to the European Convention on Human Rights[75] enshrines the right to free elections but leaves States parties a wide margin with regard to election regulation, in view of the many differences in this regard between the Convention States.[76] The ECtHR has several times accepted gender quotas pertaining to electoral lists as permissible in the ECHR system.

In the most recent case of Zevnik v. Slovenia[77] concerning a 35% gender representation requirement in favour of males and females, a three-member committee of the ECtHR held as follows: "The Court reiterates that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe[78] and that its institutions consider the lack of gender balance in politics to be a threat to the legitimacy of democracy and a violation of the right of gender equality … Consequently, the Court considers that the interference in question pursued the legitimate aim of strengthening the legitimacy of democracy by ensuring a more balanced participation of women and men in political decision-making."

The section of the ECtHR even considered that the rejection of entire lists of candidates for non-compliance with the gender quota requirement was proportionate to the legitimate aim pursued. It explained in this context that "[h]elpful guidance [could] be obtained from the relevant instruments adopted by the Council of Europe institutions, in which they not only allow but also encourage member States to adopt gender quotas into their electoral systems coupled with strict sanctions for non-compliance … The Court also attaches weight to the view of the [Slovenian] Constitutional Court that prior awareness of the fact that political parties would not be able to participate in elections unless they ensured gender-balanced representation on their lists of candidates provided the strongest impetus to satisfying gender quotas …".

In the Zevnik case, the applicants did not claim violations of the freedom of expression (Art. 10 ECHR), the freedom of association (Art. 11 ECHR) or the prohibition of discrimination (Art. 14 ECHR) so that the Court did not have to take any position in that regard. In an earlier Spanish case, however, it did not find any interference in the freedoms of expression or association of potential candidates who were not included

[75] Of 20 March 1952 (ETS No. 9).

[76] See, e.g., ECtHR (GC), judgment of 16 March 2006 (Appl. No. 58278/00), Ždanoka v. Latvia, para. 103.

[77] Decision of 12 November 2019 (Appl. No. 54893/18): Declaration declared inadmissible for being manifestly ill-founded (Art. 35 (3) lit. a ECHR). See Toplak (2019).

[78] See Staatkundig Gereformeerde Partij v. the Netherlands (dec.), no. 58369/10, § 72, 10 July 2012.

in electoral lists because of their gender: "La Cour ne décèle rien dans le dossier lui permettant de constater que les requérantes ont été empêchées de poursuivre leurs activités en tant que membres ou sympathisantes du parti politique en question."[79] Since none of the applicants was a political party, the Court did not consider the potential interference in the freedom of political parties to compile electoral lists in accordance with their own political agenda. But there is little doubt that such interference would have been justified pursuant to Art. 11 (2) ECHR as necessary in a democratic society for the protection of the rights and freedoms of others, namely the underrepresented women.

Regarding the prohibition of discrimination on the ground of sex in Art. 14 ECHR and Art. 1 of Protocol No. 12,[80] the Court held that the Spanish gender quota of 40% applied equally to both men and women, prohibiting electoral lists with more than 60% candidates of either the male or the female sex. This is why there was no discrimination based on sex.[81] The same can of course be said of a zipped-list gender parity rule. However, the state constitutional courts of Thuringia and Brandenburg rejected that group-related approach to gender discrimination considering the entire electoral list and instead opted for an individualised approach with regard to each position on such list: If that is not open for a man or a woman because it is reserved for a woman or a man, there will be gender discrimination even if the overall chances of men and women to get on the list are equal.

The ECtHR has not yet been called upon to decide whether the ECHR and Protocols might impose an obligation on Member States to introduce gender quotas for electoral lists. While the Court has derived different kinds of positive obligations from various Convention rights such as duties to protect, to investigate and to prosecute,[82] it has not yet recognised any concrete positive action obligations in favour of women.

5.3.2 Soft Law by Political Bodies of the Council of Europe

The Committee of Ministers (CM) on 12 March 2003 adopted Recommendation Rec (2003) 3 on "balanced participation of women and men in political and public decision-making".[83] In that document the governments of Member States are recommended to ensure balanced participation of women and men, i.e., representation of both women and men amounting to at least 40%. The governments are specifically invited to "consider adopting legislative reforms to introduce parity thresholds for candidates in elections at local, regional, national and supra-national levels. Where

[79] ECtHR, decision of 4 October 2011 (Appl. No. 35473/08), Méndez Pérez v. Spain, para. 29.

[80] Protocol No. 12 to the ECHR of 4 November 2000 (ETS No. 177).

[81] ECtHR, decision of 4 October 2011 (Appl. No. 35473/08), Méndez Pérez v. Spain, para. 34.

[82] See Grabenwarter and Pabel (2021), 164ff. and Grabenwarter (2021), Art. 2 margin notes 16ff.

[83] Available at https://rm.coe.int/1680519084 (with explanatory memorandum).

proportional lists exist, consider the introduction of zipper systems".[84] In the Recommendation CM/Rec (2007) 17 on gender equality standards and mechanisms,[85] the CM on 21 November 2007 further explained under B.4.31. that "[p]articipation in political and public life is a basic right of citizenship and must be enjoyed by women and men on a parity basis. The balanced participation of both sexes at all levels of political and public life, including at decision-making level, is therefore a requirement of human rights that can ensure the better functioning of a democratic society."[86]

In the Reykjavík Declaration (2023), the Heads of State and Government of the Council of Europe on 16–17 May 2023 somewhat less specifically stated: "We recall that gender equality and the full, equal and effective participation of women in public and private decision-making processes are essential to the rule of law, democracy and sustainable development."

The Parliamentary Assembly (PACE) on 27 January 2010 adopted Resolution 1706 (2010) on "increasing women's representation in politics through the electoral system".[87] In it, PACE specifically recommended the introduction of a legal quota in favour of women and a zipper system for electoral lists:

> 6. The Assembly considers that the lack of equal representation of women and men in political and public decision making is a threat to the legitimacy of democracies and a violation of the basic human right of gender equality, and thus recommends that member states rectify this situation as a priority by:
>
> 6.1. associating the gender equality and anti-discrimination provisions in their constitutions and their electoral laws with the necessary exception allowing positive discrimination measures for the underrepresented sex, if they have not done so already …; …
>
> 6.3. Reforming their electoral system to one more favourable to women's representation in parliament:
>
> 6.3.1. in countries with a proportional representation list system, consider introducing a legal quota which provides not only for a high proportion of female candidates (ideally at least 40%), but also for a strict rank-order rule (for example, a "zipper" system of alternating male and female candidates), and effective sanctions (preferably not financial, but rather the non-acceptance of candidacies/candidate lists) for non-compliance, ideally in combination with closed lists in a large constituency and/or a nation-wide district; …
>
> 6.5. encouraging political parties to voluntarily adopt gender quotas and to take other positive action measures, also within their own decision-making structures, and especially in the party structure responsible for nomination of candidates for elections ….

PACE referred to the European Commission for Democracy through Law (Venice Commission) that had approved both legally mandated and voluntarily adopted electoral gender quotas in 2009:

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[84] Id., Appendix, A.3.

[85] Available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d4aa3.

[86] The FCC in its aforementioned order of 2020 expressly left the question unanswered whether that recommendation was intended to create a legal obligation for Member States because the applicants had not made such a claim (see above note 48, margin note 119).

[87] Available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17809&lang=en.

> 115. Electoral gender quotas are highly controversial in some countries. Given the profound under-representation of women, however, quotas should be viewed as compensation for existing obstacles to women's access to parliament. They can help to overcome structural, cultural and political constraints on women's representation.
>
> 116. Since legal quotas are mandatory by nature they seem to be preferable to party quotas. However, voluntary quotas can, additionally or alternatively, contribute to an increase of women's representation, too.
>
> 117. In order to be effective, gender quotas should provide for at least 30% of women on party lists, while 40% or 50% is preferable.
>
> 118. Electoral quotas are more effective if they provide for strict ranking rules or placement mandates. "Zipper systems" can be considered the most effective method to ensure gender parity.
>
> 119. For being respected, moreover, gender quotas require effective monitoring and enforcement mechanisms.[88]

Germany has long delayed the implementation of these recommendations which are not legally binding as such. When the protagonist Thuringian and Brandenburg state legislatures closely followed them in introducing the zipper-mode gender parity requirements for electoral lists in 2019, the requirements were struck down by the state constitutional courts in 2020 and not saved by the Federal Constitutional Court in 2021, as has already been explained.

The strategic objective 4 of the current Council of Europe Gender Equality Strategy 2018–2023[89] is to "[a]chieve balanced participation of women and men in political and public decision-making".[90] After acknowledging that "[p]olitical activities and public decision-making remain male-dominated areas. Men set political priorities, and political culture continues to be structured around male behaviour and life experience", the Strategy states that the Council of Europe will seek to "identify and support measures and good practices that promote gender equality in relation to: electoral systems, training of decision makers in both public institutions and political parties, gender-sensitive functioning of decision-making bodies, setting parity thresholds, adoption of effective quota laws and voluntary party quotas, and the regulation of political parties including public funding, in co-operation with relevant bodies of the Council of Europe and with a view to achieving gender balance in decision making, combating gender stereotypes and to improve the gender-sensitiveness of decision-making environments".[91]

It is unlikely that Germany will effectively achieve gender balance in political decision-making in a timely manner without mandatory gender quotas regarding electoral lists. It remains to be seen how long their introduction will take.

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[88] Venice Commission (2009), 18.

[89] Council of Europe (2018), adopted on 7 March 2018 by the Committee of Ministers.

[90] Id., p. 27 ff.

[91] Id., para. 57 and 61.

6 Global Level: The Convention on the Elimination of All Forms of Discrimination Against Women

The first step on the global level toward gender equality in political participation was taken by the Convention on the Political Rights of Women.[92] Pursuant to Art. II, "[w]omen shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination." That provision simply prohibits gender-based restrictions on eligibility which constituted important progress at that time.

Art. 7 CEDAW[93] goes further in setting forth that the States Parties "shall take all appropriate measures to eliminate discrimination against women in the political … life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) … to be eligible for election to all publicly elected bodies …" According to Art. 4 (1) CEDAW, "[a]doption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention …".

Gender quotas or gender parity requirements for electoral lists certainly qualify as temporary measures aimed at acceleration of adequate female representation in parliaments and are therefore permitted by Art. 4 CEDAW. The treaty body of independent experts charged with monitoring CEDAW implementation, the Committee on the Elimination of Discrimination against Women, even stated that Art. 4 CEDAW (not only permitted but) "encourage[d] the use of temporary special measures in order to give full effect to articles 7 and 8."[94]

Is the imposition of mandatory gender quotas or gender parity requirements even made obligatory by Art. 7 CEDAW, because they are the most appropriate measure to eliminate the underrepresentation of women—a trace of their past discrimination—and ensure their substantive equality in political life? The CEDAW Committee has increasingly tightened its standards in this respect. In 1997 it had confined itself to observing that some political parties have adopted measures to ensure that there was a balance between the number of male and female candidates nominated for election and then demanding that "States parties should ensure that such temporary special measures are specifically permitted under anti-discrimination legislation or other constitutional guarantees of equality."[95] Seven years later, the Committee stated that the "[p]ursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources

[92] Of 31 March 1953, UNTS vol. 193, p. 135.

[93] Of 18 December 1979, UNTS vol. 1249, p. 13.

[94] General Recommendation No. 23 (1997): Political and Public Life, para. 15 (available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4736_E.pdf). See in this sense also UN General Assembly Resolution 66/130 of 19 December 2011, para. 9.

[95] Id, para. 33.

and power between men and women."[96] While quota systems are mentioned as one possible kind of special measures,[97] the Committee did not explicitly demand their use but rather leaves States parties a choice regarding the most appropriate means to promote gender equality.[98] Meanwhile the Committee has begun to recommend that quotas of up to 50% for the representation of women, including on electoral lists and in public office, be introduced and effectively enforced in a number of Concluding Observations on State reports.[99] It has also viewed the introduction of zipper systems as particularly effective.[100]

In the Joint Call with the Inter-Parliamentary Union of 8 March 2021, the Committee urged parliaments and governments to adopt national plans of action in order to accelerate progress to reach gender parity by 2030, "including by … [a]dopting electoral gender quotas to reach the gender parity target … [a]dopting the target of parity … in political and administrative, as well as executive, legislative and judiciary bodies, at both the national and subnational levels …".[101]

While the Committee, which has no power to impose legal obligations on States parties to CEDAW, has confined itself to making recommendations, the CM of the Council of Europe has interpreted Art. 7 CEDAW in the sense that it imposes an obligation on European States "to ensure equal participation of women and men in political and public decision-making. Given that the traditional liberal notion of equality of opportunity has evolved to a demand for equality of results, states now have an obligation to ensure equality of outcomes, not only equal opportunities between women and men. This means that European states are obliged to ensure an equal representation of women and men in decision-making."[102] Although quotas are not explicitly mentioned, there is practically no other way of quickly achieving equality of results with regard to representation of women in parliaments.

If one takes seriously the promise of effective equality of women in political life made by Art. 7 CEDAW and includes the long-lasting exclusion of women from that life in the equation, the interpretation ventured by the CM of the Council of Europe is reasonable. It is supported by the practice of the Human Rights Committee (HRC), the treaty body of the International Covenant on Civil and Political Rights (ICCPR),[103] regarding the political rights enshrined in Art. 25 ICCPR. This provision guarantees to every citizen the right and the opportunity, without any distinction of sex etc., to vote and to be elected. According to the HRC, "States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and

[96] General Recommendation no. 25 (2004), para. 8 (available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3733_E.pdf).

[97] Id., para. 22.

[98] Id., paras. 27 ff.

[99] Lembke (2022), Article 4, p. 208 f. and Wittkopp (2022), Article 7, p. 323 f.

[100] Wittkopp (2022), Article 7, p. 316.

[101] Joint Call (2021).

[102] Explanatory memorandum on Recommendation Rec (2003) 3 (note 83), p.15 (at the end of para. I.A.).

[103] Of 16 December 1966, UNTS vol. 999, p. 171.

take effective and positive measures to promote and ensure women's participation in the conduct of public affairs and in public office, including appropriate positive action. Effective measures taken by States parties to ensure that all persons entitled to vote are able to exercise that right should not be discriminatory on the grounds of sex. The Committee requires States parties to provide statistical information on the percentage of women in publicly elected office, including the legislature, as well as in high-ranking civil service positions and the judiciary."[104]

7 Conclusion: Political Gender Parity and Legal Education

In conclusion, there is not yet any hard and watertight international or supranational legal obligation for States to enact mandatory quotas or gender parity requirements in order to enhance the political representation of women. But the pertinent soft-law precepts on the European and global level are gradually spreading and hardening, not least because many close partner States of Germany have long ago introduced such quotas. It remains to be seen whether Germany will fall in line or rather fall behind because it proves unable to overcome State constitutional court resistance. That depends on how much women voters in Germany care about their right to equal representation enshrined in Art. 3 (2) BL, read together with and informed by Art. 7 CEDAW, and its effective implementation. According to a recent survey conducted in Germany, only a small minority (8%) of the respondents supported the introduction of mandatory gender quotas, with more female than male respondents answering positively.[105]

Obviously, much more public debate of women's political representation in Germany is necessary. Voters need to become aware that the underrepresentation of women in legislatures hinders the inclusion of the gender perspective in a critical sphere of influence.[106] Otherwise, Germany is in danger of falling behind developments on the European and global level concerning women's political representation. If that happens, Germany will probably also stay behind with regard to gender equality in general and thus fail to adequately tap the hidden resources and talents of the better part of its population. That would be a competitive disadvantage.

One way to raise awareness of the gender gap in general and the gender gap in political empowerment in particular is to promote gender-sensitive legal education. Law students will be trained to recognise de jure and de facto discrimination of women and learn to include social and political reality in their legal assessments. They

[104] General Comment No. 28, CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 29 (available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_21_Rev-1_Add-10_6619_E.pdf).

[105] Coffé and Reiser (2020).

[106] See in this sense UN General Assembly Resolution S-23/3 "Further actions and initiatives to implement the Beijing Declaration and Platform for Action" of 10 June 2000, para. 23 (available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/652/05/PDF/N0065205.pdf?OpenElement).

will be informed about existing hard law and soft law rules as well as mechanisms of redress in favour of women. They will be made aware of the possible need for further rules and mechanisms in order to eliminate discrimination and gender-based disadvantages for good and promote de jure and de facto equality between women and men across the board. They will also learn how to lead the legal and political battles for a gender-equitable society in parliaments, the courts and the general public. Most importantly, however, gender-sensitive young lawyers will function as multipliers of gender equality and gender sensitivity in society at large.

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Gender Perspectives in European Economic Law

Mareike Fröhlich

Abstracts The chapter will give an overview of the different levels how the EU can execute its influence on promoting gender equality in European economic law. First, it analyses the new directive of the EU for the composition of corporate boards as well the different initiatives for the support of female entrepreneurship. In addition, the opportunities in the regulatory fields of competition, public procurement and state aid regarding gender empowerment are also examined. Finally, the chapter focusses on the initiatives of the EU for a directive which addresses the responsibilities of companies along the global supply chain which would also include gender discrimination. Furthermore, the potential of trade agreements and the inclusion of gender related chapters is analysed.

Keywords Gender · Equality · Gender quota · Corporate boards · Competition law · General economic interest · Public procurement · State aid

1 Introduction: Different Levels of Influence

Gender equality is a fundamental principle of human rights and has been widely recognized as a key driver of economic growth and social development. In recent decades, significant progress has been made in addressing gender inequality in various areas of economic law, including employment, education, and entrepreneurship. In the context of the European Union (EU), gender equality is enshrined in the EU Treaties and has been a major priority of EU policies and initiatives. The EU has implemented a number of measures aimed at promoting gender equality in the economic sphere, including legislation and policies increasing the participation of women in the labour market and addressing the gender pay gap. Additionally, the EU has played a key role in promoting gender equality at the international level by supporting the United Nations' Sustainable Development Goals. By working to

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eliminate gender-based discrimination and promote gender equality in the economic sphere, the EU aims to create a more inclusive and equitable society for all.

European economic law does not typically have a gender perspective built into its framework. However, there have been efforts to introduce gender considerations into the interpretation and application of EU economic legislation and policies. These efforts aim to address gender-based inequalities and discrimination in the economic sphere, such as the underrepresentation of women in leadership positions. In conclusion, while gender perspectives are not built into European economic law, intrinsically efforts are underway to incorporate gender considerations into the interpretation and application of EU economic laws and policies, with the goal of promoting gender equality in the economic sphere.

The European treaties themselves provide for equality between women and men in Articles 20, 21 and 23 of the Charter of Fundamental Rights, either when the EU institutions act or when the Member States implement European law. However, no such legal obligations can be derived from the market freedoms in the TFEU, which ensure a common internal market. Rather, the fundamental freedoms are aimed at the Member States as addressees and are intended to prevent discrimination or restrictions based on nationality or comparable characteristics.

Although governments worldwide, including the EU, set different incentives to gender mainstream the business world, including company organisations, business behaviour and trade flows, there has not been enough change so that the legislators had to take action. Despite women representing more than half of the global workforce, they generate only 37% of the GDP. Closing this gender gap could lead to significant financial benefits, ranging from $12 to $26 trillion, depending on the extent to which the potential is realized.[1] Therefore, there are different regulations and initiatives to support a change in this field.

For a better understanding, the following contribution will examine the European legal framework and other initiatives at European level for the promotion of gender equality. Here, different levels can be identified which enables the European legislator to influence the progress: (1) In the business/company organisation, (2) in the regulatory field and (3) in the economic policy-making process on international level.

[1] *McKinsey Global Institute*, The Power of Parity: How Advancing Women's Equality can add $12 Trillion to Global Growth, https://www.mckinsey.com/~/media/mckinsey/industries/public%20and%20social%20sector/our%20insights/how%20advancing%20womens%20equality%20can%20add%2012%20trillion%20to%20global%20growth/mgi%20power%20of%20parity_full%20report_september%202015.pdf, p. 8 et seq.

2 Gender Perspectives in the Business/Company Context

There are two major fields of action in the area of gender equality in the context of enterprises in which the EU is active this concerns. On the one hand, the organisational structure of already existing companies and, on the other hand, the start-up culture in companies run by women. In both areas, the EU has been trying for years and has at least been able to make progress in terms of the composition of decision-making bodies in companies.

2.1 Quota in Company Boards

There is still no gender parity achieved when it comes to company boards, where only 35% of women are represented as the underrepresented sex in the European Union.[2] There have been various initiatives to raise the number of women in decision-making positions but these voluntary actions have not made a significant change, although studies have shown that women in management positions have led to an improvement in the area of gender equality. Therefore, imposing gender quotas could help to raise the number of women on corporate boards. Overall, gender quotas can help create a more inclusive and equitable workplace, which can benefit both individual employees and the company as a whole. By implementing a gender quota, more women will be represented on corporate boards, thereby increasing gender diversity. This can bring in new perspectives and ideas, leading to better decision-making and potentially better financial performance. A gender quota can help address gender bias in the selection process for corporate board positions so that the underrepresented sex receives equal consideration for open positions. Women in leadership positions can serve as role models for younger women and girls, encouraging them to pursue careers in fields where they may have previously been underrepresented. Companies that prioritize gender diversity and equality are often viewed more favourably by customers, investors and other stakeholders. A gender quota can demonstrate a company's commitment to corporate social responsibility, which in turn can improve its reputation and bottom line. Moreover, diverse groups are often more innovative and creative than homogeneous groups. By increasing gender diversity on corporate boards, companies may be able to tap into the creativity and innovation that comes with a range of perspectives and experiences.[3]

Therefore, some member states have already felt compelled to legislate for a minimum number of women on boards of directors and/or supervisory boards. The regulations either stipulate that from a minimum number of members of the board, more than 0 must be women or men (at least 1 woman and 1 man as a member in

[2] Cf. EWOB (2021).

[3] Fröhlich et al. (2023), p. 675 et seq.

each case), or a certain percentage is specified.[4] Here, a distinction is made between regulations for executive and supervisory boards as well as for private or public companies. By 2022, only 8 EU member states had enacted national gender quotas for board composition in listed companies.[5] In addition, although various soft quotas are in force, they are not equally effective,[6] and the different regulations lead to major regulatory discrepancies and requirements for companies, which can also constitute obstacles to the common market.[7]

Accordingly, the EU has been trying since 2012 to adopt a directive on gender balance in among directors in listed companies and was able to achieve success here at the end of 2022. The new directive demands in Art. 5 that at least 40% of the underrepresented gender be represented on non-executive boards of listed companies or 33% among all directors. To ensure this, Art. 6 the companies have to set up transparent appointment procedures with objective assessment based on gender neutral criteria. In case of equally qualified candidates the preference should be given to the one of the underrepresented sex. Art. 7 obliges companies to report on a yearly basis if they achieved the objectives, if not they have to explain reasons and measures to fulfil the commitments. If they do not comply with the rules in the regulation, penalties and other measures mentioned in Art. 8, which need to be "effective, proportionate and dissuasive." They can either include fines or consequences for the decision concerning the selection of directors. Finally, the directive still needs to be implemented to national law until the end of 2024, especially by those member states who have no national quota.[8]

The future will show if EU wide national quota will have a sustainable effect to ensure gender equality and support the above mentioned objectives. It can be assumed that in member states which already have a gender-friendly and sensitive general law regime in place the effect will be rather limited but in those member states with limited gender equality the directive will make a difference.

[4] In Germany, the law stipulates that at least 30% of the positions on the supervisory board of listed companies and companies with equal co-determination are to be filled by the other gender. In addition, these companies must have at least 1 man and 1 woman on the board of directors of 3 or more persons. This also applies to public companies and public corporations.

[5] EIGE (2022a), p. 43, fn. 28. Accordingly, these include France and Italy (40%), Belgium, the Netherlands and Portugal (33%), Germany and Austria (30%) and Greece (25%).

[6] Although 37% of posts in countries with quotas were filled by women and even with soft quotas the figure was still 31%, the number of women in countries without regulations fell to 18% (EIGE 2022a, p. 43).

[7] EWOB (2022).

[8] Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, OJL of 7.12.2022, L 315/44, recital 20.

2.2 Promoting Female Entrepreneurship

In this context it also has to be mentioned that only 7% of 668 listed companies located in the EU have a female CEO.[9] And only around 30% of business founders are women.[10] Keeping in mind that female leader could be more likely to create more female and family friendly structures and opportunities, the EU finds it necessary to support the entrepreneurial initiatives of women to address the main difficulties like insufficient funding, meaning access to financial loans of banking institutions or state entities, lack of knowledge regarding the legal background and how to start a business as well as insufficient support by state enterprise agencies who support entrepreneurs or the state services like childcare.

Besides the Small Business Act of 2008[11] and the Entrepreneurship 2020 Action Plan[12] which explicitly state to support female entrepreneurs, the EU has implemented several initiatives to promote female entrepreneurship. WEgate is a European platform that offers a range of services and resources for women entrepreneurs, including access to funding, training and mentoring opportunities, and networking events.[13] The European Investment Fund provides financing and guarantees to support SMEs, including those led by women entrepreneurs. It also provides support for venture capital funds that invest in innovative and high-growth SMEs. The European Network of Female Entrepreneurship Ambassadors aim to promote female entrepreneurship by appointing successful women entrepreneurs as ambassadors who will encourage and support other women in starting and growing their businesses.[14] The European Union Programme for Employment and Social Innovation (EaSI) provides funding and technical assistance to support social innovation and promote employment, including support for female entrepreneurs. COSME is the EU programme for the Competitiveness of Small and Medium-sized Enterprises (SMEs). It offers financial support to SMEs and aims to improve their access to markets, finance, and business support services. It includes support for women entrepreneurs through the "Women Entrepreneurship" action.[15] These initiatives are just a few

[9] Cf. EWOB (2022).

[10] WEGate, https://www.wegate.eu/women-entrepreneurship/.

[11] Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Think Small First" – A "Small Business Act" for Europe, COM(2008) 394 final.

[12] Entrepreneurship 2020 Action Plan, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2012) 795 final.

[13] See https://www.wegate.eu/.

[14] See https://single-market-economy.ec.europa.eu/smes/supporting-entrepreneurship/women-entrepreneurs/support-tools-and-networks-women_en.

[15] European Parliament and Council, Regulation (EU) No 1287/2013 Regulation (EU) establishing a Programme for the Competitiveness of Enterprises and small and medium-sized enterprises (COSME) (2014–2020) and repealing Decision No 1639/2006/EC, OJL of 20.12.2013, L 347/33.

examples of the many programmes and resources the EU has implemented to support and promote female entrepreneurship.

3 Gender Perspectives in the Regulatory Field

Besides the structure of companies also the business behaviour can be a starting point for promoting gender equality. The EU in cooperation with the member states are regulating business behaviour in the field of antitrust and merger, public procurement, as well as state aid. Until now the gender perspective is rather under evaluated but a link can be discussed. Regulatory policies can have a significant impact on gender equality by promoting a level playing field for businesses and preventing anti-competitive practices that can disadvantage women-owned businesses or limit women's opportunities in the workforce. There are different ways how competition policy can influence gender equality. Competition policy can help to promote access to markets for all businesses and prevent discrimination against businesses, including those owned by women. Encouraging innovation can provide new and better opportunities for growth and success. It can also promote diversity in the workforce by preventing anti-competitive practices that limit opportunities for women.

Beyond the economic effects, however, it must also be taken into consideration that competition regulation also serves the public interest in particular and that this must be taken into account in the different areas of law. In exercising EU law, the EU and its member states are bound by the EU Charter of Fundamental Rights and thus also by Art. 23 and 21. This can and must be understood to mean that the regulation of competition also contributes to the comprehensive promotion of this objective.

3.1 Competition Law

Regarding competition law, respective antitrust and merger regulations, there is no explicit rule on gender issues in EU competition law, respectively Art. 101 et seq. TFEU or in the merger regulation. Nevertheless, competition law could address certain issues to fight inequalities and to promote access to markets for all businesses, including those owned by women. Such issues need to be qualified as public interest issues, so that restrictions of competition or any other issues which promote competition relating to gender could be considered in the analysis. Since the articles 101 et seq. TFEU and the CJEU are rather silent and protecting competition as such, different linkage points are discussed in literature: (1) exceptions for undertakings which execute quasi public service obligations; (2) inclusion of public interest in the substantive antitrust analysis; (3) justification of anticompetitive practices with

public interest considerations and (4) state action defense as well as general economic interest according to Art. 106(2) TFEU.[16]

By preventing anti-competitive practices that limit market entry, such as exclusive dealing agreements or abuse of dominant market positions, competition policy can create more opportunities for women entrepreneurs to compete and succeed in the marketplace. Competition policy can encourage innovation, which can benefit women-owned businesses by providing new and better opportunities for growth and success. By preventing anti-competitive practices that limit innovation, such as anti-competitive mergers or abuse of intellectual property rights, competition policy can create an environment that encourages innovation and supports women entrepreneurs. In particular, market participation can be restricted by legal barriers or other behavioural factors.[17] These include laws that either exclude women from some business sectors, deny them ownership of property, prohibit them from running a business, or even allow the husband to prohibit his wife from working.[18]

In addition, women are more often exposed to anti-competitive behaviour that discriminates against them both as competitors and as consumers, which in turn can have an impact on their ability to start their own businesses. For many women, access to financial services is not available on the same advantageous terms as men.[19] Restrictive behaviour in substitute services, such as household support services or childcare, hits women harder and restricts their economic participation. This also applies to the fact that women pay higher prices for certain products that have the same functionality but either labelled as female or designed to be attractive for women (so-called pink tax[20]). The question of gender-sensitive market definition, which includes gender-specific characteristics and substitutability in the market analysis, also aims in the same direction.[21]

Finally, besides these technical considerations, competition authorities also need to work and be staffed in a gender-sensitive manner. Moreover, they should take an active role in gender mainstreaming in their field by advocating gender equality in competition.[22] This would also mean to take action in product markets where mainly women be consumers and are more affected than men.

[16] Dunne (2020), p. 261 et seq. Bundeskartellamt (2020), p. 15 et seq.

[17] Santacreu-Vasut and Pike (2018), p. 15 et seq.

[18] World Bank Group/World Trade Organization (2020), p. 100 et seq.

[19] Cf. Moro et al. (2017), World Bank Group/ World Trade Organization (2020), p. 95 et seq. and Muravyev et al. (2007).

[20] De Blasio (2015).

[21] Cf. Santacreu-Vasut and Pike (2018), p. 18, 21 et seq.

[22] Cf. Santacreu-Vasut and Pike (2018), p. 28 et seq.

