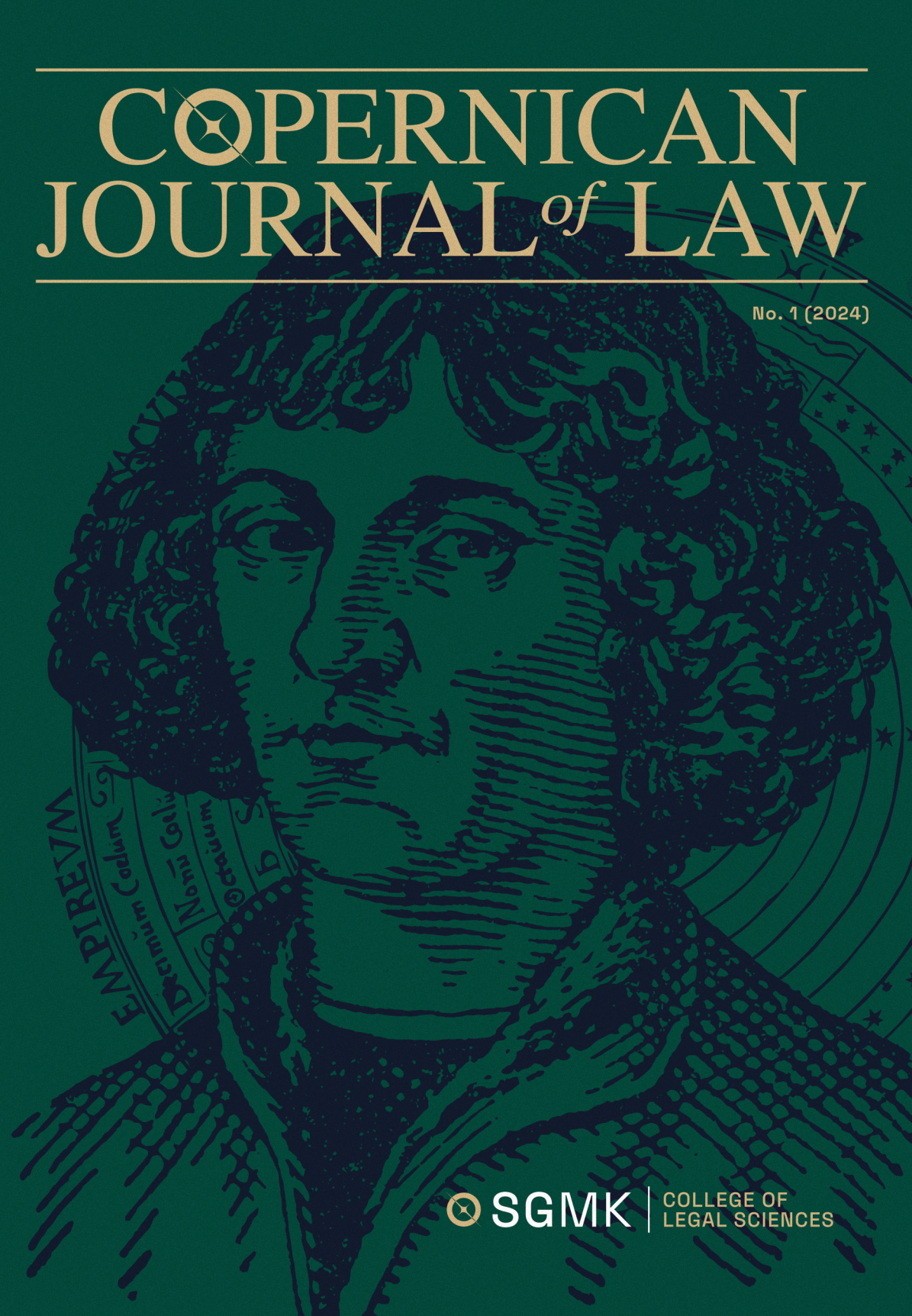
COPERNICAN JOURNAL of LAW

No. 1 (2024)



SGMK | COLLEGE OF LEGAL SCIENCES

COPERNICAN JOURNAL *of* LAW

COPERNICAN JOURNAL *of* LAW

No. 1 (2024)

NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK

Warsaw 2024

COPERNICAN JOURNAL *of* LAW

No. 1 (2024)

Publisher

SGMK Publishing
www.sgmk.edu.pl/sgmk-publishing/

Contact

SGMK College of Legal Sciences
6 Fryderyk Chopin St.
20-026 Lublin, Poland
e-mail: sekretariat.knp@sgmk.edu.pl

Issue finalized in November 2024.

Contents

NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 1 (2024), p. 7
DOI: https://doi.org/10.71042/CJL01202400

Esteemed Colleagues and Readers!

It is with great pleasure that I present to you the first issue of the *Copernican Journal of Law* established at the College of Legal Sciences of the Nicolaus Copernicus Superior School in Warsaw – a new public university on the map of Poland notably distinguished by its international character, interdisciplinary approach, and commitment to the highest standards of teaching. The Nicolaus Copernicus Superior School was established in 2023 as a living monument to Nicolaus Copernicus, one of Poland's most eminent scholars, and as an expression of recognition and gratitude on the occasion of the 550th anniversary of his birth. The University aims to educate the elite by engaging researchers, lecturers, and specialists from leading scientific centers in Poland and around the world in its activities.

The *Copernican Journal of Law* aims to publish high-quality papers in the discipline of legal sciences. The Editorial Committee has adopted the principle of publishing seven articles per issue. The current edition contains papers by Authors from four foreign universities: University Austral (Argentina), University of South Bohemia in České Budějovice (Czech Republic), Trnava University in Trnava and Pavol Jozef Šafárik University (Slovakia), and from three Polish ones: University of Siedlce, Academy of Zamość and Nicolaus Copernicus Superior School.

I would like to express my sincere gratitude to the Authors of the papers and the Editorial Reviewers for their valuable contributions to the production of this issue. Special thanks go to the Managing Editor, Prof. María Alejandra Vanney, for her exemplary dedication to the journal's success. I am deeply indebted to the members of the Advisory Board, which unites distinguished specialists from fifteen prestigious research centers across Europe, North America, and South America.

To our esteemed Readers, I wish you insightful and enriching reading. I also extend an invitation for the submission of new papers.

Paweł Lewandowski
Editor-in-Chief
ORCID ID: 0000-0003-4543-4382

NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 1 (2024), pp. 9–16
DOI: https://doi.org/10.71042/CJL01202401

Maciej ANDRZEJEWSKI
University of Siedlce, Poland*

Does Convergence of Law and Morality Exist? Polemics of H. L. A. Hart with R. Dworkin

• **Abstract** •

This article addresses the relationship between law and morality, questioning whether there is a convergence of the two. An analysis of H. L. A. Hart's critical positivism in the context of the neoliberal philosophy of law R. Dworkin was made, in view of the possibility someone has to live in complete separation of law from morality. The above considerations must be accompanied by reflection on the so-called hard cases, as well as reflections on the contemporary implications of law and morality.

Keywords: H. L. A. Hart, R. Dworkin, Law, Morality, Philosophy.

Introduction

The significance and complexity of mutual relations between law and morality was called once, in the philosophical-legal literature, the "Cape Horn" issue (Sobański, 1999). The fact that, until today, heated disputes, not only among lawyers, but, above all, among society are stirred up by the issues on the bounds between law and morality, shows that this problem is very important, these issues include: death phenomena (abortion, euthanasia, death penalty), the issue of human procreation (*in vitro*, cloning), the issues on the bounds between law and medicine (conscience clause, patient's approval), sexual minorities (legalization of homosexual marriage), institutions of criminal law (rule of material truth, torturing during interrogation, right to self-defence), educational (sexual education of children at school), family (marital infidelity, divorce, concubinages) (Bunikowski, 2023).

* ORCID ID: 0000-0001-8440-2426; address: Żytnia 39, 08-110 Siedlce, Poland; e-mail: maciej.andrzejewski@uws.edu.pl

The best method, to find an answer for a question of convergence between law and morality, seems to be a comparison of opposing arguments, however, in order to reach a goal, we should remember that argumentation must be intelligible, that is, understood for others and not only for a person expressing a given view, contradictory, based on the dispute of two equal sides, leading, as a consequence, to revealing the truth, and also logically correct. The analysis of critical positivism of H. L. A. Hart in a context of neoliberal philosophy of law by R. Dworkin seems to be justifiable in the context of above requirements, in other words, the subject of considerations mentioned below will be a reflection about the possibility of existence of the law in a complete separation from morality. Analysis of this issue becomes deeper, if we pay attention to the fact that this year, we have a thirtieth anniversary of publication of famous *Postcriptum* to the Hart's Concept of law, being one of the main point of a dispute between Hart-Dworkin. This work presents conciliatory view, typical for the so-called soft positivism, it gained as many supporters as opponents, for whom on the one side, the point of reference remained 'integrarism' Dworkin, on the other hand the so-called hard positivism (Dyrda, 2014).

The above considerations must also be accompanied by the reflection on the so-called *hard cases*, in which the conflict of positivists with naturalists about the law and morality is reflected in the best way. Is it really true that only one of these paths is a proper one, and as a consequence *tertium non datur*?

Law and morality according to H. L. A. Hart

Looking for an answer for ontological question intrigued philosophers since the beginning of the world. It is such a basic question that it is a starting point, a base for different law theories. Hart doesn't answer the question openly, but J. Woleński claims that: "he describes (…) the law as a particular connection between primary and secondary rules, gradually revealing its aspects" (Kołtun, 2023).

The starting point of Hart's considerations is a theory of the division of rules into the so-called *primary rules* and *secondary rules*, the coexistence of primary and secondary rules. Primary rules are directed to the members of society, indicate them a specific behaviour, while secondary rules are the instruments of a procedural character, oriented towards elimination of disadvantages of the secondary rules, having menial form towards them, subsidiary and non-independent (Stelmach, Sarkowicz, 1999). In addition, it divides secondary rules into 3 types: change, settlement and key rules of recognition. Only such a coexistence of rules, mutually complementing, allows, according to Hart, to create a legal system, identified here with a concept of law, while, on the one side primary rules must be respected by the society as well

as secondary rules addressed to the clerks. Such understanding of law reverberated, and particular opponent of such understanding has become R. Dworkin.

Legal positivism in its assumptions did not create one coherent definition, Hart, referring to this concept, indicated the following statements: 1) human laws are orders, 2) system of law is "closed logical system", 3) we should distinguish sociological, historical research, and also critical assessment of law from moral perspective from research on meaning of legal concepts, 4) the basis for ethical judgments can't be rational argumentation, testimony or proof, 5) there is no necessary connection between morality and law, and between law *lex lata* and *lex ferenda* (Stelmach, Sarkowicz, 1999).

We can find, in Hart's conception, the so-called social thesis, saying about taking root of the law in social conventions, what eventually causes a thesis about separation of law from morality, referring to the lack of definitional connection between law and morality. The effect of this assumption is a supposition that the law, which is incompatible with morality, is still the law (Załuski, 2009). However, we should remember that Hart formulated the so-called *minimum content of natural law*, emphasizing that they are the rules necessary for a proper functioning of each, among others: human weakness, approximate equality, limited altruism, limited amount of goods and natural reserves and imperfect will power and ability of reasoning (Stelmach, Sarkowicz, 1999). So, isn't it a contradiction, and maybe it is a beginning of a new paradigm, new way, which, from different perspective, tries to solve a dispute between positivists with naturalists about mutual relations between law and morality?

Focusing on hard cases from the perspective of conception of Hart's rules, we should look for a solution of *hard cases* beyond the system, through using the so-called open concepts, what makes it difficult to give a judicial decision to a law-making character. The solution to this problem, in Hart's opinion, is to regard this decision as being within the standard of correctness of this decision. This standard was defined through scope of meaning of the rules, which contain *open texture* expressions. It leads to a conclusion that crossing the borders of this scope is to go out beyond the standard of correctness (Zajadło, 2024).

To sum up, Hart rejected the implications of the natural law school, what led to antinomy between law and morality. In other words, their convergence is not possible, despite the indication of the minimum content of natural law in legal application. A very interesting interpretation of *hard cases* leads inevitably to a conclusion that positivism, sometimes called sophisticated in Hart's conception, tries to find a solution, in these matters, beyond normative system.

Law and morality according to R. Dworkin

The positive conception of separation of law from morality has been criticized by Dworkin. It is worth noting that there is no reference to a legal-natural argument in Dworkin's considerations, because it is incompatible with a conception of legality, that is why he expands the bounds of a conception of a norm and, what is more important, he questions the bounds separating law from morality (Zirk-Sadowki, 2022).

In Dworkin's conception, apart from *rules,* there are *principle*s and *policies* in the system of law. Hart's systematics is not sufficient enough for him, because in the positivistic spirit, it refers only to the legal rules, and they don't exhaust application for hard cases. In this sense, Dworkin claims that it is impossible to separate law from morality. For Hart's apologists, it is possible to adopt Dworkin's system, based on rules and principles, deriving principles – from a legal text – on the basis of rules of inference (Stelmach, Sarkowicz, 1999). From this counter-argument, Dworkin determines the fact that in a of process law application, the judge can't separate legal rules from principles, which in a very important process of interpretation are discovered in a global "normative structure of a society".

The considerations concerning hard cases, also in case of Dworkin, are presented differently from Hart's conception. Using conceptions of *rules*, *principles* and *policies,* Dworkin proves that the judge who, in a given case, doesn't have a clear, explicit rule, he/she can't, just like Hart, go beyond law system, but he/ /she should look for a solution on the ground of principles and clues. Fundamental assumption, on which Dworkin based his statement about convergence of law and morality concerns the so-called *hard cases*, in a situation, in which it is possible to make a few settlements, in the same way justified and reasonable, so if the judge bases only on rules, it is insufficient (Stelmach, Sarkowicz, 1999).

The essence of the issue of hard cases in a dispute between Hart with Dworkin, is not a relic of the past, but it is still relevant today, although it is often viewed from a completely different perspective. As an example, we can give a conception of Professor J. Zajadło, who thinks that *hard cases* emerge not only on the stage of law application, but also in the process of its creation, interpretation, validity and also obeying, while its solution is not only making one right decision. Moreover, the Professor indicates that hard case doesn't have to be connected with the law in force, however, if there is a "conflict of law with itself, it is important what is an indirect source of conflict – if it is a structure of the very law or external factors, such as morality, tradition, economy, politics, religion, etc." (Zajadło, 2024).

Interesting issue is an interpretation of the law as a mechanism allowing to negotiate between politics and morality, because in Dworkin's opinion, morality gathers basic rights of the individual and political procedures, while the role of the court is integration of morality and politics (Zirk-Sadowki, 2022). This assumption leads to conclusion that the judge is not independent, but he/she is subordinate to 'unavoidable dependency', what is a consequence of two theses: meta-ethical and political, formulated by this philosopher. It leads to a "specific conception of social morality as decisive in law affairs; this conception says that social law and morality is (…) political morality inscribed in laws and institutions of a given society" (Dybowski, 2001).

Analysis of Dworkin's conception clearly shows that unsolvable antinomy, between legal positivism and natural law, where it was always told *tertio non datur,* can be solved through the choice of indirect way between the legal-natural and positivistic conceptions (Morawski, 1999). Analysing deeper different approaches to hard cases, we undoubtedly come to a paradox. Hart tries to solve *hard cases* on the ground of non-legal norms, while Dworkin on principles and clues, being a part of law system (Zajadło, 2024).

The essence of the dispute between H. L. A. Hart and R. Dworkin

Analysing the opinions of Hart and Dworkin on relations between law and morality, we should look for fundaments of this dispute directly in the assumptions, which refer both to the essence and nature of law. Hart's theory of law is general, in a sense that it doesn't refer to any specific legal system or culture, is descriptive, morally neutral, and doesn't try to justify itself. While, Dworkin's conception is applicable to the marked system of law, and partially also fulfils assessing and justifying functions (Kondela, Smolat, 1995). According to A. Dyrda, the axis of the dispute between Hart and Dworkin never concerned the issue that the law, beyond the rules also contains principles, because no one questioned that. The crux of polemics was a positivistic statement that binding legal standards, both rules and principles, are always based on specific social facts. Roland Dworkin questioned this thesis, indicating that there are legal rules, which are binding only due to their moral character, the so-called rules of political morality makes it binding despite the fact that they have never been institutionalized before. The effect of this debate was overcoming dichotomous division between descriptively explaining and normatively justifying theory of law (Dyrda, 2014). To sum up, the effect of introducing axiologically justified legal rules into the legal system was a necessity of binding the conceptual connection between law and morality. We should

remember that positivism, in a version proposed by Hart, allowed to identify legal rules only by reference to social sources of law, without reference to assessment criteria, definitely determining the separation of law and morality, at least on the validation level (Kondela, Smolat, 1995).

The legacy, that these great philosophers has left to us, has also impact on contemporary world, for example, we can refer to criminal trial, where specific principles of criminal trial have fundamental meaning, i.e. rule of material truth, adversarial rule, immediacy, presumption of innocence etc. Division into rules-directives and rules-principles, is nothing more than, made by R. Alexy, modification of legal rules and principles originating from dispute between Hart-Dworkin (Waltoś, Hofmański, 2023). Stopping at this vague statement is insufficient, therefore, we should consider the issue of adequacy of, developed by Dworkin and partially modified and expanded by R. Alexy, conceptions of rules to Polish legal culture.

It is justified to accept as a turning point the year 1988 an publication in the monthly magazine "Państwo i Prawo", the article written by Professor Tomasz Gizbert-Studnicki entitled "Legal rules and principles", because from this moment, in Polish legal culture, people began to be interested in a way of comprehension of the principles, what was originated by Dworkin (Bogucki, Zieliński, 2014).

Transposition of understanding the rules by Dworkin or Alexy to Polish legal culture somehow forces to change of, consolidated in the Polish jurisprudence, vision of legal system, what leads to recognition of its fundamental heterogeneity. Another consequence of accepting the way of comprehension of the rules proposed by Dworkin, and particularly by Alexy's conception, was a necessity of developing different methods of interpretation – different for rules and different for principles. We should also remember that Polish jurisprudence made only partial reception of Alexy's views, and as a consequence adopted hybrid form of rules (Bogucki, Zieliński, 2014). This short characteristic shows that conception proposed by R. Dworkin, adopted and modified by Alexy is inadequate to Polish legal culture.

When we refer to these rules to criminal trial, we must state that they are some kind of a phenomenon, because they have the highest meaning in relation to criminal trial. The doctrine emphasizes that the rules form a particular system of mutual relations and references. Repeatedly, these trial rules become a fundament, on which rulings, not only common courts of law, but also Supreme Court and Constitutional Court are based (Wiliński, 2014). It is worth citing the words of Professor W. Daszkiewicz, who claimed that the trial rules are "points of references in axiological assessment of trial norms and institutions" (Wiliński,

2014). Taking into consideration that all phases of criminal trial, and in particular preparatory proceedings and application of preventive measures in a form of detention before trial, cause severe consequences towards suspect and his/her family, we shouldn't be surprised by the fact that trial rules in a system of trial criminal law have a particular position.

Conclusion

We can conclude that the different views of H. L. A. Hart and R. Dworkin led many generations to become interested in law, paying attention to important issues which have a direct impact on the life of every human being. Experiences of the twentieth century, with all its atrocities, showed what happens in a situation when laws and morality don't go hand in hand, because it leads to distortion of law. The evolution of attitude towards law and morality in the context of *hard cases* and the dispute between Hart with Dworkin and its consequences lead us to conviction that the law is still improving. Different conceptions are a basis to deeper search and different attitude in relation to the passage of time and change of economical-social – political-legal conditions. The proof of this is Hart's conception, which was criticized by Dworkin, and this philosophical reflection is improved by J. Zajadło.

Relation between law and morality, at the beginning called "Cape Horn", really deserved to be called like that because they "sail across the sea" of different, often extreme conceptions of law, they can easily "sink", what history taught us many times. In this sense, it is worth knowing different philosophical-legal conceptions but also returning multiple times to the sources of these discussions, which address the most important disputes, from antiquity to our times. The body of rulings of our negative legislator – the Constitutional Court – seems to tell us about an undisputed thesis of penetration of the normative environment into the content of the law, not only positive but also applied in a way of a deepened interpretation, and this Court in one of its last rulings, allowed to express a thesis of understanding of the law: "(...) not only as a set of, passed according to formally determined procedure, regulations, but as a set of axiologically related norms, being a cultural, rooted in historical experiences of the community and built on the basis of common, for a given circle of entities, system of values",[1] what is a *signum temporis* of the above study.

[1] Judgment of the Constitutional Tribunal of September 30, 2008, K 44/07, OTK-A, No. 7, item 126.

References

Bogucki, O., Zieliński, M. (2014). Koncepcja zasad i reguł R. Alexy'ego jako koncepcja nieadekwatna do polskiej kultury prawnej (The concept of R. Alexy's rules and principles as a concept inadequate to Polish legal culture). In: P. Wiliński (ed.). *System Prawa Karnego Procesowego. Tom III. Cz. I. Zasady procesu karnego*, Warszawa: Wolter Kluwer, pp. 60–80.

Bunikowski, D. (2006). *Ingerencja prawa w sferę moralności w trudnych przypadkach* (Interference of law in the sphere of morality in difficult cases). Retrieved May 25, 2023, from http://www.ipsir.uw.edu.pl/UserFiles/File/Katedra_Socjologii_Norm/TEKSTY/kk4621%281%29.pdf

Dybowski, M. (2001). Ronalda Dworkina koncepcja zasad prawa (Ronald Dworkin's principles of the law). *Ruch Prawniczy Ekonomiczny i Socjologiczny, 3*, pp. 99–115.

Dyrda, A. (2014). Spór o pojęcie prawa – debaty Hart-Dworkin ciąg dalszy? (Contention over the conception of law – continuation of Hart-Dworkin debate?). *Państwo i Prawo, 4*, pp. 3–18.

Kołtun, M. (2007). *Teoria prawa i legitymizacji prawa według H. L. A. Harta* (Theory of law and legitimization of law according to H. L. A. Hart). Retrieved May 25, 2023, from http://www.sknp.umcs.lublin.pl/materialy/zn/studenckie_zeszyty_naukowe15.pdf

Kondela, M., Smolat, M. (1995). Postscriptum H. L. A. Harta (H. L. A. Hart's Postscript). *Państwo i Prawo, 1*, pp. 52–57.

Morawski, L. (1999). *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* (The main problems related to the contemporary philosophy of law. Law in the course of transition). Warszawa: LexisNexis.

Stelmach, J., Sarkowicz, R. (1999). *Filozofia prawa XIX i XX wieku* (Philosophy of law in the 19th and 20th Centuries). Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Sobański, R. (1999). Prawo i Moralność (Law and Morality). *Śląskie Studia Historyczno-Teologiczne, 32*, pp. 159–170.

Wiliński, P. (2014). Fenomem zasad procesu karnego (The Phenomenon of Criminal Proceedings Rules). In: P. Wiliński (ed.). *System Prawa Karnego Procesowego. Tom III. Cz. I. Zasady procesu karnego*, pp. 89–92. Warszawa: Wolters Kluwer.

Waltoś, S., Hofmański, P. (2023). *Proces karny. Zarys systemu* (Criminal Procedure: An Outline of the System). Warszawa: Wolters Kluwer.

Zajadło, J. (2024). *Po co prawnikom filozofia prawa?* (Why Do Lawyers Need the Philosophy of Law?). Warszawa: Wolters Kluwer.

Załuski, W. (2009). *Ewolucyjna filozofia prawa* (Evolutionary philosophy of law). Warszawa: Wolters Kluwer.

Zirk-Sadowki, M. (2022). Wprowadzenie (Introduction). In: R. Dworkin, J. Winczorek (eds.), *Imperium Prawa*. Warszawa: Wolters Kluwer.

NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 1 (2024), pp. 17–38
DOI: https://doi.org/10.71042/CJL01202402

Khrystyna BIDONKO
Nicolaus Copernicus Superior School, Poland*

The Role of the Parliament in European Integration: Croatia's Lessons for Ukraine

• **Abstract** •

After Ukraine was granted the status of a candidate for EU membership in June 2022, the cooperation between Ukraine and the European Union has reached a new level. Such development poses challenges for the Parliament of Ukraine, which is simultaneously facing the challenges of war. It is crucial to identify, what examples from foreign experience can be explored and which good practices can be adopted to enhance parliamentary mechanisms for European integration of Ukraine. A relevant case study of successful European integration of Croatia is presented in the article. Drawing from the Croatian experience, examination of official documents, parliamentary records, and legislative acts, the article makes an overview of some adaptations conducted for successful integration of Croatia into the EU.

Keywords: Parliament, *Hrvatski sabor* (Croatian Parliament), *Verkhovna Rada* of Ukraine (VRU) (Supreme Council of Ukraine), Parliament of Ukraine, European Integration.

Introduction & framework

In times of globalization, the states have the luxury not only to exchange goods and technologies for mutual development, but also to share experiences in policy building processes. The same applies for parliamentary and legislative mechanisms. The current 27 EU member states make a good study sample for states aspiring to become members of the European Union.

In 2022 Ukraine, Moldova and Bosnia and Herzegovina were granted the status of a candidate for EU membership (European Council, 2022). In 2024, there are ongoing accession negotiations with North Macedonia and Albania, Serbia

* ORCID ID: 0009-0003-2849-4938; address: Nowogrodzka 47a, 00-695 Warsaw, Poland; e-mail: kbidonko@student.sgmk.edu.pl

and Montenegro are candidate countries. Ukraine started negotiation process with the EU on June 25th, 2024 (Council of the European Union, 2024). Thus, the European Union is now standing at the beginning of a comprehensive enlargement, which is consistent with the EU Neighbourhood policy[1] and the European Union priorities for 2019–2024.[2]

In order to be accepted to the EU, the states should fulfil three categories of criteria (Copenhagen criteria for the EU accession).[3] The criteria include stability of institutions guaranteeing values and principles of the EU. Some principles are formulated in the doctrine (e.g. the rulings of the CJEU and the ECHR), others are listed in the Article 2 of TEU and include: "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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail".[4] The second set of criteria include the existence of a functioning market economy that will be able to compete with the common European market. The third one refers to the ability to take on the whole scope of obligations that emerges from a state's membership in the EU. The third set of the aforementioned criteria cannot be achieved without an effectively functioning parliament. The parliament is responsible for adopting and enforcing legislation, conducting oversight, thus ensuring country's alignment with policies and practices of the EU.

It is important to note, that the EU can pose additional requirements that either lay within or go beyond the Copenhagen criteria. For example, in order to ensure that the state will be ready to start negotiation process, a 'conditional' candidate status was granted Ukraine in 2022. The European Commission obliged Ukraine to comply with additional 7 steps. Those include fighting corruption; adopting the law on media; implementing the Anti-Oligarch law; finalizing the reform of the legal framework for national minorities; conducting reform regard-

[1] European Commission. (n.d.). *European Neighbourhood Policy*. Retrieved November 13, 2024, from https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy_en

[2] European Union. (n.d.). *European Union priorities, 2019–2024*. Retrieved November 13, 2024, from https://european-union.europa.eu/priorities-and-actions/eu-priorities/european-union-priorities-2019-2024_en

[3] European Council. (1993). *Conclusions of the Presidency – Copenhagen, June 21–22, 1993*. SN 180/1/93. Retrieved November 13, 2024, from https://www.consilium.europa.eu/media/21225/72921.pdf

[4] Consolidated version of the Treaty on European Union. (2012). *Official Journal of the European Union*. Document C 202/1. Retrieved November 13, 2024, from https://eur-lex.europa.eu/eli/treaty/teu_2016/oj

ing the selection procedure for judges of the Constitutional Court of Ukraine; ensuring that anti-money laundering legislation complies with Financial Action Task Force requirements and adopting a reform plan for the law enforcement sector; and establishing the High Qualification Commission of Judges of Ukraine.[5] It demonstrates that the process of European integration remains a political one. The EU institutions as well as the member states take precautionary steps. With posing additional requirements, the EU reserves some time for observation of the behaviour of the candidate state and more thorough decision-making. This way, the EU aims to ensure, that the future EU member has the capacity and shows commitment to join the EU that goes beyond mere political declarations.

The process of European integration of the parliament, often referred to in the literature as *Europeanisation*, manifests itself in at least two ways (Auel, Benz, 2005, p. 372). First, the EU member states, when joining the EU, transfer part of the powers of the EU, thus voluntarily limiting their sovereignty in certain aspects, one of which being the legislative function of the parliament. According to Article 288 of the TFEU, EU institutions have the right to create legal acts: regulations, directives, decisions, recommendations, and opinions.[6] Herewith, directives and regulations have a binding direct effect on EU member states and decisions are binding on the states to whom it is addressed. Joining the EU is inherently connected to aligning the national legislation with EU *acquis* and unconditionally adopting core EU legislation.

Second, the process of *Europeanisation* can be characterized by the shift of power between the legislative bodies and the executive ones (Auel, Benz, 2005, p. 377). While the parliament frequently has to adopt EU legislation directly, the national government engages itself in the policymaking processes at the supra-national level and develops regulations and legal acts ensuring the correct functioning of the EU legislation on domestic level. Some scholars even argue that the *Europeanisation* process poses a threat to parliaments, leading to *de-parliamentarisation* (Goetz, Meyer-Sahling, 2008, p. 6).