3.2 Public Procurement Law

It is worth noting that public institutions in the EU spend around 2 trillion Euro on the goods, services and other works they purchase.[23] This significant scope opens up a large area in which the public sector itself can consider gender equality. Interestingly, 57% of all OECD countries established a framework on strategic objectives regarding gender-related issues.[24] Also, a few member states already recognized this and started to include gender aspects into the procurement process, as Estonia, Greece, Spain, France, Austria and Portugal as well as a few regions in Germany.[25] One main obstacle to the implementation of such objectives is a lack of understanding how to implement them. And even if they are implemented, this does not mean that they apply to the whole supply chain or all sub-contractors.[26]

In principle, European primary law says nothing about the consideration of gender issues in the procurement process. Only Art. 18 of the Public Procurement Directive refers to social and labour law provisions which also include gender issues[27]:

> 1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. […]
>
> 2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields od environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

As the procurement process is divided into three different stages—pre-procurement, procurement and post-procurement—there are several linkage points which could advance gender equality. Before the procurement, public institutions should carry out a needs assessment and market consultation for the impact of the contracts to gender, equality issues should be included in the contract, the procedure for gender-responsive public procurement needs to be adjusted, light regimes/reservations/lots which benefit the participation of women-owned businesses should be discussed and gender-sensitive language will be used. In the procurement phase criteria need to be introduced to exclude bidders for poor records on gender issues or to select bidders who have a GRPP friendly bid, technical specification need to be designed which reflect gender aspects of the contract, in the delivery of the contract award criteria should secure that specific equality issues are targeted and labels and certifications should be introduced to which certify gender compliance. Finally, after the procurement the contract performance conditions requesting actions for gender equality need to be implemented, gender monitoring and reporting need

[23] See https://single-market-economy.ec.europa.eu/single-market/public-procurement_en.

[24] OECD (2020), p. 7.

[25] EIGE (2022b), p. 22 et seq.

[26] OECD (2020), p. 9.

[27] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. OJ L 94 of 28 March 2014, p. 65.

to be included, subcontractors should be obligated, contractual remedies need to be used to ensure compliance as well as statistics need to be implemented.[28]

3.3 State Aid Law

To round it up, state aid law can potentially influence gender equality by promoting fair competition and preventing anti-competitive practices that can disadvantage women-owned businesses or limit women's opportunities in the workforce. It is important to ensure that state aid is used in a way that does not perpetuate or ignore discriminatory practices, and that policies and laws are in place to promote equality and prevent discrimination.

In principle, the EU prohibits in Art. 107 TFEU state intervention but allows certain exemptions under specific criteria. Especially, in the field of labour market policies an effective incentive state aid regime could support efforts. Such subsidies could either fall under different exemptions or be legal if they fall under the de minimis regulation for SME which could enable female start-ups market access. Support could also be justified according to Art. 107 (2) TFEU although this rule is interpreted narrowly so that a justification is rather possible under Art. 107 (3) TFEU, in particular with the general block exemption regulation.[29] In this regard, state aid law can promote access to finance for women-owned businesses by allowing governments to provide financial support to small and medium-sized enterprises (SMEs), including those owned by women. This can help to level the playing field for women-owned businesses that may face barriers to accessing finance in the private sector. The same applies to support for innovation, which can benefit women-owned businesses by creating an environment that encourages innovation and supports women entrepreneurs. They could also be supported by funding and other support, particular for start-ups, which are owned by women. In particular, state aid law can play a role in promoting diversity in the workforce by only granting subsidies to such companies which guarantee an environment that encourages diversity and supports women's advancement in the workforce.

Another possible solution for gender-sensitive state support would be the provision of essential public services, like childcare, which allow women to take part in the labour market. Usually public services or services provided by public undertakings or undertakings to which Member States grant special or exclusive rights fall into the scope of Art. 106 TFEU. Nevertheless, this is not the case if the essential economic services are not anymore able to achieve their objectives or perform their tasks.[30]

[28] For details EIGE (2022b), p. 10 et seq. and OECD (2020), p. 10 et seq.

[29] Finckenberg-Broman (2019), p. 163 et seq.

[30] Finckenberg-Broman (2019), p. 167 et seq.

4 Gender Perspectives in the Economic Policy-Making

Also in the field of economic policy, gender awareness should be included in policy-making. The EU started to include social responsibility, including gender issues, into its international engagement.

4.1 Global Value Chain Responsibility

Global supply chains have played a crucial role in promoting international trade and providing opportunities for companies, including those from low-income countries. This has led to job creation worldwide, with approximately 190 million women working in global supply chains, particularly in sectors like garment and textile industry.[31] However, many female workers find themselves in low-wage and precarious employment due to factors such as price-dumping and the demand for cheaper products. On the other hand, consumer demand for socially responsible and sustainable products, has increased, requiring changes in corporate social responsibility. The elimination of gender inequalities in the global supply chain is important not only for the well-being of individual female workers but also for the governments and companies involved.

To strengthen the women's economic empowerment, actions should be taken to reduce the gender pay gap, workplace discrimination, and promote equal opportunities. This includes addressing gender-based violence and harassment, promoting work-life balance, ensuring equal distribution of care work, increasing women's participation in business and management decision-making, and supporting their involvement in trade unions and associations. While gender equality is relatively better in high-income countries, efforts are needed at both national and international levels.[32]

Global value chains involve crossing borders, making international solutions preferable. However, due to a lack of binding international rules, currently only national laws exist to regulate extraterritorial situations, such as the German "Lieferkettengesetz" (Supply Chain Act).[33] Interestingly, the EU took also action to hold companies responsible for human rights violations along the supply chain.[34] The proposed directive will make those companies liable which do not set up procedures to avoid human rights violations, including discrimination of women. In contrast to other national obligations the directives provide the possibility for sanctions and liability claims.

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[31] ILO (2015), p. 135.

[32] Fröhlich (2023), p. 336 et seq.

[33] Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, BGBl. I 46 v. 22.07.2021.

[34] European Commission, Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

4.2 Gender Issues in Free Trade Agreements

The connection between trade liberalization and its impact on gender inequalities cannot be overlooked. Countries that embrace trade liberalization tend to exhibit higher levels of gender equality. Recent advancements, such as the growth of the service sector, diversification of global value chains and the emergence of new digital technologies, have expanded trading and employment opportunities for women worldwide. However, the impact of trade on women's empowerment varies depending on whether the industry is predominantly male or female. Women employed in export-oriented companies often face lower representation compared to men, and those in sectors like education, healthcare, and administration may experience limited benefits from trade liberalization. Women still encounter various challenges and disadvantages arising from trade policies. They tend to be employed in low-to-medium skilled jobs or the informal sector. Women also face higher trade costs at borders, encounter discriminatory working conditions, and are impacted by import tariffs on products specific to women. These barriers to trade for women prevent countries from fully utilizing their economic potential.[35]

Recognizing the increasing focus on gender equality over the past decade, the World Trade Organization (WTO) has taken steps to address this issue. It has adopted the Declaration on Trade and Women's Economic Empowerment and established the Informal Working Group on Trade and Gender.[36] However, due to the limitations of the consensus-based system within the WTO, many countries have turned to free trade agreements (FTAs) to promote gender empowerment. Over the years, there has been an upward trend the inclusion of gender-related provisions in FTAs, with Canada and Chile leading the way in including explicit standalone gender chapters in their agreements. High- and middle-income countries, particularly in North–South agreements, have greater commitment to integrating gender shown provisions.[37]

In contrast, the European Union (EU) has been hesitant to include standalone gender chapters in its recent FTAs. Agreements with countries such as Singapore, Korea, Australia, Mexico, Mercosur, Vietnam, and the UK only include gender provisions within sections related to trade and sustainable development or labour standards. Notably, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU does not have a dedicated chapter on gender issues, despite Canada prioritizing gender mainstreaming.

Although the EU's current efforts in this area are not particularly convincing, it began renegotiating its existing FTA with Chile in 2017. Chile appears to have succeeded in including a gender chapter in this agreement, as the proposed text

[35] For more details and references, cf. Fröhlich (2022).

[36] WTO (2021), Joint Ministerial Declaration on the Advancement of Gender Equality and Women's Empowerment within Trade. WT/MIN(21)/4/Rev. 1.

[37] Monteiro (2021), p. 2, 4 et. seq.

already contains a draft of such a chapter.[38] This chapter goes beyond previous regulations in terms of structure and wording and includes notable provisions. Article 3 outlines non-discrimination obligations and incorporates an explicit derogation clause. The chapter also introduces provisions for government consultations and the option to seek expert panels for dispute resolution in cases where consultations fail. As negotiations are still ongoing, substantial changes may occur. If the parties can reach a successful resolution without significant alterations, this chapter could serve as a modern and detailed model for future EU free trade negotiations, as suggested by the European Parliament in 2016.

5 Conclusion

In summary, the European Union has various possibilities to promote gender equality in European economic law and is also obliged to do so by the treaties. The new regulations on gender-equitable staffing of company boards will show whether the introduction of a quota can promote gender-sensitive company policy. There may be considerable scope in the area of regulatory law, which is not yet being used in this way but which has the potential to promote gender equality by creating a more level playing field for businesses and preventing anti-competitive practices that may limit opportunities for women-owned businesses or limit opportunities for women in the workforce. However, more needs to be done and, in addition to further research on the possibility of gender mainstreaming or the effectiveness of such gender-sensitive regulation, also create awareness in the EU and the member states that gender justice can be pursued by means of regulatory law. Furthermore, the EU as well as the Member States have taken the first steps towards fulfilling their global responsibility to promote gender equality outside the EU. The future will show whether supply chain legislation is effectively implemented and has a positive impact but it emphasizes the need for comprehensive governance to address gender empowerment, which should involve public, private, and social sectors. Private governance and voluntary commitments by companies have shown limited success, leading to calls for public governance and legislative activities. However, challenges exist in implementing enforceable commitments, particularly for globally operating companies that do not directly own their production suppliers along the value chain. Finally, gender mainstreaming, not only in trade issues, should become a maxim EU external action, alongside other standards such as environmental protection.

[38] Draft provisions on Trade and Gender Equality in the context of the Modernisation of the EU-Chile Association Agreement. Chapter 27. https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en.

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Law and the Climate Crisis

Climate Change and Working Time: A Complex Challenge

Maria Isabel Ribes Moreno

Abstract Working time has been traditionally focused on adapting working hours in order to allow a reconciliation of work and family life whilst assuring the workers' health and safety. Recently, a new factor impacts in the organisation of the working time. It is climate change which also has an important effect on the working conditions. This issue will certainly be a decisive factor to be taken into account in the designing and monitoring working time in the near future. The climate emergency demands for an innovative regulation from the International Institutions and introduce a new challenge for the domestic labour and social security law. Thus, in Europe, both the European Union and the Member States have a significant role in enacting innovative regulations and, additionally, in the promotion and encouragement to the social agents to negotiate "climatic oriented" working conditions.

Keywords Climate change · Working time · Health and safety at work

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1 Introduction: Working Time as a Changing Factor

The limitation of working time to achieve reasonable and adequate working hours has been a demand that has guided its regulation in Europe since the beginning of the Industrial Revolution.[1] It was a demand initially proposed, between others,[2] by manufacturer and social reformer Robert Owen claiming for "eight hours labour, eight hours recreation and eight hours rest", an innovative motto at that time.[3] In fact, during the nineteenth century, workers had to sustain exhausting hours, in an environment where abuses and excesses became the most pressing problems for the protection of workers. This aim had also been mainstay of trade unions demands.

However, it was a complex challenge for the states. Enacting legislation limiting working time at the national level posed a profound international problem since such a decision would lead to the possibility of enormous competition between countries, giving advantage of those with lax regulations.[4]

The Treaty of Versailles was a milestone on this regard,[5] whilst establishing the terms of peace in the First World War and at the same time including labour-related content concerning this issue in its part Part XIII: Section I of the Treaty. To be more specific it regulates the urgent need to improve working conditions "as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week."

The Treaty also recognised, in Article 427, the existence of certain fundamental principles that had to be respected by the members of the League of Nations. In this regard, "recognising that the well-being, physical, moral and intellectual, of industrial wage-earners, is of supreme international importance".[6] Complementarily, member states should endeavour to apply, among others, "The adoption of an eight-hour day or a forty-eight hours week as the standard to be aimed at where it has not already been attained".[7]

In addition, the Treaty included the terms for the constitution of the International Labour Organisation (hereinafter ILO). The ILO soon accomplished the objective of regulate the working time. Thus, Convention No. 1 (1919) dealt with the limitation of working hours (industry). This Convention called for the establishment of an eight-hour working day. However, the international instrument also allowed for an extension of the weekly working time up to 48 h on certain occasions and introduced a wide range of exceptions.

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[1] Hopkins (1982).

[2] In fact, he was not the first, although he is one of the best known. We can also mention, among others, Thomas More, a precursor advocating for six hours of working time in his controversial work Utopia (More, 1516).

[3] Owen (1849).

[4] Indeed, competition is a concern that underline permanently, even today, when a state adopts more protective regulation for workers in terms of working time.

[5] Versailles Treaty 28 June 1919.

[6] See Part XIII, Section II General Principles, Article 427.

[7] Ut supra.

The rationale behind the limitation of working time was the need to reduce long working hours, which affected the health of workers. The adoption of the Convention gave rise to a trend in different countries who confirmed this with an identical approach. Subsequently, different ILO Conventions continued this tendency,[8] which was followed in Europe by different legal texts in other international Institutions, as the Council of Europe (hereinafter CoE), the European Union (hereinafter EU) and states.[9] In short, the limitation of working time contributed positively to protecting the health and safety of workers. Indeed, there are many scientific studies proving the adverse effects on a human being when it comes from long working days or working at night.

However, the organisation of working time has been affected by other factors and has evolved significantly, especially with the incorporation of women into paid work. In fact, the entry of women into the working world, departing from their traditional position in the domestic sphere, led to the need first to guarantee her health and safety regarding the maternity,[10] and later to establish reconciliation rights, which would allow women to combine professional and personal responsibilities.

To achieve the aim of family responsibilities, as a first step, International Institutions, like the ILO, and governments all over the world established a set of rules

[8] So far, there are four updated agreements, four in provisional status, one pending revision, four superseded and five repealed, covering the regulation of working time in sectors as diverse as industry, mining, road transport, hotels, commerce, public works, hospitals, and others. Moreover, some ILO conventions in particular sectors, such as those concerning maritime labour (CTM2006) or fishing (C188), also include provisions on this issue. There are also conventions dealing with the regulation of night work and numerous recommendations on all these issues. More information is available via the ILO webpage NORMLEX https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12030:0::NO:::.

[9] Only in the EU Council Directive 93/104/EC of 23 November 1993, the Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC and the recent Directives 1999/63 and 95/EC, 2000/79 EC and 2002/15/EC were in charge of regulating working time aspects for specific sectors, such as seafarers, flight crews in civil aviation and mobile road transport activities, respectively. The Council of Europe also included provisions in the European Social Charter which stated in its Art. 2 About The right to just conditions of work, "with a view to ensuring the effective exercise of the right to just conditions of work, the Contracting Parties undertake: (1) to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit; (2) to provide for public holidays with pay; (3) to provide for a minimum of two weeks' annual holiday with pay; (4) to provide for additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations as prescribed; (5) to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest." Additionally, the Art. 3 reinforce the right to safe and healthy working conditions in relation to the environment. 4) to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations.

[10] See the Maternity Protection Convention (No. 3), the Maternity Protection Convention (Revised) No. 103, and the Maternity Protection Convention (No. 183). The European Social Charter also protected the maternity in its Article 8. In the EU framework the Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

which have modified the formulation of working time. The initiative led to a system of flexibility with reference to the leave of absence, through maternity and parental leaves. Within the ILO framework, the Women with Family Responsibilities Recommendation (R123), considered in its Preamble that "many such women have special problems arising out of the need to reconcile their dual family and work responsibilities", and noted "that many of these problems, though they have particular relevance to the opportunities for employment of women workers with family responsibilities".

In Europe, the initiatives of the EU have encouraged the different countries to enact regulations at the national level guaranteeing men and women the right to organize their professional and personal issues without discrimination. In a first step, Council Directive 96/34/EC of 3 June 1996, on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC,[11] had been developed encouraging to "adapt working conditions to family responsibilities".[12] Subsequently, Directive 2010/18/EU of 8 March 2010, implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC,[13] considered the need for work-life balance. Nevertheless, the content of its rules and regulations were focused on specific policies aiming at the reconciliation of work and family but in certain addressed to women.

In this vein, as a second step, we have progressively witnessed a change of perspective: the evolution from reconciliation to co-responsibility. The ILO addressed this issue with the Workers with Family Responsibilities Recommendation (R165). The convention recognized, Article 4, the right to take account of the workers with family responsibilities needs in terms and conditions of employment. The Recommendation aim for "more flexible arrangements as regards working schedules."[14] Regarding Europe, the evolution takes place in the CoE and the EU. The CoE included in the European Social Charter (revised) the new Article 27, establishing "the right to equality of opportunity and treatment for men and women workers with family responsibilities". On the other hand, the EU guarantees co-responsibilities issues in different regulations: the Charter of Fundamental Rights of the European Union (Art. 33), the European Pillar of Social Rights, pillar No.9, and the Directives. Accordingly, the Directive (EU) 2019/1158 of 20 June[15] developed this new perspective allowing the exercise of care work for men and women, configured by the figure of leaves and encouraging the organisation of work with flexible working hours.[16]

In recent years we have witnessed an essential factor to be taken into account in the working conditions: the increase in extreme weather phenomena, such as cold and heat waves of unprecedented intensity. This changing scenario will have a direct impact on the working force. In fact, the climate emergency had even caused deaths

[11] OJ L 145, 19.06.1996.

[12] Case C-243/95, Hill and Stapleton v The Revenue Commissioners and Department of Finance (ECJ 17 June 1998), para. 42.

[13] OJ L 68, 18.03.2010, 13–20.

[14] Article 18.

[15] OJ L 188, 12.07.2019, 79–93.

[16] Guerrero-Padrón et al. (2023), 607–614.

to workers in exceptional cases.[17] Thus, is it necessary to pay greater attention to the side effects on the legal and labour framework? And another crucial question arises: Should we encompass these issues in the regulatory design of working time?

2 Climate Change and Its Effects on Employment

Climate change has implications for the future of the planet and its citizens, but it also has a significant effect on the field of Labour law. Thus, to accommodate the Labour law to the crisis derived from global warming is essential to guarantee safe and healthy working conditions.[18]

Most reports and documents dealing with climate change refer to its consequences on the economic and social crisis in all sectors, highlighting that the primary sector will be affected on a larger scale.[19] Some authors are also concerned with identifying the geographical areas where the effects will be most acute.[20] In Europe, the impact will be most significant in the southern areas, particularly in the Iberian peninsula.[21] However, the least developed countries will be the most affected by the consequences of climate change.[22] It is significant that, whilst recognising the need for more decent jobs to be created, the various contributions focus mainly on the economic impact of the loss of traditional jobs.[23] Thus, the desirability of introducing more sustainable and technologically developed "green" activities is noted,[24] which will, eventually, create new employment opportunities.[25]

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[17] https://www.upi.com/Top_News/World-News/2022/07/17/Spain-heat-death-toll350/7181658063083/.

[18] As stated in Article 1 (2) of the United Nations Framework Convention on climate change (1992), "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods" will be a complex issue.

[19] In the primary sector, energy, finance and insurance, construction, logistics, and tourism, weather phenomena affect the risks and the possibility of claims. In extenso, Climate Change and employment. Also, Alvarez-Cuesta (2021), 354–355.

[20] Reflecting this problematic issue: Pereira et al. (2021).

[21] Ut supra.

[22] ETUC et al. (2007), 13 and ILO (2019b), 65–71.

[23] Communication of the European Commission of 11 December 2019 entitled 'The European Green Deal', COM(2019) 640 final.

[24] ILO (2018).

[25] ILO (2019a, b), 9: "The extension of this analysis shows that almost 25 million jobs will be created and nearly 7 million lost globally. Of the latter, 5 million can be reclaimed through labour reallocation - that is, 5 million workers who lose their jobs because of contraction in specific industries will be able to find jobs in the same occupation in another industry within the same country. This means that between 1 and 2 million workers are likely to be in occupations where jobs will be lost without equivalent vacancies arising in other industries and will require reskilling into other occupations. It also means that massive investment will be needed to train workers in the skills required for close to 20 million new jobs.".

Faced with this situation, the United Nations had advocated acting along the lines of so-called "sustainable development". This concept can be defined as "social and economic advance to assure human beings a healthy and productive life, but one that did not compromise the ability of future generations to meet their needs own needs".[26] These initiatives are directly related to the 2030 Agenda and the Global Sustainable Development Goals (SDGs), which, if we look at the world of work, are connected to SDGs 8 (decent work and economy growth), 11 (sustainable cities and communities), and 13 (climate action).

Without denying the phenomenon's multifaceted nature and the different links with aspects as complex as those mentioned above, governments are focused on decarbonising the economy by transitioning to a circular model on the one hand. On the other hand, there is talk of adapting to the impacts of climate change and implementing sustainable development in line with decent work, reducing inequalities. Notwithstanding, it is a difficult challenge to identify what is "decent work" taking into account the new approach introduced by the climate crisis.

As a consequence of this, it is not sufficient to re-direct traditional training to the performance of "sustainable activities". Therefore, other international regulatory solutions are also needed to tackle the new obstacles arising from this phenomenon in "traditional" occupations and guarantee decent work at all levels.

It is essential to note that the ILO emphasized the relevance of paying attention to this factor in some of its conventions, in order to adapt the distribution of working time to those conditions that are less harmful to the health of workers.[27] Concerning working time, even some reports are focused to refer to the number of hours lost due to heat stress, which affects the poorest countries more intensely,[28] it needs to be highlighted that it happens also in Europe and the regulations will require amendments to solve the problem.

In principle, there are certain activities, generally correspond to the primary sectors, which, as they are carried out outdoors, require actions that can reduce the impact of higher temperatures on the health of workers. Thus, agriculture and fishing work have been the subject of discussion since these are the activities with the longest working weeks.[29]

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[26] The term 'sustainable development' was launched in the report on Our Common Future in 1987 delivered by the Brundtland Commission (Oslo, 20 March 1987). Available via https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

[27] ILO (2019b), 72.

[28] In general, because of a higher share of agricultural and construction employment (Kjellstrom et al. 2019). On the other hand, the same report highlights that Central Africa, West Africa, South Asia and South-East Asia are the most affected regions, mainly because they are the poorest in the world. The ILO also highlighted this problematic issue (2019b), 65–71.

[29] According to Eurostat, in 2021, skilled agricultural, forestry and fishery workers had the longest average working weeks in the EU (42.9 h). Available via https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Hours_of_work_-_annual_statistics#How_does_the_average_working_week_vary_across_economic_activities_and_occupations.3F (Medhurst 2009, 9). The Impacts of Climate Change on European Employment in the Medium-Term, GKH.

In recent years, significant technological advances in agriculture have undoubtedly facilitated working conditions. However, the reality is that they cannot all be automated at the moment. It is therefore crucial to take these factors into account in order to adjust workplace conditions and working hours so that they are less harmful to workers' health. For instance, it would be appropriate to provide farmers with rest facilities, where they would be protected from the elements and have access to a supply of water -or hot and cold drinks- that could alleviate the harshness of working in the open air. Notwithstanding, at this point, it would be better to set compulsory rules to avoid extending working time at peak weather hours and periodic breaks to minimize the climate risks.

As far as fishing activities are concerned, rising fuel costs, fishing quota limitations and warming waters also affect employment. Additionally, the decrease in crew members again affects the need for longer working hours, resulting in greater exposure to the elements.[30] Nevertheless, recent legislative initiatives such as ILO Convention 188 and Directive (EU) 2017/159 fail to facilitate the protection of fishers in terms of working time by ensuring decent conditions in an increasingly hostile climate.[31]

In any case, the primary sector is not the only one affected by climate change, but this impact is evident in all activities that can be carried out in the open air,[32] but also in others that are apparently less exposed, such as those carried out indoors. However, all workers have the right to safe and healthy working conditions in relation to the working environment, thus this right needs to be assured to everyone taking into account the working place.

3 Are We Contributing to a just Transition by Rethinking Working Time?

These challenges described above require a change of paradigm. On the one hand, despite not being capable of anticipating the future, it is certain that many jobs will be lost and replaced by others, and we will have to adapt to other formulas under conditions such as those described above. Despite this, many other jobs will be

[30] ETUC (2007), 20.

[31] Ribes-Moreno (2022).

[32] For instance, recently in Spain has been enacted a Royal Decree which includes some measures taking into account the working time to protect workers when orange or red weather alert situations occur, affecting environmental conditions in outdoor work, or in cases of risk due to adverse weather events (Royal Decree-law 4/2023, of 11 May, DO No. 113 of 12 May 2023. Previously, a ruling has made it mandatory to provide adequate clothing for the new inclement weather conditions, and even sun protection, to postmen who provided services outdoors, as part of health and safety measures. Juzgado de lo Social No.9, Las Palmas de Gran Canaria, Judgement of 22 December 2017, (ECLI: ES:JSO:2017:62) available via https://www.poderjudicial.es/search/AN/openDocument/f79be127764e0653/20180305.

maintained as of now,[33] notably office work. Such jobs seem to be, in practice, more protected from the adverse effects of climate change.

Indeed, air-conditioned workplaces would make it easier for workers to adapt and reduce their climatic discomfort. However, it is essential to be aware that hot and cold air systems generate emissions that increase the heat outside, which can be contradictory. In addition, the constant use of air-conditioning devices entails high economic costs and energy consumption.

Sometimes, it is impossible to implement an optimal solution in the working places due to the requirement of updating regulations. In other cases, the problem are the economic circumstances regarding the change of installation of efficient technology. Both have an impact on solutions for dealing with thermal stress derived from the temperature and natural phenomena of each continent and state. Indeed, some workers are more vulnerable to this problematic issue, such as women and people with disabilities, thus their personal conditions must also be considered. On one hand, generally speaking, decisions on working conditions are often made without taking into account a gender perspective. For instance, in the case of women, because of their biology, may cause them to be more exposed to different temperatures in offices than their male counterparts. On the other hand, in the case of people with disabilities, may be deeply affected too. Regarding people who use wheelchairs or have mobility problems, the possible occurrence of adverse weather factors may have a significant impact on their access to public transport.

So, what alternatives could provide better solutions? The situation in Europe is complex. First, an emerging state of thinking advocates that we must start by reducing working time to achieve a more sustainable, healthier society. In 2021, according to Eurostat data, the average working week at the EU level lasted 36.4 h. However, this varied across the EU from 32.2 h in the Netherlands to 40.1 h in Greece.[34] Consequently, in some places would be difficult to reduce the working time more. Secondly, governments should consult with social partners and other actors to reach consensual agreements. The ILO argues that social dialogue will be a key instrument for analysing the effects of climate change and, to a greater extent, contribute to effective policies,[35] such as instituting flexible working arrangements that allow workers to adjust their hours and work according to their responsibilities. Thirdly, other theories are taking their proposals to another level, for example, advocating a reduction in working time and limits on the control of consumerism in society.[36] To this end, think tanks like NEF[37] push disruptive theories. They rely on strengthening trade union power to ensure sufficient and adequate wages, limiting maximum

[33] United Nations Environment Programme et al. (2008).

[34] Available via https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Hours_of_work_-_annual_statistics#General_overview.

[35] ILO (2018), 158.

[36] Maréchal (2018), 66–70.

[37] New Economics Foundation, more information available in the webpage https://neweconomics.org/.

wages,[38] and considering eradicating climate change and inequality at the same time. For instance, one of the NEF researchers, Anna Coote, claims this option is the better solution to reduce working time without reinforcing income inequality.[39]

From our point of view, the most appropriate solution to reduce the adverse effects of climate change at work, may be introducing flexible working hours in companies, but adapted to the environment and the circumstances of workers. The establishment of regulations at EU level tackling this problematic issue and considering the possibilities that technology offers to meet targets, could partly mitigate the effects of climate risks. Thus, provisions need to be included in regional normative instruments to continue this path, just as other historical demands took place. States need to be aware of the changing reality and adapt accordingly. Hence, the ILO and especially the EU have a key role, which they could use constructively by designing and enacting new innovative instruments that can be developed by states in accordance with their own characteristics and in line with social partners. This would be the most appropriate measure and would be in line with decent work, the 2030 Agenda and the SDGs.

4 Conclusions

The challenge of climate change requires new solutions when it comes to working hours. The international community needs to drive a substantial change. However, as far as the world of work is concerned, it is not enough to redirect activities towards more sustainable ones; it is also imperative to ensure the safety and health of workers by promoting flexible and adapted working hours. The climatic characteristics of each continent, each state and each workplace will play a fundamental role in the formulation of working time. For this reason, the role of international institutions in promoting regulatory instruments that encourage collective subjects to negotiate working conditions is essential.

It is necessary to anticipate the future, to foresee and encourage the possibility of collective bargaining being able to deal with situations of this nature which are not of a uniform nature but adapted to their geographical and productive scope. Undoubtedly, Europe are facing a profound paradigm shift that significantly affects working time, enabling companies to comply with the SDGs in the framework of the 2030 Agenda. Consequently, the climate, a factor directly related to the protection

[38] Ut supra.

[39] Maréchal (2018), 68.

of workers' well-being, will be, together with work-life balance, determining factors in establishing the distribution of working hours.

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Ecocide, a New Legal Figure Under Construction

Jesús Verdú Baeza

Abstract Ecocide is a profoundly innovative legal figure that has arisen in the context of extremely serious international environmental degradation, particularly in the context of climate change. It can be an extraordinarily useful tool for preventing and punishing major environmental violations. In a certain way, civil society, mainly NGOs and universities have a key role to play in defining the future of this figure, with an enormous potential for transforming the law.

Keywords Ecocide · International crimes · ICC

1 Introduction

It is commonplace that the evolution of law usually follows the demands of society. The speed and depth of this evolution will depend on many factors; in some instances, innovative legal constructions emerge from the academic debate and acquire particular importance, receiving a strong impulse and defense from civil society. Ecocide is one of these innovative legal concepts that have emerged from the academic debate at a time of profound ecological crisis and are rapidly taking shape. Ecocide can be defined as "unlawful or wanton acts committed with the knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts".[1]

Of course, we have yet to determine whether ecocide will ever be incorporated into positive international law. Notwithstanding, in its birth and design, in our opinion, the role of law teaching in universities is of enormous importance in creating an adequate

[1] Definition of ecocide from the Independent Expert Panel for the Legal Definition of Ecocide, convened by the Stop Ecocide Foundation.

Stop Ecocide Foundation (2021). https://ecocidelaw.com/legal-definition-and-commentary-2021/.

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conceptual framework. Additionally, a state of public opinion in all areas of the legal world that is favorable to its inclusion allows it to be a lever for putting pressure on governments, who are ultimately responsible for the decision to incorporate ecocide into international law.

After several millennia of evolution with many advances and significant setbacks, humanity is currently going through a critical period which will define the compatibility of living conditions on the planet. In this vein, even if difficult to accept this reality, we are approaching a threshold where it is simply no longer possible to continue to inhabit it. The reason is that humanity has chosen a development model that is radically incompatible with maintaining the ecological balances that have allowed human civilizations to develop on our planet for millennia. There is no doubt that we are currently undergoing a critical period of an environmental crisis that directly threatens our future.

Scientific reports have consistently predicted the problems caused by the emission of greenhouse gases since the industrial revolution that cause climate change (the most important of which are carbon dioxide and methane). The burning of fossil fuels, mainly coal, oil and gas, is the primary source of emissions of these gases, primarily responsible for climate change involving profound long-term changes in temperatures and weather patterns. Particularly relevant to understanding the situation are the reports of the Intergovernmental Panel on Climate Change which warn that the climate is changing and that this is undoubtedly due to human activity.[2] Of particular concern is that the sixth report confirms that many of the effects of climate change are already irreversible, and much of the impact predicted for the future is already unavoidable.[3]

There is no doubt that climate change is the main factor of environmental disruption, with global effects caused by man's hand. The truth is that for some time now, conscious or unconscious, willful or negligent actions have been taking place all over the planet with extraordinarily severe environmental impacts. These actions transcend, in some way, the local or regional territory where they have taken place, affecting the international community due to their seriousness. In an environmental context affected by enormous challenges that highlight the significant vulnerability of our planet with increasingly fragile ecological balances, some aggressions transcend their territorial scope and require international legal responses.

In this context of environmental degradation, there is an increasingly widespread public perception that this type of behavior that seriously damages the environment should not be protected by the generalized impunity that has been the main characteristic to date, or else only receive domestic responses that are manifestly insufficient and limited. More and more voices are denouncing that we are facing a critical moment in the ecological destruction of the planet that requires new global

[2] The IPCC provides regular assessments of the scientific bases of climate change, its impacts and future risks, and options for adaptation and mitigation. Created in 1988 by the WMO and the UNEP, its reports are a crucial input into international climate change negotiations. For more information, see https://www.ipcc.ch/about/.

[3] The reports are available at: https://www.ipcc.ch/documentation/.

responses. Furthermore, the truth is that these responses should be legal and based on an innovative proposal from international law. In this sense, the concept of ecocide is proposed as a profoundly transformative figure that reflects the evolution of law in its essential role of articulating and defining models of society based on justice.[4]

Ecocide is a neologism that combines the Greek root *oikos*, meaning house or habitat, with the Latin *occidere*, which means to kill. In short, the term is equivalent to the expression to kill the house or, in other words, to destroy the habitat.

2 Origin of the Concept and Relationship to Genocide

It seems clear that the term ecocide has been inspired by one of the most transformative legal concepts generated in the twentieth century, genocide. This concept was coined by the Polish jurist Raphael Lemkin in 1944, who had taken refuge in the United States at Duke University Law School and, through this new concept, sought to typify Nazi patterns of behaviour in their destruction policy and annihilation of the Jewish community.[5] A key aspect of the new concept was coined after some of the most atrocious behavior in recent human history. Given the extraordinary gravity of behavior aimed at the total or partial destruction of a national, ethnic, racial or religious group, the legal response, that is, the mechanisms of prevention and punishment must correspond to the international community as a whole, as it is an international crime that cannot be approached exclusively from a domestic sphere. In short, it is a profound transformation of international law, which is taking on a new role and responsibilities in the face of the severe events of the Second World War, which have profoundly affected the legal conscience of humanity.

Since its first doctrinal appearance (*Axis Rule in Occupied Europe*, published in November 1944, was the first place where the word "genocide" appeared in print[6]), the concept of genocide has gone through several phases. Lemkin actively supported its use at the Nuremberg Tribunal,[7] and it ended up crystallizing in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Sands, 2017),[8] becoming one of the crimes over which the International Criminal Court created in 1998 has jurisdiction. The main ad hoc international criminal tribunals, such as those of Rwanda and the former Yugoslavia, have also had jurisdiction over this crime.[9] Currently, both international jurisprudence and doctrinal debates are shaping and

[4] On the crime of ecocide see Gray (1995).

[5] Lemkin (1947), p. 145.

[6] Lemkin (1944).

[7] Earl (2013). p. 317.

[8] It is fascinating and enriching to read Philippe Sands' *East West Street, On the Origins of "Genocide" and "Crimes against Humanity"*, which is essential to understand the context of the creation of these revolutionary new legal concepts and their use for the first time in the Nuremberg trials, although, in the end, the sentence does not expressly include the term genocide.

[9] See Boot (2002) and Chung (2007), p. 227.

enriching one of the most valuable and transformative legal constructions of recent history, and it has been fully incorporated, not without some controversy, into public and media language, as well as into the political vocabulary.[10]

In short, the figure of ecocide has an essential reference in genocide. On the one hand, the inspiration for the formula for constructing a new word with an ingenious combination of Greek and Latin roots. On the other, in its dimension as a profoundly transformative legal tool that can finally be incorporated into positive law from a doctrinal or academic construction, responding to an important social demand.

In fact, the first attempts to construct the new figure of ecocide were linked to an overall development of genocide in that habitat destruction could be one of the constituent elements of the crime against a people's identity.

The horrors of the Holocaust and the inhumane behavior of the Nazis were the origins of the concept of genocide as real turning points (although genocidal behavior can be found in very ancient stages of human history). Similarly, the need for the concept of ecocide emerges when severe attacks on the environment of a hitherto unknown entity and gravity become known.

3 Towards International Punishment of Serious Environmental Crimes

It seems that the use of a powerful herbicide as a chemical weapon, Agent Orange, in the Vietnam War (1955–1975) by the United States, which in addition to a large number of deaths and injuries, caused the deforestation of large areas of territory, is one of the triggers for the demand to criminalize these behaviors that seriously threaten the environment.[11] It is commonly accepted that one of the first times the word ecocide appears in an international context was in a speech by Swedish Prime Minister Olaf Palme at the Stockholm Summit in 1972 denouncing the "*limits that our environment can tolerate and the dangers of ecocide*", in an indirect allusion to the Vietnam War.[12] Perhaps the Stockholm Summit, the United Nations Conference on the Human Environment, can be seen as a real turning point in the generation of environmental law and the formation of an international public opinion increasingly aware of the need for environmental protection.

From an academic perspective, based on the environmental destruction in the Indochina war, Professor Richard Falk proposed an International Convention on the Crime of Ecocide in an article published in 1973.[13]

[10] See, for example, "Biden accuses Russia of genocide in Ukraine", https://www.bbc.com/news/av/world-us-canada-61089381.

[11] Zierler (2011).

[12] Mehta and Merz (2015), p. 3.

[13] Falk (1973), p. 21.

In this context, against the backdrop of the serious environmental attacks in Vietnam, and under the auspices of the United Nations, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques was approved in 1976. The aims were established in its first article, that is, to prohibit the use for military purposes of "environmental modification techniques which have widespread, long-lasting or severe effects, as a means of causing destruction, damage or injury to another State Party".[14] In this way, a certain confluence was generated between the need to preserve the environment and international humanitarian law,[15] a positive confluence that nevertheless presents all the vulnerabilities of the very defective application of international humanitarian law and the problems derived from the relativity in the international application of treaties with a reduced number of state parties.

A certain number of international instruments have progressively incorporated provisions attempting to require States to provide for penal consequences for conduct that seriously damages the environment. For example, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal, which have put in place control systems to prevent environmental damage. Nevertheless, the fact is that to date there is not even an international treaty or instrument to combat environmental crimes that could have transnational consequences.[16] There are only partial responses and coordination mechanisms promoted by agencies and organizations such as the World Customs Organization (WCO), INTERPOL, and the United Union Office on Drugs and Crime (UNODC), which have yet to achieve minimal objectives.

In this regard, the European Union has been a dynamic player in promoting environmental protection through criminal law. The legislative impetus stems from Directive 2008/99/EC, which has consolidated a certain degree of regulatory harmonization. At present, it is worth highlighting the Commission's initiative within the framework of the European Green Pact that sets new EU environmental criminal offences**,** including illegal timber trade, illegal ship recycling or illegal abstraction of water. In addition, the proposal clarifies existing definitions of environmental criminal offences, providing for increased legal certainty.[17]

[14] On the negotiation of this agreement, Herczegh (1984), p. 730.

[15] Bouvier (1991).

[16] Elliott (2012), p. 87.

[17] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6744.

4 Ecocide as an International Crime

There is no doubt however that the ideal framework to approach the criminal treatment of serious environmental violations is international, going beyond national criminal frameworks. In this sense, from the first attempts to try to codify international crimes and set up the International Criminal Court, the opportunity to include ecocide as a crime that this international institution could prosecute was considered. In this sense, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights, responsible for the study on the prevention and punishment of the crime of genocide, incorporated the crime of ecocide as an international crime in its first studies.[18] The concept of ecocide also appears in the Rapporteur Mr Whitaker's report in 1985. He did not incorporate it as an autonomous crime but as an extension of the broader concept of genocide along with cultural genocide, although the report also admits that there are also supporters of the integration of ecocide into the concept of crimes against humanity, instead of genocide.[19]

In his reports on the draft code of crimes against the peace and security of mankind, Mr Doudou Thiam, the Special Rapporteur appointed by the International Law Commission, initially included serious attacks against the human environment as one of the crimes against humanity.[20] However, as he mentions in his last report, number 13, this crime was criticized by some states, which prevented it from being included as an autonomous crime in the draft convention establishing the International Criminal Court. Finally, in the Rome Statute establishing the International Criminal Court, a stand-alone crime against the environment was not included. The notion of a crime against the environment has indeed been included in war crimes. Article 8 (IV) on War Crimes refers to "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" on a war context. However, till now, no proceedings or investigations have been initiated based on this article.

In peacetime, there is currently no international provision for an environmental crime which, because of its unique nature or gravity, goes beyond the domestic framework where it has been committed and has serious international consequences.

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[18] Sub-Commission on Prevention of Discrimination and Protection of Minorities. Study of the Question of the Prevention and Punishment of the Crime of Genocide. Prepared by Mr Nicodème Ruhashyankiko. 4 July 1978. E/CN.4/Sub.2/416, p. 124 and p. 130.

[19] Revised and updated report on the prevention and punishment of the crime of genocide/prepared by B. Whitaker, UN Special Rapporteur on Prevention and Punishment of the Crime of Genocide, 1985. Whitaker**,** UN Special Rapporteur on Prevention and Punishment of the Crime of Genocide, 1985. E/CN.4/Sub.2/1985/6.

Available via https://digitallibrary.un.org/record/108352?ln=es.

[20] Draft code of crimes against the peace and security of mankind (Part II)—including the draft statute for an international criminal court.

Available via https://legal.un.org/ilc/documentation/english/a_cn4_466.pdf.

For this reason, the role of civil society as a driving force behind the need to transform the law is enormously important. In this sense, it is worth highlighting the proposals of British lawyer Polly Higgins, who even presented a proposal to the UN International Law Commission to incorporate ecocide into current international law.[21] Furthermore, she is also the founder of an NGO (Stop Ecocide International), which is extraordinarily active in promoting this concept.[22]

The International Criminal Court seems to be the most appropriate and coherent framework for the international prosecution of this new crime. If, as we have seen above, its inclusion was not possible at the time of its creation, the circumstances are currently more propitious and favorable due to academic debates and pressure from civil society. In this regard, in 2019, Vanuatu and the Maldives, two archipelagic states directly threatened by the consequences of climate change as they are highly vulnerable to rising sea levels, requested the initiation of a process to amend the Rome Statute in order to include the crime of ecocide.[23] The amendment of the Statute to incorporate a fifth international crime requires a long and uncertain process, but several countries have joined the debate along with NGOs and various personalities with some international weight (such as Pope Francis[24]).

In parallel, the crime of ecocide has been incorporated into the domestic legal systems of several States [it is included in the criminal codes of Georgia (1999), Armenia (2003), Ukraine (2001), Belarus (1999), Kazakhstan (1997), Kyrgyzstan (1997), Moldova (2002), Russia (1996), Tajikistan (1998) and Vietnam (1990)]. Additionally, there are currently multiple parliamentary initiatives in this regard in other States as well.

In short, important tasks are still pending in relation to the conceptualization of this new crime, the precision of the circumstances of criminality, complicity, possible negligent commission, civil liability, etc. In this sense, and in view of the difficulties faced by governments when sensitive political issues are involved, civil society is assuming a definitive leadership role mainly shared by NGOs and universities as an appropriate framework for debate, reflection and the launching of proposals and the promotion of political decision-making.

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[21] Higgins (2016).

[22] See note no. 1.

[23] See the speech of the Ambassador of Vanuatu in the General Debate of the 18th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (September 2019). Available via https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/GD.VAN.2.12.pdf. And the written statement of Maldives: Available via https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/GD.MDV.3.12.pdf.

[24] Addressing the International Association of Penal Law in the Vatican on 15th November 2019, Pope Francis proposed that "sins against ecology" be added to the teachings of the Catholic Church and went a step further, saying "ecocide" should be a fifth category of crimes against peace at the international level. Available via https://www.agensir.it/quotidiano/2019/11/15/papa-francesco-a-penalisti-sanzionare-ecocidio-per-tutela-giuridica-della-nostra-casa-comune/.

5 Conclusion

In a nutshell, we are in the presence of a profoundly innovative legal figure that has arisen in the context of extremely serious international environmental degradation, which can be an extraordinarily useful tool for preventing and punishing major environmental violations. However, there is still a long way to go before one day ecocide can be included in the ICC Statute as a fifth international crime, although the first steps in the right direction have been taken. In any case, legislative reforms in domestic law criminalizing these serious environmental crimes, which are becoming more and more frequent, is also an interesting and complementary path to the amendment of the Rome Statute.

Finally, in a certain way, civil societies mainly through NGOs and universities, have a key role to play in defining the future of this figure with an enormous potential for transforming the law.

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Law and Datafication

Ok Google or Not Ok Google?—Voice Assistants and the Protection of Privacy in Families

Christina Backes, Julia Jungfleisch, and Sebastian Pültz

Abstract Voice assistants, such as Alexa, Siri or the Google Assistant have become a fixed component in the everyday life of many. However, their use gives rise to several questions in the context of data protection. This chapter provides an overview of the function of voice assistants and the international, European and national legal framework that regulates them. The focus lies on the implications of the use of voice assistants, especially when considering the right to privacy of children towards their parents, as a special case of horizontal effects of fundamental rights between private individuals. In the context of a possible future and existing state regulation, the right of parents to educate their children, as well as the fundamentally required restraint of the state in family matters must be taken into account. New legislation in the area of digital services and AI could help to improve the protection of personal data in this area in the future. Evaluations from other, at first glance similar, cases such as smart toys or dash cams, can only be transferred to a limited extent.

Keywords Right to privacy · Family · Voice assistants · EU law

1 Introduction

The company Amazon advertises that its voice assistant Alexa "brings hands-free living into your home and can help you stay entertained and connected".[1] These type of voice assistants can perform a variety of functions, from small tasks such

[1] See: https://www.amazon.de/b?node=12775495031.

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as launching an app or playing music to organising a smart home. In such smart homes, a number of different domestic functions, such as lightning, heating and various household appliances, can be controlled, by means of a digital assistant, in particular via smartphone and respective apps.[2] Voice assistants can also create shopping lists on demand, keep a calendar with appointments and provide reminders for these appointments.[3] For children in particular, the devices offer opportunities for playing but also for learning.[4] Statistics expect that between 2022 and 2027, the volume of the global smart speaker market will continue to grow. In 2022, the market volume was around 171 million units and by 2027 this number is expected to reach almost 309 million.[5] Although voice assistants, like Alexa, Siri or the Google Assistant have become a familiar tool in everyday life, their use has given rise to a number of questions and problems in the context of the right to privacy that are not yet fully addressed. Artificial intelligence software, especially voice controlled and deep learning software, is becoming more and more common in our daily lives. Upcoming generations of lawyers will have to deal with the specific problems that these systems bring with them. The aim of this chapter is to identify and legally analyse the problems that arise in the context of family dynamics when smart speakers are used, especially in the area of data protection. This also gives a necessary spotlight for legal education in an area that tends to be easily overlooked or rather considered unimportant: children´s rights.

The contribution aspires to give a first overview over the topic, its aim is to provide a starting point for further discussion.

2 A Brief Introduction to the Functioning of Voice Assistants

Voice Assistants are software systems that allow users to interact with computers using spoken language.[6] Therefore, these systems are part of virtual assistance systems, of which the most popular commercial ones, such as Apple's Siri, Amazon's Alexa and Google's Assistant are widely known and used in private households.[7] They support a wide range of tasks of various complexity, from simple tasks as setting a timer, using a calendar, or alarm, to more complex tasks, such as reading or writing text messages, or controlling third-party apps (e.g. streaming services), to even controlling connected smart home devices (e.g. light switches and thermostats).

[2] https://www.duden.de/rechtschreibung/Smarthome.

[3] For the different possibilities to use Amazon's Alexa see, https://www.amazon.de/de/b?ie=UTF8&node=27982056031; for the different possibilities of use of Google Home, see: https://support.google.com/googlenest/answer/7130274?hl=en.

[4] Geminn et al. (2020), 600f.; Alexa has a skill for dance games but also one to learn multiplication tables, for an overview of several skills see: https://aroundsmart.de/ratgeber/die-50-besten-alexa-skills-fuer-kinder/.

[5] Statista; Statista Consumer Market Insights, https://www.statista.com/outlook/cmo/consumer-electronics/tv-radio-multimedia/speakers/worldwide#volume.

[6] Hoy (2018), pp. 81–88.

[7] Hoy (2018) and Këpuska and Bohouta (2018), pp. 99–103.

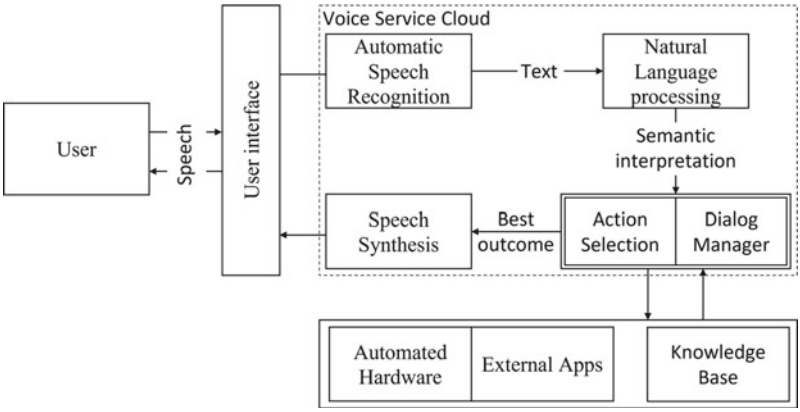

Fig. 1 Voice assistant schematic model based on concepts referred to in Fn. 15

Although they are so widespread and common it is difficult to obtain precise information about the exact software architecture of these systems.[8] However, some authors introduce generalized models of an Intelligent Personal Assistant,[9] demonstrating how such systems must be generally structured to meet the requirements of listening, understanding, and responding meaningfully. According to such a model shown in Fig. 1, the user communicates with the system via an interface like a smartphone or smart speaker, which records what the user said and channels the assistant's response. Between these two steps the assistant leverages advanced data processing methods to process the input and provide a meaningful response. Automatic Speech Recognition (ASR) is used in the first step, to translate the recorded audio data to text form. The data now can be read by the system and the meanings of words and sentences can be extracted by Natural Language Understanding (NLU), resulting in a semantic representation of the input. Depending on the completeness and feasibility of the interpretation, a dialog manager or an action selector formulates a response based on the context of the previous interaction and an available knowledge base. If the exact meaning of the user statement cannot be identified, is incomplete, or is not feasible, the dialogue manager initiates further interaction with the user, for example, in the form of an error message or a query to clarify the statement. If it is an executable command, the action selection can provide a response or even directly access connected peripherals or apps such as smart light switches or the calendar function. If a semantic answer is selected, it must follow the reverse path of the input and be translated by a Speech Synthesis into a statement understandable to the user.

It can be seen that most of the required computing power is not provided by the device but is handled by a cloud service such as the Amazon Voice Services (AVS).[10] On the one hand, this enables the production of small, compact and inexpensive end

[8] Bolton et al. (2021).

[9] Këpuska and Bohouta (2018), Bellegarda (2013), pp. 2029–33 and Mun et al. (2020), pp. 755–62.

[10] Bolton et al. (2021).

devices. But on the other hand, it requires a permanent Internet connection via that the cloud service to continuously exchange data with the end device—if the device is to be more than just a speaker. A difficult task is therefore the recognition of the so-called "wake words" ("Hey Google", "Siri", "Alexa", etc.), which is to be carried out on the end devices with their low computing power.[11] Only when this 'catch phrase' has been recognized, the voice assistant is supposed to be activated and start transmitting data to and communicating with the Voice Service Cloud.

Even though each developer uses different approaches to develop their voice assistant, resulting in different systems that vary in structure, architecture, and performance, artificial intelligence and machine learning methods are used in all of the above mentioned steps.[12] This also means that the individual components of a voice assistant are data-driven models whose performance depends not only on their internal structure, but also on being trained with a large amount of data in order to function.[13] The more complex the task of the machine learning model, the more attention must be paid to the data with which the model is trained. Variations that are to be expected in the application are already taken into account here.[14] For ASR, for example, these can be, without claiming to be exhaustive, different speech styles, speeds and colourings, speakers, voice pitches, background noise and much more.

Training in this case basically means that the model is initially fed with data and thus adapts to the given dataset. This enables the model to respond to user input and compare it to already known patterns. It then depends on the chosen methods how exactly the training of the models proceeds, which can be roughly divided into two broad groups, namely supervised and unsupervised learning methods. In supervised learning, input and output data are known and the model forms a rule to map the input data to the output data.[15] If the outputs associated with the input values are not known, only unsupervised learning methods can be considered. However, these methods cannot perform specific recognition, but rather only find similarities in the data and associate them with each other.[16]

Recently, many methods of language processing have been replaced by artificial neural networks. These are modelled on the biological structure of the brain and consist of interconnected nodes called neurons.[17] Several of these nodes together form a layer and several layers form the net. In the simplest case, the feed-forward network, the layers have a logical order and the neurons of a layer are only connected with the neighbouring layers.[18] Since speech processing also depends on the context, i.e. the previous inputs into the network, special networks, the recurrent networks with a memory function, are used for this purpose. This memory function is realized

[11] Hoy (2018).
[12] Polyakov et al. (2018), pp. 1–5.
[13] Ibid.
[14] Ibid.
[15] Oladipupo (2010).
[16] Ibid.
[17] Otter et al. (2021), pp. 604–624.
[18] Ibid.

by feedback in the neural network.[19] Training of such neural networks is done by comparing the input and the corresponding output and adjusting the weights based on that.

Another point to address is the knowledge base, which stores a wide range of information from ready-made answers to common questions based on "if-then rules",[20] to user profiles and information.[21] In this field a change from a strictly static knowledge base with a predefine set of rules towards an dynamic one that adapt to the users previous interactions can be observed.[22] Machine learning algorithms can be used on these knowledge bases to detect users with similar queries and to cluster whole groups in order to adapt the assistant even better to the behaviour of the user. Common to all these systems is their ability to store a vast amount of data about the user's behaviour when they are used by consumers, in order to enable the software to learn from previously generated data for future interactions.

3 The Legal Framework in the Context of the Use of Voice Assistants

This short explanation on the function of voice assistants maps the road for the following part where the requirements the right to privacy sets for the familial use of smart speakers as interface for the voice assistant will be analysed.

3.1 The Use of a Smart Speaker and the Right to Privacy as a Human Right

The right to privacy can be found in international,[23] as well as regional human rights treaties,[24] the Universal Declaration of Human Rights,[25] and national constitutions.[26] The right is used as a kind of catch-all basic right and protects, among other things,

[19] Ibid.

[20] Rawassizadeh et al. (2019), pp. 163–174.

[21] Admin_sentiance (2018).

[22] Rawassizadeh et al. (2019).

[23] Art. 17 International Covenant on Civil and Political Rights (ICCPR), UNTS, vol. 999, p. 171 and vol. 1057, p. 407; Art. 16 Convention on the Rights of the Child (CRC), UNTS, vol. 1577, p. 3; Art. 22 Convention on the Rights of Persons with Disabilities (CRPD), UNTS, vol. 2515, p. 3.

[24] Art. 8 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS No. 005; Art. 5 (1), Art. 11 and 18 American Convention on Human Rights – Pact of San Jose, (ACHR) OAS Treaty Series No. 36.

[25] Art. 12 Universal Declaration on Human Rights (UDHR), UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

[26] E.g. Art. 2 (1) in conjunction with Art. 1 (1) German Basic Law.

against interference with the private sphere. In the context of this contribution the right to privacy is of special interest as it encompasses the right to informational self-determination.[27] This includes the right to decide upon one's own image, one's spoken word, in fact everything that is necessary for self-presentation in public.[28] The right also includes the determination of data and information about one's own person on the internet, with the result that the right to privacy represents the basis for data protection under simple law.[29]

The use of smart speakers can result in interferences with the right to privacy.[30] Particularly regarding the protection of personal data as an important aspect of the right to privacy.[31] It is therefore instructive to discover where the data and information given to the voice assistant over the smart speaker ends up. Data protection law, and in particular the GDPR, may for example prevent or restrict the use of servers in non-EU third states.[32]

The functioning of a smart speaker, as explained above furthermore "*depends not only on their internal structure, but also on being trained with a large amount of data in order to function.*"

Of juridical interest is therefore not only where the data goes, but also when and what is recorded at all. A smart speaker that is supposed to hear the catch phrase will have to listen in all the time.[33] Of legal interest, for this reason, is the extent to which the above statement is actually true, that *"[o]nly when this word has been recognized the voice assistant is supposed to be activated and start transmitting data to and communicating with the Voice Service Cloud.*" In this context it has been shown that smart speakers such as the Google Assistant not only react to "Ok Google",[34] but also to similar sounding words or sentences. As consequence conversations and everyday

[27] The term has been introduced into German constitutional law by the Federal Constitutional Court in its Order of the First Senate of 15 December 1983 - 1 BvR 209/83, paras. 1–214, http://www.bverfg.de/e/rs19831215_1bvr020983en.html; however the concept can also be seen in the ECJ jurisprudence in the context of the right to be forgotten, ECJ, C-131/1, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECLI identifier: ECLI:EU:C:2014:317; the concept can also arguably be seen in the ECtHR´s jurisprudence of the right to privacy of famous persons in public, especially ECtHR, von Hannover v Germany, Application no. 59320/00.

[28] See e.g.: ECtHR, *von Hannover v. Germany (no. 2)*, Applications nos. 40660/08 and 60,641/08, paras. 96, 103.

[29] See e.g.: Recital No. 1 for the General Data Protection Directive (GDPR), Regulation (EU) 2016/679 OJ L 119, 4.5.2016, pp. 1–88.

[30] See on this from the perspective of the user and their privacy concerns: Michler et al. (2022).

[31] For a more thorough analysis of the relationship between the right to privacy and data protection see: Gstrein and Beaulieu (2022), pp. 20–24.

[32] See e.g.: ECJ, C-362/14, Maximillian Schrems v Data Protection Commissioner, ECLI:EU:C:2015:650.

[33] See page 4.

[34] https://support.google.com/assistant/answer/7394306?hl=en&co=GENIE.Platform%3DAndroid; other smart speaker are accessed with saying the "name" of the AI, e.g. "Hey Siri", https://support.apple.com/en-us/HT204389 or "Alexa", https://www.amazon.com/-/de/alexa-top-picks/b?ie=UTF8&node=21490748011&ref=pe_alxhub_aucc_en_us_HP_CA_1_HUB_TOP.

situations might be recorded and forwarded that were not intended to be forwarded to the respective provider.[35] Such misfunction leads to major interferences with the right to privacy and the individual has a right against the provider to expect that these recordings are deleted.[36] This leads to the question, whether and to what extent the right to privacy itself might lead to obligations of the customers towards private individuals who are living or visiting the household where the device is used, but who are not party to the contract with the provider. This chapter especially highlights the situation of children who, as minors, need special protection which may include protection against their parents.

Although there is case law at both national and EU level that assumes the direct applicability of the principle of equal treatment/prohibition of discrimination,[37] this case law cannot be extended to the right to privacy without further ado. However, the lack of a direct binding effect of the right to privacy for private individuals (in our case the parents) does not exclude a binding effect overall. As can be seen in the jurisprudence of the ECtHR,[38] fundamental rights impose an obligation on the states to ensure that the respective right, here the right to privacy is also observed between private individuals.[39] States can fulfil such a positive obligation by introducing corresponding legislation, regulating the private relationship.[40]

The question of the applicability of the right to privacy in a family adds another level to that discussion. And brings special not merely legal problems with it: while to some degree national courts have already had to consider children's rights in relation to smart speakers,[41] cases dealing with the general permissibility of the use of smart speakers and any associated parental care obligations have not yet made it to the courts.

This is hardly surprising because children do not easily sue their parents independently, which is why disputes about the rights of the child usually find their way into proceedings before national courts dealing with the divorce of the parents or related custody disputes. At present, there are no decisions where a child has taken legal action against their own parents on the basis of their digital behaviour (be it through

[35] See for example warning of: Verbraucher-Zentrale (2018), 06020.

[36] See for example Art. 17 GDPR, Amazon itself has instructions on how to delete the speech records individually or the complete history: see: https://www.amazon.de/gp/help/customer/display.html?nodeId=GYRPHMGANH7M2BNH; on the legal duty behind this see: European Data Protection Board, Guidelines 02/2021 on virtual voice assistants, p. 39, available at https://edpb.europa.eu/system/files/2021-07/edpb_guidelines_202102_on_vva_v2.0_adopted_en.pdf but also more generally on user rights under the GDPR: Heinemann and Straub (2019), 8ff.

[37] For the national level see: BVerfG, 1 BvR 3080/09, paras. 1–58, ECLI:DE:BVerfG:2018:rs20180411.1bvr308009; on the European Level see: ECJ, C-414/16, *Egenberger,* ECLI:EU:C:2018:257, para. 76.

[38] ECtHR, X and Y v The Netherlands, A/91 (1985), para. 23.

[39] ICCPR and ACHR explicitly oblige states to do so, see Art. 17 (2) ICCPR and Art. 11 (3) ACHR.

[40] See for example the GDPR, which will be discussed below.

[41] Lower Administrative Court Göttingen, judgment of 21.06.2022 – 4 A 79/21, ECLI:DE:VGGOETT:2022:0621.4A79.21.00: on the question whether it is permissible to change a child's name if the child is named like a voice assistant, such as Alexa or Siri, and is therefore ridiculed and bullied at school and in social life.

the use of smart speakers, or also in the context of sharing, i.e. when parents share pictures and videos of their children on the internet and the relevant platforms).[42]

Legislation implementing the protective obligations towards children in relation to their parents in the context of the use of smart speakers must take the following into account: children have yet to develop, the child's right to privacy therefore includes the protection and consideration of these evolving capacities when regulating topics concerning children.[43] This protection of their personal development should not only be specially enforced against the behaviour of strangers (in our case enterprises that provide smart speakers) but also where parental behaviour threatens to harm child development.[44]

3.2 Concretisation of the Right to Privacy in Legislation Relating to Children

The following section will have a look at how and to what extent the aforementioned aspects have been implemented into legislation such as the GDPR (3.2.1), the AI-Act (3.3.2) and the DSA (3.2.3).

3.2.1 Children, Their Parents, Smart Speakers and the GDPR

The GDPR refers to children in its recitals,[45] as well as in some of its provisions,[46] and makes corresponding specifications for the use and processing of their data. It regulates the capacity of children to give consent, which is assumed to be from the age of 16,[47] as well as the special consideration of the interests of the child within the framework of the balancing of interests in data processing, but also the obligation "*to provide [information regarding data processing and the associated rights] in a*

[42] An Austrian case that had been reported in 2016, where a daughter filed a claim against her parents for posting pictures of her online turned out to be a hoax, see: https://www.morgenpost.de/vermischtes/article208250793/Verklagt-18-Jaehrige-wirklich-die-Eltern-wegen-Facebookfotos.html (23.01.2023).

[43] See on this with proposals for the GDPR: Roßnagel (2020), p. 88ff.

[44] See on this also: Committee on the Rights of the Child, General Comment No. 21, on children's rights in relation to the digital environment, CRC/C/GC/25, para. 67; Bearing in mind, that the parental rights have not only to be taken into account but also given special weight when passing the respective laws. The parents' rights are part of the special protection of the family (which itself is an aspect of the right to privacy under international and regional human rights law) and ensure a certain restraint of the state in family matters.Emphasizing the restraint of the state, e.g. Committee on the Rights of the Child, General Comment No. 7 General comment No. 7 (2005): Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev.1, para. 18.