Simultaneously, scholars now talk about the *de-Europeanisation*, which can occur, when the states fail to properly adopt the EU requirements (Ertugal, 2021, p. 4).

[5] European Commission. (2022). *Communication from the Commission to the European Parliament, the European Council and the Council Commission Opinion on Ukraine's Application for Membership of the European Union, Document 52022DC0407*. Retrieved November 13, 2024, from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022DC0407

[6] Consolidated version of the Treaty on the Functioning of the European Union. *Official Journal of the European Union*. Document C 326/47. Retrieved November 13, 2024, from https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF

As Tokatli S. (2021, p. 73) argues, the tendency among Croats to identify themselves as Europeans and prioritizing the European vector of state development served as a catalysing factor for Croatia to successfully become an EU member state. According to the author, the opposite was true for other states in the Balkan region (e.g. Serbia). Membership in the EU was proclaimed the national objective of the Republic of Croatia in 2002.[7] The proclamation was followed by parliamentary oversight over its exercising.

In Ukraine, the societal support for EU accession remains high. In 2013–2014, during the Revolution of Dignity, Ukrainians declared their political intentions and ambitions to join the European Union. The result of the Revolution was the signing of the Association Agreement of Ukraine with the European Union (2014).[8] The agreement itself is an innovative instrument (Van der Loo, Van Elsuwege, Petrov, 2014) that provides for a high degree of integration of Ukraine with the Union even before Ukraine acquires the status of an EU member state. For at least three consecutive years (2022–2024) 91% of Ukrainians want Ukraine to become an EU member state before 2030 (National Democratic Institute, 2024). In political and governmental realm, the EU integration is one of the top-2 goals for Ukraine, besides winning the war. The irreversibility of Ukraine's European course is enshrined at the highest legislative level – in the text of the Preamble to the Constitution of Ukraine (1996) and is reflected in current law-making processes.[9]

The case of the European integration of Ukraine is of an extraordinary nature. Because of the full-scale invasion of the Russian Federation in Ukraine, the state is under martial law since February 24, 2022.[10] Subsequently, the main actors in the process of the European integration – the government and the parliament, are subjected to continuous challenges and were forced to undergo procedural and organizational changes. Therefore, in this article, the issue of becoming an EU member state during war is also addressed.

---

[7] Resolution on the Accession of the Republic of Croatia to the European Union. (2002). Retrieved November 13, 2024, from https://www.sabor.hr/en/european-union/resolution-accession-republic-croatia-european-union-18-december-2002

[8] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other pArticle Document 02014A0529(01)-20231201. Retrieved November 13, 2024, from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014A0529%2801%29-20231201

[9] Constitution of Ukraine. (1996). *The Official Bulletin of the Verkhovna Rada of Ukraine, no. 30, Article 141*. Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80#Text

[10] On the Imposition of Martial Law in Ukraine, Decree of The President of Ukraine. Retrieved November 13, 2024, from https://www.president.gov.ua/documents/642022-41397

The paper proceeds as follows. First, the peculiarities of the functioning of the parliament of Ukraine during wartime are presented. Second, the applicability of the case of Croatia to Ukraine is discussed, highlighting the unique nature of the process of European integration of Ukraine during war. Lastly, the specific lessons derived from Croatia's EU integration are formulated by conducting a comparative analysis of the parliamentary functions (legislative and control) in both states. Methodology-wise, the article is based on the review of the parliamentary procedures in both states, enshrined in legislation and collecting data from official state web resources (e.g. statistical information relating to the work of the VRU).

European integration during war: challenges for the Parliament of Ukraine

The parliament of Ukraine carries out its constitutional role during war. In response to the crime of aggression conducted by the Russian Federation, on February 24th, 2022, the President of Ukraine issued a decree imposing martial law in Ukraine. In compliance to the Law "On the Legal Regime of Martial Law",[11] certain parliamentary procedures were amended. For example, the parliament of Ukraine of the ninth convocation works in a continuous single plenary session, which continues until the day the martial law in Ukraine is terminated or revoked (Article 1 of the Resolution of the VRU "On Certain Issues of the Organization of the Work of the *Verkhovna Rada* of Ukraine of the Ninth Convocation under Martial Law Conditions".[12] The Chairperson of the VRU announces a break in the ongoing plenary session and determines the time and place of its continuation. During the recess, parliamentary work continues, particularly through convening committee meetings. For security reasons, the members of the parliament present at the plenary session are not allowed to share information about the start, progress, and decisions made during the session for at least an hour after the session is renewed. The transparency of parliamentary work is limited, as online transmission of the plenary session is cancelled,[13] and the access of journalists to the parliament was restricted (February 2024–May 2024) (Press Service VUR, 2024b).

[11] Act on the Legal Regime of Martial Law, *Law of Ukraine no. 389-VIII*. (2023). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/389-19#Text

[12] Act on Certain Issues of the Organization of the Work of the Verkhovna Rada of Ukraine of the Ninth Convocation under Martial Law Conditions, Resolution of the Verkhovna Rada of Ukraine. (2023). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/2912-20#Text

[13] Instead of online transmissions, the recordings of plenary session are available.

Despite the aforementioned, the VRU is executing its powers in accordance with the constitution of Ukraine and the Rules of Procedure of the VRU. The *Verkhovna Rada* of Ukraine is the only legislative body in Ukraine, as provided in the constitution of Ukraine (Article 75). The powers of the VRU are defined in the Article 85 of the Constitution. According to the article, the Parliament establishes the principles of domestic and foreign policy, supervises the implementation of the state's strategic direction in pursuit of Ukraine's full membership in the European Union and the North Atlantic Treaty Organization, ratifies or revokes international treaties.

The VRU works in sessions (Article 82). The regular sessions begin on the first Tuesday of February and the first Tuesday of September each year (Article 83). In the event of the introduction of martial law, the VRU is to meet for an extraordinary session and works until the martial law or state of emergency is lifted (Article 11, VRU Rules of Procedure).[14]

The legislative work of the parliament is conducted according to the Legislative Drafting Plan, which is adopted annually, at the beginning of the regular session (Article 191, VRU Rules of Procedure). The Legislative Drafting Plan for 2024 was adopted on February 6, 2024 (Press Service VRU, 2024a).

On the one hand, the legislation of Ukraine provides the parliament with clear procedures of functioning during martial law. Simultaneously, the VRU has the task of participating in the process of European integration while addressing the challenges of wartime. The latter manifests itself, for example, in the interplay between the Legislative Drafting Plan, urgent wartime issues and the European integration priorities in legislative work. During the 10th session (September 5, 2023 – February 5, 2024) the parliament adopted 64 laws, only 20 of which were previously laid down in the Legislative Drafting Plan for 2024.[15]

Since February 24, 2022, through August 2024, a total of 4,147 draft laws were registered in the Ukrainian parliament, with 770 to 1,138 draft laws registered per session. Wartime conditions necessitate swift responses to the threats posed by international armed conflict. Under such circumstances, adopting laws without discussion may be justified. During the 10th session, 31% of laws were adopted without discussion during the first hearing. This figure is significantly lower than in the first year of the war, when 69% of laws were adopted in this manner (Internews Ukraine, 2023–2024).

[14] On the Rules of Procedure of the Verkhovna Rada of Ukraine, *Law of Ukraine No. 1861-VI*. (2010). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/1861-17#top

[15] Verkhovna Rada of Ukraine. (n.d.). Operatyvna informatsiia pro rezultaty rozghliadu pytan poriadku dennoho na plenarnykh zasidanniakh. Retrieved November 13, 2024, from https://www.rada.gov.ua/meeting/faxiv/82

Since February 2022, additional trends have emerged in the work of the parliament, such as the issue of delegating competencies to the executive branch. One example is the Law of Ukraine "On Amending Certain Laws of Ukraine Regarding the State Final Attestation and Admission Campaign of 2024".[16] According to it, the procedure of admission to the university is to be established by the Ministry of Education, which is non-compliant with the Ukrainian law on higher education. According to the doctrine, such 'delegation' is acceptable as long as it is used in exceptional circumstances, adheres to the provisions of the Constitution of Ukraine, is temporary and "is accompanied by appropriate parliamentary or judicial oversight" (Internews Ukraine, 2023–2024). By the third year of the full-scale invasion, such trend has significantly decreased. The aforementioned, as well as the overall increasing of the amount of time the parliament devotes to discussing the draft laws, indicates that the parliament is returning to the ordinary (pre-war) way of functioning.

Applicability of the case of Croatia to Ukraine

As a case study, the Croatian example provides valuable insights into the legislative and procedural adaptations required for successful integration into the European Union. It can be stated that the Republic of Croatia is a good case study for Ukraine based on several reasons.

First, Croatia is the last state to become a member of the EU making the state's case the most temporally relevant.[17] Croatia finally concluded accession negotiations on June 30, 2011, and signed the Treaty of Accession in Brussels on December 9, 2011, followed by its approval in a national referendum on January 22, 2012, and the completion of the ratification process on April 4, 2012. Croatia's accession to the EU took place on July 1, 2013, as all 27 EU members and Croatia had ratified the treaty by that date. The process of EU integration of Croatia was unique in comparison to the other member states, as the state was the first one (so far, the only one) to enter the Union after the adoption of the Treaty of Lisbon.

Second, the state has substantial experience in conducting post-war recovery. The Croatian War of Independence took place from 1991 to 1995, which was fol-

[16] On Amending Certain Laws of Ukraine regarding the State Final Attestation and Admission Campaign of 2024, *Law of Ukraine No. 3438*-IX (2023). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/3438-IX#Text

[17] European Commission. (n.d.). Directorate-General for Neighbourhood and Enlargement Negotiations. *Croatia*. Retrieved November 13, 2024, from https://neighbourhood-enlargement.ec.europa.eu/croatia_en

lowed by comprehensive work on post-war recovery, including the establishment of new institutions, developing new processes of the functioning of the independent democratic state, and aligning national legislation with the European *acquis communautaire*. One might argue that the case of Ukraine is vastly different, given the scale of atrocities and the discrepancy in time between warfare and the EU accession process in Croatia. Nonetheless, some parallels can be drawn, such as the power imbalance between the parties to the conflict, a numerical advantage in weapons and soldiers in the Yugoslav National Army and Russian army in comparison to the Croatian army and Ukrainian armed forces, respectively, and the high number of civilian causalities, connected to a specific aggressor's war strategy (Hebrang, Henigsberg, Golem, Vidjak, Brnić, Hrabac, 2006). Surely enough, the process of European integration of Ukraine is complicated by the ongoing hostilities. However, as described in the previous section, the VRU continues to effectively exercise its constitutional powers. In its turn, after the warfare ceased, Croatia faced obstacles connected *inter alia* to the high level of Euroscepticism within the ruling elite (the president Tudjman and the leading party of the Croatian Democratic Union), which postponed the state's EU integration for at least 5 years (European Stability Initiative, 2014).

Third, the constitutional role of the parliaments in both states is significant, with Croatia being a parliamentary republic, and Ukraine – a premier-presidential republic. Moreover, the way of conducting parliamentary procedures is similar. Ukraine has a unicameral parliament, which is the only legislative body in Ukraine. It operates on the basis of the Constitution of Ukraine. *Hrvatski Sabor*, the parliament of Croatia, is also a sole legislative representative body (Article 70, Croatian Constitution) which is unicameral, is elected for a term of four years (Article 73) via direct, universal and equal suffrage by secret ballot (Article 72).[18] The parliament works in sessions (Article 79) and adopts laws in three consecutive hearings. The similarities also include the specifics of work of parliamentary committees and their secretariats and conducting parliamentary procedures, as will be discussed below. The constitutional composition of the parliament is significantly smaller (100–160 members in comparison to 450 MPs in Ukraine), however the country itself is smaller, which is why the functioning of the two parliaments can be compared on a scale.

Both Ukraine and Croatia experienced communist regimes, which has longitudinal impact on the specifics of the functioning of a state. Croatia gained inde-

[18] Constitution of the Republic of Croatia as of 15 January 2014 (consolidated text), *Official Gazette Nos 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14*. Retrieved November 13, 2024, from https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf

pendence in June 1991 and started a path of democratic transformation of a state (Ognjenovic, Jozelic, 2021). In 2001, was signed the Stabilisation and Association Agreement (S.A.A.) between the European Communities and their Member States, on the one hand, and the Republic of Croatia, on the other hand. The Agreement came into force in 2005. The goals of the document, listed in its Article 1, include fostering political dialogue, enhancing economic development (including transitioning to market economy) and developing regional cooperation. The Agreement is also an instrument for promoting European values, as respect for the democratic principles and human rights is enshrined in its provisions (Article 2, S.A.A.). In essence, the goals partially reflect the Copenhagen criteria for EU accession. The aforementioned provides a basis for stating that the Agreement is a precursor to the state's EU association.

In turn, Ukraine proclaimed independence in August 1991 and in 1993 the Resolution of the VRU "On the Main Directions of Ukraine's Foreign Policy" was adopted.[19] A separate section of the document covers issues of European regional cooperation, stating that a promising goal of Ukraine's foreign policy is membership in the European Communities. This clearly indicated Ukraine's intention to move away from its Soviet past and prioritize cooperation with the EU. This intention is also reflected in subsequent political decisions. In 1998, the Partnership and Cooperation Agreement between Ukraine and the European Communities and their Member States came into force[20] and was later superseded by the 2014 Association Agreement. In 2000 The Program of Ukraine's Integration into the European Union was developed and approved by a decree of the President of Ukraine.[21] A few years later, in 2004, the Law of Ukraine "On the Nationwide Program for the Adaptation of Ukrainian Legislation to the Legislation of the European Union" was adopted.[22]

Considering the Soviet past of both states and their orientation towards European integration shortly after gaining independence, it can be assumed that the

[19] On the Main Directions of Ukraine's Foreign Policy. Resolution of the Verkhovna Rada of Ukraine. (1993). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/3360-12?lang=en#Text

[20] Partnership and Cooperation Agreement between Ukraine and the European Communities and their Member States. (1994). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/998_012#Text

[21] On the Program of Ukraine's Integration into the European Union. Decree of The President of Ukraine (repealed). (2000). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/1072/2000#Text

[22] On the Nationwide Program for the Adaptation of Ukrainian Legislation to the Legislation of the European Union, *Law of Ukraine no. 1629-IV*. (2004). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/1629-15#Text

democratization of the states proceeded similarly. The latter thesis is supported by studies of democratic processes (Democracy Index) conducted by The Economist Intelligence Unit (Kekic, 2007). The Democracy Index considers electoral process and political pluralism, functioning of the government, political participation of the citizens, overall political culture and civil liberties. It is an assessment of the country across the five aforementioned categories, which allows for the formulation of a score on a 10-point scale and the assignment of the country to one of four regime types: full democracies, flawed democracies, hybrid regimes, and authoritarian regimes.

When compared, the scores of Croatia and Ukraine show some tendencies (Table 1). Despite the fluctuation, both countries belong to the category of flawed democracies. Based on The Economist Intelligence Unit (EIU) definition, flawed democracies are characterized by the existence of democratic elections and respect for basic civil liberties with simultaneous problems regarding functioning of the government, political participation and overall political culture (EIU, 2023).

In 2006, a year after Croatia entered the negotiation process with the EU,[23] both Indexes remained statistically close: the difference in indicators amounted to 1.43%. However, as shown in the table, the states experienced a decline in democracy index over the course of seventeen years – 7.68% for Croatia (from 7.04 in 2006 to 6.50 in 2023) and 27.09% in Ukraine (from 6.94 in 2006 to 5.06 in 2023). While the possibility to compare the results is limited (especially due to the extraordinary circumstances, in which Ukraine is forced to maintain democratic regime), we can confirm the postulation that Croatia is a relevant study sample of successful EU integration.

	2006	**2011**	**2013**	**2014**	**2022**	**2023**
Croatia	7.04	6.73	6.93	6.93	6.50	6.50
Ukraine	6.94	5.94	5.84	5.42	5.42	5.06

Table. 1. *Democracy Index in Croatia and Ukraine. Source: The Economist Intelligence Unit.*[24]

[23] The first available EIU index dates back to the 2007 report, which covers the state of democracy in 2006.

[24] As of summer 2024, the yearly reports are available online from 2006 up to 2023. The EDI shown in the table refer to the significant point in the European Integration of Croatia and Ukraine, respectively. 2011 – concluding the negotiation in Croatia, 2013 – Croatia joins the EU, 2014 – Association agreement is signed in Ukraine, 2022 – Ukraine becomes a candidate state for EU membership.

Given the communist past of the states, it can be postulated, that the democracy is still in the process of shaping, hence – the continuous presence of Croatia and Ukraine in the group of flawed democracies. To cope with the remnants of the communist regime, both states occasionally had to resort to the practice of militant democracy, exercising the parliamentary role of being the "democracy watchdog". Ukraine has a proven track record of using the means of militant democracy, such as the attempt to ban the communist party in 1991.[25] The latter was, however, followed by years of state's inactivity regarding this issue (Barabash, Berchenko, 2023, p. 66). The re-activation of the means of militant democracy (ban of political parties and certain symbols, lustration etc) in Ukraine correlate both with the signing of an Association Agreement with the EU and the start of Russian occupation of Crimea in 2014 (Bakumov, 2023, p. 17). The latest example of such measure in Ukraine is the adoption of a law limiting the activities of religious organizations that have ties with Russia.[26]

In comparison, in Croatia at least three attempts to ban the activity of extremist political parties were conducted with various success (Maciej, 2024), and the use of verbal manifestations of the totalitarian appeals is being penalized (Jašić, 2023).

Undoubtably, the possibility of policy transfer between states is limited. However, based on the relative similarity of Croatian and Ukrainian experience, familiarization with the history of EU integration of Croatia may be beneficial for Ukraine. Ultimately, Croatia's successful completion of the EU negotiation process and its accession to the European Union were facilitated by strong cooperation with both European institutions and neighboring states in a regional context (Horopakha, 2018, p. 33).

The aforementioned leads to yet another reason why Ukraine can draw some experience from the Croatian example. The VRU is continuously establishing cooperation with the parliaments of EU member states. The VRU deepens ties with the Parliament of Croatia, based on provisions of the Memorandum on cooperation between the *Verkhovna Rada* of Ukraine and the Parliament of Croatia. The Memorandum was signed on 26 of October 2022 between the Secretariat of

[25] "On the Temporary Suspension of the Activity of the Communist Party of Ukraine". Decree of the Presidium of the Verkhovna Rada of Ukraine. (1991). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/rada/show/1435-12?lang=en#Text The decree was declared unconstitutional in 2001, as the constitutional procedure of banning political parties by court decision was not followed. However, the communist party of Ukraine is successfully banned in Ukraine as of 2024 as a result of the state decommunization policy.

[26] On the protection of the constitutional order in the sphere of activities of religious organizations. *Law of Ukraine No. 3894-IX*. (2024). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/3894-20#top

the VRU and the Expert Service of the Croatian Parliament (*Verkhovna Rada* of Ukraine, 2023). The Office for International and European Affairs of the Croatian Parliament engages in capacity building processes in the VRU by providing technical assistance to the countries of the South-Eastern Europe and countries of the Eastern Neighbourhood. In order to exchange experience and best practices, educational visits of VRU representatives to the parliaments of Croatia take place (Internews Ukraine, 2023), online meetings are held, etc. By its nature, this interaction is similar to the cooperation of the parliaments of the EU member states within the framework of the COSAC[27] and emphasizes the importance of interparliamentary cooperation in the context of Ukraine's accession to the EU.

The Role of the Parliament in European Integration: Croatia's Lessons for Ukraine

Taking into the consideration the specifics of the functioning of the EU legislative system, it is the responsibility of the government to lead the process of the European integration of a state. The main legislative body, characterizing itself with broad discretion (Venher, 2013, p. 50), which plays an important role in a day-to-day life of a state, is being unfairly overlooked in the process of European integration. According to Hodic (2024), the European Commission did not pay enough attention to the role of the parliament in the integration process up until 2023, focusing on the executive branch. Nonetheless, in democratic states with separation of powers into three branches, the branches interact and strengthen each other. That is why the role of the parliament in the process is also significant.

Defining the parliament's role in the process of European integration is a complicated task, as the roles may be dependent on parliamentary tradition of the given state, the constitutional powers of the parliament and the geopolitical circumstances, etc. However, as Tapio Raunio (2011, p. 305) notes, the role of the national parliament can be categorized into two main groups: governance-related functions and those linked to its interaction with citizens. The parliamentary functions derived from Ukrainian constitutional doctrine include legislative, representative, constitutive, and control functions of the parliament (Burdin, 2020, p. 43). Thus, parliament is responsible for harmonization of the national legislation with the EU legal system (e.g. developing parliamentary procedures of adopting "Eurointegration" bills, amending existing legislation, including the Constitution), maintaining political consensus on issues related to the EU integration, conducting oversight over

[27] The Conference of Parliamentary Committees for Union Affairs.

the government, conducting parliamentary diplomacy, raising awareness among citizens and providing civic education, establishing new bodies, etc.

In this context, it is crucial to emphasize that the parliament has discrete powers to modify its functions and reallocate priorities among them. Starting negotiation process signifies a transition to a qualitatively enhanced level of cooperation with the European Union, which implies a change in the EU – Ukraine interaction (Komarova, Łazowski, 2023, p. 122). Consequently, at its *status quo*, the VRU can define its role in the negotiation process with the EU. During negotiations, *Hrvatski Sabo*r focused mainly on its legislative and control function.

Legislative function

The most obvious parliamentary role regarding the process of European integration is the adoption of corresponding legislation. In this regard, *Hrvatski Sabor* developed new parliamentary procedures. In order to make the procedure of adopting the EU legislation faster, a number of changes were introduced to the standing orders of the parliament in December 2001. Particularly, the novelties to the system of codification of the bills. Article 177 of the Standing orders of the Parliament of Croatia was supplemented with rules of codifying bills that are being adopted with the aim of harmonization of legislation.[28] According to the forementioned article, the 'European' bills are marked "P.Z.E" (*prijedlog zakona europski*, i.e. "European draft law"), which makes it easier to track the number of adopted laws and to simplify the initiation of the "urgent procedure" of adoption of the law. The introduction of such procedural novelties led to a situation where the majority of laws were subject to the "urgent procedure" by default and adopted without parliamentary debate. In other words, the parliament voluntarily limited its functions to expedite the EU integration process. In addition, the Constitution of Croatia allows for the delegation of legislative function to the government (Article 88), which might be of great use during legislation harmonization. However, such measure is temporary (the governmental decree shall be valid for a year) and may regulate a limited sphere of social relations (it cannot concern human rights, civic rights, the electoral system, the establishment of governmental bodies and activities of local self-government).

Reduced scope of parliamentary debate may pose a threat to democracy. As was mentioned, above the *Europeanisation* itself may lead to *de-parlamentarisation*.

[28] Standing Orders of the Croatian Parliament. (2020). Retrieved November 13, 2024, from https://www.sabor.hr/en/information-access/important-legislation/standing-orders-croatian-parliament-consolidated-text

The additional limitations of the legislative function may accelerate the detrimental effect on the parliamentary role, changing the law-making process into a simply "rubber-stamping" process. However, *Hrvatski Sabor* used precautionary measures. The "European" bills were discussed and debated in the first reading in response to the proposition of the competent working body. Either the Committee on the Constitution, Standing Orders and Political System or the Legislation Committee could initiate a discussion to determine whether the proposed draft law complies with the Constitution or the legal system. The Legislation Committee ensures the unity of the legal system and monitors the overall compliance with the legislative methodology. It is important to note that the harmonization of law not only involves adopting new legislation but also encompasses amendments to existing national laws that may be inconsistent, inadequate in relation to the *acquis*, or incomplete. Additionally, it may involve the partial or complete withdrawal of regulations.

In Ukraine, a similar procedure to Croatian "urgent procedure" exists. Article 101 of the Rules of Procedure of the Parliament of Ukraine establishes the possibility to designate certain bills as urgent and include them in the agenda of the nearest plenary session of the parliament. The procedure allows shortening the time required for ordinary considering of the law. As Croatian experience shows, developing a protecting mechanism is needed to prevent adopting laws without discussion.

At the same time, as shown in the previous sections, the VRU does not abuse the possibility to adopt laws without discussion even in the circumstances of war. Additionally, the mere designation of a draft law to the cohort of "urgent" does not preclude the discussion in the session hall. The procedure authorizes either the President or the VRU itself to approve the consideration of a draft law out of turn, in the first instance. In the 2023 European Commission yearly report on Ukraine, it is stated that not only does the parliament systematically carries out its legislative function, but substantial attention is paid to the EU-integration laws. The primary body responsible for proposing "European" laws remains the government, meaning that the vast majority of draft laws related to EU integration are introduced to parliament by the government.

During the negotiation process, in 2010, the *Hrvatski Sabor* adopted constitutional amendments, introducing a new chapter – Chapter VIIA: "European Union". This chapter transferred certain powers to EU institutions and recognized the direct applicability of EU law within Croatia.[29] The imposition of the martial law (as well as the state of emergency) in Ukraine makes it impossible to make

[29] Title VIIA was added to the constitutional text by Article 29 of the Amendments to the Constitution of the Republic of Croatia, *Official Gazette* 76/10.

changes to the constitution, as it is directly prohibited by article 157 of the Constitution. Concurrently, in the summer of 2024 the VRU adopted a law regarding the law-making activity, which will enter into force one year after the termination or cancellation of the martial law in Ukraine. The law arranges the law-making process and proposes a series of juridical novelties. For example, it shifts responsibility and obliges the subject of legislative initiative to check whether the draft law complies with the EU law (Article 27) before the draft law is even registered in the VRU.[30] As of now, according to Article 103 of the Rules of Procedure of the VRU, the obligatory expertise is conducted at the next stage – after the draft law was registered and included in the agenda of the session. Even though the law has not entered into force yet, its preparation, discussion, and adoption certainly contributed to the formation of a new culture of law-making activity in Ukraine.

Control function

One of the competences of the parliament of Croatia is conducting parliamentary control, both legal and political (on government). As follows from the previous section, the legislative process in the *Hrvatski Sabor* was simplified during the negotiation process. However, in the aspect of exercising parliamentary oversight, novelties were introduced.

Parliamentary control[31] itself is the direct function of the *Sabor* (Article 144, Croatian Constitution), and the government is accountable to the Croatian Parliament (Article 115). The aforementioned innovation involved the creation of a National Committee – a monitoring body composed of representatives from various groups of MPs, both in terms of political affiliation (majority/opposition) and professional background (MPs from different committees).[32] This Committee took part in preparing the negotiations position together with the government

[30] It is important to note, that such provision already exists for governmental draft laws. Additionally, pursuant to the Decree of the VRU "On some measures to fulfil Ukraine's obligations in the field of European integration", the "European" draft laws should be provided to the parliament alongside the table of compliance with the EU law.

[31] For the purposes of this paper, only the direct parliamentary oversight is taken into consideration, meaning that the parliamentary control, exercised by accountable bodies outside of parliament (e.g. ombudsman, budget office) are not covered.

[32] "Izjava Hrvatskoga sabora i Vlade Republike Hrvatske o zajedničkom djelovanju u procesu pregovora za članstvo u Europskoj uniji" (Statement of the Croatian Parliament and the Government of the Republic of Croatia on joint action in the process of negotiations for membership in the European Union) no. 12/2005, January 24, 2005. Retrieved November 13, 2024, from https://narodne-novine.nn.hr/clanci/sluzbeni/2005_01_12_189.html

and worked closely with the Croatian State Delegation for Negotiations to gather and exchange information, make recommendations, and conduct supervision. It also received the reports from the Head of the State Delegation for Negotiations, and the government annually, and reported to the parliament regarding the state of affairs twice a year.

As a particular way of parliamentary control, the members of the Croatian parliament are entitled to pose questions to the government and submit interpellations (Article 86 of the Croatian Constitution, 2010), which the government is obliged to react to within 15 days after the interpellation was submitted (Article 147 of the Standing Orders of the Parliament of Croatia, 2020).

The parliament of Ukraine conducts oversight as one of its constitutional functions (Article 85, Constitution of Ukraine). The standing committees of the VRU are characterized by the existence of control powers, as provisioned by Article 11 of the law "On the committees of the *Verkhovna Rada* of Ukraine" (1995).[33] As one of the new practises exercised in the parliament of Ukraine, there is post-legislative scrutiny that some Committees conduct (e.g. Committee on Youth and Sports (Internews Ukraine, 2024), Committee on Economic Development (2024), Committee on Energy, Housing and Utilities Services (2024) using the methodology of the British parliament. The Committees assess the effectiveness of the implementation of specific Ukrainian laws and identify issues that require legal regulation. The described practice is relatively rare and does not belong to the official methods of exercising parliamentary control defined by law. However, (1) it is only a matter of time before the practice becomes official, should it prove effective; (2) it could also be viewed as a means of conducting oversight over the government, since the implementation of the law requires the adoption of by-laws, which falls under the government's prerogative.