[45] GDPR Recital No. 38.

[46] Art. 6 (1) (f), Art. 8 (2), Art. 12 (1), Art. 17 (1) (f), Art. 40f., Art. 57 (1) (b) GDPR.

[47] Which can be reduced to 13 years by the Member States (Art. 8 GDPR).

precise, transparent, comprehensible and easily accessible form in clear and simple language".[48] In order to give children as carefree as possible a start in adult life, the GDPR grants them their own (even though insufficient as it stands)[49] right to be forgotten in Article 17.

The GDPR envisages that data processing is generally permissible if the holder of the right has given their consent. For children, therefore, data processing is permissible with the consent of the parents (as their legal guardians), provided the child cannot yet give consent themselves. The same principles can be applied to the use of smart speakers.[50] However, cases remain problematic in which, for example, the smart speaker falsely records and/or these recordings are not deleted. Here it has been shown that it is difficult to enforce the right to deletion provided for in the GDPR, depending on the provider.[51]

The regulation of parents when using smart speakers is however the wrong approach with regard to data protection for their children. Although parents are in part responsible for the violations of data protection because of the use of the product, the actual infringement itself comes from third parties (in this case the provider of the voice assistant). It is easier to regulate such private third parties, as they cannot rely on a comparably strong right such as the parental right of raising their children. Regulating parents with regard to the use of a smart speaker in connection with their children would to a certain extent confuse perpetrator and victim. For the regulation of providers, by contrast, the GDPR is decisive and a more effective implementation and enforcement is necessary to allow a more thorough protection of children´s right to privacy.

3.3 Specific Legislation Governing the Online Sector

In contrast to the GDPR, which addresses fundamental data protection concerns, the legislation around the online legislation specifically addresses various forms of artificial intelligence and challenges that online service providers present as well as risks associated with them.[52]

In this context the EU Commission's proposal for an Artificial Intelligence Regulation plays a key role. Artificial intelligence is one of the core elements of smart speakers. With the further development of so-called deep learning AI in connection with smart speakers, there are also new challenges for data protection, which the EU

[48] Art. 12 GDPR.

[49] For valid points of critique on the right or rather its effectivity see: Gstrein and Henne (2023), p. 11f.

[50] On the need to allow transparent information for children when they themselves use smart speakers see: Geminn et al. (2020), 600ff.

[51] Lemmer (2018), pp. 34–41.

[52] The DSA does not apply to the constellation of smart speakers in private use. This legislation only regulates intermediary services, hosting services, online platforms and very large online platforms.

is trying to address with its new regulation.[53] The Regulation aims to address risks of specific uses of AI. "*In doing so, the AI Regulation will make sure that Europeans can trust the AI they are using.*"[54] In particular, with the AI Regulation, the European Union wants to ensure that AI systems located in the European single market are safe to use, in terms of existing legislation in the area of fundamental rights as well as in relation to the values of the European Union. In addition, the legal act aims to contribute to the more effective implementation of existing legislation relevant to fundamental rights in the area of artificial intelligence and to ensure that security standards are established and complied with in the use of these systems.[55] In its recital number 15, the Commission recognises the many benefits that AI can bring, but at the same time it focuses on the rights of private individuals, especially children, who could be endangered by the use of AI and whose fundamental rights should be better protected by the regulation. It describes that "*that technology can also be misused and provide novel and powerful tools for manipulative, exploitative and social control practices*".[56] The Regulation specifically distinguishes in a risk-based approach three types of AI use to be regulated: (1) "*prohibited practices in the field of artificial intelligence*", (2) "*high-risk AI systems*" and (3) "*other AI systems*". First, Art. 5 of the Regulation prohibits certain practices that entail an unacceptable risk. Here, with reference to the parent–child situation, this specifically includes systems that deliberately "*exploit the vulnerability of a particular group of persons on account of their age*".[57] Art. 6 of the Regulation, which defines so-called high-risk systems, also applies in the family situation, as electronic toys in particular fall into this category. Other AI systems are only marginally covered by the Regulation, which only requires certain transparency rules (Article 52 of the Regulation) and private codes of conduct (Article 69 of the Regulation) when they are used.[58] Smart speakers can fall into both the category of unacceptable risk AI and the category of high risk AI, since in the case of the Apple and Amazon systems in particular, the respective naming of the AI (Apple: "Siri" and Amazon: "Alexa") can create the feeling, especially in children, that they are interacting with a real person.[59] This fact can be used by the respective companies for manipulation for advertising and consumption purposes. Amazon in particular states that the information generated through the use of smart speakers is used to optimise the offer of the respective

[53] Ananthakrishnan, Amazon scientists applying deep neural networks to custom skills, https://www.amazon.science/blog/amazon-scientists-applying-deep-neural-networks-to-custom-skills.

[54] https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence.

[55] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts, COM(2021) 206 final, p. 3.

[56] Ibid., p. 21.

[57] Rostalski and Weiss (2021), p. 338 explicitly point out that this wording refers to children.

[58] Schoch et al. (2022) § 35a, para. 58.

[59] Wassmer and Schwarzenegger (2022).

user and to increase the profit of the platform.[60] In order to prevent providers from locating their services in third countries to circumvent the scope of the Regulation, the European legislator has defined the geographic scope of application as broadly as possible, so that all end devices located within the EU are covered. This is especially important for the key players in this field such as Amazon, Apple and Google which are all US companies.

In its draft, the Commission aims for a horizontal approach between the people whose privacy is to be protected, and the "*providers*" and "*users*", who are to take the necessary measures to protect privacy rights when developing or using AI in a professional context.[61] The Regulation assumes that those affected are structurally inferior to providers and users. It does, therefore, specifically not cover the situation of "*personal use*" of smart speakers and the possible consequences that this use could entail. The Regulation places the responsibility for AI systems solely on the professional service providers. It is therefore even more astonishing that it only provides for possibilities of action for the EU institutions themselves and does not grant the affected parties any rights of their own or even complaint mechanisms. There are also no claims for damages or injunctive relief. Unlike in the context of the General Data Protection Regulation, which has a direct anchor in the right to informational self-determination,[62] it is difficult to derive an independent right to "*trusting interaction with AI*" from the general regulations on human and fundamental rights. According to this new legislation, even though it could cover an existing gap in data protection law concerning new technology, in case of a violation of their rights, individuals and in our case children neither have the possibility to act against their parents nor can they take legal action against the service provider. The future will show whether enforcement by public authorities alone will be sufficient to achieve the "*ecosystem of trust*" in the field of AI conjured up by the Commission.[63]

[60] "We try to sell our products roughly at break-even, sometimes a little bit more," Limp said. "Then, as customers use them, say they shop from their Alexa, that benefits all of Amazon, and gives the customer a great shopping experience, and that's how we want to monetize these things moving forward.", https://www.cnbc.com/2023/01/06/amazon-fully-committed-to-alexa-despite-layoffs-hardware-chief-says.html.

[61] Proposal (Fn. 49), Art. 3.

[62] See Recital No. 1 of the GDPR: *(1) The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the 'Charter') and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her.* See also: ECtHR, Guide to Art. 8, reference 206: *This Article provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, is collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged.*

[63] Bomhard and Merkle (2021), p. 276.

4 Lessons Learned from Private Video and Audio Surveillance?

Due to the fact that, despite the existence of special legislation in the area of AI, the protection of personal data has not yet been sufficiently and adequately regulated, the question arises as to whether it is possible to adopt standards from similar areas of law and accompanying case law and transfer it to the situation at hand. To this end, the chapter analyses a situation in which AI specifically in connection with children has already appeared in a legally relevant way. We also consider the situation of private video surveillance using dash cams, which can be legally comparable to the situation of smart speakers in family systems, as there is also surveillance without the consent of the filmed party.

4.1 Services Directly Aimed at Children

One of the most famous cases of jurisdiction on smart toys is the case of the doll "My friend Cayla",[64] which was pulled from the market by the German Federal Network Agency for a violation of §90 (1) TKG (old version) for it being an "espionage device".[65] It had a microphone and a speaker that could be controlled via smartphone using Bluetooth. The design also included the possibility for children to ask questions, which were sent to a server in the USA and analysed there to enable the doll to respond. At heart, the German legislation was not designed to deal with this type of case. However, the German authority applied the legal rules on telecommunications surveillance and illegal broadcasting equipment to this atypical case. Already in this case from 2017, the responsibility was transferred to the manufacturers to create systems that are better suited to comply with data protection standards. According to §§ 90, 115 TKG (old version), there was also the possibility to impose an obligation on buyers of unauthorised transmitting equipment to render it unusable,[66] Placing the responsibility not only on the service provider but also on the parents.[67]

This jurisdiction concerning a smart toy cannot be directly applied to smart speakers, as under German law in particular, the doll only fell under the definition of the offence because both the microphone and the loudspeaker were not visibly installed.[68] The problem, however, with smart speakers and children in particular is,

[64] See also: Hackers can hijack Wi-Fi Hello Barbie to spy on your children, Theguardian.com, 26.11.2015, https://www.theguardian.com/technology/2015/nov/26/hackers-can-hijack-wi-fi-hello-barbie-to-spy-on-your-children; Fisher-Price Smart Toy® & hereO GPS Platform Vulnerabilities (FIXED), 2.2.2016, https://community.rapid7.com/community/infosec/blog/2016/02/02/security-vulnerabilities-within-fisher-price-smart-toy-hereo-gps-platform.

[65] Now see: § 8 TTDSG.

[66] Reusch (2017), 2248.

[67] Maalouf (2017), 233.

[68] Klesczewski (2022), § 90, fn. 10.

that they probably cannot grasp the concept of an AI system that is able to talk to them as a human. Also, if we look at the privacy aspect, smart speakers collect very similar if not more personal information about their user than a smart or connected toy.[69] Particularly in the relationship between parents and children, binding and clear regulations should be created in the future, which not only impose obligations on manufacturers or providers with regard to data protection of their customers, but which also place an obligation on the private users of such systems to regularly check these rules in relation to third parties.[70] Especially in the area of the parent–child situation, a "safe harbour" should apply for the personal data of the children as well as the right to the spoken word, so that the children can grow up without data protection-related "baggage".[71]

4.2 Case Law on Dash-Cams

A further aspect of smart speakers associated with children is the saving of data without their consent, since they are not yet able to understand the concept of such an AI system and the consequences associated with it. In this context, the case law on dash cams will also be reviewed, as they also collect data without consent. This is particularly interesting because Amazon intends to use its Alexa voice assistant in cars in the future.[72] A so-called dash cam is a pre-installed camera or merely a smartphone with the camera function switched on, which is located in the windscreen of a private car. It records all traffic situations with the objective of having a record of what happened in the event of a traffic-related incident. In some cases, such recordings were not admitted in civil proceedings as inadmissible evidence, as the recording itself violates § 1 (1) BDSG.[73] However, in 2015, the AG Nienburg approved the use of such a recording for the first time.[74] The court's line of reasoning was mainly based on a balancing of interests between the personal rights of the accused and the interest of the witness in preserving evidence by making camera recordings. The court argued that the defendant's need for protection was minor, as only the vehicle, but not the passengers, had been recorded and it had only been a short, occasion-related recording. What is problematic about this, as various other courts have also found, is that the recording did not start on an occasion-related basis, but permanently and generally, since the dash cam had probably been switched on and recording the entire car journey.[75] Regarding smart speakers, at

[69] See: Maalouf (2017), 222, 225.

[70] Maalouf (2017), 234.

[71] Hornung (2018), 42.

[72] https://www.cnbc.com/video/2023/01/06/amazons-dave-limp-explains-the-companys-auto-innovation-heading-into-2023.html.

[73] OLG Celle, Beschluss v. 4/10/17 – 3 Ss (OWi) 163/17.

[74] AG Nienburg, Urteil v. 20/1/2015 – ZD 2015, p. 341.

[75] AG München, ZD 2014, p. 530; LG Heilbronn, BeckRS 2015, 05640.

least a similar problem can be transferred, since due to the necessity of the so-called catch phrase, permanent monitoring becomes necessary in order to be able to use the offered service accordingly. A smart speaker is thus always "listening", especially not on an occasion-related basis as to recognizing the signal word. Following the AG Nienburg's line in favour of smart speaker providers, the admissibility of such devices would depend on a balancing of interests between the market interests of the provider and the interest of the user in protecting his or her data. However, in this context in particular, it must be considered that the respective user himself has decided to purchase the corresponding device and has thereby implicitly consented to the permanent "listening", which means that the same requirements are not to be placed on the balancing as in the case of "third-party monitoring" by the dash cam. The position is different, as already seen, when considering the situation of children, who in the overwhelming majority of cases do not know what they are consenting to and have not opted in to such a system of AI. In such cases, the protection of their privacy, similar to the case law on unauthorised dash cam recordings, should clearly be paramount.

5 Conclusion

This chapter has explored the functioning of voice assistants and the with coming legal challenges relating to their use in families. This has proven to be especially problematic with regard to the right of privacy of the children that are indirectly affected by the voice assistant used by their parents. Even though not regulating the parent–child relationship, the new AI Regulation is a major step towards improving data protection in this area at the EU level in addition to the GDPR, regulating providers and their duties towards customers. The biggest critique of the existing legislative proposal is the lack of concretisation of the actual prohibitions and obligations by the relevant parties. What is most important here is transparency with regard to the type and handling of data collected. So-called Privacy-by-design approaches i.e. data protection precautions already pre-installed in the system of the smart device that apply automatically and do not have to be activated first, for example, are a viable option for providers of such smart devices to achieve compliance with data protection law. Only limited lessons can be learned from the comparison with other measures taken by private individuals that are data-sensitive; a specific approach to voice assistants and their consequences for (intra-family) privacy is needed.

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Reevaluating Main Concepts of Intellectual Property in the Light of AI-Challenges

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Abstract This paper examines the impact of Artificial Intelligence (AI) systems on some of the main principles of Intellectual Property, specifically those inherent to copyright and patent law. Particular attention is dedicated to the concept of authorship in relation to AI-assisted and AI-generated creations in the field of art. The chapter also examines the potential need, or a lack thereof, to re-evaluate the anthropocentric foundations of copyright embedded in the *acquis communautaire*, copyright laws of the Member States and the case law of CJEU. Taking into consideration the AI's inability to act as an autonomous agent, attention is drawn to possible legislative interventions to introduce legal certainty, whilst honoring and maintaining core values of copyright law.

Keywords Intellectual property · Artificial intelligence · Authorship · AI-generated creations · AI-assisted creations

1 Introduction

The fourth industrial revolution and Web 3.0 are no longer a matter of fiction and phantasy. In this new reality, where the borders between the physical and the digital world are not as clear as they used to be, everyone is talking about blockchain,[1]

[1] Blockchain is a type of distributed ledger (database) with some particularities such as an increase of records across a network of computer systems, the verification and grouping of such records in blocks and their cryptographical safeguarding (Szostek 2019, 45).

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NFTs,[2] Artificial Intelligence (hereinafter: AI)[3] and the metaverse.[4] Whilst this era is exciting, transformative, and offering a vast of new opportunities in almost every segment of our private and work lives, the technological progress is at the same time also shifting paradigms and challenging several "real world"-concepts, in particular in the sphere of legal regulation. The legislator is traditionally known for being a "late bloomer" when it comes to adapting to technological advancements. Nonetheless, the speed at which the current progress is moving in almost every field of industry is, to be frank, not very easy to catch up with, even for the ones that have their hand strongly placed on the pulse of the time.

One of the fields of law particularly challenged by these developments is Intellectual Property (hereinafter: "IP"). Throughout history, IP and technological growth have always been closely intertwined. Then the progress of the former has been a catalyst for introducing a comprehensive regulatory framework for the latter, to acknowledge and incentivize the creators and to further promote technological advancements and the dissemination of knowledge. At the same time, rapid technological progress—in particular the digitization—also constantly challenged IP, even to the point when the justification of its existence was questioned. However, this field of law has shown immense "shape shifter" qualities and managed to persevere, legislatively transform, and adapt to new technological circumstances.

With the emergence of AI-systems however, the world of IP was turned upside down. Perhaps even more severely than ever before. The legal field dedicated to protection of creations of the human mind was abruptly confronted with the dilemma of the legal status and legal protection of output of the simplified speaking, mechanical or artificial minds/machines. In this new era, the main question is not any more how to stop unlawful (digital) reproduction of human intellectual creations, but whether they can be replaced by the creations of the machines.[5] Some of the legal categories of IP that were considered rather self-explanatory for centuries, now potentially need to be reassessed, re-evaluated and perhaps even thoroughly redefined in the light of the "power of AI". The latter include, but are not limited to: the concept of the author, the concept of the inventor, as well as the (human) creator in general, the notion of originality of a work of art, the criteria for assessing the "inventive step" or "state of the art", the legal fiction of the "average expert" etc.

[2] The abbreviation stands for "nun-fungible tokens, as a "programmable digital unit of value that is recorded on a digital ledger" (Guadamuz 2021).

[3] There is no unanimous definition of AI. E. g. for the purpose of the "AI Act" (2021), the concept of an AI system means "Software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with" (Art. 3 (1)).

[4] In a simplified manner, metaverse represents a virtual world in which users can interact and connect with each other in a number of ways, such as through gaming, shopping, etc. (Park 2022).

[5] Dornis (2019), 1260.

Among several questions raised by AI in the field of IP, this chapter will provide a short overview of the general impact of AI-systems on the principles of copyright and patent law, before investigating the challenge to the concept of authorship in particular.

2 AI—Challenges for Patent and Copyright Law

Although discussions have become very intense in the last years, the fact remains that the potential impact of AI on the IP has already been addressed in the early 1990s by the World Intellectual Property Organization (WIPO).[6]

So far, there is no clear and generally accepted definition of it.[7] For the purpose of this paper, the one we choose is that AI represents a branch of computer science, often described as computer—based systems, that are developed to imitate human behavior.[8] In other words, AI-systems perform cognitive tasks that are inherent to humans, and they include a. o. learning, analysis, reasoning and problem solving. At the core of AI systems are software and data.[9] Hence, AI is based on computational models and algorithms, which themselves are built on the rules provided by the software applied to the data that is used as an input. The simulation and imitation of intelligent behavior by the AI can also result in outputs in art, literature, and science, as well as in a number of technical fields. If those outputs had been a result of human intellectual or creative work, they could potentially be protected by copyright, or a patent. Their creators would have the status of an author, or an inventor.

Questions have been raised about the algorithmic "creations", or outputs of the AI. Can AI be an author? Can AI be an inventor? Or do we have "creations without a creator"?[10]

The fundaments of copyright and patent law and the justification for the protection of creations under this regime are inherently anthropocentric. These rights are granted to (human) creators to acknowledge and honor their intellectual accomplishments on the one hand. On the other, they are granted as incentive for those creators to continue their work and promote creativity and technological and societal development in the public interest. Consequently, IP is devoted to the human element and human contribution in the process of creation.

However, a fact is—AI "creates", but one could also say it solely produces. Although imitation (in this case of human cognitive processes) perhaps does represent the greatest form of flattery, this "computational admiration" can have negative effects as well. What happens when the AI-outputs and human creations start competing in the field of art and industry? What if end-users do not recognize the

[6] Lauber-Rönsberg and Hetmank (2019), 641.

[7] Dornis (2019), 1253.

[8] Drexl et al. (2019), 3.

[9] Iglesias et al. (2021), 6.

[10] Dornis (2021), 784.

difference between the AI-product and human works of art and inventions, which can already be the case (comparable to Turing Test)[11]? What if the human creator, or the human contributor to the process of AI-systems generating output, becomes obsolete? Is the whole system truly so drastically at stake?

The European Union (hereinafter: "EU") has taken a stand in this regard by the Resolution of the European Parliament on IP and AI, proclaiming the following: "…a human-centered approach to AI that is compliant with ethical principles and human rights is needed, if the technology is to remain a tool that serves people and the common good."[12] This approach is in line with the Communication from the European Commission on AI for Europe, which states that "focus on investing in people is a cornerstone of a human-centric, inclusive approach to AI, and will require a significant investment", as well as that "[i]ndividuals should be able to control the data generated by using these tools and should know whether they are communicating with a machine or another human".[13]

Hence, it seems like the human creator remains the pivot of IP protection also in the future. However, the technology is advancing, and we cannot stop it. This means that AI-systems themselves and/or their outputs, if there is sufficient justification and a potential market failure—which this paper will not examine—need to be awarded some type of protection. Can the current IP laws and conventions be the legal instrument for such protection?

When it comes to IP-protection of AI-generated output in general, there are voices for and against it. Some of the arguments used in the course of this discussion opposing the protection are, that it would devaluate human creative efforts.[14] The opinions in favour state that protection would be necessary for the purpose of stimulating investment for development and introduction of AI and that it is questionable whether it would be enough to incentivise the human developers of AI by giving them an IP right on the AI itself, without awarding them at the same time the right to exclusively use the output of that given AI.[15]

In case the protection would be awarded, it remains unclear, who would be its be beneficiary?

When there is a satisfactory scope and quality of human creative contribution to the output generated by the AI, in the sense that AI was used as a tool for the human creative process ("AI-assisted creations"), the current IP framework with its human-centric approach remains applicable.[16]

But how much direct streamlining and guiding of the creative process from the human side would be enough? The sole development of the algorithm would obviously not suffice.[17] What could potentially represent an acceptable amount of creative

[11] Graham and Dowe (2021).

[12] European Parliament (2020), para. E.

[13] European Commission (2018), 3.2. and 3.3.

[14] Lauber-Rönsberg and Hetmank (2019), 645.

[15] Idem.

[16] European Parliament (2020), para. 14.

[17] Dornis (2021), 788 *et seq.*

choices of an individual would be the selection of training data, the definition of the goal of the process, and the choice of the learning protocol based on those data, as well as the possibility to modify the outcome developed by the AI by adding a title, or a commentary on its purpose.[18]

It gets challenging when AI agents act potentially completely autonomously (so-called "strong AI"[19] or "Artificial Super-Intelligence"[20]), one might even say "creative", and the human piloting of the process to a predictable output is being eliminated. This could be the case with algorithms based on machine-learning and deep learning processes.[21]

However, as several authors stress,[22] according to the current state of art, the sovereignty of the existing AI-technologies is overestimated. AI systems are in no way fully autonomous, and their outputs are predictable. Human control and human will over the frame/scope of AIs actions still exist—it is a human decision how autonomous an AI can get (so-called "weak AI"). Nevertheless, that does not prevent owners, developers or users of AI, who are (paradoxically) humans, from crediting AI-systems with authorship of various works of art,[23] or as inventors of technical innovations (e.g. DABUS),[24] both representing outputs developed by using those systems. Hence, a clear distinction needs to be made between what the technology is independently capable of on one hand and the attributes awarded to the latter on the other. The result of this differentiation gives us also some direction as to whether the current patent and copyright law is sufficient to handle the AI-challenge, or it needs to be amended.

3 Copyright Law—The Concept of Authorship and AI

3.1 Nature of AI—Outputs

Art in its broadest sense is very powerful. It can shape societies and the public opinion,[25] it can provoke, challenge the existing regimes and outdated ways of thinking, it can evoke the complete spectrum of emotions. Why? Because it is created by humans. And no matter how philosophical or ethical this argument may seem in

[18] Haberstumpf (2020), 361.

[19] Haberstumpf (2020), 361.

[20] Papadopoulou (2021), 411.

[21] Dornis (2021), 785.

[22] Dornis (2021), 787 *et seq*, Haberstumpf (2020), 361, Kim (2020), 444, Stierle (2021), 117, Cevc and Hauck (2019), 140 *et seq*, Konertz and Schönhof (2018), 380, and Meniere and Pihlajamaa (2019), 335.

[23] Most recently, the AI chatbot ChatGPT was given authorship credits for four scientific papers (Stokel-Walker 2023).

[24] Conlon (2021).

[25] Papadopoulou (2021), 412.

this legal discussion; it does carry weight. AI can imitate cognitive functions of the human brain (analysis, recognizing patterns, drawing conclusions, …), nevertheless it is questionable, if it can also imitate human creativity and the human "spirit". The individual stamp of the author on the work of art he/she is creating is also a result of other brain functions such as e.g. imagination, expression of various emotions (affection, fear, anger, sorrow, …), and others.[26] In addition to that, the sources of creative action are, among others, personality traits and biographical experiences.[27] These are all categories that an AI system cannot possess. Finally, the creative choices a human author makes in the process of creating a work are also ruled by motives, and those vastly differ with regard to humans and AI.[28] That is, if we can even speak of motives in the production process (theoretically solely) generated by the latter.

Hence, it seems that AI systems produce creations that only "look like literary and artistic works",[29] and that the law should not "reward trickery" (in this context, with crediting authorship to AI). Although the outputs of AI systems are very close to what we recognise as works of art, they are just passing off as ones.[30] There is no work of art without a creative choice of a human author.

There is quite an impressive catalogue of these "lookalikes" in the portfolio of various AI systems.[31] This includes "The Next Rembrandt", a "painting" generated by an AI that had analysed thousands of works of Rembrandt Harmenszoon van Rijn, or the "Portrait of Edmond de Belamy," which is the first AI "artwork" sold at Christie's.[32] Additionally, there is the first AI musical album "Hello World" by SKYGGE.[33]

But are they "lookalikes" or truly works of art, since, as stated above, the technological progress has apparently not yet reached the state at which AI-systems can act as fully autonomous agents. The algorithms and systems still depend on human guidance. If we look closer into the projects and the background of the above-named AI "works", we actually see this human navigation clearly. Then behind the "Portrait of Edmond de Belamy," is a collective of researchers and artists called "Obvious", who work with the latest models of deep learning to explore "the creative potential of AI". The situation is very similar with SKYGGE. Of course, this will not always be the case, but when the human author explores and uses advantages of AI as a tool to assist him/her in the process of creation, the authorship over the AI-assisted output belongs to that person.[34]

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[26] Idem.

[27] Legner (2019), 809 *et seq* and Linke and Petrlik (2020), 43 *et seq*.

[28] Legner (2019), 810 and Linke and Petrlik (2020), 43 *et seq*.

[29] Gervais (2020), 117.

[30] Idem.

[31] The next Rembrandt: can the great master be brought back to create one more painting? (2016), https://www.nextrembrandt.com/. SKYGGE (2018), https://skyggewithai.bandcamp.com/album/hello-world. Obvious (2018), https://obvious-art.com/la-famille-belamy/.

[32] Obvious (2018).

[33] SKYGGE (2018) Hello World.

[34] European Parliament (2020), para. 14.

Nevertheless, to which extent and scope human involvement in the process of creation is required in order to consider AI only as a tool of the creator, is eventually hard to determine.[35] There is no definite answer, since it would be ambitious to set a general threshold for establishing a causal chain between the natural person and the AI output, sufficiently strong to justify awarding a person the status of author. Then the latter is a very case-dependent situation.[36]

Another question is, exactly which one of the human actors (or number of them) involved in the process of AI "creation" would be awarded authorship in that case? There are three key categories of persons, whose contributions are of importance for an AI-system: the owner (investor), the developer (or a team of developers) and the user (trainer).[37] An idea would be to give it to the developer of the AI, but another person could have worked on the design of the AI, a third one could have provided the AI with training data etc.[38]

In any case natural persons are the ones making creative choices.[39] They are the ones in the root of the requirement for a work of art to be an individual creation of the mind, and for awarding such creations copyright protection.

3.2 Human-Centric Copyright

The anthropocentric approach to copyright is also to a large extent the position represented in the *acquis communautaire* and the copyright legislation of the EU Member States,[40] as well as the case law of the Court of Justice of the European Union (hereinafter: "CJEU")[41] when referring to the notions of "work", "originality", "personality", "personal touch" etc. For instance, in its Smilde judgement,[42] the CJEU stressed that there are two cumulative conditions, which must be satisfied for subject matter to be classified as a "work" (within the meaning of Directive 2001/29). These are that the subject matter concerned must be original in the sense that it is the author's own intellectual creation, and that only something which is the expression of the author's own intellectual creation may be classified as "work" within the meaning of the directive in question. Furthermore, the CJEU pointed out that copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is the own intellectual creation of the author.[43] Finally, it identified that the latter is an intellectual creation of the

[35] Legner (2019), 808.

[36] Drexl et al. (2021), 5 and 21 *et seq*.

[37] Papadopoulou (2021), 416 and Dornis (2019) 1261 *et seq*.

[38] Legner (2019), 810 *et seq*.

[39] Gervais (2020), 117.

[40] Iglesias et al. (2021), 14.

[41] Papadopoulou (2021), 410 *et seq* and Dornis (2019) 1255.

[42] CJEU (2018), para. 35–37 and 40.

[43] CJEU (2009), Infopaque. Summary of the Judgement, para. 1.

author reflecting his personality and expressing his free and creative choices in the production of that work,[44] and that by making those various choices, the author [of a portrait photograph] can stamp the work created with his "personal touch".[45]

Those are all qualities of natural persons. No machines in sight. Apart from this choice of a humanistic approach to the concept of authorship, there is a further reason why this status cannot be awarded to an AI-system: the lack of legal personhood.

To be an author is a privilege, but also a responsibility, since he/she can be held liable for unauthorised use of someone's copyright in their work, or their work of art can infringe some other rights (e.g. personality rights).[46] The AI, due to the lack of legal personhood, cannot.

A potential solution for that would be to introduce "E-personhood" for AI-systems. However, the European Parliament clearly declared in 2020 that it would not be appropriate to seek to impart legal personality to AI technologies and pointed out the negative impact of such a possibility on incentives for human creators.[47]

However, there are also legislations that do not necessarily invariably follow the principles of the "human-centric" *Droit d' Auteur*—approach, which is aiming toward protecting the human creator and his interests. They have a more investment-oriented approach to copyright. For example, Art. 9 (Authorship of work), sec. 3 of the UK Copyright, Designs and Patents Act 1988 states that: "In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken." But not only the UK, also South Africa, Hong Kong, India, Ireland and New Zealand have comparable legislative solutions, which would make it possible to grant protection for an e.g. computer-generated work.[48] Hence, it is possible that at some point we experience a division by countries in the legislative attitude toward the question, who can be considered an author of an AI-assisted work.

But this still does not mean that the authorship would be awarded to an AI-system. It would be credited to a person, who in this case could also be a legal person. The answer to the question who exactly that person is—"by whom the arrangements necessary for the creation of the work are undertaken"—in the case of an AI-assisted works remains unclear. It could be the developer, the owner of the program, the person who controls the AI, or who feeds it with necessary data.[49]

[44] It the presented case it was a photograph. CJEU (2011), Painer. Ruling, para. 2.

[45] CJEU (2011). Painer. Ruling, para. 92. And CJEU (2012), Dataco, para. 37.

[46] Lauber-Rönsberg and Hetmank (2019), 643.

[47] European Parliament (2020), para. 13.

[48] Iglesias et al. (2021), 13.

[49] Lauber-Rönsberg and Hetmank (2019), 643 and Iglesias et al. (2021), 15.

4 Final Remarks

The scope and substance of the changes that AI will bring in the field of IP rights are still uncertain. Some authors hold the view that these amendments will inevitably occur, when the technology reaches the point of development, that AI-systems can make (independent) choices[50] ("strong AI"). This opinion can be supported, because when that occurs, the current lawmaker's approach might not be sufficient to achieve legal certainty in this field. Nonetheless, perhaps we should not wait that long and begin with cautiously adapting the current legislative framework. Then already the existing "weak AI", which assists the human creators and serves as their tool, poses a number of questions and generates some legal uncertainties. These include the sufficient scope and nature of the human involvement in the process of creation and granting a person the authorship over the AI-assisted work of art, as well as the criteria for defining who that person is (developer, user, investor, …).

Although it always seems that there is quite some urgency to regulate when a new technology appears, it is usually advisable not to (legislatively or otherwise) overeact.[51] Precisely this has been "the tactics" of IP, as a highly tech-susceptible field of law, for centuries. With a lot of success, if we may notice. The majority of core principles of e.g. copyright and patent law have remained largely unchanged throughout technological storms, which therefore seems to be a reasonable result when facing the AI-challenges as well.

The regulatory goal would most certainly be to create a balance between IP and AI,[52] since the latter is obviously here to stay, but with a human-centred approach in mind, as the European Parliament proclaimed. Also, the latter announced that the new regulatory framework in the field of AI technologies and IP on the EU-level should take the form of a regulation and not a directive.[53] This would facilitate establishing equal standards across the Union, which some authors interpret as potentially announcing the adoption of a "General Copyright Regulation".[54]

When it comes to copyright and the notion of authorship, we need to admit that some of the characteristics of the system are to an extent antiquated in today's time and seem even a bit romantic.[55] Perhaps the strong personal tie between the author and his creation is no longer existent for all types of works, partially due to the technical nature of some (e.g. computer programs), or the use of technical tools to create them (e.g. software or randomisers).[56] Nevertheless, this does not in any way justify a complete change of core concepts of copyright law, such as the anthropocentric approach to authorship. Then the machines produce. But the creations emanate from

[50] Gervais (2020), 117.

[51] Stierle (2021), 116.

[52] Castets-Renard (2020), 144.

[53] European Parliament (2020), para. F. And 3.

[54] Dias Pereira (2021), 324.

[55] Linke and Petrlik (2020), 43.

[56] Lauber-Rönsberg and Hetmank (2019), 643.

the human spirit. Or in the words of George Bernard Shaw: “You use a glass mirror to see your face. You use works of art to see your soul.”

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Inheritance Law in the Twenty-First Century: New Circumstances and Challenges

Dubravka Klasiček

Abstract This chapter explores the influence of technology on traditional components of inheritance. An increasing amount of social interaction takes place online. Consequently, people accumulate large quantities of digital assets. Some of these assets have a considerable material value, while others might have emotional value for the family of a decedent. They might also have historical value for society in general. However, from the standpoint of inheritance law, in many countries it is unclear what happens to digital assets after their owner/user dies. These assets represent a new type of "property" and few legislators around the world have regulated them specifically. The need to implement these assets into inheritance law is why it is important for law students to be familiar with the concept of digital assets, understand their categories, as well as the differences between them. The chapter also considers possible solutions on what will happen to them, *post mortem.* To map the landscape for the readers, the chapter divides digital assets into four comprehensive groups and explains what happens to each of these digital assets *post mortem.* This chapter also lists the reasons why some of these assets cannot be inherited and possible problems with inheritance of those digital assets that are inheritable.

Keywords Digital assets · Digital inheritance · Online platforms · Cryptocurrencies

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1 Introduction

Certain parts of inheritance law have not changed much since Roman law.[1] Law students in most countries are still only learning about traditional features: e.g., conventional forms and types of wills and a long-established content of the estate (decedent's movable and immovable property that passes on to his/her heirs). However, traditional legal institutes are influenced by (modern) life and new circumstances. More than ever before, the datafication of society changes our lives at tremendous speed.[2] This chapter focuses on one problem associated with these changes, namely the inheritance of digital assets (digital inheritance).[3]

Most people acquire numerous digital assets during their lifetimes and these assets remain in existence long after they die. These assets are intangible in nature, stored on different media, or on clouds, they are frequently protected by passwords or encrypted and many times, they are located on online platforms'[4] servers that have strict rules about who will have access to them. Numerous authors agree that many of these assets are of great value, not only monetary, but also emotional and historical.[5] Although most people have lots of digital assets of varying value, many of them do not even understand their meaning, let alone, what will happen to these assets after they die.[6]

This also applies to legislators: few countries in the world have directly addressed the issue of digital inheritance and passed laws that regulate it. One of them is, France, which enacted a law in 2018 that, in its Art. 63, regulates what will happen to person's data in a digital form, after he/she dies.[7] Even if a decedent has not left specific instructions, according to the same article, his/her heirs will have the right to access certain information in order to gain insight into decedent's inheritance or

[1] For example, most types of wills that originated in Roman law are still used today: allographic will, holographic will, public will made in front of the clerk of the court and oral will. In most countries only testaments (testate inheritance) or the law (intestate inheritance) are still the only foundations for inheritance. Forced heirs were, like today, testator's closest family members, who had the right to claim a part of the inheritance in spite of the testator disposing of all of his property by will or donations. Forced heirs can still be disinherited for similar reasons like in Roman law (Romac 1994, 362–381).

[2] Gstrein and Beaulieu (2022), 2.

[3] For example, another problem of modern inheritance law, that the author has researched and written about, is non-recognition and non-validity of wills made with the help of digital technologies (e.g., recorded wills, wills written and saved on a computer or a cellphone, without being printed out and signed etc.) See: Klasiček (2016), 34–35 and (2019), 40–44.

[4] This term is used in accordance to Recital 13 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, because the author believes it encompasses all of the entities that are mentioned here.

[5] For example see: Banta (2014), 810–816, Beyer and Cahn (2012), 41–42, Borden (2014a), 428–434 and Watkins (2014), 200–213.

[6] Conway and Grattan (2017), 8.

[7] LOI no 2016-1321 du 7 octobre 2016, Art. 63.

obtain certain digital assets that are of persona value to the family.[8] On the other hand, Germany might not have legislation concerning digital inheritance, but there is an important case where a court granted young girl's parents access to her Facebook profile.[9] After Facebook appealed that decision, court of appeal in Berlin in 2017 ruled completely the opposite and access to Facebook account was refused. The court claimed that they did not reach such a decision only to protect decedent's privacy, but also the privacy of all of her contacts she communicated with.[10] However, the Federal Supreme Court vacated court of appeal's decision and finally granted parents access to the account and its content.[11] This was a highly publicized case in the EU and because of it many people have started thinking about something they might have never thought about before. USA also has legislation dealing with digital assets and the death of their holder (more *infra*). However, most countries do not have legislation nor case law dealing with what happens to someone's digital assets when he/she dies. Therefore, it seems as if most countries and their legislators do not know what to do with this problem.

The number and value of this new type of assets will only grow and it is time to start implementing them into property law, law of obligations and, as this chapter shows, into inheritance law. Therefore, it is imperative to start teaching law students about the importance of these assets; their characteristics; differences between them and how to treat them, both while their owner/user is alive and after he/she dies. As some scholars have stated, if we do not react now, the "rule of technology" instead of the "rule of law" will govern this aspect of our lives (or "the rule of the cloud", instead of "rule of the land").[12]

[8] Art 63, point 3: « III.-En l'absence de directives ou de mention contraire dans lesdites directives, les héritiers de la personne concernée peuvent exercer après son décès les droits mentionnés à la présente section dans la mesure nécessaire: «-à l'organisation et au règlement de la succession du défunt. A ce titre, les héritiers peuvent accéder aux traitements de données à caractère personnel qui le concernent afin d'identifier et d'obtenir communication des informations utiles à la liquidation et au partage de la succession. Ils peuvent aussi recevoir communication des biens numériques ou des données s'apparentant à des souvenirs de famille, transmissibles aux héritiers; «-à la prise en compte, par les responsables de traitement, de son décès. A ce titre, les héritiers peuvent faire procéder à la clôture des comptes utilisateurs du défunt, s'opposer à la poursuite des traitements de données à caractère personnel le concernant ou faire procéder à leur mise à jour."

[9] LG Berlin, 17-12-2015. Source: Resta (2018), 201.

[10] KG Berlin, 31-5-2017. Source: Resta (2018), 201.
More: Collins (2017).

[11] BGH 12-7-2018, III ZR 183/17.

[12] Van Erp (2016), 73 and De Filippi and Belli (2012), 10.

2 Digital Assets

Many digital assets have certain value. For example, cryptocurrencies,[13] assets in online games,[14] various digital content purchased from different online platforms, all have real monetary value.[15] However, most peoples' digital assets value is not monetary. These assets mostly have only emotional value for their owner/user and his/her family and friends.[16] In addition, today many people conduct their businesses online: they sell and buy goods and services on the Internet, they communicate with their clients online, they keep all, or most of their information in a digital form. Therefore, all of these assets are extremely important to business owners and to their heirs.[17] Also, if a digital asset belonged to someone famous (to a celebrity, scientist or a politician), they might be important for the public in general. Historians and fans would also have an interest in those assets.[18]

Because of all of this, the question as to whether digital assets are inheritable is important, and its importance will probably grow with time. Heirs are typically interested in inheriting anything that belonged to the decedent and had real monetary value. They also want to inherit something that has great emotional value for them and their family. Also, if they are inheriting the business of a decedent, it is important for heirs to inherit anything tied to that business, whether it is physical or digital.[19] However, the possibility of inheriting digital assets is faced with many problems.

One of the main problems concerning digital assets is that they remain undefined. There is still no straightforward definition of what a digital asset is; therefore, it is not certain how to treat them and what rules to apply to them. When talking about these assets, different authors usually mention emails and email accounts; social media profiles; blogs; music, photo and video collections; online bank accounts; shopping sites, domain names, online subscriptions; business information, loyalty programs.[20]

As was said in the introductory part, not many countries have specific rules about digital assets in general, especially about their inheritability. However, the United States (U.S.) adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which is a leading act concerning digital assets. It defines digital assets as electronic records in which individuals have rights or interests.[21] A record is defined as information recorded on a tangible medium, or stored in an electronic or other medium, which can be retrieved in visible form. Electronic is defined as

[13] Hull et al. (2019), 250.
[14] Harbinja (2023), 126–127.
[15] Church (2015), 154.
[16] Calem (2010) and Beyer (2011).
[17] Banta (2017), 1147 and Hopkins (2013), 214–216.
[18] Banta (2014), 814.
[19] Klasiček (2018), 1052–1054.
[20] Banta (2014), 801, Bayer and Cahn (2012) 41 and Watkins (2014), 198–200.
[21] Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), Section 2, p. 10.

having electrical, digital, magnetic, wireless, optical, electromagnetic or similar characteristics.[22]

In the literature, different authors divide digital assets into different groups. The following are some of those divisions according to various criteria:

(1) (a) online accounts and (b) files stored on various devices and cloud services[a]
(2) (a) digital assets that fall under the rules of contract for digital services and (b) the ones that are provided by a way of license[b]
(3) (a) intangible items, (b) information about property, (c) intellectual property and (d) personal data[c]
(4) (a) electronic documents, (b) social media, (c) financial assets, (d) business assets and (e) miscellaneous assets[d]

[a] Jin Park et al. (2020), 3.
[b] Berlee (2017), 257–260.
[c] Birnhack and Morse (2022), 285.
[d] Manicad and Perez (2018), 392.

It is understandable that there is a problem in defining digital assets, because they can be divided by applying many different criteria, many of them overlap and they change constantly. But the mentioned categories give a pretty good overview on what this term encompasses.

3 Digital Assets and Inheritance Law

For inheritability of a digital asset, it is important to note that one solution regarding one type of digital asset will not fit other types. Therefore, this chapter divides digital assets into four main categories. By applying this division, issues concerning inheritability of the assets can simply and effectively be explained (to readers, students and others). Of course, there are other types of digital assets that might not fall into any of these groups. However, the author decided to use these, because most people's digital assets fall into at least one of these categories.

These categories are as follows:

(1) digital assets stored on an electronic device (or a similar medium), created by the owner of the device
(2) digital accounts and its content, stored on online platforms' servers
(3) digital assets that have been purchased from online platforms
(4) cryptocurrencies

[22] RUFADAA, Art. 2, par. 22 and par. 11.

3.1 Digital Assets Stored on Electronic Devices, Created by the Owner

Inheritability of these digital assets is probably least problematic. Decedent's heirs who inherit those devices, under existing inheritance rules, will inherit these assets. These assets usually consist of photos created by the decedent; his/her manuscripts; videos and music. Most of us have computers, laptops, smartphones and flash drives full of digital assets like this. Some of those assets might be worth a lot of money, but usually they will only hold emotional value for family and friends of a decedent. In addition, many of these items are copyright protected, but since copyright is inheritable, this will not be an obstacle to inheritance.

When it comes to inheritability, the biggest problem with digital assets such as these is that they are often protected by a password or can only be accessed through some biometric measurement. Therefore, if heirs do not know the password for a device of a decedent, they will not have access to assets stored on it. This is what happened after a world-renowned composer Leonard Bernstein died in 1990 and left his password protected autobiography on his computer. He had been working on it for more than two years and nobody has had any luck in accessing it, since he passed away.[23] Therefore, a great piece of music history is lost, simply because nobody knew the password and Bernstein did not leave it to his heirs in a will or some other document. This cannot be considered as an unusual occurrence, since most people still do not think that it is important to take care of such matters, let alone over 30 years ago.

3.2 Digital Assets Stored on Online Platforms' Servers

Most people have email accounts, accounts in social networks, on dating sites, to access cloud services, etc. On a daily basis, they put content on those accounts. When it comes to the ownership of such content, it is usually stated that it belongs to the user. For example, Facebook is one of the most popular social networking services which, in accordance with Art. 3 of EU Digital Markets Act (DMA), falls into the category of "gatekeepers".[24] Facebook's terms and condition state, "You own all of the content and information you post on Facebook".[25] However, Facebook owns

[23] Digital Estate Planning Strikes a Chord with Music Industry Professionals, https://www.mylennium.com/article/digital-estate-planning-strikes-chord.

[24] „A provider of core platform services shall be designated as gatekeeper if: (a)it has a significant impact on the internal market; (b)it operates a core platform service which serves as an important gateway for business users to reach end users; and (c)it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future." Art 3(1), DMA.

[25] Facebook „Statement of Rights and Responsibilities ", https://www.facebook.com/legal/terms/previous.

the accounts, and decides what will happen to them after a user dies.[26] When it comes to most online platforms, after users die, the accounts and its content will probably not pass on to their heirs. The reason for this is that, before users set up their accounts, they had to agree to platforms' terms and conditions. Most of those terms and conditions today prohibit access to a user account to anyone else other than the user, and that includes heirs.[27] Few of them explicitly forbid inheritance, but almost all of them state that „the user's rights under the contract are non-assignable" which also prevents inheritability of such assets.[28]

One would think that the easiest way would be for people to leave their heirs passwords to their accounts. However, most, if not all online platforms forbid this.[29] If this were done, and a platform discovered it, it could lead to termination of an account or at least to an online platform changing login information so nobody could access decedent's account again.[30]

These digital assets raise the most issues when it comes to inheritability. There are valid reasons for disallowing inheritance. For example, many digital assets stored on digital accounts consist of personal data. The 2016 EU General Data Protection Regulation (GDPR) in its Art. 4 determines that personal data is data that can identify someone.[31] Therefore, if inherited, these accounts can reveal a lot about a person and users might not want this to happen. However, even if some users might want to share their personal information with their heirs, the problem is that through those same accounts, a lot can be discovered about anybody a user ever communicated with. Those persons most certainly would not wish their personal information to be passed down to someone they possibly do not know.[32] Privacy protection is actually one of the main reasons why online platforms do not let decedent's digital assets stored on their servers to be inherited—they aim to protect users' privacy (consequently, also the privacy of everybody who communicated with a user) and they also aim to avoid possible liability if they were to reveal private information.[33] As was mentioned earlier, this was the reason behind Berlin's court of appeal refusing parents of a deceased girl access to her Facebook profile (see *supra*).

Nevertheless, sometimes inheritability of these digital assets is desirable. For example, the content of an account might comprise copyrighted works made by the decedent. In those instances, if online platforms deny heirs access, heirs will inherit copyright, but they will not be able to profit from the work of the descendent.[34] In addition, if a decedent had a successful business that was conducted mostly online,

[26] Harbinja (2017), 181–182.

[27] Banta (2014), 817, Kreiczer-Levy and Doeyets-Kedar (2019), 713 and Grochowski (2019), 1203.

[28] Michels et al. (2019), 6–7, 10.

[29] Harbinja (2023), 201.

[30] Michels et al. (2019), 11.

[31] Art 4. General Data Protection Regulation, (EU) 2016/679, OJ L 119, 04.05.2016; cor. OJ L 127, 23.5.2018.

[32] Michels et al. (2019), 14–16.

[33] Borden (2014a), 417–423 and Harbinja (2023), 201.

[34] Borden (2014b), 20–21 and Michels et al. (2019), 5–6.

that business might go under, if heirs cannot access the owner's accounts and files.[35] Many utility companies and banks send their bills or statements via email. Hence, if heirs cannot access them, bills will remain unpaid and heirs might not be aware of bank accounts that the decedent had, which they have inherited after his/her death.[36] On social media (Facebook for example), the posts of users can reveal their state of mind at a certain time. That is the reason why heirs (usually family members) often want to access these accounts after the user dies—they might want to get an insight into that person's emotional state prior to death, especially if a person died of suicide or suspected suicide.[37] Social media is also used as a coping mechanism; it helps family and friends to process grief over death of a loved one.[38]

Numerous interests need to be reconciled here, the main being those of online platforms, users, heirs, and third parties.[39] So far, most online platforms have taken a safe route and decided they will not let anyone access the account of the decedent, unless they have a court order, regardless of how advantageous inheritance of some of these assets could be.[40]

However, not all online platforms have policies like the ones mentioned in this part. For example, some (Facebook, Google and Apple) have enacted rules that allow users, while they are still alive, to decide what will happen to their accounts *post mortem*.[41] These platforms have not done this on their own initiative or because users wanted it, but due to pressure from the media and the families of users.[42] However, these few actors are still outnumbered by a large majority, which do not provide any choice.[43]

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[35] Banta (2014), 811.

[36] Beyer (2011), 3.

[37] Resta (2018), 201.

[38] Brubaker and Callison-Burch (2016), 1 and Arnold (2013).

[39] Michels et al. (2019), 12–16.

[40] Here the author mentions one decision from the EU (although it was later overruled) and one from the U.S.:

BGH, Urteil vom 12. Juli 2018 - III ZR 183/17.

In re Estate of Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. Mar. 4, 2005). See for example: Cummings (2014) 898–900.

[41] Facebook, https://www.facebook.com/help/103897939701143; Google, https://myaccount.google.com/inactive?pli=1; Apple (iPhone), https://9to5mac.com/2021/12/13/pass-iphone-data-to-loved-ones-legacy-contacts/.

Harbinja (2023), 208.

Twitter, https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account Accessed. Instagram, https://help.instagram.com/264154560391256/?helpref=search&query=deceased&search_session_id=ed2e2e06e1c0cf0dd7665b69d8255823&sr=1; LinkedIn, https://www.linkedin.com/help/linkedin/answer/2842/deceased-linkedin-member?lang=en.

[42] Harbinja (2023), 208.

[43] Twitter, https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account. Instagram, https://help.instagram.com/264154560391256/?helpref=search&query=deceased&search_session_id=ed2e2e06e1c0cf0dd7665b69d8255823&sr=1; LinkedIn, https://www.linkedin.com/help/linkedin/answer/2842/deceased-linkedin-member?lang=en.

3.3 Digital Assets Purchased from ISPs

This group of digital assets also causes great controversies because many users realize only too late that they have not actually acquired ownership of content—such as e-books, music records, or videos—but merely purchased a license to use it.[44] Online platforms that "sell" digital content have strict rules that prohibit users any transfer of these assets.[45]

Concerning this content, online platforms grant users a personal copyright license in respect of the purchased content, which does not form a part of the inheritance.[46] It is important to stress that these rules only apply to situations where users were granted a permission to download such content, not to the streamed content. In case of a download, a copy of a file must be stored in the long-term memory of a device the content is being downloaded to, which is a violation of copyright owner's reproduction right.[47] In contrast, when streaming, data will be stored in the short-term memory of a device, which does not result in a copy saved in a long-term memory and does therefore not violate the copyright owner's rights of reproduction. Licensing limitations also do not apply to works that are in public domain (e.g., works for which copyright has expired).[48]

The fact that online platforms are only licensing these digital assets is not a problem: these platforms have the right to transfer this content under whichever conditions they choose. Therefore, if they want to grant users only a non-transferable license for the duration of their lives, and the users agree to that, those provisions should apply. The problem here is the fact that many users have no idea what they have agreed to, because they have not read the terms and conditions that regulate digital content purchase.[49] To prove this, online platforms have put some outrageous clauses in their terms and conditions, just to see how many users will notice. For example, a platform that offers free wi-fi put a so-called Herod clause, assigning user's firstborn child to them.[50] A platform that sells online games added a clause

[44] Michels et al. (2019), 6.

Just remember a story that exploded years ago, about Bruce Willis planning to sue Apple because he could not bequeath his big digital music collection to his children (which now we know was not true). Regardless of it being made up, it still brought people's attention to the fact that users only have a license to use Apples digital content and it caused quite a stir all around the world. Raymundo (2012).

[45] For examples, see: Amazon, https://www.amazon.com/gp/help/customer/display.html?nodeId=201380010 and Apple, https://www.apple.com/legal/internet-services/itunes/.

[46] Michels et al. (2019), 21.

[47] Ibid., 22.

[48] Ibid.

[49] Conway and Grattan (2017) 11.

[50] ""the recipient agreed to assign their first born child to us for the duration of eternity" (Fox-Brewster 2014).

that granted user's soul to them.[51] In both of those cases, only a few users noticed these clauses and reacted, others automatically agreed to them.

Additionally, most people simply consider the terms and conditions unreadable.[52] They are usually long, complex and frequently updated and because of that, it is not feasible to expect an average user to go through the huge amount of text that they consist of.[53] Also, the most important clauses tend to be hidden behind a sea of text, so that even trained lawyers find them hard to understand. Hence, it is no surprise that users do not read them or understand them.[54]

Here, the author would like to mention NFTs (non-fungible tokens) which can be linked to author's works in digital form (actually, any digital (even tangible) asset can be linked to NFT). These non-fungible tokens are based on blockchain that establishes a chain of ownership which eliminates counterfeiting of such assets.[55] Therefore, NFT represents a certificate of ownership over digital assets.[56] NFTs are usually mentioned in the context of games and digital art where a person can buy a character or an item in a game, or a piece of digital art.[57] However, they were recently also linked to virtual clothes, shoes, a house, hardware, music, music videos and the like.[58]

What this technology might bring in the future, in regards of users being able to transfer digital content purchased from online platforms, can be illustrated by the example of books. Unlike an ordinary e-book, whose copy can be downloaded by anyone, the NFT book is connected by blockchain technology, which represents a direct connection (contract) between the author and the user. In this way, one acquires an NFT book similar to how one would acquire it in the physical world—a person acquires his/her own copy which he/she can later transfer to whomever. Therefore, this technology represents a way to create a second-hand market for digital books and similar content, which is today impossible.[59] This technology has existed since 2017, but has not yet become mainstream as far as digital assets covered in this part of the chapter are concerned (books, music, movies, etc.).[60] However, it seems that

[51] "By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamesation.co.uk or one of its duly authorised minions." Friedman (2010).

[52] Benoliel and Becher (2019), 2257–2258.

[53] Gstrein and Beaulieu (2022), 19.

[54] Sherry (2012), 204–205 and Varnado (2014), 747–748.

A recent survey discovered that only 1% of respondents actually read terms and conditions (Sandle 2020), Report finds only 1 percent reads 'Terms & Conditions'.

[55] Finzer (2020).

[56] Davydova et al. (2021), 4.

[57] Finzer (2020).

[58] Fashion brands such as Gucci and Buffalo London also conducted campaigns connected to NFTs (Davydova et al. (2021), 4–5; Kastrenakes 2021).

[59] Bookvolts, https://bookvolts.com/what-is-an-nft-book/

[60] Finzer (2020).

the future will potentially bring more and more conversions of such assets into NFTs and enable secondary market for them, along with possible transfer *post mortem*.

3.4 Cryptocurrencies

Cryptocurrency is a currency, which uses cryptography to enable electronic payments without an intermediary bank or a financial institution.[61] Some of the main characteristics of cryptocurrencies, which are so attractive to their owners during their life, become a problem (even a possible obstacle) to their inheritance. Namely, cryptocurrencies are impersonal, their owner is not recorded anywhere or entered into any register, and a certificate of ownership cannot be obtained.[62] At this point, it should be noted that the word "owner" is used here with a measure of caution, given that there is still no consensus about whether these assets are objects of property rights or something else entirely.[63] Precisely because of these characteristics, the possibility of exercising any rights over cryptocurrencies depends on access to a special crypto wallet. The wallet cannot be accessed without a private key (a password), even if the owner wanted someone to access it or if, for example, there was a court order granting access to a crypto wallet.[64] This is mentioned here because heirs, who did not have login information, were able to access dead user's email and other accounts after obtaining a court order that compelled online platforms to grant them access (see *supra*). However, in the case of a crypto wallet, for someone to be able to access it and dispose of the cryptocurrencies stored there, there is no other way to do so, unless that person has information necessary for access.

Intestate inheritance would certainly pose a problem for inheritance of cryptocurrencies, given that the intestate heirs might not even know that the decedent had cryptocurrencies, let alone how to access them (if they do not have necessary information, they need to access a crypto wallet). On the other hand, inheriting cryptocurrencies based on testate inheritance would certainly be possible and a will would be the simplest and most conventional way of bequeathing such assets.[65] In the will, the testator could announce to the heirs that he/she had cryptocurrencies, so they would know about that part of the estate. He/she could also share his/her public key for the crypto wallet. As for the information for accessing the wallet—a private key—it is important to note that the testator should never put this information in the will. The reason is that wills are read publicly at the probate hearing, and everyone present at the reading of the will could find out about this information and access the wallet, which is something a testator or his/her heirs would never want.[66] Therefore, if the

[61] Carr (2019), 179.
[62] Omelchuk et al. (2021), 116.
[63] Carr (2019), 180–185.
[64] Omelchuk et al. (2021), 117.
[65] Ibid.
[66] Klasiček (2018), 1063–1064.

testator decided to include his/her cryptocurrencies and a public key in a will, private key could be listed in a separate document that would not be an integral part of the will and would not be read publicly.[67] This document could be stored in a safe deposit box in a bank or in some similar safe place to which, after testator dies, only those whom the testator wanted would have access to.[68]

Precisely because of the problems with inheritance of cryptocurrencies, a parallel could be drawn between them and the inheritance of digital assets stored on users' devices (the first group of digital assets covered in this chapter). There are no formal obstacles to the inheritance of neither of these assets. However, if the heirs do not know whether they exist and how to access them, they would never be able to benefit from them. That is why it is important for the owner of cryptocurrencies to disclose to the heirs the existence of these assets and how to access them.

4 Digital Inheritance and the Law School Curriculum

In order to understand problems connected to digital inheritance, students of a law school curriculum would need to learn about various types of digital assets in their studies. The division that has been presented in this chapter offers one way to introduce students to the topic. While doing so, students could reflect about the status of each digital asset: for example, which one could be considered intangible property, which one could be considered as private and which one could be considered as something else. According to the stand they take, they would have to investigate which rules could be applied to which type of assets. For this to be done, students would need to have prior knowledge about property law, privacy law and contract law.

Furthermore, students would have to carry out research to identify examples of different legislations that have implemented rules on digital assets and their inheritability, into their legal systems. This would allow them to discover how similar rules could be implemented into legislations that still have no rules about this issue.

Finally, law students should be encouraged to draw parallels between their digital assets and the things they have learned about this topic. This could be done in the following way:

1. Concerning the first group of digital assets, students would be encouraged to give examples of different content that is stored on their devices and would need to decide what they would like to happen to that content, in case they died. By then, they would be made aware of the importance of letting their heirs know the passwords to their devices, if they wanted them to be inherited, so they would have to express how best to leave that information to their heirs—in a will or somewhere else.

[67] Watkins (2014), 225–226.

[68] Omelchuk et al. (2021), 118.

2. Concerning the second group of assets, students could list all of their own accounts and profiles and discuss what would they want to happen to them if they passed away. They would need to examine chosen online platforms' terms and conditions, both the ones that give users a choice to decide what will happen to their accounts, and those that do not. They would also be encouraged to make the choice themselves, if they have accounts or profiles with online platforms that allow choice.
3. Concerning the third group of assets, students would need to list digital content that they have purchased from online platforms. They would have to read their terms and conditions to find clauses that determine what rights they, as users, have over the respective content. They would also have to comment on how easy it was to find those clauses and how understandable they think terms and conditions were. They would need to investigate why online platforms do not transfer ownership of digital content and by doing so, they would learn about differences between the transfer of tangible copyright protected works and its digital counterpart. Students would also be encouraged to investigate the technology behind NFTs that are associated with various digital content and give specific examples of different images, music and other digital art linked to NFTs.
4. As for cryptocurrencies, students should become aware of the fact that they themselves have to take the necessary steps for these assets to be inheritable. First, they should be aware that probably the simplest way of bequeathing these assets is to make a will in which they would draw their heir's attention to the existence of cryptocurrencies. Furthermore, they would need to choose the way in which they would inform their heirs of the access information to the crypto wallet. In the case of these digital assets, as with the first group listed here, it is important to be aware that without access data, heirs will not benefit from those assets.

5 Conclusion

Developments in technology have changed our lives in ways that only 10 years ago, most of us could never imagine. A huge part of our lives happens online, and that will only grow. Digital assets have monetary, emotional and historical value and many of them could, and should be inheritable. However, many opposing interests need to be reconciled if that is to happen. So far, this issue is, for the most part, ignored in existing private law curriculums (property law, law of obligations, inheritance and copyright law).

As was shown in this chapter, many different fields of law play a part in determining which rules should apply to digital assets, not only after their owner/user dies, but also while he/she is still alive. For students to understand issues concerning digital inheritance, they would first need to be taught about different types of digital assets, since the rules that apply to them depend on the type of digital asset in question. They would also have to understand why these rules exist in the first place, and how they

influence the possibility of inheritance of certain types of digital assets. In addition, they would have to learn about different countries' legislation on digital inheritance which would allow them to explore how similar rules could be implemented into their own legislation. Also, students would need to look at their own digital assets and analyze what could happen to those assets after they die, depending on the type of a digital asset and the rules that pertain to it.

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Law and COVID-19

Racial Discrimination and COVID-19 in the European Union

Mina Kuzminac and Milica Midžović

Abstract Repercussions of global crises can often be seen in the fact that many legal issues arise or become even more complex, while this is also true when speaking about the crisis caused by the COVID-19 pandemic. Certainly, the analysis of the effects of such crisis is of great importance during the peak of the crisis, but also afterwards, in the context shaped by the (previous) crisis. In light of the mentioned, the widely present issue of discrimination in the world of work has become even more present during the crisis caused by the COVID-19, and discrimination based on race and ethnicity is no exception in this regard. From patients refusing to be treated by doctors because of their race to increased poverty rates, one may infer that impacts of the mentioned crisis have brought injustice and inequality based on race and ethnic background to the forefront of public eye all over the world, including the European Union. In that sense, the paper deals with the legal framework of importance, but also the existence and implications of racial and ethnic discrimination in practice, especially during and after the pandemic, i.e., analyzes this issue as the issue of "law and beyond".