Based on the provisions of the Constitution of Ukraine (Article 89), the VRU may create temporary special or investigative commissions – for the preliminary consideration of issues or to investigate on matters of public interest, respectively. The investigative commissions deal with the issues of violations of national legislation by state authorities, local self-government bodies, managers of enterprises etc., that constitute an area of public interest. The law "On temporary investigative commissions and temporary special commissions of the *Verkhovna Rada* of Ukraine" (2019) does not include an exhaustive list of reasons for appointing

[33] On the Committees of the Verkhovna Rada of Ukraine, Law of Ukraine no. 116/95-BP. (1995). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/116/95-%D0%B2%D1%80#Text

a commission.[34] However, the VRU can create such commission if the violation of the law includes violating rights, freedoms and legitimate interests of citizens that led to significant damage to public interests; poses a threat to the sovereignty, the territorial integrity of Ukraine, its economy, environment, etc. (Article 4). Each commission has up to six months to conduct investigation and deliver a report regarding the conducted work with its conclusions on the issue to the VRU (Article 3). As of autumn 2024, eight temporary investigative commissions exist in the VRU.

S. Bates (2021) argues that parliamentary roles should be redefined using a new institutionalist approach, which includes thorough observation of patterns of behaviour of MPs. Contrary to Croatia, the interpolation does not officially exist in Ukraine. However, Ukrainian MPs exercise other instruments, in particular parliamentary requests and parliamentary appeal as provisioned by the 1992 law "On Status of People's Deputy of Ukraine"[35] and the "Rules of Procedure of the *Verkhovna Rada* of Ukraine". When filing an appeal, Ukrainian politician Yaroslav Zheleznyak reports about measures taken through his Telegram channel with 49938 subscribers. Social media posts, blogposts of the MPs etc. constitute an additional platform for informing society about the activities of the parliament. Although requests are available on the official parliamentary website, this approach allows parliamentary appeals and requests to take a more accessible form, potentially strengthening parliamentary oversight with the involvement of civil society. The aforementioned indicates that the VRU already inclines towards prioritizing its oversight function, especially at the level of individuals (MPs).

Additionally, as Olha Stefanishyna, Deputy Prime Minister for European and Euro-Atlantic Integration of Ukraine, emphasizes, negotiation process should be conducted with direct involvement of the parliament (Service of the Deputy Prime Minister of Ukraine, 2024). In fact, the representative of the Secretariat of the VRU and MPs are the members of the Interdepartmental Working Group on Ensuring the Negotiation Process on Ukraine's Accession to the European Union and Adaptation of Ukrainian Legislation to European Union Law.[36] Ukrainian

[34] On Temporary Investigative Commissions and Temporary Special Commissions of the Verkhovna Rada of Ukraine. Law of Ukraine no. 400-IX. (2019). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/400-20#top

[35] On Status of People's Deputy of Ukraine. Law of Ukraine no. 2790-XII. (1992). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/en/2790-12?lang=uk#Text

[36] "Some issues of ensuring the negotiation process on Ukraine's accession to the European Union". Decree of the Cabinet of Ministers of Ukraine No. 987. (2024). Retrieved November 13, 2024, from https://www.kmu.gov.ua/npas/deiaki-pytannia-zabezpechennia-perehovornoho-protsesu-pro-vstup-ukrainy-a987

legislation allows MPs to participate in the governmental working groups on his/her own behalf.

It is important to note, that as the Constitutional Court of Ukraine emphasized in 2001, the committees of the VRU cannot be considered independent subjects of parliamentary control.[37] Despite exercising scrutiny, they are only engaged at the stage of preliminary consideration of issues, and the parliamentary oversight is to be performed by the VRU as a body.

Conclusion

The transferability of Croatian experience regarding the process of European integration is limited yet offers valuable insights for Ukraine. The social and economic background of the two states differ, the circumstances of their processes of integration into the EU are quite different as well. Nonetheless, drawing from Croatia's experiences can serve as a catalyst for a more effective parliamentary involvement in Ukraine in the European integration process. The similarities that allow for drawing lessons from the Croatian example include the timing of independence, post-war recovery experiences, decommunization processes, current trends in democratization, and the similarities in the functioning of both parliaments.

The legislative function is the defining feature of the parliament. In both countries, the Parliament is the only state body with lawmaking authority. However, when a Europeanization of the Parliament takes place, a shift in power occurs, and the legislative function of Parliament in the context of EU integration takes a backseat, giving way to enhanced parliamentary scrutiny. *Hrvatski Sabor* declared the EU membership to be an official national goal and put the emphasis on its oversight function. As scholars argue, conducting effective parliamentary scrutiny over the work of the government and exercising parliamentary influence through monitoring the process of EU integration, helped Croatia to successfully become an EU member state.

The Parliament of Ukraine is simultaneously focused on addressing ongoing war-related issues within the state, while also participating in Ukraine's EU in-

[37] Conclusion of the Constitutional Court of Ukraine in the case of the appeal of the Verkhovna Rada of Ukraine to provide an opinion on the compliance of the draft Law of Ukraine "On Amendments to the Constitution of Ukraine (Articles 84, 85, 89, 92, 93, 94, 106, 147, 150, 151 and paragraph 6 of Chapter XV of the Constitution of Ukraine)" to the requirements of Articles 157 and 158 of the Constitution of Ukraine (the case of amendments to Articles 84, 85 and others of the Constitution of Ukraine). Kyiv, March 14, 2001 Case N 1-11/2001 (N 1-v/2001). Retrieved November 13, 2024, from https://zakon.rada.gov.ua/laws/show/v001v710-01#Text

tegration process. Such circumstances make the normal functioning of the parliament complicated, however the VRU has adapted and mostly has returned to the pre-war way of functioning as of 2024. As Ukraine is entering the new phase of EU accession (negotiations), the VRU can define its role and prioritize one or some of its functions in the process. Given that the VRU has a broad variety of options and already shows tendencies to prioritize control function, as Croatia did, time will shortly show, which role the parliament of Ukraine chose for itself.

References

Auel, K., Benz, A. (2005). The politics of adaptation: The Europeanisation of national parliamentary systems. *The Journal of Legislative Studies, 11*(3–4), pp. 372–393.

Bakumov, O. (2023). The Concept of 'Militant Democracy' in the Context of Russia's Armed Aggression Against Ukraine, *Access to Justice in Eastern Europe*, *4*(21). https://doi.org/10.33327/AJEE-18-6.4-n000307

Barabash, Y., Berchenko, G. (2023). Chy zdatna zakhystyty sebe demokratiia v umovakh vijny? (Is democracy able to defend itself in times of war?). Pravo Ukrainy, 1, pp. 54––75. Retrieved November 13, 2024, from https://constitutionalist.com.ua/wp-content/uploads/2023/04/YuryBarabash.pdf

Bates, S. H. (2021). Re-Structuring Parliamentary Roles. *International Journal of Parliamentary Studies*, *1(1)*, pp. 22–46. https://doi.org/10.1163/26668912-bja10017

Burdin, V. (ed.) (2020). *Pravnyche ZNO 2021: navchalnyi posibnyk* (Legal ZNO 2021: Study Guide), Konvi Print, Kyiv.

Council of the European Union. (2024). "EU opens accession negotiations with Ukraine". Press releases, 25.06.2024. Retrieved November 13, 2024, from https://www.consilium.europa.eu/en/press/press-releases/2024/06/25/eu-opens-accession-negotiations-with-ukraine/

Economist Intelligence Unit. (2013). Democracy Index 2013. *The Economist.* Retrieved November 13, 2024, from https://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0814

Economist Intelligence Unit. (2014). Democracy Index 2014. *The Economist.* Retrieved November 13, 2024, from https://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0115

Economist Intelligence Unit. (2023). Democracy Index 2023. *The Economist*. Retrieved November 13, 2024, from https://pages.eiu.com/rs/753-RIQ-438/images/Democracy-Index-2023-Final-report.pdf?version=0&mkt_tok=NzUzLVJJUS00MzgAAAGUIQLYrVmSkqrQZegOj1YCMrEKwCR4RWmzqkUzSAxLTIcvBZ6RZpquWv5lgj95zLQjJewtJnQsvWy-fW0eypmwXYdpid_1Io93yOsP4DEa1oVhAA

Ertugal, E. (2021). Hidden phases of de-Europeanization: insights from historical institutionalism. *Journal of European Integration*, *43*(7), pp. 841–857. https://doi.org/10.1080/07036337.2020.1869955

European Commission (2023). *Ukraine 2023 Report*. Retrieved November 13, 2024, from https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_699%20Ukraine%20report.pdf

European Council. (2022). Document EUCO 34/22. *Conclusions*. Retrieved November 13, 2024, from https://www.consilium.europa.eu/media/57442/2022-06-2324-euco--conclusions-en.pdf

European Stability Initiative. (2014). The difference leadership makes Lessons from Croatia's EU accession process. Discussion Paper. April 2, 2014. Retrieved November 13, 2024, from https://esiweb.org/sites/default/files/reports/pdf/Lessons%20from%20Croatia-April2014.pdf

Goetz, K. H, Meyer-Sahling, J. H. (2008). The Europeanisation of national political systems: Parliaments and executives, *Living Reviews in European Governance*, *3*(2). Retrieved November 13, 2024, from https://www.europeangovernance-livingreviews.org/Articles/lreg-2008-2/download/lreg-2008-2Color.pdf

Hebrang, A., Henigsberg, N., Golem, A. Z., Vidjak, V., Brnić, Z., Hrabac, P. (2006). Analiza zbrinjavanja vojnih i civilnih ranjenika u ratnoj agresiji na Republiku Hrvatsku (Analysis of the Care of Military and Civilian Casualties in the War of Aggression Against the Republic of Croatia). *Acta Medica Croatica, 60*(4), pp. 301–307. https://pubmed.ncbi.nlm.nih.gov/17048781/

Hogić, N. (2024). Pre-enlargement reform failures in the Western Balkans: Social and economic preconditions of the rule of law. *Hague Journal on the Rule of Law*. https://doi.org/10.1007/s40803-024-00235-2

Horopakha, S. (2018). Republic of Croatia in the European Integration Process (1992––2005), *European political and law discourse, 5*(5), pp. 28–34.

Internews Ukraine. (2023). "We help the VRU to study the experience of European parliaments for successful European integration". February 2, 2024. Retrieved November 13, 2024, from https://internews.ua/rang/news/croatia-study-visit-vru-committees

Internews Ukraine. (2023–2024). *Parliament under war conditions: Ukraine*. Retrieved November 13, 2024, from https://internews.ua/storage/app/media/rang/2024/3/parliamentinwartime/EN_Parliament_under_war_conditions_Ukraine.pdf

Internews Ukraine. (2024). Analiz zastosuvannia j efektyvnosti zakonodavstva shchodo molodizhnoi polityky (Analysis of the Application and Effectiveness of Legislation on Youth Policy), May 3, 2024. Retrieved November 13, 2024, from https://internews.ua/rang/materiale/pls-practices-youth-policy

Jašić, M. (2023). Balancing Freedom of Expression and Democracy: The Case of the "Za Dom Spremni" Greeting in Croatia, *Policy briefs,* Österreichische Gesellschaft für Europapolitik. Retrieved November 13, 2024, from https://www.oegfe.at/policy-briefs/balancing-freedom-of-expression-and-democracy-the-case-of-the-za-dom-spremni-greeting-in-croatia/?lang=

Kekic, L. (2007). *The Economist Intelligence Unit's index of democracy, 2007.* The Economist Intelligence Unit. Retrieved November 13, 2024, from https://www.economist.com/media/pdf/democracy_index_2007_v3.pdf

Komarova, T., Łazowski, A. (2023). Switching Gear: Law Approximation in Ukraine After the Application for EU Membership, *Croatian Yearbook of European Law and Policy 19*, pp. 105–132.

Skrzypek, M. (2024). The Banning of Political Parties in Post-Yugoslav States. Croatian and Serbian Experience in Using Militant Democracy. *Journal of Contemporary Central and Eastern Europe*, *32*(1), pp. 13–24. https://doi.org/10.1080/25739638.2024.2319399

Ministry of Foreign Affairs of Ukraine. (2020). *History of bilateral relations between Ukraine and the Republic of Croatia*. Retrieved November 13, 2024, from https://croatia.mfa.gov.ua/spivrobitnictvo/politichni-vidnosini

National Democratic Institute. (2024). Mozhlyvosti ta pereshkody na shliakhu demokratychnoho perekhodu Ukrainy (Opportunities and Obstacles on the Path of Ukraine's Democratic Transition). National Democratic Institute. Retrieved November 13, 2024, from https://www.kiis.com.ua/materials/pr/20240801_n/May%202024%20Opportunities%20and%20Challenges%20Facing%20Ukraine%E2%80%99s%20Democratic%20Transition%20%28Ukrainian%29.pdf

Ognjenovic, G., Jozelic, J. (eds.). (2021). *Nationalism and the Politicization of History in the Former Yugoslavia*. London: Palgrave Macmillan.

Raunio, T. (2011). The Gatekeepers of European Integration? The Functions of National Parliaments in the EU Political System, *Journal of European Integration 33*(3), pp. 303–321. https://doi.org/10.1080/07036337.2010.546848

Service of the Deputy Prime Minister of Ukraine. (2024). *In the process of EU accession negotiations, no negotiating position can be formed without the participation of Parliament: Olha Stefanishyna.* Retrieved November 13, 2024, from https://www.kmu.gov.ua/en/news/u-protsesi-peremovyn-pro-vstup-do-ies-zhodna-perehovorna-pozytsiia-ne-mozhe-buty-sformovana-bez-uchasti-parlamentu-olha-stefanishyna

Tokatlı, S. G. (2021). Analyzing The Importance of the National Identity Concept on the Path to Europenization Process of Serbia and Croatia. *EURO Politika 9*, pp. 66–88.

United Nations. International Criminal Tribunal for the former Yugoslavia. (n.d.). *The conflicts*. Retrieved November 13, 2024, from https://www.icty.org/en/about/what-former-yugoslavia/conflicts

Van der Loo, G., Van Elsuwege, P., Petrov, R. (2014). The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument, *European University Institute, Department of Law.* Retrieved November 13, 2024, from https://cadmus.eui.eu/bitstream/handle/1814/32031/LAW%20_WP_2014_9%20.pdf?sequence=1&isAllowed=y

Venher, V. (2013). Obmezhennia dyskretsiinykh povnovazhen yak skladova pryntsypu verkhovenstva prava (Restrictions of Discretionary Powers as an Element of Rule of Law). *Naukovi Zapysky. Yurydychni nauky, 340*(477), pp. 49–54.

Verkhovna Rada of Ukraine. (2022). *The Secretariat of the Verkhovna Rada of Ukraine and the Expert Service of the Croatian Parliament signed a Memorandum of Cooperation*. Press Service October 26, 2022. Retrieved November 13, 2024, from https://www.rada.gov.ua/news/Novyny/229570.html

Verkhovna Rada of Ukraine. (2024a). *The Verkhovna Rada of Ukraine adopted three laws, one draft law and two resolutions at the plenary session on 6 February*. Press Service February 6, 2024. Retrieved November 13, 2024, from https://www.rada.gov.ua/en/news/News/246402.html

Zaliznyi Nardep. (n.d.). *Telegram channel*. https://t.me/yzheleznyak

NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 1 (2024), pp. 39–51
DOI: https://doi.org/10.71042/CJL01202403

Tomáš GÁBRIŠ
Trnava University in Trnava, Slovakia*

On the Scientific Nature of Legal Scholarship[1]

• **Abstract** •

The 'scientific' nature of legal scholarship represents a long-term, more than 150-year-long controversy in which it is often questioned whether legal scholarship is really a science. In this paper, we try to compare the features of unquestioned 'real' sciences (meaning specifically natural sciences), with the features of legal scholarship, in order to assess to what extent legal scholarship meets the standards of science accepted in natural sciences. We prove that some features of proper scientificity are thereby not being met by the natural sciences themselves.

Keywords: Natural sciences, Legal scholarship, Philosophy of science, Methodology of science.

Introduction

Does legal scholarship constitute 'real' science? Legal scholars somehow automatically accept the criticism voiced by representatives of natural sciences (Schmidt, Taliga, 2013) and possibly also representatives of other social sciences and humanities, when they themselves admit that the field they study and research, is not really 'scientific' (Kosinka, 2018). The 'unscientific nature' of legal scholarship is often admitted even by practicing lawyers themselves (Honsell, Mayer-Maly, 2015, pp. 18–19). This debate is not new and was present among lawyers and legal scholars throughout the 19th and 20th Century, reacting to the criticism of unscientific nature voiced by Julius von Kirchmann (1847). For over 150 years, legal scholars have been striving to develop a new form of modern legal scholarship,

* ORCID ID: 0000-0002-6862-2688; address: Hornopotočná 23, 918 43 Trnava, Slovakia; e-mail: tomas.gabris@truni.sk

[1] The contribution is an output of the grant project APVV-22-0079 Transformations of legal science – historical and current forms of legal science and of the scientificity of law.

taking various approaches to the relationship or a distinction between law as an object of scientific research and legal scholarship itself.

A basic obstacle to the perception of legal scholarship as a 'real' science in the current understanding may be the impossibility to clearly and with complete certainty predict future legislation or a final court decision (especially in cases where there is no straightforward legislative regulation). Even legal principles, which should be used in case of a "gap" in law, are namely not always a guarantee of a predictable and only correct solution. This problem accompanies not only the adjudication and the legislative drafting (not respecting the ideal of a "rational legislator"), but also affects the compliance with law, i.e. implementation of the law by its addressees, or the lawyers giving advice to their clients. However, this is rather a problem of legal practice than of legal scholarship.

Another obstacle to the scientific nature of legal scholarship could be the diversity of legal systems across continental Europe. Laws and legal scholarship provide different answers to the same questions in individual states and their domestic legal systems. Even within one jurisdiction, opinions on the same legal issue may differ across the spectrum of lawyers. In this context, it is being claimed half-jokingly that where there are two lawyers, there are at least three legal opinions. Thus, lawyers seem to know the correct answers, but not the 'only correct answers', which is often considered a fundamental obstacle to the exact nature of legal scholarship. Again, however, this seems to be rather a problem of practical law that of legal scholarship proper.

Still, there are also voices that claim that it is still possible to make legal scholarship a real science – e.g. by examining what all legal orders and legal systems have in common (Honerkamp, 2017, p. 143 ff.). However, these approaches would be rather descriptive and not normative (prescriptive, providing guidance for the practical solution of everyday situations), albeit it might be a good distinctive feature between the legal scholarship and actual law proper – considering legal scholarship to be descriptive and law to be prescriptive. Still, another problem with this approach to legal scholarship would be the degree of abstraction which then loses sight of the practical dimensions of legal scholarship. Such a legal scholarship would namely be considered too detached from the needs of positive law and legal practice (Leith, Morison, 2005, p. 147 ff.). Currently it is namely dogmatic legal scholarship that is considered to be specifically useful for lawyers, since it is most closely connected to legal practice and to positive law. Still, it is the scientific nature of this approach in legal scholarship precisely that is being the most questioned.

In this paper, we will therefore first introduce the most relevant objections against the scientific nature of legal scholarship and will try to evaluate these. Then

we will compare the standards of scientificity in natural sciences and in legal scholarship. We will thereby argue that legal scholarship meets the standards of a science, even when taking into account the criteria of natural sciences. Moreover, we show that natural sciences themselves admit and accept that they do not meet all the criteria of scientificity properly.

Objections against the scientific nature of legal scholarship

The basic criticism addressed to legal science (not only at present, but also in the past, at least since the mid-19th Century critique voiced by Kirchmann) is the argument that neither judicial decisions, nor future legislations, are clearly predictable. That means that law has no clear methods, and thus is not meeting the criteria of a science. Disregarding here for a while the mixing up of law and legal scholarship, indeed, in legal discourse it is widely disputed whether legal methodology always leads to a single correct result. The opinion of the possibility of only one correct opinion is held today mostly by the so-called *one-right-answer theory*. Its prominent representative in recent jurisprudence was especially Ronald Dworkin (Aarnio, 2011, pp. 165–166). According to this theory, every legal problem has only one correct solution. If we cannot achieve it in practice, it is only due to lack of information or a misjudgment derived from the actually available information. Since for purely practical reasons, it is often not possible to obtain all the necessary information, it may thus happen that, on the basis of the available information, different results will appear to us to be equally well-founded and acceptable. In this regard, in fact, the theory of the one-right-answer actually coincides with its opposite – the theory of indeterminacy (underdetermination) of law, according to which it is not possible to claim in legal practice that there is a single correct answer to every legal problem. Since we do not have absolute knowledge of reality, a situation can arise, and in practice it usually does, when several solutions are equally acceptable – in that case, all the results obtained in this way (while applying generally accepted standard legal operations, e.g. of interpretation and argumentation) must be considered correct, or at least acceptable (Melzer, 2010, p. 15). This just underlines our previous argument of a difference between the theory (legal scholarship) and practice (practice of positive law).

The opinion that it is not always possible to find a single correct answer in law was nevertheless extrapolated even to legal scholarship by the prominent Czechoslovak legal theorist of the 20th Century, Viktor Knapp, when he claimed that legal scholarship is argumentative, and not axiomatic in its nature (Knapp, 1995, p. v). This means that often the choice between several possible answers does not

depend on the logical derivation of the answer by deductive method from some higher principle, from a legal axiom, but the choice between several options results rather from the arguments used by the parties, while the judges (as well as legal scholars) will base their decision on these arguments (Houbová, 2003, pp. 48–49).

It is thereby precisely the aforementioned elements of indeterminacy, non-axiomatic nature, and the application of rather persuasive, rhetorical arguments that leads critics to questioning the actual nature of the "science of law". Still, this feature may in fact rather be the actual distinction criterium for law (legal practice) and legal scholarship. While practical cases may be hard to find an answer to, the theory is built up in systematic and scholarly way.

Still, even in legal practice the ambiguity in the search for the right answer is not an issue in all cases. Ambiguous situations do not represent the core of legal problems. There are clearly more of the so-called "simple cases" (easy cases), where the answer can be found directly in the wording of the law. Only in "difficult cases" (hard cases) a situation of ambiguity may occur, but even there it is often possible to find the "correct" answer by pointing to the basic legal principles. Only in exceptional cases (i.e. in the "most difficult cases") of several "equally good" legal solutions, lawyers resort to persuasive, rhetorical arguments. However, even then they must fundamentally respect legal principles and the text of the law, and only very exceptionally can a decision go directly against the wording of the law. This is only in the cases of so-called value gaps, when the wording of the law would lead to obvious injustice.

Thus, claiming that law is completely uncertain and unscientific, is not true in most cases – in fact, cases of indeterminacy, or of several 'correct' legal solutions, from which the competent authority (judge when applying the law, legislator when drafting a legislative solution) chooses the 'final' correct solution, is in practice only present in minority of cases. And even there is always an authority entrusted with the power to have the last say, which serves to mitigate the cases of uncertainty in law (albeit in the future the said solution may be overturned in the light of other additional information and findings in different cases). Still, in most cases it is true that the correct answer can be found in the text of the legal regulation, or in the established judicial interpretation of the relevant regulation, or finally "at least" in the basic principles as additional legal tools. Thus, in most adjudication cases, a kind of a 'mechanical' approach to solving legal problems can in fact be used, in the form of a logical syllogism. This is possibly an argument "in favour" of the scientific nature of law as such. Still, this cannot be generalized since this approach would disregard the above-mentioned "difficult cases", which sometimes occur in legal practice.

Furthermore, coming back to the criticism of scientific nature of legal scholarship, it is being additionally stated that legal scholarship theories are not empirically verifiable, that they sound more like opinions than scientific theories, and finally that the argument by authority plays a major role in both law and legal scholarship, as it was the case in medieval scholasticism (Hesselink, 2009, p. 22). It is thereby true that due to the need for a quick reaction to changing situations, legal norms are usually not tested in advance experimentally before their adoption. Still, this would undoubtedly be possible. This is namely how the Austrian Civil Code of 1811 was tested, before it was introduced for the entire territory of Austria – it was first introduced in the newly acquired Polish territories of the empire. Still, a number of theories are being tested in practice and are, in fact, verifiable, as we will point out below.

Similarly, if the arguments of legal scholars sound more like opinions than scientific theories, this is again only due to the fact that they are not based on formal empirical or sociological research, but still, they are based on the generalized knowledge drawn from the actual legal practice, i.e. being based on the inductive method of collection of data from case law and legal practice. Dogmatic legal scholars cannot neglect the inductive method and the knowledge of legal practice. Their theories are based on formal logic and a systematic approach to law, rather than on haphazard opinions, as it may seem to the lay public.

Still, due to the traditional distinction between "is" and "ought" in legal scholarship, legal scholars admit that inductive method has its limits and that the actual practice is not attesting its own correctness. The empirical knowledge of practice can undergo scrutiny by legal scholars where they perceive the practice to be misleading and not in line with the principles or systematic nature of legal order. The 'opinions' of legal scholars are then in fact their claims based on the ideals of systematic nature of law, where each 'opinion' must be perfectly fitting the overall system of law. It is thus 'opinions' that must respect the formal dogmatic method, based on formal logic.

However, here one must also clearly realize the difference between law in practice and legal scholarship again. Namely, legal scholar argues precisely and solely in line with the formal dogmatic method, while legal practitioners may be inclined to argue in favour of their clients or employers, seeking to support their position in a specific situation by disregarding the systematic arguments and empirical knowledge speaking against their interests. Still, in cases of providing legal advice and expert opinions, or in case of being an independent judge, the position of legal scholar and position of a legal practitioner requires to observe the same formal dogmatic method even by the practicing lawyer – to provide an objective

advice to the client or to proclaim an objectively acceptable court decision. That is basically the moment when a legal practitioner acts as a legal scholar.

However, this identification of lawyers and legal scholars in turn serves as another argument against the scientificity of legal scholarship – namely arguing that legal scholars do not maintain a distance from the object of their research, themselves often being practicing laywers and researching their own activity (Rottleuthner, 2017, p. 252). This argument can in fact be disregarded here due to the already explained difference between the approach that legal scholars and legal practitioners are taking in selecting their tools and arguments. Still, closely connected to this counter-argument is another claim – that "methodology of legal scholarship" (methodology of legal research) is not sufficiently separated from the so-called "legal methodology", which represents a set of methodological instruments and standard operations serving for the practical creation of law (legislation), application of law (adjudication) and daily implementation of law (compliance). This might have been true in times when legal scholarship was conceived "narrowly" by legal positivism, especially by the normative school of law from the Czech Republic (impersonated by František Weyr) or by Kelsen's pure theory of law, referred to as legal normativism. Normative theory rested only on the foundations of so-called legal statics, i.e. it dealt only with the interpretation of already existing legal norms and their mutual relations. It did not include approaches of legal dynamics, i.e. issues of creation and finding (application) of law, which normativism considered to be meta-normative and essentially extralegal (Jestaedt, 2011, p. 202). A complete picture of scientific knowledge of law, however, requires a broader view than just normativist view. For example, Weinberger's legal neo-institutionalism emphasizes that the legal order is a social institution, and therefore, according to him, questions of the functioning of this institution, including questions of law-making and of application of law belong to legal scholarship as well. This view is sometimes called the "external" approach to legal scholarship (Harvánek, 2008), in contrast to the internal, normativist view. Similar opinions can be found today in the writings of the German theorist Matthias Jestaedt, who insists on distinguishing between legal scholarship (*Rechtswissenschaft*) and legal scholarship theory (*Rechtswissenschaftstheorie*), where the former focuses only on the internal view of law, while the latter specifically on the external view of law (Jestaedt, 2017).

External perspectives thereby often use the methodology of other sciences to investigate law as a specific phenomenon. Therefore, one might arrive at the paradoxical conclusion that external approaches (e.g. economic analysis of law) might be considered more scientific than the internal approach. Nevertheless, the exter-

nal views often equated with empirical legal scholarship or interdisciplinary legal scholarship (Gestel et al., 2012, p. 2) are often descriptive in their nature and not able to provide the actual guidance to legal practitioners (unlike legal dogmatics preferring internal approach). This is the reason why these approaches are not at the core of legal scholarship in Central and Eastern Europe, where legal scholarship is still focused mostly on the internal, dogmatic views of law.

The complex view of legal scholarship today is thus that the subject-matter of research is both law as a normative system (which is examined by legal dogmatics, built on formal dogmatic, logical and linguistic methods), as well as legal phenomena that are linked to law – i.e. also questions of the creation (legislation), implementation (compliance) and judicial application of law (adjudication), where also empirical and other interdisciplinary legal scholarship comes to the fore.

Still, it is important to take into account that in legal practice too, one can come across "difficult cases", which often require the application of a combination of dogmatic, empirical and other interdisciplinary approaches in order to provide for an answer that is generally acceptable and fitting into the overall system of legal scholarship and legal practice. This is to prove that even legal practice can make use of an external approach to law – it suffices to give an example of a lawyer who has to prepare a suitable wording of a contract for the client. A lawyer must take into account not only the text of legal norms that regulate a given area of social life, but she must also anticipate various possible extralegal circumstances, motives and goals of the contracting parties (cf. Dalberg-Larsen, 1983, p. 493). That is why it would not be wise to neglect completely the external approaches to law within the legal scholarship.