Keywords Racial and ethnic discrimination · Intersectional discrimination · Employment · European Union · COVID-19 pandemic

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1 Introductory Remarks

Whatever affects one directly, affects all indirectly.[1]

Historical background shows us that for decades and centuries people were, euphemistically said, treated unequally due to their race. These centuries that were "defined" by colonialism and slavery, regarded *race* as the ground base for which a person is to be considered more or less worthy.[2] Even though centuries of "maltreatment" of millions due to their race and ethnicity are today considered to be a stain in the history of humanity, it may be argued that certain traces of such background can be seen in the existence of racial and ethnic discrimination today.[3] In that regard, the definition that shall be used as a starting point when discussing the issue of racial and ethnic discrimination in the European Union is one provided in International Convention on the Elimination of All Forms of Racial Discrimination which stipulates that racial discrimination refers to:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[4]

This definition is broad and refers to unequal treatment in different spheres of life—still, racial and ethnic discrimination is *especially emphasized* in the world of work.[5] Therefore, it is important to emphasize that "the workplace is a key strategic

[1] Martin Luther King, Letter from a Birmingham Jail, 16 April 1963.

[2] For more about the intricate relation between race and slavery, both in the past, but also today see Weissbrodt (2002). Also in this sense, taking a glance at history shows us that over centuries "scientific and philosophical inquiry into species and racial diversity […] produced theories of a hierarchical ordering of the different species and races. Those theories served as the ideological and philosophical underpinning, not only for the development of theories of racial, ethnic, social and religious discrimination, but also as an intellectual framework to justify operations that were forms of exploitation or domination, such as the slave trade and colonization". The Office of the United Nations High Commissioner for Human Rights (OHCHR) in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO) (2003).

[3] Even today, in accordance with the statistics of the International Labour Organization, there are over 50 million people worldwide who are the victims of modern slavery. International Labour Organization, "50 million people worldwide in modern slavery", https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_855019/lang--en/index.htm. For a closer insight into personal stories of the ones trapped in modern slavery see Bales (2016).

[4] Art. 1 (1) of the International Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660.

[5] The testimony of globally present efforts aimed at combating racial discrimination is the statement by Chidi King, Chief of the International Labour Organization's Gender, Equality, Diversity and Inclusion Branch: "It is crucial that we create a comprehensive knowledge base on racial equality barriers and measures, give those affected a voice, and promote social dialogue for bringing about new and innovative actions to combat racial discrimination in the world of work". International

entry point for addressing racial discrimination—through awareness-raising and training, social dialogue, and observing diversity, employers and workers are better able to understand the concepts, identify cases and develop the necessary skills and tools to address racial discrimination".[6] In other words, "creating a workplace policy on ethnic diversity is one of the first steps towards publicly demonstrating that the enterprise takes the elimination of racial discrimination and the promotion of equality in the workplace seriously".[7] Furthermore, even though the issue of racial and ethnic discrimination is a globally present issue, due to the complexity of the analysis which grows exponentially when it comes to taking into account the historical and other particularities concerning different parts of the world, the focus of the paper shall be on the situation in the European Union (EU).

The special focus in regard to European Union is inspired by the fact that on the one hand "Europe in general and EU Member States in particular have developed some of the broadest and most effective social policies against discrimination in the workplace and have accumulated much experience in addressing the practice".[8] On the other hand, however, racial and ethnic discrimination and segregation continue to exist and be widely present. As stated by the European Commission against Racism and Intolerance (ECRI), concerning Europe in general, "discrimination occurs both at the recruitment stage and in the workplace",[9] while such issues become even more present and occur in even worse forms in times of crises, such as the COVID-19 pandemic and the long-lasting effects of such events continue to affect the situation in the world of work.

Labour Organization, ILO calls for papers to help stop racial discrimination at work, https://www.ilo.org/global/topics/equality-and-discrimination/WCMS_839985/lang--en/index.htm. Further on, it is important to have in mind that "people who are denied equal opportunities because of their race often suffer discrimination in other spheres as well". International Labour Orgnization, Racial Discrimination in the World of Work, Programme for the Promotion of the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Office, Geneva, 5.

[6] International Labour Organization (2014), 5.

[7] Ibid., 20.

[8] International Labour Organization, Discrimination at Work in Europe, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_90_en.pdf.

[9] European Commission against Racism and Intolerance (ECRI), Combating racism and racial discrimination in employment: ECRI General Policy Recommendation No. 14: Key Topics, https://rm.coe.int/ecri-general-policy-recommendation-no-14-key-topics-combating-racism-a/16808b763d.

2 Tackling the Issue of Racial and Ethnic Discrimination from the Perspectives of Legal Mechanisms in the European Union

2.1 Legal Framework in the European Union

Even though the legal framework is just the starting point when it comes to combatting discrimination, without the existence of a comprehensive legal framework, the fight against discrimination remains a lost cause. In that regard, it is crucial to emphasize that prohibition of discrimination in all its forms, racial and ethnic discrimination included, is one of the core values that the EU is built upon and this issue is dealt with in the primary and secondary EU law, as well as the case law of the Court of Justice of the European Union (CJEU).[10] As stated in the Declaration by the High Representative on behalf of the EU on the occasion of the International Day for the Elimination of Racial Discrimination on 21 March 2019: "within the EU, we continue to fight against any pattern or manifestation of racial discrimination and hatred, and to apply all means to respect diversity".[11]

Taking a step back shows us that the very Treaty on the European Union (TEU)[12] stipulates the following: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".[13] What is more, it is stated that the Union "shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".[14]

When it comes to Treaty on the Functioning of the European Union (TFEU),[15] it is stated that "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, *racial or ethnic origin*, religion or belief, disability, age or sexual orientation",[16] as well as that the EU may take action with the

[10] Also, it is important to mention the fact that the EU, has, as its goal, universal ratification and implementation of International Convention on the Elimination of All Forms of Racial Discrimination by all its member states.

[11] Council of the EU, Declaration by the High Representative on behalf of the EU on the occasion of the International Day for the Elimination of Racial Discrimination 21 March 2019, Press release, https://www.consilium.europa.eu/en/press/press-releases/2019/03/21/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-occasion-of-the-international-day-for-the-elimination-of-racial-discrimination-21-march-2019/.

[12] European Union, Consolidated version of the Treaty on European Union, 26.10.2012, *Official Journal of the European Union*, C 326/13 – 326/45.

[13] Article 2 of the TEU.

[14] Article 3(3) subparagraph 1 of the TEU.

[15] European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26.10. 2012, *Official Journal of the European Union*, L 326/47-326/390.

[16] Article 10 of the TFEU.

goal of combatting such discrimination.[17] Also, the principle of non-discrimination based on race is clearly laid out in Charter of Fundamental Rights of the European Union,[18] whilst notable importance should be dedicated to secondary EC/EU law, especially directives. The key legal instrument in this regard is the Directive 2000/43/EC (Racial Equality Directive)[19] which, though it tackles the issue of racial discrimination in general, also highlights the issue of (in)equality in employment.[20] Namely, the Directive clearly prohibits both direct and indirect discrimination, as well as harassment. Furthermore, emphasized that the principle of equality applies to conditions for access to employment, access to all types and all levels of vocational guidance, employment and working conditions, including dismissals and pay, membership of and involvement in an organization of workers or employers, as well as social protection, social advantages and education.[21] Exception to this rule is made only if there are *genuine and determining occupational requirements*.[22] What is more, the Directive also addresses the issues of positive action, minimum requirements, dissemination of information, as well as the burden of proof, social dialogue and dialogue with non-governmental organizations.

Further on, also of great importance is the Directive 2000/78 (Employment Equality Directive),[23] which is constructed upon the understanding that "employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realizing their potential".[24] This directive is a horizontal one in the sense of dealing with employment in general. Moreover, it clearly refers to the Racial Equality Directive with regard to racial discrimination, which speaks of the fact that prohibition of racial discrimination is recognized when speaking of employment in the EU in general.

[17] Article 19 of the TFEU.

[18] Article 21 of the Charter of Fundamental Rights of the European Union (European Union, *Charter of Fundamental Rights of the European Union*, 18.12.2000, *Official Journal of the European Union*, C 364/1 – 364/22).

[19] European Union: Council of the European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 19.07.2000, *Official Journal of the European Union*, L 180/22 – 180/26.

[20] As stated in Article 1 of the Directive, "the purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment".

[21] Article 2 of the Racial Equality Directive.

[22] Article 4 of the Racial Equality Directive.

[23] European Union: Council of the European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 02.12.2000, *Official Journal of the European Union*, L 303–303/22.

[24] Furthermore, when speaking about equality in employment, one should bear in mind that the Directive 2006/54/EC deals with the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

2.2 Case Law of the Court of Justice of the European Union

In addition to the legal framework as such, it is important when discussing the issue, to take into account the case law of the CJEU,[25] whilst also bearing in mind that:

> The segmentation of workplace anti-discrimination law into three different sets of directives – one concerning race and ethnic origin, one concerning religion or belief, disability, age, or sexual orientation, and one concerning gender discrimination – presents an obstacle, as claims brought to the CJEU which span different directives may have to be brought under more than one of them.[26]

Given the very extensive case law of the CJEU, a few cases from the Court's case law shall be explained in more detail. Just by analyzing these cases, one can conclude that the CJEU has a clear stance regarding the importance of dealing with racial and ethnic discrimination.

In that sense, an example of a case that speaks of the Court's view concerning racial discrimination is the *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* case,[27] where the issue concerned an employer, a sales and installation company from Belgium, and the public statements of its director which were discriminatory in terms of employment of foreigners. It was left up to the CJEU to decide whether direct discrimination existed in the case at hand since there was no specific victim of such discriminatory policy. In this regard, the Court took the stance that:

> The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim.[28]

What is more, the Court also addressed the issue of burden of proof by taking the stance that it was up to the employer to prove that there was no discrimination. Therefore, the statements of the director referring to the fact that he refuses to hire people of certain ethnic and racial background were considered sufficient to constitute the presumption that there was discrimination.

Another important case in this regard is the *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* case.[29] Even though this case does not deal with

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[25] Also, especially in relation to race, Sandra Fredman is of the opinion that "there is some potential for a capacious approach to race or ethnic origin in EU jurisprudence", given the fact that the Racial Equality Directive, as well as other legal instruments does not provide for a clear definition of racial and ethnic origin. Fredman (2016), 75.

[26] Donegan (2020), 154.

[27] Case C-54/07, 10.07.2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, ECLI:EU:C:2008:397.

[28] Paragraph 25 of the *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*.

[29] Case C-83/14, 16.07.2015, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, ECLI:EU:C:2015:480.

the sphere of employment in particular, its importance in terms of protecting equality and even, to some extent, applying an intersectional approach, is noteworthy. Namely, this case dealt with the issue of electricity meters which were placed in higher locations in the areas where the dominant population was Roma in comparison to other areas in Bulgaria. The inhabitants of these areas felt stigmatized, "like criminals", and claimed they were deprived of the possibility to monitor and check electricity. Such practice was deemed to be discriminatory and resulting in stigmatization by the Court. The stance of the Court in this instance and in relation to the Racial Equality Directive was that:

"[…] the principle of equal treatment to which that directive refers applies not to a particular category of person but by reference to the grounds mentioned in Article 1 thereof, so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds".[30] On the basis of this, it can be concluded that the CJEU has, by addressing this case as an example of both direct and indirect discrimination, recognized, in an implicit manner, the intersection of race and ethnic origin with socio-economic status.

3 The Issue of Racial and Ethnic Discrimination in the European Union as the Existing Issue "Beyond the Law"

3.1 Introductory Remarks

Taking every step forward in terms of achieving equality, in employment and in general, *also* encompasses addressing the roots, consequences and other issues relating to discrimination i.e., issues "beyond the law".[31] In other words, regarding racial and ethnic discrimination, "although indispensable, the legal prohibition of racial discrimination alone may fail to eliminate this practice, and it is recognized now that a mix of policies and instruments is essential to achieve equality in the world of work".[32]

In this sense, special attention is going to be dedicated to the causes, consequences and statistics of racial and ethnic discrimination in the world of work, the issue of intersectional discrimination concerning racial discrimination and finally the impact that the COVID-19 pandemic has had on racial discrimination, all of the mentioned analyzed within the context of the EU. Only the analysis of the three mentioned

[30] Paragraph 56 of the *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia.*

[31] In that regard, it is necessary to insist to achieving substantive rather than "only" formal equality. For more about the issue of *substantive equality* see Smith (2016), 99.

[32] International Labour Organization, Racial Discrimination in the World of Work, Programme for the Promotion of the ILO Declaration on Fundamental Principles and Rights at Work, *op. cit*., 6.

aspects, i.e., issues, provides for a comprehensive picture of a situation when a person is discriminated based on their race and ethnicity (and potentially other grounds) *during, but also after* the COVID-19 pandemic in the EU.

3.2 *The Causes, Consequences and Statistics—Racial and Ethnic Discrimination in Practice*

As it is the case with any personal ground as a (potential) basis for discrimination, stereotypes and prejudices play a "crucial role" in affecting a person's situation in the world of work when it comes to race and ethnicity.[33] Namely, "discrimination and intolerance are often based on or justified by prejudice and stereotyping of people and social groups, consciously or unconsciously; they are an expression of prejudice in practice".[34] The situation is even more complex when speaking of racial discrimination and taking into account the historical context that contributes to its complexity. In this regard, one should have in mind that, not so long ago, in 1997, the results of the survey conducted in the EU were quite worrisome:

> with nearly 33% of those interviewed openly describing themselves as 'quite racist' or 'very racist'. Dissatisfaction with their life circumstances, fear of unemployment, insecurity about the future and low confidence in the way public authorities and the political establishment worked in their country were the main characteristics of those who put themselves at the top of the racist scale and who were more likely to agree with negative stereotypes on immigrants and minorities.[35]

Despite the fact that the situation has improved over time, even today, jobseekers and employees often face multiple, complex, and structural inequalities in the world of work.[36] Moreover, it should also be taken into account that the issue of race and ethnicity in the EU is also often related to the migrant status and that migrants are likely to be discriminated against, especially in the world of work. Proof of such claim can be found in the stance taken by International Labour Organization (ILO) when referring to the fact that "global migration combined with the redefinition of national boundaries and growing economic problems and inequalities have worsened xenophobia and racial and religious discrimination".[37] In light of the aforementioned,

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[33] In that sense, it is important to have in mind that "contemporary forms of discrimination, however, are often subtle and covert, posing problems for social scientific conceptualization and measurement". Pager and Shepherd (2008), 1.

[34] Council of Europe, Discrimination and Intolerance, https://www.coe.int/en/web/compass/discrimination-and-intolerance#:~:text=Discrimination%20and%20intolerance%20are%20often,of%20perpetuated%20forms%20of%20prejudice, accessed 18 November 2022.

[35] Eurobarometer Opinion Poll no 47.1 First results presented at the Closing Conference of the European Year Against Racism Luxembourg, 18 & 19 December 1997.

[36] Sheppard (2011), 35.

[37] International Labour Organization, ILO: Workplace discrimination, a picture of hope and concern, https://www.ilo.org/global/publications/world-of-work-magazine/articles/WCMS_081324/lang--en/index.htm.

it is especially important to reiterate the fact that "across Europe, the population is becoming increasingly ethnically diverse with migration from both within and outside the European Union transforming the ethnic composition of workplaces. The workplace, historically the key site for identity formation and consciousness is becoming recast as the primary site for interaction between people of different ethnicities, national origins and nationalities".[38]

When it comes to statistics, according to the survey conducted in the EU in 2019, "over half of Europeans believe racial or ethnic discrimination to be widespread in their countries, but with considerable variations between Member States".[39] Further on, based on research conducted by the Eurobarometar, ethnic background and skin color are considered to be amongst the most common grounds for discrimination, with over 50% of respondents arguing that such discrimination is widespread in the EU.[40] In this regard, the same research confirmed that fact that the labor market is not a "level playing field":

> One in four (25 %) respondents felt racially discriminated against when looking for work in the five years before the survey. The highest levels were observed in Austria (46 %), Luxembourg (47 %) and Italy (46 %).[41]

Furthermore, when dealing with racial and ethnic discrimination, one should take into account the existence of professional segregation in the EU. Namely, "the share of ethnic and racial minority workers in skilled-managerial, professional and technical occupations is lower than that of workers in the majority or dominant ethnic group in a majority of countries with data".[42] In that sense, research conducted by the European Union Agency for Fundamental Rights refers to the fact that the findings "on labor market participation are particularly striking, demonstrating that people of African descent are often engaged in low quality employment that does not correspond to their level of education".[43]

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[38] That is why it is especially important to focus on the situation in this regard, i.e., in the workplace. Jefferys et al. (2013), 4.

[39] European Parliament, EU legislation and policies to address racial and ethnic discrimination, https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690525/EPRS_BRI(2021)690525_EN.pdf. Namely, as stated earlier, many persons in the EU continue to face serious obstacles in relation to employment due to their race. Furthermore, when speaking about intersectional discrimination in relation to race in the EU: "the extent of intersectional disadvantage in the EU is difficult to gauge because of the lack of comprehensive data. While data disaggregated by gender and by age are readily available, there is little systematic collection of data on the other grounds, let alone data reflecting intersectional experiences". Sandra Fredman, *op. cit*., 39.

[40] European Commission, Special Eurobarametar 493, 6.

[41] European Agency for Fundamental Rights, Being Black in the EU Second European Union Minorities and Discrimination Survey, 10.

[42] United Nations Department of Economic and Social Affairs Division for Social Policy and Development, Employment Opportunities: Do Race and Ethnicity Matter?, Social Development Brief #3, https://www.un.org/development/desa/socialperspectiveondevelopment/wp-content/uploads/sites/27/2017/07/RWSSPolicyBrief3.pdf.

[43] European Agency for Fundamental Rights, Being Black in the EU Second European Union Minorities and Discrimination Survey, *op. cit*.

Even though the above data paint a picture in relation to ethnic and racial discrimination in the EU, it is also important to have in mind that "over 1 in 2 Europeans believe that discrimination because of one's ethnic origin is widespread. Yet no European-wide data is available on exactly how many persons experience unequal treatment because of their racial or ethnic origin".[44]

The EU is, undoubtedly, putting efforts aimed to address racial and ethnic discrimination. However, the data detail need to make a more concerted effort and go one step further each day with the goal to overcome racial and ethnic discrimination.[45]

3.3 Racial Discrimination in Light of Intersectional Discrimination in the EU

In order to understand and deal with discrimination in a comprehensive manner, it is important to, besides the analysis of discrimination based on a single ground, also implement the intersectional approach. Namely, it was Kimberlé Crenshaw who first pointed out that the situation of Afro-American women, in terms of obstacles and challenges they are faced with, can be fully understood only by applying the intersectional approach and understanding the concept of intersectional discrimination. In this regard, only the analysis that takes into account both gender and *race* (two or more grounds) as grounds that influence a person's situation without the possibility of distinguishing between them, i.e., the existence of intersectional discrimination, in some cases can provide a comprehensive insight into someone's situation.[46] When Crenshaw addresses the situation of Afro-American women, she states:

> Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.[47]

What is more, she emphasizes that the single-axis discourses, which takes into account only one ground of discrimination are not comprehensive as such "discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism.[48] Therefore, when dealing with the issue of race and ethnicity, it

[44] ENAR, Equality data, https://www.enar-eu.org/about/equality-data/, accessed 10 January 2023.

[45] European Commission, EU funding to tackle racism and xenophobia, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-funding-tackle-racism-and-xenophobia_en.

[46] "This racialization is just one of the ways in which racial hierarchy 'made up' gender, and not just race, and structured gendered hierarchies, and not just racial ones. The gendered and racialized ordering of racial patriarchy is precisely why women are (and historically have been) differentially intelligible as women". Carbado and Harris (2019), 2230.

[47] Crenshaw (1989), 140. In order to further emphasize the obstacles that victims of intersectional discrimination are faced with compares their situation with standing in the basement where other people stand on their shoulders, and the ones who can see above the ceiling, in fact understand that such a ceiling is actually the floor for the ones that are not victims of discrimination.

[48] Crenshaw (1991), 1252.

is also important to have in mind that victims of racial and ethnic discrimination are often discriminated based on other grounds as well, making their situation particularly difficult. Therefore, it is important to reflect on a person's situation by looking at different and multiple identities that a person has, but also the relations of power and subordination in society.[49] In other words, it is important to have in mind that "race, gender, class, disability, etc. are not just personal identity characteristics but social hierarchies that shape a person's power status and capabilities".[50]

In relation to this, it is crucial not to forget that a workplace and generally the sphere of employment is an area where intersectional discrimination is *very present*.[51] Therefore, it can be said that it is often the case that as a "consequence of gender and class oppression, that are then compounded by the racially discriminatory employment and housing practices" persons of certain races are deprived of their labor rights and even the possibility to find employment.[52] For example, when analyzing the issue of discrimination with the focus on race and gender in the EU, it is important to have in mind that "if an ethnic minority woman experiences discrimination, her suffering could result from sex discrimination, race discrimination or other forms of discrimination – but most often, it arises due to their confluence".[53] Taking into account the aforementioned, "on one hand the gender segregation, on the hand the racial segregation and all other reflections of racial and gender inequality in employment clearly speak of the difficult situation that a woman that is also discriminated based on her race is faced with".[54]

In light of the mentioned, Sandra Fredman states that:

> Intersectionality is perhaps most marked within Roma, Sinti and Traveller communities, where race, gender, age, disability and religious discrimination all interact to create multiple synergies of disadvantage. For many members of these communities, the discrimination manifested along the four axes highlighted here is particularly acute.[55]

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[49] Namely, "since symbolic violence and material inequalities are rooted in relationships that are defined by race, class, sexuality, and gender, the project of deconstructing the normative assumptions of these categories contributes to the possibility of positive social change". McCall (2005), 1771. However, it is also important not to forget that the issues of intersectional discrimination are on one hand the issues of identity, while they are also the issues of societal power structures. Fehr (2012), 19.

[50] Dimitrina Petrova (2016), 6. For more about "hierarchies of power based on race, immigration, religion, class, and citizenship among feminist activists, but not reducible to them" see Lé pinard (2020), 80.

[51] Xenidis (2018), 41.

[52] Kimberlé Crenshaw, *op. cit*., 1296.

[53] Cara Donegan, *op. cit*., 148–149. In that sense, it is commendable that through different EU reports special attention was dedicated to the issue of intersectional discrimination.

[54] In that sense, it is important to notice that the issue of race, in relation to religion as well as gender has caused greater attention of the EU in the last couple of years, and especially in relation to Muslim women and wearing headscarves. Namely, it is stated that "ignoring the intersections of religion, gender and race and how they shape particular situations could thus result in the invisibility of the specific prejudice experienced by Muslim women". Raphaële Xenidis, *op. cit*., 2.

[55] Fredman (2016), 42.

It can be concluded that there is still a long road ahead to recognizing, addressing and overcoming intersectional discrimination, globally and in the EU. In this sense, it is of utmost importance to have in mind that further efforts in this regard are necessary also when speaking about fighting against racial and ethnic discrimination.

3.4 The Influence of the COVID-19 Pandemic on Racial Discrimination in the World of Work

The COVID-19 pandemic, as any other crisis, has greatly affected the world of work, globally and in the EU.[56] Specifically, "across the globe, indigenous peoples as well as people of African descent, Roma and other ethnic minorities experience stigma, racism and racial discrimination […]This has been evidenced and exacerbated during the COVID-19 pandemic, in which some of the starkest inequities have emerged among populations experiencing racial discrimination".[57]

According to ILO, the pandemic was a major economic and labor market shock, which has and shall have long term consequences regarding both the unemployment and the quality of work.[58] The stance of the European Commission regarding the COVID-19 pandemic can be summarized through the following statement:

> The coronavirus crisis constitutes a challenge for the European economy and the livelihoods of citizens. During this health crisis, it is vital that we not only protect the critical sectors of our economy, but also our assets, technology and infrastructure, and more importantly, we need to protect jobs and workers.[59]

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[56] The advent of COVID-19 brought the world to a sudden halt, and the consequences for economies across the globe turned out to be far-reaching. The European Union has entered the deepest recession since World War II and deepening of the impact of COVID-19 on the economy and the labor market. European Union, How Covid-19 is reshaping the World, https://www.eeas.europa.eu/eeas/how-covid-19-reshaping-world_en. In light of the mentioned, it is important to look at a person's situation in a comprehensive manner, so not to forget that any issue that is analyzed in the period of the pandemic must be regarded in the wider context. Such context refers to the fact that persons were not equal even in terms of the right to health protection. Highly infectious diseases, such as COVID-19 often increase pressure on limited health care resources and if a society that often favors citizens of a country, non-citizens and people of color face a higher risk of infection and mortality from COVID-19. The risk of infection and death from COVID-19 is even higher for undocumented immigrants who are likely to avoid medical attention as they face an additional risk of detention and deportation (Devakumar et al. 2020, 1194).

[57] World Health Organization, Tackling structural racism and ethnicity-based discrimination in health, https://www.who.int/activities/tackling-structural-racism-and-ethnicity-based-discrimination-in-health.

[58] International Labor Organization (2021), 5.

[59] European Commission, Jobs and economy during the coronavirus pandemic, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic_en.

Many persons in the EU have lost their jobs, their income and generally any possibilities in the labor market.[60] Workers such as health and care workers, grocery and delivery personnel, bus and transport drivers, and domestic workers were frontline workers during the pandemic.[61] Further on, lockdowns and other measures have had a disproportionate impact on workers in a precarious employment situation, self-employed and workers in the informal economy.[62] Finally, it can be stated that those belonging to vulnerable groups, including those belonging to such groups based on race and ethnicity, have been put in an especially difficult situation, during and after the pandemic.[63]

The pandemic exacerbated existing inequalities, especially affecting those belonging to vulnerable groups with precarious and low-income jobs which in the EU, is often also related to the issue of race and ethnicity. Xenophobia, stigmatization and marginalization have become even more present.[64] In other words, the structural inequalities that are influenced by race and ethnicity have become even more evident which reflected on the functioning of the labor market and world of work.

A vivid example of the mentioned can be seen from the following:

> The Federal Antidiscrimination Agency in Germany received complaints about a doctor refusing to treat a patient of Chinese origin who had no COVID-19 symptoms but had recently been to China; a Chinese student who was prevented from renting a flat on the grounds that the owner 'did not want to have Coronavirus'; and the owner of a grocery store denying Chinese tourists access to his shop. In Poland, the staff of a wedding dress shop refused to serve two Asian clients. The Equality Ombudsman of Sweden reported on a complaint against a restaurant discriminating against persons of Chinese origin![65]

Namely, "the cases underline how this pandemic is exacerbating and shining a light on existing structural racism and inequalities in the labor market, in housing, or in

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[60] . In this regard, it is important to take into account that, according to research conducted by the European Foundation for the Improvement of Living and Working Conditions: "10% of respondents left the workforce and 8% became unemployed during the COVID-19 crisis. Countries with the highest proportions of respondents who lost their job during the pandemic were Spain and Greece (both 18%) and Hungary and Romania (both 14%). Vulnerable groups as young women and self-employed respondents under the age of 35 were most likely to become unemployed (11% women – compared to 9% of young men). According to the latest Eurostat quarterly data, in the first quarter of 2020, 12.1% of all people of working age (15–64) in employment had a temporary contract in the EU. These contracts were more common among young people aged 15–24 (45.6%) and less common among those aged 55 or over (5.1%)" (Eurofound 2020, 10).

[61] Workers in jobs that could not be performed from home and required physical proximity to other people have paid a double price during the COVID-19 crisis in terms of being subjected to a higher risk of both income loss, when their hours were cut or their jobs terminated, and infection when they continued working. These workers were disproportionately young, low educated, migrants, ethnic minorities and employed in low-paid occupations.

[62] Racial discrimination in the context of the COVID-19 crisis, https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/COVID19_and_Racial_Discrimination.pdf.

[63] European Union Agency for Fundamental Rights (2010), 45.

[64] International Labour Organization (2020).

[65] European Union Agency for Fundamental Rights (2020), 34.

institutions such as the police, meaning that some groups are being hit harder".[66] Thus it can be concluded, that the COVID-19 pandemic exacerbated the need for explicit policies to tackle racial and ethnic discrimination both with the greater intensity but at the same time in the long-term.

4 Concluding Remarks

Racial and ethnic discrimination continues to exist despite the consistent efforts to overcome it, and the COVID-19 pandemic has once again shown not only the existence but the scope of such discrimination. Namely, the existence of racism remains a reality all over the world, and the EU is no exception to this "rule". The basis for unequal treatment due to race can be found in the stereotypes and prejudices which are deeply rooted in the decades and centuries behind us and that stand in the way of achieving equality. The consequences of such discrimination are reflected on a daily basis across every sphere of life.

In light of the mentioned, it can be stated that the sphere in which such discrimination is especially present is the sphere of employment—both jobseekers and employees often face racial and ethnic discrimination. This is true in any part of the world, including the EU. In this regard, it must be stated that both primary and secondary EU law recognize of importance of prohibition of (racial and ethnic) discrimination, while the case law of the CJEU further emphasizes the efforts of the EU to put an end to the existence of such discrimination. However, as with every legal issue, especially legal issues regarding discrimination, this also has an aspect that is "beyond the law" and the legal framework and case law as such are not sufficient in this instance.

Namely, the data from the EU testifies the fact that race and ethnic background are amongst the most prevalent grounds for discrimination, and conducted research speaks of the many respondents that were discriminated against in the labor market and, more generally, world of work. Racial segregation being the defining factor regarding the type of employment, is also very present in the EU. Furthermore, the issue becomes even more complex when we consider the existence of intersectional discrimination, i.e., discrimination based on more grounds simultaneously, while the synergic nature of such discrimination that has an extremely negative effect on a person's situation.

Finally, the effects of the COVID-19 pandemic in the world of work must be reflected upon from the perspective of all of above mentioned aspects. In that sense, each crisis, including the one caused by the pandemic, further highlights inequalities in the world of work. Therefore, it can be concluded that the crisis caused by the pandemic has further emphasized the existence of racial and ethnic discrimination

[66] ENAR, Evidence of the impact of COVID-19 on racialised communities exposes need to address persistant ineqaulities and racism, https://www.enar-eu.org/evidence-of-the-impact-of-covid-19-on-racialised-communities-exposes-need-to/.

in the EU and the structural issues that need to be dealt with in this regard. Certainly, dealing with the effect that the pandemic has had on particular legal issues was crucial during the peak of it, but it is also of great importance when discussing the post-pandemic landscape and the long-term consequences that have not ceased to exist.

To conclude, the COVID-19 pandemic has created obstacles with far-reaching implications for the ability of all individuals to survive, thrive, and participate in an economy that gives equal chance to each and every person. However, this should not be considered a discouragement but rather a reason to put even more efforts aimed at achieving equality.

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Right to Salary Benefit During Temporary Inability to Work Due to COVID-19

Anđelija Tasić and Goran Obradović

Abstract In 2020, the Government of the Republic of Serbia brought a non-binding conclusion that recommends employers raise the amount of salary benefit from 65 to 100% in all cases involving the contagious SARS-COV-2 virus, which differs from the general norm for all other medical reasons. This recommendation becomes binding only upon being incorporated in a relevant general act of employers (mainly those funded from the RS budget), and it does not depend on any additional factors: whether the employee is vaccinated or not, whether he/she refuses treatment without justified reasons etc. The main question of this paper is whether the different treatment between the employees infected only by one specific disease could be justified. Related to that question we are also wondering if different treatments can be conditioned by the employee's behaviour in assessing his/her contribution to the contagion and the development of the disease. Finally, we are questioning whether it violates the principle of equality or the actual application of the good faith and fair dealing principle to those who deliberately or in gross negligence endanger themselves and others. To answer these questions, we refer to the relevant case law of the ECtHR, which finds itself competent to the question of vaccination under the scope of Article 8.

Keywords Right to salary benefit · Temporary inability to work · COVID-19

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1 The Republic of Serbia, COVID-19 and the Law "in the Context" of Natural Sciences

The World Health Organization (WHO), on March 11, 2020, declared the novel coronavirus (COVID-19) outbreak a global pandemic caused by the SARS-CoV-2 virus.[1] The pandemic created a new reality and brought many new challenges in almost all areas of life. The states worldwide responded to the pandemic differently, but with the same goal—to protect the population against this disease. The Republic of Serbia declared a state of emergency on March 15, 2020.[2] As the National Assembly was not in a position to convene, the decision proclaiming the state of emergency was adopted by the President of the Republic together with the President of the National Assembly and the Prime Minister, as envisaged by the constitution. This decision served as a base for bringing different legal acts which permanently or temporarily changed the legal system of the Republic of Serbia.[3] Based on this decision, the Republic of Serbia made the derogation of the European Convention of Human Rights and Fundamental Freedoms, based on Article 15 of the Convention. Unlike some other countries, which in the notice of derogation of human rights addressed to the Council of Europe emphasized which rights this restriction refers to, the Republic of Serbia did not do so.[4] The only rights in relation to which no derogation is allowed are the right to life (except in respect of deaths resulting from lawful acts of war), the prohibition of torture, prohibition of slavery and forced labor and punishment only based on law.[5] This derogation lasted from April 7 to October 13, 2020.

The goal of this paper is to, looking at the issue of changing labor law regulations, point out the need to look at the issue of immunization "in context"—both of other sciences and in the context of one branch of law versus/complementary with another branch of law. Do we look at law in context, or do we look for context in law? Context has at least two meanings: how one legal norm relates to other legal norms or its social, political, economic, or religious environment. The first question has an internal perspective, so it is monodisciplinary, and the second question has an external perspective that requires the influence of other—non-legal disciplines. The external perspective is much more difficult for the legal researcher because it raises the question of how competent he/she is to conduct non-legal research. The internal perspective refers to the study within law; it explores the relationships between norms and their place in the legal system. The external perspective is interdisciplinary and more demanding regarding the research question and the methods for its processing,

[1] https://www.who.int.

[2] "Official Gazette RS", No. 29/2020 (15.3.2020).

[3] It is interesting to mention that Republic of Serbia declared the coronavirus epidemic only just after it declared the state of emergency, although it is expected that a state of emergency will be declared due to the declared epidemic. "Official GazeteRS", No. 37/2020 (20.3.2020).

[4] Derogation in time of emergency was made by the following member states: Albania, Estonia, Armenia, Georgia (the derogation lasted until December 31, 2022), Latvia, North Macedonia, Moldova, Romania and San Marino (https://www.coe.int/en/web/conventions/derogations-covid-19).

[5] Nastić (2020), 75.

but in return, it offers rounded answers.[6] To understand the issue of vaccination—the mandatory, as well as the difference in treatment toward vaccinated and non-vaccinated to prevent infectious disease, knowledge of natural sciences is needed, or at least the correct use of the conclusions reached by researchers from the field of natural sciences. The hypothesis we are starting from is that the findings made by natural scientists conditioned specific legal solutions, while the limits set by law affect the scope of research. In this particular case, if natural scientists had taken a firmer stance about the efficiency of the vaccination, the law could introduce mandatory vaccination. However, the broader understanding of *causa* in obligation law encourages defensive medicine. That is why we should support interdisciplinarity—even though that is the more challenging way.

2 Temporarily Absence from Work Due to COVID-19—A Punishment or a Reward

The COVID-19 pandemic motivated the Government of the Republic of Serbia to adopt Conclusion 05 No. 53-3008/2020-2 on the recommendation to employers to amend their general act, i.e., employment contract or other individual act, in the part that governs wage compensation, i.e., salary compensation.[7] This conclusion recommends to all employers to pay the full amount of the salary to to all employees who are sick with COVID-19 and are temporarily absent from work, or are in isolation or self-isolation due to the contact with COVID-19 diseased. In conclusion, it was established that employers who adopt the recommendation pay compensation: for the first 30 days of absence from work, at the expense of the employer's own resources (all 100%), and starting from the 31st day of absence, 35% is at the expense of the employer's own resources, because the prescribed amount of compensation of 65% according to the provisions of Article 95 of the Law on Health Insurance comes from the funds of the compulsory health insurance. However, the conclusion mentioned above underwent changes. The government amended it through conclusion 05 No. 53-4228/2021, which is in force from May 5 2021.[8] A new line was added, stating: "The right to compensation of wages in the amount of 100% of the basis for compensation of wages is provided to employees who, during the duration of the declared infectious disease epidemic and before temporary absence from work due to the confirmed infectious disease COVID-19, were vaccinated, as well as to employees who cannot be vaccinated for health reasons and who, along with a doctor's report on temporary incapacity for work, submit a corresponding certificate from the competent health institution."

As a reminder, compensation for wages during temporary incapacity for work belongs to the insured person, i.e. a member of his immediate family whose condition

[6] Cvetković (2022), 218.

[7] "Official Gazete RS", No. 50/2020 – hereandafter: Initial Conclusion (4.3.2020).

[8] "Official Gazette RS", No. 46/2021 – hereandafter: New Conclusion (5.5.2021).

is such that the insured person is prevented from working. This is due to, among other things, the prescribed measure of mandatory isolation as a virus carrier, or due to the appearance of infectious diseases in his environment (Article 73, Paragraph 1, Item 4 of the Law on Health Insurance[9]). These persons are entitled to salary compensation, which is provided from the mandatory health insurance funds in the amount of 65% of the base for salary compensation. For the first 30 days of absence, the employer provides the compensation, and from the 31st day, the Republic Health Insurance Fund. However, the insured does not have the right to compensation if he/she intentionally prevents recovery or abuses the right to use the leave from work due to temporary inability to work in some other way (violation of self-isolation, for example, Article 84 of the Law on Health Insurance).

The new conclusion created doubts regarding the employer's obligation to provide compensation of 100% of wages to employees who were vaccinated when the epidemic was declared. Bearing in mind the previously stated positions and disputed point 3a of the new conclusion, it follows from the language interpretation of the provision "provided" that all employees who meet the condition of vaccination or its justified absence have the right to compensation of 100% of their salary. After that they are temporarily prevented from work as a result of being infected with COVID-19, regardless of where they were infected.

However, we would like to remind you of Article 115, paragraph 1, item 1 of the Labor Law.[10] This article enables an employee who exercises the right to wage compensation to receive at least 65% of the average salary, which is definitely lower than the 100% enabled by the conclusions. As the conclusions—both initial and new—is an act of the executive power it cannot be considered a regulation (law) by which this issue could be handled differently.

The provisions of the initial conclusion are, without any additional discussion, incorporated into the special collective agreements for 2020.[11] This agreement confirms that the employee, in case of the established infectious disease COVID-19 or due to the measure of isolation or self-isolation ordered in connection with that disease has the right to 100% compensation. Once again, this agreement differs from the regulations stipulated in the Labor Law. This special collective agreement in the field of higher education, without amendments, has been extended until December 14, 2022.[12]

It is important to emphasise that the Republic of Serbia did not introduce a mandatory vaccination measure against the disease COVID-19.[13] Therefore, there are no

[9] "Official Gazette", No. 25/2019.

[10] "Official Gazette", No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – Constitutional Court Decision, 113/2017 and 95/2018 – authentical interpretation.

[11] For example: Special collective agreement for higher education, "Official Gazette", No. 86/2019, 93/2020 or Special collective agreement for employed in elementary and high schools and pupil's dormitories. "Official Gazette", No. 21/2015, 92/2020, 123/2022.

[12] https://prosveta.gov.rs/vesti/produzeno-vazenje-posebnog-kolektivnog-ugovora-za-visoko-obrazovanje/.

[13] And yet, given the atmosphere of fear (of death, hospitalization and long-term negative effects of the disease) created by the government, mandatory immunization was imposed as a key response

sanctions for those who decide not to get vaccinated. The Law on the Protection of the Population from Infectious Diseases defines the terms "mandatory immunization" and "recommended immunization".[14] The former refers to the immunization of persons of a certain age, as well as other persons specified by law, which the person to be immunized, as well as the parent or guardian, cannot refuse. However, there is an exception in the case of temporary or permanent medical contraindications determined by a medical doctor of the appropriate specialty, or an expert team, for contraindications (Art. 32, paragraph 2). The latter refers to immunization recommended by a medical doctor or a specialist in the appropriate branch of medicine in accordance with the population immunization program against certain infectious diseases (Art. 32, paragraph 5).[15] It is important to note that although the Law on the Protection of the Population from Infectious Diseases underwent changes in 2020 inspired by the COVID-19 pandemic,[16] and introduced concepts such as "home isolation" (Art. 29a), "quarantine in home conditions" (Art. 31a) or "preventive measures restricting the freedom of movement of persons in collective accommodation to prevent the introduction of infection into the collective" (Art. 31b). However, these amendments did not change the list of persons or diseases for which mandatory or recommended immunization is prescribed, neither serve as a basis for introducing mandatory immunization against COVID-19.

3 Summum Ius, Summa Iniuria

How do we find these conclusions inappropriate—in contrary to the Labor Law and antidiscrimination norms on national and international levels? The relationship between persons who went on leave due to a temporary inability to work due to

to the current situation. However, the state persistently denied responsibility for the negative effects of vaccination (Radulović (2022, 99–118).

[14] "Official Gazette RS", No. 15/2016, 68/2020 and 136/2020.

[15] This article of the Law was also the subject of an initiative to assess constitutionality and compliance with confirmed international treaties. By the decision of the Constitutional Court IUz 46/2016 of October 26, 2017, the Constitutional Court found that "there is no basis for initiating proceedings because prescribing mandatory immunization against certain diseases established by law does not contradict the constitutional guarantee of the right to protection of physical and mental health from Article 68, Paragraph 1 of the Constitution."On the contrary, the mentioned measure is undertaken precisely with the aim of achieving the highest possible level of preserving the health of citizens and eradicating certain infectious diseases, in accordance with the mentioned constitutional provision".

[16] According to the Law on the Protection of the Population from Infectious Diseases, infectious diseases by category and special health issues that are subject to epidemiological surveillance and against which measures to prevent and control infectious diseases are applied are: (1) diseases that can be prevented by immunization, (2) sexually transmitted diseases, (3) viral hepatitis, (4) food and water borne diseases and environmental diseases, (5) other diseases and (6) special health issues. Category 5 (other diseases) includes: (1) diseases transmitted by non-conventional pathogens, (2) airborne diseases, (3) zoonoses, (4) serious imported diseases and (5) vector-borne diseases. The disease COVID-19, which is caused by the SARS-CoV-2 virus, belongs to the category of airborne diseases.

infection with the SARS-CoV-2 virus and those who are absent due to temporary inability to work caused by another virus is disputed. Furthermore, the ultimate effect that the proposed measure has on different types of employers seems controversial. Before these provisions are interpreted in the context of the right to equality and the prohibition of discrimination, it is important to emphasize that the decision-maker itself, the government, referred not only to the decision on the introduction of a state of emergency as a legal basis, but also to Art. 8 para. 2 of the Labor Law. According to this provision the general act and the labor contract may establish better rights and more favorable working conditions when compared to the rights and conditions established by law.

The prohibition of discrimination represents one of the fundamental human rights, raised to the rank of basic principles by the Serbian constitution (Art. 21).[17] Article 20 para. 2. foresees that the achieved level of human and minority rights cannot be reduced. The prohibition of discrimination is elaborated in the Law on Prohibition of Discrimination,[18] as an umbrella law, which, among other things, prohibits discrimination based on the health status (Article 2, paragraph 1, point 1). It provides the entire range of prohibitions related to discrimination in the field of work (Art. 16). The Labor Law also prohibits indirect and direct discrimination of persons seeking employment, as well as employees, based on different personal characteristics, including their health status (Art. 18). Putting persons suffering from different diseases in a different position, and even more narrowly, persons suffering from a different type of infectious disease, can be considered as putting them in a disadvantageous position by any act, action or omission of a person or a group of persons, due to his or their personal characteristics, which constitutes direct discrimination (Art. 6 of the Law on Prohibition of Discrimination). In this case, by an act of the Serbian government, an act of direct discrimination was caused to persons suffering from some other infectious disease, which is not COVID-19. Special measures that the Republic of Serbia may introduce to achieve full equality of persons or groups of persons who are essentially in an unequal position with other citizens (affirmative action measures, Article 21, Para 4 of the Constitution) are not considered discrimination. Here, however, this article of the constitution cannot be applied. Persons suffering from the disease COVID-19 are in the same position as those suffering from other infectious diseases.

Another equally important question in the context of equality is whether the conclusions, equally affect the position of employees in the public and private sectors. As already emphasized, the preliminary conclusion has become an integral part of special collective agreements. In contrast, the employer in the private sector had no obligation to apply this recommendation to his employees. This leads us to the concept of indirect discrimination, which, by an apparently neutral provision, criterion or practice, puts or could put a person or a group of persons, due to their personal characteristics, in a disadvantageous position compared to other persons in the same or similar situation. Such a treatment is illegal, unless it is objectively justified by

[17] "Official Gazette RS", No. 98/2006 and 115/2021.

[18] "Official Gazette RS", No. 22/2009 and 52/2021.

a legitimate aim, and the means to achieve that goal are appropriate and necessary (Art. 7. Law on Prohibition of Discrimination). However, in the special collective agreement the part concerning vaccination is not incorporated, so all the people in the public sector, infected by or isolated because of the COVID-19 get the full amount of the compensation. Thus, the number of people who are in an unequal (more favorable) situation is increased. By not introducing the provision from the new conclusion, which narrows the scope of this right to the vaccinated and persons who are contraindicated for vaccination, the incentive for vaccination as a potential legitimate goal is lost.[19] Therefore, the initial conclusion will bind only the employer in the public sector and, consequently, will only affect the employees in the public sector. As users of budget funds, 100% of their earnings will be reimbursed by the Republic of Serbia, i.e., its citizens, in one way or another. For employees in the private sector, it is expected that compensation due to temporary disability for work remains 65%.

An additional question is whether persons who refused immunization without a medically justifiable reason have the right to compensation of wages (even 65%), if the infection of COVID-19 caused the inability to work. The Law on Health Insurance prescribes cases when the insured will not have the right to compensation for wages during temporary incapacity for work. However, the provisions of the Law on Obligations are also applicable,[20] especially those concerning the principles of conscientiousness and honesty (Art. 12. Law on Obligation). In case of inability to work due to the infection of COVID-19, the damage for the insured is reflected in the reduction of wages, for the employer in terms of payment of wages until the 30th day of incapacity, and for the Health Insurance Fund in terms of treatment costs and compensation after the 30th day of illness. Therefore, the question arises whether the employee who refused immunization without a valid reason contributed to the occurrence of damage by violating the principle of conscientiousness and honesty, and whether there is a right to compensation in the event of a temporary inability to work due to a COVID-19 infection.

[19] The Republic of Serbia tried to encourage vaccination in various ways, so, among other things, it passed the Decree on incentive measures for immunization and prevention and suppression of the infectious disease COVID-19, "Official Gazette RS", No. 46/2021 by which "citizens of the Republic of Serbia over the age of 16 who, as of May 31, 2021, have received at least one dose of the vaccine against the infectious disease COVID-19 on the territory of the Republic of Serbia, whose safety, effectiveness and quality confirmed by the Agency for Medicines and Medical Devices of Serbia and issued a license for the use of the medicine, i.e. who expressed interest in immunization through the eAdministration portal by May 31, 2021 and received at least one dose of that vaccine by June 7, 2021, is entitled to the payment of a monetary amount of 3,000.00 dinars in the name of contribution to the prevention of the spread of an infectious disease, that is, the prevention and suppression of an infectious disease". More about the legal framework of immunization against COVID-19: Mojašević and Stefanović (2022), 79–98.

[20] "Official Gazette SFRY", No. 29/78, 39/85, 45/89 – Constitutional Court Decision and 57/89, "Official Gazette FRY", No. 31/93, "Official Gazette SM", No. 1/2003 – Constitutional Charter and "Official Gazette RS", No. 18/2020.

We should emphasise that no national case law regarding vaccination exists in any context. Considering that court decisions are based, *inter alia*, on the ratified international treaties, we shifted our attention to the relevant case law of the European Court of Human Rights (ECtHR). In its grounds for reasoning, judges often point to the case law of the ECtHR. ECtHR was rarely involved in cases regarding compulsory immunization. In (a total of) two cases in which the court acted, it brought the issue of mandatory immunization in connection with a potential violation of Art 8 of the European Convention—the right to personal and family life.[21] As there was no forced immunization in both cases, the initial question arose as whether this issue can be considered a violation of physical integrity. Regarding the urgent social need for the introduction of a mandatory vaccination policy, the ECtHR reminded that member states have a positive obligation to take measures to protect the life and health of people under their jurisdiction. The court further highlighted the risk to general health if immunization remained at the recommended level, which meant in the specific case that the response of the Czech authorities was a reaction to an immediate social need. The Court also accepted as valid and sufficient that the Czech government gave in support of the mandatory immunization policy, especially considering the best interests of children. Finally, examining mandatory immunization as a proportionate measure to protect the population from infectious diseases, the ECtHR first examined the relevant items of the national system (paras. 290–309). Examining the proportionality of the measure, the ECtHR examined the transparency of domestic decisions and emphasized the consensus regarding the effectiveness of immunization and the safety of vaccines. The second important question was whether there is a possibility of compensation for damages if an individual suffers adverse consequences due to immunization, although he emphasized that the said issue is not relevant in the specific case.

In another case—Vavrička and others the ECtHR explicitly confirmed that mandatory immunization, as an involuntary medical intervention, represents an interference with the right to respect for private life, regardless of whether the immunization was carried out (para 261). Although the case concerns the mandatory immunization of children against certain infectious diseases, and consequently, the sanctions that follow for the refusal of immunization (denial of stay in kindergarten, and a fine for the adult responsible for the children), it is expected that it paves the way for eventual decisions concerning (mandatory) immunizations in case of the disease COVID-19. So far, the ECtHR has not ruled on such cases. However, it has ruled in three cases in which it did not go into the merits, but decided on the issuance of temporary measures

[21] Solomakhin v. Ukraine, Application No. 24429/03, Vavřička and Others v the Czech Republic, Application No. 47621/13, 3867/14, 73094/14.

against the laws on mandatory immunization against the COVID-19 disease, namely one against France,[22] and two against Greece.[23]

4 Conclusion

In this paper, we tried to give answers to certain questions regarding the difference treatment during temporary inability to work due to COVID-19. Our main concern was whether the difference in treatment towards infected by COVID-19 and by other diseased could be justified and if that inequality in treatment could be caused by the prior behaviour of the employee (wearing a mask, vaccination). To conclude, we found the different treatments of vaccinated and non-vaccinated persons were justified and in accordance with Serbian law. It is also in accordance with the ECHR and the relevant case law of the ECtHR as far as applicable. The differing treatment passes the so-called discrimination test, as first introduced and subsequently confirmed by various cases of the ECtHR. We find the protection of the life and health of people under the jurisdiction of the Republic of Serbia objective reason, and different amounts of salary benefit for the vaccinated as the proportionate measure, speaking by the language of the ECtHR. Further, we argued the issue of mandatory vaccination, as the aside one. However, even though the Law on the Protection of the Population from Infectious Diseases actually allows the introduction of mandatory vaccination, it hasn't been done for COVID-19. We have argued that mandatory vaccination was one of the possible answers, at least at the peak of the pandemic. By not using this option the Republic of Serbia failed to use all possible means to protect its citizens. However, the measure taken to encourage vaccination by financially stimulating persons who decided on vaccination could have been a small, but an important incentive towards immunisation.

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Law on the Protection against discrimination
Law on the Protection of the Population from Infectious Diseases
Kakaletri and Others v. Greece, Application No. 43375/21
Solomakhin v. Ukraine, Application No. 24429/03
Theofanopoulou and Others v. Greece. Application No. 43910/21
Vavřička and Others v the Czech Republic, Application No. 47621/13, 3867/14, 73094/14

Mandatory Vaccination Against COVID-19 in Europe: Public Health Versus 'Saved by the Bell' Individual Autonomy

Elena Ignovska

Abstract The text aims to reconcile the bioethical principles (autonomy, beneficence, non-maleficence and justice) (Beauchamp TL, Childress JF in Principles of biomedical ethics, 6th edn. Oxford University Press, 2009) with the principles used by legal institutions (primarily, the European Court of Human Rights) to evaluate possible human rights infringements due to mandatory vaccination against Covid-19 (legality, necessity, proportionality and legitimate aim) (This is the so-called 'structural approach' that the ECtHR follows when considering interferences of the qualified right and is also stipulated in article 26 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention).) by National Public Health policies of the Member States of the Council of Europe. (Even more, the idea is to bring closer the methodology of teaching/learning and researching via the HELP platform of the Council of Europe in the course on Bioethics to the law students.) The trigger is to test these principles using deductive reasoning in the pioneering Austrian case of mandatory vaccination, while inductive methodology is used to evaluate how recent similar cases (such as Vavřička and Others v. Czech Republic) contributed to support the theory that next to human rights, there are also duties. Since circumstances with the pandemic are rather turbulent and constantly changing (even as this article is being written), the time factor significantly influences the conclusions drawn. Namely, the author holds the opinion that with a carefully chosen methodology and model, any severe disease that significantly threatens the individual and public health at particular time, period or might constantly be a reason to restrict individual autonomy with scientifically proven, safe and efficient vaccines. Nevertheless, regarding Covid-19, at the current time, even if the means of coercion do not include applying direct physical force (As in the case of Vavřička or in the pioneering but suspended legislation for mandatory vaccination in Austria.), they are not proportionate to the possible infringement on

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one's private life and individual consent for the sake of public health, or at least not anymore.

Keywords Mandatory vaccination · Covid-19 · Informed consent · Public health · Bioethics · Law

1 Introduction

The Covid-19 pandemic management emphasized the necessity for an international and interdisciplinary approach among a few disciplines such as, but not limited to, medicine, epidemiology, virology, bioethics and biolaw in order to create adequate public health policies. An isolated observation of such a complicated (yet not fully known)[1] and broad-scale (global) phenomenon fails to be satisfactory. The first mass vaccination program started in early December 2020 and since then different brands of vaccines such as prevention from infection have been available.[2] Societies worldwide initially faced dilemmas regarding: (1) the fast-track vaccine development in a public health emergency[3] and (2) equality and equity in their distribution,[4] whilst later on there was a shift towards: (3) their mandatory or voluntary application (related to the concept of informed consent) and (4) restrictions on human rights for the non-vaccinated (for instance, the right to free movement[5] and the right to private life) or possible discrimination.[6] The reasons why a person intentionally avoids vaccination differ (mostly related to trust towards the institutions or the health system that approves and applies them[7] or fraudulent research findings).[8] Regardless of the reasons, the mere fact that there is vaccine hesitancy and skepticism over immunization via vaccination is enough for the purposes of this text.

[1] For instance, we lacked for a long time the necessary medical and epidemiological expertise to assess whether vaccines as a mandatory public health measure are necessary and proportionate to the aim—protecting public health and the rights of others. Namely, developing herd immunity could count as a legitimate aim but we still do not fully know if the mandatory vaccination is the only or the best (there are no others/better alternatives) way to achieve that goal. Even more, with corona viruses, it is probable that vaccination cannot achieve herd immunity at all times, having in mind that we constantly need buster doses. Furthermore, we still do not fully know if vaccines are efficient for the newly detected variants.

[2] WHO (2022).

[3] In Europe monitored by European Medicines Agency (EMA).

[4] Committee on Bioethics (DH-BIO), Council of Europe (22 Jan. 2021).

[5] Derived from art. 45 of the European Charter of Fundamental Rights as a right of EU citizens and legally resident third-country nationals to move and freely reside within the territory of the EU Member States.

[6] Committee on Bioethics (DH-BIO), Council of Europe (4 May 2021).

[7] Larson et al. (2018), p. 6.

[8] Wakefield et al. (1998).

Austria was the first country in Europe that tried to make Covid-19 vaccines mandatory for all adults with the law in force since February 3, 2022 (soon after suspended). Other countries were considering similar possibilities (for instance, Greece, France, Germany, Italy, Hungary, the United Kingdom, Poland, Slovakia, Luxembourg etc.),[9] while already having restrictions for the non-vaccinated on different grounds: (1) age (usually over 50 or 60), (2) profession (doctors, nurses, teachers etc.), (3) participation in public activities, entrance to particular restaurants, institutions etc.[10]

Inevitably, questions arise regarding the ethical and legal aspects of mandatory immunization.

2 How Both Bioethics and Biolaw Are Engaged in the Discussion over Mandatory Vaccination

The term bioethics was first introduced by Van Rensselaer Potter in 1970 who launched the beginning of a new scientific field critical towards life and new scientific challenges. Next to Potter, a very important contribution is held by Andre Hellegers. Even though they come from different professional background (biologist and physician), they managed to unite and standardize a new emerging discipline—bioethics.[11] In the very beginning of such conception, the American contribution is also indisputable, especially after the Conference on the birth of Bioethics organized by Albert R. Jonson at the University of Washington in 1992.[12] According to him, the genesis of bioethics is deeply rooted in the American ethos and its three main characteristics: moralism—affinity to moralize human actions, meliorism—belief that the human condition could and should be improved and individualism as a reflection of the human's free will. Despite some controversies regarding the issue as to who holds the innovation rights of the new discipline—bioethics, Diego Gracia stands at the opinion that bioethics is a global phenomenon with global importance and implications that are more our future than our past. For him, one of the main reasons for the development of the new science is the emancipation of the human person in light of making decisions on his own about his own body (including the controversial decisions about his own life and death) by substituting the traditional principle of imposed preferred decisions with the principle of autonomy.[13]

[9] Chadwick (2022). Also see: Reich (2021).

[10] The ECtHR already rejected three applications for interim measures during the pandemics against Greece and France, as well as against other countries where not all national remedies have been exhausted. In addition to it, other applications are ongoing in front of the courts of the member states of the European Union and of the Council of Europe. See more in Janis (2021).

[11] See more in Potter (1970, 1971).

[12] Jonsen (1997).

[13] Gracia (1989).

Theoretically, there are two opposed standpoints regarding the role that the law may have in bioethical issues. According to the first, the role of the law should be minimalistic so that a private, individual approach and choice of the patient is allowed. The reason for such a diminutive attitude towards the law could be traced in the concepts of individual autonomy and social regulation but also in the internal ethical codex of medicine.[14] According to the second, the role of the law is crucial because it has to regulate it all and not leave it up to individual discretion to differentiate what is right and what is wrong. The third, neutral approach stands for weak law—a law that imposes only some basic rights and obligations. Here, individuals are free to make their choices in between these basics but only in informed, predictable, unified and equally available ways.

Chronologically, the first and still the main source of regulating the intersection between Human rights and Bioethics is the European Convention on Human Rights (ECHR)—1950. The Convention itself does not mention Bioethics directly (since Bioethics as a scientific field emerged later on), but many articles such as art. 2 (right to life), art. 3 (prohibition of inhumane and degrading treatment) and art. 8 (right to private and family life) refer to it and are used by the European Court of Human Rights (ECtHR) when dealing with such issues in particular cases. The Court actually has to be very prudent and patient when deciding in such ethically sensitive issues, especially those related to the beginning of life, end of life and many bio-processes in between, due to the margin of appreciation mechanism, that in such cases is still considered to be flexible allowing national states (Member States of the Council of Europe) to decide themselves about issues they consider important for their public interest, therefore under their own national supremacy.[15,16]

Second, yet a very important source of legal reasoning for the ECtHR in the intersection of bioethics and law is the Convention for the Protection of Human Rights and Dignity of the Human Being with regards to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (so called Oviedo

[14] Nielsen (1998) and Garrison and Schneider (2002).

[15] For more on how the mechanism operates see in Schokkenbroek (1998).

[16] For instance, the application of art. 2 is controversial in cases regarding the beginning and the end of human life. In cases that deal with the beginning of the human life, the destiny of human embryos is still contested. The ECtHR has decided in many cases that regard the life of in vitro embryos (for instance, the cases Evans v. the UK, Droon v. France, Maurice v. France or Costa and Pavan v. Italy), or in vivo embryos that touch upon abortion (one of the most important to be Vo v. France) in which, in general, concluded that life of embryos is not covered by the protection offered in art. 2 (even though there were many dissenting opinions). In the cases that deal with the end of life, the Court has also been challenged to decide (for instance, in the case of Pretty v. the UK, concluding that the right to live does not include the right to die). In both cases (beginning and end of life), the general conclusion still is that these topics do not enjoy European consensus, therefore national states should enjoy more flexibility and supremacy to decide on their own. When it comes to the application of art. 8 (private and family life), in circumstances where surrogate arrangements are not a European consensus (in most European countries are forbidden due to prevention of women's bodies exploitation), the case of Paradiso and Campanelli v. Italy (reproductive tourism from a country that banns surrogacies to a country that allows them) followed a wide margin of appreciation towards the national authorities allowing them supremacy in regulating such ethically sensitive practices under the excuse—protection of public interest.

Convention).[17] The Preamble of the Convention states its devotion to take measures that are necessary to safeguard human dignity and fundamental rights and freedoms of the individual with regard to the application of biology and medicine, legally regulated in advance and with consent of the concerned. The aim of the Convention is to protect human dignity, rights and freedoms through informed consent, protection of private life and ban on discrimination. In general, the Convention gives priority to individual over collective interests as a prevention of eventual experiments for the sake of certain group interests or ideologies, especially ones practiced in the past, with the goal being that they are never repeated again. The approach of the Convention is structural (art. 26)—the rights and freedoms could be restricted only under certain circumstances: (1) the restrictions are stipulated in the law (principle of legality), (2) the restriction is necessary in a democratic society (principle of proportionality), and the restriction is in public interest (protection of public health, rights and freedoms of others etc.) i.e. legitimate aim. This is in line with the legal methodology used by the ECtHR itself.[18]

The last, but not least important, European international document in the intersection of human rights and bioethics is the Charter of Fundamental Rights of the European Union (Charter). This Charter is in line with the ECHR and the Oviedo Convention and acknowledges the Member States of the European Union regarding their implementation of the EU law. The first three articles of the Charter represent the supreme values to be protected: human dignity (art. 1), right to life (art. 2) and the right to integrity of the person (art. 3) including both physical and mental.