Comparison with natural sciences

In the following, second part of the paper, we will approach legal scholarship from a different angle. Namely, from the position of natural sciences, in order to research to what extent are natural sciences comparable with legal scholarship and whether the natural sciences themselves meet all the criteria of scientificity being imposed on other types of sciences. We shall thereby investigate first the realist and anti-realist approaches within the methodology of science, then continue with the problem of induction, and finally end up with the problem of demarcation – all three being issues of methodology of science and of philosophy of science widely discussed and problematized even in natural sciences.

Realism or anti-realism?

Realism in scientific thinking is perceived in terms of the possibility of knowing the actual reality surrounding us. Its opposite position is that of anti-realism, which does not recognize the possibility of knowing all the reality and limiting scientific research only to empirically verifiable facts (Schmidt, Taliga, 2013). Scientific positivism, which gained popularity from the second half of the 19th century, falls under the category of anti-realism, as it recognizes only empirically observable facts as the basis and the only object of proper scientific knowledge. In legal scholarship, this partly corresponds to the focus on the text of legal norms and on the study of actual legal relations (perceived as social facts).

However, science certainly researches also empirically ungraspable facts, which the positivists avoided as objects that were not empirically proven, and thus "unreal". This is the realist approach which believes that even such empirically incomprehensible facts can be considered as real. Thus, unlike anti-realism, realism assumes even the existence of reality, which is not directly observable and empirically provable, but is nevertheless researched with the use of scientific methodology. Thus, scientific realism also recognizes non-empirical, theoretical entities (such as mathematical values, formulas and relationships). If we would like to further specify or divide these entities in some way, we can use a classification which divides them into detectable by scientific devices and undetectable by devices (Schmidt, Taliga, 2013, p. 17). While, for example, mitochondria are detectable, although imperceptible to the senses, mathematical knowledge is both undetectable by instruments and imperceptible to the senses.

If at this point we return to the problem of legal science and its position on the scale between realism and anti-realism, we can probably accept that the anti-realist positivist legal concept focusing only on the legal norms contained in legal texts or on the legal relationships considered as social facts, no longer describes the sole essence of today's legal scholarship. Even if it were to work exclusively with legal norms, it would no longer find these exclusively in legal texts, but also in sources such as, for example, the natural law concept of human rights, or legal principles and the like. Legal norms, at least those resulting from such specific sources, thus have a nature similar to mathematical entities or axioms (1 + 1 = 2). Legal scholarship thus in fact works both with empirically unobservable and undetectable entities (for example, "objective and subjective property rights") as well as with empirically observable and detectable facts (for example actual behavior as a social fact, judicial decisions, or texts of laws). Of course, in situations where legal scholars rank among scientific realists, working with empirically unobservable

and undetectable but scientifically recognized entities (in addition to empirically observable and detectable facts), such an approach understandably requires mature scientific theories that are constantly further tested, whereby new, previously unknown entities are often predicted, the existence of which is subsequently confirmed (such as, for example, new legal principles or new legal norms). However, it is also true that entities postulated in this way can later be denied or refuted, as it sometimes happens even in natural sciences – for example, in the past, this happened with theories about the existence of phlogiston as a specific substance. Even in law and legal scholarship, there are legal regulations and theories that have not proven themselves, were never introduced in practice or have been abandoned in the meantime. On the contrary, new theories, concepts and legal institutes have often been created in the place of abandoned ones, striving for better regulation and achieving more successful predictions of the future behavior and actions of the addressees of law.

An argument used in the methodology of science against the indicated realistic approach is often the argument of so-called indeterminacy, which means that some phenomena can also be explained by competing theories, which may only prove to be true in the future (Schmidt, Taliga, 2013, p. 24). Thus, as an example, while we believe we are regulating human behavior by legal norms adopted by designated authorities, in reality, the behavior and action can be motivated by completely different factors than by the legal regulation, e.g. by economic interests. Due to this criticism, a sort of a compromise between realism and anti-realism in science is currently being suggested by the so-called structural realism, which is based on the fact that individual elements of the structure (for example, legal institutes) can be changed, abandoned, or replaced, but the basic structure of the scientific theory (i.e. contemporary scientific paradigm) remains preserved – for example, in legal science, it could be an effort to regulate human behavior via special "legal" instruments with the possibility of enforcing them by the designated authorities, while the contents of the laws may change and evolve. Still, according to contemporary anti-realists, such as constructivists, even these structures do not really exist, and can anytime be simply abandoned in Kuhn's sense of paradigm shifts. The choice between them and the transition from one to the other is dependent on the consensus of the scientific and professional community. In this sense, legal scholarship has rich historical experience with several paradigm shifts – starting from ancient Rome to present days (Varga, 2012).

Finally, there is also another anti-realist strand in the methodology of science, which is called constructive empiricism. It is relatively close to structural realism. Instead of objective truth, it only suggests empirical adequacy of theories, but

at the same time recognizes that we confront the theories with actual empirical data and try to squeeze the data into our structures and models. If this works, the theory is empirically adequate. If not, we change the structures and models, or we abandon them. This approach could also work well in both natural sciences as well as in legal scholarship, not building any strict barriers between the sciences.

Induction

Bringing legal scholarship closer to natural sciences is not a heretical idea nowadays. It is related to the shaking of some basic methodological starting points of the natural sciences themselves, such as the method of induction, which has been fundamental for natural sciences from the Middle Ages until recent times. Still, traditionally, induction was always a dubious approach from the methodological point of view, since it is a process of thought in which the conclusion exceeds the premises. This can namely take the form of an inductive conclusion about the existence of only white swans based on the observed high number of white swans and the hitherto unobserved black swan. Similarly, it can take the form of expectation of a future conclusion from past experiences – for example, if we extend the previous experience of sunrise to the expected sunrise tomorrow as well. The truth of the premises does not guarantee the truth of the conclusion, and the conclusion thus exceeds the premises.

The indicated problem is the one that legal scholarship is very well aware of. It traditionally denies the possibility of inductive reasoning in order to predict future behavior – it refuses to derive "ought" from "is". The starting point of induction is namely the assumption of uniformity – either of the nature in general, or of the people specifically. Albeit this famous Hume's induction dilemma is well known to all sciences (Holländer, 2012, p. 260), in spite of that, it is specifically legal scholarship that takes this problem explicitly into account in its scholarly theories.

The problem of demarcation

Another general problem of all sciences, including natural sciences, is the so-called problem of demarcation, which means the problem of distinguishing scientific from non-scientific knowledge. Obviously, given the problem of induction, neither previous experience nor experiments can represent a fully-fledged demarcation criterion. Therefore, the methodology of science connects the problem of demarcation instead with the concepts of verification and falsification as scientific procedures typical for the natural sciences. To what extent this approach is used

and can be used also in legal scholarship, including dogmatic scholarship and not only in its empirical or other interdisciplinary offshoots will be examined below.

While verification problem was investigated and promoted as a criterion of scientific knowledge mainly by logical positivists, Karl R. Popper, as the founder of critical rationalism, on the contrary brought the concept of falsification into the methodology of science – precisely for the purpose of demarcating scientific knowledge from non-scientific knowledge. Indeed, verifiability required confirmation by empirical experience, or experiment, which, however, ran into the already mentioned problem of induction, due to which verifiability is not possible to full extent. Moreover, even in the natural sciences, there are also such statements and conclusions that go beyond empirically built premises, and therefore are not verifiable in fact. Falsification as Popper's contribution to the methodology of science, on the other hand, is based on the fact that if there are at least potential falsifiers against empirical claims, these claims can be considered scientific despite their impossibility of verification. And even if falsification will indeed lead to the rejection of a scientific claim, that does not take anything away from its previous scientificity – precisely due to the given scientific possibility of its falsification. On the other hand, however, this only works with empirical claims, while there are still, even in natural sciences, existential claims that are not falsifiable (for example, because one cannot search the entire world looking for a single black swan). Their scientificity then depends rather on the falsifiable theories from which they are derived, the theory of falsification claims.

The same probably applies to legal scholarship – the fact that there are statements (especially those going beyond the wording of the law) that cannot be empirically verified or empirically falsified in practice does not mean that all legal scholarship is unscientific and should be considered only 'magic' or empty words. What is more important here is whether the theories and constructs of legal scholarship are based on falsifiable foundations, which in the case of law can be the fundaments according to which, e.g., legal norms are rules of behavior created by a designated entity and enforced by designated entities. Additionally, all claims of legal scholarship that speak about the real world, about the text of laws and of judgments, as well as about the logical pyramid of legal dogmatics, are fundamentally falsifiable. It is also possible to falsify legal regulations by not actually complying with them, or by generally accepting illegal behaviour by the enforcement authorities. Still, here also applies what Kuhn already claimed in relation to constructivism as a theory of paradigm shifts – that even in the case of individual falsifications, discrediting the whole theory or the current paradigm of science requires the falsification (refutation) of the entire system, or of the major part of its

fundaments, not only individual statements. The partial non-correspondence of the theories of legal scholarship with the reality does not mean the falsification of the entire legal scholarship, or the necessity to abandon its current paradigm – as long as its foundational theories still remain unfalsified.

Conclusion

Legal scholarship and its object of research cannot be limited only to legal norms, as legal positivists, who were close to logical positivism, did. Nor can it be identified with sole research of social fact (legal relations) as legal empiricists of sociological school of law claimed. Legal scholarship in all its shapes (dogmatic, empirical and other interdisciplinary approaches) is closely related to external reality and legal practice. It creates falsifiable constructs, models and structures into which the facts of the external world are supposed to fit. However, even if all the facts do not fit into the theories (i.e. the practice fails), this is not enough to reject the entire constructed structure or model. Only when a model or construct is proven to not work at all, it is about time to abandon the construct in favour of new constructs and models that will prove to be more successful. This approach, accepted in the natural sciences, can apply equally also to legal scholarship. Nothing can thus in any way detract from the scientific nature of legal scholarship; on the contrary, while it features basically the same characteristics and problems as the natural sciences, it is in fact more open to accepting all the challenges and caveats voiced by the general methodology of science than natural sciences do.

References

Aarnio, A. (2011). *Essays on the Doctrinal Study of Law*. Dordrecht: Springer.

Dalberg-Larsen, J. (1983). On bridging the so-called gap between normative legal dogmatics and empirical-theoretical social science. In: A. Peczenik, L. Lindahl, B. Van Roermund (eds.). *Theory of Legal Science*. Dordrecht: D. Reidel Publishing Company.

Gestel, R. Van, Micklitz H.-W., Poiares Maduro, M. (2012). Introduction. In: R. Van Gestel, H.-W. Micklitz, M. Poiares Maduro (eds.). *Methodology in the New Legal World*. San Domenico di Fiesole: European University Institute.

Harvánek, J. (2008). *Teorie práva* (Theory of Law). Plzeň: Aleš Čeněk.

Hesselink, M. (2009). A European Legal Method? On European Private Law and Scientific Method. *European Law Journal, 15* (1), 20–45.

Holländer, P. (2012). *Philosophy of law*. 2nd ed. Pilsen: Aleš Čeněk.

Honerkamp, J. (2017). *Die Idee der Wissenschaft: Ihr Schicksal in Physik, Rechtswissenschaft und Theologie* (The Idea of Science: Its Fate in Physics, Law, and Theology). Berlin: Springer-Verlag.

Honsell, H., Mayer-Maly, T. (2015). *Rechtswissenschaft: Eine Einführung in das Recht und seine Grundlagen* (Jurisprudence: An Introduction to Law and Its Foundations). 6th ed. Berlin: Springer-Verlag.

Houbová, D. (2003). Meze logické interpretace právních norem (Czech Legal Thought and Logic – Past and Perspectives). In: *České právní myšlení a logika – minulost a perspektivy*. Brno: Masarykova univerzita.

Jestaedt, M. (2017). Rechtswissenschaft als normative Disziplin (Jurisprudence as a Normative Discipline). In: E. Hilgendorf, J. C. Joerden (eds.). *Handbuch Rechtsphilosophie,* pp. 267–274. Dordrecht: Springer.

Jestaedt, M. (2011). Was die Reine Rechtslehre nicht leistet – Anspruch und Horizont einer beschränkten Theorie (What the Pure Theory of Law Does Not Achieve – The Claim and Horizon of a Limited Theory). *Zeitschrift für Öffentliches Recht 66,* pp. 201–213.

Knapp, V. (1995). *Teorie práva* (Theory of Law). Praha: C. H. Beck.

Kosinka, J. P. (2018). Vědeckost právní vědy (Scientificity of Legal Scholarship). *Distance, 2.* Retrieved November 8, 2024, from https://www.distance.cz/ro%C4%8Dn%C3%ADk-2018/2%C4%8D%C3%ADslo/v%C4%9Bdeckost-pr%C3%A1vn%C3%AD-v%C4%9Bdy

Leith, P., Morison, J. (2005). Can Jurisprudence Without Empiricism Ever be a Science? In: S. Coyle, G. Pavlakos (eds.). *Jurisprudence or Legal Science? A Debate about the Nature of Legal Theory*, pp. 147–167. Oxford: Hart Publishing.

Melzer, F. (2010). *Metodologie nalézání práva: Úvod do právní argumentace* (Methodology of Finding the Law: An Introduction to Legal Argumentation). Praha: C.H. Beck.

Rottleuthner, H. (2017). Rechtswissenschaft als Sozialwissenschaft (Jurisprudence as a Social Science). In: E. Hilgendorf, J. C. Joerden (eds.). *Handbuch Rechtsphilosophie,* pp. 264–266. Dordrecht: Springer.

Schmidt, M., Taliga, M. (2013). *Philosophy of natural sciences*. Bratislava: Aleph.

Varga, C. (2012). *The Paradigms of Legal Thinking*. Budapest: Szent István Társulat.

NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 1 (2024), pp. 53–66
DOI: https://doi.org/10.71042/CJL01202404

Róbert GYURI
Pavol Jozef Šafárik University, Slovakia*

Peter MOLITORIS
Pavol Jozef Šafárik University, Slovakia**

Financing of the Catholic Church in Slovakia under the Optics of the Basic Treaty between the Slovak Republic and the Holy See[1]

• **Abstract** •

The paper focuses on the issue of financing the Catholic Church in Slovakia, from the perspective of the international Basic Treaty between the Slovak Republic and the Holy See. It analyzes the basic issues related to the Basic Treaty and the principles on which it stands, as well as the provisions that affect the financing of the Catholic Church. Subsequently, it discusses the mechanism of current financing of the Catholic Church in Slovakia. The second part of the contribution tries to answer the question whether the Slovak Republic is obliged to finance the Catholic Church according to the adopted Basic Treaty.

Keywords: Basic Treaty between the Slovak Republic and the Holy See, Financing of the Catholic Church, International agreements.

Introduction

The question of financing or financial and economic security of any institution operating in the state is always one of the key issues of its functioning. It is no different in the case of the Catholic Church, which has been operating for a long

* ORCID ID: 0000-0002-9362-7501; address: Popradská 66, 041 32 Košice, Slovakia; e-mail: robert.gyuri@upjs.sk

** ORCID ID: 0000-0002-2123-5760; address: Popradská 66, 041 32 Košice, Slovakia; e-mail: peter.molitoris@upjs.sk

[1] This paper is an output of the grant VEGA 1/0170/21 – International Legal Obligations of the Slovak Republic in the Field of Financing of the Catholic Church.

time also in the conditions of the Slovak Republic. However, the method of financing religious organizations operating in the state (including the financing of the Catholic Church), as well as its content and scope, varies from country to country, is not unified and uniform and is determined by many factors, including historical development, legal culture, the relationship of the state to churches and religious communities (or, more precisely, the relationship of the state to the Catholic Church), and is also determined by a number of other factors. It is also the case of the Slovak Republic, where the state's relationship to churches, religious communities, religions, and societies, the political or societal will, as well as the various historical and political obligations of the state towards churches, including international law. The subject of this article is the analysis of the issues of financial security of the Catholic Church in Slovakia under the optics of the legal and especially international law regulations in force in the Slovak Republic, focusing in particular on the international law obligations of the Slovak Republic contained in the Basic Treaty between the Slovak Republic and the Holy See representing the Catholic Churches operating in the Slovak Republic.

Basic Treaty between the Slovak Republic and the Holy See and its characteristics

The Basic Treaty between the Slovak Republic and the Holy See (hereinafter referred to as the "Basic Treaty" or the "Treaty") is an example of a treaty between the State and the Churches with the nature of an international treaty. The Treaty was signed at the Vatican on 24 November 2000. The National Council of the Slovak Republic agreed to ratify the Treaty on 30 November 2000 by Resolution No. 1159 and the President of the Slovak Republic ratified it on 4 December 2000. The Treaty entered into force on the date of the exchange of instruments of ratification, i.e. 18 December 2000, on the basis of Article 24(2) thereof and was published in the Collection of Laws of the Slovak Republic as the basic form of publication in the Slovak Republic by the notification of the Ministry of Foreign Affairs of the Slovak Republic No. 326/2001 Z. z. of 23 August 2001 (No. 136).

The basic treaty is formally a standard international treaty. Procedurally, it is a political international treaty of the presidential type, which, once signed on the basis of a decision of the Government of the Slovak Republic, requires ratification by the President of the Slovak Republic with the prior consent of the National Council of the Slovak Republic. In terms of content, it is a comprehensive framework for the regulation of legal relations between the Holy See and the Slovak Republic, as well as between the Slovak Republic and the Catholic Church.

At this point, however, from a formal legal point of view, it is necessary to recall that after the amendment of the Constitutional Act No. 460/1992 Coll., the Constitution of the Slovak Republic, as amended (hereinafter referred to as the "Constitution of the Slovak Republic") by Constitutional Act No. 90/2001 Coll., two constitutional law regimes relating to the application of international treaties in the field of human rights and freedoms were created in Slovakia. The first is Article 154c of the Constitution of the Slovak Republic, which provides that "international treaties on human rights and fundamental freedoms ratified by the Slovak Republic and promulgated in the manner prescribed by law before the entry into force of this Constitutional Act shall form part of its legal order and shall take precedence over the law if they provide for a greater scope of constitutional rights and freedoms". This provision has retroactive effect and applies to those international treaties in the field of human rights and fundamental freedoms which the Slovak Republic has ratified on the basis of the content of the now repealed Article 11 of the Constitution of the Slovak Republic. The second is Article 7(5) of the Slovak Constitution, which states that "international treaties on human rights and fundamental freedoms, international treaties for the implementation of which no law is required and international treaties which directly create rights or obligations for natural persons or legal persons and which have been ratified and promulgated in the manner prescribed by law shall take precedence over laws". The aforementioned regime applies to those international treaties which are ratified and proclaimed by the Slovak Republic in the manner prescribed by law after the entry into force of Constitutional Act No. 90/2001 Coll., which will always take precedence over the laws of the Slovak Republic pursuant to Article 7(5), i.e. without conditions or limitations (Drgonec, 2004, pp. 163–164).

Since the Basic Treaty was ratified and entered into force before the entry into force of Constitutional Act No. 90/2001 Coll., it is subject to the regime of Article 154c of the Constitution of the Slovak Republic. However, since the Basic Treaty in its text still foresees the adoption of so-called partial international treaties (it contains blanket provisions) to be adopted in the future, which will regulate selected issues in more detail, the above-mentioned international treaties, which have been and will be adopted after the entry into force of Constitutional Act No. 90/2001 Coll. (i.e. after 1 July 2001), are already subject to the regime of Article 7(5) of the Constitution of the Slovak Republic, with their "automatic" precedence over the laws (Čeplíková, 2011, p. 203).

At this point, from the point of view of the content of this paper, we consider it necessary to highlight the fact that from the conceptual point of view the Treaty is based on certain principles, which must be taken into account in its interpretation

and application, and which are also partly the determinant for the regulation of relations between the Slovak Republic and the Catholic Church in the financial and economic sphere. These are:

a) **individual and common good** – is an expression of the meaning of the contract, which is a commitment to mutually contribute to the individual and common good of a material and spiritual nature. Such an objective, to which each of the parties contributes by its own means, requires respect for the independence and autonomy and the creation of conditions for the action of both parties and their cooperation with each other;
b) **the role of the State and the role of the Church** – in the most general terms, both the State and the Catholic Church pursue the common goal of creating the conditions for a dignified human life in society. However, each of these parties has different means at its disposal. While the state has primarily the law at its disposal, through which it regulates the behavior of its subjects and is able to ensure the desired behavior by the use of coercion (the so-called external dimension), the Catholic Church finds the focus of its existence in the spiritual dimension, where one of its tasks is the moral formation of people's consciences (the so-called internal dimension);
c) **a citizen represented by both parties to the treaty** – the specificity of this international treaty is the fact that its contracting parties represent an identical subject – citizens of the Slovak Republic with Catholic faith. An important fact is the requirement that the rights and obligations of a citizen of the Slovak Republic should not conflict with the rights and obligations of a member of the Catholic Church;
d) **subject matter of the contract** – the subject matter of the Basic Treaty is to establish clear and non-ambiguous rules for both parties in their co-existence and cooperation, which also reflect the quality and interactivity of their relationship. The subject of the Basic Treaty is also the legal relations in the area of the Catholic Church's activities in the territory of the Slovak Republic;
e) **the nature of the treaty obligations** – unlike other international treaties, where the rights and obligations of the parties are generally quantitatively balanced, the Basic Treaty does not contain obligations of the same kind and, as a result, there is no reciprocal distribution of obligations between the parties. Rather, in the case of the Basic Treaty, it is a complementarity of the entitlements attaching to the addressees of the legal norms contained in the treaty;
f) **"pyramid system"** – the Basic Treaty is of a framework nature and contains only solutions in principle; in order to ensure the comprehensiveness of

the legal regulation, it singles out for special regulation four technically and politically demanding areas, which are to be regulated by separate treaties and whose adoption is envisaged in the future (including the issues of the financing of the Catholic Church);

g) **the principle of the creation and application of the Treaty** – when creating the text of the Basic Treaty, the State relies on the legal principles valid in the entire legal order of the Slovak Republic, the Catholic Church relies primarily on the norms of canon law and the documents of the Second Vatican Council.

Overall, the most important principles on which the Basic Treaty is based include: the principle of the independence and autonomy of the Holy See and the Slovak Republic as two separate subjects of international law, respect for the religious freedom of the faithful and the freedom of the Catholic Church in the Slovak Republic, the principle of the independence of the Catholic Church from the State (the State may not interfere in the competence of the Church) and the autonomy of the Catholic Church (the Church manages and administers its internal affairs independently), the principle of cooperation between the Church and the State for the benefit of man and the common good and the exclusion of conflicts of conscience (Šmid, 2001, p. 73–81).

The main task of this treaty is to regulate the legal relations between the Slovak Republic and the Holy See, as well as the Catholic Church operating in Slovakia, in such a way as to guarantee the religious freedom of the Catholic faithful. According to the Basic Treaty, the Slovak Republic recognises the right of the Catholic Church in the Slovak Republic and of its members to free and independent activity, which includes in particular the right of public profession, proclamation and practice of the Catholic faith, the freedom to carry out the mission of the Catholic Church, the exercise of its competences laid down by canon law, the exercise of the right of ownership of its financial and material resources, and the management of its internal affairs. The Slovak Republic has undertaken to guarantee the inviolability of sacred places (in case of compelling reasons, the consent of the Catholic Church is required for other use of sacred places, except in the cases provided for in the Treaty) and the confidentiality of confessions, to respect certain Church holidays as days of rest, to create conditions for the Catholic education of children in schools and pre-schools, and to recognise marriages in accordance with canon law. The Catholic Church is guaranteed the exclusive right to establish and change its own legal order (i.e. canon law). The Slovak Republic thus recognises the existence of canon law as an independent legal system (but without the attribute of universal binding force) and the associated right of the Catholic Church to regulate the range

of social relations determined by it, while at the same time rejecting responsibility for the actions of the subjects of the Catholic Church in the application of canon law to its members.[1] Furthermore, the Treaty guarantees the Catholic Church the right to fill offices according to canon law and to appoint and remove bishops, to establish, administer and use for education and training primary and secondary schools, colleges and educational establishments in accordance with the conditions laid down by the legal order of the Slovak Republic. The Catholic Church has the right to act in the celebration of marriages according to canon law, with the consequence that a marriage celebrated before a clergyman of the Catholic Church has the same legal status and effects in the territory of the Slovak Republic as a marriage celebrated in a civil manner. In addition, the Catholic Church has the right to exercise pastoral care for the faithful in penal institutions, penitentiaries and other public institutions. However, the exercise of these rights must be in accordance with the conditions laid down by the legal order of the Slovak Republic.

All of the above rights of the Catholic Church have been, in principle, more or less included in various legal regulations of the Slovak Republic since 1989. The Treaty has only changed the legal force of the regulation of the above-mentioned area of social relations. The wording of the Basic Treaty is thus to a large extent a substantive reception of the already existing relevant legal regulation. For the Catholic Church in Slovakia, however, the conclusion of the Basic Treaty brought the necessary guarantees for its existence and activity, which cannot be unilaterally changed or abrogated by unilateral legal interventions of the State.

The Basic Treaty is normative, public, general and framework in nature and constitutes only the basic legal framework for cooperation between the Catholic Church and the Slovak Republic. The Treaty itself foresees that some of its provisions regulating particular issues are to be further regulated and specified in the future in four other specific sub-international treaties (lat. *pactum de contrahendo*), which will contain a more detailed and detailed regulation of the rights and obligations of the contracting parties. These are the questions of the scope and conditions of the exercise of the right of conscientious objection (Article 7), the exercise of the clerical ministry in the armed forces and armed corps (Article 14[4]), the action of the Catholic Church in the field of education and training (Article 13[9]) and, in particular, the question of the financial security of the Catholic Church (Article 20). From the point of view of the issue of the financial security of the Catholic Church, this issue has thus been singled out for a separate, more detailed treaty regulation.

[1] Resolution of the Constitutional Court of the Slovak Republic, Case No. II. ÚS 128/95.

To date, only two sub-treaties have been adopted which further regulate the provisions of the Basic Treaty, namely in the area of the exercise of spiritual ministry in the armed forces and armed forces (the Treaty between the Slovak Republic and the Holy See on the Spiritual Ministry to Catholic Faithful in the Armed Forces and Armed Forces of the Slovak Republic) and in the area of education and training (the Treaty between the Slovak Republic and the Holy See on Catholic Education and Training). A separate sub-treaty on the financing of the Catholic Church has not been adopted to date, so the contractual obligation arising from the Basic Treaty has not yet been fulfilled. The professional discussion on this issue is still determined by the state administration's declared need to adopt a "general law" on the financing of churches and religious societies before adopting the so-called partial financing contracts, which would address this issue across the board for all registered churches and religious societies, and not only for the Catholic Church. This model seems to be supported by some of those registered churches and religious societies operating in Slovakia that have a smaller membership base.

On the other hand, as many authors state, the contractual anchoring of the issue of financing of churches and religious societies could be more specific, could correspond to the specifics of individual entities and also to the needs of the state towards specific religious entities, and would give individual churches and religious societies greater legal certainty compared to the law, which can be unilaterally changed or abolished by the state (Moravčíková, 2019).

Current legal regulation of the financing of the Catholic Church in Slovakia

The issue of financial security of churches and religious societies in Slovakia (including the Catholic Church) is currently addressed 'only' at the statutory level, namely by Act No. 370/2019 Coll. on the Financial Support of the Activities of Churches and Religious Societies (hereinafter referred to as "Act No. 370/2019 Coll." or simply as "the Act"). In this case, it is a relatively new piece of legislation, adopted 20 years after the adoption of the Basic Treaty.

The Ministry of Culture of the Slovak Republic (hereinafter referred to as "the Ministry") already stated in the process of preparation of this new law that Act No. 218/1949 Coll. contained obsolete norms, i.e. obligations of the state which had not been applied for a long time (the reimbursement of worship costs, church administration and extraordinary material costs). Their payment would significantly increase the burden on the state budget. As a result, the state has for a long time provided churches and religious societies with money only for the salaries of

clergy, while paying levies and a contribution for the operation of the headquarters of churches and religious societies. The churches were (and still are) the employers of their clergy, but the obligation to provide funds for their salaries lay with the state, while according to the amended Act No. 218/1949 Coll. and its implementing government regulation (most recently No. 299/2007 Coll. on the regulation of personal benefits provided to clergy of churches and religious societies), the Basic Salary Scale for Clergy, included as an appendix to this regulation, was followed (Němec, 2023).

It is important to note at this point that the new law did not change the default form of the funding model for churches (including the Catholic Church). The state continues to provide registered churches and religious communities with financial support from the state budget, which has three components: a contribution, a special-purpose subsidy from the funds of the Ministry and the Office of the Government of the Slovak Republic, as well as tax and fee relief. However, the law changes one important aspect of the above concept. From 1949 until the adoption of the new Act of 2019, the areas for which the state provided funds from the state budget were precisely determined by the state in Act No. 218/1949 Coll. on the Economic Security of Churches and Religious Societies. The new Act merely states that the allowance is intended to support the financing of the activities of churches, enumerating in general terms those areas which, by the nature of the activities and focus of the churches, include within this framework, according to Article 6, paragraph 1 of the Act, worship activities, educational activities, cultural activities, charitable activities, the costs of the church related to the performance of its activities in the capacity of an employer, and the operating costs of the church. As aptly stated by M. Němec, in accordance with Article 24(3) of the Constitution of the Slovak Republic, the new law strengthens and respects the internal autonomy of churches and religious societies in the area of management, as in § 6(2) of the cited article the new law provides for the autonomy of churches and religious societies in the area of management. In Article 6(6) of the Act, the activities for which the state contribution may not be used are enumerated only in a negative way. In principle, these are commercial or business and political activities (Němec, 2023).

At this point it can be stated that this system emphasizes the separate and independent management of churches according to their own budgets, which is fully in line with the diction of the relevant provisions of the Constitution of the Slovak Republic, including the requirements of Article 5(2) of Act No. 308/1991 Coll. on Freedom of Religious Belief and on the Status of Churches and Religious Societies, as amended (hereinafter referred to as "Act No. 308/1991 Coll."), according to which churches manage their affairs independently of the state authorities. The

explanatory memorandum to the draft law further states that the independent status of churches also includes their right to manage their own budgets, which they approve independently.

Act No. 370/2019 Coll. changes the criterion for the amount of the contribution granted to a given church. The previous legislation was based on the number of clergy, but after 1989 the number of clergy (in pastoral care, clergy training institutes and church administration headquarters) was determined by the individual churches themselves, which could have been a potential burden on the state budget. However, the system of salary tables (personal emoluments) for clergy was again an expression of a rigid approach to the material provision of the clergy. According to the new legislation, the criterion for the amount of the allowance granted by the state is the religious denomination, as ascertained from the latest census of population, houses and dwellings by the Statistical Office of the Slovak Republic, or the number of members of churches, as ascertained from the application for registration of a church pursuant to Article 11 of Act No. 308/1991 Coll. (Němec, 2023).

Discussion – is the state obliged to fund the Catholic Church under the adopted Basic Treaty?

The fact that the method of financing the Catholic Church has been established in the legislation of the Slovak Republic for a long time without the conclusion of a special agreement on the financial security of the Catholic Church does not mean that this issue has not been resonating in society. The revival of the debate on the appropriateness of the recent funding model can also be seen in states that have long been considered "Catholic" and whose relations with the Catholic Church have been rather positive and stable for a long time. An example is Poland, where Prime Minister Tusk's new government grouping is announcing efforts to make changes to funding by phasing out the Church Fund and replacing it with a tax-assessment system. In the Slovak political discourse, the topic of changes in the setting of state funding of churches is mainly raised by parties from the liberal spectrum. Part of the election programme of the strongest opposition party, Progressive Slovakia, was the introduction of a method of financing the "basic running" of churches and religious societies by switching from a flat-rate state contribution to a specific tax regime through which churches would be financed exclusively by members and sympathisers. Despite the fact that the current government grouping has currently prepared a change in church financing in the form of a change in the method of calculating the amount of the state contribu-

tion, so that the final amount of the contribution will increase compared to the past years, it is necessary to reflect from a legal point of view on the possibilities and limits of the state in its possible efforts to unilaterally change the current financing model, or to completely "cut off" the churches from the direct financial transfers from the state budget.

In this context, an interesting study by Turčan and Mrva (2021) has been published, in which the authors analyse in detail the possible options for ending the current model of state financing of churches in the Slovak Republic. As a radical model they present a complete end of financing from the state budget, as a less radical one they consider the model of switching to an earmarking tax, as proposed by several, currently opposition political parties. They conclude that, despite the failure to adopt a special financial contract as envisaged in the Basic Treaty with churches and religious societies, unilateral termination of the financing of churches without consensus would be contrary to the obligations arising from the Basic Treaty and the Treaty with Registered Churches and Religious Societies. As regards the Catholic Church, they base their conclusion on the object and purpose of the Basic Treaty, as expressed in Article 20(1) thereof, the importance of which they see precisely in the assumption of at least some financial support for the Church by the State. They also rely on the wording of Articles 13, 17 and 21 of the Basic Treaty. Although these articles explicitly refer to the financing of church education, church hospitals and similar facilities, and the maintenance of church cultural monuments from the state budget, they conclude that the purpose of Article 20(1) of the Basic Treaty is to create a special regime for the state financing of the church as such, and thus also of its religious activities, given that the financing of these areas is already guaranteed by the legislation in force even without special treaties. On this basis, the authors also analyse the possibilities of legal defence for churches in the event that the state unilaterally and without due discussion completely disconnects them from the state budget. They argue about the public law nature of the agreements on the financing of churches and religious societies (which have not yet been concluded) and, despite their public law basis, stress that the financing of churches is not necessarily directed towards the performance of public administration tasks or the realisation of the needs of public administration entities. Assuming that it were accepted that the contracts are public law contracts, the churches' defence could be to bring an action under the special rule on liability for damage caused in the exercise of public authority. However, since the authors conclude that the financial support of the churches is of a private law nature, which they analogise to the relationship between a municipality and non-profit organisations established by it and linked to the municipality by means of subsidies, it would be necessary

for the churches to sue for damages under the general provisions of the Civil Code on compensation for damages. The amount of damages should be determined "on the basis of the *status quo ante*" (Turčan, Mrva 2021, p. 82).

The conclusions expressed in the summarized paper in question, which is undoubtedly a very important contribution to the debate on the relationship between the Basic Treaty and the state policy of church financing, are rather polemical, which is, however, emphasized by the authors themselves. At this point, it is therefore appropriate to put forward an argumentation different from the conclusions presented in the above-mentioned article, specifically in relation to the Catholic Church.

The content of the Basic Treaty does not directly imply an obligation of the state to finance the church from the state budget. Even implicitly inferring this obligation from the purpose of the treaty, as Turčan and Mrva (2021) do, is problematic, since the aforementioned Articles 13, 17 and 21 of the Basic Treaty, referring to a future international treaty on financial security pursuant to Article 20(1), contain an obligation of the state to regulate the scope of financing in relation to church education, hospitals and cultural monuments by a special agreement. Such wording unquestionably presupposes that to some extent these particular areas of the Church's activities will be financed by the State. The meaning or purpose of the State's commitment to conclude another special financial agreement with the Holy See under Article 20(1) of the Basic Treaty is therefore to guarantee the extent of the funding, not the funding as such, exclusively in relation to the above-mentioned areas of activity of the Churches. The contractual wording used does not, therefore, lead to the conclusion presented by Turčan and Mrva that Article 20(1) of the Basic Treaty is a special contract intended to guarantee state financing of the churches as such. This conclusion is not supported by the argument that if the treaties with the Holy See were to result in an obligation on the part of the State to finance exclusively the areas mentioned above from the State budget, this would not require modification by the Basic Treaty and the special treaty, since the financing of these areas is already guaranteed by the legislation in force. The Basic Treaty in Articles 13, 17, 21 implicitly speaks of the obligation of the State to finance the areas of the Church's activity mentioned there; the special treaty on financial provision is to determine the extent of this financing guaranteed by the State. Thus, the Basic Treaty directly protects the Catholic Church from the situation where the State would completely refrain from financing the listed areas. The specific financial contract should also provide a guarantee of a certain agreed level of funding. An interpretation according to which the generally worded Article 20(1) of the Basic Treaty, which is also referred to in Articles 13, 17 and 21 above, and which contains the State's commitment to the future

conclusion of a special contract for the financial security of the Catholic Church, implicitly binds the State to the financing of the Church as such (even beyond the activities listed in Articles 13, 17 and 21), appears to be unduly expansive. Based on the content of the Basic Treaty, the State is explicitly obliged to negotiate with the Catholic Church the elements of a contract on the provision of financing for the Catholic Church, but without concluding such a contract, it is obliged to provide for the financing of the Church's activities from the state budget only to the extent of the activities listed in Articles 13, 17 and 21. The manner and extent of the financing by the State is itself, in the absence of a specific contract, in principle a matter of the State's own discretion.

Based on the above, the conclusion on the possibilities of defence of the Church in case the State unilaterally completely abolishes any funding of the Church from the State budget (i.e. also under Articles 13, 17 and 21) can be considered polemical. Here, only the instruments of international law and diplomacy would seem to come into play, but not compensation for damages, whether in terms of damage caused by misconduct in public office or damage in terms of private law. As regards the possibility of compensation for damages on the basis of private law rules, the problem is that the specific legal obligation of the State to finance, to an agreed extent, church schools, hospitals and similar establishments and church cultural monuments is of a public-law nature. The Basic Treaty, to the extent under examination, concerns a public interest and is a legal act of public international law. The State does not act here as a private law subject but as a public authority, just as the Holy See is a public law subject of international law. The content of the Basic Treaty quite clearly concerns religious freedom as well as other rights and obligations in the sphere of social life. The content of the Treaty concerns the regulation of legal relations which are important for the functioning of public life and public institutions (conscientious objection, respect for the confidentiality of confessions, the establishment of days of rest, marriage, education, health care, cultural monuments, service in the armed forces and police, mutual diplomatic representation). The obligation of the state to guarantee (to some extent financially) the position of the church in the above-mentioned areas of social life and public interest regulated by public law already implies that the state is acting here as a subject of public authority, not as a private law subject. The public law nature of the Basic Treaty itself then also has an impact on the public law nature of the Church's financing. The Church does not receive a state contribution for its activities on the basis of special, periodically concluded subsidy contracts of a private law nature or on the basis of grants for which it applies. In the current setting, it is a direct transfer from the state budget, the terms of which are not negotiated in a special

contract but are laid down directly in a public law regulation. The conditions of financing or the determination of the amount of the contribution are therefore not negotiated contractually "based on the law", but are laid down directly by law, i.e. the entitlement to receive them arises directly from the text of the law. From the point of view of the nature of these transfers, therefore, they are not analogous to subsidies granted to other private law entities, but rather an obligation of the State to ensure certain public law rights and obligations, which include religious freedom and the public law status of churches. It is also inappropriate to consider a private law action for damages in view of other problematic aspects, such as proving the occurrence and amount of the damage. If the damage is demonstrable loss of property or non-property, then the plaintiff church would have to prove in the proceedings that it had a legal right to the amount sued for. However, since there is currently no international treaty guaranteeing a church a specific amount of contribution for a certain period in advance, it is a matter for the legislature alone to determine the amount of the contribution for subsequent periods, simply by amending domestic legislation. The argument that, if the State had not abolished the allowance altogether, the Church would have received an allowance of approximately the same amount as in previous years, which would consequently have represented the amount of the damage claimed, would be difficult to prove in the light of all the conclusions reached so far. It is by no means impossible that, in a year in which no allowance was granted at all, the alternative to not granting an allowance would have been to grant the allowance at the original amount. In view of the questionable possibility of legal protection for the Church through a private law action for damages, it would be possible, in view of the public law nature of the financial relations between the State and the Church, to consider compensation for damages under Act No 514/2003 Coll. on Liability for Damage Caused in the Exercise of Public Authority. However, the analysis of the complete cessation of the financing of churches with regard to its legal basis would have to be the result of the legislative activity of the State through the National Council of the Slovak Republic as the legislative body. However, according to Section 6(4) of Act No. 514/2003 Coll., which makes it possible to claim compensation for damage caused by an unlawful decision or procedure, an unlawful decision is not considered to be the result of a procedure of the National Council of the Slovak Republic in the exercise of its competence under Article 86(a) and (d) of the Constitution of the Slovak Republic, i.e. in its legislative and ratification activities. Thus, this provision directly excludes the possibility of claiming compensation for damages by the Church in accordance with the procedure under Act and No. 514/2003 Coll. as compensation for damages caused by the improper exercise of public authority.

Conclusion

In the light of the above, the fact that the Slovak Republic and the Holy See have not yet concluded a specific international treaty on the provision of financing for the Catholic Church appears to be a rather risky situation, especially from the Church's point of view. The financing of the Church 'as such', including its activities outside the framework of Articles 13, 17 and 21 of the Basic Treaty, is in principle entirely in the hands of the legislator. Despite the deep social consensus on the need to maintain some form of state funding for churches, whether by contribution or by appropriation, the church does not, as things stand, have an adequate range of sufficiently effective legal means to defend itself in the event that the state were to cut it off from public funding altogether. It would seem that the only way to address such a case would be through the unspecified diplomatic route to which the parties have committed themselves in Article 23 of the Basic Treaty.

References

Čeplíková, M. (2011). *Konfesné právo v Slovenskej republike. Vybrané kapitoly z histórie a súčasnosť* (Confessional law in the Slovak Republic. Selected chapters from history and the present). Bratislava: ÚVŠC.

Drgonec, J. (2004). *Ústava Slovenskej republiky. Komentár* (Constitution of the Slovak Republic. Comment). Šamorín: Heuréka.

Kubina, P. (2003). Úprava vzťahu štátu a katolíckej cirkvi v Slovenskej republike a jej východiská (Adjustment of the relationship between the state and the Catholic Church in the Slovak Republic and its starting points). *Justičná revue 55* (2), pp. 148–167.

Moravčíková, M. (2019). Zákon o finančnej podpore činnosti cirkví a náboženských spoločností a dva zmluvné záväzky slovenskej republiky voči cirkvám a náboženským spoločnostiam (Act on financial support for the activities of churches and religious societies and two contractual obligations of the Slovak Republic towards churches and religious societies). In: Moravčíková, M. (ed.) *Financovanie cirkví a náboženských spoločností v modernom demokratickom štáte* (pp. 156–172). Bratislava: Wolters Kluwer.

Němec, M. (2023). Zmeny v právnej úprave financovania cirkví na základe zákona č. 370/2019 Z. z (Changes in the legal regulation of church financing based on Act no. 370/2019 Coll). In: M. Gregor, M. O. Mychajlovyč, M. Němec, Ľ. Batka, M. Cenkner and A. Csukás, *Konfesné právo. Štát, právo a náboženstvo*, pp. 188–197. Bratislava: C.H. Beck.

Turčan, M. and Mrva, M. (2021). K problému ukončenia financovania cirkví štátom (On the problem of ending state financing of churches). *Revue církevního práva 4* (85), pp. 71–85.

Šmid, M. (2001). *Základná zmluva medzi Svätou stolicou a Slovenskou republikou s komentárom* (Basic Treaty between the Holy See and the Slovak Republic with a commentary). Bratislava: KBS, Vydavateľstvo Lúč.

NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 1 (2024), pp. 67–75
DOI: https://doi.org/10.71042/CJL01202405

Ryszard PANKIEWICZ
Academy of Zamość, Poland*

Acquisition and Loss of the Right of Patronage according to the 1917 Code of Canon Law

• **Abstract** •

The present article is a brief analysis of the acquisition and loss of the right of patronage as described in the provisions of the 1917 Code of Canon Law. The author brings to the readers' attention the specific nature of the institution of patronage, which was not only ecclesiastical, due to the fact that it was regulated by canon law, but also civil, since the right of patronage to a large extent concerned lay believers and was also regulated by secular law. As founders of churches and benefices, patrons, or church protectors, along with those who acquired the right of patronage later on, occupied an important position in the system of church financing in the period described, even though the ecclesiastical legislators had intended to remove this institution from the legal order altogether. For this reason, it is important to explain how the members of the Catholic Church could acquire this right or be deprived of it.

Keywords: Right of patronage, Privilege of presentation to an ecclesiastical office, Financing of churches and religious associations.

Introduction

It is important to note that the 1917 Code of Canon Law, the first document of this kind in the history of the Catholic Church, on the one hand regulated the acquisition and loss of the right of patronage enjoyed by lay and clerical founders of churches and benefices, and, on the other hand, prohibited the emergence of this right in the future, thus aiming to remove the institution of patronage from the legal order altogether. According to canon law, the right of patronage could

* ORCID ID: 0000-0003-2574-0550; address: Pereca 2, 22-400 Zamość, Poland; e-mail: ryszard.pankiewicz@akademiazamojska.edu.pl

be acquired either directly, by being granted a papal privilege, or indirectly, by way of inheritance, donation, contract, exchange, or prescription. The acquisition of patronage was linked to the existence, or lack thereof, of a person's capacity to receive this right. Those incapable of acquiring it were the unbaptised (pagans and Jews), heretics, apostates, the excommunicated, and schismatics belonging to associations condemned by the Church (Grabowski, 1948, p. 485).

Papal privileges

The 1917 Code of Canon Law[1] imposed an absolute prohibition on the creation of new patronages in the future.[2] At the same time, as an expression of gratitude to founders of churches and benefices, it allowed ordinaries to undertake to say prayers and services for them (*spiritualia suffragia*), either for a certain period or forever, depending on the generosity of the founder. The code also approved of foundations on the condition that the first beneficiary would be the founder, if he was a clergyman, or a clergyman presented by the founder (Bączkowicz, Baron, Stawinoga 1957, p. 384; Grabowski, 1948, p. 485).

Canon law left in place any privileges and obligations that had arisen prior to the codification.[3] This was confirmed by c. 1451 § 1 of the CCL/17.[4] To give an example of a particular law, according to the statute of the 67th Sandomierz Diocesan Synod of 1923, all parishes in the Sandomierz diocese were *liberae collationis*. It was the bishop alone, without the involvement of the patrons, that appointed the pastors in the diocese under his authority.[5] In the parish of Ruda Kościelna,

[1] *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, 1–593 (hereinafter: CCL/17). For an English translation, see *The 1917 or Pio-Benedictine Code of Canon Law* available at https://cdn.restorethe54.com/media/pdf/1917-code-of-canon-law-english.pdf

[2] CCL/17, c. 1450 § 1: Nullum patronatus ius ullo titulo constitui in posterum valide potest. § 2. Loci autem Ordinarius potest: 1° Fidelibus qui ex toto vel ex parte ecclesias exstruxerint vel beneficia fundaverint, spiritualia suffragia, eorum liberalitati proportionata, concedere vel ad tempus vel etiam in perpetuum; 2° Fundationem beneficii admittere ea adiecta conditione, ut beneficium prima vice conferatur clerico fundatori vel alii clerico a fundatore designato (Pasternak, 1970, p. 194).

[3] "The existing patrons are not abolished, but the Code seeks to remove them gradually. The Ordinary is therefore to induce patrons to renounce their patronages or at least their right of presentation, for which they may receive the suffrages mentioned above. If a patron agrees to this, the benefice becomes subject to free conferral (*liberae collationis*). Should one or another of several patrons renounce their right, their place is taken by the bishop" (Bączkowicz, Baron, Stawinoga, 1957, p. 385).

[4] "Curent locorum Ordinarii ut patroni, loco iuris patronatus quo fruuntur aut saltem loco iuris praesentandi, spiritualia suffragia etiam perpetua pro se suisve acceptant".

[5] See Stat. 67. (ad c. 455). Omnes parochiae in dioecesi Sandomiriensi sunt liberae collationis. In: *Prima Synodus Dioecesana Sandomirensis: sub excellentissimo ac reverendissimo Domino Domino*

for instance, the last presentation for a parish priest made by a patron took place before 1860 (Bastrzykowski, 1947, p. 37).

With regard to patrons' renunciation of their right of patronage, which involved their goodwill, the CCL/17 stated that, in the absence of such a renunciation, patrons were obliged to exercise their right in compliance with canon law (c. 1451 § 2).[6]

Canon law, which prohibited the appointment of new patrons, condemned the right of patronage to a slow extinction. The only exception on the basis of which it was possible to acquire patronage directly (*modi derivati*) was the papal privilege. S. Pasternak argues that, according to c. 1471 of the CCL/17, an indult of presentation for a vacant ecclesiastical office or benefice granted by the Holy See cannot be equated with the acquisition of the right of patronage. It is only possible to regard such a permission as a privilege of making a presentation strictly according to the words of the indult (Pasternak, 1970, p. 193). In this way, the code consistently deprived the laity of the influence over the filling of vacant ecclesiastical posts and, consequently, of exercising authority in the Church. The immediate effect, however, was supposed to be a complete elimination of the institution of patronage from social life.

Hereditary rights

The transfer of the right of patronage from one person to another by inheritance was regulated in c. 1453 (§ 1 and 2),[7] which specified the formal requirements necessary for such transfer to be legally valid and enumerated the persons to whom the right could not be transferred. These were non-believers, public apostates, heretics, schismatics, and persons belonging to secret sects not tolerated by the Church (Grabowski, 1948, p. 483, 485).

The code also introduced the principle of the written consent of the local bishop for a transfer of the right of patronage to occur (c. 1453 § 2) and specified the limitations that resulted from the provisions of the foundation act. If the act

Mariano Ryx Episcopo Sandomiriensi Sandomiriae in Ecclesia Cathedrali Nativitatis B. M. V. A. D. MCMXXIII diebus 3, 4 et 5 julii celebrate. Diecezja Sandomierska: Sandomierz, 1923, p. 68.

[6] CCL/17, c. 1451 § 2: "Si patroni id noluerint, eorum ius patronatus canonibus qui sequuntur, regatur".

[7] CCL/17, c. 1453 § 1: "Ius patronatus personale transmitti valide nequit ad infideles, publice apostatas, haereticos, schismaticos, adscriptos societatibus secretis ab Ecclesia damnatis, nec ad quoslibet excommunicatos post sententiam declaratoriam vel condemnatoriam. § 2. Ut ad alios ius patronatus personale transmitti valide possit, requiritur consensus Ordinarii in scriptis datus, salvis legibus fundationis itemque praescripto can. 1470 § 1, 4°".

limited the right of patronage to a particular clan, family, or line, it was only such persons that could inherit this right. If no heirs were mentioned in the foundation act, the right could pass to anyone with the capacity to acquire it (Rittner, 1912, p. 240).

According to canon law, real patronage and the things attached to it could not be passed to persons who were deprived of the right of personal patronage, i.e. non-believers, public apostates from the faith, heretics, schismatics, members of secret organisations condemned by the Church, and the excommunicated (Pasternak, 1970, p. 195). In such cases, the real right of patronage was suspended (c. 1453 § 3).[8]

The right of patronage was inherited by testamentary or statutory means. According to E. Rittner, the non-testamentary right was regulated by national laws.[9] If there were several heirs, they acquired the right of patronage jointly and severally (*in solidum*), regardless of the size of their respective shares. In addition, patronage could also be granted in a bequest or *fideicomissum*.[10]

Donations

The right of patronage was also transferred by means of donation (*donatio*). The acquisition of real patronage in such a way without the consent of the local ordinary was only possible in situations when a lay patron donated the right of patronage to a clergyman, an ecclesiastical institute, or the Church and a co-patron (Rittner,

[8] CCL/17, c. 1453 § 3: "Si res, cui ius patronatus reale cohaeret, ad aliquam personam de qua in §1 transeat, ius patronatus suspensum manet."

[9] E. Rittner describes the controversy concerning the absence of testamentary and non-testamentary heirs: "The disputed issue is whether in the absence of testamentary and non-testamentary heirs *libera collatio* arises, or whether the public treasury, by taking the *bona vacantia*, also acquires the right of patronage. Bearing in mind that, unless the foundation act states otherwise, patronage passes to each heir and that, acquiring the *bona vacantia*, the public treasury is considered an heir, there is no reason to deny the public treasury the right of patronage in this case. The confiscation of property is another thing: as patronage does not count towards property rights, confiscation does not apply to it at all; therefore, personal patronage remains untouched in this case" (Rittner, 1912, p. 240).

[10] A type of bequest whereby the heir undertakes to carry out the testator's will. "*Fideicomissum* was primarily associated with the testator's trust that their heirs will do whatever was asked of them. This trust was based on the Roman *fides*, which in law meant a public commitment, a guarantee, or a vow, as well as good faith, loyalty and fidelity to the word given. It was the attribution of the execution of a bequest to the honesty of the one to whom the testator made the request – *fidei committere* – that the name *fideicommissum* and the words *fideicommitto* and *fideicommissariuss* originated from. Therefore, in the Polish language the word *fideicommissum* is sometimes also translated as 'trust' or 'fiduciary bequest'" (Longchamps de Bérier, 2006, pp.8–9).

1912, p. 240). It should be added that a donation of a patronage by a lay person to a clergyman involved its transformation into an ecclesiastical patronage.[11] At the same time, however, similarly to the inherited right of patronage, the donated right of patronage could be suspended, pursuant to the provision expressed in c. 1453 § 3.

As in the case of hereditary patronage, in a situation in which the real right of patronage could only be exercised by the members of the donor's family, donating this right to someone else was declared null and void. As a consequence, personal patronage could not be transferred to another person since, besides the person's capacity to be granted the right of patronage by way of donation, canon law required the consent of the local ordinary.

Contracts

The 1917 Code of Canon Law approved of a purchase-sale (*emptio*, *venditio*) of real patronage only, as opposed to personal patronage. For example, in a situation in which the right of patronage belonged to the first-born son of a family (personal patronage), he could not sell this right under the threat of simony.[12] This approach was dictated by a proper understanding of the right of patronage, which, to a large extent, was a spiritual right (*antecedenter spirituali annexum*) and, as such, was not subject to sale. Besides, as a spiritual right, personal patronage could not be given a price (Rittner, 1912, p. 240).[13] As for material possessions, if their price was raised, for instance, because of the patronage rights attached to them, the seller was guilty of simony, too (Rittner, 1912, p. 240), and, consequently, lost their right of patronage (c. 1470 § 1, 6).

[11] *Prawo patronatu* 99.

[12] "Trade in spiritual goods. The name originates from an event described in the Acts of the Apostles (8:9–24), when Simon, called a sorcerer, wanted to buy from the apostles the power to dispense the Holy Spirit. The first of the Commandments of the Decalogue condemns anyone seeking to acquire spiritual goods by means of trade and claiming to be their owner or master. The practice of simony, which has always been condemned by the Church (above all, the practice of selling indulgences), usually occurred when bishops' religious authority was accompanied by their secular estates and privileges" (Witczyk, 2001, p. 691).

[13] CCL/17, c. 1470 § 1: "Praeter casum de quo in can. 1469 § 3, ius patronatus exstinguitur: Si patronus ius partronatus simoniace in alium transferre attentaverit; si lapsus fuerit in apostasiam, haeresim aut schisma; si bona ac iura ecclesiae vel beneficii iniuste usurpaverit aut detineat; si rectorem vel alium clericum ecclesiae servitio addictum aut beneficiarium per se vel per alios occiderit vel mutilaverit".

Exchanges

The 1917 Pio-Benedictine Code regulated the exchange (*permutatio*) of things attached to real patronage. Such exchange was also possible for things that were free from the right of patronage. According to canon law, when performing this type of action, there was no need to obtain the consent of the local ordinary, provided the exchange was not simoniacal.

As in the case of contracts, the exchange of personal patronage was distinguished from that of family patronage. While the exchange of personal patronage for another patronage or thing, fully or partially spiritual (*res spiritulis vel spirituali annexa*), with the exception of temporal goods, could take place freely and without the consent of the local ordinary,[14] for the exchange of family patronage to be valid two conditions had to be met. First, the exchange could only be made with another family member, provided there was a relevant clause in the foundation deed. Second, such an exchange obligatorily required the consent of the ordinary. (c. 1453 § 2; c. 1470 § 1, 4°).[15]

Prescriptions

The 1917 Code of Canon Law also regulated the acquisition of the right of patronage by the long-term exercise of the right of prescription (*praescriptio*).[16] This right concerned patronages to which a given thing was attached, i.e. real patronages. It should be emphasized, however, that the acquisition of a thing by way of prescription was not synonymous with the acquisition of the right of patronage. For such an acquisition to occur, the right of prescription had to have been exercised for a certain time. In addition, the new patron's prerogatives were the same as those of

[14] *Prawo patronatu* 99–100.

[15] CCL/17, c. 1453 § 2: "Ut ad alios ius patronatus personale transmitti valide possit, requiritur consensus Ordinarii in scriptis datus, salvis legibus fundationis itemque praescripto can. 1470 § 1, 4°." CCL/17, c. 1470 § 1, 4°: "Si res, cui ius patronatus inhaeret, pereat, aut exstinguatur familia, gens, linea cui secundum tabulas fundationis reservatur; quo in altero casu nec ius patronatus hereditarium evadit, nec Ordinarius valide permittere poterit donationem iuris patronatus alii fieri."

[16] "The most widespread opinion is that for clerical patronage to be prescribed, 40 years are always required, whereas for secular patronage this period is 30 years. In addition, *bona fides continua* is needed in every case. According to Austrian law, secular patronage can be prescribed after 30 years, and clerical patronage after 40 years, on the condition that during this period the opportunity to exercise patronage rights has arisen at least three times and that this opportunity was, in fact, taken advantage of. In any case, the effect of the prescription is that only those particular patronage rights are acquired which the person has actually exercised according to the general legal principle of *tantum est praescriptum*, *quantum possessum*" (Rittner, 1912, pp. 240–241).

their predecessor.[17] Similarly to other ways of transferring the right of patronage, patronage acquired by way of prescription could concern several persons. In such a situation, they jointly and severally acquired the patronage, becoming co-patrons. Since the time that had to elapse for the right of prescription to be exercised was specified in the civil law of the respective countries (c. 1508),[18] there was a close correspondence between canon law and secular law.

The Church ruled out prescription in the case of personal patronage, introducing the written consent of the local ordinary for such an acquisition to be valid, as was the case for exchange of patronage (c. 1453 § 2). Patronage could also be transferred to the state, which acquired it by way of confiscation.[19] In addition, there were several other legal circumstances under which the right of patronage could be exercised.[20]

Conclusion

The ways of acquiring and losing the right of patronage in the light of the 1917 Code of Canon Law discussed in this article lead to the main conclusion that the Church hierarchs consistently sought to expunge this institution from canon law, which was expected to result in its removal from secular law, too. This is confirmed by the fact that the only codified means of acquiring the right of patronage directly was the papal privilege. On the other hand, the variety of ways in which the right of patronage could be acquired indirectly as specified in the CCL/17, in-

[17] *Prawo patronatu* 101–103.