Despite the fact that all the rights that stream from the above mentioned international documents are binding (for the countries that ratified them), it remains that the intersection between human rights and bioethics is an evolving concept that is founded in principles. They are not only rooted in the formal documents but are also directions for the interpretation of rights in a particular context facilitating the role of institutions entitled to interpret them. The origin of the principles could be located in the Belmont Report and the activities of the American Commission for the Protection of Human Subjects of Biomedicine and Behavioral Research in between 1974 and 1978.[19] Beauchamp and Childress are the authors of the Principles of Biomedical Ethics, which are still considered to be the alphabet of Bioethics. These principles are: (1) Principle of autonomy, (2) Principle of beneficence and its antipode, (3) Principle of non-maleficence and (4) Justice.[20] The first principle refers to the obligation of the institutions to enable free and informed consent for each therapy/intervention, as well as the possibility to withdraw it, right to gain information regarding one's own health condition, but also the antipode of that right—not receiving the information. The second and the third principle refer to the moral obligation to maximize potential wellbeing while minimizing potential harm or risk (as much as possible), and the last principle refers to the need for legal order and justice, certainty, equality,

[17] Council of Europe, European Treaty Series, No. 164. 1997.

[18] In line with footnote 2.

[19] The Belmont Report (18.4.1979).

[20] *Op.cit.* Beauchamp and Childress (2009).

equity and nondiscrimination when it comes to health protection of human beings in general. Even though these principles should be guiding human actions in particular circumstances, when it comes to mandatory vaccination they are being interpreted differently: *contra*—presuming beneficence of individuals as a private choice each can make for themselves,[21] and *pro*—presuming beneficence not to an isolated individual, but to the wider public.[22] Therefore, the Covid-19 vaccines pose a serious paradox during times of crises: beneficence of individuals as part of the collective or of the collective in general and non-maleficence of individuals as part of the collective or of the collective in general? Even though beneficence and non-maleficence of individuals are meant to be uplifted by vaccination, they are simply not perceived like that by individuals who, for various reasons are opposed, yet remain steadfast in their quest—individual autonomy over their own body to be guaranteed.

3 Personal Autonomy (Informed Consent) as an Individual Right

Personal autonomy and the concept of free and informed consent followed the well-established and rooted practice of patriarchy in the relationship between the patient and the physician that was unquestionable until the second half of the twentieth century. The foundations could be found in the North-American jurisprudence, while the concept found relevance after the condemnation of the cruel research practices on humans conducted by the Nazi in the Nuremberg Code.[23] The dignity and the integrity of the human being associated with it are protected in many international documents (such as the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights etc.). In Europe (Member States of the Council of Europe), the ECHR covers the physical and mental integrity as part of the private life in art. 8, while in severe cases (in the domain of inhuman and degrading treatment) it is covered by art. 3. The Oviedo Convention covers it in more details in articles 5, 6, 8, 9, 16, 17, 20, while the Charter in its art. 3. Under the Oviedo Convention (art. 5) and the EU law, the modalities

[21] Cheng (2022). This author holds the opinion that an individual protects oneself before protecting the community; and taking care of oneself during this pandemic is beneficial to society. In contrast, a compulsory shot ignores the fears of vaccines hesitant people and unreasonably pushes them to sacrifice their personal safety along physical and psychological dimensions that is tantamount to collective bullying, while forcing them in name of civic responsibility is moral bullying.

[22] Here, a state justifies compulsory vaccination, as a way to prevent further harm to its population (duty of non-maleficence), by removing, treating, or curing the particular contagion before it (duty of beneficence). See more in Beazley (2020).

[23] Some parts from this section (3) and the following (4) are elaborated also in the text Ignovska E. Human Rights and Bioethics during the Covid-19 Pandemic, The International Legal Match Djokovic v. Australia, 2022 when explaining concepts since they were written simultaneously but for different purpose, in different context and with different conclusions. The relation with this text is also mentioned in a note in the above-mentioned text.

of informed consent (presumed—meaning that consent is implied if there is no objection, or explicit—explicitly stated) are left upon the decision on national states, while the concept is included in several Directives and Regulations (such as Reg. No. 536/2014 on Clinical Trials). Nowadays, the concept of free and informed consent is a leading principle in Bioethics (principle of autonomy) overtaken by national laws governing the intersection between bioethics and medicine. The concept presupposes the process of enabling a person to make individual choices based on information, understanding and clearly expressed wish on the choice, barring in mind all the other alternatives as well as the future prospects. Therefore, key elements of the concept are: (1) Information,[24] (2) Freedom of consent (voluntary in nature, lack of pressure or undue influence) and (3) Ability to make decisions.[25] The presumption of personal autonomy is not, however, absolute. In fact, it is the most often overridden like, for example, when urgent medical care is needed for a patient unable to provide the consent,[26] or in cases when the consent is presumed unless explicitly stated the opposite.[27]

However, there are restrictions and limitations to its application as envisaged in art. 8(2) of the ECHR and art. 26 of the Oviedo Convention and they both include (1) Situations that are prescribed in the law so that persons are aware and can guide their actions (principle of legal certainty) and (2) Situations that are necessary in a democratic society (principle of legitimate aim). Such situations may be provoked by a pressing social need—public safety, prevention of crime, protection of public health or rights and freedoms of others. In such situations, the interference by the state towards the claimed right of an individual should be proportionate to the legitimate aim i.e. if a fair balance has been struck between the legitimate aim pursued and the requirements for protection of individual rights.

Elucidating informed consent and vaccination is the case Solomakhin v. Ukraine[28] where the ECtHR (par. 36) stated: 'In the Court's opinion the interference with the applicant's physical integrity could be said to be justified by the public health considerations and necessity to control the spreading of infectious diseases in the region. Furthermore, according to the domestic court's findings, the medical staff

[24] In the case of information regarding vaccines, one of the problems that appears is that there is an overload of information coming from different sources. The Governments that want to increase the level of vaccinated should inform their population accordingly. Nevertheless, people read different sources, experts' opinions, even fake news on different media and form their opinion based on the different sources of information they consulted.

[25] Council of Europe HELP Course: Key Human Rights Principles in Biomedicine - Bioethics, Module 2.

[26] *Op. cit*. Beazley (2020).

[27] This is the case for instance, in the Republic of North Macedonia for transplantation from deceased donors. The previous concept of informed consent was replaced by the concept of presumed consent (unless the person did not object explicitly and officially—with a written statement authorized by notary public during life: Закон за земање и пресадување на делови од човечкото тело заради лекување (2011, 2013) Such a flip in concepts was decided on referendum in Switzerland in May, 2022 for purposes of shifting the organ donation in the country. See more in The Guardian (2022).

[28] Solomakhin v. Ukraine (2012).

had checked his suitability for vaccination prior to carrying out the vaccination, which suggests that necessary precautions had been taken to ensure that the medical intervention would not be to the applicant's detriment to the extent that would upset the balance of interests between the applicant's personal integrity and the public interest of protection health of the population.'

Another similar case regarding restrictions to informed consent (this time due to mandatory X-rays to children from prevention of tuberculosis in Belgium) is the case of Acmanne v. Belgium[29] where the ECHR (the Commission) stated that there was no violation of art. 8 as it does not include an unlimited right to do with one's body as one pleases.

The Oviedo convention has specific rules to protect persons not able to consent. The general rule is that an intervention may be carried out only if it is in their direct benefit (art. 6(1)). When it comes to minors, an authorization by a legal representative/custodian is required or one of an individual assigned by law. In any case, an opinion of the minor should be taken into account depending of the level of maturity and possibility to understand the consequences. In some countries, it is explicitly regulated that a consent from the minor could be given if the minor is over 14 (Latvia), 15 (Slovenia), 16 (Spain), 15 (Denmark), 16 (UK).[30] When it comes to persons not able to consent authorization has to be given by the person's representative or an authority provided by law. An exception of this rule is possible in two cases: concerning medical research (art. 17) and removal of regenerative tissue (art. 20).

4 Public Health as a Collective Right

Public health is defined as "the science and art of preventing disease, prolonging life and promoting health through the organized efforts and informed choices of society, organizations, public and private, communities and individuals".[31] The term public health includes 'public' in terms of a small or larger number of people that could spread (a disease) on a smaller or larger territory (this for instance, makes difference between epidemics and pandemics), and 'health' which is already defined very wide by the WHO including physical, psychological and social well-being.[32]

[29] Acmanne and Others v. Belgium (1984).

[30] *Op. cit.* Council of Europe HELP Course: Key Human Rights Principles in Biomedicine - Bioethics, Module 2.

[31] Gatseva and Argirova (2011), pp. 205–206.

[32] The WHO Constitution (1946) envisages … 'the highest attainable standard of health as a fundamental right of every human being'.

Public health may be invoked as a ground for limiting certain rights 'in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population'.[33] The Siracusa Principles require that any measures taken which limit individual human rights be (1) provided for and carried out in accordance with law; (2) directed toward a legitimate objective of general interest; (3) strictly necessary in a democratic society to achieve the objective; (4) least intrusive and restrictive to achieve the objective; (5) be based on scientific evidence[34]; (6) neither arbitrary nor discriminatory in application and of limited duration; (7) respectful of human dignity; and 8. subject to review. Nevertheless, these principles are part of a soft law mechanism, non-binding suggestions on how to solve conflicts between individual and collective rights and are dependent on the willingness of national states to uphold and exercise them.[35]

The ECHR also has a specific provision authorizing to derogate unilaterally to conventional rights. Article 15, entitled 'derogation in time of emergency', permits states 'in time of war or other public emergency threatening the life of the Nation [...] to take measures derogating from its obligations…'. In application of art. 15(3) of the ECHR, many countries such as, Latvia, Romania, Armenia, Estonia, Moldova, Georgia, Albania, North Macedonia, Serbia, and San Marino invoked this provision to face the ongoing pandemics.[36] According to Emilie Hafner-Burton et al. derogations are 'suspensions of certain civil and political liberties – in response to crises'. They defined them as 'a rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties'.[37]

The central dilemma in public health law and ethics is that any legal intervention to safeguard population health will inevitably initiate a conflict between collective interests and individual rights to bodily integrity, privacy, freedom of association, freedom of movement, freedom of conscience, and other core liberties. Authors who approve mandatory vaccination use utilitarian arguments, mostly relying on collective herd immunity.[38] Contrary to them stand authors who consider that mandatory vaccination underestimates human autonomy, dignity, and individuality in the name of a presumed 'greater good', 'communal need', or 'national interest'.[39] As a result, ethical and legal tensions between the individual and the collective good (or their definitions and scopes in particular circumstances) still do exist.

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[33] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights. American Association for the International Commission of Jurists (1985), par. 25.

[34] Apart of the fact that this measure provides further specification, proves to be tricky in light of the Covid-19 pandemics since scientific evidence varied over time, i.e. from the time the abstract for this text was sent until the time of writing it, the new variants of the virus showed that vaccines are becoming less effective or ineffective.

[35] *Op. cit.* Beazley (2020), pp. 6 and 7.

[36] *Ibid*., p. 3.

[37] Hafner-Burton et al. (2011).

[38] Zaid et al. (2022) and Lefri (2021), pp. 30 and 31.

[39] Thomson and Ip (2020), p. 3.

5 Council of Europe—Statements During the Covid-19 Pandemics

At the forefront of the pandemic was the Council of Europe's Committee on Bioethics which highlighted some of the human rights principles laid down in the Oviedo Convention via its Statements on: Human Rights Considerations relevant to the Covid-19 Pandemics,[40] Vaccines[41] and Vaccines Passes and Similar Documents.[42]

The most relevant rights that are noted are: the right to life and the right to protection of health, the right of equitable access to health care, even in context of scarce resources, protection against discrimination, the right of privacy and data protection in respect of democracy, rule of law and respect for human rights.[43] However, these rights can be restricted as an exception for purposes of protection of public interest, including public health if interpreted in the light of the criteria established by the ECtHR (especially, necessity and proportionality) These principles are in line and moreover, complement the Oviedo Convention in order to stress the link between human rights, solidarity and responsibility urging for a greater unity between Member States. Therefore, an international cooperation for safeguarding rights and responsibilities of all members of society is encouraged. We live in a globalized world and this pandemic made it even more obvious, yet, as discussed above, the way societies dealt with the pandemic was mostly left upon their own assessments of good v. bad, right v. wrong, individual rights v. collective rights, i.e. their national supremacy.

Regarding vaccines, the Statement on Vaccines suggested that the application of the rights and principles should ensure that everyone, without discrimination, is offered a fair opportunity to receive a safe and effective vaccine. Vaccination is meant to be encouraged in a transparent, informed and communicated way in order to reach everyone, including those who may have low literacy levels or special communication needs. Vaccination outcomes are meant to be monitored for the purposes of reporting adverse effects, which was an obligation of the national competent authorities. Nevertheless, the Statement asks for insurance that persons who either temporarily or permanently could not be vaccinated, be otherwise protected.

The Statement does not discriminate between persons with different 'immune status' if a range of other options remain available. That would mean that for those who for either medical or other reasons cannot be vaccinated, there have to be other alternatives that allow them to enjoy their human rights.

The focus of all these documents is on different issues depending on the actual pressing need at the specific moment in the timeline of the Covid-19 pandemic. If anything, the pandemic showed that timing for particular measures is very important in the way societies deal with such events. For instance, the quarantine that was

[40] Committee on Bioethics (DH-BIO) (14 April, 2020).

[41] Committee on Bioethics (DH-BIO) (22 January, 2021).

[42] Committee on Bioethics (DH-BIO) (4 May, 2021).

[43] Committee on Convention 1081 and the Data Protection 1 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108) 3 Commissioner of the Council of Europe.

present almost in every society in 2020 became totally unnecessary (even unjustified) in 2022. In contrast, most public health policies allowed the spread of the virus in spontaneous ways to achieve collective immunity. Moreover, mandatory vaccination became less important topic, while other ways of personal protection remained in place (depending on individual choices) such as: voluntary vaccination (including buster doses), wearing masks, proper hygiene, physical distancing etc.

6 European Court of Human Rights' Case-Law Regarding Mandatory Vaccination in General and in Relation to Covid-19

Mandatory vaccination is in fact restriction of the right to freely decide about one's own body and physical integrity in terms of medical treatment and, therefore, an interference with the right to respect for private life.[44] Even though it may be considered as a way to overcome certain human rights restrictions (such as the freedom to move or assembly), it is at the same time a threat towards those very same rights. Furthermore, the right to effective legal protection (art. 13 ECHR) would presuppose certain responsibilities of the society if the mandatory vaccination triggers unwanted side effects, such as compensation of non-material damage etc.[45] For these reasons, the ECtHR is very cautious when dealing with such conflicting rights. Nevertheless, the case law inclines towards positive attitude regarding national authorities' efforts to combat contagious diseases via vaccination if certain requirements are fulfilled.

The case Boffa and Others v. San Marino,[46] developed the theory that if there is a lack of proof that vaccines could endanger human lives, then mandatory vaccination is not an infringement to the right to life as in art. 2. This means that the burden of proof lies on those who claim that vaccines are endangering human lives or health. In the case Solomakhin v. Ukraine,[47] the ECtHR found that the right to private life as stipulated in art. 8 is not infringed by mandatory vaccination if: (1) Vaccines are meant to protect the life of the individual as well as the collective health in an utilitarian way where the expected good effects by far outweigh the negative outcomes, (2) They are administered during extra-ordinary circumstances (i.e. epidemics), and (3) There are available mechanisms to examine eventual concerns regarding vaccines' quality and its side effects. In the case of Jehovah's Witnesses

[44] *Infra* Solomakhin v. Ukraine, par. 33, reaffirmed also in *infra* Vavřička and Others v. the Czech Republic.

[45] Ognjanoska (2021). The World Health Organization (WHO) and Chubb Limited (NYSE: CB), through ESIS Inc., a Chubb company, signed an agreement on behalf of the COVAX Facility on 17 February 2021 for the administration of a no-fault compensation programme: https://www.who.int/news/item/22-02-2021-no-fault-compensation-programme-for-covid-19-vaccines-is-a-world-first.

[46] Boffa and Others v. San Marrino, ECtHR (1998).

[47] Solomakhin v. Ukaine, ECtHR (2012).

of Moscow and Others v. Russia,[48] the Court elaborated on the concept of mandatory vaccination through the prism of health protection of others (third parties) that extended beyond the individual's determination to vaccinate or not. Most important is the most recent case of Vavřička and Others v. the Czech Republic regarding mandatory vaccination for well-known diseases in medical science for kids.[49] The applicants alleged that the various consequences for them of non-compliance with the statutory duty of vaccination had been incompatible with their right to respect for their private life under art. 8 of the Convention. Due to its importance, the case was allocated to the Grand Chamber. Namely, in the Czech Republic (as well as in many other countries, including North Macedonia) there is a general legal duty to vaccinate children against nine diseases that are well known to medical science. Parents who fail to comply, without good reason, can be fined (not forced to vaccinate), whist non-vaccinated children are not accepted in nursery schools (an exception is made for those who cannot be vaccinated due to health reasons). The Court recognized that the Czech policy pursued legitimate aims of protecting health as well as the rights of the others, noting that vaccination protects both those who receive it and those who cannot be vaccinated for medical reasons and are therefore reliant on herd immunity for protection against serious contagious diseases. It further considered that a wide 'margin of appreciation" was appropriate for the respondent State in this context. It noted that in the Czech Republic, the vaccination duty was strongly supported by the relevant medical authorities and therefore represented the national authorities' answer to the pressing social need to protect individual and public health against the diseases in question. The Czech health policy was considered to be consistent with the best interests of the children who were its focus since it protected every child against serious diseases (through vaccination or by virtue of herd immunity). The Court also observed that the vaccination duty concerned nine diseases against which vaccination was considered effective and safe by the scientific community, as was the tenth vaccination, which was given to children with particular health indications.[50]

It furthermore noted that the fine imposed on Mr Vavřička had not been excessive. Although the non-admission to preschool for the other applicants' children had meant loss of an important opportunity to develop their personalities, it was a preventative rather than a punitive measure, and had been limited in time wherein when they reached the age of mandatory school attendance their admission to primary school would not have been affected by their vaccination status. The Court also declared, that the complaints under art. 9 (freedom of thought and conscience) of the Convention are inadmissible and that there was no need to examine the case separately under art. 2 of Protocol No. 1 (right to education) to the Convention. It remains questionable

[48] Jehovah's Witnesses of Moscow and Others v. Russia, ECtHR (2010).

[49] Vavřička and Others v. the Czech Republic (2021).

[50] European Court of Human Rights 116, Press release on Court's First Judgment on Compulsory Childhood Vaccination on Violation of the Convention, 8.4.2021.

if the decision of the Court would have been the same if it regarded compulsory vaccination for mandatory school attendance.[51]

The Court noted that 'there was a general consensus that vaccination was one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination among its population. However, there was no consensus amongst the Contracting Parties to the Convention over a single model. Rather, there existed a spectrum of policies concerning the vaccination of children. Even though there is no European consensus about mandatory vaccination, the Court reiterated that, in matters of health-care policy, it was the national authorities who were best placed to assess priorities, the use of resources and the needs of society. All of these aspects were relevant in the present context, and they came within the wide margin of appreciation that the Court should accord to the respondent State. Even more, there was an obligation on States to place the best interests of the child, and those of children as a group, at the center of all decisions affecting their health and development. With regard to immunization, the objective had to be to protect every child against serious diseases only achievable by children receiving the full schedule of vaccinations during their early years.[52]

Consequently, the ECtHR in the case against the Czech Republic decided that there was a proportionality of the mandatory vaccination to the legitimate aims pursued (to protect against diseases, which could pose a serious risk to health) through the vaccination duty.[53] However, the weight of this consideration was lessened by the fact that vaccinations were not administered against the will of the applicants. Instead, they were either fined or not accepted in nursery that is not compulsory (meaning they had a choice while the measure was limited in time). This was interpreted as a measure of preventative rather than punitive nature. The Court considered the fact that the vaccines were considered efficient and safe by medical science. Moreover, the Czech law allowed exceptions due to medical reasons. Therefore, the interference was both legitimate and necessary in a democratic society.

The medical reasoning that was uplifted in the case of Vavřička makes the analogy with the case of mandatory vaccination against Covid-19 trickier (at least where population confidence is concerned) since obtaining accurate medical data takes time to investigate and to reinvestigate initial assumptions. For instance, the mandatory vaccines in Vavřička case were already proven to be safe, efficient and in line

[51] As it is in the Republic of North Macedonia, where the Constitutional Court decided in 2014 that this too does not represent a Constitutional breach, especially when in line with art. 39(2) and art. 40(3) that stipulate that the a citizen has a right and a duty to protect not only its own but also the health of others while parents are responsible to do the same in behalf of their children (Решение на Уставниот суд на Република Северна Македонија - 2014). Parts of this decision were quoted in the comparative material in the Vavřička case (par. 103): 'In order to safeguard the health of the child and the child's right to health, which was subject to a special level of protection, it was justified to deny the parents' freedom to refuse vaccination, since the right of the child to health prevailed over the parents' right to choose.'

[52] European Court of Human Rights 116, Press release 8.4.2021.

[53] This is probably, the key point of the case—stressing out duties and responsibilities prior to rights (as opposed to how usually is in front of the ECtHR) when a person co-exists in a society.

with the objective—achieving herd immunity over time, unlike in the case of Covid-vaccines. Namely, these relatively new vaccines (which are also considered safe and efficient but only on a level to lessen the disease or not to cause lethal outcomes) were supposed to deliver immunity in the beginning, while this proved to be tricky over time (since booster doses are constantly needed while new variants of the virus are resistant to vaccines). In this sense, Janis makes an observation that when human rights experts,[54] suggest that the court should also support compulsory vaccination in the case of COVID-19,[55] without considering medical issues and scientific publications, the conclusions may be decisive. Therefore, not just primary, but also auxiliary sources of reasoning have to be consulted prior to making final judgments.[56] Consequently, in order to assess whether mandatory Covid-19 vaccination has legitimate aim (collective benefit), one needs to prove that they will eventually cause herd immunity. In the lack of such medical evidence, the measure—imposing compulsory vaccination against Covid-19 is not proportionate to the legitimate aim (achieving immunity, even less herd) in a democratic society.[57]

Apart from the methodology of legitimacy, proportionality and necessity to evaluate certain applications, mandatory vaccination asks for other prerequisites to be fulfilled such as: informed consent, effective legal protection and remuneration of damage in case of unwanted side-effects.[58] When it comes to informed consent, it should be underlined that in such cases, the concept is suspended instead of falsely preserved. This is for instance when in mandatory vaccination there is an informed consent form that people should sign.[59] If there are negative consequences for not vaccinated, then that is indirectly forced, not voluntary vaccination, even less valid signed informed consent sheet. Along these lines, Anja Kresser, defines 'every consequence as a result of refusing to carry out a vaccination as 'compulsory vaccination' … as these consequences can (and are intended to) influence one's decision to get vaccinated."[60] Therefore, it is a 'bitter choice' to make 'forced-voluntary' (oxymoron per se) informed consent criteria satisfied in mandatory vaccination against Covid-19. Nevertheless, this 'bitter choice' could be a 'better choice' from the available

[54] Katsoni (2021).

[55] Vinceti (2021).

[56] Schabas (2015).

[57] Other authors go much further considering compulsory vaccination illegal due to lack of medical assurance, insufficient knowledge of the effects of the vaccine and its interactions with various medical conditions as well as no established treatments for its side effects and abnormalities caused by it. See for instance Niroshan (2022), p. 267.

[58] *Op. cit.* Ognjanoska (2021).

[59] Even those who are indirectly 'forced' to be vaccinated because of particular benefits that come along with the vaccination status (such as entrance to nursery school etc.) have to sign an 'informed consent' sheet prior to vaccination. However, informed consent in such cases or when there is a legal obligation to vaccinate (in mandatory vaccination) cannot be voluntary—which is one of its necessary premises and therefore—valid. Instead, it is 'coerced informed consent' which is an oxymoron per se. See for instance in Anna et al. (2018).

[60] Krasser (2021).

difficult options, having in mind all the negative consequences of the pandemics, especially during its initial peaks.[61]

The number of cases that tackle different aspects of the Covid-19 crisis management in its aftermath brought to ECtHR is raising.[62] Especially relevant regarding mandatory vaccination for specific occupations is the case Pasquinelly and Others v. San Marino (No. 24622/22) that raises concerns regarding art. 8 (right to respect for private life) of the Convention and is still pending. The Court also received requests for interim measures concerning vaccination schemes (lodged by workers in specific occupations, who challenged the compulsory vaccination) or certificates granting pass to public places. These requests were rejected for being out of scope of application of Rule 39.[63]

7 Time as a Factor to 'Change the Game' and Ease the Conflict Between Individual Autonomy and Public Health

Austria was the first country to introduce mandatory vaccines with a law dating from 16 February 2022 but it promised not to enforce it for a month. In the meantime, and prior to its enforcement, Austria suspended its law because the circumstances changed—the next—Omicron variant showed to be less dangerous and the Government assessed that the measure would then be disproportional to the threat, while the infringement of individual rights may not be justified.[64] Therefore, the mandatory vaccination in Austria could not test both—bioethical and legal principles in practice.

Unavoidably, the essence of the debate regarding mandatory vaccination against Covid-19 is the way we perceive individualism v. collectivism, i.e. the prevalence of the individual right to bodily autonomy or the collective duty to preserve collective

[61] See for instance: Gibelli et al. (2022).

[62] In the case Zambrano v. France, the ECtHR (41994/21) an university lecturer complained about national laws which introduced and imposed health pass which, in his opinion, was essentially intended to compel individuals to consent to vaccination that allegedly caused a discriminatory interference with the right to respect for private life. The Court in the Decision from 21.9.21 declared the application inadmissible for several reasons, mainly due to the failure to exhaust the domestic remedies and the fact that it amounted to an abuse of the right of individual application. Another decision of the Court that declared inadmissibility due to failure to exhaust domestic remedies is in the case of Thevenon v. France (46061/21). This case is more closely related to mandatory vaccination since it concerned a firefighter's refusal to comply with the Covid-19 vaccination requirement imposed on workers in certain occupations as part of the public management of the health crisis. After the refusal without claiming a medical exemption under the statute, he was suspended from both his professional and volunteer duties. For more cases regarding other aspects of the management of the Covid-10 health crises, see the Factsheet Covid-19 Health Crises, ECtHR, Press Unit, Jan. 2023.

[63] *Ibid.* Factsheet Covid-19 Health Crises, p. 12.

[64] BBC News (9 March, 2022).

health. They are both important, and only in specific particular circumstances could one make the difference and decide which one should prevail.

Several authors have already discussed this (in more recent papers), suggesting methods on how to favor one method over others, offering arguments and contra-arguments.[65,66] Savulescu suggests four conditions for mandatory vaccination: first, if the disease is a stern threat to public health; second, if vaccines are safe and effective; third, if mandatory vaccination proves to be a convincing cost–benefit profile compared with other alternatives; and lastly, if the level of coercion is proportionate. Other experts propose seven principles to make rational and transparent decisions, including three basic medical ethics (justice, autonomy and harm avoidance), public trust, solidarity and reciprocity, population health maximization, and protection of the vulnerable.[67] Having these elements as the basis to start from, Cheng offers arguments why Covid-19 vaccines should not be compulsory. Firstly, there are alternatives to vaccination methods to stop the spread of the disease, such as public mask usage, personal hygiene behavior, physical distancing and social distancing (limiting gatherings). Secondly, the booster dose that was recommended by experts, especially for vulnerable groups suggests that the vaccines we have at disposal are not capable of achieving herd immunity. In fact, it was recommended that even vaccinated people should continue with precautionary measures (including all of the above that were used even prior to vaccines). Thirdly, vaccination did not prove to prevent the spread of disease since even the vaccinated were capable of doing so.[68] Having all these concerns in mind (at the very least), mandatory vaccination is neither necessary nor sufficient, therefore proportionate.

Janis is on the similar page. He explores the compulsory vaccination against Covid-19 within the scope of article 2 and 8 of the ECHR.[69] In the framework of the right to life, he suggests that better public health response to the pandemic would be adequate preventative and therapeutic treatment for COVID-19.[70] In the framework of the right to private life, he rejects the existence of immunity as a reason to prioritize public good against private choices of the individual since the Covid-19 vaccines do not stop the transmission of the virus. Moreover, when the rate of transmission of infection for vaccinated individuals is equivalent to that of unvaccinated individuals,[71] those vaccinated are deluded into believing they are safe for themselves and for others they come into contact with.

Even though ethical and legal methodology of reasoning regarding mandatory vaccination against Covid-19 differ, sometimes they achieve similar conclusions. Professor Stavroula Tsinorema during her lecture for master students of bioethics

[65] Savulescu (2021).

[66] Cheng (2022).

[67] Maeckelberghe and Schroder-Back (2020), pp. 852–853.

[68] *Op.cit.* Cheng (2022).

[69] Kjumel (2021).

[70] Therapeutics and COVID-19: living guideline.

[71] Singanayagam and Hakki (2022), pp. 183–185.

criticized normative reasoning that tends to measure one right over another.[72] Her criticism of the proportionality principle suggests that individual autonomy and common good should be harmonized and not measured. Similar conclusion (even though using precisely the opposite methodology—measuring) is reached by Cheng. He believes that voluntary participation can ease tensions between public interests and individual freedom because in this case individualism does not act against collectivism, in that it involves the interdependent self with shared interests. The individual self is an essential component of the collective self, and these are not necessarily mutually exclusive. The individual's membership in a group presupposes that individual interests are taken into account and the individual accepts his role as a group member and accordingly the aggregate interests.[73]

If the role of the official authorities is understood on a level of informing, educating, recommending and providing incentives for vaccination,[74] then the individual health and public health could complement each other, at least in this period of the development of the Covid-19 pandemic.[75,76]

8 Conclusion

The tension between the individual consent as a self-determination agency and the public health requirements that tend to limit it does exist. Accordingly, there is no European consensus about mandatory vaccinations and States enjoy wide margin of appreciation. The conflict was resolved by holistic approach (including medical science, epidemiology, virology etc.) added to the normative reasoning by the ECtHR in the case of Vavřička and Others v. the Czech Republic. In many aspects, this case seemed relevant to Covid-19 and an analogy could be drawn especially when vaccines were first introduced while the state of the situation was still severe. However, the case of mandatory vaccination against known diseases to science for children in nursery currently differs from the case of mandatory vaccination against Covid-19 for everyone. Firstly, the threat of the virus becomes less serious in nature to both individuals and public health over time (the measure is not necessary, at least not anymore). Secondly, time has shown that prevention from Covid-19 cannot be achieved only and solely with mandatory vaccination because vaccination itself does not provide herd immunity and it does not stopcurb the spread. In that regard, there are other alternatives that can achieve that aim, such as voluntary vaccination, wearing masks, proper hygiene, amongst others, rendering the legitimate aim of vaccination unaccomplished. Lastly, time has also shown that even if the level of coercion does

[72] Tsinorema (2022).

[73] Bishop (2014).

[74] D'Errico et al. (2021).

[75] *Op.cit.* Cheng (2022).

[76] Note: Prior to publishing this work, the author published another text that relates to the concepts elaborated here (Ignovska 2022).

not include direct force (instead, it includes fines or other restrictions, such as in the case of Vavřička or in the pioneering but suspended legislation for mandatory vaccination in Austria), this is not proportionate to the possible infringements on private life and individual consent. It can therefore, be concluded that mandatory vaccination would currently be tantamount to infringement on human rights and liberties. It means that time has shown to be the factor that 'changed the game'. However, if it had not been for (voluntary) vaccination that timing could have been extended and the number of deceased higher. As such, if the situation deteriorates, the bitter choice between appreciating consent or imposing one, will once more challenge bioethicists, lawyers, academics and citizens in general. The evaluation should therefore focus on two main elements: whether the measure is effective and whether the sole (or the best) methodology for prevention is scientifically proven and uncontested in regard to its efficiency as well as possible side effects.

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