[18] CCL/17, c. 1508: "Praescriptionem, tanquam acquirendi et se liberandi modum, prout est in legislatione civili respectivae nationis, Ecclesia pro bonis ecclesiasticis recipit, salvo praescripto canonum qui sequuntur".

[19] "[T]he secularisation of churches, monasteries or ecclesiastical establishments to which patronage was attached does not constitute a legal basis for the recognition of patronage rights. However, the Church tolerates this or even explicitly recognises it. Patronage *in rem* also passes along with the property to a feudatory, emphyteutic lessee, fideicommissary, and, in general, to those to whom a long-term usufruct (*dominium utile*) is transferred." (Bączkowicz, Baron, Stawinoga, 1957, p. 387).

[20] "It is not only the transfer of ownership but also other legal and private relations concerning the land in question that may have an effect on the patronage right attached to it, so that such right, while remaining *quo ad jus* with the former patron, is transferred to another person, who in this way exercises the patronage right: 1) in the case of so-called divided property, the one to whom the *dominium utile* serves, i.e. a fief, a perpetual tenant, or a superficiary; 2) a usufructuary (*usufructuarius*); 3) a husband representing his wife, who owns the land in question as part of her dowry – unless otherwise stipulated by an express agreement in all the three cases; 4) a court sequestrator in charge of the disputed land. By contrast, the right of patronage cannot be transferred either to a pledgee, even though in possession of the land pledged to them, or a tenant, unless the owner has expressly transferred the exercise of the patronage to them" (Rittner, 1912, pp. 241–242).

cluding the reference to civil law regulations, clearly shows that the institution of church protector, which had been shaped over many centuries, was not only firmly rooted in the tradition of the nation but also in secular law. It should also be noted, the discussion of which is beyond the scope of this article, that the right of patronage was regulated in domestic law, too. As for the period of the Second Polish Republic, the provisions concerning patronage were the subject of the Concordat between the Holy See and the Republic of Poland signed in Rome on 10 February 1925 and ratified in accordance with the Act of 23 April 1925 (Journal of Laws of 1925 No. 47, item 324).[21] Those provisions were also contained in several normative acts of the sates that had occupied Poland, and they had been in force in the recovered territory until the establishment of national law.[22] This confirms the thesis that if the outbreak of the Second World War and the subsequent changes in property relations in post-war Poland had not taken place, the right of patronage would still be an institution functioning in canon and secular law.

References

Bastrzykowki, A. (1947). *Monografja historyczna parafii Ruda Kościelna nad Kamienną* (Historical Monograph of the Parish of Ruda Kościelna on the Kamienna River). Ostrowiec: published by the author.

Bączkowicz, F., Baron, J., Stawinoga, W. (1957). *Prawo kanoniczne. Podręcznik dla duchowieństwa* (Canon Law: A Handbook for the Clergy) (3rd ed., Vol. I). Opole: Wydawnictwo Diecezjalne Św. Krzyża.

Grabowski, I. (1918). *Prawo kościelne osobowe i rzeczowe w nowym kodeksie kościelnym* (Personal and Property Church Law in the New Code of Canon Law). Lwów: Drukarnia Józefa Chęcińskiego.

Grabowski, I. (1948). *Prawo kanoniczne* (Canon Law) (4th ed.). Warszawa: Gebethner & Wolff.

Longchamps de Bérier, F. (2006). *O elastyczność prawa spadkowego: fideikomis uniwersalny w klasycznym prawie rzymskim* (On the Flexibility of Inheritance Law: The Universal Fideicommissum in Classical Roman Law). Warszawa: Liber.

Pasternak, F. (1970). *Urzędy i beneficja kościelne. Majątek kościelny. Zarys Prawa Kanonicznego. Prawo rzeczowe* (Ecclesiastical Offices and Benefices. Church Property. An Overview of Canon Law. Property Law) (Vol. III, no V). Warszawa: Akademia Teologii Katolickiej.

Rittner, E. (1912). *Prawo kościelne katolickie* (Catholic Church Law) (4th ed., Vol. I). Lwów: Księgarnia Samuela Bodeka.

[21] Journal of Laws No.72, item 501.

[22] Act of 17 March, 1932 on Contributions to the Catholic Church), *Journal of Law* 1932.35. 358.

Uniwersytet Jagielloński, Towarzystwo Biblioteki Słuchaczów Prawa. (1918). *Prawo patronatu* (Patronage Law). Kraków: Wydawnictwo Towarzystwa Biblioteki Słuchaczów Prawa Uniwersytetu Jagiellońskiego.

Witczyk, H. (ed.), (2001). Symonia (Simony). In: *Encyklopedia chrześcijaństwa: Historia i współczesność 2000 lat nadziei*. Kielce: Jedność.

NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 1 (2024), pp. 77–90
DOI: https://doi.org/10.71042/CJL01202406

Stanislav PŘIBYL
University of South Bohemia in České Budějovice, the Czech Republic*

The Status of Churches under Public Law in the Czech Republic and their Transition to Financial Self-Sustainability[1]

• **Abstract** •

Determining whether churches and religious societies in the Czech Republic are subjects of public or private law is a challenging question in confessional law. The privileged status under public law by no means implies a uniform legal regime for the various public corporations. In the Czech Republic, churches enter the arena of public law; the state, for example, guarantees the right to teach religion in public schools, co-finances the operation of church schools, recognizes the civil validity of marriage, respects the seal of the confessional, pays the salaries of hospital chaplains, and allows and pays for the activities of military and prison chaplains. However, especially the Catholic Church was long burdened with the struggle for the restitution of church property seized by the communist regime. The issue was settled with the adoption of the Act on Property Settlement with Churches and Religious Societies. Since 2013, the law has no longer funded the operation of church headquarters as well as all clerical salaries. The churches also recovered their lost properties and obtained financial compensation for those properties that could no longer be reclaimed. In addition, churches are still subsidised by decreasing amounts each year to allow for a smooth transition to financial self-sustainability. This, however, has led to a situation in which churches are partially losing their public law character. The article also identifies the challenges the Catholic Church in particular has to overcome in order to stabilise its new system of financing.

Keywords: Churches, Public law, Special rights, Restitution, Church property.

* ORCID ID: 0000-0002-2470-1405; address: Krymská 23, 101 00 Praha 10, Czech Republic; e-mail: standa.pribyl@volny.cz

[1] The paper was prepared in the framework of the project VEGA 1/0170/21 International Legal Obligations of the Slovak Republic in the Field of Financing of the Catholic Church.

Introduction: The Ambiguity in Treating the Public Law Status of Churches

In some states, the public law status of churches and the legal entities the churches establish is strongly accentuated. However, even in those countries the stated public law character of churches does not correspond to the definitional framework of public law corporations[1]; in fact, confessional law experts in those countries often turn to our scholars in the field to enquire what status churches have in the Czech Republic, whether private or public law. However, this question has no clear answer, since the status of churches and religious societies in our country has its own specific features *sui generis* when compared to all other corporations established under Czech law. Nevertheless, we have seen some evolution in this field: "As regards the position of churches, no clear prognosis can be put forward as to which direction their position will take; for the time being it can be stated that in some areas registered churches act as subjects of public law, in others as subjects of private law" (Tretera, 2002, p. 72).

Moreover, the link between public law status and the property law of the Catholic Church has been subject of manipulations aimed at denying the very existence of Church property: "In legal literature, in case law, and especially in the media, the term 'public law' is used in connection with the Roman Catholic Church and its property intended for restitution" (Potz et al., 2004, p. 59). Confessional law strictly rejects such a purposive notion: "In the past but even today, one can come across the view that churches did not actually own any property because their property was of public law nature; as a result, the state had the right to freely dispose of it. Thus, demanding the restitution of church property is said to be legally inadequate. However, one forgets that public law is not the same as state law. Moreover, churches have always been somewhat special institutions which cannot be clearly categorised as being either public or private. It would be absurd to tell the members of the different churches who for generations have built up a common church property from their gifts, collections and the work of their own hands that what they have been doing, they have actually been doing for the state" (Tretera, 2002, p. 121).

[1] "Technically speaking, public corporation is 'a state-constituted administrative body endowed with superior power, founded on the principle of membership and at the same time independent of the fluctuation of its members.' Except for the existence of a membership structure, however, this conceptual definition is by no means fitting for churches" (Löffler, 2007, p. 10).

The Scope of the Concept of Secular State

Generally speaking, the more the model of the relationship between state and churches tends towards separation, the more the churches' position becomes subject of private law; besides, the more the state participates in the financing of the churches, the more the churches themselves naturally penetrate the public sphere. The 'pure' separation model is notorious mainly because of the radical separation in France, where the intention was to establish a so-called 'secular state' (*état laïque*): "In 1905, after the electoral victory of the Republicans, a new act on the separation of the Church and the State was adopted in France (which is, with some modifications, still in force today). The law deprived the Church not only of its privileged status under the Concordat, but also of its legal personality and, in consequence, of all its property. The state ceased to finance the needs of churches; in fact, churches could only acquire property through registered private cult associations" (Hrdina, 2006, p. 155). Interestingly enough, although virtually unnoticed by the professional public, the phrase 'secular state' also appeared in a groundbreaking ruling of the Constitutional Court of the Czech Republic. It took the form of a general characterization of the status of churches and religious societies in the country: "The Czech Republic is based on the principle of a secular state. According to Article 2(1) of the Charter, the state is founded on democratic values and 'may not be bound either by and exclusive ideology or by a particular religious faith.' Thus, it is evident that the Czech Republic must accept and tolerate religious pluralism; meaning that, above all, it must not discriminate against or, on the contrary, give unjustified advantage to any particular religious faith. It also follows from the cited article that the state must be separate from specific religions".[2]

The concept of secular state as expressed by the Constitutional Court of the Czech Republic is certainly not as radical as the former secessionist policies in France. Rather, the Constitutional Court judges attempted to pinpoint the Czech state's religious and ideological neutrality and the resulting separation of the organs of state and their activities from any particular religious beliefs,[3] as expressed

[2] Reasoning IV of the Decision of the Constitutional Court of the Czech Republic no. 6/02, 27 November 2002. Published under No. 4/2003 Collection of Laws (Coll.).

[3] The maker of the Czech constitution thus implicitly reacts to the epoch of the totalitarian state led by the Communist Party, which was practically a confessional state *à rebours*, i.e., upside down: "Ensuring the supremacy of Marxist-Leninist ideology in the socialist states of Eastern Europe thirty years ago as the so-called 'scientific world view', of which atheism was an inseparable part, was due not only to the *de facto* dictatorial position of the communist or otherwise known as Marxist political party, but in many cases also to the constitutional enshrinement of its 'leading role' and a number of other provisions forming the legal order of these states" (Tretera, Horák, 2015, p. 121).

in the current law on churches and religious societies: "The state, regions and municipalities cannot carry out religious or anti-religious activities".[4] Indeed, this is another argument in favour of the private legal status of churches and religious societies in the Czech Republic.

Churches Enter the Public Sphere

The 2002 Act on Churches and Religious Societies is the second law in the field passed in the Czech Republic after 1989. The first, issued in 1991 as a federal law for the whole of Czechoslovakia,[5] was a true manifesto of renewed religious freedom and enjoyed the support of both church leaders[6] and academics in the field of confessional law.[7] While in the Slovak part of the former Czechoslovak federation this law still remains in force, albeit in an amended version, the Czech Republic chose its own path with the new law of 2002. A model of two-stage registration of churches and religious societies was created in connection with the introduction of their authorisation to exercise the so-called special rights. In the original version of the law, the list of these rights had six parts: "In order to fulfil its mission, a registered church and religious society under conditions set by this act can acquire authorization to possess these special rights: a) to teach religion in state schools according to a special legal regulation, b) to authorize persons performing clerical activities to perform clerical service in the armed forces of the Czech Republic, in places where detention, imprisonment, protective custody, protective treatment and protective education are carried out, c) to be financed according to a special legal regulation on the financial security of churches and religious societies, d) to perform ceremonies in which church marriages are contracted in accordance with a special legal regulation, e) to establish church schools in accordance with a special legal regulation, f) to observe the obligation of confidentiality by clergy in connection with the exercise of confessional secrecy or the exercise of a right similar to confessional secrecy, if this obligation has been a traditional part of the teachings of

[4] Act No. 3/2002 Coll. on freedom of religious confession and the position of churches and religious societies and on the changes of some legal acts (Law on churches and religious societies), Article 4 (2).

[5] Act No. 308/1991 Coll., on Freedom of Religious Belief and the Status of Churches and Religious Societies.

[6] "The final response in the Czechoslovak Federal Republic was Act No. 308/1991 Coll., which represents the highest level of religious freedom for churches and religious societies in the history of our state" (Duka, 2004, p. 18).

[7] "Act No. 308/1991 Coll. was a satisfactory norm at the time of its drafting, and the good inventiveness of its drafters was evident" (Tretera, 2002, p. 65).

the church and religious society for at least 50 years; however, this does not concern the obligation to prevent a criminal offence imposed by a special law."[8]

According to the law, churches and religious societies already recognized before the act entered into force could exercise these rights to the existing extent,[9] while those that have been newly registered on the basis of this law will only be able to achieve 'accreditation' for special rights under predefined conditions. However, these conditions are so demanding that none of the 23 churches and religious societies newly registered under the law has met them so far, although more than twenty years have passed since the law came into force. It would certainly be possible to comply with the generally established conditions: "An application for granting the authorization to exercise special rights may be submitted by a registered church and religious society that: a) has been registered under this Act continuously for at least 10 years as of the date of submission of the application, b) has published annual reports on its activities for the calendar year for 10 years prior to the submission of the application, c) has duly fulfilled its obligations towards the state and third parties, and d) is legally upstanding".[10] However, the conditions also include a requirement that the entity applying for the authorisation to exercise special rights must, *inter alia*, submit "original signatures of as many adult citizens of the Czech Republic or foreigners with permanent residence in the Czech Republic who are members of the church and religious society as at least 1 per cent of the population of the Czech Republic according to the latest census (…)."[11] Instead of the original 300 signatures for simple registration, one per cent of the population of the Czech Republic would now be required, which in practice represents a return to the much-criticised 10,000-signature census.[12]

Under the previous legislation, the legislator treated the special rights as a tool allowing churches and religious societies to enter the public sphere, and thus not remaining merely institutions "satisfying the religious needs" of their members. It is obvious that the special rights defined by law cannot encompass the entire scope of legal relations that draw church-type corporations into social life and often

[8] Act No. 3/2002 Coll., § 7 (1).

[9] Act No. 3/2002 Coll., § 28 (1).

[10] Act No. 3/2002 Coll., § 11 (1).

[11] Act No 3/2002 Coll., § 11 (4) (a).

[12] It was introduced as a follow-up to the referring provision of Section 23 of Act No. 308/1991 Coll. by a separate Act of the Czech National Council No. 161/1992 Coll., on the registration of churches and religious societies: "This census might have been well-intentioned, but by European standards it aimed too high and was hardly achievable in practice. It became the subject of criticism from the beginning and was one of the reasons for the adoption of the new, now valid Act on Churches and Religious Societies (…)" (Hrdina, 2004, p. 76).

also into the public sphere. After all, even churches that do not have the authority to exercise them can assert themselves outside their internal ecclesiastical structures: "Especially in areas where churches and religious societies, or registered legal persons, carry out activities of general benefit, for example in the field of social welfare, health care, education, crime prevention, etc., they necessarily enter the public sphere, including those churches and religious societies that do not enjoy these special rights" (Chocholáč, 2016, p. 61).

The Concept of the So-Called 'Special Rights'

However, the concept of special rights is also viewed as a closed system of state privileges granted to churches as corporations, i.e., not primarily as a means of exercising individual rights arising from religious freedom enshrined in the Charter of Fundamental Freedoms and international human rights documents. "Special rights are understood as entitlements of churches and religious societies as institutions. The legislation does not take into account the rights of persons in a particular life situation (such as detention, imprisonment, service in the armed forces, etc.). (…) Since the right of persons to freedom of religion is a fundamental right, it is questionable to what extent churches and religious societies can be said to have 'special' rights if some of these special rights serve as a means of exercising a fundamental human right" (Kříž, 2011, p. 94).

In addition, the area of spiritual care in the health care system, for example, is not included among the special rights at all, although the 2011 Health Services Act (*Zákon o zdravotních službách*) provides for a broad right of patients to the services of the clergy of all state-recognized churches without exception, namely, the right to "receive spiritual care and spiritual support in an inpatient or overnight care facility from clergy of churches and religious societies registered in the Czech Republic or from persons entrusted with the exercise of clerical activities in accordance with internal regulations or in a manner that does not violate the rights of other patients, and with regard to their health condition, unless another legal regulation provides otherwise; a visit by a clergyman may not be denied to a patient in cases of danger to his life or serious damage to his health, unless another legal regulation provides otherwise."[13]

As regards the right of churches to receive spiritual care in social institutions, it is applicable directly on the basis of the constitutional rights of believers, as given

[13] Act No 372/2011 Coll., on Health Services and Conditions of their Provision (Health Services Act), Section 28 (3) (j).

by the Charter of Fundamental Rights and Freedoms: "In the case of other institutions where the law has not restricted freedom of access and movement, including the right to manifest religious beliefs (e.g. in retirement homes), the right to receive spiritual care follows directly from Article 16(1) of the Charter and is not limited to registered churches and religious societies" (Chocholáč, 2016, p. 67).

In the case of the special right to marry with civil law effects, it is the clergyman of the relevant church himself who substitutes the public authority of the State for the defined act of marriage: "The competent authority of the church or religious society acts replaces the authority of the State; however, by the same token it does not become the authority of the State, nor does it perform its function. It is and remains an organ of the church, fulfilling the function it has precisely as an organ of the Church (indeed, its competence is determined by ecclesiastical regulations), to which the State has granted a special privilege, namely that it has elevated an official act which would otherwise remain an official act recognized only by the Church to an act recognized by itself" (Radvanová, Zuklínová, 1999, p. 23).

The clerical service in the army is performed by military clerics who, as professional soldiers, are employees of the Ministry of Defence, to whom "all the rights and obligations of a soldier in other service apply, unless they conflict with his status guaranteed to him by international law".[14] Prison chaplains also occupy a position of employment in the service of the State: "Authorised persons, employed by the Prison Service, serve as Prison Service chaplains. The chaplains are methodically directed by the Chief Chaplain in collaboration with the Deputy Chief Chaplain."[15]

It is therefore evident that the state has a direct interest in some of the services provided by the churches, and, in certain cases, their clergy are allowed to enter otherwise inaccessible buildings and to perform specific spiritual activities there, even though these may be seen as pre-evangelization rather than actual acts of cult: "The ministry of the clergy in the army is not missionary or evangelistic in character; it is primarily a ministry of listening and sharing in the professional and personal joys and difficulties of everyone who entrusts himself to a military cleric" (Chocholáč, p. 70).

[14] Agreement on Cooperation Between the Ministry of Defence of the Czech Republic, the Ecumenical Council of Churches in the Czech Republic and the Czech Bishops' Conference, point C – Status of Military Clergy.

[15] Agreement on Pastoral Service in Prisons between the Prison Administration of the Czech Republic, the Ecumenic Council of Churches in the Czech Republic and the Czech Bishops Conference on the establishment of Prison religious services, Article 4 (1).

Two of the special rights concern the activities of churches in education. These are the right to teach religion in state (public) schools, which is even explicitly supported in the Charter as a constitutionally guaranteed right,[16] and the right to establish their own church schools. This special right differs from a similar right granted to churches and religious societies not yet entitled to exercise special rights, namely the right "to teach and educate their clergy and lay workers in their own schools and other institutions as well as in divinity schools and divinity faculties under the conditions provided for in special legislation."[17] While the schools that these 'unaccredited' churches may establish follow the legal regime of private schools in their self-financing, the operation of church education in the sense of exercising a special right also implies the entitlement of these schools to partial financing from public budgets, which distinguishes church education from both private and public education, where the state bears the full cost. The State budget thus finances the operation of "schools and educational establishments established by registered churches or religious societies which have been granted the right to exercise the special right to establish church schools", in accordance with the provisions of the Education Act.[18]

The Churches' Expenses Paid by the State

The state pays the salaries of hospital, military and prison chaplains, and contributes to church education from the state budget. It means that the entry of churches and religious societies into the public sphere also implies financial participation of the state in the activities of the churches concerned. The cases above concern the financing of services in which a public interest is at stake; however, the complex financing of the operation of church headquarters and of all clergy salaries, which the democratic Czechoslovak state inherited from its totalitarian predecessor at the end of 1989,[19] was a completely different matter. The very origins of this system of financing, established in the harshest Stalinist phase of the communist regime, led especially the Catholic Church to seek to change it under the new democratic conditions, because the communist regime deprived the Church of virtually all of its real property, the proceeds of which had previously financed its operations.[20]

[16] Article 16 (3) of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

[17] Act No. 3/2002 Coll., § 6 (3) (a).

[18] Act No. 561/2004 Coll. on Pre-school, Primary, Secondary, Higher Vocational and Other Education (Education Act), Section 160 (1) (b).

[19] Act No. 218/1949 Coll., on the economic security of churches and religious societies.

[20] "In conjunction with the withdrawal of all remaining economic assets from the Catholic

The Church also raised this issue during the negotiations with the Holy See on the Concordat Treaty, which probably led to the result that the Treaty has remained unratified: "(1) The Czech Republic will attempt in the quickest and for both parties acceptable way to resolve questions concerning the properties of the Catholic Church. (2) In the Czech Republic the economic safety of the Catholic Church has been guaranteed by the legal system of the Czech Republic. In case a new model of financing is drawn up, provisions will be made for avoiding economic problems for the Catholic Church in the period of transition before the new model replaces the current one."[21]

The Law on Churches and Religious Societies of 2002 then placed the right to public funding of churches and religious societies within the framework of 'special rights' as the right of a church "to be funded according to a special legal regulation regarding the financial security of churches and religious societies."[22] If, however, state funding of institutions is to be a characteristic feature of their public law character, then the planned abandonment of state funding of church operations and salary costs is more likely to result in churches moving to a private law status, at least in such an important area as their funding.

Restitution and Property Settlements with Churches

In the Czech Republic, the long-awaited and disproportionately delayed comprehensive solution to church restitution took the form of the Act on Property Settlement with Churches and Religious Societies (*Zákon o majetkovém vyrovnání s církvemi a náboženskými společnostmi*), which came into force at the beginning of 2013.[23] It allowed the churches to become financially independent on the state. By far the most significant recipient "The settlement of property relations between the state and churches and religious societies within the meaning of Section 1 of the Act means the achievement of a state in which the state will no longer subsidize churches and religious societies in their purely ecclesiastical activities, i.e. the state of financial separation of churches and religious societies from the state. This, of

Church, it was to be the economic security that would effectively isolate Czech Catholics from communion with the Catholic Church in the world and deprive the Czech Church of any influence of the higher leadership (bishops)" (Jäger, 2009, p. 784).

[21] Treaty Between the Czech Republic and the Holy See Modifying Some Relations, art. 17 (1) and (2). (2002). *Revue církevního práva 22*(2), pp. 163–175.

[22] Act No 3/2002 Coll., § 7 (1) (c) of the original text.

[23] Act No. 428/2012 Coll., on Property Settlement with Churches and Religious Societies and on Amendments to Certain Acts (Act on Property Settlement with Churches and Religious Societies).

course, does not exclude the provision of support for specific activities under the conditions under which the state also provides support to non-church entities (e.g. in the field of health care, social care, protection of cultural monuments, etc.)" (Kříž, Valeš, 2011, p. 92).

To bridge this transitional period, the State still pays a contribution to support the activities of the churches and religious societies concerned: "For a period of 17 years from the date of entry into force of this Act, the State will pay a contribution to support their activities to the churches and religious societies concerned. In the first three years of the transitional period, the amount of the contribution shall be equal to the amount granted to the church and religious society concerned on the basis of Act No 218/1949 Coll., on the economic security of churches and religious societies by the State, as amended, in 2011. The amount of the allowance shall be reduced annually from the fourth year of the transitional period by an amount corresponding to 5 % of the amount paid in the first year of the transitional period."[24]

Since the Law on Property Settlement with Churches and Religious Societies stipulated, among other things, the conditions for restitution in kind of church property, the legislator also required the responsiveness of all relevant authorities and other entities that participate in the restitution processes. Thus, one can speak of "a favour in favour of restitution" (*favor restitutionis*): "In applying this law, its purpose, which is to alleviate the property injustices caused to registered churches and religious societies during the given period, must be respected. The public authorities shall provide assistance to the persons entitled, in particular by providing them, without undue delay and free of charge, with extracts and copies of records and other documents which may contribute to the clarification of their claims."[25]

Unfortunately, this clear will of the legislator has not been heeded, and the Catholic Church in particular has been constantly confronted with obstruction by state authorities, formalistic approach of the courts and the reluctance of the entities obliged to hand over the property: "Thus, since 2013, churches and religious societies could hope that the legislation and the relevant jurisprudence of the Constitutional Court had been on their side in the process of property restitution and that after two decades of waiting for the redress of the injustices of the communist era, the chapter called 'restitution of stolen property' would be closed within the first or at maximum the second year. Very soon, however, they were to see that the reality would be quite different. Almost daily, churches and religious societies were discovering how difficult these processes of requesting, supplementing, appealing

[24] Act No. 428/2012 Coll., § 17 (1–3).
[25] Act No. 428/2012 Coll., § 18 (4).

or even suing for the return of property could be, and how the general climate and political pressures (…) were not conducive to a sympathetic administration" (Čačík, 2019, p. 84).

Churches were offered financial compensation for former church property that could not be restituted[26] for reasons specified by law: "A registered church and religious society that does not refuse to conclude a settlement agreement with the state (…) will receive a lump sum financial compensation. The amount of the financial compensation for the individual church and religious society concerned is: (…) CZK 47.200.000.000 for the Roman Catholic Church."[27] This financial compensation, which, in accordance to the law, is paid in annual instalments over a period of 30 years, plus an annual increase in the rate of inflation, "will not be subject to any tax, charge or other similar pecuniary benefit."[28] Nevertheless, there was a governmental and parliamentary attempt to impose taxation on the financial compensation ('annuity'), which was fortunately prevented successfully and in time, thanks to the intervention of the Constitutional Court of the Czech Republic.[29]

Challenges in the Transition to Self-Financing in the Catholic Church

The Catholic Church, or rather its dioceses and religious communities, are gradually transitioning to a new model of financing with the help of a gradually shrinking state contribution, the temporary payment of financial restitution compensation and the often uncertain proceeds from real estate restitution. However, it should not be overlooked that the principal source of funding for the Church's pastoral work, activities and apostolate should primarily be the collections and donations of the faithful themselves. Therefore, the faithful must be properly motivated to take such responsibility for the running of their church. Catholic dioceses are also moving towards stewardship in their various areas of activity through the creation of special-purpose funds, inspired also by the practice traditionally established in their non-Catholic counterparts.[30]

[26] Act No. 428/2012 Coll., § 8.

[27] Act No. 428/2012 Coll., § 15(1), (2) (g).

[28] Act No. 428/2012 Coll., § 15 (6).

[29] On 1 October 2019, the Plenum of the Constitutional Court issued a constitutional ruling under Pl. 586/1992 Coll., on Income Taxes, as amended, introduced by Act No. 125/2019 Coll., with effect from the date of publication of the ruling in the Collection of Laws. The words read "except for financial compensation."

[30] The raising and distribution of funds for building and similar purposes is taken care of in religious communities by their special institutions, such as the Brotherly Aid Fund (*Fond bratrské*

The annual decline in the state contribution, which is used, among other things, for the purpose of paying clergy salaries, is being addressed, for example, by introducing the 'St. Adalbert Fund' (*Fond svatého Vojtěcha*) in the Archdiocese of Prague. This fund provides salary support (service fees) of clergy and has been established for the purpose of "creating a financial source intended to finance the personal costs of clergy in a service relationship with the Archbishopric of Prague."[31] The proceeds of the church collections are already handed over four times a year for this purpose.

In contrast to the former system of ecclesiastical benefices, whose management was based on a maximum effort to be self-sufficient,[32] the current canon law is more inclined towards massive redistribution and centralization of funding: "Each diocese has a special facility which collects property or donations for the purpose of providing for the maintenance of the clergy who are serving the diocese, unless otherwise provided for. (…) If necessary, a common fund shall be established in each diocese, from which the bishops may discharge their obligations to other persons serving the Church and contribute to the various needs of the diocese, by which also the richer dioceses may assist the poorer ones."[33]

As a result, Catholic parishes are burdened with ever more frequent compulsory collections, the proceeds of which are sent to the dioceses. In addition, the dioceses also tend to tax heavily or sometimes even take away the most lucrative properties acquired by the parishes in the process of restitution in kind. However, the main burden of care for the property remains on the shoulders of the local spiritual administrators. Contrary to the exaggerated expectations, the realistically formulated prediction is more likely to come true: "It is clear to everyone that full restitution of church property is a difficult matter and would probably not provide sufficient economic security for the churches, anyway" (Tretera, p. 133).

Conclusion

The expectations placed on church restitution and self-financing of churches will not be met in many respects. In the Catholic Church, it will depend on how individual dioceses and particular religious orders perform. In a way, self-financ-

pomoci) in the Czechoslovak Hussite Church (*Československá církev husitská*) or the Jerome Unity in the Evangelical Church of Czech Brethren (*Jeronýmova jednota v Českobratrské církvi evangelické*), similar to the Gustav-Adolf-Werke in Germany and Austria" (Tretera, Horák, p. 251).

[31] *Acta curiae archiepiscopalis pragensis*, *4/2021*, p. 3.

[32] Cf. Code of Canon Law, 1917, c. 1409 *et seq*.

[33] Code of Canon Law, 1983, c. 1274 § 1 and § 3.

ing and independence from public budgets means a retreat from the previous position of the churches, which was certainly closer to public law in this respect. The situation in which the state also contributes to the operation of churches can sometimes be seen as a manifestation of its favourable attitude towards religion (*favor religionis*), and at other times as an attempt to gain control over churches and religious societies. In the Czech Republic, which has already done away with state payment of clergy service fees (*služné*), the state-paid services of chaplains, whether military, prison or hospital, remain in the public sphere; moreover, there is privileged funding for church schools over private schools. Other institutions in churches' hands, especially charitable, social or medical institutions, are funded under the same conditions and legislation as similar non-ecclesiastical institutions. The same situation can be seen in the area of ecclesial cultural heritage. Among the special rights of churches and religious societies, however, there are also some others which are not directly related to their funding, namely the right to teach religion in state schools, the right to a marriage with civil effects and the respect for the confidentiality of confession (the seal of confession).[34] Nevertheless, these rights also give churches the opportunity to enter the public sphere where other similar entities independent of the state cannot operate.

References

Arcibiskupství pražské. (2021). *Acta curiae archiepiscopalis pragensis*, *4*.

Čačík, M. B. (2019). In favorem restitutionis – teorie a praxe (In Favorem Restitutionis – – Theory and Practice). *Revue církevního práva, 76*(3), pp. 81–96.

Dohoda o duchovní službě ve vězeňství (Agreement on Prison Ministry). (2014). *Revue církevního práva*, *58*(2), pp. 55–61.

Dohoda o spolupráci mezi Ministerstvem obrany ČR, Ekumenickou radou církví v ČR a Českou biskupskou konferencí (Agreement on Cooperation Between the Ministry of Defence of the Czech Republic, the Ecumenical Council of Churches in the Czech Republic and the Czech Bishops' Conference). (1998). *Revue církevního práva 10*(2), pp. 129–135.

Duka, D. (2004). Přátelská odluka a kooperace jsou si blízké (Friendly separation and co-operation are closely related). In: M. Loužek (ed.). *Vztah církví a státu. Sborník textů*, Praha: Centrum pro ekonomiku a politiku, pp. 17–23.

Hrdina, I. A. (2004). *Náboženská svoboda v právu České republiky* (Religious Freedom in the Law of the Czech Republic). Praha: Eurolex Bohemia.

Hrdina, I. A. (2006). *Texty ke studiu konfesního práva I. – Evropa a USA* (Texts for the Study of Confessional Law I – Europe and the USA). Praha: Eurolex Bohemia.

[34] Cf. Act No 3/2002 Coll., § 7(1)(a), (c), (e) as amended.

Chocholáč, A. (2016). *Zákon o církvích a náboženských společnostech. Komentář* (The Law on Churches and Religious Societies: A Commentary). Praha: Wolters Kluwer.

Jäger, P. (2009). *Svoboda vyznání a právní poměry církví a náboženských společností v letech 1948–1989* (Freedom of Religion and the Legal Status of Churches and Religious Societies from 1948 to 1989). In: M. Bobek, P. Molek, V. Šimíček. *Komunistické právo v Československu. Kapitoly z dějin bezpráví* pp. 769–810. Brno: Mezinárodní politologický ústav.

Kříž, J. (2011). *Zákon o církvích a náboženských společnostech. Komentář* (The Law on Churches and Religious Societies: A Commentary). Praha: C.H. Beck.

Kříž, J., Valeš, V. (2011). *Zákon o majetkovém vyrovnání s církvemi a náboženskými společnostmi. Komentář* (Act on Property Settlement with Churches and Religious Societies: A Commentary). Prague: Wolters Kluwer.

Löffler, R. (2007). *Ungestraft aus der Kirche austreten?* (Leaving the Church Without Penalty?). Würzburg: Echter.

Potz, R., Schinkele, B., Schwarz, K., Synek, E. M. and Wiesheider, W. (2004). *Recht und Religion in Mittel- und Osteuropa, Band 2, Tschechien* (Law and Religion in Central and Eastern Europe, Volume 2, Czech Republic). Wien: WUV Universitätsverlag.

Radvanová, S., Zuklínová, M. (1999). *Kurs občanského práva. Instituty rodinného práva* (Course in Civil Law: Institutes of Family Law). Praha: C.H. Beck.

Smlouva mezi Českou republikou a Svatým stolcem o úpravě vzájemných vztahů (Treaty Between the Czech Republic and the Holy See Modifying Some Relations). (2002). *Revue církevního práva 22(2)*, pp. 163–175.

Tretera, J. R. (2002). *Stát a církve v České republice* (The State and Churches in the Czech Republic). Kostelní Vydří: Karmelitánské.

Tretera, J. R., Horák, Z. (2015). *Konfesní právo* (Ecclesiastical Law). Praha: Leges.

NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 1 (2024), pp. 91–114
DOI: https://doi.org/10.71042/CJL01202407

Carlos E. VANNEY
University Austral, Argentina*

Artificial Intelligence within Corporate Structures: The Case of Argentina's Simplified Joint Stock Companies

• **Abstract** •

The increasing integration of artificial intelligence (AI) into corporate law has prompted consideration of its role within corporate structures. Among the various corporate entities, the simplified joint stock company (SJSC) or SAS (Sociedad por Acciones Simplificada, for its Spanish designation) – a flexible corporate form known by different names in different jurisdictions – offers greater adaptability in structuring internal governance. This paper explores the potential for incorporating AI into the governance of the Argentine SJSC, analyzing its legal implications and practical feasibility.

Keywords: Digital transformation, Simplified corporation, Corporate governance, Supervisory bodies, Principle of the autonomy of the will, SAS.

Introduction

Within the broad and flexible corporate structure of the simplified joint stock company,[1] the autonomy of the shareholders serves as a guiding principle, allowing them to tailor the design of the company to their specific needs. However, this principle is not unique to Argentina; it is reflected in various jurisdictions around the world, where flexible business models are becoming increasingly important. In this context, the emergence of AI within corporate structures will be explored.[2]

* ORCID ID: 0009-0008-7136-1627; address: Cerrito 1250, 1010 Ciudad de Buenos Aires, Argentina; e-mail: CVanney-ext@austral.edu.ar

[1] Throughout this article, we will use the English abbreviation SJSC instead of the corresponding Spanish abbreviation SAS, although we will be referring more specifically to this type of corporation as it exists in Argentina.

[2] This article builds on previous research, offering a more in-depth analysis of these issues by unifying and expanding on topics previously addressed in separate works. See, Vanney, 2022a; Vanney, 2022b; and Vanney, 2019a.

To contextualize this analysis, three fundamental concepts will be examined:

- The principle of autonomy of will that prevails in contemporary corporate law, not only in Argentina – where this phenomenon is gradually being observed depending on the jurisdiction – but globally, with the proliferation of simple, flexible corporate forms tailored to the specific needs of partners.
- How this principle of autonomy of will affects Argentina's SJSC and how it enables partners to design the organizational structure of each company.
- Within this organizational design, the possibility of replacing human individuals in corporate roles with artificial intelligence, with a specific focus on the case of Argentina's SJSC.

The autonomy of will as a substantial element of modern simplified corporate forms

Societies have undergone profound transformations over time. From the earliest forms of association in ancient civilizations to modern companies, the evolution of corporate law has been marked by numerous changes. Since the days of the Code of Hammurabi,[3] corporate regulations have shifted dramatically, not only in terms of structure but – more critically – in the limitation of liability. While some have sought to identify traces of limited liability in Roman law, historical evidence suggests otherwise. Though certain contractual forms in early commerce, especially maritime law, limited liability – such as the bottomry loan or the *fortuna maris* doctrine, which protected the *fortune du terre* of shipowners – it can be posited that the true advent of limited liability can be traced to the rise of Indian trading companies around 1600, particularly in the Netherlands. There, the perfection of accounting techniques and corporate governance mechanisms played a pivotal role (Duprat, 2024). The establishment of limited liability was the first major leap in corporate law. The second, albeit of lesser significance, is the freedom to design corporate structures that contemporary legal forms now allow.

Given this foundational change, it is evident that the concept of limited liability has profoundly influenced corporate governance – a sentiment echoed by Nicholas Butler in 1911, when he, a Nobel Peace Prize laureate and dean of Columbia University, remarked on its groundbreaking nature. He asserted that its emergence was more transformative than the discoveries of steam and electricity,

[3] "If a man gave money to (another) man for a partnership, they shall divide equally in the presence of god the profit or loss which was incurred". This precept of the first normative body of history dictated by the King of Babylon shows us that 4000 years ago the idea of some kind of associative form already existed.

positing that both would be virtually powerless without the fundamental innovation of the Limited Liability Company (LLC), thus highlighting the profound impact of this legal development on modern economic structures (Hadad, 2023).

This major milestone in corporate law is also highlighted in a major work covering that branch of law, where it was held that "limited liability shields the firm's owners – the shareholders – from creditors' claims. Importantly, this facilitates diversification. With unlimited liability, the downside risk borne by shareholders depends on the way the business is carried out. Shareholders will therefore generally prefer to be actively involved in the running of the business, to keep this risk under control. This need to be 'hands-on' makes investing in multiple businesses difficult. Limited liability, by contrast, imposes a finite cap on downside losses, making it feasible for shareholders to diversify their holdings. It lowers the aggregate risk of shareholders portfolios, reducing the risk premium they will demand, and so lowers the firm's cost of equity capital" (Kraakman et al., 2017, p. 9).

On the other hand, the second leap in modern corporate law – the emergence of simplified corporate types, in which the shareholders' freedom to create the internal structure of the entity prevails – signified a true paradigm shift and a rethinking of more stagnant corporate concepts and structures, transforming them into flexible frameworks designed to meet the partners' needs.

This structural flexibility and the empowerment of partners' freedom at a global level align with the legislator's intent to modernize commerce and the tools that support it. Therefore, by granting SJSC in Argentina considerable freedom and delegating to its shareholders the creation of most of its organizational structure, the legislator demonstrated confidence in their exercise of autonomy of will, which is one of the main characteristics of this type of company (Pérez Hualde, 2017).

An Overview of Simplified Corporate Structures around the world[4]

The global phenomenon of corporate simplification and recognition of the freedom of the shareholders in the organization of their own entity is not unique to this 21st century. In fact, already at the end of the last century, this paradigm shift in corporate organization was beginning to be noticed.

In France, the first simplified company of its kind in the world, the *société par actions simplifiée* (SAS),[5] was legislated in 1994, serving as the basis for the subse-

[4] The source of most of the information regarding simplified companies worldwide referenced in this section is: Ramirez, 2023.

[5] The French *société par actions simplifiée* was created in 1994 by Law 94-1 (January 3, 1994). This type of company was designed to function as a partnership entity, as only legal entities could act as partners.

quent SAS, which was reformed in 1999 to extend its applicability to natural persons (Law 99–587). In Spain, the legislative innovation occurred in 2003 with the enactment of Law 7/2003, which established the *sociedad limitada nueva empresa*. Subsequently, in 2013, Law 14/2013 was enacted to simplify the establishment of companies with the aim of promoting economic recovery and supporting entrepreneurial development. Finally, in 2022, Law 18/2022, known as the "Create and Grow" Law, was passed, which amends various provisions, including the Consolidated Text of the Capital Companies Law, effectively abolishing the requirement for share capital by reducing it to a minimum of one euro. In 2012, Italy legislated a derivation of the *società a responsabilità limitata* (SRL) by creating the *società a responsabilità limitata semplificata* (SRLS). Its shareholders must be natural persons, and unlike the SJSC, it was initially conceived as a subtype of the SRL rather than as an autonomous type.[6] In the corporate law of the Kingdom of the Netherlands, the entity similar to the SJSC is the *Besloten Vennootschap* (BV). This country has always been characterized by a strong respect for the autonomy of will in corporate matters, not requiring minimum capital (only € 0.01) and allowing considerable flexibility in designing the organizational structure of the entity.

Outside of Europe, corporate flexibility is also evident in Asia. While each country possesses its unique characteristics and the extent of simplification in corporate structures and requirements varies, this phenomenon is apparent in Hong Kong, Japan, India, and the United Arab Emirates. In the case of Singapore, it is noteworthy that for quite some time, it has been one of the countries in the region that has most effectively adapted its corporate regime to the phenomenon of entrepreneurship. This adaptation is driven by the need to compete with the various jurisdictions of its neighbors and the growth of China and its business ecosystem. Consequently, in 2005, Singapore legislated its Limited Liability Partnership (LLP)[7], modeled on the LLPs of Delaware and the United Kingdom, providing flexibility in its organizational structures alongside a pass-through taxation regime (McCahery et al., 2006).

In Africa, several countries are in the process of modernizing their corporate legislation to simplify it. For example, Kenya has introduced provisions for Single-Member Companies,[8] eliminated minimum capital requirements, and developed electronic company registration. Meanwhile, in Oceania, New Zealand stands out as a leader in terms of ease and efficiency in the incorporation of com-

[6] Law 27/2012 (new Article 2463-bis of the Italian Civil Code), June 26, 2012.

[7] Singapore Limited Liability Partnerships Act, April 11, 2005; amended on December 1, 2021.

[8] Company Act of the Republic of Kenya, *Kenya Gazette Supplement*, September 15, 2015, p. 267.

panies. Turning to the Americas, the continent on which this article primarily focuses, many countries have embraced corporate simplification and recognized the autonomy of will as a guiding principle in this area.

In the United States, several types of companies cater to small businesses, with the most common being the LLC and the LLP. Notably, the evolution of the LLC has made it the most widely used business structure, second only to corporations. One of the key advantages of the LLC is the ability to choose the applicable tax system, allowing it to be taxed as either a partnership or a corporation. This tax flexibility, combined with the broad recognition of the partners' autonomy, has led to the LLC becoming the preferred business structure across all states in the country.

Among the countries of South America, Colombia serves as the most significant example regarding the SJSC, which was established in 2008 by Law 1258.[9] It serves as a reference point across the continent for regulating this type of company and has become a common source for comparative law, as it represented a completely disruptive innovation in the traditional corporate law of Hispanic America. Beyond the initial shock, the reality of its acceptance by Colombians prevailed, and it is now the most commonly chosen corporate structure in the country.[10] Its distinguishing features include: the ability to be a single-member company, establishment through a private document, limitation of liability for the company's obligations, an indeterminate corporate purpose, an indefinite duration, classification of shares, the possibility of multiple voting rights, the abolition of the requirement for plurality in quorum and decision-making majorities, the option to waive the right to be called to assembly meetings, freedom regarding the proportion between authorized and subscribed capital, an extensive period of two years for the integration of social capital without adherence to a defined initial contribution ratio, the effectiveness of shareholders' agreements – including the possibility of enforcing specific performance of agreed-upon obligations – and the removal of prohibitions for corporate administrators and limits on the distribution of profits.

In other countries of the region, several have recognized the success of this corporate form in Colombia and have subsequently implemented modifications to their company regulations. Simple corporate structures have been introduced, characterized by a predominant emphasis on the freedom to design their internal structures and define the rights of the shareholders.

[9] Law 1258/2008 on "the creation of the simplified stock company", December 5, 2008.

[10] According to official data, approximately 98% of the new companies established in Colombia are SJSCs.

In Chile, the joint-stock company was made more flexible in 2007 to promote the venture capital industry and modernize the capital market.[11] This type of company is the most similar to the SJSC, as its flexibility allows shareholders – or a single shareholder, since it permits sole membership – to establish their rights and obligations in a practically unrestricted manner. In contrast, Mexico introduced the SJSC in 2016 as an easy and inexpensive registration system, but it is limited to micro-enterprises and stipulates that only natural persons can be partners of the SJSC.

Uruguay established the simplified SJSC through the 2019 Law on the Promotion of Entrepreneurship,[12] largely following the Model Law of the Organization of American States (OAS). The Uruguayan SJSC can be incorporated digitally with electronic signatures, allowing for both natural and legal persons to be shareholders. Meanwhile, Paraguay legislated the SJSC in 2020.[13] It can also be established electronically, with no minimum capital requirement, and it can be a single-member entity. In 2018, Peru introduced the Closed Simplified Joint Stock Corporation through Legislative Decree 1409, aimed at regulating an alternative corporate framework of limited liability to formalize and invigorate micro, small, and medium-sized enterprises (MSMEs).[14] This type of company can also be established electronically; however, it notably cannot be a single-member entity, with only natural persons permitted to be members and a maximum of 20 shareholders allowed. Ecuador, a country that sought to position itself as a leader in this area, enacted legislation in 2006 to establish single-member limited liability companies (*Empresas Unipersonales de Responsabilidad Limitada* – EURL).[15] However, due to certain regulatory limitations, the EURL failed to gain traction. The modernization of the corporate framework occurred in 2020 with the adoption of the SJSC,[16] which has since become the most commonly used corporate structure in the country, also drawing upon the OAS Model Law. Consequently,

[11] Law 20190 on the "Introduction of Tax and Institutional Adjustments for the Promotion of the Risk Capital Industry and the Continuation of the Process of Modernization of the Capital Market", May 17, 2007; amended on May 24, 2019.

[12] Law 19820 on "the Promotion of Entrepreneurship", September 18, 2009.

[13] Law 6480/20, on "the creation of the Simplified Joint-Stock Company", November 14, 2019; regulated by Decree 3998/2020, August 28, 2020.

[14] Legislative Decree 1409, introducing the "Sociedad por Acciones Cerrada Simplificada", September 12, 2018.

[15] Law 2005-27, introducing the "Empresas Unipersonales de Responsabilidad Limitada", January 26, 2006.

[16] Through the Organic Law of Entrepreneurship and Innovation, the Rules of Good Corporate Governance and the Law of Modernization of the Companies. *Official Gazette* No. 151, February 28, 2020.

the Ecuadorian SJSC provides substantial flexibility to shareholders in determining the operational and structural aspects of the company, making it a highly attractive option due to its adaptability, ease of incorporation, tax benefits, and capacity to respond to the changing needs of the market.[17]

In the context of Central America, Guatemala stands out for the enactment of Decree 20–2018, which reinforced entrepreneurial initiatives by establishing a comprehensive framework designed to promote and stimulate such activities, notably through the establishment of the Entrepreneurship Company (*Sociedad de Emprendimiento* – SE).[18] In the Dominican Republic, the General Law on Commercial Companies and Limited Liability Individual Enterprises (Law 479–08) incorporated the SJSC.[19] This corporate structure emphasizes the autonomy of freedom in the organic design of the entity, provided that it does not contravene public order.

Finally, it is essential to highlight the legislative models or guidelines provided by international organizations such as the United Nations Commission on International Trade Law (UNCITRAL) and the OAS.

Since 2013, the UNCITRAL has been developing a document to offer recommendations to countries on corporate legislation for MSMEs, culminating in the 2021 approval of the UNCITRAL Legislative Guide on Limited Liability Companies.[20] This guide emphasizes key features such as freedom, autonomy, and flexibility, alongside the speed and simplicity of establishing and maintaining an entity, and the security and protection of partners' assets through a distinct patrimony. To achieve these objectives, it advocates for respect for the autonomy of the will as a guiding principle, a broad or indeterminate corporate purpose, the absence of a minimum capital requirement for incorporation, the allowance of single-member entities, the freedom to design the internal structure of the entity, and the use of alternative dispute resolution mechanisms, among other recommendations.

Regarding the OAS, it is noteworthy that in June 2017, the General Assembly of the organization adopted a resolution approving and requesting a report on the Model Law on Simplified Joint Stock Companies, as approved by the Inter-American Juridical Committee.[21] This resolution invited OAS member states

[17] The Argentine case is not addressed here, as it will be discussed in the following section.

[18] Decree 20-2018 "Law on Strengthening Entrepreneurship", October 29, 2018.

[19] Through the amendment of Law No. 31-11 of February 11, 2011.

[20] Legislative Guide on Limited Liability Companies, adopted at its fifty-fourth session, Vienna, June 28 – July 16, 2021.

[21] AG/RES. 2906 (XLVII-O/17) Model Law on the Simplified Corporation, adopted at the first plenary session, June 20, 2017.

to adopt the Model Law in accordance with their own legislation and regulations, providing assistance for this purpose. The Model Law emphasizes the facilitation of registration by removing formalities and allowing for incorporation through a private instrument. It permits participation by both natural and legal persons, accommodating both single-member and multi-member structures, establishes limitations on the liability of partners, allows for indefinite duration, and provides for an unlimited corporate purpose.

The autonomy of the will as a typifying element of Argentine SJSC

In 2017, the Argentine Republic enacted Law 27349, known as the Law for the Support of Entrepreneurial Capital (*Ley de Apoyo al Capital Emprendedor* – LACE), which introduced the SJSC into the nation's legal framework.[22] Article 33 of the LACE characterizes this entity as "a new type of company"[23] and establishes that it will be governed by "the scope and characteristics outlined in this law." Additionally, it specifies that "supplementarily, the provisions of the General Corporations Law shall apply (...) insofar as they are compatible with those of this law." Consequently, it is clear that the General Corporations Law (*Ley General de Sociedades* – LGS[24]) do not govern the SJSC in instances where it conflicts with the stipulations of the LACE.

[22] Law 27349 for the Support of Entrepreneurial Capital. *Official Gazette*, April 12, 2017. Articles 33 to 62.

[23] The discussion regarding whether a new type of corporate entity is being addressed proves futile, as the law explicitly establishes this. Those who hold a differing view should advocate for legislative reform to amend the definition outlined in Article 33 of the LACE. Therefore, it is perplexing that the former head of the Public Registry of Commerce of Buenos Aires denied something so evident and even went further by asserting that they are not companies, stating that the SJSC "are not – legally speaking – legal entities nor – by obvious consequence – companies" (Nissen 2022, p. 3). It is also contradictory that an individual who directly denies in an academic publication that the SAS is a legal entity and a company, when issuing general resolutions for the agency he led, asserted that "the SAS can be a valuable legal instrument provided that they are utilized by genuine entrepreneurs and that they do so in conditions of transparency and fairness" (considerations of the General Resolution IGJ 9/2020) – but were they not even legal entities? Furthermore, it is striking that he stated, "the Simplified Joint Stock Company under Law 27,349 is a subtype of joint-stock company, along with others contemplated in Law 19,550, such as the single-member joint-stock company and the joint-stock company with majority state participation" (considerations of the General Resolution IGJ 44/2020). According to these statements, it appears that the SJSC is a subtype of joint-stock company; however – weren't the SJSC not even considered companies? Or is he suggesting that the joint-stock company is not a company either?

[24] General Corporations Law 19550, April 3, 1972, amended by the Annex to Decree 841/84 *Official Gazette*, March 30, 1984.

Regarding the organizational structure of the SJSC, Article 36 of the LACE states that "the constitutive instrument, without prejudice to the clauses that the partners choose to include, must contain at least the following requirements." Among these, it stipulates that the contract must provide for: "7. The organization of the administration, of the partners' meetings, and, if applicable, of the control; 8. The rules for distributing profits and bearing losses, as well as the clauses necessary to establish the rights and obligations of the partners among themselves and with respect to third parties." This article enshrines the partners' freedom to redact the constitutive instrument, subject to the limitation – or, more precisely, the minimum content – that the law explicitly requires. Consequently, the partners must delineate how the internal structure of the company will be organized, specifically detailing the functioning of the corporate bodies. Moreover, the LGS will only apply to this organization – established by the partners in accordance with an explicit legal provision – if it aligns with the structure they have created.

The regulation of the SJSC outside of the LGS is a result of the legislator's intention, and it must remain this way, as "the importance of maintaining the regime in this form lies in the paradigm shift represented by the SJSC, as a new conception of corporate law. If it had been incorporated into the LGS, there would be a risk of analyzing it from different perspectives, assumed as dogmas within the LGS" (Ramírez, 2019).

There are also certain matters in which the shareholders of the SJSC cannot exercise such freedom, and thus the principle of autonomy of the will does not apply. This is the case, for instance, with the liability regime for capital contribution set forth in Article 43 of the LACE (whereby the shareholders jointly and unlimitedly guarantee the full contribution of the share capital to third parties), which cannot be altered in the constitutive instrument. This example clearly demonstrates that when the law intends to limit the autonomy of the will of the shareholders, it does so expressly and unambiguously, whereas the principle of the autonomy of the will in the SJSC applies to matters such as the composition, competences, duration, and requirements of the company's governing bodies.

Freedom in Establishing the Organizational Structure of the Company in the Argentinean SJSC

Chapter IV of the LACE, titled "Organization of the Company", addresses the organizational structure of the SJSC. This is articulated through five articles. In the first one (Art. 49), it establishes the general principle of the partners' freedom to determine the organizational structure of the company, stating that there will

be an administrative body, a governing body, and that there may – or may not – be a supervisory body. These bodies "shall operate in accordance with the provisions set forth in this law, in the constitutive instrument, and, supplementarily, by those applicable to Limited Liability Companies and the general provisions of the General Corporations Law (LGS)".

This means that the LACE clearly states that the LGS is applicable supplementary to its provisions – just like the regulations pertaining to limited liability companies – such that the general law may only be applied to matters not addressed in the LACE or not specified by the shareholders in the constitutive instrument. Consequently, the only limitation on the freedom of the partners is the LACE itself, as its provisions are the only ones that take precedence over the autonomy of the will.[25]

The law subsequently regulates, in three articles – Articles 50 to 52 – the administrative body and the representation of the company, and then, in Article 53, it addresses the governing body. Notably, this same article regulates the supervisory body in a single sentence (literally!).[26]

Concerning the administrative body, Article 50 stipulates that it may consist of "one or more natural persons, whether or not they are partners, appointed for a specified or unspecified term". This provision explicitly limits the autonomy of the shareholders' will, excluding the possibility of this body being composed of a legal entity,[27] as well as an algorithm or artificial intelligence.

Article 51 addresses the functions of this body, stipulating that if it is composed of more than one person, the law requires the constitutive instrument to

[25] Obviously, the general principles of the law and the National Civil and Commercial Code also apply, especially its first articles (Art. 9: Principle of Good Faith and Art. 10: Abuse of rights). However, in order to avoid abuse or to recognize good faith, it will not be necessary to resort to the LGS, since the LACE itself expressly clarifies that it is of supplementary application. The LGS should not be applied, except when applicable by reference – supplementarily – from the LACE. However, the legal system as a whole can and must be applied.

[26] It is challenging to assert that the norm 'regulates' the supervisory body in that single sentence, as it merely establishes that this body may or may not exist.

[27] This is a topic that has long been discussed in legal doctrine but clearly exceeds the scope of this paper. In an earlier presentation by Alberto Verón titled "La capacidad de una persona jurídica para ser director" ("The Capacity of a Legal Entity to Serve as a Board Director"), presented at the II Congress of Corporate Law (Mar del Plata, 1979), the doctrinal positions on this matter are summarized. Verón explains that "Halperin, Zaldívar, Arecha, and García Cuerva, along with Perrotta, lean toward the permissive thesis. In contrast, Farina and Mascheroni consider it inadmissible to appoint a legal person as the director of a corporation." Furthermore, the classic "Cuadernos de Derecho Societario" ("Corporate Law Notebooks") stated regarding the Board of Directors that "without natural persons who form the will of the society, it cannot fulfill the specific purpose for which it was created" (Zaldivar et al., 1982, p. 453).

specify the functions of each administrator or to indicate that they will act jointly or collegially. This provision introduces a new limitation on the autonomy of the members' will, as they cannot determine that the body itself will establish these functions. Similarly, it is not permissible to appoint administrators who all reside outside the country, which represents yet another limitation on the partners' freedom. Regarding the way the meeting is to be held – and its summons – the law grants the partners the liberty to define these aspects.

This same article also refers to the legal representation of the company. The aim of this text is not to delve into the discussion about whether the legal representative must be a member of the administrative body or whether they can be distinct persons or even different bodies.[28] However, the law stipulates that the legal representation of the company shall also be entrusted to individuals, whether they are members or not, and that the constitutive instrument will establish the method of designation. If this is not specified, the meeting of shareholders will appoint the legal representative. I concur with Ramírez (2019, p. 179) and Balbín (2020, p. 121) that the LACE distinguishes between the administrative body and the representation body, but I do not agree with the requirement of certain public registries that the legal representative of the SJSC must be a member of the administrative body (Vanney, 2019a).[29]

In turn, Article 52 establishes that the duties, obligations and liabilities set forth in Article 157 of the LGS (i.e. the same as those of the managers of the LLC) are applicable to the administrators and legal representatives. This provision explicitly references the LGS and imposes limitations on the partners' autonomy in these matters. Additionally, it addresses the responsibilities of de facto administrators, stipulating that shareholders cannot absolve them of these responsibilities, thereby introducing another limitation.

After three articles dedicated to the administrative body, the LACE refers to the governing body in a single article – Article 53. Within that same article, it

[28] My position on this issue has already been articulated – expressing my opposition to that requirement – in a paper presented at the XIV Argentine Congress of Corporate Law and X Ibero-American Congress of Corporate and Business Law, Rosario, Argentina, September 4–6, 2019, entitled "Representar sin administrar" ("Representing Without Managing"), a title that reveals precisely what that stance is (Cf. Vanney, 2019b).

[29] General Resolution 6/2017 issued by the General Inspection of Justice (IGJ), the regulatory authority in Argentina responsible for overseeing and enforcing compliance with corporate and commercial laws, under the Ministry of Justice, "Art. 29.- The legal representative of the company must have the character of administrator of the same. In case of silence of the constitutive instrument and its subsequent amendments regarding the exercise of the legal representation, all the administrators may represent the SAS individually and indistinctly."

briefly addresses the supervisory body in just one sentence. Regarding the governing body, it establishes that it is the "Meeting of Shareholders", delegating to them the authority – in the constitutive instrument – to determine the manner in which these meetings will be conducted (whether in person, remotely, at the company's registered office, outside of it, or even asynchronously by sending their expression of intent etc.). Concerning the domicile of the shareholders, the law does set a guideline, as they must specify it in the constitutive instrument and subsequently inform of any changes.

As can be clearly observed, the LACE only provides general guidelines regarding these bodies and leaves many aspects of their functioning to the autonomy of the will. Furthermore, it does not specify their competencies. Additionally, when the law intends to impose a limit on the freedom of the shareholders, it does so explicitly. Ultimately, what the legislator intended was for the shareholders, in the constitutive instrument – and potentially in its amendments – to establish the rules for each particular company.

There is no doubt that the shareholders are the ones who best understand what is most convenient for them and how they want the company they are forming or in which they are involved to operate, rather than a legislator dictating norms that limit their autonomy of will and constrain the operation of a company that the legislator will not be a part of. As states Hadad (2019) "the Simplified Joint Stock Company came to put an end to the paternalistic era of corporate law, it came to eliminate the technocratic prejudice of thinking that the legislator and the doctrine are in a better position than the shareholders and their lawyers to provide more efficient rules to the companies."

It could be argued that within the framework of the SJSC, there exists the potential to blur or even redefine the traditional boundaries between corporate bodies and their respective competences. In alignment with Balbín's perspective, "the strict separation of functions among corporate bodies, typical of the LGS, is relaxed in the context of the SJSC. In the latter, the allocation of powers is subject to the discretion of the shareholders as stipulated in the constitutive instrument. The shareholders are thus afforded the freedom to determine these competences without constraints, save for those imposed by the LACE, and may even overlap them should they find it beneficial." (Balbín, 2020, p. 26).

The assertion that the LACE *mistakenly* reserves the decision of early dissolution of the company to the shareholders' meeting does not appear to be valid. The law reflects a clear expression of the legislator's intent, designating such a significant decision exclusively to that body, thereby limiting autonomy in this regard. This reinforces the argument that the competencies of the corporate bodies of the

SJSC may be freely determined by the shareholders, provided that the LACE does not impose restrictions on such freedom. When limitations are intended, the law articulates them explicitly, as evidenced by the provision regarding the decision on early dissolution.

This underscores the position that shareholders' freedom to organize the corporate structure of their company should not be restricted – except where explicitly stipulated by law – merely due to potential 'conflicts' with established interpretations developed from years of application of the LGS. In essence, who is better suited than the shareholders themselves to decide how to structure their company internally, as well as determine the powers granted to each body? If they make an error, as Hadad (2019) suggests, the financial loss will be theirs. However, such losses should not result from being compelled to conform to decisions imposed by external parties (legislators), particularly when these limit the shareholders' autonomy in structuring their SJSC.

Regarding the supervisory body – mentioned in the final sentence of Article 53 – the LACE merely states that its existence is optional, without imposing any restrictions on the shareholders' decision to establish it or not.[30] Furthermore, concerning the internal organization of this body and the freedom shareholders have to appoint professionals beyond just lawyers or accountants, I maintain, as have previously stated, that if the shareholders "decide that the SJSC will have a supervisory body, they may design it with complete freedom, without the functional, professional, or numerical limitations imposed by the corporate forms under the LGS" (Vanney, 2019a).

It should not be feared that shareholders, when embarking on a new business or project, would want to do so with an instrument – the company – tailored to their needs or desires. This consideration applies not only to the internal organization of the SJSC but also to the competencies of its governing bodies. Furthermore, there should be no concern regarding their decision to relinquish certain rights or confer powers traditionally reserved for shareholders under the LGS to individuals who may not be shareholders themselves.

The freedom of shareholders to organize the company, along with the enshrinement of the principle of autonomy of will, is explicitly articulated in the law itself. This freedom encompasses the power to determine the internal organization of the company and the functions of its governing bodies. Within this framework, share-

[30] This is why I believe that Article 4 of the now-repealed General Resolution 9/2020 of the IGJ infringed upon the law by mandating the obligatory existence of the supervisory body when the capital of the SJSC exceeds the threshold specified in paragraph 2 of Article 299 of the LGS.

holders can decide whether to appoint individuals as members of these bodies or to designate an algorithm or artificial intelligence, provided that the regulations governing each body do not limit its composition to natural or legal persons.

Artificial intelligence in Corporate Law

Stepping away from Argentine national legislation, it is essential to examine – if only briefly – the application of artificial intelligence in modern corporate law and the potential designation of such technology as members of corporate bodies. This consideration comes despite specific limitations that may exist in some countries, which stipulate that the members of corporate bodies can only be human or legal persons. This possibility is neither utopian nor part of a magical realism narrative. Globally, this issue is currently under active discussion, with notable developments emerging over the past few years (Boza, 2018). For example, the case of Deep Knowledge Ventures, an investment fund based in Hong Kong, exemplifies this trend, as it has appointed an algorithm to its board of directors (Wile, 2014).

However, the debate surrounding this issue is not confined to corporate law. News reports increasingly highlight instances of artificial intelligence replacing certain tasks that were previously performed by humans. Additionally, the potential application of these technological tools within insolvency law is beginning to be considered.

In this context, Lorente (2023) has suggested that AI-driven algorithms can efficiently analyze large volumes of economic, financial, accounting, and legal data, enabling professionals working in the field of insolvency to assess the financial health of companies with greater accuracy. By leveraging machine learning techniques, AI can identify patterns and detect early warning signs of insolvency, allowing stakeholders to take proactive measures. Furthermore, AI can automate routine tasks such as document review, data extraction, and contract analysis, thereby reducing administrative burdens, lowering costs, and enhancing the overall efficiency of bankruptcy processes.

Moreover, as will be emphasized later in this article, AI can facilitate the development of predictive models for asset valuation, leading to more effective liquidation processes and ultimately improving the estimation of creditor recovery rates. These models can assist in determining optimal strategies for asset distribution, thereby maximizing returns for creditors. Additionally, in insolvency proceedings, blockchain technology can offer an auditable, secure, and immutable record of transactions, asset transfers, and creditor claims. This transparency enhances the accuracy and integrity of asset distribution, thereby reducing the risk of fraud and

disputes. Smart contracts – self-executing agreements embedded in blockchain – can automate key aspects of insolvency, including the distribution of funds and the processes for approving or rejecting bankruptcy proposals. Most importantly, they ensure the effective and automatic compliance with obligations arising from approved insolvency agreements. Furthermore, blockchain-based tokens can represent fractional ownership of assets, thereby enhancing liquidity and facilitating the sale of distressed assets.

Lorente also notes that the use of artificial intelligence is prominent in business law, particularly in the realm of contracts. In this context, it has been stated that Smart Contracts are self-executing agreements in which the terms are directly embedded in code, triggering predefined actions upon the fulfillment of specific conditions.

However, the emergence of AI in legal matters and its application in law has prompted discussions not only about its utilization across various areas of commercial law or its direct integration into the governance of corporate entities but also about the possibility of granting legal personality directly to artificial intelligence.

In this context, there are both supporting and opposing views regarding the recognition of legal personality for artificial intelligence. Notably, in 2017, the European Parliament approved the "Civil Law Rules on Robotics", which addressed the question of liability concerning robots and artificial intelligence requesting that (no. 59) "when carrying out an impact assessment of its future legislative instrument, to explore, analyze, and consider the implications of all possible legal solutions, such as: (…) f) creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently".[31] On the other hand, those who hold the opposing position – denying the possibility of granting legal personality to AI – argue that "although AI appears to have a certain autonomy by making decisions without the need for a proper order by the human being, such behavior is nothing more than a result of its technological construction, which will only have a specific function that responds to the intention of its creator" (Quiñones, 2024, p. 26).

It is worth noting that the debate is not limited to the application of modern technologies in the field of corporate law; rather, it is much broader, and the dis-

[31] Resolution of 16 February 2017 with recommendations to the Commission on civil law rules on robotics (2015/2103(INL). Retrieved November 3, 2024, from https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.pdf

cussion is much deeper. However, when focusing on its application, it should be emphasized that not only is the role of AI in the integration of corporate structures being discussed, but also its involvement in debt restructuring and liquidation proceedings. These tools may, in the near future, prove useful, expedite procedures, and perform tasks that would otherwise take a human being many hours or even weeks. The significant problem of the length of bankruptcy proceedings could potentially be alleviated with the introduction of artificial intelligence. Furthermore, within corporate law, the execution of contracts through technological tools that do not require human activity or decision-making for their formulation and execution is already a reality.

The emergence of artificial intelligence in business law is both complex and promising. Thus, an in-depth exploration of specific AI disciplines, such as ML – defined as a system that autonomously learns by identifying intricate patterns within vast amounts of data, analyzing them, and predicting future behaviors or outcomes – will not be undertaken here. The potential applications in this realm are virtually limitless. Similarly, the concept of Decentralized Autonomous Organizations (DAOs), which is rooted in blockchain technology and enables the establishment of organizations governed by code rather than centralized authorities or individuals, will also not be discussed. The DAO is a community-driven entity governed by computer code that can function autonomously without the need for central leadership and, unlike traditional organizations, does not allow a single person or group to enforce decisions unilaterally but rather all members of the community can suggest ideas and vote on them, ensuring that decisions are made by the entire group, not just a few powerful individuals.[32]

Artificial Intelligence as a Member of a Corporate Body

Beyond the application of AI to various aspects of corporate law, this analysis specifically aims to explore the potential for this technological resource to be integrated into a corporate body as one of its members. It has been noted that there exists a precedent – particularly in Asia – where AI has been incorporated into the organizational structure of a corporate entity. Consequently, this study will concentrate on the feasibility of such integration occurring within Argentine corporations, with a primary focus on SJSC, as previously discussed.

[32] See: https://academy.binance.com/en/articles/decentralized-autonomous-organizations-daos-explained I have self-imposed these limitations since the specific purpose of this article is just to focus on the possibility of an AI being part of an organ of a traditional commercial company.

As previously mentioned, one of the defining characteristics of SJSC is the considerable freedom afforded to shareholders in organizing the company's bodies, including their composition and functions. The law explicitly states that it is the shareholders who determine the organizational structure of the company, with the bodies operating in accordance with the LACE, the constitutive instrument, and, in a supplementary manner, the regulations governing LLC and the LGS.[33]

The regulatory framework in Argentine law imposes more stringent requirements regarding the composition of the administrative and governing bodies. The former must consist solely of natural persons (Article 50 LACE), while the latter, at least in its initial composition, must be composed by natural or legal persons.[34] In contrast, the supervisory body is subject to minimal regulation, as the law merely states that it may or may not exist, thus leaving its organization and composition entirely to the discretion of the shareholders. Although the legal text specifies that "a supervisory body, syndic, or council may be established", it does not suggest that these are the only forms of oversight permitted within a SJSC, as the law merely references them as illustrative examples.[35] Therefore, shareholders are free to rename the supervisory body and define its functions, membership requirements, election procedures, and other relevant aspects.[36]

In this context, shareholders of a SJSC may ascertain that, for effective oversight of the company they are forming, alternative personal qualifications beyond the stringent requirements outlined in the LGS are essential. Consequently, they could customize the composition of the supervisory bodies to align with the corporate purpose or the activities undertaken by the company within its broad objectives, establishing additional criteria relevant to that activity. For instance, they

[33] First paragraph of Article 49 of the LACE – Internal Legal Organization: Shareholders shall determine the corporate structure of the company and the other rules governing the operation of its corporate bodies. The administrative, governing, and supervisory bodies, where applicable, shall operate in accordance with the provisions established in this law, in the founding document, and, subsidiarily, in the regulations governing limited liability companies and the general provisions of the General Law of Corporations, 19,550, as amended in 1984.

[34] This initial integration arises from Article 34 of the LACE, which regulates its constitution, establishing that the members are the shareholders who will form that initial governing body. However, the law does not specify who may be part of the administrative body when regulating its functioning in Article 53.

[35] It can be inferred that Perciavalle and Martorell are against this position (Cf. Perciavalle, Martorell, 2018, p. 163).

[36] Boquín (2019) has argued with respect to the SJSC that "there is nothing to fear from the freedom to act. Freedom with responsibility is typical of culturally advanced societies... jurisprudence will have the last word and will mark whether as a society we are up to the challenge of acting freely and responsibly."

might impose distinct professional qualifications, allowing for the stipulation that the supervisory body need not consist solely of accountants or lawyers (Ramírez, 2019, p. 210).

As an illustration, in a SJSC with an agricultural purpose, the members of the supervisory body could include a geneticist, an agronomist, and a veterinarian. In a SJSC with a petroleum-related objective, the supervisory body could comprise a geologist, a petroleum engineer, and an environmentalist. Similarly, in a SJSC with a sports-related focus, the members of this body could be a technical director, a sports journalist, and "an expert in sports administration".[37]

Similarly, the functions and responsibilities of this body can also be established by the shareholders in the constitutive instrument or during a shareholders' meeting. Thus, a supervisory body may possess broader functions than the traditional roles of a supervisory board, potentially having the authority to remove directors or auditors or to make decisions typically reserved for a board of directors in conjunction with it. Furthermore, if this oversight body is characterized by the expertise of its members in areas related to the company's activities, it may also make business decisions concerning the management of operations, such as authorizing new projects. The possibilities are extensive and will depend on the size of the business.

It is within this extensive range of possibilities that the integration of an algorithm, artificial intelligence, or machine learning into the supervisory body of a SJSC warrants consideration. If the law explicitly outlines or restricts who may constitute specific bodies – particularly the essential bodies of the SJSC, namely administration, representation, and governance – by stipulating that these bodies must comprise individuals, whether natural or legal persons, it can be inferred that, in the absence of specific provisions regarding the composition of the supervisory body, the shareholders will determine who or what may constitute it, should they choose to establish such a body. In this regard, the shareholders are not obligated to appoint lawyers, accountants, or firms comprising them, nor are they required to adhere to prior operational rules or competencies. They also do not have to designate partners as controllers. Instead, they can choose to appoint a unipersonal syndic, establish a supervisory committee, or form a supervisory board in accordance with the provisions of the LGS, or select any other body they deem suitable to implement the desired type of control for their company. If, as stated above, shareholders can organize oversight by appointing members from various professions or

[37] As required by Article 8 of Law 25284 (assuming it can eventually be determined what this requirement specifically refers to).

activities, it can also be maintained that a step further can be taken by designating an algorithm, artificial intelligence, or even a machine learning system for that function – and thus as part of the supervisory body.

Without claiming to be an expert – far from it – it is essential, even at a basic level, to differentiate between the following three concepts, which are often confused with one another:[38] An algorithm is a set of clear rules and instructions that process data to generate a solution. While the term is commonly used in computing, algorithms are not limited to this field and have been utilized for thousands of years. For example, the Sieve of Eratosthenes is an ancient algorithm for finding all prime numbers up to a specified given natural number. Artificial intelligence refers to systems designed to mimic human problem-solving and decision-making abilities in order to perform specific tasks. These systems can also improve over time. Machine learning is a branch of artificial intelligence focused on generating predictions about events based on previously obtained data.

Within the considerable freedom granted to the shareholders in forming the supervisory body, they may choose to have the company's oversight executed not by individuals (either natural or legal persons) but rather by an AI or a ML system. Such systems would operate independently of personal biases, favoritism toward any member of another governing body, and would not be susceptible to superficial or prejudiced oversight. Therefore, what is proposed here, while it may initially seem like a strained interpretation of the law that pushes the boundaries of a legal void – specifically the limited regulations surrounding the oversight body and the absence of a clear mandate that it must be composed exclusively of "persons" – should not be perceived as an attempt to misinterpret the law. Instead, it represents a legitimate exploration of one of the numerous options permitted by the existing regulations.

In comparing this proposal with a "traditional" supervisory body as defined by the LGS, it is essential to reflect on its functioning and outcomes over more than fifty years since the enactment of the Argentine General Corporations Law, particularly concerning closed companies. In these instances, the professionalism and independence of the syndic are generally not considered, and they often do not act as true third parties; instead, they frequently serve the interests of the majority shareholder who appointed them, resulting in biased and one-sided oversight. In summary, oversight bodies composed of individuals appointed by individuals have

[38] I would like to express my gratitude to my son Francisco, a computer science student, for the foundational explanations he provided on these topics, which significantly enhanced my understanding.

demonstrated their inadequacy. While it remains uncertain whether an AI or ML system would perform better, at the very least, an opportunity should be afforded to assess their potential for more efficient control.

Laws – not only the LACE but laws in general – are full of loopholes and gaps that can, and often must, be interpreted and supplemented by legal actors. The norms regarding the supervisory body of the SJSC serve as an example of this. Article 33 of the LACE establishes that the rules of the LGS shall be applicable "insofar as they are reconciled with those of this law." Following this reasoning, this proposal recognizes the freedom granted by the LACE to the shareholders regarding the internal organization of the company. Thus, when they determine that the traditional supervisory bodies defined by the LGS – which, it should be noted, have failed in practice over the past fifty years – are not suitable for the purposes of the SJSC, they may exercise their freedom to create a supervisory body that differs from any existing model. Today, technology offers opportunities that were not available a few years ago, suggesting that the time has come to capitalize on these advancements.

This freedom and this opportunity are, on one hand, constrained; yet, on the other hand, they are acknowledged in the draft reform of the SJSC recently presented by ASEA (Association of Entrepreneurs of Argentina) and prepared by a group of eight specialists in corporate law.[39] The constraints arise from Article 53 bis, which the draft adds to the existing legislation, stipulating that the supervisory body – if established – must be composed of natural or legal persons. Nonetheless, it explicitly recognizes the potential, within the oversight body, to "establish automatic control mechanisms operated by artificial intelligence or similar systems, delineating the functions and powers of these entities."[40]

The myriad possibilities that technology currently offers, and may continue to offer in the future, such as DAOs, smart contracts, tokenized shares, and other related innovations, will not be explored in depth here. The current text of the

[39] Preliminary Draft Bill for the Reform of the Simplified Joint Stock Company presented by ASEA (Association of Entrepreneurs of Argentina), authored by Sebastián Balbín, Ricardo Cony Etchart, Lisandro Hadad, Fernando Pérez Hualde, Alejandro H. Ramírez, José Sala Mercado, Manuel Tanoira, and Carlos E. Vanney. Published in the special supplement of *La Ley* (March 14, 2024).

[40] The complete text of Article 53 bis of the Preliminary Draft is as follows: "Supervisory Body. A supervisory body, whether unipersonal or plural, may be established, consisting of either natural or legal persons. The constitutive instrument may specify the personal and/or professional qualifications of its members, the duration of their positions, and their functions and powers. Automatic control mechanisms may be implemented, utilizing artificial intelligence or similar systems, detailing their functions and authorities. The provisions of the General Companies Law No. 19,550, as consolidated in 1984 and its amendments, shall apply supplementarily, unless otherwise stipulated by the shareholders. The establishment of a supervisory body is always optional."

LACE restricts certain options (for instance, DAOs) by requiring the involvement of natural persons in both management and representation, as well as stipulating that governance must be carried out by natural or legal persons. Nevertheless, within the existing legal framework and the considerable freedom granted to shareholders, the use of certain technologies, such as smart contracts or tokenized shares, remains permissible.

While it may be argued that oversight or supervision could be challenging, given that it involves the analysis of automated operations, this still falls within the scope of the shareholders' autonomy. Shareholders ultimately retain the freedom to decide whether such a form of control is appropriate for their SJSC. They may also decide that the supervisory body should include not only an AI or ML system but also other members – either natural or legal persons – each with assigned functions. However, if no additional members are appointed, the AI or ML system could still communicate the results of its analysis to the appropriate parties.

In this context, shareholders could assign specific tasks to the AI or ML, such as overseeing certain automated operations and reporting the results to designated recipients – whether other members of the supervisory body (if applicable), another control body established by the incorporation instrument, the shareholders, investors, or other relevant entities. Any current limitations in the ability of AI or ML to perform this oversight may be overcome as these technologies evolve. The future remains uncertain, but the possibilities are limitless.

And it is important to insist that the law does not prohibit what is being proposed here. Therefore, this approach is legally permissible.[41]

Conclusion

Having analyzed the issues raised in the first section of this article – namely, the autonomy of will that prevails in current corporate law and the proliferation of simple, flexible corporate types tailored to the needs of shareholders; the impact of this principle on the Argentine Simplified Joint Stock Company (SJSC), which permits shareholders to design the organizational structure of their company; and, within that organizational design, the possibility of replacing human members of the governing bodies with artificial intelligence – it can be concluded that, under the current legal framework, this replacement would only be feasible within the supervisory body.

[41] According to Article 19 of the National Constitution of the Argentine Republic which, in its pertinent part, establishes that "No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit."

Although the absence of limitations regarding the composition of the supervisory body could be interpreted as an oversight by the legislator or as a reflection of insufficient emphasis on the control function, it can also be contended, as articulated herein, that this is not merely an omission. Rather, the legislator may have intentionally opted to afford shareholders greater latitude in configuring this body, refraining from imposing restrictions on its composition or functions, particularly in light of the shortcomings observed in the supervisory bodies established under the General Corporations Law (LGS). From this perspective, it can be cogently claimed that the shareholders may establish a supervisory body comprising not only natural or legal persons but also AI or ML systems, thereby assigning specific functions and determining the recipients of their reports.

References

Balbín, S. (2020). *SAS. Sociedades Por Acciones Simplificadas* (Simplified Joint Stock Companies). Buenos Aires: Cathedra Jurídica.

Boquín, G. (2019). Prelación normativa y sujetos pasivos en las acciones de responsabilidad en el régimen de las SAS (Normative Precedence and Liable Parties in Liability Actions under the Simplified Joint Stock Companies). In: Congreso Argentino de Derecho Societario (ed.), *Hacia un nuevo derecho societario*, pp. 1213–1216. Rosario: Universidad Nacional de Rosario.

Boza, B. (2018). ¿Algoritmos en el directorio? (Algorithms in the board of directors?). Ernst & Young. September 30, 2018. Retrieved October 29, 2024, from https://www.ey.com/es_pe/news/2018/09/algoritmos-en-el-directorio

Duprat, D. (2024). Los elementos esenciales de las sociedades de capital. Origen y evolución (The Essential Elements of Capital Companies. Origin and Evolution). *Jurisprudencia Argentina 2024-I*, pp. 159–178.

Hadad, L. (2019). Ud. debería confiar en que aquellos que arriesgan su propio dinero hagan los cálculos adecuadamente. Podrán estar equivocados, pero estarán menos equivocados que los académicos y los legisladores que están decidiendo con el dinero de otro (You should trust that those who risk their own money will make the calculations properly. They may be wrong, but they will be less wrong than academics and legislators who are deciding with someone else's money). In: Congreso Argentino de Derecho Societario (ed.), *Hacia un nuevo derecho societario*, pp. 999–1003. Córdoba: Advocatus.

Hadad, L. (2023). Acerca de la persona jurídica y su concurso preventivo. La no diferenciación con sus socios y administradores por la justicia penal (On the legal entity and its preventive bankruptcy. The failure to distinguish between the entity and its partners and managers by the criminal justice system.). Paper presented at the XXII National Conference of Institutes of Commercial Law, Austral University, November 2–3, 2023.

Kraakman, R., Armour, J., Davies, P., Enriques, L., Hansmann, H., Hertig, G., Hopt, K., Kanda, H., Pargendler, M., Ringe, W. G., and Rock, E. (eds). (2017). *The Anatomy of Corporate Law: A Comparative and Functional Approach*. Oxford: Oxford University Press.

Lorente, J. (2023). Aplicación de inteligencia artificial, blockchain y smart contracts cadena de bloques en procedimientos concursales: el futuro es hoy (Application of Artificial Intelligence, Blockchain, and Smart Contracts in Bankruptcy Proceedings: The Future is Now). Paper presented at the XXII National Conference of Institutes of Commercial Law, Austral University, Pilar, November 2–3, 2023.

Mccahery, J., Vermeulen, E., Hisatake M. and Saito, J. (2006). *The new company law – what matters in an innovative economy? ECGI – Law Working Paper 75/2006*.

Nissen, R. (2022). *Memoria, balance y estado de resultados de las sociedades por acciones simplificadas, a casi cinco años de la vigencia de la ley 27.349* (Report, Balance Sheet, and Income Statement of Simplified Joint Stock Companies, Almost Five Years After the Enactment of Law 27.349). Buenos Aires: La Ley.

Perciavalle, M., Martorell, E. (2018). *SAS – Ley Comentada de la Sociedad por Acciones Simplificadas – Teoría y práctica de su funcionamiento* (Annotated Law of the Simplified Joint Stock Company – Theory and Practice of Its Operation). Buenos Aires: Erreius.

Pérez Hualde, F. (2017). La autonomía de la voluntad como nota tipificante de la Sociedad por Acciones Simplificada (The Autonomy of Will as a Defining Characteristic of the Simplified Joint Stock Company). *La Ley 2017-F*, pp. 561–567.

Quiñones, M. C. (2024). La personalidad jurídica de la inteligencia artificial (The Legal Personality of Artificial Intelligence). *El Derecho: Derecho, innovación & desarrollo sustentable 20/2024*, pp. 21–26.

Ramírez, A. (2019a). La regulación de la SAS por fuera de la Ley General de Sociedades (The Regulation of the SJSC Outside the General Companies Law). In: Congreso Argentino de Derecho Societario (ed.), *Hacia un nuevo derecho societario*, pp. 913–916. Rosario: Universidad Nacional de Rosario.

Ramírez, A. (2019b). *SAS – Sociedad por Acciones Simplificadas* (SJSC – Simplified Joint Stock Company). Buenos Aires: Astrea.

Ramírez, A. (2023). El auge de las Sociedades por Acciones Simplificadas en Latinoamérica: Análisis comparativo de su regulación (The Rise of Simplified Joint Stock Companies in Latin America: A Comparative Analysis of Their Regulation). *Revista Latinoamericana de Derecho Societario I-2023*. Retrieved October 29, 2024, from https://ijeditores.com/pop.php?option=articulo&Hash=236170f74e7f0073ab3a24cc951b5cc4

Vanney, C. E. (2019a). La autonomía de la voluntad y la fiscalización de la SAS (The Autonomy of Will and the Supervision of the SJSC). In: Congreso Argentino de Derecho Societario (ed.), *Hacia un nuevo derecho societario*, pp. 1151–1156. Rosario: Universidad Nacional de Rosario.

Vanney, C. E. (2019b). Representar sin administrar (Representing Without Managing). In: Congreso Argentino de Derecho Societario (ed.), *Hacia un nuevo derecho societario*, pp. 1143–1149. Rosario: Universidad Nacional de Rosario.

Vanney, C. E. (2022a). ¿Una inteligencia artificial fiscalizando? (An Artificial Intelligence Supervising?) Paper presented at the XV Argentine Congress of Corporate Law and XI Ibero-American Congress of Corporate and Business Law "Por un nuevo Derecho Societario: Libertad bajo responsabilidad" – Córdoba, Argentina, October 26–29, 2022.

Vanney, C. E. (2022b). En los órganos de la SAS la autonomía de la voluntad prevalece sobre las previsiones de la Ley General de Sociedades (In the Bodies of the SJSC, the Autonomy of Will Prevails Over the Provisions of the General Companies Law). Paper presented at the XV Argentine Congress of Corporate Law and XI Ibero-American Congress of Corporate and Business Law "Por un nuevo Derecho Societario: Libertad bajo responsabilidad" – Córdoba, Argentina, October 26–29, 2022.

Verón, A. (1979). La capacidad de una persona jurídica para ser director (The Capacity of a Legal Entity to Be a Board Director). Paper presented at the II Congress of Corporate Law, Mar del Plata, Argentina, October 11–13, 1979.

Wile, R. (2014). *A Venture Capital Firm Just Named an Algorithm to Its Board of Directors – Here's What It Actually Does*. Retrieved October 29, 2024, from https://www.businessinsider.com/vital-named-to-board-2014-5

Zaldivar, E., Manovil, R., Ragazzi, G. and Rovira, A. *Cuadernos de Derecho Societario* (Corporate Law Notebooks), vol. III. Buenos Aires: Abeledo Perrot.